

ORDER SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD. **JUDICIAL DEPARTMENT.**

Writ Petition No. 2758/2023

Bushra Imran Khan

Versus

Federation of Pakistan through Secretary Ministry of Interior and
Secretary Ministry of Defence & others

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
(13)	25.06.2024	<p>Sardar Shahbaz Khosa, Ghulam Murtaza and Ms. Suzain Jehan Khan, Advocates for the petitioner.</p> <p>Barrister Munawar Iqbal Duggal, Additional Attorney General, and Mr. Aqeel Akhtar Raja, Assistant Attorney General.</p> <p>Mr. Afzal Khan, Advocate along with Mr. Muhammad Khurram Siddiqui, Director General (L&R), Mr. Naeem Ashraf, Mr. Adil Javed, AD, PTA.</p> <p>Mr. Muhammad Taimur Khan, Advocate for PTA.</p> <p>Mr. Muhammad Naeem Ashraf, Director (Litigation), Ch. Adil Javed, Assistant Director (Litigation), and Syeda Itrat Batool, Law Officer, PTA.</p> <p>Mr. Faisal Siddiqi, ASC, for PBA.</p> <p>Malik Abdul Rehman, State Counsel.</p> <p>Mr. Tariq Zaman, Advocate for respondents No. 2 and 3 in W.P No. 1805/2023.</p> <p>Mr. Uzair Bin Shafi, Advocate for respondents in W.P No. 1805/2023.</p> <p>Mr. Ayaz Khan, Additional Director (OPS), Mr. Sarfraz Khatana, Addl. Director (law) and Mr. Imran Haider, Assistant Director, FIA.</p> <p>Mr. Wajid Aziz Qureshi, S.O, M/o Law and Justice.</p> <p>Mr. Shahid Rafiq, Manger Legal Cybernet.</p> <p>Brig. (R) Falak Naz Legal Advisor and Lt. Col. Zahid Hussain, Law Officer, Ministry of Defence.</p> <p>Mr. Amjad Iqbal, Deputy Director (Litigation), Intelligence Bureau along with Mr. Shahzad Saleem Inspector.</p> <p>Mr. Tahir Farooq Tarar, Head legal, PEMRA along with Mr. Mohsin Hameed Dogar, Director Regulation and Sardar Alam Shafqat, Law officer PEMRA</p> <p>Mr. M. Irfan ul Haq, DS Law and Mr. Abdul Rahim, S.O Litigation, M/o Interior.</p> <p>Mr. Tahir Kazim, Law Officer, IGP's office alongwith Mr. Tanveer Pasha, Sub-Inspector, Police Station Kohsar, Islamabad.</p>

M/s Ali Ahmed Uzair Hashmi and Muhammad Shoib on behalf of Wateen Telecom and Multinet. Mr. Rashid Khan, Technical Expert, Telenor.
Mr. Muhammad Arbab, Assistant Litigation, respondent No. 2 in W.P No. 1805/2023.

The foundational issue before the court in the instant petitions is an allegation on part of the petitioners as citizens of Pakistan that they have been illegally surveilled. Their private phone conversations have been recorded and subsequently released to social media with the object of manufacturing criminal charges against them and/or to intimidate and blackmail them. In one of these petitions, notices were issued on 31.05.2023 and this Court had framed five questions that needed to be adjudicated. Question No.3 amongst the questions was whether *"the Constitution or statutory law empowers the Executive, and in the present case the Federal Government, to record or surveil phone calls or telecommunication between private citizens, and if so the supervisory and regulatory legal regime within which such recording and surveillance can take place?"*. Question No.5 was that *"in the event that there is no legal sanction to tap phones, record telecommunication between citizens or undertake surveillance, which public authority or agency is to be held liable for such surveillance and enforcement over the rights of citizens to liberty and privacy and or release of illegally recorded private conversations to the public"*. The order sheets in the instant petitions would reflect that the Federal Government, its divisions and agencies have been found wanting in their obligation to assist the Court. This Court has repeatedly implored the learned counsels for the

Respondents and the learned Additional Attorney General to ensure that the respondents discharge their obligations to address the questions framed for adjudication in a candid and truthful manner. The reports filed, as will be discussed further in this order, have been cagey at best, if not outrightly misreading.

2. Learned Additional Attorney General submitted that the reports solicited by this Court by order dated 29-05-2024, had been filed by PTA, various Divisions of the Federal Government and Intelligence Agencies. He submitted that in the report filed by the PTA, it has appended standard operating procedures for sharing of CDRs, live locations and related data ("**Consumer Telecom Data**") that have been issued by the Ministry of the Interior from time to time and have been communicated by PTA to providers of telecom services ("**Telecom Licensees**") under provisions of the Pakistan Telecommunication (Re-organization) Act, 1996 ("**Telecom Act**").

