ORDER SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Criminal Original No. 157 of 2022

Saleem Ullah Khan, Advocate
Versus
Fowad Ahmed Chaudhary, Former Federal Minister/Member Core Committee of Pakistan Tehreek-e-Insaf.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	06.09.2022	Petitioner in person.

The petitioner, an Advocate of High Courts, has sought initiation of contempt proceedings against Mr. Fawad Ahmed Chaudhary, former Federal Minister and Member of Core Committee of Pakistan Tehreek-e-Insaf **("Respondent")** under Article 204 of the Constitution of the Islamic Republic of Pakistan, 1973 **("Constitution")**, read together with Contempt of Court Ordinance, 2003 **("Ordinance")**.

2. The petitioner contended that the Respondent had uttered derogatory, imperious and disparaging remarks in respect of Hon'ble Chief Justice of Islamabad High Court and had expressed an expectation that the Hon'ble Chief Justice ought to have tendered an apology for overlooking the issue of alleged torture of Mr. Shahbaz Gill. He read out the transcript of the Respondent's

allegedly contemptuous speech on a TV Show aired on 25.08.2022 in which the Respondent claimed a right to criticize decisions if not satisfied by them. When asked whether Mr. Imran Khan would apologize for the statements made in relation to Ms. Zeba Chaudhry, learned Additional Sessions Judge, Islamabad, the Respondent stated if he were the Chief Justice of Islamabad High Court he would have tendered an apology for ignoring the question of torture in the case of Mr. Shahbaz Gill. And when the host, Mr. Kamran Shahid, suggested to the Respondent that he was liable to be held in contempt, the Respondent replied that there was no question of contempt as he had made remarks in relation to the judgment rendered by the Chief Justice, Islamabad High Court. The petitioner submitted that contempt was a matter between the court and the contemnor and as an officer of the court it was his duty to bring the matter to the attention of the court.

3. This Court inquired from the petitioner as to the nature of the contempt he believed the Respondent had committed in the interview that was telecast on Dunya TV on 25.08.2022. The petitioner responded by stating that the Respondent was liable for

criminal contempt. He submitted that the Respondent had criticized the Hon'ble Chief Justice and Judges of Islamabad High Court in a derogatory manner and this Court ought to initiate contempt proceedings to hold the Respondent to account and also to deter other political leaders from making the judiciary a target of vile criticism.

4. The term 'contempt of court' has been defined in Article 204 of the Constitution and section 3 of the Ordinance, as disobeying an order or direction of a court, committing a willful breach of valid undertaking given to a court, anything done which tends to bring the authority of a court or administration of law into disrespect or disrepute, interfering with or obstructing or interrupting or prejudicing the process of law or judicial proceedings, scandalizing a judge in relation to his office, or disturbing the order or decorum of a court. The Ordinance trifurcates this definition into three types of contempt: (a) civil contempt, (b) criminal contempt, and (c) judicial contempt.

5. The criminal contempt has been defined in section 2(b) of the Ordinance as "*the doing of any act with intent to, or having the effect of, obstructing the administration of justice*".

Likewise 'judicial contempt" has been defined under section 2(c) of the Ordinance as *"the scandalization of a Court and includes personalized criticism of a Judge while holding office"*.

6. It would also be useful to reproduce section 3 of the Ordinance that defines contempt.

> ***Contempt of Court****. Whoever disobeys or disregards any order, direction or process of a Court, which he is legally bound to obey; or commits a willful breach of a valid undertaking given to a Court; or does anything which is intended to or tends to bring the authority of a Court or the administration of law into disrespect or disrepute, or to interfere with or obstruct or interrupt or prejudice the process of law or the due course of any judicial proceedings, or to lower the authority of a Court or scandalize a Judge in relation to his office, or to disturb the order or decorum of a Court, is said to commit "contempt of Court". The contempt is of three types, namely, the "civil contempt", "criminal contempt" and "judicial contempt".*

7. Section 6 of the Ordinance enumerates the circumstances in which it could be deemed that a criminal contempt has been committed which focus on an attempt to intimidate a Judge, in order to secure a favourable verdict in any legal proceedings or to divert the course of justice. Section 7 of the Ordinance

provides that a superior court (which as defined by Article 2(g) of the Ordinance includes a High Court) may take cognizance of criminal contempt suo *motu* or on the initiative of any person connected with the proceedings in which the contempt has been committed or on the application of a Law Officer of a Provincial or Federal Government.

