

**Athar Minallah, J.** I have had the privilege of reading the opinion authored by my learned brother Qazi Faez Isa CJ and I need not reiterate the facts which have been elaborately recorded therein. However, I felt it necessary to add a separate note as well.

2. The Constitution is the supreme law of the land and every public office holder, before assuming the responsibilities of his or her office, swears an oath in the name of Almighty Allah to uphold, defend and protect this testament of the expression of the will of the people. The Constitution manifests the solemn commitment of the State to the people of Pakistan that it is an inalienable right of every citizen, where ever he or she may be and of every person for the time being within Pakistan, to enjoy the protection of law and to be treated in accordance with law; it resolutely assures and guarantees that no action detrimental to the life and liberty, body, reputation or property shall be taken except in accordance with law.<sup>1</sup> The basic duty of every citizen to be loyal to the State is premised on the inviolable obligation of obedience of the Constitution.<sup>2</sup> Despite these solemn declarations, commitments and guarantees, the impunity for violation of the Constitution and failure of the State to enable the people to enjoy the inalienable right to be treated in accordance with the law appears to have relegated the fundamental rights enshrined in the Constitution to a mere rhetoric. Such impunity in itself is the most serious violation of the supreme law of the land and it persists unabated, without demur or deterrence. The matter before us highlights misfeasance in public office by those upon whom the Constitution has imposed the onerous duty to exclusively serve the people and to protect their rights. The violation of the Constitution and denial to the people of Pakistan of their most

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<sup>1</sup> (Article 4) of the Constitution.

<sup>2</sup> (Article 5) of the Constitution.

valuable rights stands established because of failure to hold elections within the time expressly specified by the framers of the supreme law. Before discussing the serious breach of duties by those upon whom they are imposed under the Constitution and denial of legal rights and remedies available to a citizen for their vindication, I consider it necessary to record the relevant facts in addition to what have already been described in my learned brothers opinion.

**DELAYED APPOINTMENT AND ANNOUNCEMENT OF THE DATE FOR HOLDING GENERAL ELECTIONS.**

3. The last general elections were held in Pakistan on July 25, 2018 while the first session of the 15th National Assembly was held on August 13, 2018. The National Assembly and the four provincial Assemblies were to continue for a period of five years unless sooner dissolved.<sup>3</sup> They would have stood dissolved on the expiry of the five year term if not dissolved earlier. Pursuant to the advice tendered to the Governors by the Chief Ministers,<sup>4</sup> the Assemblies of Punjab and Khyber Pakhtunkhwa were dissolved on January 01, 2023 and January 18, 2023 respectively. In the case of Punjab, the Governor chose not to act on the advice while the Governor of Khyber Pakhtunkhwa did act and passed an order to dissolve the Assembly. The dissolution of the Assemblies was followed by the appointment of care-taker governments in both the provinces to run the day to day affairs during the ninety days fixed for holding the elections. On January 01, 2023, the Election Commission of Pakistan ('**Commission**') advised the Governor of Punjab to appoint the date for general election between April 04, 2023 and April 13, 2023 while the Governor of Khyber Pakhtunkhwa was requested to appoint a date between April 15, 2023 and April 17, 2023. The latter, on January 01, 2023, instead of appointing a date sought consultation with the Commission. On January 29, 2023 the constitutional

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<sup>3</sup> (Article 52 - Article 107) of the Constitution

<sup>4</sup> (Article 112(1)) of the Constitution

jurisdiction of the Lahore High Court was invoked and the petition filed under Article 199 of the Constitution was allowed vide judgment dated February 10, 2023, and authoritative binding writs were granted for holding the general election in the province of Punjab within the time frame prescribed under the Constitution. The proceedings for initiating contempt proceedings were also undertaken by the single Bench since the judgment was not implemented and it was not interfered with by the Division Bench which was hearing the Intra Court Appeals. Likewise, the constitutional jurisdiction of the Peshawar High Court was also invoked on February 07, 2023 and the matter was being heard by a Division Bench after issuance of notices to the concerned authorities. While the High Courts were competently and diligently exercising the extraordinary jurisdiction conferred under Article 199, petitions were also filed before this Court invoking its original jurisdiction under Article 184(3) of the Constitution. The Chief Justice also took Sou Motu cognizance. A nine member Bench was constituted to hear Suo Motu Case No. 1 of 2023 and the two connected petitions. The proceedings before the High Courts were obviously hindered. Two members of the Bench, myself and Yahya Afridi J, dismissed the petitions on the first day through short orders because in our opinion a premature interference by this Court was likely to prejudice and impede the implementation of the authoritative and binding judgment handed down by the Lahore High Court, thereby delaying the holding of the elections and resulting in violation of the Constitution. The pending proceedings before the Peshawar High Court would also have been affected. The relevant portions of my opinion rendered in Suo Moto case no. 01 of 2023 are as follows;

*6. The proceedings relating to the petitions filed before the Lahore High Court were diligently concluded and they were adjudicated vide judgment dated*

10.2.2023 passed in Pakistan Tehreek-e-Insaf through its General Secretary v. Governor of Punjab and another (Writ Petition No. 5851 of 2023), Munir Ahmad v. The Governor of Punjab and others (Writ Petition No. 6118 of 2023), Zaman Khan Vardag v. Province of Punjab and another (Writ Petition No. 6093 of 2023), and Sabir Raza Gill v. Governor of Punjab (Writ Petition No. 6119 of 2023). The High Court had allowed the prayers sought in the petitions and appropriate writs were granted under Article 199 of the Constitution in the following terms:-

*“In view of the constitutional provisions mentioned above and the judgments of the Supreme Court of Pakistan, the prayer made in the “consolidated petitions” is allowed and the “ECP” is directed to immediately announce the “date of election” of the Provincial Assembly of Punjab with the Notification specifying reasons, after consultation with the Governor of Punjab, being the constitutional Head of the Province, to ensure that the elections are held not later than ninety days as per the mandate of the “Constitution”.*

7. The above judgment was assailed by preferring intra court appeals which are pending before a Division Bench of the High Court. The appeals have been taken up for hearing and they are being heard. Admittedly, the writs granted by the single judge of the High Court vide the aforementioned judgment have not been interfered with since no injunctive order has been passed by the Division Bench. The judgment of the Lahore High Court is, therefore, validly subsisting and binding on the public authorities who are saddled with the responsibility to enforce it. Petition(s) have also been filed seeking implementation of the judgment by way of initiation of contempt proceedings. This Court has no reason to doubt the ability and competence of the High Court to enforce its judgment because, by doing so, the competence and independence of a provincial constitutional court would be unjustifiably undermined. The enforceable writs granted by the High Court are binding and any attempt to impede its implementation

*could expose the delinquent authorities to grave consequences. On the other hand, the Peshawar High Court has assiduously taken up the petitions and there is no reason to assume that the proceedings and adjudication of the petitions would be delayed. The High Court has taken effective steps and any assumption regarding its competence or ability would be unwarranted and unjustified."*

*"19. It is not disputed that the Lahore High Court has already allowed the petitions and rendered an authoritative judgment and its competence to have it implemented cannot be doubted. The Peshawar High Court is also seized of the matter. In the light of the binding 'salutary principles' discussed above, the petitions and the suo motu jurisdiction must not be entertained lest it may interfere with the implementation of the judgment of the Lahore High Court and the proceedings pending before the Peshawar High Court. The premature and pre-emptive proceedings before this Court at this stage is likely to delay the enforcement of the judgment of the Lahore High Court, leading to infringement of the Constitution by exceeding the time frame prescribed *ibid*. This is also obvious from the opinions of my learned brothers Syed Mansoor Ali Shah, Yahya Afridi and Jamal Khan Mandokhel, JJs who have also dismissed the petitions and on this ground, *i.e.*, pendency of the same matter before two competent High Courts. Moreover, any person who would be aggrieved from the judgments of the High Courts will have the option to exercise the right to invoke this Court's jurisdiction under Article 185 of the Constitution. In the facts and circumstances of the case in hand, it is not a 'genuinely exceptional' case to deviate from the binding salutary principles. By entertaining the petitions and suo motu jurisdiction, the Court would be unjustifiably undermining the independence of two provincial High Courts. The indulgence at this stage would be premature and it would unnecessarily prejudice public trust in the independence and*