3. When asked as to the legal authority of the Interior Division to issue directions to the Pakistan Telecommunication Authority ("**PTA**"), which is an independent statutory regulator, learned Additional Attorney General assisted by the learned counsel for PTA submitted that under section 8 of the Telecom Act, the Federal Government has the authority to issue policy directions to PTA. When asked as to whether the Federal Government, as defined by the Supreme Court in **Mustafa Impex and others vs. The Government of Pakistan and others (PLD 2016 SC 808)**, had approved the SOPs, and whether the Interior Division would be

considered Federal Government for purposes of Section 8 of the Telecom Act even prior to **Mustafa Impex**, learned Additional Attorney General sought time to file the relevant summaries that reflect the manner in which the SOPs were authorized by the Interior Division and/or the Federal Government, and further to assist the Court as to whether the SOPs pursuant to which Consumer's Telecom Data was being shared with the law enforcement agencies was in accordance with the requirements of Telecom Act.

4. This Court by order dated 29.05.2024, had enumerated that interception, as defined in Section 3(g)(ii) of the Investigation for Fair Trial Act, 2013 ("**Fair Trial Act**") (which includes "*emails, SMS, internet protocol detailed record – IPDR, call detailed records – CDR, and any form of computer-based or cell phone based communication and voice analysis*") can be permitted, to various extents, as provided in Section 5 of the ("**Telegraph Act**"), Section 54 of the Telecom Act and provisions of the Fair Trial Act, and had directed that reports be filed by the Federal Government, its Divisions, and investigation and intelligence agencies, as to the number of requests that have been generated seeking warrants to intercept material and undertake surveillance in accordance with provisions of the Fair Trial Act. The Additional Attorney General submitted that according to the reports, since the enactment of the Fair Trial Act in 2013, not a single request for grant of permission to undertake surveillance had been made under provisions of the Fair Trial Act. He further submitted that in view of Section 5 of the Fair Trial Act read together with Schedule I of the Fair Trial Act, grant of

permission for surveillance under the Fair Trial Act could only be made in relation to scheduled offenses, which did not include matters of national security. When asked as to how matters of national security were excluded and under what provisions of law could surveillance be undertaken for purposes of national security, the Additional Attorney General was unable to identify any provision of the law. The Additional Attorney General, however, conceded that as per the reports filed by the Federal Government and its Divisions, it was only provisions of the Telegraph Act, The Telecom Act, and the Fair Trial Act that permitted undertaking surveillance in accordance with the requirements of such laws. The Additional Attorney General was asked to confirm whether any rules had been framed for purposes of section 54 of the Telecom Act, pursuant to section 57(2)(ah) of the Telecom Act, to grant authority to any person(s) who intercepted/traced calls and messages. He made a feeble attempt to argue that the matter should be heard in the chambers as it might have implications for national security. The learned A.A.G. was asked if the answer to the question of whether or not rules had been framed for purposes of section 54 of the Telecom Act was a matter of national security, he was at a loss for words.

5. The Open Court principle is a well-entrenched principle for the administration of justice. Within common law jurisdictions, to hold hearings in open court accessible to the public-at-large as well as the litigating parties is the general principle, and conducting proceedings in camera is the exception to be justified by recording reasons as to why the

Open Court principle is being dispensed with. The principle of dispensing justice in full public view has its roots in community traditions dating back at least a thousand years, if not more. Within the realm of more recent common law tradition, the courts have cited English philosopher **Jeremy Bentham**, who in *Anarchical Fallacies*, 1791 wrote, "*[i]n the darkness of secrecy, sinister interest and evil in every shape have full swing...where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself while trying under-trial*".

6. It is well settled, and frequently recited principle of administration of justice, laid down by **Lord Hewart in *Rex v. Sussex Justices*, [1924] 1 KB 256**, that "*[n]ot only must Justice be done; it must also be seen to be done*". The principle forms part of Article 4 of the Code of Conduct for Judges of the Supreme Court of Pakistan and of the High Courts of Pakistan ("**Judicial Code of Conduct**"). The Judges of Constitutional Courts swear an oath to dispense justice in accordance with the Constitution and the law, while abiding by the Judicial Code of Conduct.

7. The Open Court principle is meant to ensure that there is public accountability for the manner in which judges dispense justice, and ensure that in doing so they are abiding by their Oath of Office and the Judicial Code of Conduct. The underlying interest is that of the public in impartial and fair administration of justice. The exceptions to the Open Court principle, therefore, have to be narrowly drawn in, *inter alia*, the interest of the administration of justice, privacy of the

litigating parties in sensitive cases and matters of national security, etc.