8. Section 9 of the Ordinance provides that personalized criticism of a judge may constitute judicial contempt save and except when it constitutes true averment made in good faith and in temperate language in a complaint made to a competent judicial or state authority. Section 11 provides that, "*a superior court may take action in a case of judicial contempt on its own initiative or on information laid before it by any person"*.

9. In terms of defence, section 10 provides that *"the fair and healthy comments on a judgment involving question of public importance in a case which has finally been decided and is no longer pending shall not constitute contempt: provided that it is phrased in temperate language and the integrity and impartiality of a Judge is not impugned."* Section 18 of the Ordinance provides that, "*no person shall be found guilty*

of contempt of court, or punished accordingly, unless the court is satisfied that the contempt is one which is substantially detrimental to the administration of justice or scandalizes the court or otherwise tends to bring the court or Judge of the court into a hatred or ridicule."

10. It is in the context of section 18 read together with section 10 of the Ordinance that the comments of the Respondent need to be analyzed to determine whether or not they constitute criminal contempt or judicial contempt. And such analysis needs to be undertaken in view of the relevant provisions of the Constitution, which include, *inter alia*, the right to freedom of speech as guaranteed by Article 19 of the Constitution as well as the right of citizens to fair trial and due process (and their access to justice through an independent judiciary) guaranteed by Article 10A of the Constitution.

11. It is settled law that independence of the judiciary is a salient feature of our Constitution and it is for purposes of guarding public interest in the independence of judiciary that the power to initiate contempt proceedings has been provided by the Constitution itself under Article 204 of the Constitution. In cases of criticism of the

judiciary the foremost question is how the right balance is to be struck between public interest in freedom of speech and public interest in the independence of judiciary and its ability to dispense justice without considerations of fear and favour or threats and intimidation.

12. Liberty, rule of law, and partisan politics are all features of a representative democracy. These features are built on a foundation supported by free speech. Without individual liberties, including the freedom of expression, the edifice of democracy would remain hollow. The law of contempt, be it in the case of disobedience of court orders, obstruction of judicial processes, interference in the administration of justice or scandalizing judges is not enacted to shield individual judges from the gaze of public scrutiny. Its purpose is to nurture and protect the administration of justice and the rule of law. The inroads it makes into regulating free speech is for promoting the rule of law. It indeed lies at the confluence of the streams of justice and free flow of expression, and this must never be lost sight of while considering allegations of contempt of court.

13. The offence of scandalizing a judge was invented by common law to prevent the undermining of public confidence in the administration of justice. It is used where there is a 'scurrilous abuse of a judge or a court of law' or where there is a false imputation of bias or some form of partiality against a judge or when it is falsely alleged that a judge or a court has been influenced by someone.

14. The expression "scandalizing the court', is *"any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority".* The object is to protect the proper functioning of the court, not the feelings of individual judges. Not every criticism of a judge amounts to contempt. It is also true that both judges and the courts are open to criticism where reasonable arguments are advanced and justifications furnished backing such criticism. The expression "scandalizing" the judge has no application to honest criticism based on rational grounds for that would negate the right to free speech and expression.

15. Let us consider the jurisprudence in relation to contempt of court that has evolved

in other common law jurisdictions. The UK Law Commission in a Consultation Paper No. 209 has articulated arguments in favour of abolishing the offence of scandalizing judges. The conclusions drawn by the U.K Law Commission are inspired by judicial pronouncements over decades. Lord Atkin had famously stated for Privy Council as far back as 1936 in *Ambard v Attorney General of Trinidad and Tobago* that *"justice is not a cloistered virtue"*, while explaining that, *"the path of criticism is a public way*: *the wrongheaded are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice…"* Likewise, Lord Denning had emphasized in *Regina v Commissioner of Police* (1968) that the contempt law doesn't exist as a self-serving tool for judges: *"Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself."*

16. In the US the applicable standard for a finding of contempt is the "clear and present danger" test, which was articulated in *Bridges v California (1941)* where Justice Hugo Black stated that, *"the assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. ... an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."*