*impartiality of this Court. This Court has no reason to apprehend that the High Courts are less competent to defend, protect and preserve the Constitution."*

4. Two learned judges on the Bench did not continue with the proceedings while the remaining five concluded their proceedings in *Suo Motu* Case No.1 of 2023 on March 03, 2023. Three learned judges allowed the petitions and the *Suo Motu* proceedings while they were dismissed by the other two learned judges on the ground of maintainability and the likely delay in holding the general elections if the pending proceedings before the two High Courts were impeded. The latter two learned judges had expected the Division Bench of the Lahore High Court to decide the pending *Intra Court Appeal* within three days. Both the High Courts disposed of the petitions in the light of the judgment handed down by the three learned judges of this Court who had allowed the *Suo Motu* Case No. 1 of 2023 and the connected petitions. The four Judges who had dismissed the *Suo Moto* Case No. 01 of 2023 unanimously held that general elections were to be held within the ninety days period prescribed under the Constitution. The President, through an order dated February 02, 2023 had appointed April 09, 2023 as the date for holding general elections in the provinces of Punjab and Khyber Pakhtunkhwa. The Commission, vide letter dated March 03, 2023, advised the President to appoint a date for the general elections of the province of Punjab between April 30, 2023 and May 07, 2023. The President, through an order, appointed the date of April 30, 2023 as the date for holding the general elections in the province of Punjab. However, the Governor of Khyber Pakhtunkhwa did not fix a date for the general elections to be held in his province. The Commission notified the election schedule for holding the general elections in Punjab on March 08, 2023. On March 22, 2023 the Commission recalled the election schedule notified on March 08, 2023

and announced a fresh date i.e October 08, 2023. This Court entertained Constitutional Petition No. 05 of 2023 pursuant to the jurisdiction conferred under Article 184(3) and it was allowed through a short order dated April 04, 2023. The election schedule notified by the Commission on March 08, 2023 was revived and restored with modifications made by this Court itself. The date for holding general elections in the province of Punjab was fixed by this Court as May 14, 2023. The judgment was not implemented and no attempt was made either by the Court or an interested party to have it enforced. We have been informed that no one, not even the petitioners nor any other interested party had sought its enforcement. The meeting of the Council of Common Interests was called on August 05, 2023, only four days before dissolution of the National Assembly and the 7th census was duly approved. Meanwhile, the President acted on the advice of the Prime Minister and the National Assembly was dissolved on August 09, 2023 and general elections were to be held within ninety days i.e not later than November 07, 2023. The Governors, acting on the advice of the Chief Ministers, dissolved the Assemblies of Sindh and Baluchistan on August 11, 2023 and August 12, 2023 respectively. On August 08, 2023 the Commission notified its decision to carry out the process of delimitation and also that the general elections would not be held before December 12, 2023. The President addressed a belated letter to the Commission on August 23, 2023 inviting the latter for consultation so that a date could be appointed for the general elections. The Commission declined the invitation, communicated to the President vide letter dated August 24, 2023. These petitions were filed but belatedly fixed before this Bench despite the urgency.

5. On the last date of hearing we had made it clear to all the parties that there was no ambiguity whatsoever regarding who was competent

to appoint the date for general elections in the case of the National Assembly. It was not disputed by the Attorney General that, under Article 48(5) of the Constitution, the duty to 'appoint' a date was imposed upon the President while the announcement was to be made by the Commission as required under section 57(1) of the Act of 2017. We had also made it absolutely clear that it was not the function of this Court to appoint a date nor was it conferred with any power or jurisdiction to do so. We had unequivocally informed the concerned parties as well as the Attorney General that the Court is itself a creation of the Constitution and therefore, bereft of any power or jurisdiction to condone or validate its violations and the resultant denial of the valuable rights of the people. This Court had asked the Attorney General to inform the President and the Commission that the violation of the Constitution had taken place in the case of Punjab and Khyber Pukhtunkhwa while the infringement had become imminent to the extent of holding general elections to the National Assembly and the two provincial Assemblies of Sindh and Baluchistan. The duty to ensure that the people of Pakistan are not deprived of their right to vote and they do not remain unrepresented for more than a ninety day period was that of the President, the Governors and the Commission. The Constitution was made unworkable by their reckless disregard for the duties imposed upon them under the Constitution and the Act of 2017. This Court could not become complicit to the serious violations of the Constitution. The date of February 08, 2024 was appointed by the President and announced by the Commission without prejudice to and notwithstanding the consequences that they may have exposed themselves to on account of the violations of the Constitution and denial of rights to the people of Pakistan. The violation of Article 224(2) and the resultant denial of the rights to the people of Pakistan is so grave and profound that it cannot be cured, condoned nor the acts are

immune from being held to account. In order to understand the violations of the Constitution and the right of the people denied due to delay caused in holding the elections within the ninety day time frame expressly provided under the Constitution, it would be necessary to describe the duties imposed under the Constitution and the Act of 2017.

**DUTIES IMPOSED UNDER THE CONSTITUTION AND THE ACT OF 2017 TO HOLD GENERAL ELECTIONS.**

6. As noted above, pursuant to the general elections the legislatures, whether the National Assembly or the provincial Assemblies, continue for a period of five years from the date of its first sitting unless earlier dissolved. The National Assembly may stand dissolved pursuant to an order of the President in three eventualities described under the Constitution.<sup>5</sup> Firstly on expiration of the five year term from its first meeting, secondly, if earlier advised by the Prime Minister and, lastly, the dissolution may be pursuant to the exercise of the latter's discretion if, after a vote of no confidence having been passed against the Prime Minister, no other member commands a majority. The duty to appoint a date, not later than ninety days from the date of the dissolution is imposed upon the President (48(5)(a) ) and a corresponding duty to appoint a care-taker Cabinet (Article 48(5)(b) in accordance with the provisions of the Constitution.<sup>6</sup> If the dissolution of the Assembly is upon the expiry of its term then the general elections shall be held within a period of sixty days immediately following the day on which the term of the Assembly is due to expire, However, in case the President dissolves the National Assembly on the advice of the Prime Minister earlier than the expiry of the term of five years then the Constitution

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<sup>5</sup> (Article 58) of the Constitution

<sup>6</sup> (Article 224 or Article 224 A) of the Constitution

commands the holding of general elections within ninety days. The relevant provision is as follows;

*“224(2) When the National Assembly or a Provincial Assembly is dissolved, a general election to the Assembly shall be held within a period of ninety days after the dissolution, and the results of the election shall be declared not later than fourteen days after the conclusion of the polls.”*

7. In case of the above eventualities it is the duty of the President to appoint the date i.e within sixty or ninety days, as the case may be. Likewise, a provincial Assembly may also be dissolved by the Governor on the advice of the Chief Minister before the expiry of the five year term. If the Governor acts on the advice then the Assembly is dissolved immediately, though the latter may also choose not to act and make an order that the Assembly stands dissolved on the expiry of forty eight hours from the tendering of the advice.<sup>7</sup> The Governor may also dissolve the Assembly at his discretion subject to the conditions expressly set out in the Constitution.<sup>8</sup> Where the Governor has dissolved the Assembly then the Constitution has explicitly imposed a duty upon him/her to appoint a date not later than ninety days for the general elections to the Assembly.<sup>9</sup> In case of any ambiguity as to who has to appoint a date in the event that the Governor does not act on the advice tendered by the Chief Minister to dissolve the Assembly then it becomes an inviolable duty of the Commission to forthwith consult the Governor and to take all reasonable steps so as to ensure that the constitutional rights of the people and the express command of the Constitution are not violated. The Lahore High Court had correctly issued the writ directing the Governor of Punjab and the Commission to appoint a date

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<sup>7</sup> (Article 112(1) of the Constitution.

