**Secret Cypher Trial**

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“In the darkness of secrecy, sinister interest and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice.” – Jeremy Bentham

The Federal Government, through various notifications, subjected Chairman Pakistan Tehreek-e-Insaf (PTI), Imran Khan to a jail trial in a criminal case registered by the Federal Investigation Agency (Cypher Case). Initially, the trial commenced in Attock Jail and is now, with unholy haste, underway in Adiala Jail, where Imran Khan is presently confined.

PTI, and, in particular, Imran Khan has raised serious objections on the validity, legality and constitutionality of the jail trial. Hence, it will be apposite to discuss the merits of the objections raised by Imran Khan.

Section 352 of the Code of Criminal Procedure, 1898 states that the place, in which a criminal court is held for the purpose of trying an offence, shall be deemed to be an open Court, to which the public may have access. To elucidate it further, section 352 was interpreted by the Sindh High Court in the Mairaj Muhammad Case (1978) wherein the accused (a politician) was being tried in jail on charges of sedition. He alleged political victimization. The prescribed procedure for trial was exceedingly loaded in favour of the prosecution. The court held that it was, therefore, all the more necessary that the trial should have been held in public view. Court further held that section 352 envisages a judicial power and it must be exercised with great care and circumspection. Thus, an order under section 352 must be a speaking order, reflecting the independent application of the mind and based on cogent reasons. The court was of the view that due to the political nature of the case, there were convincing reasons that demanded an open trial so that justice should not only be done but should manifestly seen to be. The court also adumbrated that publicity in the administration of justice is an indubitable guarantee of our liberty and the court should be cautious against its rejection.

Likewise, the notification of the Government and order of the trial judge, which subjected Imran Khan to jail trial merely on the basis of security concerns (of Imran Khan) appears to be arbitrary, lacking reasoning and independent application of mind. In the past, such notifications have been issued rarely and only when accused were hardened criminals involved in terrorist activities. The main objective was to ensure the protection of prosecutors, witnesses and judges. Seemingly, reliance on security concerns is totally misconceived.

For the sake of argument, if we ignore the illegitimacy of the jail trial, there are issues emerging from the way it is functioning. The language of section 352 itself indicates that even if a trial is held in a private house or is held inside the jail or anywhere, no sooner it becomes a venue of trial, it is deemed to be in law an open place and everyone who wants to go has the right to attend the trial. It can be easily noticed that so far, every effort has been made to cloak the proceedings of the cypher trial in secrecy. Interestingly, on the very day, Imran Khan secured the suspension of his sentence from the Islamabad High Court in the Toshakhana Case; a warrant for production of Imran Khan was issued, thus, prohibiting his release. It is amusing to note that Imran Khan was not even aware that he was, for two weeks, on judicial remand in the said case until he secured suspension of sentence. It probably has happened for the first time in our judicial history that an accused has been sent to judicial remand without his knowledge and in the absence of his lawyer. Since that date, all the proceedings in the Cypher Case against Imran Khan have been taking place inside jail premises with no free and adequate access to the legal counsels, no access to families, no access to the public, and no access to the local and international media.

Presently, court in cypher trial appears to be similar to the 17th century, “Star Chamber”. Star Chamber was a notorious secret court in the United Kingdom, used by King Charles I to subdue political opposition, muzzle dissent and impose his ostracized political and ecclesiastical policies. Star Chamber lacked common-law procedural safeguards; its most tarnished feature was its surreptitious working. It was accountable to no one except the king. Even nowadays, “Star Chamber” is a phrase used in litigation to refer to a secret, arbitrary and unfair court proceeding. In US v Ju Toy (1905), the U.S. Supreme Court observed, “If this be not a star-chamber proceeding of the most stringent sort, what more is necessary to make it one?”. In Burnham v Commonwealth (2018), a litigant sued state officials for conducting a criminal prosecution against him, which he characterized as analogous to a 16th-century star chamber proceeding. Academics and jurists all over the world are averse to the idea of secrecy in court proceedings. Hegel in his “Philosophy of Right” maintained that judicial proceedings must be public since the aim of the court is justice, which is a universal belonging to all. In Scott vs Scott (1913), the House of Lords observed that civil liberty contains a guarantee of open justice, the subjects of any state be cannot reckoned to enjoy real freedom, where this condition is not found in its judicial institutions. Likewise, Lord Diplock in AG vs Leveller remarked that open courts act as a bulwark against judicial arbitrariness and vagaries. By the same token, in Re Oliver (1948), the court in the US held that open trial is a safeguard against any attempt to employ courts as instruments of persecution. In Richmond Newspapers v Virginia (1980), the USA Supreme Court held open trial is the minimum requisite of a fair trial.

In Cypher’s case, it is now the sole discretion of Jail authorities to regulate the entry for coming to the court and based on these circumstances and the jail the trial is not public and open. To exclude the public, press, and family/relatives of Imran Khan from the Cypher trial is to immunize the state in particular its judicial arm from any of its advertent or deliberate lapses. Article 10-A of the Constitution which guarantees the right to a fair trial, prohibits the state from depriving Imran Khan of the right to an open trial as is essential to the fairness of any trial against him. Media and the press have not been able to adequately report on the matter and there is no independent source of news available to the public. Moreover, the Indian Supreme Court has recently held that the fundamental right to life (Article 9 of our Constitution), confers on every citizen a right to an open public trial.

It needs to be noted that the courts can subsist only by the strength of public confidence. Public confidence is only bolstered by exposing courts to public scrutiny. The presence of the public and press discourages misconduct and abuse of power by judges & prosecutors. A criminal trial is a public experience. What emerges in the courtroom is public property. Closed trials raise suspicion of preconception and arbitrariness, which in turn broods contempt for the justice system. It is through publicity that the citizens can be persuaded that the courts are rendering impartial justice.

It is indispensable that cypher trials should be open to the public. There should not be any veil of secrecy in the proceedings. The dynamics of the cypher trial should be thrown open to the public at every phase. The people must see that Imran Khan is fairly dealt with and not prejudicially condemned. It must be seen that the procedural rights of Imran Khan are being respected. It is of colossal public importance as it could relate to the conviction of an ex-Prime Minister on extremely grave charges and in such circumstances it is all the more imperative that the trial be held openly in public rather than behind closed doors. The nature of the case, and its potential consequence on the elections in the country, is a factor in favour of there being an open trial. Let’s not repeat what Joseph Stalin did in the infamous Moscow Trials to eliminate his political enemies’ i.e. emulating the idea of the Star Chamber.

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