

2018 C L C 1858

[Islamabad]

Before Athar Minallah, J

MAHERA SAJID----Petitioner

Versus

STATION HOUSE OFFICER, POLICE STATION SHALIMAR and 6 others----  
Respondents

W.P. No.2974 of 2016, decided on 11th July, 2018.

(a) Interpretation of Constitution---

---Scheme of the Constitution---Scope---State through its instrumentalities and functionaries is absolutely and exclusively responsible for protecting and safeguarding Fundamental Rights which have been guaranteed under the Constitution to every citizen.

Habib Ullah Energy Limited and another v. WAPDA through Chairman and others  
PLD 2014 SC 47 rel.

(b) Pakistan Commission of Inquiry Act (VI of 1956)---

---S. 8---Commission of Inquiry on Enforced Disappearances Regulation, Rgln. 2(d)---United Nations International Convention for Protection of All Persons from Enforced Disappearances (2006), Arts. 1(2), 2, 5 & 6(1)(b)(iii)---Inter-American Convention on Enforced Disappearances (1994)---Rome Statute of International Criminal Court (1998)---Expression 'enforced disappearance'---Object, scope and effect---Expression 'enforced disappearance' involves direct or indirect involvement of state through its organs and agencies---Positive Constitutional obligation of State is to protect Fundamental Rights and to prevent, investigate and punish any perpetrator in accordance with law is not only severely breached but simultaneously gives rise to an unimaginable paradox when state and its functionaries assume role of abductors---'Enforced disappearances' affect in a complex and profound manner because person subjected to disappearance is not the only victim/and his or her relatives, particularly those who are dependents, suffer most; their anguish and suffering cannot be comprehended because their loved ones are removed from protection of law---By removing a person from protection of law, gives captors freedom and license to do what they feel like; as such it creates an environment of uncertainty for dependents and other family members---Perpetrators get license to subject the victim to torture, which is otherwise strictly forbidden under law and in case of death, it enables them to cause body to vanish without a trace---Fundamental Rights of victims guaranteed under the Constitution become irrelevant and virtually

suspended; it creates anguish, insecurity and fear for close relatives, exposing them to grave economic and social consequences particularly if abductee is sole breadwinner.

Human Rights Case No.29388-K of 2013 PLD 2014 SC 305 rel.

(c) Constitution of Pakistan---

---Art. 199---Civil Procedure Code (V of 1908), S. 35-A---Constitutional petition--- Compensation, quantum of---Violation of Fundamental Rights---Effect---High Court, in an appropriate case, while exercising jurisdiction under Art. 199 of the Constitution can order the State to compensate a citizen for an established violation of Fundamental Rights guaranteed under the Constitution---Cost may be imposed in excess of amount prescribed under S.35-A, C.P.C.

Ali Ahmed v. Muhammad Yakoob Almani, Deputy Superintendent of Police, Qasimabad, Hyderabad and others PLD 1999 Kar. 134; Syed Hassan Ali Shah v. Station House Officer, Police Station Dadu and others PLD 2006 Kar. 425; Abid Hussain and another v. Chairman, Pakistan Bait-ul-Mal and others PLD 2002 Lah. 482; Dr Mehmood Nayyar Azam v. State of Chaattisgarh and others 2013 SCMR 66; 'Rudul Sah v. State of Bihar and another' AIR 1983 SC 1086; Sebastian M. Hongray v. Union of Inida AIR 1984 SC 1026; Bhim Singh, MLA v. State of J&K. and others AIR 1986 SC 494; Khurshid Ahmed Naz Faridi v. Bashir Ahmed and 3 others 1993 SCMR 639 and Muhammad Zia v. Ch. Nazir Muhammad, Advocate and 4 others 2002 CLC 59 rel.

(d) Constitution of Pakistan---

---Art. 199---Constitutional petition---Fundamental Rights, violation of---Missing persons---Onus to prove---Responsibility of State---Petitioner invoked Constitutional jurisdiction of High Court against missing of his husband who was victim of 'enforced disappearance' by State machinery---Petitioner sought recovery of her husband and also sought recovery of compensation from the State functionaries---Validity--- Enforced disappearance is one of the most cruel and inhuman acts and was categorized as a crime against humanity---Complaint which alleged or disclosed characteristics in nature of enforced disappearance would be treated by authorities as heinous act and thus had dealt with accordingly---Onus was on public functionaries to dispel any impression regarding involvement of State or its instrumentalities in alleged abduction---Such onus was to be discharged by establishing prompt, responsive and effective investigations---High Court directed the authorities to pay amount demanded by petitioner lady or such amount as could be determined pursuant to verification and that arrears would be calculated and paid to the petitioner with effect from date when her husband had gone missing---High Court further directed that monthly payment would be made to petitioner till state through its functionaries had traced whereabouts or fate of detenu---High Court also directed that concerned officials would pay costs through cross-cheques drawn in name of petitioner within 10 days of announcement of judgment---Constitutional petition was allowed accordingly.

Muhammad Bashir v. Station House Officer, Okara Cantt. and others PLD 2007 SC 539; District Bar Association, Rawalpindi and others v. Federation of Pakistan and others PLD 2015 SC 401; Muhammad Yasin v. Federation of Pakistan through Secretary Establishment Division, Islamabad and others PLD 2012 SC 132; Bazorkini v. Russia No. 69481/01, ECHR-2006; 139; Aslakhanova and others v. Russia, Applications Nos. 2944/06 and 8300/07, 5018/07, 332/08, 42509/10; Caracazo v. Venezuela, judgment dated 29-8-2002; Trujillo-Oroza v. Bolivia.; judgment dated 27-02-2002 and President Balochistan High Court Bar Association v. Federation of Pakistan and others 2012 SCMR 1958 ref.

Umer Ijaz Gillani, Muhammad Haider Imtiaz and Waleed Bin Usman for Petitioner.

Raja Khalid Mehmood, Deputy Attorney-General, Kh. Muhammad Imtiaz, Asstt. Attorney General and Umar Hanif Khichi for Respondents.

Ahmer Bilal Sufi, ASC (Amicus).

Babar Sattar, ASC (Amicus).

Tariq Mehmood Jehangiri, ASC (Amicus).

Sheikh Zubair, S.P. Investigations, Azhar Shah, DSP/Legal, Abid Ikram, SHO, PS Shalimar for Islamabad Capital Territory Police.

Date of hearing: 11th May, 2018.

#### ORDER

ATHAR MINALLAH, J.---The petitioner, namely Mahera Sajid, wife of Sajid Mehmood, has invoked the constitutional jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the 'Constitution') asserting that the failure on the part of the respondents and other State functionaries to fulfill their obligations has led to the grave violation of her fundamental rights, which have been guaranteed to every person or citizen by the framers of the Constitution. She has also asserted that the fundamental rights of her husband, namely Sajid Mehmood, son of Capt. Dilawar Khan (hereinafter referred to as the 'Detenu'), their three young daughters and other family members have also been breached and violated. She has, therefore, invoked the constitutional jurisdiction of this Court for the enforcement of fundamental rights guaranteed under the Constitution.