<sup>8</sup> (Article 112(2)) of the Constitution.

<sup>9</sup> (Article 105(3)a) of the Constitution

for holding the general elections within the time frame unambiguously provided in the Constitution i.e ninety days. It is noted that the offices of the President and the Governor are premised on the principle of neutrality and its incumbents ought to foresee that failing to perform their constitutional duties could lead to depriving the people of their most valuable rights. In case of a constitutional impasse created either by the President or a Governor, regardless of whether it is politically motivated, deliberate or reckless disregard for the constitutional rights of the people, it becomes a duty of the Commission to proactively make the Constitution workable. This duty of the Commission is implicit in the functions assigned to it by the framers of the Constitution. It is misfeasance in public office and amounts to misconduct when public powers entrusted to the exalted holders of public offices are used in a manner which they ought to have foreseen would result in denying the people their constitutional rights.

8. In matters relating to holding the general elections the role of the Commission is crucial. The Commission is a creation of the Constitution itself for performing specific duties and functions clearly set out by the framers as follows;

*"219. The Commission shall be charged with the duty of-*

- (a) preparing electoral rolls for election to the National Assembly, Provincial Assemblies and local governments, and revising such rolls periodically to keep them up-to-date,*
- (b) organizing and conducting election to the Senate or to fill casual vacancies in a House or a Provincial Assembly; and*
- (a) appointing Election Tribunals*
- (d) the holding of general elections to the National Assembly, Provincial Assemblies and the local governments; and*
- (e) such other functions as may be specified by an Act of Majlis-e-Shoora (Parliament)."*

9. The importance of the Commission having been given the status of an institution created by the Constitution itself is emphasised by the framers in the expression 'shall be charged with the duty --- the holding of general elections to the National Assembly, Provincial Assemblies, and the local governments'. The duty is not subject to appointing the date by the President or a Governor as the case may be. The duty also does not end with holding of the general elections. It is a continuing duty and subsists even after holding a general election because preparations have to be proactively made to hold the next general elections. The Commission is not merely charged with the duty to hold the general elections but to hold it in accordance with the command of the Constitution. The expansive powers conferred upon the Commission by the framers of the Constitution empowers it to give such advice and direction to the President and the Governors as it may deem necessary to ensure that the general elections are held without denial of the constitutional rights to the people and infringement of the Constitution. When the President or a Governor fail to perform their duties enshrined under the Constitution, which ought to be foreseen as infringing the rights of the people, the Commission cannot remain a silent spectator. In such an eventuality the Commission is charged with the duty to remove any impediment likely to delay the general elections in violation of the express command of the Constitution. The Commission, in order to hold a general election in accordance with the Constitution, is also empowered to give advice and directions to the governments, Federal or Provincial, and it is not bound by their decisions which are seen as delaying the general elections in violation of the Constitution. The buck stops with the Commission because the framers of the Constitution have 'charged it with the duty' to hold the general elections within the time expressly enshrined in the Constitution. No reason or excuse can condone the violation of the Constitution in relation to holding the

general elections within the expressly provided time frame therein. This is a strict liability duty because deprivation of the people of their right to vote and to participate in the governance is so serious and grave that the violation is intolerable and an attempt to condone it is complicity. The Act of 2017 also imposes statutory duties upon the Commission and the relevant provision is as follows;

*"57(1). Subject to the Constitution, the Commission shall by notification in the official Gazette announce the date or dates, as the case may be, of the general elections."*

*(2). Within seven days of the announcement under subsection (1), the Commission shall, by notification in the official Gazettee and by publication on its website, call upon the voters of the notified Assembly constituencies to elect their representatives in accordance with an Election Programme, which shall stipulate-*

- (a) the last date for making nominations, which shall be the sixth day after the date of publication of the notification or, if that day is a public holiday, the next succeeding day which is not a public holiday;*
- (b) that last date for publication of names of the nominated candidates, which shall be day following the last date of filing of nomination papers;*
- (c) the last date for the scrutiny of nominations, which shall be the eight day immediately following the last date for making nominations or, if that day is a public holiday, the next succeeding day which is not a public holiday;*
- (d) the last date for filing of appeals against acceptance or rejection of nominations, which shall be the fourth day following the last date for the scrutiny of nominations or, if that day is a public holiday, the next succeeding day which is not a public holiday;*
- (e) the last date for decision of appeals, which shall be the seventh day following the last date for filing of appeals or, if that day is a public holiday, the next succeeding day which is not a public holiday;*
- (f) the last date for publication of the revised list of candidates, which shall be the day following the last date for decision of appeals;*
- (g) the last date for the withdrawal of candidature, which shall be the day following the last date of publication of revised list of candidates or, if that*

*day is a public holiday, the next succeeding day which is not a public holiday;*

- (h) the date for allocation of symbols to contesting candidates and publication of list of contesting candidates, which shall be the day following the last date for withdrawal of candidature or, if that day is a public holiday, the next succeeding day which is not a public holiday; and*
- (i) the date or dates on which a poll shall, if necessary, be taken, which or the first of which shall be a date not earlier than the twenty-eight day after the publication of the revised list of candidates."*

10. The above statutory duties of the Commission are onerous and they are also strict liability obligations. The onus will always be on the Commission, the Commissioner and its members to establish on the touchstone of the principles of strict liability duty to establish that they were not in breach nor accountable for denial of constitutional rights to the people. It is also the duty of the governments whether Federal or Provincial not to act in any manner during the term of the Assemblies that may impede or prejudice the holding of elections within the time frame explicitly provided under the Constitution. Before I discuss whether duties imposed under the Constitution and the Act of 2017 have been breached and what remedies are available to a citizen for infringement of the latter's legal rights, it would be beneficial to examine the nature of rights involved when a general election is delayed beyond the time frame provided under the Constitution.

### **THE RIGHT TO GOVERN BREACHED**

11. The Constitution has been described by this Court as 'an organic living testament of the aspirations of the people that it governs attracting the doctrine of 'living tree'. The Constitution sets out the fundamental rules and principles agreed upon by the people of Pakistan which describe how the State is to be governed. It provides a framework for the decisions made by the public officials and public office holders

and sets out the limits for exercise of public power. The Constitution describes the relationship between the State and its people. It has expressly set out the rights of the people while some rights are implicit and implied from the framework of the Constitution. The edifice of the scheme of the Constitution stands on the principles of democracy, freedom, equality, tolerance and social justice. The soul and foundation of the Constitution is its representative character. The framers of the Constitution have expressly declared in the preamble that the 'State shall exercise its powers and authority through the chosen representatives of the people". This declaration manifests the constitutional democratic scheme. The legislatures, whether the Majils-e-Shoora (Parliament) or the Provincial Assemblies, consist of the representatives of the people and they are chosen by them through the process of the scheme of elections envisaged in the Constitution. The legislatures are supreme forums having the exclusive power to make laws relating to the governance of the State. The executive branch is also representative in character because they are elected by members of the respective legislatures and are thus answerable to them. The judicial branch, consisting of unelected judges, is entrusted with the function to interpret the laws made by the chosen representatives and to decide and resolve disputes between the citizens. The laws made by the legislatures can only be interpreted by discovering their intent but the unelected judges have no power nor jurisdiction to tamper with the legislation in any manner that may be construed as rewriting of the statute so much so that 'casus omissus', anything omitted by inadvertence or oversight cannot be supplied by the courts. The entire scheme of the Constitution is exclusively based on the principle of governance of the State by the people through their chosen representatives. It is inconceivable under the Constitution that the State could be governed otherwise than by the chosen representatives