17. In Canadian jurisprudence as well, freedom of expression has been accorded due protection. In *R v Koptyo (1987) 24 D.A.C 81(CA)*, Cory J held that, *"an unsuccessful litigant may well make comments after the decision is rendered that are not felicitously worded… But the courts are not fragile flowers that will wither in the hot sea of controversy… The courts have functioned well and effectively in difficult times. They are well regarded in the community because they merit respect. They need not fear criticism nor need to sustain unnecessary barriers to complaints about their operations or decisions."*

18. In *AG for New South Wales v Mundey* (1972), Australia's Justice Hope stated that, *"there is no more reason why acts of courts should not be trenchantly criticized than acts of public institutions, including parliaments. The truth is of course that public institutions in a free society must stand upon their own merits: they cannot be propped up if their conduct does not command respect and confidence of a community; if their conduct justifies respect and confidence of a community they do not need protection of special rules to shield them from criticism."*

19. South Africa's Constitutional Court in *State v Mamabolo* (2001) held that, *"scandalising the court is not concerned with self-esteem or even reputations of judges as individuals…ultimately the test is whether the offending context, viewed contextually, really was likely to damage the administration of justice."*

20. Let us now consider the text of the Constitution as well as the Ordinance. Article 204(2)(b) of the Constitution itself provides the textual basis for the offence of 'scandalizing the court' and vests in the superior courts the power to punish someone who *"scandalizes the Court or otherwise does*

anything which tends to bring the Court or a Judge of the Court into hatred, ridicule or contempt". Similarly section 3 of the Ordinance includes within the definition of contempt "*anything which is intended to or tends to…lower the authority of a Court or scandalize a Judge in relation to his office*". The courts do not write laws. They interpret and implement the laws. Given that the offence of scandalizing the court is explicitly inserted in the Constitution as well as in the Ordinance, a court cannot rewrite the text on the basis that the offence scandalizing the court belongs to a past era and needs to be abandoned.

21. Article 19 of the Constitution guarantees the right of citizens to freedom of speech. Such right, however, is subject to reasonable restrictions imposed by law. And the consideration identified, on the basis of which reasonable restrictions can be imposed, includes contempt of court. Given that the Constitution itself defines what constitutes contempt of court in Article 204 of the Constitution, the reasonable restrictions imposed by provisions of the Ordinance in view of the concept of contempt as defined by the Constitution cannot be deemed to be

unreasonable or *ultra vires* Article 19 of the Constitution.

22. While the offence of scandalizing the court in Pakistan retains its constitutional basis, the exercise of the power to impose punishment for such offence remains an exception to the rule i.e. in the context of judicial contempt, courts exercise restraint. It was held by the august Supreme Court in ***Syed Masroor Ahsan Vs. Ardeshir Cowasjee (PLD 1998 SC 823)*** that, "*unlike the popular belief and the first impression that the contempt law protects the courts and the judges, the real purpose or the raison d'être of the law is the protection of the public, as without respect and public faith the administration of justice would be undermined and the law itself would fall in disrepute." It* was further held that*, "criticism of judicial decisions is a part of the democratic process. Journalist, columnists, academics, lawyers, judges, politicians and the people at-large are free to disagree with any view or opinion provided that the expression of such disagreement remains confined to democratic means. This is what free speech is all about."*

23. The logical question then is what would be the nature of speech that would fall within

the category of proscribed speech for purposes of Article 19 of the Constitution read together with Article 204 of the Constitution and the provisions of the Ordinance. And this is where sections 10 and 18 of the Ordinance become relevant. Article 19 of the Constitution itself proscribes speech that amounts to incitement to an offence and speech that constitutes contempt of court. Article 204(2)(a) & (c) relate to criminal contempt where the speech in question amounts to an attempt to prevent the presentation of true facts during legal proceedings or to intimidate a judge to secure a favourable verdict or obstruct the process of the court and/or prejudice the determination of a judicial outcome thereby diverting the course of justice.