2. The facts, in brief, are that the petitioner and her husband i.e. the Detenu, are engineers by profession and duly registered as such by the Pakistan Engineering Council. After tying the knot they were blessed with three daughters, namely, Hanaa Sajid, Aymun Sajid and Haadiya Sajid who, at the time of filing this constitutional petition, were 08, 13 and 14 years old respectively. The Detenu was the sole bread earner of the family and his aging parents were also dependent on him. The Detenu

was self employed and was, inter alia, engaged in the business of software development. The family appears to have been living happily in House No.13-B, Street No.29, Sector F-10/1, Islamabad. There is nothing on record to show that the Detenu was ever involved in any illegal activity, let alone a crime. There is also nothing on record to even remotely indicate that he had any enmity or that he was involved in politics or had any connection with any crime. The petitioner and the Detenu had established a firm in order to carry on their lawful business of software development which was duly registered with the Pakistan Software Export Board. The petitioner asserts that on 14-03-2016, around a dozen men, who had come in two vehicles described as "double cabins", forcefully entered their house. Some were wearing masks while others were in uniform, which according to the petitioner resembled that of the special police force. After forcefully entering the house they searched the premises and forcibly abducted the Detenu. They also took with them computers/laptops, cell phones and some documents. The crime scene was the home of the petitioner and the Detenu, which is situated in an upscale developed and populated sector of the Capital of Pakistan i.e. Islamabad. The incident had taken place at 06:00 p.m. on 14-03-2016. It is the case of the petitioner that since the persons who had forcibly taken her husband appeared to belong to some security or law enforcing agency of the State, therefore, she expected that she would be informed regarding his whereabouts. However, when no information was received till the next morning she filed a formal written complaint on 15-03-2016 at the Police Station Shalimar, F-10, Islamabad. Admittedly, the detailed narration in the written report was entered in the Daily Diary as rapat No.45, dated 15-03-2016. However, a criminal case was not registered as mandated under section 154 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the 'Cr.P.C.') and thus investigations were not carried out. The father of the Detenu, namely, Capt. Dilawar Khan filed a complaint on 18-06-2016 with the Commission of Inquiry on Enforced Disappearance (hereinafter referred to as the 'Commission'). Pursuant to the direction given by the Commission a criminal case was registered on 05-07-2016 i.e. FIR No.216, dated 05-07-2016, at the Police Station Shalimar, Islamabad. The record shows that a Joint Investigation Team (hereinafter referred to as the 'JIT') was also constituted. When no positive response was forthcoming despite registration of a criminal case and constitution of the JIT, the petitioner invoked the jurisdiction of this Court under Article 199 of the Constitution by filing the instant petition on 03-08-2016.

3. Pursuant to directions given by this Court, written reports were filed by the respondents. Respondents Nos.6 and 7 i.e. the Inter Services Intelligence and the Military Intelligence submitted their respective reports through the Secretary, Ministry of Defence. The Secretary, Ministry of Interior was also directed vide order, dated 21-09-2016, to submit a written report, inter alia, identifying the officials who had failed to protect a citizen of Pakistan from being abducted and thereafter refusing to register a criminal case or to investigate the alleged crime in accordance with the law.

4. Mr. Tariq Mehmood Jehangiri, ASC, who at the time was President, Islamabad High Court Bar Association, Mr Babar Sattar, ASC and Mr. Ahmer Bilal Sufi, ASC were appointed as amici curiae vide order, dated 06-10-2016. This Court had enquired, vide

order dated 18-11-2016, whether the Incharge of the Police Station who had refused/ failed in his duty to register a criminal case, was proceeded against. An explanation in this regard was sought from the Inspector General of Police, Islamabad Capital Territory. The respondents were reminded regarding their obligations in the light of the law laid down by the august Supreme Court in the case titled 'Muhammad Bashir v. Station House Officer, Okara Cantt. and others' [PLD 2007 SC 539]. It was after the passing of the aforesaid order that show cause notices, dated 28-11-2016, were issued against Mr Qaiser Niaz Gillani, Inspector and Manzoor Ahmed, ASI respectively who, at the time of filing the complaint were posted at the Police Station Shalimar. Both were found guilty of having committed misconduct and were handed down the minor punishment of 'forfeiture of one year approved service' vide order dated 02-06-2017 respectively. A written report was submitted by the Assistant Inspector General of Police (Operations) on behalf of the Inspector General of Police, wherein details regarding progress made in the course of investigations were mentioned. Copies of the letters written to various other officials were also attached with the written report which clearly establishes that they were sent after the filing of the instant petition and the issuance of notices to the respondents. Moreover, regarding the proceedings conducted by the JIT, it was stated that some meetings were held and minutes relating to only two meetings i.e. 21-01-2017 and 16-05-2017 were attached with the report. The minutes of the meeting held on 16-05-2017 explicitly acknowledges that it was the first meeting of the 'senior JIT'. In the written report it was also mentioned that the Inspector General of Police, Islamabad Capital Territory had chaired a meeting with the members of the JIT and it was concluded that it was a case of "enforced disappearance". It is noted that the JIT was headed by a senior officer of the Islamabad Capital Territory Police and, inter alia, included representatives of the three intelligence agencies, namely, Intelligence Bureau, Military Intelligence and the Inter Services Intelligence. All the members of the JIT, except the representative of the Military Intelligence, had unanimously concluded that it was a case of "enforced disappearance". However, the representative of the Military Intelligence had not recorded any reason to disagree with the other members. On 11-04-2017 the Secretary, Ministry of Interior and a Senior Joint Secretary of the Ministry of Defence appeared along with the learned Additional Attorney General and sought time in order to make efforts to trace the whereabouts of the Detenu. A written report was submitted by the Secretary, Ministry of Defence stating therein that the intelligence agencies, under the administrative control of his Ministry, had confirmed that the Detenu was not in their custody.

5. The petitioner, through an application, prayed that since the State had failed in its duty to protect fundamental rights guaranteed under the Constitution or to trace her husband, therefore, the respondents be held responsible and that she and her three young daughters be directed to be compensated because it was an acknowledged fact that the sole bread earner of the family was a victim of involuntary disappearance. She demanded that since she and her children were suffering solely because of failure on the part of the State and its functionaries to protect their fundamental rights, therefore, the latter be directed to pay for the day to day expenses and put her and the three young children in the same position in which they were at the time of the 'enforced

disappearance' of the Detenu. She also gave a break up of her expenses which amounted to Rs.117,500/- per month. None of the respondents have contested the said breakup of the amount of expenses demanded by the petitioner. It is her case that she has no independent source of income and that the Detenu was the sole income earner of the household.