8. National security, however, is not the security of an inanimate monolith. It is the collective security of the citizens to be protected by the state. In a democracy, the state can conceivably not articulate interests that are independent of and divorced from the interests of the citizens. The notion of national security is therefore used as a broad concept to define, promote and protect the collective interests and rights of the citizens of the state, and not those of any artificial legal construct that can be set up against the collective rights and interests of the citizens. Where national security interests trump the individual interests of the citizens, it is by virtue of a shared understanding that in a community, the collective rights and interests of the community will be granted preference over the rights and interests of any individual. It is for this purpose that individual rights as guaranteed by the Constitution are often balanced against the collective rights and interests of the society, including in cases where national security interests of the polity are at stake.

9. The history of the Star Chamber in England, which was at one point regarded as an efficient institution for the dispensation of justice, is an infamous one. Due to the lack of transparency and opaqueness in the manner in which the Star Chamber functioned, it came to be regarded ultimately as an instrument of oppression and a tool for persecution. As a historical matter, the in-camera proceedings conducted by Star Chamber have come to be seen as one of the reasons for its degeneration from being an instrument of justice to

becoming a tool for torture and persecution. The lessons learned from the example of Star Chamber by common law jurisdictions have been to ensure the application of the Open Court principle. In the context of accountability, dicta from ***Ambard vs. Attorney General for Trinidad and Tobago ([1936], A.C. 322)*** has often been cited where it was held that, “[j]ustice is not a cloistered virtue...She must be allowed to suffer the scrutiny and respectful...comments of ordinary men.” In a similar vein, it was opined by U.S. Supreme Court, Justice Louis Brandeis, in ‘*What Publicity Can Do*’ (***Harper’s Weekly, 1913***) that, “sunlight is said to be the best of disinfectants...”.

10. The Constitution of Pakistan guarantees the right of citizens to freedom of information. Article 19(A) was enacted by the 18th Constitutional Amendment in 2010 to explicitly provide for the right to information, which was previously deemed to be a subset of the right to freedom of speech. In a matter where the charge against the State is that it is indulging in illegal surveillance of citizens, it is all the more important that judicial proceedings be held in full public view, to reaffirm public faith in the ability of the judicial organ to dispense justice in accordance with the law and the Constitution, and to act as a check on the executive functionaries who exceed their authority in a manner that undermines the fundamental rights of citizens. The question before the court relates to whether or not illegal surveillance is being undertaken in the country, and in the event that it is being undertaken, who is liable for such illegality, and who is endowed with the legal obligation, to ensure that such

illegality is not allowed to persist. The manner in which these questions are answered will affect all citizens, as at their heart is the scope of the right to liberty, dignity and privacy and the right of citizens to be left alone in the private spheres of their lives, as guaranteed by the Constitution.

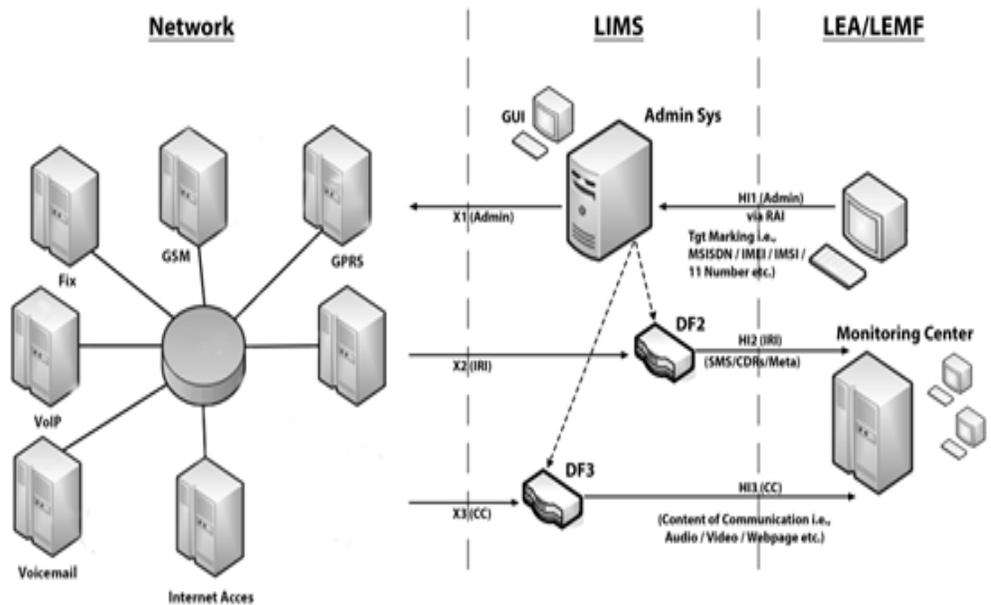
11. The petitioners before the court are private citizens. The conversations that have been recorded and leaked to social media have nothing to do with national security. It cannot be countenanced that details of the legal framework that exists and has to be complied with by state functionaries in the event that surveillance is to be undertaken is a matter that must be shrouded in secrecy. The entire purpose of rule of law is, on the one hand, to put citizens on notice as to the rules that they must abide by in ordering their lives, and on the other, to put state functionaries on notice as to the manner in which they are permitted to exercise state authority that has been conferred upon them by law, which is to be exercised as a public trust. In a rule of law polity functioning under a written constitution and declared laws, it is inconceivable that public functionaries may be permitted to act pursuant to secret policies, not backed by the law and the Constitution, especially when such policies have a bearing on the fundamental rights of citizens. Learned A.A.G. has failed to satisfy the court as to the exception within which the present proceedings fall requiring that the Open Court principle be dispensed with. Thus, the request for an in-camera proceeding or chamber hearings cannot be allowed.