24. The rights in issue in criminal contempt are the rights of parties interested in legal proceedings and the interest of public-at-large in dispensation of justice unaffected by extraneous considerations without taking into account considerations of fear and favour. In trying to strike a balance between public interest in freedom of speech and public interest in dispensation of justice without being influenced by considerations of fear and

favour, the balance must trip in favour of the latter and very little leeway can be afforded to someone who claims to exercise the right of free speech in a manner that abuses, interferes with or obstructs the process of law and consequently the judicial outcome linked to such process. This is why obstruction of the justice is the mainstay of contempt jurisprudence produced across common law jurisdictions. This is why the subjudice rule is accepted as a solitary principle. The fetters placed on freedom of speech, when such speech interferes with the process of the court and the intent or effect of it is to influence the outcome of court proceedings, is therefore a justifiable limitation on freedom of speech. Such speech, even if considered political speech, to promote the interest of a partisan group or a political party, cannot be deemed to be a legitimate exercise of freedom of expression where it tends to or is aimed at influencing the outcome of a subjudice matter. This is why section 10 of the Ordinance carves out space for fair comment and limits such comment to questions of public importance in cases that have been finally decided and are no longer pending. Thus, where speech or expression relates to a matter pending adjudication, such speech is proscribed by the

subjudice rule and would tantamount to criminal contempt if it is likely to cause substantial detriment to the administration of justice in view of section 18 of the Ordinance.

25. In the present case the petitioner does not allege that the Respondent expressed opinion relating to the matter that is pending before the court. The speech that has been highlighted as constituting contempt of court relates to commentary on a judgment delivered by this Court. Such speech would not fall within the realm of criminal contempt but that of judicial contempt. If the speech tends to scandalize the court or bring the Court or a Judge into hatred, ridicule or contempt it would fall within the scope of Article 204(2)(b) of the Constitution read together with section 3 of the Ordinance. The question then is whether criticism against the judgment rendered by the Court, which is intemperate and odious, would scandalize the court and bring it into hatred, ridicule or contempt. It is often said that sunlight is the best disinfectant. It cannot be fathomed in this day and age that the purpose of contempt law in giving effect to the offence of scandalizing the court is to impose judicial censorship of views critical of the judiciary or

judgments. In this context a distinction needs to be drawn between assertion of facts (such as those imputing motives to a judge or impugning the integrity of the judge for example), and expression of opinions regarding the correctness of a judgment. The former would fall within the domain of scandalizing the court. But in case of the latter, speech critical of a judgment already rendered needs to be afforded a lot more latitude.

26. The object of contempt law is to protect public interest in the administration of justice served by an independent judiciary able to dispense justice without being influenced by extraneous consideration (such as fear of incitement or threats and intimidation), as opposed to shielding judges from criticism of their judgments. Judgments once delivered are public documents and criticism, even harsh or imprudent or irreverent, cannot be seen as shaking public faith in the administration of justice. A judgment or the outcome that it produces, even when subjected to trenchant criticism, must stand on its own merit and reasoning. Courts tend to avoid the political thicket. But they cannot refuse to adjudicate issues that have legal

dimensions as well as political. Judgments when rendered in relation to a legal issue involving a political party or that creates political consequences often attract public comments and criticism. Such criticism can be inspired by partisan interests and loyalties as well. So long as such criticism does not impugn the integrity and impartiality of the court, the court must not wield the contempt law to interfere with or pre-empt such criticism even when it is partisan or odious or in bad taste. The system of administration of justice is adversarial in nature. One of the two parties walking out of the court is unhappy with the outcome of judicial proceedings. The purpose of contempt law is not to preempt, suppress or censor such criticism. The court must exercise restraint in relation to such speech no matter how trenchant and scathing the criticism. Because, after all, contempt proceedings are sui generis in nature where the court itself stands in the stead of the complainant and must not be seen to be acting in its own cause. This is why section 18 requires that the court must be satisfied that the detriment caused to the administration of justice must be serious and substantial before a conclusion is reached that the person exercising his right to speech is liable to be

punished for contempt. Consequently where the question before the Court is that of judicial contempt, unless the criticism on the judgment is such that impugns the integrity and impartiality of the judge, it ought not be deemed to scandalize the court. For purposes of contempt law speech must only be proscribed in a manner that is least restrictive of the right of freedom of speech guaranteed under Article 19 of the Constitution.