6. This Court, after going through the record and reports filed by the respondents, directed the latter to identify the officials who were posted as Chief Commissioner, District Magistrate, Inspector General of Police, Superintendent of Police, Sub Divisional Police Officer and the Incharge of Police Station on the day the Detenu was alleged to have been taken and the Police Station, despite having received a written complaint, preferred not to respond. They were directed to submit their respective affidavits explaining as to why they may not be held responsible for the obvious failure on their part in protecting the fundamental rights of citizens and for failure to fulfill their obligations towards the petitioner, her daughters and the Detenu. Pursuant to the direction of this Court, Mr. Zulfiqar Haider, Mr. Khalid Khan Khattak, Capt. (R) Mushtaq Ahmed, Mr. Bilal Zafar Sheikh and Mr. Qaiser Niaz who, at the relevant time i.e. on 14-03-2016, were posted as Chief Commissioner, Islamabad Capital Territory, Inspector General of Police, Islamabad Capital Territory, District Magistrate, Islamabad Capital Territory, Sub Divisional Police Officer and Incharge Police Station Shalimar, respectively submitted separate affidavits under oath. The Secretary, Ministry of Defence also filed his affidavit. None took responsibility for the failure of the criminal justice system in responding to the plight of the petitioner. Not a single official referred to obligations imposed upon him under the law. Interestingly, every official has tried to be evasive and shift the blame on others. Most of them have taken the plea that they had not been informed regarding the incident nor was a written complaint filed till 15-03-2016 by the petitioner. It is ironic that most of these public functionaries, who were holding some of the highest offices of the State, have not hesitated in blaming the petitioner for failing to properly pursue her written complaint. Mr. Khalid Khan Khattak, who at that time was holding the post of Acting Inspector General of Police in addition to the post of Deputy Inspector General, went to the extent of stating in his affidavit that he was only responsible for the general administration of the police force and that he had "kept his attention mainly towards fulfilling his job related issues and that he exercised powers of Inspector General of Police only in matters of "great importance". Likewise the Secretary, Ministry of Defence, in his affidavit, has accused the petitioner of making false assertions regarding the events of 14-03-2016. The relevant portion of his affidavit is reproduced as follows.-

"The Hon'ble Court may appreciate that the alleged incident took place during day time on 14 March, 2016 but ironically Police Station Shalimar, Islamabad which is at a distance of 5 minutes from the place of occurrence was not informed. The Commission and Islamabad High Court were also approached after an inordinate delay of about 5 months. These are all factors, which create suspicion about the actual happening. Hence, the issue needs to be investigated at larger forum i.e. Senior JIT/PTF etc which fall under the domain of

Commission of Inquiry on Enforced Disappearances to determine the facts."

7. The three learned amici curiae have also submitted their respective reports.
8. The learned counsel for the petitioner has contended that; the respondents failed to fulfill their obligations imposed under the law and have breached their fiduciary duties towards the petitioner, other immediate members of the family and the Detenu; it is an admitted position that it is a case of enforced disappearance; it is ironic that a criminal case was registered after a direction was issued by the Commission i.e. after a lapse of more than four months; even after registration of the criminal case, the investigations carried out were only an eye wash; only two meetings of the JIT were conducted; the disparity in the response of the officials in the case of a similar crime committed against a privileged person or a member of the latter's family and against an ordinary citizen such as the petitioner is obvious from the conduct of the respondents and the record; letters were written by the respondents to other agencies and officials after the instant petition was filed and notices were issued; the affidavit filed by those holding the respective posts at the time of the incident are evasive and makes a mockery of the criminal justice system; the fundamental rights guaranteed under Articles 9, 10, 10A and 23 of the Constitution have been violated. The Chief Commissioner, District Magistrate, Inspector General of Police, Superintendent of Police and the concerned Incharge of Police Station failed to perform their duties and fulfill obligations, inter alia, under the Police Rules, 1934 (hereinafter referred to as the 'Police Rules'); the breach of duty and failure to fulfill obligations entrusted by the State has led to serious violations of the fundamental rights, not only of the petitioner and the Detenu but their three young daughters as well; the officials through their conduct have established that they were complicit; the petitioner and members of the family are entitled as of right to be put in the same financial position as they were when the incident had occurred resulting in the abduction of the only bread winner of the family; reliance has been placed on several judgments cited in the written arguments.
9. The learned Deputy Attorney General has argued that; disciplinary action has been taken against the officials who were found responsible for the delay in registration of the criminal case; penalties have been awarded against such officials; the matter was not properly pursued by the petitioner or any other family member of the Detenu; the petitioner is not entitled to compensation as no such policy exists; the officials of the civil administration of Islamabad Capital Territory had fulfilled their obligations and, therefore, they cannot be held responsible for the abduction of the Detenu; the relevant provisions of the Police Rules prescribe the responsibilities of the respondents, details whereof are mentioned in the written arguments.
10. Mr. Umar Hanif Khichi, Advocate, appeared on behalf of Capt. (R) Mushtaq Ahmed, District Magistrate, Islamabad Capital Territory and has argued that; the latter had fulfilled his obligations and had given strict directions to police officials to conduct proper and transparent investigations; as District Magistrate he has no duty to get involved in the investigations.
11. Mr. Tariq Mehmood Jehangiri, ASC assisting as amicus curiae was of the opinion

that enforced disappearance is a serious offence and that the State is under an obligation to protect and safeguard the life and liberty of a citizen; in the instant case the respondents have not been able to show that they had fulfilled their obligations in letter in spirit.

12. Mr. Babar Satar, ASC (amicus curiae) placed reliance on several judgments from Pakistan and foreign jurisdictions in support of the contention that in an appropriate case, particularly when violation of fundamental rights stands established, constitutional Courts are empowered to direct that affected persons be adequately compensated by the State and its functionaries. The case law has been cited in the written brief which was made part of the proceedings.

13. Mr. Ahmer Bilal Sufi, ASC (amicus curiae) submitted his amicus brief and has described in detail the reasons for disappearances; he has explained that on the one hand the State is under an obligation to implement the United Nations Resolution No.1373 which urges for taking effective measures against terrorism and terrorist acts and on the other the State is also under an obligation to uphold human rights as enshrined in the International Covenant on Civil and Political Rights; the State functionaries are in a difficult situation because of the wide spread terrorist activities in Pakistan; Pakistan is passing through a phase where its security is being threatened; this factual aspect was acknowledged by the august Supreme Court in the case titled 'District Bar Association, Rawalpindi and others v. Federation of Pakistan and others' [PLD 2015 SC 401]; no legislation has been enacted keeping in view Article 10(8) of the Constitution; various laws have been enacted whereby persons can be detained lawfully.

14. The learned counsel for the petitioner and the learned Deputy Attorney General have been heard and the record perused with their able assistance. Moreover, this Court has also benefited in rendering this judgment due to the briefs of the amici curiae.

15. The admitted facts are that the petitioner had filed a written complaint on the morning of 15-03-2016 narrating therein the facts regarding the alleged abduction of her husband i.e. the Detenu, the previous evening by persons who appeared to be State functionaries, some of whom were in the uniform of some law enforcing agency. They searched the premises and took with them the Detenu, laptops, cellular phones and some documents. Despite the graveness of the alleged incident, the details whereof were explicitly mentioned in the written complaint, the then Incharge of the Police Station, namely, Qaiser Niaz Gillani, Inspector, casually forwarded the same to Manzoor Ahmed, ASI. The latter was satisfied with entering the narrated facts in the Daily Diary as rapat No.45, dated 15-03-2016, and obviously investigations did not ensue because a criminal case under section 154 of the Cr.P.C was not registered. The incident which allegedly had the characteristics of an 'enforced disappearance' was not amongst the priorities of the administration because neither the Chief Commissioner nor the Inspector General were informed. The said officials also appeared the least interested in knowing about the crimes taking place in their jurisdiction because they did not make any enquiry nor had they given instructions that they be kept informed.

On 18-06-2016, the father of the Detenu approached the Commission and pursuant to the latter's direction a criminal case was registered, almost after four months from the date of occurrence.

