IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CJ
MR. JUSTICE MIAN SHAKIRULLAH JAN
MR. JUSTICE TASSADUQ MR. HUSAIN JILLANI
MR. JUSTICE JAWWAD S. KHAWAJA
MR. JUSTICE TARIQ PARVEZ
MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE IJAZ AHMED CHAUDHRY
MR. JUSTICE MUHAMMAD ATHER SAEED

CONSTITUTION PETITIONS NO. 77 TO 85 & 89 OF 2011
& CMA NO. 5505/2011 IN CONST. P. 79 OF 2011

[Constitution Petition under Article 184(3) of the Constitution regarding alleged Memorandum to Admiral Mike Mullen by Mr. Husain Haqqani, former Ambassador of Pakistan to the United States of America]

...

Watan Party	...	PETITIONER [CP 77/2011]
M. Tariq Asad Advocate Supreme Court	...	PETITIONER [CP 78/2011]
Muhammad Nawaz Sharif	...	PETITIONER [CP 79/2011]
Senator Muhammad Ishaq Dar & another	...	PETITIONERS [CP 80/2011]
Iqbal Zafar Jhagra & another	...	PETITIONERS [CP 81/2011]
Lt. General ® Abdul Qadir Baloch & 2 others	...	PETITIONERS [CP 82/2011]
Raja Muhammad Farooq Haider Khan & another	...	PETITIONERS [CP 83/2011]
Syed Ghous Ali Shah & 2 others	...	PETITIONERS [CP 84/2011]

Hafeez ur Rahman ... PETITIONER
[CP 85/2011]

Shafqatullah Sohail ... PETITIONER
[CP 89/2011]

VERSUS

Federation of Pakistan & others ... RESPONDENTS

For the petitioners: Barrister Zafarullah Khan, ASC in person
Mr. Tariq Asad, ASC in person
Mr. Rashid A. Razvi, Sr. ASC
Senator Muhammad Ishaq Dar &
Khawaja Muhammad Asif, MNA in person
Mr. Muhammad Rafiq Rajwana, ASC
Mr. Attique Shah, ASC
Dr. M. Salahuddin Mengal, ASC
Sardar Asmatullah Khan, ASC
Syed Ghous Ali Shah, ASC
Dr. M. Shamim Rana, ASC
Mr. Naseer Ahmad Bhutta, ASC
Mr. M.S. Khattak, AOR

For the President of Pakistan: *Nemo*.

For the Prime Minister of Pakistan: *Nemo*.

For Chief of Army Staff,
DG, ISI & M/O of Cabinet,
Defence, Foreign Affairs,
Interior & Law: Maulvi Anwar-ul-Haq
Attorney General for Pakistan
Mr. Dil Muhammad Alizai, DAG

For Mr. Husain Haqqani: Ms. Asma Jahangir, ASC
Ch. Akhtar Ali, AOR assisted by
M/s Idrees Ashraf and Asad Jamal, Advocates

For Mansoor Ijaz: *Nemo*.

Date of hearing: 19-23 & 27-30 December, 2011

...

O R D E R

IFTIKHAR MUHAMMAD CHAUDHRY, CJ. – We have upheld the maintainability of the listed petitions vide following order dated 30.12.2011:-

> "The Objectives Resolution, which has been made substantive part of the Constitution by means of Article 2A of the Constitution of Islamic Republic of Pakistan commands that:
>
> > "And whereas it is the will of the people of Pakistan to establish an order;
> >
> > Wherein integrity of the territories of the Federation, its independence and all its rights, including its sovereign rights on land, sea and air, shall be safeguarded;
> >
> > So that people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity."

2. This short order shall be followed by detailed reasons, to be recorded later. The above petitions have been instituted under Article 184(3) of the Constitution of Islamic Republic of Pakistan.

3. For the purpose of understanding the issues involved in these petitions precisely the facts noted from the pleadings of the parties are that on 10th October, 2011, the respondent Mansoor Ijaz wrote an Article in Financial Times, London. The contents of the said Memo have already been reproduced in the order dated 1st December, 2011, however, same are repeated herein below:-

> **"CONFIDENTIAL MEMORANDUM**
> **BRIEFING FOR ADM. MIKE MULLEN, CHAIRMAN, JOINT CHIEFS OF STAFF**
>
> During the past 72 hours since a meeting was held between the president, the prime minister and the chief of army staff, there has seen a significant deterioration in Pakistan's political atmosphere. Increasingly desperate efforts by the various agencies and factions within the government to find a home – ISI and/or Army, or the civilian government – for assigning blame over the UBL raid now dominate the tug of war between military and civilian sectors. Subsequent tit-for-tat reactions, including outing of the CIA station chief's name in Islamabad by ISI officials, demonstrates a dangerous devolution of the ground situation in Islamabad where no central control appears to be in place.
> Civilians cannot withstand much more of the hard pressure being delivered from the Army to succumb to wholesale changes. If civilians are forced from power, Pakistan becomes a sanctuary for UBL's legacy and potentially the platform for far more rapid spread of al Qaeda's brand of fanaticism and terror. A unique window of opportunity exists for the civilians to gain the upper hand over army and intelligence directorates due to their complicity in the UBL matter.
> Request your direct intervention in conveying a strong, urgent and direct message to Gen Kayani that delivers Washington's demand for him and Gen Pasha to end their brinkmanship aimed at bringing down

the civilian apparatus – that this is a 1971 moment in Pakistan's history. Should you be willing to do so, Washington's political/military backing would result in a revamp of the civilian government that, while weak at the top echelon in terms of strategic direction and implementation (even though mandated by domestic political forces), in a wholesale manner replaces the national security adviser and other national security officials with trusted advisers that include ex-military and civilian leaders favorably viewed by Washington, each of whom have long and historical ties to the US military, political and intelligence communities. Names will be provided to you in a face-to-face meeting with the person delivering this message.

In the event Washington's direct intervention behind the scenes can be secured through your personal communication with Kayani (he will likely listen only to you at this moment) to stand down the Pakistani military-intelligence establishment, the new national security team is prepared, with full backing of the civilian apparatus, to do the following:

1. President of Pakistan will order an independent inquiry into the allegations that Pakistan harbored and offered assistance to UBL and other senior Qaeda operatives. The White House can suggest names of independent investigators to populate the panel, along the lines of the bipartisan 9-11 Commission, for example.

2. The inquiry will be accountable and independent, and result in findings of tangible value to the US government and the American people that identify with exacting detail those elements responsible for harboring and aiding UBL inside and close to the inner ring of influence in Pakistan's Government (civilian, intelligence directorates and military). It is certain that the UBL Commission will result in immediate termination of active service officers in the appropriate government offices and agencies found responsible for complicity in assisting UBL.

3. The new national security team will implement a policy of either handing over those left in the leadership of Al Qaeda or other affiliated terrorist groups who are still on Pakistani soil, including Ayman Al Zawahiri, Mullah Omar and Sirajuddin Haqqani, or giving US military forces a "green light" to conduct the necessary operations to capture or kill them on Pakistani soil. This "carte blanche" guarantee is not without political risks, but should demonstrate the new group's commitment to rooting out bad elements on our soil. This commitment has the backing of the top echelon on the civilian side of our house, and we will insure necessary collateral support.

4. One of the great fears of the military-intelligence establishment is that with your stealth capabilities to enter and exit Pakistani airspace at will, Pakistan's nuclear assets are now legitimate targets. The new national security team is prepared, with full backing of the Pakistani government – initially civilian but eventually all three power centers – to develop an acceptable framework of discipline for the nuclear program. This effort was begun under the previous military regime, with acceptable results. We are prepared to reactivate those ideas and build on them in a way that brings Pakistan's nuclear assets under a more verifiable, transparent regime.

5. The new national security team will eliminate Section S of the ISI charged with maintaining relations to the Taliban, Haqqani network, etc. This will dramatically improve relations with Afghanistan.

6. We are prepared to cooperate fully under the new national security team's guidance with the Indian government on bringing all perpetrators of Pakistani origin to account for the 2008 Mumbai attacks, whether outside government or inside any part of the government, including its intelligence agencies. This includes handing over those against whom

sufficient evidence exists of guilt to the Indian security services.

Pakistan faces a decision point of unprecedented importance. We, who believe in democratic governance and building a much better structural relationship in the region with India AND Afghanistan, seek US assistance to help us pigeon-hole the forces lined up against your interests and ours, including containment of certain elements inside our country that require appropriate re-sets and re-tasking in terms of direction and extent of responsibility after the UBL affair.
We submit this Memorandum for your consideration collectively as the members of the new national security team who will be inducted by the President of Pakistan with your support in this undertaking."

4. Petitioners invoked original jurisdiction of this Court by means of Constitution Petitions, questioning therein the contents of above Memo on stated allegations that question of public importance involving their fundamental rights under the Constitution has been made out as according to the version of Mansoor Ijaz-respondent, Memo was prepared/drafted for the purpose of delivering the same to Chairman of the US Joint Chiefs of Staff Admiral Mike Mullen through Gen. (Retd.) James Logan Jones, former US National Security Advisor.

5. All the petitions were taken up for hearing on 1st December, 2011 when after hearing the petitioners, either through counsel or in person, notices were issued to the respondents for filing of their replies and to conduct a probe regarding the Memo, Mr. Tariq Khosa, former Secretary Narcotics/DG, FIA, subject to his consent, was directed to act as a Commission. On the same day, by means of press-conference held in PID office by Dr. Babar Awan, Sr. ASC along with two Ministers and others, the order of the Court was criticized contemptuously. Inasmuch as, brother of Mr. Tariq Khosa, namely, Mr. Justice Asif Saeed Khan Khosa, a learned Judge of this Court, who although was not member of the Bench, was referred in terms which *prima facie* are contemptuous, therefore, for such reasons, Mr. Tariq Khosa recused to act as a Commission. In this context, reaction of the Chief Executive/Prime Minister of Pakistan had been obtained and appropriate directions shall be passed in the later part of the order.

6. Parties, including the Chief of Army Staff, DG, ISI, Mansoor Ijaz as well as Mr. Husain Haqqani and the Federation of Pakistan through Secretary Interior, Foreign Secretary represented by learned Attorney General for Pakistan, filed their replies. No separate reply has been filed by the President of Pakistan.

7. With a view to narrow down the controversy between the parties, directions were issued to them to file counter affidavits/re-joinders to the replies of each others vide order dated 19.12.2011. A perusal of the pleadings suggests:-

(i) *After the publication of above Article along with Memo in Financial Times, London on 10th of October, 2011, DG, ISI (Mr. Shujah Pasha) established his contact with Mansoor Ijaz in London and on his return to Pakistan shared his views with the Chief of Army Staff, General Ashfaq Parvez Kayani, thus, both of them in their replies to the petitions as well as affidavits have maintained that Memo dated 10th May, 2011 exists.*

(ii) *On 16th November, 2011 Mr. Husain Haqqani addressed a letter to the President of Pakistan wherein after mentioning certain facts, he desired*

to tender his resignation from the post of Ambassador of Pakistan in United States and expressed to probe into the matter.

(iii) About 3 to 4 meetings were held between the Prime Minister and Chief of Army Staff, the President and Chief of Army Staff and joint meeting between the President, Prime Minister, Chief of Army Staff, DG ISI and Mr. Husain Haqqani, whereafter, Mr. Husain Haqqani on account of their persuasion tendered his resignation on 22.11.2011, which was accepted vide notification dated 23.11.2011.

(iv) Former Ambassador, Mr. Husain Huqqani has denied categorically about his role in preparation of the Memo who at the same time has relied upon an affidavit tendered by James Jones, to establish that Mansoor Ijaz has concocted this story that such Memo was sent by him for delivering to Admiral Mike Mullen before 9th May, 2011.

(v) *In the meanwhile, vide letter dated 28.11.2011, issued under the signatures of Mr. Khushnood Akhter Lashari, Principal Secretary to the Prime Minister referred the matter to the Parliamentary Committee to conduct probe on the subject issue. The proposed terms of the reference are as under:-*

a. *To probe into the memo purportedly written and sent by Mr. Mansoor Ijaz.*

b. *To give consequential recommendations.*

(vi) Federation of Pakistan through Secretary Interior had not denied the existence of the Memo in their counter affidavits except raising technical flaws in respect of undertaking journey by DG, ISI to London to conduct a meeting with Mansoor Ijaz without permission of the Prime Minister.

(vii) Mansoor Ijaz in his reply and in counter affidavit has contradicted the stand taken by Mr. Husain Haqqani, former Ambassador and he has offered to provide further evidence to substantiate his plea that allegedly on persuasion of Mr. Husain Haqqani, Memo dated 10th may, 2011 was drafted to be delivered to Mike Mullen through James Jones.

8. On 1st of December, 2011 the Court itself raised the question about the maintainability of the petitions and at the same time it was observed that it would be appreciated if the outcome of the proposed inquiry by the Parliamentary Committee on National Security is shared with the Court, if possible.

9. After having heard the parties and having taken into consideration the relevant provisions of the Constitution and the law, judgments cited on behalf of both the sides and the pleadings of the parties carefully, we hold as under:-

(a) In exercise of powers of Judicial Review, we hold that in these petitions, petitioners have succeeded in establishing that the issues involved are justiciable and question of public importance with regard to enforcement of fundamental rights, prima facie, under Articles 9, 14 and 19A of the Constitution has been made out. Thus, the

petitions under Article 184(3) of the Constitution are maintainable.

(b) *To delineate measures with a view to ensure enforcement of the fundamental rights noted in para ibid, a probe is called for to ascertain the origin, authenticity and purpose of creating/drafting of Memo for delivering it to Chairman of the US Joint Chiefs of Staff Admiral Mike Mullen through Gen. (Retd.) James Logan Jones, former US National Security Advisor. Thus, in exercise of powers conferred upon this Court under Article 187 of the Constitution, Order XXXII, Rules 1 and 2 read with Order XXXVI of the Supreme Court Rules, 1980 coupled with the principle of Civil Procedure Code, a Commission is appointed. As the due process of law is the entitlement of all the stakholders, therefore, to ensure probe into the matter in an transparent manner the Commission shall be comprising of:*

(i)	*Mr. Justice Qazi Faez Isa,* *Chief Justice of Balochistan High Court*	*(Chairman)*
(ii)	*Mr. Justice Iqbal Hameed-ur-Rehman* *Chief Justice, Islamabad High Court*	*(Member)*
(iii)	*Mr. Justice Mushir Alam* *Chief Justice, High Court of Sindh*	*(Member)*

Raja Jawwad Abbas Hassan, District & Sessions Judge, Islamabad is appointed as Secretary to the Commission.

(c) *The Commission shall hold its meetings in the building of Islamabad High Court. The Commission shall be exercising all the powers of Judicial Officers for the purpose of carrying out the object mentioned hereinabove and it shall be free to avail services of advocates, experts of forensic science and cyber crimes. All the Federal Secretaries, including Interior Secretary, Secretary Cabinet, Secretary Foreign Affairs; Chief Secretaries of all the provinces; DG, FIA; Inspector Generals of Police of all the provinces and Ambassadors of Pakistan in USA and UK, shall provide necessary assistance to the Commission.*

(d) *Government of Pakistan through Secretary Cabinet Division shall provide logistic support to the Commission, subject to its demands through the Secretary of the Commission.*

(e) *The Commission shall be authorized to collect evidence within and outside Pakistan according to prevailing laws on the subject.*

(f) *The Commission shall provide full opportunity of hearing to all the parties.*

(g) *The Commission is required to complete this task within a period of four weeks after receipt hereof.*

10. It is to be noted that the reply submitted before the Court by Mr. Mansoor Ijaz, inter alia, comprises of certain documents including exchange of e-mails and other communications using the BlackBerry Messaging service commonly known as BBM between them i.e. Mansoor Ijaz and Mr. Husain Haqqani were in constant touch either

through BBM, e-mails or voice calling w.e.f. 9th to 12th May, 2011. In fact during relevant days, as many as 85 BBMs, voice calls and e-mails were exchanged between the two. Prima facie these communications form the most important piece of evidence regarding purported contacts between the two for the purposes of drafting the alleged Memo. In addition to these dates, Mansoor Ijaz also claims that he had electronic/telephonic interactions with Mr. Husain Haqqani on October, 28 and November, 1 2011. Therefore, in the interest of justice, it is appropriate to get the confirmation about the veracity and authenticity of these communications from the original company known as Research in Motion (RIM) based in Canada being the sole and exclusive custodian of such information. Therefore, the learned Attorney General is directed to contact the said Company RIM through Secretary, Ministry of Foreign Affairs for getting confirmation about the authenticity of the above mentioned electronic communications exchanged between Mansoor Ijaz and Mr. Husain Haqqani. This confirmation may be obtained at the earliest and in order to save and protect the forensic evidence and to scrutinize the same it should be produced before the Commission. As forensic evidence is likely to be collected from the company Research in Motion (RIM) based in Canada, therefore, the High Commission of Pakistan in Canada is directed to cooperate and assist the Commission as well.

11. Vide order dated 1st December, 2011, Mr. Husain Haqqani was directed not to leave the country without the permission of the Court. This order is kept intact.

12. Office is directed to put a separate note in the Chambers of Chief Justice of Pakistan along with the transcription of the press-conference dated 1st December, 2011 of Mr. Babar Awan, Sr. ASC along with replies/reactions of the Prime Minister of Pakistan dated 23rd December and 26th December, 2011 for passing appropriate orders.

13. The petitions are adjourned for a date to be fixed by the office after receipt of the report from the Commission."

2. Detailed marshaling of the facts of instant case are not called for because of the settled principle of law with regard to exercise of jurisdiction under Article 184(3) of the Constitution that the Court should not enter into disputed questions of fact involving appreciation of voluminous evidence. However, to decide the question brought before the Court relating to the public importance and enforcement of fundamental rights, there is no prohibition to consider facts, which do not require consideration of voluminous evidence. Reference may be made to the cases of *Nawaz Sharif v. President of Pakistan* (PLD 1993 SC 473), *Pakistan Muslim League (N) v. Federation of Pakistan* (PLD

2007 SC 642), *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879), *Dr. Mubashir Hassan v. Federation of Pakistan* (PLD 2010 SC 265) and *Al-Jehad Trust v. Lahore High Court* (2011 SCMR 1688). It is also settled practice of the Court that proceedings are not undertaken for academic purposes but on the basis of admitted or proven facts to resolve the controversy [*Dr. Mubashir Hassan's case(supra)*].