27. The authority of the judge to dispense justice springs from the Constitution itself and the power to haul a citizen for contempt of court is not to be wielded as a stick to shield judges from criticism of their judgments. The legitimacy of a court in dispensing justice is backed by the Constitution and the foundation of such legitimacy is not so ramshackle so as to be shaken by trenchant criticism even when launched by political leaders or their followers on a partisan basis. In the ultimate resort, the legitimacy of the court, public faith in the court's creditability and the court's ability to dispense justice as an impartial arbiter of the law is rooted in the merit of the judicial decisions and the reasoning of such decisions. It is history that sits in judgment over the independence and legitimacy of the judiciary

and not transient public opinion shaped by partisan loyalties. Judges of constitutional courts swear an oath to not be influenced by public opinion in discharging their duties and be guided by the law and law alone. It can thus not be casually concluded that the criticism of judgments of such judges would cause a substantial detriment to the administration of justice by influencing their opinion in subsequent cases. Consequently, speech critical of a judgment even where such criticism is intemperately launched by political leaders inspired by partisan interests cannot automatically be deemed to be scandalizing the court or bringing it into hatred, ridicule or contempt of public-at-large. It cannot be assumed that public-at-large is incapable of seeing the merit of judgments or would be influenced by partisan speech. The public-at-large cannot be deemed to lack agency. Thus, in striking a balance between the right to freedom of speech and public interest in the administration of justice, when it comes to question of judicial contempt based on criticism of the judgment in a matter that has been decided by a court, the court must exercise restraint and uphold the right of freedom of speech so that the law of contempt operates in a manner least restrictive of the

freedom guaranteed by Article 19 of the Constitution.

28. Let us restate the law enumerated by precedent. In ***Ch. Zahoor Ilahi M.N.A Vs. Mr. Zulfiqar Ali Bhutto*** ***(PLD 1975 SC 383)***, the august Supreme Court observed that, *"we have to remember that this power to commit for contempt is a power which has been vested in the superior Courts as an extraordinary power and has, therefore, to be exercised with great circumspection only where it is absolutely necessary in the public interest to do so. Comments in respect of pending proceedings are treated as contempt in order to keep the streams of justice pure and unsullied. Only those comments or remarks should, therefore, be considered to be punishable which really have a tendency to substantially prejudice the hearing of a case or to interfere with the course of justice."* In ***Syed Masroor Ahsan*** the Apex Court held that, *"jurisdiction in contempt is not be invoked unless there is real prejudice which can be regarded as substantial interference with the due course of justice…"* The law laid down in ***Syed Masroor Ahsan*** was more recently reiterated by the august Supreme Court in ***Talal Ahmed Chaudhry Vs. The***

State ***(2019 SCMR 542)*** in relation to the test applicable to consideration of an apology.

29. In view of ***Saadat Khialay, Staff Reporter and others Vs. The State*** ***(PLD 1962 SC 457)*** the role of intent in a case of criminal contempt is to be distinguished from that in a case of judicial contempt. Criminal contempt attracts strict liability and intent is irrelevant so long as the effect, as determined objectively by applying an ordinary person standard, is that of causing substantial detriment to the administration of justice. In judicial contempt, on the contrary, intent to bring the court into hatred or ridicule is a constituent part of the offence. In striking a balance between public interest in free speech and that in the administration of justice, in a case of judicial contempt the court would find in favour of free speech. In a case of criminal contempt, however, the court would apply the substantial detriment test objectively to make a determination regarding the effect of the speech or action seen as interfering with the course of justice.

30. In the instant case the allegation against the Respondent is that the expression of his opinion in the program broadcast by Dunya TV tends to scandalize this Court and its judges

due to intemperate criticism against the judgment rendered by this Court. As mentioned above the legitimacy and moral authority of this court must rest on the quality or merit of its judgments and not by imposing judicial censorship on criticism of its judgments. This Court is therefore not convinced that even intemperate and misconceived criticism on a judgment of this Court by the Respondent would cause serious or substantial detriment to administration of justice by this Court rendering the Respondent liable to be tried for the offence of contempt of court.

31. For the above reasons, this petition is without merit and is **dismissed.**

(BABAR SATTAR)
JUDGE

Approved for reporting.

Saeed.