except during the expressly specified period between the dissolution of the legislatures and the election of the leader of the House pursuant to the general elections. The Constitution has expressly specified the holding of general elections within sixty or ninety days, as the case may be. The appointment of caretakers is a unique feature of our Constitution and alien in most of the other democratic states. The appointment of caretaker governments is temporary and only for the period specified under the Constitution i.e till the election of a leader of the House after the holding of the general elections within the mandatory period of sixty or ninety days. The State cannot be governed in the absence of the chosen representatives for more than the ninety days expressly provided for holding the general elections followed by election of a leader of the House. The object and purpose of appointing a caretaker government is to ensure that the routine and day to day functions of the executive branch of the State are not affected during the time between the dissolution of the Assemblies and a new elected government is sworn in. The primary duty and function of the caretaker governments is to maintain utmost neutrality and create an environment to enable the people to choose their representatives through a free and fair election process. It is, therefore, obvious that the framework of the Constitution is exclusively based on the governance of the State by the people of Pakistan through their chosen representatives. Delay of a single day in holding the general elections beyond the expressly provided time frame, i.e ninety days, is the most grave violation of the Constitution and denial of the constitutional rights of the people. It amounts to suspension of the Constitution because it breaches its foundational principle; exercise of powers and authority of the State through the chosen representatives.

12. The framework of the Constitution has created a political right in favour of each citizen to govern the State and exercise the powers and authority through their chosen representatives. The enjoyment of all other rights expressly guaranteed in the Constitution is subject to and dependent on the foundational political right to participate in the governance of the State and exercise the powers and authority through chosen representatives. This right is so valuable and important that its violation would render the Constitution unworkable and relegate it to a mere platitude. The Constitutional violation can neither be condoned nor cured on the touchstone of Article 254. The impunity for deprivation of such a fundamental right of the people of Pakistan and thus allowing the powers and authority of the State to be exercised by other than the chosen representatives for more than the expressly specified period would erode and suspend the order established by the will of the people of Pakistan as enshrined under the Constitution. The undermining and suspension of an order established by the people for the governance of the State amounts to holding the Constitution in abeyance. An attempt to delay elections deprives the people of exercising their fundamental right to exercise the powers and authority of the State through chosen representatives and thus alienates and isolates them, besides undermining the legitimacy of the scheme of the Constitution. Associated with this basic constitutional right are the right to form or to be a member of a political party, the right to participate or contest in the elections and then to form a government if successful. (Article 17). The exercise of the right to vote in a free, fair and transparent election is the first and integral step in giving effect to the order established by the will of the people.<sup>10</sup> Denial of the fundamental right to exercise powers and authority of the State due to

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<sup>10</sup> (Article 51(6)(a) of the Constitution  
PLD 2012 SC 681)

violation of the Constitutional command of holding general elections within the prescribed time frame is simultaneously a denial of the right to vote in accordance with the dictate of the Constitution. They are absolute rights which cannot be restricted in any manner or for any reason. They are definitely not derogated nor suspended. The violation of these rights are so serious that the effect extends to denial of other constitutionally guaranteed rights, inter alia, the right to enjoy the protection and to be treated in accordance with law<sup>11</sup>, the right to life and liberty<sup>12</sup> and inviolability of dignity<sup>13</sup>. The deprivation of the most fundamental and valued right to exercise the powers and authority of the State through the chosen representatives and the right to vote on account of breach of the time frame expressly prescribed is the gravest violation of the Constitution.

#### **THE CONSTITUTION VIOLATED AND DUTIES IMPOSED BREACHED.**

13. The Constitution has already been violated and its further violation has become imminent and unavoidable. The Assemblies of Punjab and Khyber Pakhtunkhwa were dissolved and general elections were to be held within ninety days. The Governor had acted on the advice of the Chief Minister and the Assembly was dissolved in the Province of Khyber Pakhtunkhwa. The Governor breached his duty by not appointing a date for holding the elections within the time frame provided under the Constitution. In Punjab the Governor did not act on the advice and the Assembly was dissolved on expiry of forty eight hours from the tendering of the advice. The Commission advised the Governors to appoint a date and had also proposed the timeframe. The Governors chose not to discharge their constitutional duties. The Commission did not pursue the matter proactively nor did the President

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<sup>11</sup> (Article 4) of the Constitution

<sup>12</sup> (Article 9) of the Constitution.

<sup>13</sup> (Article 14) of the Constitution.

appear to have discharged his duties effectively. A constitutional impasse seems to have been created by the holders of public office. They ought to have foreseen that failure of appointing a date would violate the Constitution and the constitutionally guaranteed rights of the people of the two Provinces. The President, Governor and the Commission failed to resolve the created impasse which itself was in violation of the duties imposed on them under the Constitution. The Lahore High Court had handed down a binding and authoritative judgment but the Commission and the Governor preferred not to comply with it. The High Court was in the process of initiating proceedings to implement its judgment, which appears to have been impeded because this Court had intervened. The President also appointed the date through an order passed on February 02, 2023. This order by the President may also have prejudiced the proceedings before the High Court. It appears that the Commission and the Governor were not meaningfully consulted by the President before appointing the date. The four judges of this Court who had dismissed Sou Motu Case No. 1 of 2023 were unanimously of the view that the general elections were to be held within ninety days but a premature intervention could impede the implementation of the judgment of the High Court, thus causing delay. The three judges who had allowed the Suo Moto Case No. 1 of 2023 had held that the order of the President dated February 20, 2023 was constitutionally competent. It appears that, pursuant to the opinion of the three judges of this Court, the Commission proposed to the President to appoint a date. The latter appointed a fresh date for holding the general elections in Punjab and a schedule was also announced by the Commission. The latter, however, recalled the schedule and announced a fresh date. This Court again entertained a petition in exercise of its original jurisdiction under Article 184(4) of the Constitution and it was allowed. The date for general elections was fixed

and a schedule was also set out. The directions to the Federal Government were issued. The Commission, instead of complying with the judgment of this Court, decided on its own to carry out delimitation on the pretext that it had to comply with the decision of the Council of Common Interests. The judgment of the Lahore High Court and its endeavours to have it implemented were frustrated. The judgment of this Court was also ignored. No attempt was made to implement the judgment of this Court. The judgments of this Court and the High Court have become part of the law reports, unimplemented and without holding anyone accountable.

14. The President, upon dissolution of the National Assembly, failed in his duty to promptly appoint a date for the general elections as required under Article 48(5) and instead wrote a belated letter to the Commission for consultation. The latter, despite being the creation of the Constitution, refused consultation with a constitutional office and instead chose to write a letter based on its own interpretation which was in reckless disregard to the express provisions of the Constitution and the Act of 2017. These petitions were filed but they were not fixed for hearing. Their fixation at this stage has made the violation of the Constitution and denial of the rights of the people imminent because the ninety days period will expire on November 07, 2023. The breach of the Constitution has yet again become unavoidable. The victims are the people of Pakistan who would be denied their constitutionally guaranteed rights. The President, Governors and the Commission have breached their duties expressly imposed upon them under the Constitution or the Act of 2017, as the case may be. The general elections in the Provinces of Punjab and Khyber Pakhtunkhwa could not be held within the time frame expressly set out in the Constitution. The general elections to the National Assembly and the other two

Provinces cannot be held within the specified time because the strict liability imposed under the Constitution and the Act of 2017 upon the President, Governors and the Commission have been breached. The legal rights of the people have been violated so has been the Constitutional command. It appears that the neutrality of the exalted offices of the President and Governors were compromised. The Commission failed in its duty imposed under the Constitution read with the Act of 2017 to ensure that elections are held in accordance with its commands, particularly the time frame expressly set out by its framers. Their actions and conduct have materially contributed to violation of the Constitution which has deprived the people of their most fundamental and valuable rights. Their egregious public wrongdoings and reckless disregard to the duties imposed upon them under the Constitution were the cause for the loss or injury suffered by the people of Pakistan, deprivation of their constitutional rights. The Federal Government, prior to dissolution of the National Assembly, also, prima facie, seems to have been complicit because of its actions and refusal to comply with the directions of this Court.