12. Learned Counsel, on behalf of the IGP, ICT submitted that Islamabad Capital Territory Police ("**ICT Police**") had

never sought a warrant for surveillance under provisions of the Fair Trial Act. It was submitted that ICP police sought Consumer Telecom Data from telecom licensees in the investigation of duly registered cases pursuant to provision of section 94 of CrPC. He further submitted that after the registration of the FIR, police authorities had sufficient power under section 94 of CrPC to procure Consumer Telecom Data and did not need any additional permission under provisions of the Telegraph Act, the Telecom Act and the Fair Trial Act. But ICT Police never felt the need to undertake surveillance in relation to any offense as scheduled under the Fair Trial Act and consequently no warrants had ever been sought for surveillance. It was submitted that in view of order dated 29.05.2024, the Telecom Licensees had suspended the practice of sharing, Consumer Telecom Data with ICT Police, which was hindering its investigation in various cases.

13. For purposes of this order, the arguments of the learned counsel for Telecom Licensees need not be recorded. Suffice is to say that they relied on provisions of the licenses issued to Telecom Licensees by PTA to argue that they were under a legal obligation to comply with the Lawful Intercept **(LI)** regime as prescribed by PTA. The court was informed that PTA had issued directions to Telecom Licensees to finance, import, and install a Lawful Intercept Management System **(“LIMS”)** at a designated place for the use of designated agencies (which, for convenience, will be referred to as **“Surveillance Center”**). The Telecom Licensees complied with such directions.

14. The court was informed that the Lawful Intercept Management System enables interception of data and records of telecom customers. The manner in which interception can be undertaken by designated agencies for purposes of surveillance through the Lawful Intercept Management System at the Surveillance Center was explained through the following chart:



15. The court was informed that the Lawful Intercept Management System has been provided in compliance with PTA-imposed license requirements. The LEMF on the right side of the graph stands for "Law Enforcement Monitoring Function". From the Surveillance Center, a designated agency initiates a track and trace request through the click of a button, in relation to any SIM or IMEI number or MSISBN identity belonging to a consumer. Once track and trace has been initiated, the request goes through the Lawful Intercept Management System in an automated manner, which system is then connected with the network of Telecom Licensees. And without any human intervention details of the SMS, Call Data

Reports and metadata are reported through a server into a monitoring center established at the Surveillance Center. Similarly, through another server, the entire content of communication between the consumers undertaken through the network of the Telecom Licensee, including his/her audio and video content and web page records are shared with the monitoring center at the Surveillance Center. The Court was informed that through the Lawful Intercept Management System, the aforementioned data of any consumer can be surveilled and retrieved, voice calls heard and reheard and SMS read. To the extent that any encrypted material (created through use of mobile apps etc.) forms part of the consumer data, the encrypted material is also shared with the monitoring center at the Surveillance Center. The Lawful Intercept Management System does not provide automated means to decrypt such encrypted data. But requests for decryption can be made to the relevant company that owns the social media application. The court was informed that Telecom Licensees are under an obligation to ensure that up to 2% of their entire consumer base can be surveilled through the Lawful Intercept Management System. The court was also informed that Telecom Licensees had no visibility over which consumer was/is being surveyed or what track and trace requests have been initiated by designated agencies utilizing the Lawful Intercept Management System. The court was informed that the Lawful Intercept Management System had been procured, installed and deployed on the direction of PTA at the Surveillance Center identified by PTA and can be used by

designated agencies, whose identity was not revealed to the court.

16. What emerges from the above is that PTA has included within the licenses of Telecom Licensees explicit provisions requiring Telecom Licensees to procure, install and deploy the Lawful Intercept Management System, which is connected with the networks of Telecom Licensees (through which telecom services are provided to consumers). The Lawful Intercept Management System is deployed at the Surveillance Center designated by PTA, and can be accessed by the designated agencies without any supervision, oversight or control. The Lawful Intercept Management System is, in effect, a mass surveillance system through which 2% of all telecom consumers in Pakistan can be surveyed without any judicial or executive oversight. According to the data available on the PTA website, there are approximately **192 million** mobile cellular subscribers, approximately **2.5 million** fixed telecom service subscribers and approximately **136 million** broadband subscribers. A rough estimation reflects that at any given time over **4 million** citizens, who are subscribers of licensed telecom services, can be surveilled through the Lawful Intercept Management System that has been installed on the directions of PTA.