16. Perusal of written reports, affidavits and copies of minutes of meetings placed on record, makes it obvious that the JIT had held only two meetings i.e. on 21-01-2017 and 16-05-2017. The Inspector General of Police had also held a meeting with the JIT and except for the representative of the Military Intelligence all other members had concluded that abduction of the Detenu was a case of 'enforced disappearance'. The officials holding respective public offices at the relevant time have submitted affidavits and none have accepted responsibility for the delay in taking timely action and to effectively investigate the crime. It is also evident from the record that pursuant to registration of a criminal case that too after a considerable delay of almost four months from the date of occurrence, effective investigations were not conducted. The criminal justice system appears to have become active when the instant petition was filed but remained confined to writing letters and holding of a few meetings. Some officials in their affidavits have tried to hold the petitioner responsible for the delay because according to them she did not pursue the case. The Inspector General was of the view that abduction of a citizen from one of the most upscale area of the Capital of Pakistan, refusal of the Incharge Police Station to register a criminal case despite having been informed in writing and failing to promptly and effectively investigate the disappearance of a citizen were not important enough so as to require his attention. The Secretary, Defence who happens to be the administrative head of a Ministry under whose control one of the reputable and competent intelligence agencies are working went to the extent of suspecting the bona fides of the petitioner not realizing that the JIT had unequivocally concluded that it was a case of "enforced disappearance". The Secretary, Ministry of Interior and a Sr. Joint Secretary of Ministry of Defence appeared on 14-04-2017 and had sought time to make efforts in tracing the whereabouts of the Detenu. They also appear to have got involved with matters which they felt were more important because they did not submit any report nor informed the Attorney General office so as to explain to this Court as to what efforts were made by their respective Ministries. From perusal of the affidavits filed by the Chief Commissioner and the District Magistrate, it is obvious that they felt that they had no responsibility other than giving directions to the police officials. The Chief Commissioner Islamabad Capital Territory is the Executive head who exercises powers vested in a Provincial Government. Likewise, the District Magistrate has powers and responsibilities regarding efficient working of the criminal justice system under the law which he did not refer to in his affidavit. Departmental proceedings were initiated against the Incharge Police Station who had not fulfilled his duty and obligations by promptly registering a First Information Report after this Court had enquired in this regard. The concerned Incharge Police Station was found guilty of misconduct but the authorized officer and the authority considered the lapse so trivial that a minor penalty was considered sufficient to hold him accountable. The criminal justice system was only responding and reacting to directions given and enquiries made by this Court and otherwise appears to have been unresponsive. Was this response justified when everyone at the helm of affairs had concluded that it was a case of 'enforced

disappearance'. Is an 'enforced disappearance' such a trivial matter not important enough to be dealt with as a heinous crime. Should the petitioner and her three young daughters have been made to suffer or was it the responsibility of the former to have vigorously pursued her case so that the criminal justice could respond, as has been suggested in some of the reports and affidavits filed by the respondents. Would the Chief Commissioner, Inspector General, District Magistrate, Secretary, Defence, heads of the three intelligence agencies, Secretary, Interior and other concerned functionaries have responded in the same manner had one of their loved ones disappeared under similar circumstances instead of the Detenu? The answer is definitely an emphatic 'no'. The frequency of such constitutional petitions indicates that either public functionaries are, directly or indirectly, complicit or they do not consider such complaints important enough to satisfy the aggrieved persons through prompt and effective response and action so that there is no need for them to invoke the jurisdiction of this Court. Are the public functionaries who are entrusted with the obligations and duties by and on behalf of the State accountable to the citizens when there is an obvious breach thereof? Should the public functionaries respond to a crime against an ordinary citizen and one belonging to the privileged classes differently? Is a citizen entitled to be compensated when the violation of fundamental rights and breach of obligations and duties of the State and its public functionaries stands established? If so then can a Constitutional Court issue a writ in this regard while exercising power under Article 199 of the Constitution? These are some of the questions which have arisen for consideration of this Court in the facts and circumstances of the instant petition.

17. There is no cavil to the proposition that the scheme of the Constitution has made the State through its instrumentalities and functionaries absolutely and exclusively responsible for protecting and safeguarding the fundamental rights which have been guaranteed under the Constitution to every citizen. The august Supreme Court in the case titled 'Habib Ullah Energy Limited and another v. WAPDA through Chairman and others' [PLD 2014 SC 47] has emphasized that the basis of the power of State functionaries is the delegation of authority by the principal who are the people of Pakistan. It has been held and declared that the State's legal authority is derived from a fiduciary relationship and if the State or its instrumentalities deviate from their fiduciary obligations then it inevitably erodes the authority of the State to administer and enforce the law. It has been unambiguously held that the violation of duties and obligations by a public fiduciary cannot be condoned because doing so would lead to the erosion of the very basis of the State's legal authority and thus undermine the rule of law. It has been further stressed that the basis of a fiduciary relationship is the exclusive principle which mandates that every fiduciary has a duty to act solely in the interest of the beneficiary and that such fiduciary obligations depend on demonstrating complete commitment to act exclusively in the best interest of the principal. In the case titled 'Muhammad Yasin v. Federation of Pakistan through Secretary Establishment Division, Islamabad and others' [PLD 2012 SC 132] the august Supreme Court has held that; 'Civil servants and other holders of public offices have to remain conscious that in the terms of the Constitution it is the will of the people of Pakistan which has established the Constitutional order under which they hold their respective offices. As such they are, first and foremost fiduciaries and trustees for the people of Pakistan.

And when performing the functions of their office, they can have no interest other than the interests of the honourable people of Pakistan in whose name they hold the office and from whose pockets they draw their salaries and perquisites". The duty to protect the citizens from harm and jealously safeguard their fundamental rights is exclusively that of the State and its functionaries. In this regard the latter, as fiduciaries and trustees appointed by the people of Pakistan to exercise powers exclusively in their interest, are accountable for any breach and the same is not condonable. The most cherished and valuable fundamental rights guaranteed under the Constitution are security, life and liberty (Article 9); the right not to be arrested or detained in custody without being informed of the grounds for such arrest and the right to consult and be defended by a legal practitioner of choice; to be produced before a Magistrate within the specified period of his or her arrest or detention (Article 10); a person is entitled to a fair trial and due process (Article 10A); no law authorizes the punishment of a person for an act or omission that was not punishable by law (Article 12); no person can be compelled to be a witness against himself even if he is accused of an offence (Article 13); the dignity of a person and, subject to law, the privacy of his or her house has been declared to be inviolable and that no person shall be subjected to torture for the purposes of extracting evidence (Article 14); every citizen has the right to remain in and, subject to reasonable restriction imposed by law in public interest, enter and move freely throughout Pakistan and to reside and settle in any part thereof (Article 15); Articles 16 and 17 guarantees freedom of assembly and freedom of association respectively, while Article 18 relates to freedom of trade, business or profession; Articles 19 and 19A guarantees to every citizen freedom of speech and the right to information respectively. All citizens are equal before law and entitled to equal protection of law (Article 25). All these fundamental rights have been guaranteed by the framers of the Constitution to every citizen or person, as the case may be. The protection of these rights and the duty and obligation to ensure that they are enjoyed by every citizen solely is that of the State through those who hold public office as fiduciaries and trustees of the people. Article 3 of the Constitution declares that the State shall ensure elimination of all forms of exploitation while Article 4 enjoins that the protection of law and to be treated in accordance with law is an inalienable right of every citizen. What if the State through its instrumentalities, directly or indirectly, expressly or tacitly, assumes the role of usurping the aforementioned fundamental rights? Is "enforced disappearance" such a tool where the State as a protector and custodian of fundamental rights arrogates to itself a role which is in flagrant violation of its fiduciary obligations towards its citizens. If that is so then what ought to be the consequences for complicity or recklessness of public functionaries who fail in fulfilling the obligations and duties entrusted to them by the people of Pakistan.