15. In all these petitions the prayers are restricted to seeking declarations or injunctions. The time for granting a declaration or injunctions was already over when the petitions were taken up. The Constitution stood violated in the case of holding general elections in the Provinces of Khyber Pakhtunkhwa and Punjab while the breach had become unavoidable and imminent in the case of the National Assembly and the other two Provinces. Each day of the delay was a fresh cause of action for the loss and injury suffered by the people of Pakistan. It had, therefore, become necessary that the date was appointed by the President in consultation with the Commission at the earliest so that further loss, injury and deprivation of constitutional rights is not

suffered by the people. The President, Governors, Commission and the Federal Government had already exposed themselves to the consequences arising from violation of the Constitution and deprivation of constitutional rights. We had thus given the President an opportunity to appoint a date in consultation with the Commission without prejudice to any proceedings under the law or remedies available to the citizens for denial of constitutional rights. They have appointed and announced the date at their own risk. What consequences could be faced by those who were responsible for or may have materially contributed to causing deprivation of constitutional rights and violating the Constitution on account of misfeasance in public office, reckless indifference to the duties imposed upon them under the Constitution and the Act of 2017? It was alarming to note in these proceedings that there is no fear, rather absolute impunity for violation the Constitution and the rights of the people. Before I discuss the consequences, it would be beneficial to understand why there is such absolute impunity.

**THE IMPUNITY FOR COMMITTING CONSTITUTIONAL VIOLATIONS AND DEPRIVATION OF CONSTITUTIONAL RIGHTS.**

16. The Constitution is the supreme law. It guarantees freedoms and rights to the people and has bestowed public powers upon the government and public office holders to enable them to fulfil their duty of protecting those rights. The public power can only be exercised to enable the people to enjoy their freedoms and guaranteed rights. Abuse, transgression or wrongful exercise of public power is a breach of trust and a serious misconduct because it violates constitutionally guaranteed rights and thus relegates the testament of the will of the people, the Constitution to a mere platitude. It erodes public confidence of the people in the efficacy of the constitutional rights and alienates them. The rule of law is eroded and when people lose trust in the commitment of the State to protect their freedoms and rights then in

such an eventuality the society descends into chaos and anarchy. The relationship between the State and its citizens is eroded and inevitably they feel that their security, wellbeing and freedoms are at risk. The public office holders make themselves liable to be held accountable for the slightest misfeasance in office or wrongful exercise of public powers entrusted to them exclusively to serve the people.

17. When the transgressors and those responsible for wrongful exercise of public powers become unaccountable it creates impunity for even the most serious infringement of the Constitution and the freedoms and rights of the people. Such impunity renders the Constitution unworkable and a farce. Is the impunity for deprivation of constitutional rights and serious violations of the Constitution absolute? The answer is undeniably in the affirmative. The impunity with which the Constitution has been seriously violated and the constitutional rights infringed in the past and continues to be so is inconceivable and appalling. Considering the fact that the Constitution itself states that violation of the Constitution amounts to the offence of high treason there is obviously no deterrence and this is obvious from the blatant and repeated violations throughout our history.

18. The phenomenon of enforced disappearances, one of the gravest and most atrocious forms of deprivation of constitutional rights seems to have become an unannounced policy of the State since it was acknowledged with pride by a legitimised ruler in his memoirs.<sup>14</sup> The arbitrary deprivation of liberty, trespass of private homes, violation of the right to privacy or the inviolable right to dignity, child labour and their employment for gain seem to have become a norm without demur. The inhumane, harsh and life threatening conditions in prisons, custodial torture, violence against journalists and political workers,

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<sup>14</sup> (General Pervaiz Musharraf-In the Line of Fire).

arbitrary restrictions on freedom of expression through wrongful exercise of public powers appear to have become a norm. The victims are not only the ones who have been wronged but the society as a whole. Misfeasance in public office, abuse of public power, oppressive and arbitrary conduct of those who hold public power have reduced the guaranteed fundamental rights to mere clichés. Before we discuss the remedies available under the Constitution to put an end to such absolute impunity for the most serious violations of the constitutional rights, it would be necessary to understand the cause of lack of deterrence.

19. Regrettably, our constitutional history is not at all flattering. At the inception of the creation of Pakistan as an independent State, this Court contrived the doctrine of necessity in the Maulvi Tamizuddin case<sup>15</sup> which was an invitation to future adventurers to suppress the will of the people. The foundation for legitimising a martial law was laid down by this Court in the Dosso case<sup>16</sup>. The revered Dorab Patel<sup>17</sup> describes the judgment in these words, 'Justice Cornelius's judgment in Dosso's case was a disaster for millions of people living in the former provinces of Baluchistan and the Frontier Province. However, the judgments in Dosso's case are remembered more for the views of the Judges on Martial Law, as this was the first case in which our superior Courts had to face this problem, and as he wrote the leading judgment in the case, Justice Munir has been criticised for having validated not only the coup of October 1958 but all future coups, provided they are successful. This criticism of the Chief Justice ignores the fact that the other four judges of the Court had agreed with him. .... The judges who heard Dosso's case had taken an oath to uphold the 1956 Constitution

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<sup>15</sup> (PLD 1955 FC 240)

<sup>16</sup> (PLD 1958 SC 533)

<sup>17</sup> (Testament of a Liberal page 59)

and when the constitution was abrogated by Martial Law it was their duty to decide whether they should resign or continue working, because to continue working meant validation of the coup." The judges who were on the Bench and had validated the martial law included Justice Cornelius who later chose to serve as the Chief Justice of this Court during the period of the legitimised usurper for eight years. A former Chief Justice of this Court, Dr Nasim Hassan Shah in his memoirs<sup>18</sup> has criticised the Provisional Constitutional Orders issued during the martial law imposed by General Agha Mohammad Yahya Khan between 1968 to 1971 and writes that, 'The legal advisor (with the rank and status of a Federal Minister) at that time to Gen Yahya Khan was no other than the highly respected Justice A.R Cornelius, a former Chief Justice of Pakistan. Mercifully, the judges were not called upon to take new oaths, as has happened subsequently'. General Yahya Khan resigned on December 20, 1971 after the fall of Dhaka and dismemberment of Pakistan. The Provisional Constitutional Orders issued by General Yahya Khan were subsequently declared to be of no legal validity by this Court in the Asma Jilani case<sup>19</sup>. One of the judges on the Bench, Mohammad Yaqub Ali J, as he then was, observed that judges could not break the oath they had taken to defend, preserve and protect the constitution and declare that because of the superior will of the usurper they have been relieved from their obligations. Moreover, 'if the judges find the executive organ of the State unwilling to enforce their decrees and orders, the only course open to them is to vacate their office. Those who are desirous of serving the usurper may take office under the legal order imposed by him, but this depends upon the discretion and personal decision of the judges and has no legal effect. If they adopt the -- course they will be acknowledging that 'might is right'

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<sup>18</sup> (Memoirs and Reflections - pages 129 to 130)