3. According to the contentions of Mr. Tariq Asad, ASC in respect of Memo dated 10th May, 2011 originated/drafted by Mansoor Ijaz in the circumstances, which have already been noted hereinabove information whereof was communicated by the media. Therefore, he instituted petition No.78/2011 on 21st of November, 2011 wherein *inter alia* it was prayed to constitute high level Commission to investigate into the matter of Memo written to US Government and to fix the responsibilities for damaging the sovereignty of the country. Prior to filing of this petition, another petition was filed by Wattan Party through Barrister Zafarullah Khan, ASC on 19th November, 2011 wherein *inter alia* it is stated that text of the Memo, which contains six points, are regarding the concessions, which will be given to America so that all the desired demands of American Army are met and Pakistan will change its security team and new national security team will make arrangements, provided the pressure of Pakistan Army on civilian governments is released or control by the Army on civilian government is removed through America's interference, etc. It was prayed that issue of secret Memo, issued after the approval of government and President be determined whether it is treasonous document or fabrication imputed to the government of day/President

and Judicial Commission be appointed for its investigation. Similarly, Mian Muhammad Nawaz Sharif and others submitted petitions on 23.11.2011 wherein other important facts were disclosed that copy of the transcript of the said conversation released by said Mansoor Ijaz as published in the issue of 18th November, 2011 of the Daily "the News" was available which was appended as annexure P/II. However, it was mentioned that in the meantime frightfully disturbing comments also came from the spokesman of Admiral Mike Mullen to the effect that:-

> "Admn. Mullen had no recollection of the Memo and no relationship with Mr. Ijaz. After the original Article appeared on Foreign Policy's website, he felt it incumbent upon himself to cheque his memory. He reached out to others who he believed might have had knowledge of such a Memo, and one of them was able to produce a copy of it".

It was prayed that the ones responsible and/or involved in initiating the process leading to the said memorandum; authoring the same; providing any assistance whatsoever in the process and the ones blessing or approving the said act, may graciously be identified.

4. Undisputedly, an Article has been published in Financial Times, London on 10th October, 2011, reference of which has been made in the short order, reproduced hereinabove. Subsequently, on 22nd October, 2011, DG ISI (Lieutenant General Ahmad Shuja Pasha) contacted the author of Article (Mansoor Ijaz, respondent) in London. The Federation, through Secretary Interior in counter affidavit, has not denied this fact except raising the objection that the DG ISI had gone to London without permission of Chief Executive/Prime Minister. It has

also not been disputed by the Federation that on 13th November, 2011 the Chief of Army Staff advised the Prime Minister that details of the Memo were gradually coming to light and that contents of the Memo, so far leaked, were highly sensitive in nature, therefore, position would have to be taken on the veracity or otherwise of the said issue. It was, therefore, important that complete details be collected as early as possible. He strongly recommended to the Prime Minister that Ambassador of Pakistan in the United States, who was best suited and informed on the matter, be called to brief the Country's leadership, as the time was of essence and that earlier they knew the truth, the better it would be to address the negative fallout for the country. On 15th November, 2011, the President asked him for a meeting. He met him at the Presidency at 1400 hours on the same day. The Prime Minister had already informed the President about his recommendations. The President told him that he had already decided to call Mr. Husain Haqqani for a briefing. On 16th November, 2011, another meeting was held between Chief of Army Staff, President and Prime Minister, wherein, it was decided that Mr. Husain Haqqani should come to Islamabad as early as possible. On 22nd November, 2011 at 1500 hours, a meeting was held in the Prime Minister House, which was attended by President, Prime Minister, Chief of Army Staff and DG, ISI, whereby, Mr. Husain Haqqani was called in to brief. Thereafter, the Prime Minister took the decision to ask for Mr. Husain Haqqani's resignation and also ordered for investigation.

5. Likewise, a copy of the letter dated 16th November, 2011 addressed to Mr. Asif Ali Zardari, President of Pakistan has been filed in Court by respondent Mr. Husain Haqqani through his

learned counsel Ms. Asma Jahangir, ASC. The letter, which has been relied upon by the respondent himself, needs to be reproduced hereinbelow as it discloses important aspects of the case:-

"EMBASSY OF PAKISTAN
3517 International Court, N.W.
Washington, D.C. 20008

November 16, 2011

Dear Mr. President,

Since my appointment as Ambassador of Pakistan to the United States in 2008, I have strived to serve the country and represent it forcefully in the country of my accreditation. I have faithfully followed the directions of the Prime Minister and the government in executing my duties and dealt with many crises that have bedeviled US-Pakistan ties.

It is unfortunate that I have been consistently vilified by those who oppose the democratically elected government as well as the opponents of good relations between the United States and Pakistan. This vilification has often included the baseless charge that somehow I undermine or defame the armed forces of Pakistan even though many members of my family have faithfully served the country as military officers. Like many Pakistanis, I have consistently opposed military intervention in politics but I have never connived, conspired or sought to undermine our armed forces or their leadership.

Most recently allegations have been made that I wrote a letter or memo on your behalf to the US Chairman Joint Chiefs, Admiral Michael Mullen, soon after the May 2 raid in Abbottabad that resulted in the killing of Al-Qaeda leader Osama Bin Laden. The alleged memo/letter proposed US support for civilian rule in return for changes in Pakistan's military leadership. I want to categorically state that at no point was I asked by you, or anyone else, in the government of Pakistan to write such a letter or memo and that I did not draft or deliver such a letter or memo nor did I ask anyone to do so on my behalf or that of the government or President of Pakistan.

I may add that as ambassador it is my official duty to communicate with US officials at all levels and I am perfectly capable of drafting and delivering all official communications myself.

It has been my privilege to serve Pakistan as its ambassador in the US but I cannot do so effectively under the shadow of suspicion and vilification. I, therefore, request that an inquiry be set up to ascertain the veracity of any specific allegations against me. Pending ascertainment of facts I propose to resign to your will in the national interest.

I am a Pakistani patriot who serves as ambassador at the pleasure of the Prime Minister and yourself. I do not wish to be a distraction from the more important challenges faced by our country and its government. As instructed, I am preparing to travel to Islamabad for consultation.

With highest consideration and regards.

Yours sincerely,

Sd/-
Mr. Husain Haqqani
Ambassador

His Excellency Asif A. Zardari
President of Pakistan
Islambad"

Two things are very prominent from the recitation of the above letter; (i) he had taken upon himself to make the reference of the letter/memo with reservation that he had not associated himself to originate/draft it on behalf of the President of Pakistan; (ii) he had made the reference to the incident, which took place on 2nd May, 2011, which resulted in killing of Al-Qaeda leader, Osama Bin Laden. Said incident generated the public interest in the length and breath of the country as a whole and the nation vociferously condemned the incident publically, as a consequence whereof a joint session of

Parliament was held on 13th and 14th May, 2011 to consider the situation in depth and as a result of discussion including presentation made on the relevant issues, a unanimous resolution was passed, which called upon the government to appoint an independent Commission of Inquiry for the said purpose. Accordingly, on 31st May, 2011 vide notification No.NIL/2011, Government of Pakistan, Ministry of Law, Justice and Parliamentary Affairs, a Commission was constituted u/s 3 and 5(1) of the Pakistan Commissions of Inquiry Act, 1956 headed by Mr. Justice Javed Iqbal, senior most Judge of the Supreme Court as President with four other members. The notification was followed by another notification dated 21st June, 2011 in supersession of earlier notification as the former notification was issued for the appointment of a learned Judge as President/Chairman of the Commission, without approval of the Chief Justice of Pakistan and such action apparently seemed to be contrary to the principle of independence of the judiciary, hence rectified. The Commission so constituted, in respect of incident of Abbottabad, continues its probe, which has not so far been concluded.

6. It might not be out of context to mention that the Memorandum does not disclose the name of any of the persons, who allegedly got it originated. However, subject to all just exceptions and without causing prejudice to the case of any of the parties, the letter of Mr. Husain Haqqani reproduced hereinabove, relied upon by the respondent's counsel herself discloses that Mr. Husain Haqqani was being involved on having written a letter or Memo on behalf of the President of Pakistan to Chairman US Joint Chiefs of Staff Admiral Mike Mullen soon after the 2nd May, 2011 raid in Abbottabad that resulted in

the killing of Al-Qaeda leader Osama Bin Laden. It is also not disputed that in the meeting between high-ups i.e. President, Prime Minister, Chief of Army Staff and DG ISI, resignation was tendered by Mr. Husain Haqqani, addressed to the Prime Minister at Islamabad on 22nd November, 2011, contents whereof read as under:-

"Islamabad, November 22, 2011

Resignation

Having served as Ambassador of Pakistan to the United States since 2008, I have faithfully fulfilled my obligations under your direction and guidance.

2. *I serve at your pleasure and pursuant to your instructions and under the terms of the contract of my appointment, I hereby tender resignation from the position entrusted to me by you.*

Sd/-
Mr. Husain Haqqani

The Honorable Prime Minister"

7. As far as an Ambassador of Pakistan is concerned, including the one who is on contract appointment is deemed to be holding the post in connection with the affairs of the Federation and is to be governed by the rules applicable to the general body of civil servants, such as the Government Servants (Efficiency and Discipline) Rules, Government Servants Conduct Rules and the Civil Services (Classification, Control and Appeal) Rules. Reference may be made to the case of *Abida Hussain v. Tribunal for N.A.69* (PLD 1994 SC 60).

8. A perusal of resignation of Mr. Husain Haqqani reveals that pursuant to the instructions of the Prime Minister and under the terms of contract of his appointment, he tendered resignation, which was accepted on 23rd November, 2011 vide notification No.Estt(I)-10/177/2008 w.e.f. 22nd November, 2011. It is equally significant to

note that in the letter dated 16th November, 2011, Mr. Husain Haqqani also requested to the President Asif Ali Zardari that an inquiry be set up to ascertain the veracity of any specific allegations against him. Further, pending ascertainment of facts, he proposed to resign in the national interest.

9. It may not be out of context to infer from the facts and circumstances of the case that existence of the Memo has been accepted because otherwise there was no necessity for holding four consecutive meetings between the Constitutional figures i.e. President, Prime Minister and the Chief of Army Staff as well as DG ISI and Mr. Husain Haqqani, and as a consequence of these meetings, resignation was tendered by the latter and order was also passed by Prime Minister for initiating probe in the matter.

10. Barrister Zafarullah Khan, ASC appearing in Constitution Petition No.77/2011, has contended that as a matter of right being a citizen, he has right to have access to information in respect of the Memo. He contended that Articles 5, 9 and 14 of the Constitution, deal with security of person; if there is no security, there is no liberty of individuals. The action of originating/drafting Memo in relation to the affairs of Pakistan, as has been mentioned therein, is tantamount to compromising security and sovereignty of Pakistan and if such effort had succeeded, Americans would have been allowed to control our security, the independent character of the government of the country would be totally lost. Thus, the security of life and dignity of citizens and of persons, which are fundamental right guaranteed under the Constitution, shall have seriously been violated. He placed reliance upon the cases of *Malik Asad Ali v. Federation of Pakistan* (PLD 1998

SC 161), *Wattan Party v. Federation of Pakistan* (PLD 2006 SC 697) and *in Re: Corruption in Hajj Arrangements* (PLD 2011 SC 963).

11. Mr. Tariq Asad, learned ASC appearing in CP No. 78/2011 has stated that when citizens know that their rulers were conspiring against people, Army, Intelligence Agencies, etc., it is against the dignity of man. Further, Articles 14 and 19A of the Constitution have to be read together to ascertain as to whether fundamental rights of citizens guaranteed under both these Articles have been violated or not. He further contended that Federation while denying the existence of the Memo, is not coming forward with the truth about the circumstances which led to issuance of Memo dated 10th May, 2011. Though the article published in the Financial Times suggests that the Memo was prepared on 10th May, 2011 outside the country, but it shows concern about the security inside Pakistan and security agencies of Pakistan. He further emphasized that seeking intervention, as is evident from the contents of the Memo, is against the dignity of the people and he being a citizen has no source to collect the information about genuineness or otherwise of the Memo, therefore, he has impleaded in his petition the COAS, DG ISI and others. He referred Sura Al-Mumtaĥanah wherein it has been ordained as under:-

> "O you who have believed, do not take My enemies and your enemies as allies, extending to them affection while they have disbelieved in what came to you of the truth, having driven out the Prophet and yourselves [only] because you believe in Allah, your Lord. If you have come out for jihad in My cause and seeking means to My approval, [take them not as friends]. You confide to them affection, but I am most knowing of what you have concealed and what you have declared. And whoever does

> it among you has certainly strayed from the soundness of the way." [60:1]

In Sura Al-Mā'idah it has been said that:-

> "But the Jews and the Christians say, "We are the children of Allah and His beloved." Say, "Then why does He punish you for your sins?" Rather, you are human beings from among those He has created. He forgives whom He wills, and He punishes whom He wills. And to Allah belongs the dominion of the heavens and the earth and whatever is between them, and to Him is the [final] destination." [5:18]

12. Mr. Rashid A. Razvi, learned Sr. ASC contended that the fact noted in the petitions as well as replies on behalf of the respondents in CMAs, touches the question of security, independence and sovereignty of this country; therefore, apparently, Articles 9 and 14 of the Constitution have been violated. There are so many cases, which indicate that this Court is bound to enforce the fundamental rights. Reliance was placed in the cases of *Miss Benazir Bhutto v. Federation of Pakistan* (PLD 1988 SC 416), *Pakistan Muslim League (N) v. Federation of Pakistan* (PLD 2007 SC 642), *Shahida Zaheer Abbasi v. President of Pakistan* (PLD 1996 SC 632), and *Zulfiqar Mehdi v. Pakistan International Airlines Corporation* (1998 SCMR 793) and *in Re: Corruption in Hajj Arrangements in 2010* (PLD 2011 SC 963). As in the instant case fundamental rights have been violated, therefore, this Court is bound to enforce the same because an important question of public importance has been raised before this Court and Court has no discretion to decline the relief as it is possible under Article 199 of the Constitution. And principle of judicial restraint cannot be applied to deprive the citizens as their security/integrity of the entire country is involved.

13. He further stated that objection raised by the learned counsel for Mr. Husain Haqqani that issue presented before the Court falls within the definition of sensitive political question, therefore, the Court may not go into the same, has no relevance as there is absolutely no political question and the matter relates to civil liability as well as criminal responsibility subject to establishing that Memo was originated and executed to compromise the integrity/security of this Country. He has referred the case of *Mehmood Khan Achakzai v. Federation of Pakistan* (PLD 1997 SC 426) in support of his arguments.

14. Senator Muhammad Ishaq Dar, appeared in person in Constitution Petition No. 80/2011 and contended that overall perspective is linked with violation of fundamental rights. None of the respondents has disputed the contents of the Memo, however, without disclosing the name, what was the object and motivation of its dissemination. He further stated that probe of the Memo has been conceded by all of them except raising the dispute in respect of forum. He stated that he had written a letter to Parliamentary Committee on National Security for the purpose of taking up the issue, but on having seen that no progress was made out, he approached this Court for redressal of his grievance. He further has contended that the Committee [of which he himself is a member] was originally comprised of 17-members but presently strength of the Committee has reduced to 14-members. He was also of the opinion that in view of the rules framed by the Committee and considering the past history of the Committee, it would not be able to achieve the progress beyond a threshold. He explained that this Committee was notified on 11th November, 2008, whereas, the Memo Issue cropped up on 10th May,

2011 and was brought to the lime light after publication of Article written by Mansoor Ijaz on 10th October, 2011 in the Financial Times, London. Therefore, the Committee would not be authorized to look into this matter. Without prejudice to the arguments, he added that not a single report so far has been received from the Committee and like other Committees it has failed to deliver, therefore, suggestions made by the respondent in his reply that let the matter be probed into by the Parliamentary Committee on National Security, is not in accordance with its mandate.

15. Mr. Attique Shah ASC and Mr. Muhammad Rafiq Rajwana, ASC learned counsel in Petition No. 81/2011 framed following two questions:-

(i) Whether it is a case in which question of infringement of fundamental rights arises?

(ii) Whether the present lis involves controversy relating to judicially discoverable and manageable standards?

They have referred to the case of *Powell v. McCormack* [395 US 486(1969)] to substantiate their plea that the issue presented before the Court is justiciable and is to be resolved by the Judicial Forum. They have also relied upon the cases of *Mehmood Khan Achakzai* (supra), *Darshan Masih v. the State* (PLD 1990 SC 513) and *Muhammad Yasin v. Federation of Pakistan* (Civil Petition No.42 of 2011).

16. Mr. Attique Shah learned ASC also made a categorical statement that in the past few years, the people of Malakand Division have suffered atrocities and miseries, and have sacrificed life and

honour. In the operation of Swat, etc., apart from other damages and destruction suffered by the people of Malakand, two million people became IDPs and had lived in camps, only for the sovereignty and integrity of this country. Out of them, 4000 were members of the legal fraternity. The Memo contains concessions on the one hand, and the destruction on the other. This court is to appreciate that right from 1979 till date, only Peshawar is having the burden of 3 million Afghan migrants. We have lost dignity, profession and finances for the sake of integrity and sovereignty of this nation. At present on western borders spreading over 500 km, due to the activities of the troops, 21000 civilian casualties have occurred for the honour, integrity and sovereignty of the country, but through the Memo the concessions are being given. This is the result of serious active connivance amongst the responsible persons. There are drone attacks and activities of militants. Thus it is a case of serious violation of Fundamental Rights.