18. In the instant case admittedly the respondents have unequivocally stated that it is a case of "enforced disappearance". Enforced disappearance has not been defined in any statute nor has the Majlis-e-Shoora (Parliament) enacted a law to prevent or punish acts or omissions relating to enforced disappearance. The surge in complaints regarding the alleged involvement of the State and its instrumentalities in the abduction of citizens had led the apex Court to direct the Federal Government to constitute the Commission pursuant to powers conferred under section 8 of the Pakistan Commission

of Inquiry Act, 1956 (hereinafter referred to as the 'Act of 1956'). Clause (d) of Regulation 2 of the Commission of Inquiry on Enforced Disappearances Regulations (hereinafter referred to as the 'Regulations') has defined the expression "Enforced Disappearance/Missing person" as meaning such a person picked up/taken into custody by one of the law enforcement/intelligence agencies, working under the civilian or military control, in a manner which is contrary to the provision of law". Likewise the expression "Joint Investigation Team" has been defined in Regulation 2(i) and its constitution has been described under Regulation 13.

19. The august Supreme Court in the case titled 'Human Rights Case No.29388-K of 2013' [PLD 2014 SC 305] has dealt with in great detail cases of involuntary disappearances and in paragraph 17 of the judgment has referred with approval to a judgment rendered by the Supreme Court of Nepal wherein implementation of the principles enshrined in the United Nations General Assembly Declaration on Enforced Disappearances (1992) and the Convention against Enforced Disappearance (2006) have been acknowledged. The august Supreme Court has, therefore, observed and held as follows.-

"It is pertinent to note that Pakistan has also not ratified this Convention. The Supreme Court of Nepal applied the principles of the 2006 Convention in light of the right to life guaranteed in the Interim Constitution of Nepal, 2007. Our Constitution at Article 9 lays down the right to life which has received an expansive interpretation from this Court. Moreover, Article 10 provides direct protection from enforced disappearances. Thus the crime against humanity of enforced disappearances is clearly violative of the Constitution of Pakistan. Therefore, this Court can also apply the principles enshrined in 2006 Convention in order to achieve the ends of justice. Likewise there are cases from international tribunals such as the UN Human Rights Committee, the Inter-American Court of Human Rights and the European Court of Human Rights as well as other national courts, most notably the Constitutional Courts of Peru and Colombia, where the Courts were forced to issue directions to the concerned authorities for effecting recovery of the missing persons and also dealing with those persons who are responsible for their enforced disappearance."

It is obvious from the above that the principles of the aforesaid Conventions have been made applicable in order to meet the ends of justice.

20. The United Nations International Convention for the Protection of All Persons from Enforced Disappearances (2006) has explicitly provided in sub Article 2 of Article 1 that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance. Moreover, Article 2 defines the expression "enforced disappearance" for the purposes of the Convention as the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or

acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law. Article 5 of the Convention has unequivocally declared the phenomena of enforced disappearance as constituting a crime against humanity. This has been unambiguously endorsed with approval by the august Supreme Court in the above cited judgment. Article 6, sub Article 1(b)(iii) provides that a superior who fails to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation is also responsible for the offence. The other international instruments relating to causing disappearance of persons by the State or with its acquiescence are the Inter-American Convention on Enforced Disappearances (1994), the Rome Statute of International Criminal Court, 1998 and the International Convention for Protection of All Persons from Enforced Disappearances, 2006. The expression "enforced disappearance" has been treated in all the instruments in almost the same way. It is, therefore, axiomatic that the expression "enforced disappearance" involves the direct or indirect involvement of the State through its organs and agencies. The positive Constitutional obligation of a State to protect fundamental rights and to prevent, investigate and punish any perpetrator in accordance with law is not only severally breached but simultaneously gives rise to an unimaginable paradox when the State and its functionaries assume the role of abductors.

21. The phenomena of enforced disappearance is not new and has been widespread in many countries across the world. During World War II on 07-12-1941 Adolf Hitler, the German Chancellor issued 'Nacht und Nebel' (The Night of the Fog decree). The rationale for this official decree was to create a deterrent effect by making prisoners vanish without leaving a trace and refusing to give information regarding their whereabouts or fate to their family members. Enforced disappearance affects in a complex and profound manner because the person subjected to disappearance is not the only victim. His or her close relatives, particularly those who are dependents, suffer the most. Their anguish and suffering cannot be comprehended because their loved ones are removed from the protection of the law. By removing a person from protection of the law gives the captors the freedom and license to do what they feel like. This creates an environment of uncertainty for the dependents and other family members. The perpetrators get a license to subject the victim to torture, which is otherwise strictly forbidden under the law, and in the case of death it enables them to cause the body to vanish without a trace. The fundamental rights of the victims guaranteed under the Constitution become irrelevant and virtually suspended. It creates anguish, insecurity and fear for the close relatives, exposing them to grave economic and social consequences, particularly if the abductee is the sole breadwinner. It has the effect of creating a sense of fear and insecurity in society and, therefore, depending on the facts and circumstances, it may also attract the provisions and offences defined under the Anti Terrorism Act, 1997. Lack of response, non cooperative and negative attitudes of the public functionaries entrusted with the duty to deal with complaints exaggerates the anguish and suffering of close relatives and amounts to the degrading treatment of citizens at the hands of the State functionaries. This inevitably leads to grave violations

of the fundamental rights of the close relatives as well. The State and its functionaries, instead of fulfilling the obligations imposed upon them as fiduciaries and trustees, resort to inhuman and cruel usurpation of fundamental rights. It is for this reason that enforced disappearance has been declared as a crime against humanity and indeed that is exactly what it is. It results in multiple violations of fundamental rights guaranteed under the Constitution. It is, therefore, one of the most heinous crimes and cannot be justified on any ground whatsoever, particularly under the Constitution of Pakistan. It is definitely a crime which ought to be given the highest priority by the State instrumentalities and functionaries and their conduct and attitude towards the victims must manifest their intent and will as guardians of the fundamental rights of citizens.

22. It would be pertinent to refer to a relevant judgment rendered by the European Court of Human Rights in the case titled *Bazorkini v. Russia* No. 69481/01, ECHR-2006; 139. The facts of the case related to the disappearance of the applicant's son. The European Court of Human Rights, while examining the violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, has observed and held as follows.-

"The Court would further emphasize that the essence of such violation does not mainly lie in the fact of disappearance of the family members but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is specially in respect of the latter that a relative may claim directly to be a victim of the authorities conduct"

23. The Court, in the facts and circumstances of the above case, concluded that the manner in which the complaint of the applicant i.e. the mother of the disappeared person had been dealt with constituted inhuman treatment contrary to Article 3 of the Convention which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Likewise in the case of *Aslakhanova and others v. Russia*, Applications Nos. 2944/06 and 8300/07, 5018/07, 332/08, 42509/10 vide its final judgment dated 29-04-2013 the European Court of Human Rights held and declared the applicants, who were close relatives of the disappeared men, as victims of the violation of Article 3 on account of the distress and anguish which they had suffered and continued to suffer as a result of the inability of State functionaries to ascertain the fate of their family members and the manner in which their complaints had been dealt with. In these cases financial compensation to the families was acknowledged as one of the remedies for the inability of the State to promptly and effectively investigate the complaints which had given rise to the anguish and suffering of the families. This has also been recognized by the Inter American Court of Human Rights in several judgments. Reference may be made to the judgment dated 19-06-1998 in *Benavides-Cevallos v. Ecuador*, judgment dated 29-08-2002 in *Caracazo v. Venezuela*, and judgment dated 27-02-2002 in *Trujillo-Oroza v. Bolivia*.