<sup>19</sup> (PLD 1972 SC 139)

and become collaborators with the usurpers'. It was further observed that when a person destroys the national legal order in an illegitimate manner then the latter cannot be regarded as a valid source of law making. The people and the courts are silenced temporarily through the coercive apparatus of the State. but the order which the usurper imposes would remain illegal and the courts will not recognise the rule and act upon them as de jure. It was emphasised that ' as soon as the first opportunity arises when the coercive apparatus falls from the hands of the usurper, he should be tried for high treason and be suitably punished. This alone will serve as a deterrent to would be adventurers.' The usurper was never tried. The Asma Jilani judgment was handed down in March 1972 and it was followed by promulgation of the Constitution on April 12, 1973. Article 6 defined the offence of high treason and pursuant thereto The High Treason (Punishment) Act, 1973 (**'High Treason Act'**) was enacted on September 26, 1973 which provided that a person found guilty of high treason 'shall be punishable with death or imprisonment for life'. Did it create a deterrence? This was answered by the former Chief Justice, Mohammad Munir in his memoirs in these words; 'But despite Asma Jilani, Martial Law came twice and we are still under Martial Law. No judgment of a court of law has ever prevented future changes in the society or the coming fortunes or misfortunes of a country ...".<sup>20</sup> On July 05, 1977, less than five years from handing down of the judgment in the Asma Jilani case another usurper, General Zia ul Haq abrogated the Constitution. The judges of this Court preferred to become collaborators of the usurper by purportedly legitimising the high treason and declaring it as a 'revolution' and a 'new order' through the judgment in the Begum Nusrat Bhutto case.<sup>21</sup> He was also given the power to amend the

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<sup>20</sup> (Highways and Bye-Ways of Life- Mohammad Munir).

<sup>21</sup> (PLD 1977 SC 657).

Constitution. Dorab Patel J, who was also a member of the Bench later lamented; 'This judgment has been criticised because it gave the Chief Martial Law Administrator the power to amend the Constitution. It is our misfortune that we do not have law journals, which examine, and if necessary, criticise judgments, or judgments to which they have been parties. Having considered the criticism that we should not have given the Chief Martial Law Administrator the power to amend the Constitution, I am of the view that this criticism was correct.'. After having been legitimised, the usurper required the judges to take a fresh oath swearing allegiance to him which, according to former Chief Justice Dr. Nasim Hassan Shah, 'They moved surreptitiously by promulgating the PCO at midnight of the 24th March 1981.'<sup>22</sup> Justifying violating the oath taken under the Constitution by taking a fresh oath he writes; "I went through a very tense emotional trauma on reading the PCO. There was no doubt in my mind that the PCO was an immoral instrument, and my feelings against the military President and his legal advisors ran high, more so when his legal advisors included such imminent humanists as A.K Brohi, who had argued in the Ayub Khan courts that rights of man come from rights given by God; and Mr Sharifuddin Pirzada who had argued Nusrat Bhutto's case on behalf of the General. However I decided that if I am called I shall take the new oath. My considerations were that the long dark night of the Martial Laws will pass away, as had the Martial Laws of Ayub Khan and Yahya Khan; and I had 14 years more to serve, and I could use my jurisdiction, limited as they were, for the benefit .... In a way I am glad that I took such a decision, for in 1993 I had the opportunity to preside over the Nawaz Sharif case in the Supreme Court, and restore a deposed Prime Minister to office.... ". An interesting justification is also narrated by another former Chief Justice of Pakistan, Ajmal Mian in his

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<sup>22</sup> (page 131)

memoirs; "In Sindh High Court, the matter much debated among the judges was whether it was advisable to take the oath or not. Justice Nasir Aslam Zahid, who had not been confirmed as a permanent judge and myself (having been confirmed in March 1980) held discussions in my chamber on this important question. Our initial reaction was that we should decline but we discussed the question with Mr Saiyed Ashad Ali, the Registrar of the Sindh High Court .... His advice was that we were appointed by the CMLA and had not taken oath under the Constitution. Our taking the prescribed oath would not be a breach of the oath under the Constitution. .... This convinced us to take the oath". Dorab Patel J and some judges of the Lahore and Sindh High Court chose not to take the fresh oath. The country was ruled for the next ten years by a usurper who was never tried for high treason nor were his collaborators made accountable. The unconstitutionally deposed elected Prime Minister was sent to the gallows. The fairness of the trial and subsequent dismissal of his appeal by this Court remains to be questionable. In the words of Mohammad Yaqub Ali J, an omnipotent sovereign ruled over the recipients of the delegated sovereignty, the people 'in a similar manner as the alien commander who has conquered a country and his will alone regulates the conduct and behaviour of the subjugated populace'. On October 12 1999 yet another usurper, General Pervaiz Musharraf abrogated the Constitution and the judges of this Court, except five, preferred to collaborate by purportedly legitimising his act of high treason through the Syed Zafar Ali Shah case.<sup>23</sup> No one was tried for the offence of high treason. On November 03, 2007 the legitimised usurper struck the very institution which had granted legitimacy to his action of abrogating the Constitution. Some judges were detained while others preferred to

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<sup>23</sup> (PLD 2000 SC 869).

violate their oath by swearing allegiance to the already legitimised usurper. Belatedly, the legitimised usurper alone was tried and convicted by a special court while his collaborators were pardoned by this Court. Procuring attendance of the alleged usurper by the special court was frustrated and he was convicted and sentenced in absentia. The constitution of the special court was later declared illegal by the Lahore High Court. The function of the offence of high treason to deter serious violations of the Constitution stood frustrated. Every person who enters a public office or joins the service of Pakistan swears by Almighty Allah to protect, defend and preserve the Constitution but barring a few they violate the oath with impunity. The apparent impunity for the perpetrators of committing serious violations of the Constitution and the guaranteed rights of the people through oppressive, arbitrary and unconstitutional abuse or transgression of public powers has remained entrenched in more than seventy years of our constitutional history and it has carried on till this day. The memoirs of the judges who have served the institution and the judgments of this Court manifest that breaking the oath or legitimising the abrogation of the supreme law is not a sin. If the oath had been recognised as a solemn commitment with Almighty Allah and the people, no one would have dared to violate the Constitution nor deprive citizens of their constitutional rights. No one is infallible and every human may err, but for a judge to violate the oath is indeed a sin. The usurpers would not have ruled for half of this nation's history if they were not legitimised by this Court nor would the people have suffered. This is what has created absolute impunity and as judges we ought to accept that we were responsible. Constitutional violations and deprivation of freedoms and constitutional rights are intolerable. Those who deprive the citizens of their constitutional rights must be held to account. The panacea to the miseries and hardships faced by the people

of Pakistan solely rests on upholding the Constitution and make the authorities answerable for wrongful exercise of public power and transgression. It is an inviolable duty to put an end to the impunity for violating the Constitution and deprivation of constitutional rights. No one, not even the judges, are above the law nor immune from being held accountable. The public powers are meant to be exercised for serving the people and to protect them from harm. Next I will examine the remedies available to the citizens to vindicate their rights and which also have the effect of creating deterrence for the future wrongful abuse of public power.