17. Dr. Salahuddin Mengal, ASC stated that by means of Article 2A, which is now the substantive part of the Constitution, adequate provision to safeguard the interests of judiciary have been provided including the sovereignty, security and dignity of this country; that the crux of the Memo is admitted by Mansoor Ijaz; DG ISI travelled to UK, inspected BBM and other computer material, submitted report to the President; a meeting was convened in the President House; Paras 1, 2, 3 of the Memo speak of the new National Security Team, etc.; this falls within the definition of violation of fundamental right of the people of this country. Previously, Amal Kansi was handed over to Americans, which was very unfortunate and it also needs to be probed. The Memo has shaken the entire nation. He has

stated that he is representing the elected members of the National Assembly who belong to Balochistan. His emphasis was mainly on the violation of Article 9 of the Constitution.

18. Sardar Asmatullah Khan, ASC has appeared in Constitution Petition No. 83/2011 and argued that the petitioners are former President and Speaker of Azad Jummu & Kashmir and are also citizen of Pakistan. It is a matter of violation of Articles 9 and 19A of the Constitution. He also referred to the case of *Shehla Zia v. WAPDA* (PLD 1994 SC 693).

19. Syed Ghous Ali Shah, ASC has appeared in Constitution Petition No. 84/2011 and adopted the arguments of other counsel for the petitioners, however, has added two things; firstly, it is absolutely incorrect that if the matter is decided by this Court, supremacy of the Parliament will be affected, because except the Court or a Tribunal constituted by it, no other forum would be in a position to conduct a thorough probe; secondly, the issue of Memo has affected every citizen of Pakistan and not just merely one or two institutions of the State. Thus, it is a matter of public importance with reference to enforcement of fundamental right.

20. Rana M. Shamim, ASC has appeared in Constitution Petition No.84/2011 and adopted the arguments of other learned counsel while relying upon the judgments cited by them. He, however, added that COAS has filed affidavit in this Court requesting for a probe into the matter, as sovereignty and integrity of the country is involved.

21. Mr. Naseer Ahmad Bhutta, ASC has appeared in Constitution Petition No.85/2011. He has adopted the arguments of other learned counsel for the petitioners.

22. Maulvi Anwar-ul-Haq, learned Attorney General for Pakistan appeared on behalf of the Federation and contended that as the Court has observed that respondents, COAS and DG ISI also fall within the definition of Federation, therefore, he is appearing on behalf of all of them. It is a matter of record that replies dated 14th December, 2011 on behalf of respondents Chief of Army Staff and DG ISI were duly filed under covering letter No.1(3)/2011-AGP dated 15th December, 2011 before this Court through the learned Attorney General for Pakistan. Similarly, affidavits of Chief of Army Staff and DG ISI dated 21st December, 2011, which were delivered by the M/o Defence vide letter No.1/603/Dir (Legal)/11 to the office of Attorney General for Pakistan, were filed in Court vide C.M.As No.5625/2011 and 5691/2011 respectively.

He further contended that there is no existence of Memo because a person, whose name is Mansoor Ijaz, is sitting outside the country who is an American National. And he on his own, originated/drafted a Memo allegedly to involve Ambassador of Pakistan in US, for which no cogent and tangible reasons exist. He contended that the Federal Government as well as the Presidency has already denied the contents of the said Article published on 10th October, 2011 and having taken notice of the same, proper steps have already been initiated by the competent authority, on the executive side as well as at Parliamentary Forum, for the purpose of conducting probe in the issue. The Parliamentary Committee is fully empowered not only to

probe into the matter but also to ensure production of such evidence as it deems necessary. He stated that the former Ambassador of Pakistan to US has put in his resignation on the call of Chief Executive and its acceptance has been notified.

23. Mr. Mansoor Ijaz has sent his reply through e-mail along with attached documents to substantiate the plea that Memo dated 10th May, 2011 originated at the behest of Respondent No.4, Mr. Husain Haqqani.

24. Ms. Asma Jahangir, Learned counsel appearing on behalf of Mr. Husain Haqqani has vehemently contested the petition for want of infraction, violation and breach of any of the fundamental rights of the petitioners, as according to her, absence of such elements is sufficient to render the petitions liable to be dismissed being not maintainable. She has contended that question of public importance and enforcement of fundamental rights should have direct link with each other, enabling this Court to exercise jurisdiction under Article 184(3) of the Constitution. There must be *bona fides* of the petitioners to approach this Court for a relief under Article 184(3). This Court has to safeguard the fundamental rights on the basis of cogent evidence, as merely on the basis of assumptions and presumptions, jurisdiction cannot be exercised as the same is likely to create chaos, if ultimately it is found that the declaration is not enforceable. Exercise of jurisdiction must not be vague and based on hypothesis. The remedy sought should strengthen and enforce the fundamental rights. Jurisdiction under Article 184(3) is remedial in character and exercise of the jurisdiction under this provision is conditioned by following three pre-requisites; namely, there is a question of public importance; such

question involves enforcement of the fundamental rights; and fundamental rights to be enforced are conferred by Chapter 1, Part II of the Constitution. When there is a question of fact, which is disputed, copious or too intricate, then restraint has to be exercised while exercising jurisdiction under Article 184(3). Actions or inactions of the State, which result in actual breach of fundamental rights, would warrant exercise of jurisdiction. The fundamental rights have to be established in tangible terms for establishing *bona fides*. Safeguard provided under the Constitutional jurisdiction for the due process of law has to be adhered to strictly, as now through Article 10A of the Constitution, it has become a fundamental right of the citizens. No infraction, breach or violation of Article 9, 14, and 19A, as is alleged, has been involved in the instant case. Therefore, petitions deserve to be dismissed with special costs. She has relied upon the judgments in the cases of *Miss Benazir Bhutto v. Federation of Pakistan* (PLD 1988 SC 416), *Pakistan Muslim League (N) v. Federation of Pakistan* (PLD 2007 SC 642), *Corruption in Hajj Arrangements, 2010:* (PLD 2011 SC 963), *Mrs. Shahida Zaheer Abbasi v. President of Pakistan* (PLD 1996 SC 632), *Syed Zulfiqar Mehdi v. Pakistan International Airlines Corporation through M.D.* (1998 SCMR 793), *K.B. Threads (Pvt.) Limited v. Zila Nazim, Lahore* (PLD 2004 Lahore 376), *Jamat-e-Islami v. Federation of Pakistan* (PLD 2008 SC 30), *Ch. Muhammad Siddique v. Government of Pakistan* (PLD 2005 SC 1), *Haji Muhammad Saifullah Khan v. The Federation of Pakistan* (1989 SCMR 22), *Grp. Capt. (Retd.) Cecil Sohail Chowdhry v. Federation of Pakistan* (1989 SCMR 523), *Al-Jehad Trust v. The President of Pakistan* (PLD 2000 SC 84), *Mian Muhammad Shahbaz Sharif v. Federation of Pakistan* (PLD 2004 SC 583), *Al-Jehad Trust v. Lahore High Court*

(2011 SCMR 1688), *In Re: Suo Moto Case No.10 OF 2007* (PLD 2008 SC 673), *Nawaz Sharif v. President of Pakistan* (PLD 1993 SC 473), *State Life Insurance Employees Federation v. Federal Government of Pakistan* (1994 SCMR 1341) and *Ashok Kumar Pandey v. The State of West Bengal* (AIR 2004 SC 280) = [(2004) 3 SCC 349].

25. Learned counsel for the parties have no serious reservations about the question of public importance in this matter to be one of the components to attract the jurisdiction of this Court under Article 184(3) of the Constitution coupled with the fact that three elements i.e. question of public importance, question of enforcement of fundamental right and fundamental rights sought to be enforced as conferred by Chapter 1, Part II of the Constitution, are required to be satisfied.

26. Learned Attorney General, however, conceded that petitions relate to matter of public importance.

27. According to the dictionary meaning, the term "public importance" could be defined that the question, which affects and has its repercussions on the public at large and it also includes a purpose and aim, in which the general interest of the community, particularly interest of individuals is directly or vitally concerned. In Words and Phrases Vol. 18-A, 'Great Public Importance' has been defined as under:-

> *"A case in which a court is proceeding without jurisdiction of person or subject matter involves a matter of 'great public importance' within rule providing that relief in nature of prohibition will not be granted by Supreme Court except in matters of great public importance."*

28. This Court had undertaken exercise to define this phrase in the cases of *Manzoor Elahi v. Federation of Pakistan* (PLD 1975 SC 66), *Miss Benazir Bhutto v. Federation of Pakistan* (PLD 1988 SC 416), *Maqbool Ahmad v. Pakistan Agricultural* (2006 SCMR 470), *Mian Muhammad Shahbaz Sharif v. Federation of Pakistan* (PLD 2004 SC 583) and *Shahida Zaheer Abbasi v. President of Pakistan* (PLD 1996 SC 632). In the case of *State of Jammu and Kashmir v. Bakshi Ghulam Mohammad* (AIR 1967 SC 122) some of the actions of Bakshi Ghulam Mohammad (the then Chief Minister) were challenged before the High Court and the High Court expressed the view that such acts would have been acts of public importance if he was in office but they ceased to be so, as he was out of office, when the notification was issued. The Supreme Court reversed the finding while observing that this was a misreading by the High Court and held that *what is to be inquired into in any case are necessarily past acts and it is because they have already affected the public well-being or their effect might do so, that they became matters of public importance*. It was further held that *it is of public importance that public men failing in their duty should be called upon to face the consequences. It is certainly a matter of importance to the public that lapses on the part of the Ministers should be exposed*. In the case of *Sohail Butt v. Deputy Inspector General of Police* (2011 SCMR 698) it was held that *the word 'public importance' can only be defined by a process of judicial inclusion or exclusion because the expression public importance is not capable of any precise definition and has not a rigid meaning, therefore, each case has to be judged in the circumstances of that case as to whether the question of public importance is involved. But it is settled that public importance must include a purpose or aim in*

which the general interest of the community as opposed to the particular interest of the individuals is directly and vitally concerned.

29. This Court in Manzoor Elahi's case (supra) has observed that *in order to acquire public importance the case must obviously raise a question, which is of interest to, or affects the whole body of people or an entire community. In other words, the case must be such as gives rise to questions affecting the legal rights or liabilities or the public or the community at large, even though the individual, who is the subject matter of the case, may be of no particular consequence*. In the case of *Munir Hussain Bhatti advocate v. Federation of Pakistan and others*(PLD 2011 SC 407) it has been held that a wealth of jurisprudence is available on this subject. The issue, therefore, which has to be addressed while deciding the respondent's preliminary objection is whether or not these petitions raise issues of public importance. Furthermore, in making this determination, the Court is not to be swayed by expressions of public sentiment nor is it to conduct an opinion poll to determine if the public has any interest in an issue being agitated before the Court under Article 184(3) of the Constitution. Instead, a whole range of factors need to be kept in mind, which have, over the years, been expounded in numerous precedents of this Court. It is important to keep these precedents in view because, as noted in an earlier judgment, it is through the use of precedent that the contours of the law are constantly defined. In the case of *Muhammad Shahbaz Sharif* (PLD 2004 SC 583) it has been held that in order to acquire public importance the case must obviously raise a question, which is of interest to, or affects the whole body of people or an entire community. What is essential is that the question

so raised must relate to the interest of whole body of the people or an entire community. To put it in other words, the case must be such, which raises a question affecting the legal rights or liabilities of the public or the community at large, irrespective of the fact that who raised such question. In the case of *Kellner v. District Court* [256 P.2d 887 (1953) 127 Colo 320], the Supreme Court of Colorado has laid down that as to the question of what is of great public importance, *sole determination in all cases, according to the peculiar features of each, is within the province of the court. In some cases there may be an adequate remedy at law, but not speedy. In some instances, and we believe applicable here it is apparent on the face of the pleadings and record before us*. The Supreme Court of Judicature, UK in the case of *the Queen on the Application of Compton v. Wiltshire Primary Care Trust* [(2008) EWCA Civ 749] has held that the first governing principle requires the judge to evaluate the importance of the issues raised and to make a judgment as to whether they are of general public importance. In the case of *Jamat-e-Islami v. Federation of Pakistan* (PLD 2009 SC 549), the dual office of General Pervez Musharraf as Chief Executive and the Chief of Army Staff was challenged. Although the petitions were dismissed being not maintainable, however, in the majority view, it was held that the condition precedent for following the precedent must be question of public importance. The learned Judge, who authored the majority judgment, accepted the principle that jurisdiction under Article 184(3) of the Constitution cannot be exercised unless the matter is of public importance involving the fundamental rights conferred by Part-II Chapter 1 of the Constitution. In the case of *Muhammad Yasin v.*

Federation of Pakistan (Civil Petition No.42 of 2011) it has been held as under:-

> "It is clear from the text of this article that the Court's powers and jurisdiction are broad in scope. We have elaborated the contours of our jurisdiction in a recent judgment wherein it has been held that *"Article 184(3) ibid empowers this Court to exercise jurisdiction thereunder whenever the Court considers a matter to: (i) be of public importance and (ii) that it pertains to the enforcement of fundamental rights. The determination on both these counts is made by this Court itself keeping the facts of the case in mind".* The exercise of jurisdiction by the Supreme Court, thus is not dependent on the existence of a petitioner. We have also before us precedent where this Court has exercised jurisdiction under Article 184(3) even where a legal proceeding in respect of the same matter was pending or had been finally decided by a High Court. Reference in this behalf can be made to *Suo Moto Case No.10 of 2009,* (2010 SCMR 8845)."

30. As noted above, existence of Memo dated 10th May, 2011 has not been denied by the Federation, otherwise there was no necessity for holding four meetings between the Constitutional and other senior figures i.e. President, Prime Minister, the Chief of Army Staff and DG ISI as well as Mr. Husain Haqqani and as a consequence of these meetings tendering of resignation by Mr. Husain Haqqani and initiation of probe by the Prime Minister. What was the nature of discussion between all of them is not available as only the Chief of Army Staff and DG ISI have submitted their replies as well as counter affidavits whereas the Federation through the Secretary Interior has also not disputed this fact but without sharing information with the Court on account of which two important decisions referred to hereinabaove were taken. The persons who represent the masses, are bound by the Constitution but when any decision is taken, it also creates curiosity amongst masses to know the reality about the events, which persuaded the Constitutional figures to take prima facie extreme steps like obtaining resignation from respondent No.4 (Mr.

Husain Haqqani) and directing the probe. We may mention here that this angle of the case has been examined in view of the admitted facts as it has been pointed out hereinabove. The body of the people, who are the citizens of this country, are always interested in well being and security of their beloved country. There are not only many people who are interested to know the reality but the media, both electronic and print, had highlighted the issue extensively. Rightly so, because as a living nation, they have every right to know about the affairs of their country.

31. In view of above principle/observations and after considering the nature of the issue it is observed that the expression "public importance" is tagged with the enforcement of the Fundamental Rights as a precondition of the exercise of the power. This should not be understood in a limited sense, but in the gamut of the constitutional rights of freedoms and liberties, their protection and invasion of such freedoms in a manner which raises a serious question regarding their enforcement. Such matters can be viewed as of public importance, whether they arise from an individual's case touching his honour, liberty and freedom, or of a class or a group of persons as they would also be legitimately covered by this expression. Thus, it is held that *"to delineate measures with a view to ensure enforcement of fundamental rights, a probe is called for to ascertain the* ***ORIGIN, AUTHENTICITY and PURPOSE*** *of creating/drafting for delivering it to Admiral Mike Mullen through James Jones"*, thus, a question squarely fallen within the definition of term 'public importance'.

32. Now next question for examination is as to whether the matter involves the enforcement of any of the fundamental rights conferred by Chapter 1, Part-II of the Constitution of Pakistan.

33. Ms. Asma Jahangir, learned ASC has vehemently contended that the petitioners have failed to show the infringement of any of their fundamental rights as they have prayed for conducting inquiry/probe into the matter, and such prayer does not confer any fundamental right as per Constitution.

34. On the other hand, learned counsel for the petitioners in rebuttal have stated that in the petitions they have categorically stated that the matter involves the sovereignty and integrity of the country, therefore, their right to life is involved. Further, they contended that this Court has jurisdiction in case of any threat to the fundamental rights of the petitioners, to conduct probe to enforce fundamental rights envisaged by the Constitution.

35. On having gone through facts of the case and the judgments cited by the learned counsel for the parties, following principles are highlighted to exercise jurisdiction under Article 184(3) of the Constitution:-

(1) It is not necessary that who has approached the Court for the enforcement of fundamental rights as an information has to be laid before the Court, may be by an individual or more than one person.

(2) The case must involve decision on an issue in which the public-at-large is interested.

(3) The case also relates to the enforcement/violation of any of the fundamental rights mentioned in Chapter I, Part-II of the Constitution, namely, Articles 8 to 28.

(4) If it is permissible for the next friend to move the Court on behalf of a minor or a person under disability, or a person under detention or in restraint, then why not a person, who were to act bona fide to activise a Court for the enforcement of the Fundamental Rights of a group or a class of persons who are unable to seek relief.

(5) Under Article 184(3), it is not a traditional litigation which, of course, is of an adversary character where there is a lis between the two contending parties, one claiming relief against the other and the other resisting the claim.

(6) The Court while dealing with a case under Article 184(3) of the Constitution is neither bound by the procedural trappings of Article 199 nor by the limitations mentioned in the said Article for exercise of power by the High Court.

(7) The provisions of Article 184(3) of the Constitution are self-contained and they regulate the jurisdiction of this Court on its own terminology.

(8) In a given case where a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, it should directly interfere, and any rigid or a strait-jacket formula prescribed for enforcement of the Rights would be self-defeating.

(9) In order to ascertain the violation of a fundamental right, the Court has to consider the direct and inevitable consequences of the action which is sought to be remedied or the guarantee of which is sought to be enforced.