17. Through such surveillance, the voice calls made by subscribers can be heard and re-heard. Their SMS messages can be read. The audio and video content generated by or that passes through the devices of consumers and details of webpages browsed by consumers can be reviewed and stored. (The question of whether encrypted data of such consumers

can be decrypted, either directly by the designated agencies or by seeking assistance from the relevant service provider/social media company, was not addressed). This mass surveillance system that exists and includes the Lawful Intercept Management System installed at the Surveillance Center on the direction of PTA, *prima facie*, appears to have no legal backing. Section 54 of the Telecom Act states that in the interest of national security or in the event of apprehension regarding any offense, the Federal Government may authorize any person or persons to intercept calls and messages and to trace calls through any telecommunication system. Under Section 57 (2) (ah), of the Telecom Act, the Federal Government is required to prescribe rules for purposes of lawful interception. Further, it appears from a plain reading of relevant statutory provisions, that such rules can only be prescribed such that they do not fall foul of provisions of the Fair Trial Act.

18. The learned A.A.G. represented to the court, in view of the report filed by the Federal Government and its Divisions, that neither any rules have been framed for purposes of lawful interception nor any permission has been granted by the Federal Government. The court has been informed that no permission has been granted for purposes of surveillance under Section 5 of the Telegraph Act. The court has also been informed over the last 11 years since the enactment of the Fair Trial Act, not one surveillance permission has been sought from the courts in accordance with the provisions of the Fair Trial Act. The proviso of the Fair Trial Act states that it is "*an Act to provide for investigation for collection of evidence by*

means of modern techniques and devices to prevent and effectively deal with scheduled offences and to regulate the powers of the law enforcement and intelligence agencies and for matters connected therewith or ancillary thereto". Section 3(g) defines intercepted material as follows:

"Intercepted material" means evidence collected under Section 17 and will refer,--

(i) for the purposes of "Surveillance" to include:

(a) data, information or material in any documented form, whether written, through audio visual device, CCTV, still photography, observation or any other mode of modern devices or techniques obtained under this Act; and

(b) documents, papers, pamphlets, booklets; and

(ii) for the purposes of "Interception" to, include mails, SMS, IPDR (internet protocol detail record) or CDR (cell detail record) and any form of computer-based or cell phone-based communication and voice analysis. It also includes any means of communication using wired or wireless or IP (internet protocol) based media or gadgetry;

Section 5 of the Telegraph Act provides the following:

5. Power for Government to take possession of licensed telegraphs and to order interception of messages.

(1) *On the occurrence of any public emergency, or in the interest of the public safety, the Federal Government or a Provincial Government, or any officer specially authorized in this behalf by the Federal Government or a Provincial Government, may:*

(a) *take temporary possession of any telegraph established, maintained or worked by any person licensed under this Act; or*

(b) order that any message or class of messages to or from any person or class of persons or relating to any particular subject brought for transmission by, or transmitted or received by, any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order.

(2) If any doubt arises as to the existence of a public emergency, or whether any act done under subsection (1) was in the interest of the public safety, a certificate of the Federal Government or, as the case may be, the Provincial Government shall be conclusive proof on the point.

19. In the report filed by the principal secretary to the Prime Minister, dated 15.09.2023, it was submitted that the legal framework for recording telephone conversations is provided under Fair Trial Act, and permission to interfere with Consumer Telecom Data can also be granted under section 5 of the Telegraph Act. With regard to identifying the entities and agencies with the requisite technological capability to tap telephones, the report said that the Prime Minister's office does not interfere with the day-to-day working of intelligence agencies. In a subsequent report filed by the Secretary to the Prime Minister dated 14.12.2023 it has been stated that no permission/authorization has been granted/given by the Federal Government to any person/officer to intercept/tap/record the conversation/call that form subject matter of the instant petitions.

20. In the report submitted by the Ministry of Defence dated 14.09.2023, it was submitted that *"the agencies working under the administrative control of this ministry, neither have*

any role in the recording of any of the conversations of private individuals in the present case, nor such conversations are recorded". In the report filed by the Ministry of Interior dated 20.10.2023, it was submitted that *"no agency under the administrative control of the Ministry of Interior possesses the capacity to undertake electronic surveillance of the citizens and record the telephone calls"*.

21. In the report filed by PTA dated 11.08.2023, it was submitted that *"PTA is neither an investigating agency nor does it have any capacity or capability to identify the person who leaked or released the audio recordings on social media"*. In the revised report filed by PTA dated 27.10.2023, it was submitted that the regulatory framework for surveillance is provided under the Fair Trial Act, whereby PTA, *"neither has any authority to authorize or permit any agency, or entity to intercept, nor has it ever issued any directions/instructions to telephone operators to allow such legal interception"*. On 14.03.2024, Chairman PTA appeared before the court (he had also been directed to file an affidavit stating whether or not PTA had authorized or permitted any person or agency to intercept Consumer Telecom Data). He submitted that PTA neither facilitated any agency or entity to undertake Lawful Intercepts nor allowed any agency or entity to use the LI infrastructure to surveil citizens.

