IN THE SUPREME COURT OF PAKISTAN
(Appellate / Original Jurisdiction)

Present:

Mr. Justice Jawwad S. Khawaja
Mr. Justice Khilji Arif Hussain
Mr. Justice Ejaz Afzal Khan

CMA NO.2376/2013, etc. IN CONST. P. NO.105/2012

Hamid Mir & another	vs.	Federation of Pakistan, etc.
For the applicant	:	Mr. Tariq Mehmood, ASC (in CMA No.2383 / 13) (in CMA No.2376, 2381-2385 / 13 (applicants in-person)
For the petitioner (s) (in Const.P.105 / 2012)	:	Mr. Absar Alam & Mr. Asad Kharral.
On Court Notice	:	Mr. Irfan Qadir, Attorney General for Pak. Mr. Dil Muhammad Khan Alizai, DAG. Mr. Jamal Nasir, DG Information. Mr. Tahir Hassan, Director Information. Mr. Azam Khan, Director (Law) FIA. Raja Amir Abbas, ASC for M / o Information.
Date of hearing	:	07.05.2013

O R D E R

Jawwad S. Khawaja, J. – Constitution Petition No.105 of 2012 was filed by two journalists namely, Hamid Mir and Absar Alam Haider. They were later joined by other journalists. A number of issues have been raised in this Constitution Petition. Vide order passed by us on 15.01.2013, a two-Member Commission has been appointed by the Court for the purpose of preparing a report on nine Terms of References (ToRs) numbered A to I, which have been set out in our order dated 15.01.2013. The Commission has already submitted a report in respect of ToR No.F and is due to finalize its report on the remaining ToRs by 31.05.2013.

2. While the Commission is engaged in finalizing its report, the issue of establishing and maintenance of accounts by the Government (respondent No.1) which have not been subjected to audit has come to the fore. Over the last few hearings of this petition, we have been informed that substantial sums of money have been spent by the Ministry of Information and Broadcasting. Details of these expenditures have neither been disclosed nor audited by the office of the Auditor General. This has raised constitutional issues. The

petitioners have also highlighted the need for openness and transparency in spending funds from the public exchequer which have been collected by the government by way of taxes, fiscal levies and impositions. It has also been submitted by the petitioners that substantial amounts have been allocated to various ministries/departments which have not been audited.

3. There is a fundamental premise, relating to disclosure/audit, on which allocation of such funds and their spending is to be judged. Article 19A of the Constitution stipulates in very clear terms 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".* Article 19 of the Constitution, *inter alia*, guarantees *"freedom of the press, subject to any reasonable restrictions imposed by law"*. Such reasonable restriction can only relate to and be imposed *"in the interest of the glory of Islam or the integrity, security or defence of Pakistan or friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, [commission of] or incitement to an offence"*. The fundamental premise to be kept in mind, is that all funds in the State exchequer are funds which have come out of the pockets of the people of Pakistan. These funds are the product of the toil, sweat, tears and blood of the people. The Government is at most a trustee and custodian of these funds and is accountable for the expenditure of these funds in a fiduciary capacity as envisioned in the Constitution. The only exception against public disclosure is given in Articles 19 and 19A of the Constitution referred to above. Even where the government or the legislature choose to regulate or impose restrictions upon disclosure of disbursement of funds, such restrictions cannot be arbitrary but have to be reasonable. As to what is or what is not reasonable is a matter of which the government is not the sole arbiter. It is constrained by the Constitution and by law. Any restriction on disclosure of expenses made from the exchequer, which the government imposes, or the legislature provides for, would be justiceable on the touchstone of Articles 19 and 19A of the Constitution.

4. It is in this context that at least since September, 2012, we have repeatedly been asking the Government to state its basis to justify non-disclosure of expenses from the public exchequer; but, it is most unfortunate that despite our repeated directions and

orders nothing material has been done. In our order dated 13.9.2012, we had directed the respondent Ministry to *"set out in detail the budget allocation for the financial years ending 30.6.2010, 30.6.2011, 30.6.2012 and 30.6.2013 alongwith supplementary grants"*. We had further required the Ministry to furnish details of the budget allocation and supplementary grants for these years alongwith the report of the Auditor General of Pakistan in respect of the said budget allocations. Although this was required to be done before 17.9.2012, we note that our order has not been complied with. Instead, on 17.10.2012, learned counsel representing the respondent Ministry stated that there were only three heads of account in respect of which a privilege against disclosure was being claimed namely, (a) Special Publicity Fund, (b) Secret Service Expenditure and (c) the Institute of Regional Studies. A relatively small amount totaling Rs.14,00,00,000/- (rupees fourteen crores) approximately was mentioned as the sum expended from these accounts. The order which was then passed by us on 20.12.2012 is of relevance to the question presently being considered by us. The issue is as to whether *"the federal budgets have allocated from time to time to the federal Ministry of Information and Broadcasting any funds that may be spent in its discretion or that may be spent in secrecy without disclosing the purpose of the disbursements or the identity of its recipients? If so did the said Ministry have a constitutional basis for such disbursements?"* It was clarified by us that in line with the provisions of Articles 19A and 19 of the Constitution, we were not inclined to accept the contention of the Ministry that use and expenditure of these funds could be kept secret. We also observed and recorded as under:

> *"Prima facie, while the Ministry may claim privilege from making public disclosure of certain parts of its budget, such privilege is not automatically available to the Government. It must be claimed from the Court. Information for which secrecy is sought must be clearly marked and the reasons for seeking secrecy must also be clearly stated. The Court can then make a determination on this point in line with the law and the Constitution".*

5. In the same order we noted the submissions of Mr. Asad Kharal, a journalist, who has been impleaded as a petitioner, that *"the budgets of 27 other Ministries also contain secret funds similar to the ones which are in place in the Ministry of Information"*. If correct, this would be a disturbing matter since secret funds can potentially be a tool for undermining

the rights of citizens protected under Articles 19 and 19A of the Constitution and may encourage waste and corruption. It has consistently been stated by this Court that all public authorities and functionaries are fiduciaries of the public and receive their perquisites, positions and funding from the public. The Auditor General is constitutionally empowered to have access to information relating to budgeted expenditures and supplementary grants in order to ensure that there is no misuse of money spent from the public exchequer and the possibility of corrupt practices is eliminated. It may also usefully be noted that in our three immediate preceding orders dated 25.04.2013, 02.05.2013 & 06.05.2013, we have again and again emphasized to the Government that without a lawful justification, there cannot be a denial of disclosure or withholding of accounts from audit by the Auditor General. Numerous opportunities were given to the learned Attorney General but as noted, he has not been able to render any assistance whatsoever or to give any meaningful response to the simple question raised by us.

6. Today, the Attorney General started his submissions by referring to Article 241 of the Constitution, in support of the Government's plea that some funds identified by the Government itself, are not subject to audit by the Auditor General. We have gone through Article 241 of the Constitution and note that it is wholly irrelevant and has no nexus whatsoever with the question of audit of accounts. Article 241 *ibid* relates to service matters and deals with the *"appointment to and conditions of service of persons in the service of Pakistan"*. We are, therefore, quite surprised that this Article was referred to in the context of expenditure from the exchequer referred to above.

7. When this was pointed out to the Attorney General, he readily conceded that Article 241 of the Constitution had no relevance in the present matter. We, therefore, are constrained to record the lack of preparation and seriousness on the part of the Attorney General in this important Constitutional case. The Attorney General then stated that Para-130, Appendix-VIII of the General Financial Rules, 1973 (hereinafter referred to as the 'GFR') provided complete justification against disclosure/audit of expenses which the government itself designates as being not subject to audit or disclosure. When we asked the learned Attorney General to give us the legal sanction, under which the GFR were

made or adapted in Pakistan, he was unable to do so; instead he referred to Section 124 of the Government of India Act, Article 224 of the Constitution of 1956, Article 241 of the Constitution of 1962 and Article 268 of the Constitution of 1973. Article 268 of the Constitution, *inter alia*, provides that *"except as provided by this Article, all existing laws shall, subject to the Constitution, continue in force, so far as applicable and with the necessary adaptations, until altered, repealed or amended by the appropriate Legislature"*. In the light of this Article the obvious question which arose and which was put to the Attorney General was to show as to how the GFR can be treated as existing law. We were given no justification from the government in support of a plea that GFR can be treated as 'existing law'. At this point, we may add that there has been no adaptation of the GFR in Pakistan and none was shown to us by the learned Attorney General. In India, however, we have tentatively ascertained that some adaptation was made after 1947. We are also quite amazed that nobody in government seems to be aware of the legal sanction behind the GFR and yet the same are being accepted (contrary to the Constitution and law) as having legal backing. Surprisingly, this absence of relevant statutory backing is reflected in confusing and misleading replies given in the CMAs filed by the Government. It is the Government's case in CMA No.3827 of 2012 that *"transaction/operation under the head of account "Secret Service Expenditure" is not auditable. A certificate is recorded by the Controlling Officer as required vide S.No.37 of General Financial Rules Vol. II"*. In CMA No. 3827 of 2012, no indication whatsoever is given as to the source of legitimacy of the GFR. Sub-Rule (5) of Rule 37 stipulates that *"the accounts of secret service expenditure will not be subjected to scrutiny by the Audit authority".* CMA No. 446 of 2012 filed by the Government makes the averment, *inter alia*, that *"the details of spending of amounts specified as secret funds in the budget cannot be divulged to the petitioners as the same are different from other public funds which are open to scrutiny and audit".* While no basis has been given for this averment made in the CMA a brief has been appended with the said application. For ease of reference and in view of its significance, the brief is reproduced in its entirety as under:-

> *"BRIEF :*
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> *1. "Secret Service Fund is an allocation made under the Annual Budget Book (now CFY:2012-13) titled under "DEMAND NO.058: Head of Account ID 1358: Secret Service Expenditure" (Rs. 1,20,00,000/-) which is similar in nature to Secret Fund provided to other GOP organizations. Besides, regular annual allocation in this Head of Account, special*

allocations are made by the Prime Minister for various specific assignments and projects given to this Ministry from time to time. The expenditure for such allocations are maintained separately as per law.