36. It is also significant to note that the Court seized with the inquisitorial kind of proceedings is bound to be careful while examining the matter placed before it, lest it should cause injustice or prejudice to any of them and shall make reference of the material/ documents or circumstances, which are not disputed between them. As in the instant case reference has only been made to the documents in respect whereof the parties before the Court have no controversial attitude against each other and despite it, final determination about the civil liability and criminal culpability has to be made by the forum empowered to determine the extent of the involvement subject to following the due process as defined in Articles 4 and 10A of the Constitution. In short order dated 30.12.2011 except appointing a Commission to probe into the matter for the purpose of delineating measures with a view to ensure enforcement of fundamental rights i.e. Articles 9, 14 and 19A to ascertain the **origin, authenticity and purpose of creating/drafting of Memo** for delivering it to Chairman of Joint Chiefs of Staff, Admiral Mike Mullen through General (R), James Logon Jones, Former US National Security Advisor. No reference concerning involvement of any of the respondents has been made. Inasmuch as in the earlier order dated 1st December, 2011 after having observed that no sooner the issue of Memo came to limelight, former Ambassador of Pakistan tendered his resignation. We do not want to attribute to him anything adverse on account of his

involvement as he is entitled to due respect but we desired that he should fully cooperate with the Commission and during pendency of the cases before this Court he would not be leaving the country without prior permission of this Court. As far as later portion of leaving the country without permission of this Court is concerned, it shall be dealt with later separately, in the light of arguments of Ms. Asma Jahangir, ASC. However, in view of the fact that instant proceedings are inquisitorial in nature, the expression in contradiction to adversarial proceedings has been defined in following paras in *Watan Party's case* (PLD 2011 SC 997):-

> "42. Adversarial proceedings are defined as proceedings relating to, or characteristic of an adversary or adversary procedures. The term ""adversarial" has been defined in the Concise Oxford English Dictionary, Eleventh Edition, Revised, as under:-.
>
> > "1. Involving or characterized by conflict or opposition. 2. Law (of legal proceedings) in which the parties involved have the responsibilities for finding and presenting evidence."
>
> In "Advanced Law Lexicon" the term "Adversarial Process" has been defined as under: -
>
> > "A process in which each party to a dispute puts forward its case to the other and before a neutral judge, soliciting to prove the fairness of their cases."
>
> In the American Heritage Dictionary of the English Language, Fourth Edition: Published by Houghton Mifflin Company, the term is defined as under:-
>
> > "Relating to or characteristic of an adversary; involving antagonistic elements: "the chasm between management and labor in this country, an often needlessly adversarial …..atmosphere" (Steve Lohr)."
>
> In Collins English Dictionary - Complete and Unabridged, it is defined as under:
>
> > "1. Pertaining to or characterized by antagonism and conflict
> > 2. (Law) Brit having or involving opposing parties or interests in a legal contest US term adversary"
>
> The adversarial system (or adversary system) is a legal system where two advocates represent their parties' positions before an impartial person or group of people, usually a jury or judge, who attempt to determine the truth of the case, whereas, the inquisitorial system has a judge (or a group of judges who work together) whose task is to investigate the case.
>
> 43. The adversarial system is a two-sided structure under

which criminal trial courts operate that pits the prosecution against the defence. Justice is done when the most effective and rightful adversary is able to convince the judge or jury that his or her. perspective on the case is the correct one.

44. As against the above, the term "inquisitorial" is defined in "Concise Oxford English Dictionary, Eleventh Edition, Revised as under: -

> "1. Of or like an inquisitor.
> 2. Law (of performing an examining role)"

In "Advanced Law Lexicon" 3rd Edition, 2005, it is defined in the following words:

> "The system of criminal justice in most civil law nations, where judges serve as prosecutors and have broad powers of discovery."

Webster's New World College Dictionary Copyright 2010, by Wiley Publishing, Inc., Cleveland,. Ohio defines it as under --

> "1. of or like an inquisitor or inquisition
> 2. inquisitive; prying"

Collins World English Dictionary defines it as under:-

> "1. of or pertaining to an inquisitor or inquisition.
> 2. exercising the office of an inquisitor.
> 3. law.
> a. pertaining to a trial with one person or group inquiring into the facts and acting as both prosecutor and judge.
> b. pertaining to secret criminal prosecutions.
> 4. resembling an inquisitor in harshness or intrusiveness.
> 5. inquisitive; prying.

45. The Free Dictionary describes it in part, as "a method of legal practice in which the judge endeavours to discover facts whilst simultaneously representing the interests of the State in a trial". Under the inquisitorial model, the obligations of a Judge are far greater and he is no longer a passive arbiter of proceedings but an active member of the fact finding process.

46. An inquisitorial system is a legal system where the court or a part of the court is actively involved in investigating the facts of the case, as opposed to an adversarial" system where the role of the court is primarily that of an impartial referee between the prosecution and the defense. Inquisitorial systems are used in some countries with civil legal systems as opposed to common law systems. Also countries using common law, including the United States, may use an inquisitorial system for summary hearings in' the case of misdemeanors such as minor traffic violations. In fact, the distinction between an adversarial and inquisitorial system is theoretically unrelated to the distinction between a civil legal and common law system. Some legal scholars consider the term "inquisitorial" misleading, and prefer the word "non-adversarial".

47. The inquisitorial system applies to questions of criminal procedure as opposed to questions of substantive law; that is, it

> determines how criminal enquiries and trials are conducted, not the kind of crimes for which one can be prosecuted, nor the sentences that they carry. It is most readily used in some civil legal systems. However some jurists do not recognize this dichotomy and see procedure and substantive legal relationships as being interconnected and part of a theory of justice as applied differently in various legal cultures.

37. Thus, following the principle/judicial consensus that while interpreting Article 184(3) of the Constitution, the interpretative approach should not be ceremonious observance of the rules or usages of the interpretation but regard should be had to the object and purpose for which this Article is enacted i.e. the interpretative approach must receive inspiration from the triad of provisions which saturate and invigorate the entire Constitution including the Objectives Resolution (Article 2-A), the fundamental rights and the directive principles of State policy so as to achieve democracy, tolerance, equity and social justice according to Islam. The term as defined in article 9, 14 and 19A of the Constitution is interpreted hereinbelow with reference to matter under discussion.

38. It is observed that the preamble which is now the substantive part of the Constitution by means of Article 2A, commands that *it is the will of the people of Pakistan to establish an order wherein the integrity of the territories of the Federation, its independence and all its rights, including its sovereign rights on land, sea and air, shall be safeguarded; so that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and made their full contribution towards international peace and progress and happiness of humanity*. These words of the Constitution comprehensively define the stature of an

independent Pakistan where the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the world. Undoubtedly, this provision of Constitution has overwhelming nexus with the fundamental rights of the citizens of Pakistan (people) specifically guaranteed under Articles 9 and 14 of Chapter 1, Part-II of the Constitution.

39. The expression 'life' implied in Article 9 of the Constitution, is also used in the corresponding Article 21 of the Indian Constitution. Article 9 of the Constitution of Pakistan prescribes that "no person shall be deprived of life or liberty save in accordance with law". Whereas in the Indian Constitution it reads that "no person shall be deprived of his life or personal liberty except according to procedure established by law". Fourteenth Amendment of the American Constitution provides, "no State shall deprive any person of life, liberty, or property without due process of law". In *Shehla Zia's case* (ibid), it is held that the word "Life" used in Article 9 of the Constitution is very significant as it covers all facets of human existence. The word "life" has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. In the case of *Munn v. Illinois* (100 U.S. 1) Field, J., in his dissenting opinion has held that *by the term "life," as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by*

the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to everyone with life for its growth and enjoyment, is prohibited by the provision in question if its efficacy be not frittered away by judicial decision. The Indian Supreme Court in *Francis Coralie Mullin v. The Administrator* (AIR 1981 SC 746) has held that *any act which damages or injures or interferes with the use of any limb or faculty of a person either permanently or even temporarily, would be within the inhibition of Article 21. Fundamental right to life which is most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and validity endure for years to come and hence the dignity of individual and the worth of human person*. It was further observed as under:-

> "It is the fundamental right of everyone in this country ... to live with **human dignity** free from exploitation. This right to live with human dignity enshrined in A. 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of A. 39, A. 41 and A. 42 and at least, therefore it must include protection of the health and strength of the workers men and women, and of the tender age of children against abuse, opportunities an facilities for children to develop in a healthy manner and in conditions of freedom and **dignity**, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State has the right to take any action which will deprive a person of the enjoyment of these basic essentials." [emphasis supplied]

In this case, the term “life” has been defined with an expansive spirit, according to which every limb or faculty, with which life is enjoyed is protected by Article 21 and a fortiori, which would include the faculties of making and feeling. The expression “life” in this Article does not connote mere animal existence or continuing drudgery through life. It means something much more than just physical survival. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the work place and leisure. It would be advantageous to reproduce relevant extracts from the case of *Bandhua Murti Morcha v. Union of India* [1984 (3) SCC 161]:-

> “It is the fundamental right of everyone in this Country, assured under the interpretation given to Arty. 21 by this court in Farancis Mullin's case (1981) 1 SCC 608 to live with **human dignity**, **free from exploitation**. This right to live with human dignity enshrined in Art.21 derives its life breath from the Directive principles of State Policy and Particularly cls. (e) and (f) of Art. 39 and Arts. 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities an facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just as human conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with **human dignity** and no state neither the central Government has the right to take any action which will deprive a person of the enjoyment of these basic essentials.” [emphasis supplied]

Similarly, in the case of *Sunil Batra v. Delhi Administration* (AIR 1978 SC 1675) the word “life” has been defined as “every act which **offends against or impairs human dignity** would constitute deprivation protanto of this right to live and it would have to be in accordance with

reasonable, fair and just procedure established by law which stands test of other fundamental rights. In the case of *Bira Kishore Naik v. Coal India Ltd.* (AIR 1986 SC 2123) it has been held that Article 21 of the Constitution guarantees right to life, which right would be meaningless unless the citizen has a right to live with dignity. In the case of *Common Cause v. Union of India* (AIR 1999 SC 2979) it has been held that the rights also include the right to live with human dignity and all that goes along with. Same view was taken in the cases of *Bandhua Mukti Morcha v. Union of India* (AIR 1984 SC 802) = [(1984)2SCR 67] and *N. P. S. NPC Teachers' Association v. Union of India* (AIR 1993 SC 369).

40. In the case of *Shehla Zia* (ibid) citizen having apprehension against construction of a grid station in residential area sent a letter to the Supreme Court for consideration as human rights case raising two questions; namely, whether any Government agency has a right to endanger the life of citizens by its actions without the latter's consent; and secondly, whether zoning laws vest rights in citizens which cannot be withdrawn or altered without the citizen's consent. The Court declared the petition to be maintainable on the ground that if there are **threats** of serious damage, effective measures should be taken to control it and it should not be postponed merely on the ground that scientific research and studies are uncertain and not conclusive. The word 'life' constitutionally is so wide that the danger and encroachment complaint would impinge fundamental right of a citizen. In the case of *Bank of Punjab v. Haris Steel Industries* (PLD 2010 SC 1109), the matter was related to one of the gravest financial scams in the banking history of Pakistan as a result of which

the Bank stood cheated of an enormous amount of around eleven billion rupees which amount of money in fact belonged to around one million innocent depositors including depositors of small amounts of money **whose life savings and property had come under serious threat,** therefore, it was held that the facts cast an obligation on the Supreme Court to move in to protect and defend the right of property of such a large section of the population i.e. about one million depositors and customers of the Bank which right of property stood guaranteed to them by Art.24 and Art.9 of the Constitution and it was in view of the facts and circumstances that the Bank had felt compelled to approach Supreme Court under Art. 184(3) of the Constitution read with O.XXXIII, R. 6 of the Supreme Court Rules, 1980 through Constitutional petition. It was further held that Supreme Court was possessed of power to make any order of the nature mentioned in Art.199 of the Constitution, if in its opinion, a question of public importance relating to the enforcement of any of the Fundamental Rights was involved in the matter. In the case of *D. A. V. College, Bhatinda v. The State of Punjab* [AIR 1971 SC 1731] the Indian Supreme Court has held that whether or not ultimately any fundamental right in fact is threatened or violated so long as a **prima facie case of such a threat or violation** is made out a petition under Art. 32 must be entertained. So long as the petitioner makes out a prima facie case that his fundamental rights are affected or threatened he cannot be prevented from challenging that the law complained of, which affects or invades those rights, is invalid because of want of legislative competence. In the case of *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar* (AIR 1958 SC 538) it has been held that quite conceivably the conduct of an individual person or

company or a group of individual persons or companies may assume such a dangerous proportion and may so prejudicially affect or threaten to affect the public well-being as to make such conduct a definite matter of public importance urgently calling for a full inquiry.

41. The term 'life with dignity', defined by the Superior Courts, pointed out hereinabove, *prima facie* suggests that a citizen who is constitutionally under the obligation to be loyal to State, the Constitution and the law, whatever his status may be, also remains under the command of the Constitution to have an honoured place amongst the nations of the world. The attempt/act of threatening to the dignity of the people, collectively or individually, concerning the independence, sovereignty and security of their country, *prima facie*, raises a serious question tagged/linked with their fundamental rights. The existence of Memo dated 10th May, 2011 may have effects of not only compromising national sovereignty but also its dignity. The loyal citizens have shown great concern, to live in the comity of nations with dignity and honour, as according to expanded meanings of 'life', the citizen have a right to ask the State to provide safety to their lives from internal as well as external threats. Undoubtedly this nation had achieved independence at the cost of great sacrifices. Inasmuch as, at present security forces are fighting against the unscrupulous persons involved in terrorism, not in a particular part but throughout the country, without any distinction.

42. Learned counsel for respondent No.4 emphasized that there must be a serious question involving enforcement of the fundamental rights. *Prima facie*, what could be more threat to the life of citizens who are loyal to this country and the Constitution where on

the basis of activities, which resulted in originating Memo dated 10th May, 2011. Its existence, as discussed above, has been established. Inasmuch as, the Federation itself, is of the opinion that the matter requires to be probed into and the initiative apparently has been taken in view of the letter dated 16th November, 2011, copy of which has been produced by learned counsel for respondent No.4, in which besides mentioning other facts he himself has offered for a probe into the issue of the Memo, therefore, in such like cases when cogent, concurrent and undisputed facts have come on record about the existence of the Memo dated 10th May, 2011 and contents whereof have threatened the independence, sovereignty and security of the country, the loyal citizens are, *prima facie*, justified to raise a voice about the denial of their fundamental rights under Articles 9, 14 and 19A of the Constitution, which are tagged with the question of public importance, thus, call for their enforcement. Learned counsel, however, stated that for enforcement of the "Fundamental rights to have access to information, under Article 19A of the Constitution", alternate remedy is available under the Freedom of Information Ordinance, 2002 (Promulgated on 26th October, 2002). On having gone through the scheme of the Ordinance, we are not inclined to agree with her, as in the instant case, enforcement of fundamental rights in terms of Article 184(3) of the Constitution has been prayed for.

43. Subject to all just exceptions, Mansoor Ijaz has shared with DG ISI evidence to prove that he had written Memo, which the latter brought into the notice of Chief of Army Staff, so on and so forth. But surprisingly, in the reply submitted by Mr. Hussain Haqqani,

he has not mentioned about the briefing given to the President in the presence of Chief of Army Staff and D.G. ISI on 22nd November, 2011 in Prime Minister House, nor has he stated about the resignation. As far as D.G. ISI is concerned, he has furnished complete detail/description of his meeting held by him in London with respondent Mansoor Ijaz. On receipt of reply from Chief of Army Staff and D.G., ISI, copies of the same were handed over to all the parties for re-joinders, if any, by means of order dated 15.12.2011. No reply contradicting statement of both the respondents was filed, except vide CMA 5539/2011 Ms. Asma Jahangir filed affidavit, received from James Logan Jones, which he has not sent though Embassy of US nor the Government or to the Registrar of this Court. This affidavit, however, has been contradicted by Mansoor Ijaz, copies of which have also been supplied to all concerned. Interestingly, the Federation despite knowing all these facts had not taken position in respect of events which have been pointed in the concise statement of the Chief of Army Staff and D.G. ISI. For sake of arguments and to be on safe side at the moment without discussing or taking into consideration the statement of Mansoor Ijaz (respondent No.4) and James Jones, *prima facie* it is established that a Memo was drafted and prepared, which was sent to Mike Mullen, who initially denied its existence but later he admitted that he received such a Memo. Reference to the statement has been made in Constitution Petition No.79/2011 (Mohammad Nawaz Sharif v. Federation of Pakistan). These assertions are important to, *prima facie,* draw an inference that the memo episode has an impact on national security. The contents of memo, if believed to be true, *prima-facie,* are tantamount to compromising the security, sovereignty and

independence of the country. It is not desirable to discuss its contents, lest it should cause prejudice to either parties.

44. In all these petitions specifically amongst the respondents, no one has been sought to be held liable to take brunt of the civil liability or criminal culpability, except praying to probe into the matter and to identify those who are responsible in issuance of the derogatory Memo, though they have alleged threat to life, security, dignity as well as denial of fundamental right to have complete information about the issue wherein allegedly independence, sovereignty and security of the country is likely to be compromised. Seeking no relief against any of the respondents suggests that in accordance with the provisions of Article 184(3) of the Constitution, this Court is empowered to make a declaratory order to enforce any of the fundamental rights conferred by Chapter-I, Part II. Such kind of litigation falls within the category of inquisitorial proceedings and not adversarial, which is generally undertaken by the litigants against each other for determination of their respective rights in the common law countries.

45. Ms. Asma Jahangir, learned ASC also has not resisted the question of probe into the issue of Memo dated 10th May, 2011 and she made a categorical statement that as it is not a fundamental right of the petitioners to insist for inquiry according to their own choice, thus, subject to following the principle of due process of law, a probe, whether conducted by a Commission appointed by the Federal Government under Commissions of Inquiry Act, 1956 or by the Parliamentary Committee to whom the job is assigned by the Prime Minister of Pakistan, or by means of the departmental inquiry against

Mr. Husain Haqqani can be held. However, she opposed the probe by a body or the Commission constituted by this Court.