22. Similarly, the representatives from the various Divisions and law enforcement and intelligence agencies who appeared before the court, as well as the learned Attorney General, have submitted to this court, as recorded in its various orders, that no person or entity in Pakistan has been authorized to surveil

citizens. By order dated 29.05.2024, this court had also directed that reports be filed stating the number of requests that had been filed for the purposes of undertaking surveillance under provisions of the Fair Trial Act. The reports filed on behalf of the Federal Government, Intelligence Bureau, IGP ICT, and Ministry of Interior state that not one surveillance request has been made or warrants for purposes of surveillance have been obtained under provisions of the Fair Trial Act since the promulgation of the law in the year 2013.

23. Such reports stating that no warrants for surveillance have been sought from the courts under the Fair Trial Act, which is the only existing legal framework for undertaking surveillance of citizens, together with reports stating that no agency or entity has been granted authorization to undertake surveillance under any other law, including the Telecom Act and the Telegraph Act, leads to one of two possibilities. One, that the state and its investigation and intelligence agencies have never felt the need to undertake surveillance for any state purpose. Or two, that state agencies and instrumentalities undertake surveillance in an illegal manner, without being backed by the authority of law. These possibilities have to be considered in view of the innumerable incidents of the release of illegally recorded audio conversations, including those that form the subject matter of the instance petitions.

24. AAJ News English in a report dated 10.12.2022 called the year 2022 as one where audio leaks overshadowed consequential events. It reported that on 04.01.2022 an audio leak of Ms. Mariyam Nawaz Sharif (PML-N leader and presently

Chief Minister Punjab) with regard to the media management of PML-N was leaked. On 05.06.2022 an alleged conversation between Malik Riaz (Businessman) and his daughter was leaked. On 25.09.2022 an audio of an alleged conversation of Mr. Muhammad Shahbaz Sharif (Prime Minister of Pakistan) during a PML-N meeting at the Prime Minister's House was leaked. On 28.09.2022 Mr. Imran Khan's alleged audio conversation as Prime Minister of Pakistan with his Principal Secretary was leaked. On 07.10.2022, two alleged audio conversations of Mr. Imran Khan as Prime Minister were leaked. On 29.10.2022 an alleged audio conversation of Mr. Ali Amin Gandapur (Presently Chief Minister Khyber Pakhtunkhwa) was leaked. On 08.12.2022, an alleged conversation between one of the petitioners and Mr. Zulfi Buhari (a former minister and PTI leader) was leaked.

25. In C.M.A. No.3932 of 2023 in CP No.14 of 2023 (**Abid Shahid Zuberi versus Federation of Pakistan**) the Supreme Court in order dated 06.06.2023 noted three sets of leaked audio recordings of alleged telephone conversations between (i) Chaudhary Pervez Elahi (then Chief Minister Punjab) and Arshad Jhoja ASC, (ii) Mr. Abid Zubairi, ASC, and Chaudhary Pervez Elahi, and (iii) Chaudhary Pervez Elahi and Justice Sayyed Mazahar Ali Akbar Naqvi (then Judge, Supreme Court). The order further noted that an alleged conversation involving the mother-in-law of the former Chief Justice of Pakistan, Mr. Justice Umar Ata Bandial, with the wife of another lawyer was leaked.

26. A logical deduction from the reported instances of audio leaks would, *prima facie*, be that there are surveillance

mechanisms in place through the use of which audio recordings of Prime Ministers (irrespective of the political party he is affiliated with), of political leaders in and out of parliament, of judges and their relatives, and of relatives of politically relevant individuals and prominent businessmen are being made and subsequently released through the anonymous accounts on social media, which conversations then make their way to mainstream media. A suggestion was sheepishly made by the learned Additional Attorney General that audio recordings as part of illegal surveillance may have been the handiwork of hostile agencies operating in Pakistan. When asked whether it would not constitute a massive security breach and failure on part of the state if the conversations of the highest executive, legislative and judicial officeholders of the country could be surveilled by hostile agencies, the learned A.A.G. did not press the point any further.