24. The august Supreme Court in the case titled '*President Balochistan High Court Bar Association v. Federation of Pakistan and others*' [2012 SCMR 1958] has held that it is the constitutional obligation of the State to exercise all options to ensure that the

fundamental rights of the people of Pakistan are fully protected and secured particularly relating to the security of their lives. The august Supreme Court has emphasized that the Executive authorities cannot be allowed to continue to be silent spectators to the violation of fundamental rights. The Federal Government was, therefore, called upon to ensure taking immediate action under the Constitution to provide security to the citizens.

25. A learned Division Bench of the Sindh High Court in the case titled 'Ali Ahmed v. Muhammad Yakoob Almani, Deputy Superintendent of Police, Qasimabad, Hyderabad and others' [PLD 1999 Karachi 134] has held that once the High Court has come to the conclusion that the detention of a person was without justification, then compensation could be awarded. Another learned Division Bench of the learned Sindh High Court in the case titled 'Syed Hassan Ali Shah v. Station House Officer, Police Station Dadu and others' [PLD 2006 Karachi 425] after examining the precedent law has summarized the principles as follows.-

"(i) When a Court finds that a person in custody was detained without lawful authority or in an unlawful manner, it could apart from directing his release, pass any appropriate incidental or consequential order as it may consider proper in the interest of justice under Article 199 of the Constitution.

(ii) That the jurisdiction of this Court to grant relief under Article 199(1)(b)(1) or Article 199(1)(c) is not hedged by the limitation of English precedents or provision of Sub-constitutional legislation.

(iii) In case such detention prima facie amounts to a penal offence the Court could direct that the case against a person responsible for such unlawful detention may be registered and tried in accordance with the law.

(iv) An order merely directing the release of a person from custody upon finding his detention illegal and condoning the violation of his most cherished fundamental rights of liberty and dignity in defiance of the requirements of law and the Constitution may not be the appropriate relief to which such person may be entitled. Under the wide powers available to this Court under Article 199 of the Constitution it would be proper to award monetary recommendation to a victim of violation of fundamental rights.

(v) The liability to pay such compensation is in the nature of a public law duty as distinguished from the private law right of a citizen to claim damages in tort and can be enforced in proceedings under Article 199 of the Constitution. The amount of compensation paid or payable under these proceedings, however, will be taken into account by a Court subsequently trying a suit for damages.

(vi) That the amount of such compensation would be determined by the Court in its discretion keeping in view the principle applied in awarding general damages in case of false imprisonment and exemplary damages in case of mala fide conduct of a public officer under the law. Special damages sustained by a

victim of unlawful imprisonment, however, can only be proved through ordinary civil suit. In accordance with the decision of this Court such compensation ought to be substantial and not nominal.

(vii) The liability to pay such compensation would devolve jointly and severally upon the State as well as the public officials responsible for illegally depriving a citizen of his liberty. The State Government however, would be entitled to recover the amount paid/payable to the detenu from such officials for having caused wrongful loss to the Government through misuse of powers under the relevant Service Rules applicable to such official instead of burdening the taxpayer.

(viii) In addition to the above the petitioner/victim may also be entitled to payment of actual, compensatory or deterrent cost apart from actual costs of litigation calculated according to the applicable Rules. Compensatory costs may be awarded and the official responsible for illegal action may be personally burdened with the liability to pay exemplary or punitive costs in terms of the law declared by the Honourable Supreme Court."

26. The Hon'ble Justice Asif Saeed Khan Khosa, when he was Judge of the Lahore High Court, has observed in the case titled 'Abid Hussain and another v. Chairman, Pakistan Bait-ul-Mal and others' [PLD 2002 Lahore 482] as follows.-

"Secondly, the State had failed to protect the victim's life or physical safety and it, thus, cannot avoid sharing the blame for the harm coming to him and therefore, chipping in by the State towards payment of compensation to the victim or his heirs is the least that the State can do in such a situation. And, thirdly being a welfare State, an Islamic State is even otherwise expected to reach out and come to the rescue and assistance of a helpless citizen in need, be he a convict or has substantially cleaned himself of the crime by undergoing the entire substantive sentence of imprisonment passed against him."

27. The Supreme Court of India has consistently held that relief of monetary compensation, as exemplary damages, can be awarded by the Supreme Court or a High Court by way of public law remedy if there is an established infringement of the constitutional right of protection of life and that it is based on strict liability for contravention. Reference in this regard may be made to the cases of 'Dr Mehmood Nayyar Azam v. State of Chaattisgarh and others' [2013 SCMR 66], 'Rudul Sah v. State of Bihar and another' [AIR 1983 SC 1086], 'Sebastian M. Hongray v. Union of India' [AIR 1984 SC 1026], 'Bhim Singh, MLA v. State of Jammu and Kashmir and others' [AIR 1986 SC 494].

28. It is, therefore, obvious from the above discussion that in an appropriate case a High Court, while exercising jurisdiction under Article 199 of the Constitution, can order the State to compensate a citizen for an established violation of fundamental rights guaranteed under the Constitution. After receiving a complaint alleging facts which have the characteristics of 'enforced disappearance', it becomes the State's duty

and obligation through its functionaries to promptly and effectively take all reasonable steps, inter alia, to register a criminal case and to investigate and secure evidence. Keeping the complainant informed regarding the progress made in the investigations and steps taken is also part of this duty of the concerned public functionaries. The onus is on the State and its functionaries to unambiguously demonstrate their bona fides through responses, conduct and attitudes, particularly if it is alleged to be a case of enforced disappearance. Delay in taking action and reasonable steps would not only raise an inference of complicity but would violate the fundamental rights of the person alleged to have been subjected to 'enforced disappearance' and also of those close relatives who have to go through anguish, pain and extreme stress which cannot be comprehended by a human mind and that too for no fault of their own. The fundamental rights of the immediate family members i.e. spouse, young children and parents, inter alia, guaranteed under Articles 9, 14 and 25 of the Constitution are equally violated if the response of the State and its functionaries is deficient and not in consonance with the required standard of promptness and effectiveness. The nature of the complaint i.e. alleged enforced disappearance definitely puts a far higher onus to be discharged by the public functionaries in order to establish their bona fides by clearly demonstrating on the basis of strict liability in the context of prompt and effective response and confidence inspiring attitudes. This obligation and onerous duty is undoubtedly fiduciary in nature. In case of breach of this duty, the State and the concerned functionaries definitely would expose themselves to be accountable besides being liable to compensate the affected citizens.