46. Learned Attorney General stated that the Parliamentary Committee on the National Security on the request of one of the petitioners, namely, Senator Ishaq Dar vide letter dated 21st November, 2011 addressed to the Chairman of the Committee constituted under a Joint Resolution of both the Houses has already commenced probe into the matter and its first meeting has been held on 25th November, 2011, therefore, let the Committee accomplish its assignment. As such, all the petitions being pre-mature, may be dismissed. As far as this aspect of the case is concerned, on the first day of hearing i.e. 1st December, 2011, the learned Attorney General for Pakistan had advanced the same arguments and without any reservation we had observed:-

> *"We are told that the Prime Minister of Pakistan has also announced that the Parliamentary Committee on National Security will probe into the matter. We do not know the mandate of the Committee. However, we have been informed that as far as this Committee is concerned, it has no constitutional backing, i.e. it has not been constituted under any provision of the Constitution. Be that as it may, if any incriminating evidence is collected by the Committee both for civil and criminal action by probing into the matter, we would welcome the same. During the pendency of the proceedings, we would appreciate if the outcome of the proposed inquiry by the Committee is shared with us, if possible."*

As in the instant case in view of the facts noted hereinabove, contained in the letter dated 16th November, 2011 addressed by the

former Ambassador Husain Haqqani to the President of Pakistan, the letter dated 28th November, 2011 and the request made in Constitution Petitions No.77 and 78/2011 as well as by other petitioners during course of the arguments including the learned Attorney General as well as the counsel for respondent No.4 Mr. Husain Haqqani all are one on the point that probe should be conducted in the matter. This fact itself indicates the importance of the issue, otherwise respondent No.4 and the Prime Minister in the letter dated 28th November, 2011 would have not referred the matter for probe by the Parliamentary Committee on National Security.

47. The mandate of the Parliamentary Committee as conferred by the Consensus Resolution passed at the conclusion of the Joint Sitting of Parliament (8th to 22nd October, 2008) is given below:-

> "This in-camera joint session of Parliament has noted with great concern that extremism, militancy and terrorism in all forms and manifestations pose a grave danger to the stability and integrity of the nation-state. It was recalled that in the past the dictatorial regimes pursued policies aimed at perpetuating their own power at the cost of national interest. This House, having considered the issue thoroughly and at great length is of the view that in terms of framing laws, building institutions; protecting our citizens from violence, eradication of terror at its roots, re-building our economy and developing opportunities for the disadvantaged, we all commit to the following:-
>
> 1. That we need an urgent review of our national security strategy and revisit the methodology of combating terrorism in order to restore peace and stability to Pakistan and the region through an independent foreign policy.
>
> 2. The challenge of militancy and extremism must be met through developing a consensus and dialogue with all genuine stakeholders.
>
> 3. The nation stands united to combat this growing menace, with a strong public message condemning all forms and manifestations of terrorism, including the spread of sectarian hatred and violence, with a firm resolve to combat it and to address its root causes.
>
> 4. That Pakistan's sovereignty and territorial integrity shall be safeguarded. The nation stands united against any incursions and invasions of the homeland, and calls upon the government to deal with it effectively.

5. That Pakistan's territory shall not be used for any kind of attacks on other countries and all foreign fighters, if found, shall be expelled from our soil.

6. That dialogue must now be the highest priority, as a principal instrument of conflict management and resolution. Dialogue will be encouraged with all those elements willing to abide by the Constitution of Pakistan and rule of law.

7. That the development of troubled zones, particularly the tribal areas, and NWFP (Pukhtoonkhwa), must also be pursued through all possible ways and legitimate means to create genuine stakeholders in peace. New economic opportunities shall be created in order to bring the less privileged areas at par with the rest of Pakistan.

8. That a political dialogue with the people of Balochistan, the redressal of grievances and redistribution of resources shall be enhanced and accelerated.

9. That the state shall maintain the rule of law, and that when it has to intervene to protect the lives of its citizens, caution must be exercised to avoid casualties of non-combatants in conflict zones.

10. That the federation must be strengthened through the process of democratic pluralism, social justice, religious values and tolerance, and equitable resource sharing between the provinces as enshrined in the Constitution of 1973.

11. That the state shall establish its writ in the troubled zones, and confidence building mechanisms by using customary and local communities (jirga) and that the military will be replaced as early as possible by civilian law enforcement agencies with enhanced capacity and a sustainable political system achieved through a consultative process.

12. That Pakistan's strategic interests be protected by developing stakes in regional peace and trade, both on the western and eastern borders.

13. That mechanisms for internal security be institutionalized by; paying compensation for victims of violence; and rehabilitate those displaced from their homes as soon as possible; that spill-over effects of terrorism be contained throughout the country and that public consensus be built against terrorism through media and religious participation.

14. That a Special Committee of Parliament be constituted to periodically review, provide guidelines and monitor the implementation of the principles framed and roadmap given in this Resolution. This House authorizes the Speaker to constitute the said Committee in consultation with the parliamentary leaders of both Houses. The Committee will frame its own rules upon meeting."

48. Senator Ishaq Dar explained that despite filing of application before the Parliamentary Committee no action was initiated, therefore, he had to file a petition before this Court on 23.11.2011 as according to his contention the first meeting of the Committee was convened after issuance of letter dated 28th November, 2011, the Principal Secretary to Prime Minister, whereby the matter was referred to Parliamentary Committee on National Security for probe. Reference to this letter has already been made in the short order dated 30.12.2011. He however, further stated that in pursuance of consensus resolution passed at the conclusion of in-camera Joint Sitting of Parliament (8th to 22nd October, 2008) a Committee was constituted. As per contents of the resolution, the joint session of Parliament noted with great concern that extremism, militancy and terrorism in all forms and manifestations posed a grave danger to the stability and integrity of the nation/state. It may be recalled that in the past, the dictatorial regimes pursued policies aimed at perpetuating their own rule at the cost of national interest, therefore, the Committee would not be empowered for conducting probe in this matter.

49. Following the above consensus resolution dated 22nd October, 2008 the rules of procedure for the Parliamentary Committee on National Security were framed on 17th November, 2008. Its preface categorically stated that the Parliamentary Committee on National Security was constituted with specific terms of reference **to periodically review, provide guidelines and monitor the implementation of the principles framed and roadmap given in the Resolution**. Essentially, these rules and resolution are self

explanatory, which calls for no interpretation by this Court with reference to undertaking a probe into the issue of Memo dated 10th May, 2011. Despite serious issues raised qua its jurisdiction to probe into the origin of Memo dated 10th May, 2011, in the order dated 1st December, 2011 and 30th December, 2011, it was observed that if evidence was collected, it may be shared with this Court, if possible, and we again reiterate the same in the interest of country and the nation.

50. Apprehension of the learned counsel about non-observance of the principle of due process by the commission set up by the Court, as it has been argued by her, is unfounded. Instant proceedings are inquisitorial in its nature and the Commission to whom job of probing into the matter is entrusted, shall be bound to discharge its function to draw its proceedings following the judicial norms, i.e. fair opportunity of hearing, right to participate in the proceedings with a view to assist the Commission for reaching at a correct conclusion. Learned counsel in support of her contention relied upon the judgment in the case of *Aftab Shaban Mirani v. President of Pakistan* (1998 SCMR 1863), relevant para wherefrom is reproduced hereinbelow:-

> 12. ..... It may be observed that by now it is a well settled proposition that a person cannot be condemned without providing him a fair opportunity to meet rte allegation. In this regard reference may be made to the case of Government of Balochistan through Additional Chief Secretary v Azizullah Memmon and 16 others (PLD 1993 SC 341), wherein after referring certain case law the following conclusion was recorded by this Court as to the right of access to Courts and justice:--
>
> > "12. Another aspect ..... This aspect of the case was considered in Sharaf Faridi v Islamic Republic of Pakistan (PLD 1989 Karachi 404) when after referring to Syed Abul A'la Maudoodi's case (PLD 1964 SC 673 at

710) and Ms. 13enazir Bhutio s ease (PLD 1989 SC 416) observed as follows:-

'The right of 'access to justice to all' is a well-recognised inviolable right enshrined in Article 9 of the Constitution. This right is equally found in the doctrine of 'due process of law'. The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. This conclusion finds support from the observation of Willoughby in Constitution of United States, Second Edition, Vo1.II at page 1709 where the term 'due process of law' has been summarised as follows:--

(1) He shall have. due notice of proceedings which affect his rights.

(2) He shall be given reasonable opportunity to defend.

(3) That the Tribunal or Court before which his rights are adjudicated is so constituted as to give reasonable assurance of his honesty and impartiality, and

(4) That it is a Court of competent jurisdiction. "

13. The above extract indicates what are the basic requirements of the doctrine "due process of law", which is enshrined inter alia in Article 4 of our Constitution. It is intrinsically linked with the right to have access to justice, which this Court has held inter alia in the above report as a fundamental right. This right inter alia includes the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. A person cannot be said to have been given a fair and proper trial unless he is provided a reasonable opportunity to defend the allegation made against him. In the instant case the Returning Officer was seized of the question, whether respondent No.1 was qualified to be a candidate for the office of the President. His decision that respondent No.1 was not qualified to be elected as a member of the Parliament would have entailed his non-seating as a member of the Senate, which was a question of the nature, which could not have been adjudicated upon in a summary inquiry under Rule 5(3)(a) of the rules, particularly when the correctness of the contents of the interview was not admitted by respondent No.1.

She also relied upon the case of *Muhammad Nadeem Arif v. Inspector-General of Police, Punjab, Lahore* (2011 SCMR 408), wherein it has been observed that the right of “access to justice to all”

is a well recognized inviolable right enshrined in Article 9 of the Constitution and is equally found in the doctrine of "due process of law". It includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial court or tribunal.

51. The crux of the above judgments persuades us to hold that right of due process, *inter alia,* envisages the right to have a fair and proper trial and right to have impartial court or tribunal. The phrase/expression in the principle highlighted therefrom are referable to the basic judicial function, which necessarily are known to judicial minded persons. For the safe administration of justice we may observe that the principle discussed in both the judgments can only be adhered to strictly by the forums manned by the persons responsible to deliver judicial findings subject to following principle of natural justice.

52. It was strenuously argued by Ms. Asma Jahangir that the question of probe into **origin, authenticity and purpose** of creating/drafting of Memo is a political question, therefore, Parliamentary Committee on the National Security is a competent forum to look into this issue. This aspect of the case has also engaged our attention during the hearing. In this context, Mr. Rashid A. Razvi, learned Sr. ASC contended that issue of probe into the Memo is a question, which is justiciable only by the Judicial forums, being a question of public importance with reference to the enforcement of any of the fundamental rights conferred by Chapter 1, Part-II of the Constitution, as it has been highlighted hereinabove.

53. Arguments so raised in this behalf give rise to the proposition namely, as to whether question of ascertainment of the **origin, authenticity and the purpose** of creating/drafting the Memo dated 10th May, 2011 is justiciable or non-justiciable by the Court in exercise of its power of judicial review, and if jurisdiction is not vested in the judicial forum then essentially the matter has to be decided by a forum other than it.

54. Thus, so far as the question of justiciability or non-justiciability of the issue is concerned, it would provide a test for the purpose of exercising the jurisdiction or otherwise?

55. The history of the judiciary in our country indicates that in the past, the court had been approached from time to time for granting relief in which political issues are involved, either to express its opinion under Article 186 or to exercise jurisdiction or under Article 184(1) or 184(3) of the Constitution. Reference in this behalf may be made to the cases of *Benazir Bhutto v. Federation of Pakistan* (PLD 1988 SC 416) and *Muhammad Nawaz Sharif v. Federation of Pakistan* (PLD 1993 SC 473), where dissolution of the Assemblies were challenged before the Court notwithstanding the fact that such issues may give rise to a political question. Similarly, at times, references have been made for the purpose of getting permission to make expenditure out of consolidated fund in absence of Parliament. Inasmuch as, a Reference was sent to this Court to adjudicate upon purely political matter regarding formal recognition of Bangladesh. The Court considered the issue and expressed its opinion that there was no legal bar in considering or adopting such resolution. Similarly, in the case of *Benazir Bhutto's case* (PLD 1988 SC 416), the amendments in

the Political Parties Act, 1962 regarding compulsory registration of political parties were challenged. The Court declared certain provisions of the law to be void being inconsistent with the fundamental rights.

56. At this juncture, reference may be made to the case of *Baker v. Carr* [369 U.S. 186 (1962)], wherein the complainant sought a declaration that Tennessee Apportionment Act, 1901 was unconstitutional followed by the relief of injunction restraining the defendants from conducting any further election under the Act. It was their case that Act violated the Fourteenth Amendment in its disregard of the slander, thereby affecting a gross disproportion of the population to vote and place the complainant in a position constitutionally unjustifiable in equity. The District Court, presided over by three Judges, dismissed the action on the ground that it lacked jurisdiction of the subject matter and the complainant failed to state that the claim was justiciable and the relief could be granted. On appeal, the Supreme Court reversed the judgment of the District Court and remanded the case. Brennan J., expressing the view of six members of the Court, held that the District Court possessed jurisdiction over the subject matter; that a justiciable cause of action was stated upon which plaintiff would be entitled to appropriate relief and that the plaintiff had standing to challenge the Tennessee Apportionment Act. Two Hon'ble Judges Douglas and Clark concurred with the Brennan J. in separate opinion stating that in their view a case for relief was established if the allegations in the complaint could be sustained. Stewart J. also concurred in separate opinion and made it clear that in his view the merits of the case were not before the Supreme Court. However, Frankfurter J., with the concurrence of

Harlan J. dissented on the ground that case involved the class of political controversy, which by the nature of its subject is unfit for federal judicial action, whereas Whittaker J. did not participate. This case in fact went down in history as one of the most important decisions ever. The matter involved a delineation of the extent of the judicial review, while dealing with whether 'equal protection of law' was violated by the borders of a district not being redrawn appropriately to adjust for population movement. The issue placed before the Court was whether it could, in fact, investigate and adjudicate on such issues, giving the existence of a strict separation of powers between the legislation and the judiciary. Mr. Rafiq Rajwana also cited the case of *Powell v. McCormack* [395 US 486 (1969)], which has in fact proceeded as the principle laid down in *Baker's* case.

57. It is to be noted that precisely question raised in the said petition before the Supreme Court was whether appellants' allegations of impairment of their votes by the 1901 Apportionment Statute will ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment did produce a legally cognizable injury, they would be among those who had sustained it. They were asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes," not merely a claim of "the right, possessed by every citizen, to require that the Government be administered according to law…". The Supreme Court, after having taken into consideration the principles which were highlighted by the learned counsel granted relief to the appellant, *inter alia,* observing that the challenge to an apportionment presented no non-justiciable "political question". It was further held that:

(1) The claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore, not foreclosed by our decisions of cases involving that clause. The District Court misinterpreted Cole-grove v Green and other decisions of this Court on which it relied. Appellants' claim that they are being denied equal protection is justiciable and if discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.

(2) That to show why reject the argument based on the Guaranty Claus, we must examine the authorities under it. But because there appears to be some uncertainty as to why those cases did presently political questions, and specifically as to whether this apportionment case is like those cases, we deem it necessary first to consider the contours of the "political question" doctrine.

(2) That re-view reveals that in the Guaranty Clause cases and in the other "political question" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question."

(3) In determination whether a question falls within[the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and

also the lack of satisfactory criteria for a judicial determination are dominant considerations."

(4) Non-justiciability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case by case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

(5) To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine.

In the Corpus Juris Secundum Volume 16, it has been stated that:-

> "It is not easy to define the phrase 'political question', nor to determine what matters fall within its scope. It is frequently used to designate all questions that lie outside the scope of the judicial power. More' properly, however, it means those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or to regard to which full discretionary, authority has been delegated to the legislative or executive branch of the Government. A political question encompasses more than a question *about* politics, but the *mere* fact that litigation seeks protection of a political rights, might have political consequences does not mean it presents a political question."

It was further observed :

> "The doctrine is based on Constitutional provisions relating to the distribution of powers among the branches *of* Government, and *it is as a* function of the separation of powers that political questions are, not' determinable by the *judiciary . thus,* the limitations on judicial review imposed by the political question doctrine apply only when the Court is M faced with a challenge to action by a coordinate branch of the Government, and not where the issue involved falls within the traditional role accorded to Courts to interpret the law or the Constitution. "

In Ballentines Law Dictionary "political question" means:-

> "A question, the determination of which is a prerogative of the legislative or executive branch of the Government, so as not to be appropriate for judicial inquiry or adjudication."

58. This Court has always emphasized that it has no concern with powers of other organs of the State. In the case of *Muhammad Nawaz Sharif vs. Federation of Pakistan* (PLD 1993 SC 473) Shafi-ur-Rahman J. observed that it was not easy to draw a line of demarcation between a political and a non-political question. This has to be determined by the Court on the facts of each case. The Courts' function is to enforce, preserve, protect and defend the Constitution. Any action taken, act done or policy framed, which followed the provisions of the Constitution are not permissible under the Constitution or law. The Court irrespective of the fact that it is a political question must exercise power of judicial review. Abuse, excess or non-observance of the provisions of the Constitution has to be checked by the Court unless its jurisdiction is barred by the Constitution or law. In the case of *Mahmood Khan Achakzai v. Federation of Pakistan* (PLD 1997 SC 526) a larger Bench held that a political question is one, which, because of its political sensitivity, is not fit for adjudication by the Court or the Constitution requires it to be determined finally by any other organ of the State. This 'political question doctrine' is based on the respect for the Constitutional provisions relating to separation of powers among the organs of the State. But where in a case the Court has jurisdiction to exercise power of judicial review, the fact that it involves political question, cannot compel the Court to refuse its determination.

59. In view of the above discussion it is held that this Court enjoys jurisdiction to proceed in all those matters which are justiciable. However, if there is an issue, which is alleged to be non-justiciable it would be the duty of the Court to examine each case in view of its facts and circumstances, and then to come to the conclusion whether it is non-justiciable or otherwise.