27. What emerges from the above is the following:

- a. The Federal government has granted no permission under the Telegraph Act or the Telecom Act to any agency (security or intelligence) or person to record audio calls or surveil citizens.
- b. The Federal Government as well as law enforcement and intelligence agencies across Pakistan, have never once sought a warrant for surveillance under provisions of the Fair Trial Act.
- c. A mass citizen surveillance system in the form of a Lawful Intercept Management System has been installed at the expense of Telecom Licensees on the

direction of PTA at a Surveillance Center designated by PTA, for use of designated agencies, through which system north of 4 million citizens can be surveilled at any given time, providing designated agencies access to the audio and video data of citizens through the networks of Telecom Licensees.

d. The Lawful Intercept Management System has been installed and is being operated without any backing of law, and those who are using and/or enabling the use of the Lawful Intercept Management System to surveil citizens may have rendered themselves liable to criminal liability under provisions of the Fair Trial Act, Telecom Act, Pakistan Electronic Media Crimes Act (PECA), Telegraph Act and Pakistan Penal Code.

e. Neither the Federal Government nor any investigation or intelligence agency has admitted to undertaking surveillance, and they have further expressed their inability to identify who is undertaking illegal surveillance in Pakistan and how the fruit of such surveillance in the form of audio leaks finds its way to social media and mainstream media in Pakistan.

28. The aforementioned picture is both frightening and damning for a rule of law democracy functioning under the Constitution. The right to life and liberty guaranteed by Article 9 of the Constitution includes the right of citizens to be left alone in their private spheres. The right to privacy has also been recognized by the superior courts of Pakistan as having been guaranteed by Article 14 of the Constitution. The right to

freedom of speech guaranteed by Article 19 of the Constitution also includes the freedom to speak freely without the state prying on private conversations. All these rights and constitutional guarantees appear, *prima facie*, to have been undermined through mass surveillance of citizens in Pakistan without any constitutional or legal mandate and/or judicial oversight. Such mass surveillance system seems inspired by George Orwell's "**Nineteen Eighty-Four**". If, *prima facie*, the impressions as summarized above turn out to be true, the consequences would be significant, both for the state of fundamental rights and rule of law in Pakistan, as well as the manner in which the Federal Government is conducting itself.

29. In **Mohtarma Benazir Bhutto and another vs. President of Pakistan (PLD 1998 SC 388)** it was argued on behalf of the President of Pakistan that telephone tapping and eavesdropping, which was employed by the then incumbent Federal Government, in respect of judges of superior courts, leaders of political parties and high-ranking military and civil officers was one of the grounds for dismissal of the Federal Government. The Supreme Court had held that Article 14 of the Constitution guarantees that the dignity of man and the privacy of his home shall be inviolable. And these rights stand violated by tapping of telephones and installation of bugging devices. It was further held that the tapping or eavesdropping of citizens of whatever class, group, or status is not only an offence under the Telegraph Act but also an offence against Articles 9 and 14 of the Constitution. In one of the opinions, it was held that "*so long as proper law is not legislated in this field, which may protect the violation of constitutional rights,*

we direct that in future, whenever any telephone is required to be tapped, intruded or eavesdropping exercise is to be carried on, it should be done with the prior permission of the Supreme Court or by a commission constituted by the Supreme Court, which shall examine each case on its merits". The relevant law that has since been promulgated to provide a mechanism for engaging in surveillance subject to judicial oversight is the Fair Trial Act.

30. The question of illegal surveillance of a judge, once again, came before the Supreme Court in **Justice Qazi Faez Isa and others vs. The President of Pakistan (PLD 2021 SC 1)**. In the opinion rendered by Hon'ble Justice Syed Mansoor Ali Shah, it was observed that privacy was a foundational requirement of democracy that guaranteed *"the agency and autonomy of an individual and the right of every person to have freedom and liberty to life of dignity"*. The imperative of protecting the right to privacy was highlighted as follows:

"33. In fledgling democracies, where institutional development is still finding its feet and the concept of rule of law has not been firmly taken ground, special care is required to ensure that law enforcement and intelligence agencies fully comply with the law dealing with surveillance and interception. And laxity or concession given to these agencies to step outside the law and collect evidence, can be a serious threat to Constitutional guarantees of the people, in particular, and to democracy, in general. International experience tells us that unconstitutional and illegally procured

private information amassed by the agencies can be used to manipulate and blackmail people for promoting political agendas. This cripples human security and dismantles democracy, lowering it slowly into an abyss of totalitarianism. Any unconstitutional intrusion and unlawful collection of reels of unauthorized private data can make any law enforcement and intelligence agency become a Frankenstein – indestructible and uncontrollable – infringing the foundational principle of separation of power. In a parliamentary democracy with inbuilt checks and balances, the question of who will guard the guards does not arise and should not arise”.

31. In view of the law as laid down in **Benazir Bhutto** together with the unambiguous provisions of the Fair Trial Act, Telegraph Act, PECA, Telecom Act, and PPC, any surveillance being undertaken in breach of the Fair Trial Act is a criminal act. And to the extent that the Lawful Intercept Management System has been installed under the direction and supervision of the state that enables the state to undertake mass surveillance of over 4 million citizens simultaneously, the liability rests with the Federal Government. The Prime Minister and the members of his cabinet are individually and collectively responsible for the existence and operation of any mass surveillance system if it turns out that such surveillance is being or has been undertaken.