29. It would be relevant to note that the Police Order, 2002 was promulgated and notified on 14-08-2002 and under subsection (3) of section 1 it was to come into force in the Islamabad Capital Territory on the date when the Local Government was to assume office in the said territory. Pursuant to promulgation of the Local Government Act, 2015, Local Governments have been established in the Islamabad Capital Territory. However, a formal notification regarding the Police Order, 2002 having become operative has not yet been issued. This Court has been informed that The Police Act, 1861 (hereinafter referred to as the 'Act of 1861') and the Police Rules, 1934 (hereinafter referred to as the 'Police Rules') presently govern the administration of Police within the Islamabad Capital Territory. A plain reading of subsection (3) of section 1 of the Police Order, 2002 shows that issuance of a notification would be a mere formality if the condition of assumption of offices of Local Governments has been met. Nonetheless, whether or not the Chief Commissioner, Inspector General of Police, District Magistrate, the Superintendent of Police and Incharge of the concerned Police Station have breached their respective responsibilities and obligations shall be determined by the competent authority under the relevant law. The Chief Commissioner is appointed under the Presidents Order No.18 of 1980 read with Presidents Order No.2 of 1980. The Chief Commissioner exercises the authority of the Provincial Government in respect of the Islamabad Capital Territory relating to powers and duties conferred or imposed on the Provincial Government under any law enforced within said territory.

30. The facts and circumstances relating to the instant petition have been discussed in

detail above. The failure on the part of the criminal justice system to promptly and effectively respond to the complaint filed by the petitioner stands established beyond doubt. The conduct of all the public functionaries who have been referred to above and their attitude towards the helpless petitioner and her three young daughters is distressing. The events of 14-03-2016 narrated by the petitioner in her written complaint filed at the Police station the next morning reflected that the manner in which the perpetrators had conducted the operation was similar in its characteristics to that of 'enforced disappearance'. The events had taken place in the heart of the Capital of Pakistan. The concerned Police Station was informed by the petitioner in writing the next morning and despite the gravity of the alleged crime and the settled principles and law a criminal case was not registered so that prompt and effective investigations could be initiated and evidence secured. The Chief Commissioner, as the executive head of the Islamabad Capital Territory, vested with the powers of the Provincial Government and the Inspector General of Police who was responsible for the command of the Police force did not seem to have been interested in knowing about incidents of crime, particularly grave violations of fundamental rights of citizens within their jurisdiction. The District Magistrate who was responsible for the functioning of the criminal justice system and had a duty under the Police Rules of regularly inspecting the Police Stations was either not interested in knowing about crimes taking place within his jurisdiction or in case he knew that then for reasons best known to him he did not fulfill his duty towards the Detenu, the petitioner and their three young daughters. The same attitude and conduct was also displayed by all other relevant functionaries. The crucial time for carrying out investigations was indeed lost because of the inaction, which cannot be attributed to any reason other than being willfully complicit. A more disturbing dimension which stems from the facts and circumstances of the instant petition is the response of the Inspector General of Police who at the relevant time was also holding the post of Deputy Inspector General. In his affidavit dated 02-06-2017 he has deposed that he was not informed by his subordinates regarding the incident nor had the petitioner approached him in writing in this regard. He has also blamed the petitioner for delay in informing the Police Station regarding the incident. In his affidavit he has quoted the relevant provisions of the Police Rules and has thus admitted that he was responsible for the command, discipline and administration of the Police force. He has explicitly stated in his affidavit that while holding the acting charge of the post of Inspector General Police he exercised powers 'only in matters of great importance'. However, he has not explained as to what could have been a matter of more importance than a citizen alleged to have been a victim of 'enforced disappearance'. According to his deposition the petitioner should have filed a petition under section 22-A of the Cr.P.C for registration of the First Information Report. Despite having acknowledged that he was responsible for the command of the Police force, he has conveniently shifted the blame on his subordinates. A plain reading of the affidavits filed by the Chief Commissioner and the District Magistrate also shows that they were either not interested in keeping themselves informed about the crimes committed within their jurisdiction or serious incidents of abduction of citizens and violations of fundamental rights of helpless family members seemed unimportant to them. Admittedly, the Special Branch and the other two premier intelligence agencies of the State i.e. the Intelligence Bureau and the Inter Services Intelligence not only

operate within the Islamabad Capital Territory but also keep the higher authorities informed regarding important incidents. The Secretary, Defence in his written affidavit has gone to the extent of suspecting the bona fides of the petitioners version without realizing that the JIT, including the representative of the Inter Services Intelligence, has concluded and affirmed that it was a case of 'enforced disappearance'. These are the officials who are at the helm of affairs, holding the highest public offices and entrusted with the onerous duty to serve the people of Pakistan and safeguard their fundamental rights. By virtue of the public offices which they were holding at the time of filing the affidavits, they were custodians of the fundamental rights of the citizens. They were responsible to protect the citizens from harm without the latter being required to approach them. This onerous duty was imposed upon them while acting on behalf and as representatives of the State. They owed the citizens, which inevitably includes the petitioner, her husband, the latter's aging parents and three young daughters, a duty of care. They were entrusted with obligations by the State as fiduciaries and trustees. It appears from their affidavits that either the criminal justice system has completely failed in responding to crimes committed against an ordinary citizen or that the persons holding the highest public offices are, directly or indirectly, complicit in serious infringements of fundamental rights of citizens who are victims of enforced disappearances. After four months a criminal case was registered and that too when the father of the Detenu had approached the Commission. It is evident from the record that even after registration of the criminal case and the constitution of a JIT no effective investigations were carried out. However, the JIT appears to have met twice and had unequivocally concluded that it was a case of 'enforced disappearance'. Beyond this affirmation nothing was brought on record to show that the JIT had carried out effective investigations to trace the Detenu and make the perpetrators accountable for committing a crime of a grave nature. The proceedings do not appear to be more than an eye wash. It is obvious from the record that the respondents were merely responding to notices, directions and queries made from time to time during the proceedings in the instant petition, otherwise the criminal justice system was not responding on its own. After a query was made by this Court, only then disciplinary proceedings were initiated against the Incharge Police Station who had not registered a criminal case despite receiving a written complaint. He was found guilty but despite the gravity of the misconduct and the ensuing consequences, awarding of a minor penalty was considered an appropriate retribution. The most disturbing dimension in the instant case is the agony, suffering and unimaginable pain of the petitioner because of the attitude of public functionaries towards her and her family. Instead of serving her as a citizen, it is obvious from the record that they were treating the proceedings as adversarial. The conduct of the officials who were holding some of the highest public offices when according to their own findings the Detenu and his close relatives were victims of 'enforced disappearance' and their attitude towards the petitioner is obvious and established from the written reports and the affidavits which speak volumes in this regard. The failure of all the officials named above and their successors in fulfilling their fiduciary duty and obligations and resultantly gravely violating the fundamental rights of the petitioner and her three young daughters, inter alia, under Articles 9, 14 and 25 stands established beyond doubt. Their attitude towards the petitioner and other family members has been degrading thus violating their fundamental right under Article 14 of the Constitution. Every official acting as an agent of the State, from the Incharge Police Station to the Inspector General of Police and District Magistrate to the Chief Commissioner failed to discharge the duties and obligations on behalf of the State. Each one of them is responsible for the non responsiveness of the criminal justice system despite having been informed in writing. The petitioner was not required to have pursued the matter as has been suggested by those who were holding one of the highest public offices. The premier intelligence agencies also failed in their obligations by not being able to demonstrate having taken effective measures in tracing the whereabouts of the Detenu and identifying the perpetrators. Either everyone was complicit or simply did not care because the petitioner and her three young daughters were ordinary citizens. The latter have not been treated with respect and the officials named in this judgment and their successors are responsible for the unimaginable anguish, pain and degrading treatment which they definitely deserved from the State and its agents. In a nut shell the State has undoubtedly failed in its duty and obligations towards the petitioner and her three young daughters. The officials responsible to protect the citizens as appointed agents of the State are jointly and severally accountable to the petitioner and her three young daughters. The State of Pakistan as an Islamic welfare state has, therefore, made itself liable to compensate the petitioner and her three young daughters for the established acts and omissions, conduct and degrading attitude of the public functionaries which has caused unimaginable anguish and suffering to the petitioner and her three daughters, thus gravely violating the fundamental rights guaranteed to them under the Constitution. The Chief Commissioner and the Inspector General of Police, being the highest office holders in the hierarchy of administration of the Islamabad Capital Territory, are responsible for the failure of their subordinates and for the criminal justice system failing to respond to the complaint of the petitioner, because the buck stops at the top. The non cooperative, insensitive and humiliating attitude of the agents of the State has exposed each one of them to be proceeded against.