60. The arguments raised before this Court pose two questions; firstly, to conduct probe to ascertain the origin, authenticity and effect of Memo, for the purpose of enforcement of Fundamental Rights; and secondly, consequential effect of such probe, which would determine civil and criminal liability against the person(s), who were responsible for it. In view of the test laid down hereinabove, such questions, in exercise of power of judicial review are justiciable by this Court treating it to be proceedings of criminal nature as in exercise of Article 184(3) of the Constitution, Court is seized with the case which falls in category of inquisitorial nature.

61. Learned counsel also suggested for probe through a Commission to be constituted under the Pakistan Commission of Inquiry Act, 1956. It is to be noted that the Federal Government is empowered to constitute an Inquiry Commission but the same has not been done because the matter has been referred to Parliamentary Committee, reference of which has been made hereinabove. She also pointed out that the petitioner who is in service of Pakistan can be subjected to disciplinary proceedings as he has tendered resignation pursuant to the directions of the Prime Minister, therefore, it would be for the department to initiate any proceeding if permissible under the law, which so far have not been commenced, as such, this argument

has no substance to be considered at this stage. Therefore, the points so raised need no elaborate discussion. In these circumstances, for the foregoing reasons, we are of the considered opinion that issue of probe to ascertain the **origin, authenticity and purpose** of **creating/drafting of the Memo is justiciable.**

62. As far as jurisdiction of the Supreme Court to initiate proceedings in the cases with the object of enforcement of fundamental rights guaranteed under Chapter 1 Part II of the Constitution, relating to a matter of public importance is concerned, the Court enjoys ample powers to constitute Commission. Same is the position in the neighbouring country.

63. The Supreme Court of India, under Articles 32 and 131 of the Indian Constitution, exercises invariably such powers, whereas, under Article 184(3), more power/jurisdiction is conferred upon the Supreme Court of Pakistan as compared to Indian Constitution for enforcement of fundamental rights, relating to the question of public importance. Before citing any judgment from our own jurisdiction, reference to the case of *Vineet Narain v. Union of India* (AIR 1998 SC 889) may be made, which is commonly known as 'Jan Havala case'. In this case, jurisdiction of the Supreme Court was invoked under Article 32 of the Constitution in the public interest for the enforcement of rule of law. In the said case, an alleged terrorist was arrested in Delhi. During the raids conducted by the Central Bureau of Investigation (CBI), Indian and foreign currency as well as two diaries and two note books were seized, containing the details of accounts of vast payments made to some persons, allegedly high ranking politicians in power and

out of power, and of high ranking bureaucrats. The writ petitions were filed in the public interest under Article 32 of the Constitution of the India, as nothing was being done in the matter of investigation. The gist of the allegations in the writ petitions was that Government agencies like the CBI and the revenue authorities had failed to perform their duties and legal obligations inasmuch as they had failed to investigate matters arising out of the seizure of the "Jan diaries"; that the apprehension of terrorists had led to the discovery of financial support to them by clandestine and illegal means using tainted funds obtained through `havala' transactions; that this had also disclosed a nexus between politicians, bureaucrats and criminals, who were recipients of money from unlawful sources, given for unlawful consideration; that the CBI and other Government agencies had failed to investigate the matter, take it to its logical conclusion and prosecute all persons who were found to have committed the offence; that this was done with a view to protect the persons involved, who were very influential and powerful; that the matter disclosed a nexus between crime and corruption at high levels in public life and it posed a serious threat to the integrity, security and economy of the nation; that probity in public life, the rule of law and the preservation of democracy required that the Government agencies be compelled to duly perform their legal obligations and to proceed in accordance with law against every person involved, irrespective of where he was placed in the political hierarchy. The Court observed that:-

> “8. The sum and substance of these orders is that the CBI and other Governmental agencies had not carried out their public duty to investigate the offences disclosed; that none stands above the law so that an alleged offence by him is not required to be investigated; that we would monitor the investigations, in

> the sense that we would do what we permissibly could to see that the investigations progressed while yet ensuring that we did not direct or channel those investigations or in any other manner prejudice the right of those who might be accused to a full and fair trial. We made it clear that the task of the monitoring court would and the moment a charge-sheet was filed in respect of a particular investigation and that the ordinary processes of the law would then take over. Having regard to the direction in which the investigations were leading, we found it necessary to direct the CBI not to report the progress of the investigations to the person occupying the highest office in the political executive. This was done to eliminate any impression of bias or lack of fairness or objectivity and to maintain the credibility of the investigations. In short, the procedure adopted was of "continuing mandamus".”

64. Above judgment was followed in so many other cases by the Indian Supreme Court including *Rubabbuddin Sheikh v. State of Gujrat and others* [(2010)2 SCC 200], *Zahira Habibullah Sheikh (5) v. State of Gujrat* [(2006) SCC 374] and *Common Cause, Registered Society v. Union of India* (Air 1999 SC 2979).

65. Similarly, superior courts in Pakistan in the case of *Pervaiz Elahi v. Province of Punjab* (PLD 1993 Lahore 595), *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879), *Dr. Mubashir Hassan v. Federation of Pakistan* (PLD 2010 SC 265), *in Re: Construction of Fast Food Chain in F.9 Park* (PLD 2010 SC 759), *Bank of Punjab v. Haris Steel Industries* (PLD 2010 SC 1109), *In Re: Suo Moto Case No.18 of 2010*(PLD 2011 SC 997), *In Re: Corruption in Hajj Arrangements* (PLD 2011 SC 963) and *Munir Hussain Bhatti v. Federation of Pakistan* (PLD 2011 SC 407) have exercised jurisdiction with reference to enforcement of fundamental rights.

> Our consensus remain that following the trichotomy of powers, all the three organs of the State i.e. Legislature, Executive and the Judiciary have to exercise their powers within their respective spheres. Most importantly, the Judiciary could not remain oblivious from its duties nor can compromise the mandate of the Constitution i.e. 2A, because it is the will of the people of Pakistan to establish an order wherein independence of judiciary shall be fully secured. However, in view of its distinction and difference, a separate character has been bestowed upon it under Article 175(3) of the Constitution. This aspect of the case has been highlighted in the case of *Government of Balochistan v. Azizullah* (PLD 1993 SC 341).

66. In the case of *In Re: Corruption in Hajj Arrangements* (PLD 2011 SC 963) the power of judicial review of the Supreme Court discussed in detail. Relevant paragraphs from the said judgment are mentioned hereinbelow:-

> "27. The power of judicial review which was exercised in the case of Sindh High Court Bar Association (supra) has been accepted by the Government as it has not supported the actions of 3rd November, 2007. As far as Parliament is concerned, we have also admired it as a body, which for the first time in the history of the country did not validate the actions taken on 3rd November, 2007, whereas in the past the situation had been different. A number of judgments can be cited for assuming jurisdiction and exercise of power of judicial review available to this Court under the Constitution, to which we need not make reference here, but going through the same one can well understand that this Court has always been enjoying the jurisdiction of judicial review against administrative actions of the executive which is a settled law by now. If any reference is required, right from Madison up to the case of Sindh High Court Bar Association, there are chain of authorities where the Supreme Court has assumed jurisdiction of judicial review, which even otherwise is the final arbiter of disputes in order to maintain check and balance. For these reasons, the independence of the judiciary has been guaranteed and the very preamble of the Constitution provides that the people of Pakistan and the independence of judiciary shall be fully secured. The judiciary cannot compromise at any cost its independence as guaranteed under the Constitution, as such compromises would lead us to the situation of the last, so many years. It is for the first time the judiciary asserted its authority and as a result thereof the' democratic system is prospering in the country. In the case of Dr. Mubashir Hasan v. Federation of Pakistan (PLD 2010 SC 265) whereby NRO was declared to be illegal, unconstitutional and void ab initio, this Court has exercised its constitutional jurisdiction of judicial review.

28. At times, present case was fixed for the purpose of seeking implementation of the order, but we postponed in order to ensure that the democratic system under the Constitution must prevail and avoid chaos. However, when the cases of massive corruption, not only one, but so many came for hearing, therefore, this Court in the exercise of its constitutional jurisdiction had enforced fundamental rights of the citizens under Articles 4, 9, 14 and 25 of the Constitution. It is quite heartening to observe that even the worthy Parliamentarians had also approached 1 this Court, like in the case of Rental Power Projects where one of the sitting Ministers namely, Makhdoom Syed Faisal Saleh Hayat had approached the Court. Likewise, Ms. Marvi Memon, MNA, approached this Court in the matter of Breach of embankments of rivers in floods causing damages. Similarly, Khawaja Muhammad Asif MNA brought the case of OGDCL, all of them acknowledge power of judicial review of this Court. In matters of the steal Mills, LPG case, National Police Foundation, NICL, Hajj arrangements and RPPs are under consideration including the Bank of Punjab case where, in exercise of the power of judicial review for the enforcement of fundamental rights millions of rupees have been recovered which were being looted by government officials and others. Undoubtedly, whenever the Court will notice that there is corruption or corrupt practices, it would be very difficult to compromise or digest it because the public money of the country cannot be allowed to be looted by any one whatsoever status he may have.

29. The jurisdiction of this Court is always exercised judiciously and with judicial restraint. All those cases which are quoted hereinabove clearly indicate that in the matter of exercise of power of judicial review in Pakistan we have not travelled so far as is the position in the neighboring' country. By now, the parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court can interfere with the same are well settled. Indisputably, if the action or decision is perverse or is such that no reasonable body of persons, properly informed; could come to or has been arrived at by the authority misdirecting itself by adopting a wrong approach or has been influenced by irrelevant or extraneous matters the Court would be justified in interfering with the same. [Commissioner of Income Tax v. Mahindra (AIR 1984 SC 1182)]. The exercise of constitutional powers by the High Court and the Supreme Court is categorised as power of judicial review. Every executive or administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of Fundamental Rights guaranteed by the Constitution. With the expanding horizon of Articles dealing with Fundamental Rights, every executive action of the Government or other public bodies, if arbitrary, unreasonable or contrary to law, is now amenable to the writ jurisdiction of the Superior Courts and can be validly scrutinised on the touchstone of the

Constitutional mandates. [Common Cause, A Regd. Society v. Union of India (AIR 1999 SC 2979)]. In the case of Union Carbide Corporation v. Union of India [AIR 1992 SC 248 = 1991 SCR (1) Supl. 251], the Court while taking up the issues of healthcare and compensation to the victims, supervised the distribution of the money among the victims of Bhopal gas tragedy and monitored the hospitals set up to treat the victims. In Vishaka v. State of Rajasthan [AIR 1997 SC 3011] = [(1997) 6 SCC 241], the Court laid down guidelines to make the workplace safer for women making a grievance redressal mechanism in all private and public offices mandatory. In the case of Vineet Narain v. Union of India (AIR 1998 SC 889), commonly known as Hawala case, the Supreme Court of India had taken over the charge of CBI to ensure transparent investigation into corruption and corrupt practices under its own supervision. In the case of Zahira Habibullah Sheikh v. State of Gujarat [(2006) 3 SCC 374], the Court reopened several cases and set up a special investigation team where the police deliberately botched up the probe to help perpetrators of the post Godhra mob violence against Muslims in 2002, including overseas investigations into the Sohrabuddin fake encounter case of 2005 whereby several senior police officers and key politicians were put in the dock. In the Case of Rubabbuddin Sheikh v. State of Gujarat [(2010) 2 SCC 200] petitioner wrote a letter to the Chief Justice of India complaining about the killing of his brother in a fake encounter and disappearance of his sister-in-law at the hands of the Anti-Terrorist Squad (ATS) Police (Gujarat) and Rajasthan Special Task Force (STF). Taking notice of this letter, the Court forwarded it to the Director General of Police, Gujarat to take further action. The CID (Crime) conducted an enquiry and the statements of a number of witnesses, including the petitioner, were recorded. The learned Attorney General for -India submitted that in view of the serious nature of the offence in which some highly placed police officials of the State of Gujarat were alleged to be involved, orders may be immediately passed directing the CBI to take charge of the investigation and report .to this Court. The CBI Authorities were directed to investigate all aspects of the case relating to the killing of the deceased including the alleged possibility of a larger conspiracy.' The report of the CBI Authorities was directed to be filed in the Court when the Court would pass further necessary orders in accordance with the said report, if necessary. Ultimately, it was held that accusations were directed against the local police personnel in which high police officials of the State were involved. Therefore, it was directed that if investigation was allowed to be carried out by the local police authorities, all concerned including the relatives of the deceased may feel that investigation was not proper and in the circumstances it would be fit and proper that the petitioner and the relatives of the deceased should be assured that an independent agency should look into the matter and that would lend the final outcome of the investigation credibility. In the case of Center for Pil v. Union of India [Appeal arising out of SLP (C) No. 24873 of 2010 decided on 16-12-2010], the Court ordered probe into a mega crore scam against the sitting Telecom

> Minister. In the case of Center for Pil v. Union of India [Writ Petition (C) No. 348 of 2010, decided on 3-3-2011], the Court quashed the illegal appointment of P J Thomas as Central_ Vigilance Commissioner because of a charge-sheet pending against him in Kerala. The Court also laid d o n guidelines for future appointments to this post. In the case of Radhy Shyarn v. State of UP (Civil Appeal No.3261 of 2011, decided on 15-4-2011), the Supreme Court quashed Government's notification to acquire land for the planned industrial development in District Gautam Budh Nagar through Greater Noida Industrial Development Authority, which appeared to be a device to grab the land of the poor farmers. In the case of Nandini Sundar v. State of Chattisgarh [Writ Petition (Civil) No. 250 of 2007 decided on 5-7-2011], the Court disbanded and disarmed Special Police Officers involved in anti-Naxal operations in many states. Thus, the Supreme Court of India has been monitoring public distribution system, treatment at hospitals and conservation of forests for more than two decades. It also set up a judicial commission to examine the public distribution system and directed the Government to provide more facilities in the poorer districts.

67. In the *Bank of Punjab's case* (PLD 2010 SC 1109), this Court observed that not only a colossal amount of money/property belonging to a large section of the public but the very existence of the Bank of Punjab was at stake, thus not only the right of the Court but in fact its onerous obligation was to intervene to forestall the assault on the said fundamental right to life and property of the public.

68. In the recent past, a decision has been given by the Supreme Court in Suo Moto Case No.16/2011, in respect of non-adherence to the Constitutional provision and providing guarantee to life and security in target killing in Karachi. The said judgment has been welcomed by all and sundry. The effect of the proceedings and the judgment passed in the said case have brought calm and peace in Karachi and the jurisdiction, exercised by this Court in the said case was also under Article 184(3) of the Constitution. *Inter alia* such jurisdiction is exercised to ensure effectiveness of the orders passed by the Court under Article 190 of the Constitution, which commands

that all the executive and judicial authorities throughout Pakistan to act in aid of Supreme Court. In the case of *Tirupati Balji Developers Pvt. Ltd. v. State of Bihar* (AIR 2004 SC 2351), while interpreting Article 144 of the Indian Constitution, which is corresponding Article of the Constitution of Pakistan, the Supreme Court observed that under Article 144 all the authorities, civil and judicial, in the territory of India— and that would include High Court as well— shall act in aid of the Supreme Court.

69. The issue of probe through experienced judicial officers who are Chief Justices of three High Courts itself is sufficient to attach importance with the case from two angles (i) that the matter relates to sovereignty, independence and security of Pakistan and during course of probe procuring of evidence shall be helpful to determine civil liability as well as criminal culpability based on forensic evidence and other material, which is likely to be produced before the Commission. Thus, senior judicial office holders in view of their experience would conduct thorough probe into the matter in order to ascertain the correct facts.

70. Thus, for the foregoing reasons, we are of the opinion that issue of probe to ascertain the origin, authenticity and purpose of creating/drafting Memo is required to be determined by holding a Judicial Probe. Therefore, in exercise of judicial powers conferred upon this Court under Articles 187 and 190 of the Constitution, Order XXXII, Rules 1 & 2 read with Order XXXIII, Rule I of the Supreme Court Rules, 1980 (in short order inadvertently typed as Order XXXVI) coupled with the principles of Civil Procedure Code including Order

XXVI, Rule 10 and following the principles/observations discussed hereinabove, a High Powered Commission has been constituted.

71. Learned counsel for respondent No.4 contended that the petitions submitted on behalf of the petitioners are *benami* petitions as the pleas taken by the respondents Chief of Army Staff and DG, ISI seem to be the case of the petitioners and the petitions have been filed with a *mala fide* intention. We failed to appreciate the argument of the learned counsel except observing that the defence functionaries under the Constitution are bound to discharge their functions strictly in accordance with the Constitution. The affidavits/counter affidavits filed by both the high-ups of the Pakistan Army the events, which took place after 10th October, 2011, details whereof have been mentioned, and such events have not been denied by the Federation through learned Attorney General. As certain facts have been placed before the Court, it does not mean that they are supporters of the petitioners. In addition to it, ascertainment of **origin, authenticity and the purpose** of the drafting/creating the Memo is a matter of public importance and *prima facie* calls for enforcement of their Fundamental Rights provided under Articles 9, 14 and 19A of the Constitution, hence, whosoever has laid information before the Court, calls for due consideration as the object is to see what he is speaking, and not who is speaking the same. In this behalf we cannot do better than to reproduce a para from the judgment in Civil Petition No.42 of 2011 composed by Mr. Justice Jawwad S. Khawaja:-

> 24. Before concluding our discussion on the issue of maintainability of this petition we need to address the respondent's submission that the petition has been filed *mala fide*. We have found no lawful basis for this submission. Simply because the petitioner may have been a contender for the office of Chairman, OGRA, does not *per*

> *se* translate into *mala fides.* The petitioner can genuinely consider himself to be a suitable candidate for the position while simultaneously holding the view that the respondent does not meet the eligibility criteria set out in section 3 (4) of the Ordinance. Furthermore, we have already held in the case titled *Moulvi Iqbal Haider versus Capital Development Authority and others* (2006 SC 394 at 413) that the contents of a petition under Article 184 (3) *ibid* will override concerns arising on account of the conduct or antecedents of a petitioner. This approach is reflective of the sagacity of wise men such as *Maulana* Jalaluddin Rumi who have emphasized the importance of the message rather than the messenger. Learned counsel for the respondent then cited the Indian case titled *Dattaraj Nathuji Thaware v. State of Maharashtra and others* [(2005) 1 Supreme Court Cases 590] to support his plea that the petition had been filed *mala fide* and should, therefore, be dismissed. We have gone through the cited judgment and find the same to be wholly irrelevant. In that case it was determined by the Indian Supreme Court that the petitioner therein *"had resorted to blackmailing the respondents . . . and was caught red-handed accepting 'blackmailing money"*. No such circumstances arise, or were even suggested in this case. In view of this discussion, we are satisfied that this petition is not liable to dismissal on the ground of *mala fides* of the petitioner.