32. Let a copy of this order be sent to the Prime Minister through his Principal Secretary. Let a copy of the order also be sent to Secretary Cabinet Division, so it can be shared with members of the Cabinet for their information. This court

expects that the Prime Minister will solicit appropriate reports from all the intelligence agencies that ultimately report to him and place the matter before the Federal Cabinet. Then PM shall have a report filed on behalf of the Federal Government as to whether (i) surveillance is being undertaken in Pakistan in breach of provisions of the Fair Trial Act, Telecom Act and Telegraph Act, in a manner that undermines Articles 9, 14, and 19 of the Constitution as enumerated by the Supreme Court in the **Benazir Bhutto**, (ii) who is responsible for installation of Lawful Interception Management System in breach of provisions of the Telecom Act and the Fair Trial Act, and who is to be held liable for installing a mass surveillance system in breach of constitutional rights of citizens and statutory requirements, and (iii) who is in charge of the operation of the surveillance system and who is to be held liable for the breach of the right of privacy of citizens, whose data has been accessed through the Lawful Interception Management System and released on social media. Let such report be filed within a period of **six weeks**.

33. Let the Telecom Licensees file their own reports in sealed envelopes along with the entire set of correspondence between them and PTA in relation to the procurement, installment, and operation of the Lawful Interception Management System by **05.07.2024**. As installation and operation of the Lawful Interception Management System is, *prima facie*, not in accordance with law and it has been represented by the Federal Government as well as PTA that no agency has been authorized to indulge in surveillance and utilize such system for purposes of surveillance, all Telecom

Licensees, whether or not they are a party in the instant petitions, will ensure that the Lawful Interception Management System is not allowed to access their networks such that it can be used to access and/or procure consumer data. The Telecom Licensees will file compliance reports, stating that their networks cannot be accessed through Lawful Intercept Management System, by **05.07.2024**. It is clarified that to the extent that Telecom Licensees enable any entity or person to access data of citizens in breach of the constitutional guarantees under Articles 9, 14 and 19 of the Constitution and provisions of the Fair Trial Act, Telecom Act, Telegraph Act, PECA and PPC, the management of Telecom Licensees and the members of their board of directors, individually and collectively, will be rendering themselves liable for criminal liabilities under the aforementioned laws. A copy of this order will be communicated by PTA to all Telecom Licensees who have been required to provide access to their network through the Lawful Interception Management System for compliance. The non-provision of access to the network of Telecom Licensees to anyone through the Lawful Interception Management System will not prevent law enforcement and intelligence agencies to undertake surveillance for any legitimate state purpose in accordance with provisions of the Fair Trial Act.

34. The learned counsel for IGP ICT as well as the counsel for Telecom Licensees have submitted that Telecom Licensees have suspended the sharing of CDRs, live locations of accused persons and Consumer's Telecom Data with law enforcement agencies, in compliance with SOPs issued by the Interior

Division, in view of the order of this court dated 29.05.2024. As the question of legality of any instructions and SOPs issued by the Interior Division and/or PTA to Telecom Licensees with regard to the provision of Consumer's Telecom Data to police authorities and investigation agencies is yet to be determined, the Telecom Licensees will continue to share such data in accordance with the SOPs issued by the Ministry of Interior till the next date of hearing.

35. This Court has formed a preliminary view that the Chairman and Members of PTA have misrepresented themselves in the reports filed before this Court and in terms of their representation with regard to the Lawful Interception Management System procured and deployed on the directions of PTA. PTA will also file a sealed report along with correspondence with Telecom Licensees for procurement, installment, and operationalization of the Lawful Interception Management System while identifying how the Surveillance Center (where such system is installed) is manned and the entities and the individuals who have, and have had, access to it. The technical experts from PTA shall make a graphic representation before the court, of the manner in which the Lawful Interception Management System operates, and how data procured through such system, is stored, retrieved, used, protected, and destroyed (if at all).

36. As this court has formed the preliminary view that the Chairman and Members of PTA have misrepresented themselves to this court, Let a show-cause notice be issued to them under Article 204 of the Constitution read together with Section 2(b) and 6 of the Contempt of Court Ordinance, 2003,

for filing reports and making misrepresentations with regard to the Lawful Intercept Management System with an attempt to divert the course of justice and prejudice the determination of subject matter in the instant petitions. They shall file their responses to the show-cause notices within a period of six weeks and appear in person on the next date of hearing.

37. Learned Additional Attorney General, also submitted that the Federal Government wishes to present certain documents in chambers for the assistance of the Court. As the request for in-chamber proceedings has been turned down, for reasons stated in the earlier part of this order, let the Federal Government file any such documents in a sealed envelope before the next date of hearing.

38. Let a copy of this order be sent to the Prime Minister through his Principal Secretary, to Secretary Cabinet Division and to Chairman PTA for compliance.

39. Re-list on **04.09.2024**.

(BABAR SATTAR)
JUDGE

Saeed.