**PUTTING AN END TO THE IMPUNITY FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS AND MAKING THE PUBLIC POWERS ACCOUNTABLE.**

20. The framers of the Constitution had created the offence of high treason under Article 6 with the object that it will function as a formidable deterrence. But the events following the promulgation of the Constitution have proved that the offence, rather than creating deterrence, has been reduced to a mere platitude. The citizen has no control over putting the proceedings in motion. The Federal Government has only once invoked the offence and that too because this Court had shown its inclination. Though the trial culminated in conviction of the usurper but the sentence could not be executed. The usurper passed away without being accountable. Apart from criminal action, other remedies include seeking a declaration or an injunction from a constitutional court. In the petitions in hand, the jurisdiction of the High Courts was invoked. Binding and enforceable declarations and injunctions were granted by the Lahore High Court but they were not executed for reasons already discussed above. This Court had also exercised its original jurisdiction and had granted declarations and injunctions but they were not implemented nor appropriate action was sought or any effort made to have them implemented. The citizens were

deprived of their most valuable constitutional rights. The Constitution also stood violated. Each day of delay in holding general elections after expiry of the ninety day mandatory constitutional period gives rise to a fresh cause of action. The registered voters, 1,020,953, 5,228,726, 21,415,490, 71,565,168 and 26, 396,053 in Islamabad, Baluchistan, Khyber Pakhtun Khwa and Punjab<sup>24</sup> respectively have been deprived of their constitutional rights and they have been forced to be governed by the unelected caretakers in transgression of the Constitution. The 125,626,390 registered voters are victims and the responsible authorities i.e the President, Governors and the Commission are accountable to them for causing injury and loss; depriving them of their legal rights. How can these citizens vindicate their valuable rights and hold the authorities accountable so that they are effectively deterred from doing the same in future? Are the remedies available under the public law available to them? Can they recover damages for the constitutional tort; violation of their constitutional rights by the State authorities? Yes, the Constitution has created a right for claiming remedies for constitutional torts. This right is unique and will be discussed later. However, I feel it necessary to survey how remedies in public law or for constitutional tort have been dealt with in other jurisdictions. It is noted that the remedies in public law are distinct to those available in the private law of torts, though they may be considered as guiding principles. Public law deals with the relationship between a State and the citizen. It sets out the rules that govern the powers of the State and deals with issues that affect the general public and society. The State power is solely meant to serve the people and it is always accountable to those over whom it is exercised. When, on account of transgression, wrongful exercise of authority, abuse of power or reckless disregard for or neglect of public duties the constitutional

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<sup>24</sup> Website of the Commission

rights are denied or breached, the citizen who has been wronged becomes entitled to claim various remedies including damages in common law for the tortuous acts. The violation of a constitutional right is in itself an independent wrong and its violation is premised on the adage that there is no right without a remedy. In a few jurisdictions the right to seek a remedy for tortuous acts of public authorities is recognised in the constitution while in most of the countries the jurisprudence has developed under the common law.

21. The Privy Council, in *Maharaj v Attorney General of Trinidad and Tobago*<sup>25</sup>, has held in the context of section 6 of the Constitution of Trinidad and Tobago that it had created a new cause of action in public law directly against the State, unlike the principle of vicarious liability for a private law tort. It was recognised that this cause of action empowered the courts to grant 'effective redress, including reparation and monetary compensation. In the opinion of Lord Diplock, such damages were a claim in public law for compensation of deprivation of a right and it was distinct from a tort claim in private law. The mode of assessment of damages was also to be distinct. This formed the basis for developing the category of damages known as 'vindictory damages'. The public law remedies were later affirmed by the Privy Council in the case of *Ramanoop (Attorney General of Trinidad and Tobago v Ramanoop)*<sup>26</sup> in which Lord Nicholls highlighted that with reference to vindictory damages, (i) vindication in most cases requires more than mere words, (ii) constitutional claims are independent of common law tort claims, (iii) though damages in common law tort claims would provide useful guidance (iv) they are an extra dimension and an additional award in order to reflect 'the sense of public outrage, to emphasise the importance of the constitutional right that was violated

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<sup>25</sup> ([1978] 2 All E R 670)

<sup>26</sup> (2006) 1 AC 328)

and the gravity of the breach and to deter the breach' (v) this discretionary award is vindicatory and not punitive.

22. In Australia, the High Court in *Plenty v Dillon and others*<sup>27</sup> has recognised the award of substantial damages and has held that, 'If the courts of common law do not uphold the rights of individuals by granting remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's right particularly when the invader is a government official. The appellant is entitled to have his right of property vindicated by a substantial award of damages'.

23. The Supreme Court of Canada has developed jurisprudence which recognises remedies by awarding damages for the breach of the rights guaranteed under the Charter. The test enunciated for claiming damages in *Vancouver (City) v Ward*<sup>28</sup> is based on four factors; First, to establish a breach of Charter and secondly, identification of the purpose of damages. Three purposes have been identified, compensation for any personal loss and suffering caused by the violation of one's constitutional right, vindication of the right by affirming its constitutional value and, lastly, deterrence in the sense of regulating government behaviour. Third, if financial damages are justified the court could consider countervailing factors to determine whether they are appropriate and just or may become a burden on the State. Lastly, the assessment of damages and, in this context, the primary object is compensation of the citizen while vindication and deterrence are the additional dimensions. These principles were reaffirmed in *Henry v*

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<sup>27</sup> ([1991] 171 CLR 635)

<sup>28</sup> ([2010] 2 SCR 28)

British Columbia (Attorney General)<sup>29</sup>. The test laid down in Canada recognises that the loss suffered could be pecuniary or non-pecuniary.

24. In New Zealand the Supreme Court has also recognised that a breach of the constitution and constitutional right was an independent cause of action in public law and the remedies available did not rest on the principle of vicarious liability. It has also recognised that the mode of assessment of damages must not be constrained by the principles of damages in the private law of tort. In the case of *Simpson v Attorney General (Baigent's case)*<sup>30</sup> the Supreme Court has adopted a rights centered approach in the case of violation of the Bill of Rights. It was emphasised that fundamental rights are the essential fabric of a society and when they are violated it becomes a duty of the court to provide an appropriate remedy. The award of damages should be of a quantum that are not excessive but also does not trivialise the breach. In the case of *Dunlea v Attorney General*<sup>31</sup> the award of damages was upheld for being mistakenly identified as terrorist suspects by the public authorities. However, the Supreme Court did not find the conduct of the police officers to have been outrageous or high-handed and, therefore, the exemplary damages were set aside. However, the award of a lump sum amount was upheld. In *Taunoa v Attorney General*<sup>32</sup> the Supreme Court recognised that in cases relating to claims arising from the breach of the Bills of Right there were two victims, the claimant who had suffered injury and loss and the society as a whole was the other victim. The breach tended to undermine the rule of law and social norms, therefore, it was appropriate for the court to consider what was necessary for vindication so as to ensure protection of the interests of the society in the observance of fundamental rights and freedoms.

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<sup>29</sup> ([2015] 2 SCR 214)

<sup>30</sup> [1994] 3 NZLR 667

<sup>31</sup> ([2000] 3 NZLR 136)

<sup>32</sup> ((2008] 1 NZLR 429

Regarding the question of remedy it was held that the object was to 'find an overall remedy or set of remedies which was sufficient to deter any repetition by agents of the State and to vindicate the breach of the right in question'. The damages are recognised to compensate, vindicate and create effective deterrence. In assessing vindicatory damages, Tipling J has identified the factors relevant for assessment of the damages in the context of vindication as the nature of the right which has been violated, the circumstances and the seriousness of the breach, the seriousness of the consequences of the breach, the response of the public authorities to the breach and any relief awarded on a related cause of action.

25. The action in public law is recognised in the United Kingdom, as illustrated in the case of *R (Greenfield) v Secretary of State for the Home Department*<sup>33</sup>. However, in awarding damages the quantum is determined on the principle that the court 'must take into account the principles applied by the European Court of Human Rights in relation to award of compensation under Article 41 of the Convention'. The jurisprudence evolved by the Strasbourg Court is taken as a guide for assessment of damages. The House of Lords did not reject the award of vindicatory damages in *Lumba (Congo) v Secretary of State for the Home Department*.<sup>34</sup> Lady Hale emphasised that the constitutional rights were so important that their violation ought to be vindicated by law in some way regardless of whether compensable harm had been suffered or whether the conduct of the authorities was so egregious as to attract exemplary damages. However, exemplary damages are recoverable when the conduct and action of the public authorities is oppressive, arbitrary or unconstitutional; *Rookes v Barnard*<sup>35</sup>. In *Wilkes*

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<sup>33</sup> ([2005] 1 WLR 673)

<sup>34</sup> ([2011] 2 WLR 671.