Thus, objection being unfounded is accordingly repelled.

72. Learned counsel for respondent No.4 vehemently contended that instant petitions lack *bona fides*. She relied upon news clippings filed by her with C.M.A. No. 5440/2011 as under:-

- ***Haqqani detain. (Dawn Thursday, May 6, 1999)***
- ***Haqqani remanded in FIA custody for 4 days. (Dawn Tuesday, May 18, 1999.)***
- ***Haqqani's medical record 'goes missing'. (Dawn Wednesday, May 19, 1999)***
- ***Ehtesab Bureau decision in Haqqani case embarrasses FIA" (Dawn May 21, 1999)***

آنکھوں پر پٹی، بے پناہ تشدد، میں نے بڑے دکھ جھیلے ہیں، حسین حقانی

میرا اور نجم سیٹھی کا جرم یہ ہے کہ ہم نے فسطائیت میں ڈھلتی جمہوریت پر کھل کر تنقید کی جس کی پاداش میں سزا جھیل رہے ہیں۔

7 مئی کو عدالت نے میرے طبی معائنے کا حکم جاری کیا، 13 مئی تک نہ کرایا گیا تا کہ تشدد کے نشانات مدہم ہوسکیں، پیشی پر گفتگو

(روزنامہ جرأت، کراچی۔۔۔18 مئی 1999ء)

حسین حقانی کی گرفتاری نے ایف آئی اے کو الجھن سے دوچار کر دیا۔

انہیں 4 مئی کو گرفتار کیا گیا تھا اور 7 مئی کو ایف آئی اے کے حوالے کر دیا گیا تھا۔

(روزنامہ آغاز، کراچی۔۔۔21 مئی 1999ء)

صحافیوں کی گرفتاری کے خلاف امریکی سینیٹروں کا نواز شریف سے احتجاج

اس طرح کے اقدامات سے پاکستان اور امریکہ کے تعلقات خراب ہوسکتے ہیں۔امریکی سینیٹرز کا خط

(روزنامہ آغاز، کراچی۔۔۔21 مئی 1999ء)

Reliance is placed on the case of *Ms. Benazir Bhutto* (PLD 1988 SC 416). On the other hand, Mr. Rashid A Razvi, learned counsel vehemently denied the allegations and contended that the *mala fides* are required to be proved through cogent evidence. He has relied upon the cases of *Lt. Col. Farzand Ali v. Province of West Pakistan* (PLD 1970 SC 98), *Federation of Pakistan v. Saeed Khan* (PLD 1974 SC151) and *Tabassum Shahzad v. I.S.I. and others* (2011 SCMR 1886).

It is to be noted that allegation of *mala fides* has been raised in Constitution Petitions No.79 & 80/2011, whereas, there are other petitions bearing Constitution Petitions No.77-78/2011, etc., reference of which has been made hereinabove, wherein no such allegation is leveled. This Court in the case of *Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri* (PLD 1969 SC 14) has held that *bona fides* are to be presumed unless the party challenging the action is able to substantiate that the action was *mala fide* or without any grounds whatsoever. The petitioner in Constitution Petition

No.79/2011 cannot be attributed *mala fides* because he has not claimed any relief against respondent No.4. In addition to it, except filing news clippings, no other cogent evidence has been produced. Moreover, there are other petitioners as well who have also joined Respondent No.4 as party. Thus, objection being without substance, is repelled.

73. Learned counsel vociferously stated that respondent No.4 is a law abiding citizen and his liberty has been curtailed by placing his name on the ECL. She has relied upon the judgments in the cases of *Munir Ahmad Bhatti v. Government of Pakistan, Ministry Of Interior through Secretary* (2010 CLD 1829), *Govt. of Pakistan v. Dada Amir Haidar Khan* (PLD 1987 SC 504) and *Satwant Singh Sawhney v. D. Ramarathnam, Assistant* (AIR 1967 SC 1836).

74. There is no cavil with the above propositions of law, but in the instant case no restraint has been placed on his movement vide order dated 1st December, 2011 except that he has been asked not to leave the country without prior permission of this Court as to ascertain **origin, authenticity and affect of memorandum** is under probe before a Commission.

75. Thus, instant petitions have raised serious question of public importance, which, *prima facie* is linked with the enforcement of fundamental rights under Articles 9, 14 and 19A of the Constitution based on cogent material available on record. Therefore, petitions being maintainable, empowered this Court to make declaration for the enforcement of fundamental rights based on the report of probe through the Commission, which has already been constituted to

ascertain the **origin, authenticity and purpose** of creating/drafting Memo dated 10th May, 2011.

Above are the reasons for the short order dated 30.12.2011.

IFTIKHAR MUHAMMAD CHAUDHRY, CJ

MIAN SHAKIRULLAH JAN, J. TASSADUQ MR. HUSAIN JILLANI, J.

JAWWAD S. KHAWAJA, J. TARIQ PARVEZ, J.

MIAN SAQIB NISAR, J. EJAZ AFZAL KHAN, J.

IJAZ AHMED CHAUDHRY, J. MUHAMMAD ATHER SAEED, J.

Islamabad, the
30th December, 2011

Approved For Reporting.

Jawwad S. Khawaja, J. **"***And ye shall know the Truth, and the Truth shall set you free*" (John 8:32). Thus spake *Hazrat* Isa, the Messiah and champion of the oppressed. In the same vein, the Persian savant *Hakeem* Sinai Ghaznavi said: *"embrace the truth and become free of grief and torment"*. It is these Biblical and sage sentiments and other similar sensibilities which appear to have inspired an important change in the Constitution - the recent incorporation of Article 19A in the Chapter on fundamental rights. The said Article stipulates that *"every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law".* Most petitioners and respondents, and their learned counsel seem to have ignored or glossed over the significance of this major constitutional change. While the circumstances in which these cases arise have been elaborated in fair detail in the reasoning of Hon'ble the Chief Justice, I only reiterate this salient aspect of the case.

2. It is an unfortunate facet of our history that during the 64 years since Pakistan's independence in 1947, the people of Pakistan have been, at times, disserved by a non-inclusive governance paradigm where information critical to them has been withheld from them. Pakistan has faced many crises of public importance. This, in itself, is not unexpected in the life of a State. What has, however, been aggravating for the People is that numerous inquiries and probes have been undertaken by Governments which have spent substantial amounts of public time, money and effort, but the citizens of Pakistan, the most direct affectees, have remained clueless and uninformed as to the causes or the progenitors of the multiple crises in our history.

3. Major events in our history in the past six decades since 1947 have included the dismemberment of the country in 1971 and the murder of one incumbent and one former Prime Minister of Pakistan. We have witnessed the extraordinary case of those in the seats of governance in December 1971 informing us that all was going well in East Pakistan even after the surrender of forces in Dhaka. The results

of probes into such events have almost invariably been withheld from the people of Pakistan or, at times, selectively disclosed. The people in quest of the truth have mostly been left with conjectures, rumours and half truths. Concealment of information has, in turn led to a distorted history of the country and to a destabilizing division in the polity.

4. This paradigm has shifted through the recent incorporation of Article 19A in the Constitution. By virtue of the said Article the right of a citizen to have information *"in all matters of public importance"* is made a fundamental right which is guaranteed by the Constitution. Article 184 (3) of the Constitution stipulates, *inter alia,* that this Court shall have jurisdiction to pass an order in a case *"if it considers that a question of public importance with reference to the enforcement of any of the fundamental rights conferred by Chapter I of Part II [of the Constitution] is involved".* Article 184 (3) read in conjunction with Article 19A has empowered the citizens of Pakistan by making access to information a justiceable right of the People rather than being largesse bestowed by the State at its whim. Article 19A has thus, enabled every citizen to become independent of power centres which, heretofore, have been in control of information on matters of public importance.

5. Many of the arguments that came up during the hearing of these petitions are premised on a lack of appreciation not just for this aspect of our constitutional law, but also for the intrinsic worth of Truth as a value in itself. What, it may be asked, is the intrinsic worth of information as a stand-alone fundamental right? The answer to this is simple. The very essence of a democratic dispensation is informed choice. It is through such choice that the political sovereign, the People of Pakistan acquire the ability to reward or punish their elected representatives or aspirants to elected office, when it is time for the People to exercise their choice. If information on matters of public importance is not made available to citizens, it is obvious they will not have the ability to evaluate available choices. Information on matters of public importance thus, is a foundational bedrock of representative

democracy and the accountability of chosen representatives of the people. It is in this context, both historical and conceptual, that the fundamental right to information has to be seen. Through Article 19A in the Constitution, the citizens of Pakistan have also been freed from the caprice of a sorry fate and have become independent of whistle-blowers in foreign lands or the magnanimity of the likes of WikiLeaks or biographies of political actors, to get to the information they are now entitled to as of right under the Constitution. This provides for and makes good a crucial missing element of responsible state governance in our Constitutional scheme.

6. At this point it is necessary to highlight an important aspect of our Constitution which is often over-looked. The Constitution of 1973 has not been bestowed as a matter of grace on the People of Pakistan by a monarch or a foreign Parliament as, for instance, is the case with Canada, Australia and a number of other countries. Our Constitutional Order has been established by "*the will of the people of Pakistan".* All State functionaries have to understand that in a very real sense, they are employed in the service of the People of Pakistan and are paid for by them. The loyalty, therefore, of these State functionaries has to be to the Constitutional Order established by the People. Once this context is understood, the issue in these petitions stands greatly simplified. There is no contention between the parties arrayed before us that the Memo and the events surrounding it are "*matters of public importance"*. The parties are also agreed that these events should be probed. It is, therefore, clear that a petition under Article 184 (3) to enforce the fundamental right granted by Article 19A is maintainable.

7. We are cognizant that there may be situations where the Government may want to justify non-disclosure of information on a matter of public importance. That plea, however, does not arise and nor has it been taken in these cases. It is, therefore, not necessary to comment on the same as a mere speculative exercise. Learned ASC for Mr. Haqqani contended that these petitions raise a political

question and the Court should, therefore, avoid deciding the same. This argument has been adequately discussed in the reasoning of Hon'ble the Chief Justice. I would only add that the conduct of a government's foreign policy is indeed, by and large, a political question. But the fact is that the present petitions do not require us to devise the country's foreign policy or to direct the government in that regard. These petitions only seek to enforce the People's right to know the truth about what their government, and its functionaries, are up to. And that is by no means, a political question. It is a fully jusiticiable fundamental right enumerated in Chapter II, of the Constitution no less. We need not look any further than Article 19A, for this conclusion.

8. This brings me to a consideration of the Freedom of Information Ordinance, 2002 ("FIO, 2002") and to see if there is anything therein which can support the contention advanced on behalf of Mr. Haqqani, that the information sought by the petitioners should be denied to them in these proceedings or that the FIO 2002 is an adequate and complete alternate to Article 19A. Section 3 (1) of the FIO 2002 specifies the substantive right provided for thereunder. It is couched in restrictive language and reads as under:-

> *"**3. Access to information not to be denied:-** (1) Notwithstanding anything contained in any other law for the time being in force, and subject to the provisions of this Ordinance, no requester shall be denied access to any official record other than exemptions as provided in Section 15."*

In stark contrast Article 19A in affirmative and expansive language avows as under:

> *"**19A.** Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law."*

9. It is clear from a reading of Article 19A and section 3 (1) *ibid*, that the Constitutional right is much broader and more assertive than the statutory right

which by its own terms is restricted to disclosure of official record only. Furthermore, the principle of law is that the fundamental right under Article 19A is a grant of the Constitution and, therefore, cannot be altered or abridged by a law enacted by Parliament. The submissions of learned ASC for Mr. Haqqani, based on the FIO 2002 are, therefore, misconceived and have no merit.

10. At this point it may also be added that when the quest is for the truth under Article 19A, and nothing but the truth, the Court cannot foresee the result of the probe which has been ordered. The arguments on behalf of Mr. Haqqani amount to asking the Court to adjust its opinion according to some anticipated consequences of such inquiry. As an objective enforcer of fundamental rights we cannot do that. Whether the petitioners or the respondents stand to benefit from our order or which institution or functionary of the State ends up being indicted by the Truth, we are not called upon to say. In fact, that is the very point of the inquiry; the only calculus this Court is entitled to engage in is the calculus of true information and its availability to the citizens of Pakistan.

11. The Truth will indeed be critical if the nation is to achieve the goal the Constitution, in its Preamble, sets for all organs of the state: viz. "*the preservation of democracy achieved by the unremitting struggle of the people against oppression and tyranny.*" It, therefore, will not do for this Court to deny to the citizens their guaranteed fundamental right under Article 19A by limiting or trivializing the scope of such right through an elitist construction whereby information remains the preserve of those who exercise state power.

(Jawwad S. Khawaja)
Judge

جواد ایس خواجہ، جج

"اور سچ تم پر ظاہر ہو جائیگا اوروہ تمہارا وسیلہِ نجات ہو گا۔" (یوحنا 8:32)

یہ حکیمانہ کلمات انجیلِ مقدّس میں یوحنا کی کتاب میں حضرت عیسی سے منسوب ہیں۔حکیم سنائی غزنوی کا ایک مصرعہ بھی اسی پیغام کا عکاس ہے۔ **"راستی پیشہ کن، زِغم رَستی"** ۔سچائی اختیار کرواور غموں سے نجات پاؤ۔ ایسے ہی اقوال اور احساسات کے مدِنظر، ہمارے آئین میں حال ہی میں ایک تبدیلی واقع ہوئی ہے جو کہ آرٹیکل 19A کی شکل میں ہے۔اس آئینی شق کے مطابق **" قانون میں وضع شدہ معقول ضوابط کے تحت ہر شہری کو عوامی اہمیت کے تمام امور کی بابت معلومات تك رسائی کا حق حاصل ہے"** ۔فریقین کے فاضل وکلاء بشمول فاضل اٹارنی جنرل شاید اس اہم آئینی تبدیلی کا صحیح معنوں میں ادراک نہیں کر پائے۔اس اضافی نوٹ میں اسی ایک نقطے کی تائید مطلوب ہے ورنہ جناب چیف جسٹس صاحب کے فیصلے میں ان درخواستوں کے واقعاتی پس منظر کے بارے میں سیر حاصل بحث کی گئی ہے جس سے مجھے اتفاق ہے۔میں فقط آرٹیکل 19A، اور اِس مقدمے کے تناظر میں اِس کی آئینی اہمیت کے بارے میں یہ نوٹ تحریر کر رہا ہوں۔

2۔ یہ ہماری قومی کم نصیبی ہے کہ 1947ء میں آزادی کے بعد بھی ملک کے عوام کو بالعموم اہم امور کے بارے میں بے خبر رکھا گیا۔نصف صدی سے زائد اس عرصے میں، بحیثیت قوم، ہم پر نہ جانے کتنے سانحے اور المیے بیت چکے ہیں۔ بذاتِ خود یہ کوئی غیر معمولی امر نہیں۔مد و جزر قوموں کی تاریخ کا لازمی جزو ہیں۔البتہ جو بات زیادہ تکلیف دہ اور باعثِ تشویش ہے وہ یہ کہ باوجود تفتیش اور خاطر خواہ اسرافِ وقت پیسہ اور محنت کے، عوام الناس کو آج تک یہ نہیں پتہ چلا کہ ان قومی سانحوں کے محرک کون اور محرکات کیا تھے۔

3۔ ہماری قومی تاریخ کے ان سانحوں میں ملک کا دولخت ہونا، ایک وزیرِ اعظم اور ایک سابق وزیرِ اعظم کا قتل ہونا شامل ہیں۔ ہمیں یہ بھی یاد ہے کہ حکومتی عہدوں پر فائض لوگ اور اس وقت کا میڈیا دسمبر 1971ء میں سقوطِ ڈھاکہ کے کئی روز بعد تک "سب ٹھیک ہے" کی جھوٹی رٹ لگائے ہوئے تھے۔ سچ کو منظرِ عام پر لانے اور عوام تک پہنچانے کی ضرورت ہی محسوس نہیں کی گئی اور شہریوں کو محض افواہوں، قیاس آرائیوں اور نیم عیاں حقائق کی اندھیر نگری میں بھٹکنے دیا گیا۔ نتیجتاً ایک مسخ شدہ تاریخ پیش کر کے عوام میں تفریق کی بنیاد رکھی گئی۔

4۔ خوش قسمتی سے یہ سابقہ طریقۂ کار اب آرٹیکل 19 A کی بدولت بدل چکا ہے۔ اب اس دیس کے ہر شہری کو حق حاصل ہے کہ وہ عوامی اہمیت کے حامل امور کے بارے میں معلومات حاصل کرے۔ اور اس حق کے نفاذ کی خاطر وہ عدالتی چارہ جوئی بھی کر سکتا ہے۔ اس حق کے حصول میں حکومت کے فرامین اور پارلیمان کی قانون سازی بھی حائل نہیں ہو سکتی کیونکہ یہ حق ہر شہری کو آئین نے دیا ہے نہ کہ حکومت یا پارلیمان نے۔