31. For what has been discussed above, the instant petition is allowed and consequently it is declared and directed as follows:-

- i.) 'Enforced disappearance' is one of the most cruel and inhuman acts and categorized as a crime against humanity. A complaint which alleges or discloses characteristics in the nature of 'enforced disappearance' shall be treated by the respondents as a heinous act and thus dealt with accordingly.
- ii.) It is the duty and obligation of the State to take effective and prompt action when 'enforced

disappearance' has been alleged. The Chief Commissioner, vested with powers of a Provincial Government and the Inspector General of Police, responsible for command of the Police force, are and shall be accountable for the lack of response of the criminal justice system according to the required standards in general and in cases alleging acts of 'enforced disappearance' in particular, within their jurisdiction in the Islamabad Capital Territory. The onus shall be on the public functionaries to dispel any impression regarding involvement of the State or its instrumentalities in an alleged abduction. This onus shall be discharged by establishing prompt, responsive and effective investigations.

iii.) In the event that it is established that the criminal justice system failed in responding promptly, followed by conducting effective investigations into a complaint of a citizen alleging enforced disappearance of a loved one, then the State depending on the facts and circumstances in each case shall become liable to compensate the person if it can be shown that the latter's fundamental right(s) stand infringed. Any loss suffered by the exchequer on account of payment of compensation shall be recovered from the public functionaries, inter alia, in the case of the Islamabad Capital Territory from the Chief Commissioner and the Inspector General of Police.

iv.) It is the duty of the Special Branch, Intelligence Bureau, the Inter Services Intelligence and the Military Intelligence to collect information and promptly report to the concerned functionaries regarding any incident of abduction of a citizen having the characteristics of an 'enforced disappearance' and to take effective measures in tracing the whereabouts of the victim. It is noted that these instrumentalities of the State are part of the JIT constituted under the Regulations. In the case of failure in fulfilling this duty the respective Sector Commanders shall expose themselves to being accountable and proceeded against.

v.) The failure of the criminal justice system to promptly respond to the complaint of the petitioner and then to conduct effective investigations stands established in the instant case. Moreover, the attitude and conduct of public functionaries towards the petitioner not being in conformity with the fundamental right guaranteed under Article 14 of the Constitution is also established and evident from the reports and affidavits brought on record. The State and its functionaries have failed in safeguarding the fundamental right of the petitioner guaranteed under Article 9 of the Constitution. It is, therefore, an obligation of the State to financially put the petitioner in the same position by way of compensation as existed on the day of occurrence i.e. 14-03-2016. The breakup of the expenses amounting to Rs.117,500/- per month placed on record has not been contested by the respondents. However, the Chief Commissioner and the Inspector General of Police shall constitute a joint Committee consisting of senior officers to verify the actual expenses if they have any reservations regarding the break up provided by the petitioner. If such a Committee is constituted then it shall complete verifications within 30(thirty)

days from the date of receiving a certified copy of this judgment. The petitioner shall be paid an amount of Rs.117,500/- per month, or such amount as may be determined pursuant to verification, as the case may be. The arrears shall be calculated and paid to the petitioner with effect from 14-03-2016. The said monthly payment shall be made to the petitioner till the State through its functionaries has traced the whereabouts or fate of the Detenu.

vi.) The Federal Government is directed to conduct an inquiry through an officer not lower in rank than a Federal Secretary or a Committee, into the failure of the criminal justice system in the Islamabad Capital Territory as is evident from the facts highlighted above. The inquiry shall also identify the officials responsible for the established failure in the instant case and the loss suffered to the exchequer as payment of maintenance to the petitioner and her three young daughters shall be recovered from such delinquents. The inquiry is directed to be completed within thirty days from the date of receipt of this judgment and a report in this regard shall be submitted by the Secretary interior to the Registrar of this Court.

vii.) The JIT is directed to take appropriate measures and effectively investigate the alleged enforced disappearance in the instant case. The members of the JIT representing the intelligence agencies are directed to trace the whereabouts of the Detenu. The head of the JIT shall submit a progress report before the Registrar of this Court on the 15th of each month.

32. Lastly, this Court while exercising constitutional jurisdiction cannot ignore the conduct and attitude of the public functionaries towards the petitioner, which is evident from their affidavits. They owed a duty of care towards the petitioner who has been running from pillar to post to make the criminal justice system respond to her unimaginable plight. Those who have been appointed as agents of the State to safeguard the rights of the citizens have displayed an attitude which was appalling and distressing. Because of the conduct and attitude of the custodians of fundamental rights of the citizens the petitioner despite her grave anguish and suffering was subjected to unnecessary litigation and harassment. It is evident from the affidavits that the attitude of each functionary has been degrading towards the helpless citizen who was not required to engage in litigation had the criminal justice system responded to her complaint promptly and effectively. Each public functionary has made himself liable to pay special costs to the petitioner. Moreover, it is settled law that while exercising constitutional jurisdiction under Article 199 of the Constitution it may impose costs in excess of the amount prescribed under section 35-A of the Civil Procedure Code, 1908. Reliance is placed on the cases of 'Khurshid Ahmed Naz Faridi v. Bashir Ahmed and 3 others' [1993 SCMR 639] and 'Muhammad Zia v. Ch. Nazir Muhammad, Advocate and 4 others' [2002 CLC 59]. Keeping in view the facts and circumstances of this case, this Court imposes cost of Rs.100,000/- (Rupees one hundred thousand only) each on Lt. General (Retd) Zamir-ul-Hassan Shah, Secretary Ministry of Defence, Mr. Zulfiqar Haider, Chief Commissioner, Islamabad Capital Territory, Mr. Khalid Khan Khattak, Inspector General of Police, Islamabad Capital Territory and Capt. (Retd) Mushtaq

Ahmed, District Magistrate, Islamabad Capital Territory. A cost of Rs.300,000/- (Rupees three hundred thousand only) is imposed on Mr. Qaiser Niaz, Inspector who was the Incharge of Police Station, Shalimar on 14-03-2016. This Court expects that the said public functionaries and others would deal with ordinary citizens and display conduct and attitude towards them which visibly demonstrates respect and care, having regard to the fundamental right guaranteed under Article 14 of the Constitution which provides that "the dignity of man and, subject to law, the privacy of home, shall be inviolable". The officials named above shall pay the costs through crossed cheques drawn in the name of the petitioner within ten days from the date of announcement of this judgment.

MH/85/Isl. Petition allowed.

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