<sup>35</sup> (*Rookes v Barnard* (1964) AC 1129)

v Wood<sup>36</sup> Lord Parker CJ explained that damages 'are designed not only as a satisfaction to the injured, but likewise a punishment to the guilty, to deter from any such proceedings for the future and as a proof of the detestation of the jury to the action itself'. In *Ashby v White*<sup>37</sup> the plaintiff was deprived of the right to vote. The House of Lords restored the trial courts award of presumed general damages. In the first appellate court Chief Justice Holt had held that 'the right of voting... is a thing of the highest importance, and so great a privilege, that it is to deprive the plaintiff of it'. The precedent was followed in a voting right case by the Supreme Court of the United States in the case of *Nixon v Herndon*.<sup>38</sup>

26. The Constitutional Court of South Africa recognises remedies to protect and enforce constitutional rights. In *Hoffmann v South African Airways*<sup>39</sup> the Court has laid down principles for grant of an appropriate relief on the basis of the nature of the wrong, deterrence from future violations and fairness to all the parties. In *Fose v Minister of Safety and Security*<sup>40</sup> it was observed that vindication was the fundamental object of a constitutional remedy. The Court recognised the award of delictual damages and did not consider nominal damages as that would amount to trivialising the right. Remedies for violation of constitutional rights were affirmed in the case of *Modder East Squatters v Modderklip Boerdery (Pvt) Ltd*.<sup>41</sup>

27. As is obvious from the above survey, the remedy in the form of recovery of damages are of different types, compensatory, general, non pecuniary, pecuniary, exemplary or vindicatory. In the case of denial of

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<sup>36</sup> 98 ER 489

<sup>37</sup> (1 ER 417)/126 (K.B 1703)]

<sup>38</sup> (273 US 536.

<sup>39</sup> ((2001 [1] SA 1)

<sup>40</sup> (1997 [3] SA 786

<sup>41</sup> (2004 [6] SA 40)

right to vote or participate in the governance through chosen representatives the loss is indelible and thus not quantifiable. The assessment or determination of damages in cases of defamation, libel or breach of the right to privacy the loss is of an intangible nature. It is not quantifiable. The victim cannot prove the monetary value of the loss. The non pecuniary losses are compensated on the basis of presumed general damages. An additional category, vindicatory damages has also evolved in the jurisprudence as an effective public law remedy. It is discretionary and is awarded when no other remedy is available to vindicate the rights. They are in addition to other remedies and not precluded even when compensatory damages become recoverable. It recognises the intrinsic value of a constitutional right. The quantum is assessed on the touchstone of the principles of rationality and proportionality. The factors that are, inter alia, taken into consideration in assessing the damages are the seriousness of the breach, the effect on the victim, the nature and gravity of the tortuous act and deterrence against future violations. They are meant to vindicate the entrenched constitutional rights.

28. The courts in different jurisdictions have adopted varied approaches to the appropriate remedies in public law. But all recognise that the remedy for violation of constitutional rights is an action falling within the realm of public law. The jurisprudence evolved by the Supreme Court of Canada appears to be practical and just in order to achieve the objects of compensation, vindication and deterrence for denial of constitutional rights. In our Constitution the framers have expressly created the right to claim remedies for tortuous acts of the Government or any person in the service of Pakistan or other authority empowered by law to levy any tax or cess and any servant of such

authority acting in the discharge of his duties as such servant. The relevant provisions are as follows;

*"212.(1).Notwithstanding anything hereinbefore contained the appropriate Legislature may by Act [provide for the establishment] one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of-*

*(a).....*

*(b) matters relating to claims arising from tortuous acts of Government, or any person in the service of Pakistan, or of any local or other authority empowered by law to levy any tax or cess and any servant of such authority acting in the discharge of his duties as such servant;*

*(c)....*

*(2). Notwithstanding anything hereinbefore contained where any Administrative Court or Tribunal is established under clause (1), no other court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends [and all proceedings in respect of any such matter which may be pending before such other court immediately before the establishment of the Administrative Court or Tribunal [; other than an appeal pending before the Supreme Court,] shall abate on such establishment.";*

29. It is a unique and distinguishable feature of the Constitution because it expressly confers the right to claim public law remedies for tortuous acts of three categories of public authorities. It is a right which appears to have escaped the attention of the courts nor has it been invoked by a victim of wrongful exercise of public power. It can create a formidable deterrence for violations of the Constitution and constitutional rights if the victims are enabled to effectively exercise this right. It is regrettable that no initiative has been made since the promulgation of the Constitution to establish special courts as contemplated by the framers. Nonetheless, since this right has been created under the Constitution it cannot be denied nor made redundant

on account of failure to establish the special courts to exercise exclusive jurisdiction as was intended by the framers. No right is without a remedy. When the Service Tribunal was not established or it becomes non-functional, the rights of the civil servants are not extinguished, rather they seek remedies from other forums including the High Courts. The right to claim remedies against the tortuous acts of the three categories of public authorities cannot be denied to the citizens or other persons merely because a special court has not been established to exercise exclusive jurisdiction. The jurisdiction of the courts of plenary civil jurisdiction and, in an appropriate case, the High Courts are not barred till such time that a special court conferred with exclusive jurisdiction has been established. The constitutional right conferred on a person to claim remedies against tortuous acts of public authorities is of profound importance. It is one of the most effective means for a victim to vindicate the infringed right, hold public authorities to account and ensure that the public powers are not abused or wrongfully exercised. The constitutionally created right empowers the people to police the misconduct of public authorities and the Government in addition to being compensated and vindicated for a wrong. If effectively used and enforced it is a right that would encourage public participation in putting an end to abuse of powers and the impunity for violation of the Constitution and constitutional rights. It is a right exercisable by the citizens and general public without being at the mercy of others such as the Federal Government for commencing criminal proceedings in case of the offence under Article 6. It will be the duty of and an onerous challenge for the courts to ensure that the citizens or other persons effectively enforce this valuable right. Imagine if this right had been exercised by the people of Pakistan against the usurpers and collaborators for abrogating, subverting or holding the Constitution in abeyance. The right has been expressly enshrined as a

constitutional right and in such an eventuality the courts enjoy wide discretion to design or create a remedy to appropriately redress a constitutional right and to deter repetition of the tortuous acts in future. Besides compensatory damages the court can, in addition, award exemplary or vindicatory damages, as the case may be. The criterion for assessment of damages in the case of vindication of a constitutional right is presumed general damages.

30. In the case in hand the people of Pakistan, particularly the registered voters, have been deprived of the most fundamental right to participate in the governance of the State through chosen representatives and obviously the right to vote in accordance with law. They are being governed by unelected caretakers in violation of the Constitution and their fundamental rights. They are victims of the wrongful exercise of public powers and reckless disregard for duties imposed under the Constitution and statutes upon the President, Governors and the Commission i.e the Commissioner and the members. They are all in breach of their statutory duties. Their conduct and failure to discharge their constitutional duties has made them answerable to the people. They have exposed themselves to actions against their tortuous acts. It is the duty of public authorities to obey the law and exclusively serve the interests of the general public. It is a duty of the courts to put an end to impunity against the violation of the Constitution and constitutional rights. As a corollary, it is the duty of the courts to ensure that if citizens file claims for alleged tortuous acts of public authorities that they are decided expeditiously and in accordance with the law. It is a primary constitutional duty of the Commission that the delayed elections are held in a fair, free and transparent manner without giving anyone an opportunity to complain. The Commission will be failing in its duty if the elections are not only

held in a fair, free and transparent manner but they must also be seen as such by each citizen. The registered voters, 125,626,390, who have suffered the denial of their most valuable constitutional rights may, if they so desire, exercise their right to claim remedies for the tortuous acts and thus vindicate their rights and set an example for creating a deterrence for the future.

(Athar Minallah)

**'APPROVED FOR REPORTING'**