5۔ ان مقدمات کی سماعت کے دوران پیش کئے جانے والے دلائل و معروضات سے یہ تاثر ملتا ہے کہ فاضل وکلاء بھی پوری طرح یہ سمجھ نہیں سکے کہ سچ، خود اپنی ذات میں، کتنی بڑی انقلابی قوت ہے۔ اور کیوں اس تک رسائی کو بنیادی حقوق میں شامل کیا گیا ہے۔ بطور بنیادی حق، سچ کی اہمیت کیا ہے؟ اس کا جواب نہایت سیدھا اور آسان ہے۔ جمہوری نظام کی بنیاد عوامی نمائندوں کے صحیح چناؤ پر موقوف ہے۔ منطق اور عقل کی رو سے صحیح چناؤ اس وقت تک ممکن نہیں جب تک عوام کو اپنے نمائندوں اور حکومتِ وقت کے افسران، اور ان کی کارکردگی، کے بارے میں مکمل معلومات حاصل نہ ہوں۔ درست معلومات پر مبنی انتخاب ہی صحیح معنوں میں عوام کی حاکمیت اعلیٰ قائم کر سکتا ہے۔ ایسی معلومات کے ذریعے ہی عوام اس بات کا تعین کر سکتے ہیں کہ انہوں نے حکومتِ وقت اور عوامی نمائندگان کو دوبارہ ووٹ دینا ہے یا نہیں۔ اگر انہیں صحیح معلومات ہی فراہم نہیں تو ان کے لئے صحیح فیصلہ کرنا بھی ممکن نہیں ہوگا۔ اس

طرح سچ اور حقائق پر مبنی choice ہی کو جمہوریت کا بنیادی ستون گردانا جا سکتا ہے کیونکہ مستند معلومات ہی عوام کو پرکھ اور پہچان کی صلاحیت دیتی ہیں۔ لہٰذا موجودہ آئینی درخواستوں کے تناظر میں بھی یہ بات عیاں ہے کہ عوام کو جب صحیح معلومات حاصل ہو جائیں گی تو وہ خود اس بات کا فیصلہ کر لیں گے کہ انہوں نے کس کو سزا اور کس کو جزا کا مستوجب ٹھہرانا ہے۔ جمہوریت میں احتساب کا بالآخر یہی طریقہ ہے۔

6۔ پاکستان کے آئین میں معلومات تک رسائی کے حق کو مندرجہ بالا تناظر اور تاریخی و منطقی پس منظر میں دیکھنے کی ضرورت ہے۔ ماضی میں جو کچھ بھی ہوتا رہا، اب آرٹیکل 19A کی بدولت پاکستانی عوام غیر ملکی کرم فرماؤں مثلاً وکی لیکس (Wikileaks) اور سیاسی اکابرین کی خود نوشتہ داستانوں کے مرہونِ منت نہیں ہیں۔ اب پاکستانی شہری بذریعہ عدالت سچ پر مبنی معلومات حاصل کرنے کے حقدار ہیں اور ان سے یہ آئینی حق کوئی بھی چھین نہیں سکتا۔

7۔ اس موقع پر یہ لازم ہے کہ ہم اپنے آئین کے ایک اہم پہلو پر روشنی ڈالیں جس پہلو کو بسا اوقات نظر انداز کر دیا جاتا ہے۔ پاکستان کے ہر آئین کے ابتدائیہ میں یہ الفاظ دہرائے گئے ہیں: **"پاکستان کے عوام ایک ایسے نظام کی بنیاد ڈالنے کے خواہاں ہیں ---"** یہ الفاظ اس امر کی طرف اشارہ کرتے ہیں کہ بعض ممالک مثلاً کینیڈا اور آسٹریلیا کے برعکس ہمارا آئین کسی سامراجی بادشاہ یا غیر ملکی پارلیمان کی عطاء نہیں، بلکہ خود پاکستانی عوام کی کاوشوں اور قربانیوں کا نتیجہ ہے۔ لہٰذا تمام سرکاری اور حکومتی عہدیداران کو یہ بات دل سے تسلیم کر لینی چاہیئے کہ وہ عوام کے ہی تنخواہ دار اور خدمت گزار ہیں۔ ان کی وفاداری صرف اس آئینی نظام سے ہو سکتی ہے جو کہ عوام نے اپنے لئے تجویز کیا ہے۔ جب اس امر کا ادراک کر لیا جائے تو ان مقدمات میں اٹھنے والے سوالات کا جواب بآسانی مل جاتا ہے۔ ہمارے سامنے کسی بھی فریق کا یہ موقف نہیں کہ میمو اور اس کے پس و پیش واقعات عوامی اہمیت کے حامل نہیں۔ فریقین اس بات پر بھی متفق ہیں کہ ان معاملات کی پڑتال اور تحقیقات ہونی چاہیئے۔ لہٰذا یہ

امر واضح ہے کہ یہ مقدمات آئین کے آرٹیکل (3)184 کے تحت عدالت کے دائرۂ سماعت میں ہیں اور قابلِ پیش رفت ہیں۔

8۔ ہمیں ادراک ہے کہ بعض حالات میں حکومت امورِ عامہ سے متعلق معلومات کو منظرِ عام پر لانے سے گریزاں ہوگی اور اس موقف کے دفاع میں مفادِ عامہ پر مبنی دلائل پیش کرنے کی خواہاں ہوگی۔ مگر اس مقدمہ میں نہ تو ایسے حالات ہیں اور نہ ہی حکومت نے اس دلیل کا سہارا لیا۔ چونکہ حکومت نے یہ قانونی دلیل سرے سے پیش ہی نہیں کی، اس لئے اس کی جزئیات اور متعلقہ قانونی نکات پر زیادہ بحث بے جا ہوگی۔ ہاں یہ ضرور ہے کہ جناب حقانی کی فاضل وکیل نے استدعا کی کہ زیرِ بحث معاملہ "**سیاسی امور**" کے ضمن میں آتا ہے اور عدالت کو اسے درخورِ اعتنا نہیں کرنا چاہیئے۔ فاضل چیف جسٹس صاحب کے فیصلے میں اس سوال کا جواب بخوبی دیا گیا ہے۔ یہاں میں صرف یہ اضافہ کرنا چاہتا ہوں کہ خارجہ پالیسی واقعی ہی بڑی حد تک ایک سیاسی مسئلہ ہے جس کا تصفیہ عدالتوں کے دائرہ کار سے باہر ہے۔ مگر زیرِ نظر درخواستیں نہ تو عدالت سے کسی متبادل خارجہ پالیسی کی طلب گار ہیں اور نہ اس بات کی کہ عدالت حکومت کو خارجہ پالیسی سے متعلق کوئی ہدایات دے۔ یہ درخواستیں تو صرف عوام کے اس بنیادی حق کا نفاذ چاہتی ہیں کہ انہیں اپنی حکومت اور اس کے اہلکاروں کے بعض مبینہ فیصلوں اور امور کے بارے میں مستند معلومات فراہم کی جائیں۔ خارجہ تعلقات کے تعین کا معاملہ کچھ اور ہے، اور حکومت کے امور کے بارے میں معلومات تک رسائی کا معاملہ اور۔ موخر الذکر ایک بنیادی حق ہے، نہ کہ کوئی سیاسی معاملہ۔ یہ حق آئین کے باب دوم میں صراحتاً درج ہے اور عدالتوں میں قابل نفاذ بھی۔ اس تصفیہ کے لئے آرٹیکل 19A کو پڑھ لینا ہی کافی ہے۔

9۔ اس بیان کے بعد ہم معلومات تک رسائی کے قانون یعنی **Freedom of Information Ordinance, 2002 ("FIO")** پر ایک نظر ڈالتے ہیں تاکہ یہ معلوم ہو سکے کہ آیا اس قانون میں دیا گیا طریقِ کار آئین کے آرٹیکل 19A

میں دیئے گئے حق کی ادائیگی کا مکمل اور سیر حاصل اہتمام کرتا ہے۔ کیونکہ ایسی صورت میں سائلان کو 19A کے تحت اس عدالت کا رخ کرنے کی حاجت نہیں ہوگی۔

FIO کے حدودِ اربعہ کا بنیادی تعین سیکشن 3 میں کیا گیا ہے۔ اس میں درج ہے:۔

"دیگر قوانین و ضوابط سے قطع نظر اور اس قانون کے ضابطوں کو ملحوظِ خاطر رکھتے ہوئے کسی بھی خواہشمند شخص کو سرکاری ریکارڈ تك رسائی سے روکا نہیں جا سکتا، ماسوائے ان استثنائی حالات میں جن کا ذکر سیکشن 15 میں کیا گیا ہے۔"

اب ذرا آئین کے آرٹیکل 19A پر دوبارہ غور فرمائیں جس کا متن حسب ذیل ہے:

"قانون میں وضع شدہ معقول ضوابط کے تحت ہر شہری کو عوامی اہمیت کے تمام امور کی بابت معلومات تك رسائی کا حق حاصل ہے"۔

10۔ دونوں شقوں کے متن پر اجمالی نظر دوڑانے سے بھی یہ بات صاف ظاہر ہے کہ آئین میں عطا کردہ حق بہت وسیع اور کسی حد تک "جارحانہ" بھی ہے، جبکہ FIO میں دیا گیا حق کسی قدر محدود نوعیت کا ہے۔ اور ویسے بھی 19A آئین کی شق ہے اور اس اعتبار سے پارلیمان کا منظور کردہ کوئی بھی قانون اس شق اور اس میں دیئے گئے حق کی نفی یا تخفیف نہیں کر سکتا۔ اس لئے ہم اس واضح نتیجے پر پہنچے ہیں کہ جناب حقانی کی وکیل صاحبہ کا یہ استدلال کہ FIO کی بدولت یہ معاملہ عدالت کے اختیار سماعت سے باہر ہے، قابل قبول نہیں۔

11۔ فاضل وکیل صاحبہ کے بعض دلائل عدالت سے یہ تقاضہ کرتے دکھائی دیتے ہیں کہ عدالت تحقیقات کا حکم صادر کرتے ہوئے تحقیقات کے متوقع نتائج کو بھی پیش نظر رکھے۔ ظاہر ہے کہ بطور عدالت ہم ایسا کرنے سے

قاصر ہیں۔ ہمارا کام آئینی حقوق کا بلا خوف وخطر نفاذ ہے۔ یہاں بھی ہم یہی کر رہے ہیں۔اس فیصلے کا فائدہ کس فریق کو ہوگا، سائلان کو یا مسئول علیہہ کو؟ آخر میں سچ کا ظہور ریاست کے کس ادارے پر بھاری ہوگا؟ یہ سوالات تو سرے سے ہمارے پیشِ نظر ہیں ہی نہیں اور نہ ہی ہمیں ان سوالوں سے سروکار ہے۔اور ویسے بھی اگر ان سوالوں کے بارے میں ہم ابھی سے کوئی مفروضہ قائم کرلیں تو پھر تحقیقات کا مقصد فوت ہو جاتا ہے۔نفع وضرر کا حساب کتاب ان مقدمات میں اس وقت درکار نہیں۔ یہاں تو عدالت صرف ایک ہی بنیادی حق کا حساب رکھتی ہے اور وہ ہے سچائی کے ظہور کا حساب۔

12۔ آئین کے ابتدائیہ (Preamble) میں **"ظلم اور جبر کے خلاف عوام کی جہدِ مسلسل سے حاصل کردہ اس جمہوری نظام کی حفاظت"** کی جو کٹھن ذمہ داری آئین نے ریاست کے تمام اعضاء پر ڈالی ہے، اس ذمہ داری کو سہارنے کے لئے سچ ہی ہمارا سہارا ہے۔ان حالات میں سچ ہی ہمارا وسیلۂ نجات ہوگا۔عدالت آرٹیکل 19A میں دیئے گئے حق یا اس آرٹیکل کی کوئی ایسی محدود تاویل نہیں دے سکتی جس سے سچ ایک بار پھر سرکار کے اداروں کا محکوم ہو جائے اور کذِب پھر صدِق کو ظلمت میں پنہاں کر سکے۔

جواد ایس خواجہ

جج

EJAZ AFZAL KHAN, J.- I have gone through the judgment authored by my lord the Chief Justice. It is complete and comprehensive in all respects. Reasons recorded and the case law referred are so persuasive and powerful that one cannot have any other choice but to agree therewith. I respectfully agree with the judgment thus authored. However, I would like to add a few words to illustrate nexus between security of person and State and dignity of person and State and also nexus between a right and its different implications and manifestations.

2. The right to vote, for instance, is not a right confined to casting a ballot. It is a wider and more comprehensive term. If it, on the one hand, aims at choosing the representative, it on the other includes the right to participate in the electoral process, political activity consisting in forming a political party, projecting a programme through a manifesto and propagating it and thereby persuading the people to accept it. In the case of Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416) and many other cases cited in the main judgment this Court has interpreted the expression fundamental right as of much greater amplitude and of much wider ring and connotation. It has been extended to include all the possible implications and manifestations of such right. Apparently registration of a political party has no nexus with a fundamental right. The more so when the vires of a statute making its registration compulsory is challenged in a Court of law. But since it is one of the manifestations and one of the consequential effects of such right, it was extended to cover the same.

3. Security of person is one of the most important fundamental rights. It is inextricably linked with the security of the State. If and when a person performing functions in connection with the affairs of the Federation acts in a manner which imperils the very existence of the State a writ of prohibition or any other appropriate writ, according to the circumstances of the case could be issued against him. A petition filed by a citizen asking for the issuance of an appropriate writ cannot be declined simply because his fundamental right has not yet been infringed. A narrow and pedantic interpretation may lend support to the argument that security of person is not imperiled or infringed by a mere threat to the security of the State, but actually it is otherwise. Security of person in the absence of a strong, secure and stable State would be

inconceivable. It would be as imaginary as drinking water from a mirage. Therefore, fundamental right of person would stand infringed the moment something tending to imperil the security of State is done.

4. Why is loyalty to the State the basic duty of every citizen? Why is obedience to the Constitution and law the inviolable obligation of citizens? Why are fundamental rights suspended when security of the State is at stake? Because the State is a fortress protecting such rights. Because the Constitution and the law are the fountains of such rights. So long as the fortress is intact fundamental rights shall remain protected. So long as the fountains are secure fundamental rights would continue flowing from it. It would thus be naive to say that threat to security of the State has nothing to do with fundamental rights of person. A threat to the fortress protecting such rights would, therefore, be a threat to the security of person. A citizen with seeing eyes and thinking mind would not sit relaxed and relieved till the fall of such fortress by seeking refuge in the belief that security of person is yet to be attacked or assaulted. Such belief seems have originated from no other state except that of self-deception. A person hacking a branch of a tree another is sitting on, does not harm the latter but when the branch is hacked, its fall would coincide with the fall of the person sitting thereon.

5. The Constitution of the Islamic Republic of Pakistan not only guarantees the security of person but also his right to live with dignity. The word “dignity” has various shades of meanings. It, according to Chambers 21st Century Dictionary means “stateliness, seriousness and formality of manner and appearance, goodness and ability of character, calmness, self-control and high rank and position.” This right has various effects and implications ranging from individual life to the collective national life. Within the confines of his individuality he may be respectable but he cannot live with his head high within or outside his country, when the country does not command respect in the comity of nations. If the dignity of State which cannot be detached from the dignity of person, appears to have been compromised or made negotiable by express or implied terms he not only looses his moorings but also ceases to live with dignity and respect. His right thus stands infringed. In the case of Benazir Bhutto vs. Federation of Pakistan (PLD 1998 SC 388) this Court while highlighting this aspect held in no

uncertain terms that the right to live includes the right to live with respect, honour and dignity. Therefore, dignity of person being commingled with the dignity of State cannot be dealt with as something apart from the latter. Wherever an act or omission of a person who is at the helm of affairs in any department of life tends to compromise or even negotiate the dignity of the state that would be an affront to the fundamental right of the citizen guaranteeing his dignity, notwithstanding his person may not be subjected to any indignity. This is what has been portrayed in the preamble of the Constitution in the words as follows:-

> "So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity;"

6. What is sovereignty and what does it mean? Sovereignty means supreme and independent power or authority. According to the preamble of the Constitution, authority over the entire universe belongs to Almighty Allah alone. This has been delegated to the people as a trust. It is to be exercised by them through their chosen representatives within the limits prescribed by Him. Principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam are the norms to be followed. Those who are chosen are not given carte blanche to rule according to their whim and caprice but according to the provisions of the Constitution and law. Any chosen representative who does not exercise this authority in accordance with the provisions of the Constitution shall betray the mandate given to him pursuant to the exercise of right to vote. Such a course though does not infringe a right at its primary level but it does so in its ultimate form and manifestation. Because the very condition for the exercise of such right is that those who are chosen shall exercise their authority in accordance with the provisions of the Constitution.

7. Consent to, connivance at or complicity in the infringement of security of person may not be so criminal, as an act, an omission or an attitude evincing the aforesaid attributes in the infringement of security of State. It is rather pedantic, perverse and preposterous to detach or disassociate security, solidarity and sovereignty of the State from fundamental rights. Security of person and security of State are

integral part of each other. Existence of one cannot be conceived without existence of the other. All this is a part of an organic, integrated and indivisible whole. As an injury to a limb of one's body can't be considered in isolation, so can't be an injury to a vital organ like the brain or the heart when it tends to paralyze or benumb all the limbs. One cannot keep them in water tight compartments or away from or independent of each other. Security of the State is like a ship. One cannot have a safe and smooth sailing in the ship by permitting others to drive a hole into that. Such an approach or outlook, we are afraid, would be dangerous, devastating and even catastrophic for all those who live in the hard world of reality and, of course not in fool's paradise. Partial and piecemeal approach or outlook in such matters cannot be approved of. It, therefore, follows that the nexus between security of person and State and dignity of person and State cannot be lost sight of while hearing a *lis* for enforcement of fundamental rights. The probe ordered by us is a prelude thereto as it aims at uncovering the truth for taking remedial measures before the situation goes beyond repair.

(Ejaz Afzal Khan)
Judge
12.01.2012