2. "The Secret Service Fund is judiciously utilized by the Secretary of Information & Broadcasting as Principal Accounting Officer (PAO) to supplement and support the publicity and projection efforts of the Government's development policies/action plan, and to counter negative propaganda which is against national interest, both within and outside the country. Since the expenditure incurred on such sensitive assignments cannot be met out of regular auditable budgetary allocation, all the previous governments in the past have been placing these funds at the disposal of this Ministry which is strictly utilized in accordance with the rules and regulations governing "Secret Service Expenditure" issued by the Finance Division from time to time. The fund has always been audited by various Finance Secretaries in the past as and when required as per regulations".

3. "The Secret Service Fund was established since long most probably in the 70s. The allocation for specific assignments/projects was initiated sometimes in the 80s. Logically, it would not be possible to trace the record of last 30 years in order to find out as to when the fund was formally established. However, one of the documents traced indicate that the Bank Account was shifted from Muslim Commercial Bank, Civic Centre, Islamabad to National Bank of Pakistan, Model Branch, Islamabad in 1997. At present the Accounts are being maintained in the National Bank of Pakistan as per law."

5. "The annual budget documents of the Finance Division titled ***Demands for Grant and Appropriations*** *provides details of budget allocation out of* ***FEDERAL GOVERNMENT'S CONSOLIDATED FUND to*** *each Ministry/Division/Department/Organization. The Finance Act 2012-13 which extends to whole of Pakistan in terms of Federal Government financial proposals gives legal effect to this authorized budget and its components including allocations under classified head of Secret Service Fund (SSF) of M/o I&B. The said Act passed by the Parliament is duly assented by the President, authorizing each Minister/Division including I&B to incur expenditure as per allocation. Historically this fund has existed since 1947-50 onwards when the Federal Capital was located in Karachi. It has time tested authenticity and utility."*

6(a). "The AGPR's quarterly release of SSF to I&B Division is always preceded by provision of Certificate of Expenditure for the earlier quarter, a copy of which is invariably sent to Directorate General of Audit in terms of Para- 37 of Appendix –8 of GFR Vol-II, for its record and reference."

8. The salient aspects of the above brief, which represents the case of the Federation, can now be noted. It is not disputed that the Secret Service Fund is an allocation made under the Annual Budget Book titled Demand No.058. A self serving statement has been made that the Secret Service Fund is judiciously utilized by the Secretary of Information & Broadcasting as Principal Accounting Officer. It has also been stated in the brief that the annual budget document of the Finance Division titled "Demands for Grant of Appropriations" provides details of budget allocations out of the Federal Government's Consolidated Fund to each Ministry/Division/Department/ Organization and these amounts including allocations are classified as Secret Service Fund. From this, it is

evident that the government has allocated funds to various Ministries, which funds or expenses therefrom are neither disclosed nor audited. One of the petitioners namely, Mr. Asad Kharal has stated in his CMA No. 5226 of 2013 that there are 27 Ministries to which funds have been allocated but which are neither audited nor disclosed to the public on the untenable plea that the same are secret.

9. What we also find surprising is that in the above referred brief, it is stated that *"the Secret Service Fund was established since long, most probably in the 70s"* (emphasis provided). At another point in the brief, it has been stated contrary to this averment, that the *"Secret Service Fund is existing since 1947-50 onwards"*. When the above submissions are analyzed, it becomes evident that without any statutory or constitutional backing, Rule 37(5) of GFR cannot be legally sustained. If indeed, the Federal Government is seeking protection under the aforesaid Rule, this is not legally permissible because no justification or basis or source of Rule 37(5) of the GFR has been shown to us. Under the Constitution, in Articles 78 to 86 the financial procedure for the Federation's accounts has been clearly spelt out. The entire revenues of the Federation are either part of the Federal Consolidated Fund or the same are part of the Public Accounts of the Federation. There is no third account of the Federation. No part of the Consolidated Fund and the Public Accounts of the Federation, is exempted from audit under the Constitution.

10. We can now advert to two Statutes, which are of direct relevance to the issue before us; these are the *Auditor General's (Functions, Powers and Terms & Conditions of Service) Ordinance, 2001* and the *Controller General of Accounts (Appointment, Functions & Powers) Ordinance, 2001*. It is quite clear from the submissions made by the learned Attorney General in Court today, that the provisions of Article 169 and 170 of the Constitution have not been taken note of by him nor is he aware of the existence of these statutes as is evident from his misguided reliance on Article 268 of the Constitution, noted above. Article 170 of the Constitution, it may be noted, was materially amended in 2010 through the 18th Amendment. The original Article was renumbered as sub-Article (1) and a new sub-Article (2) was added. The same being directly relevant is reproduced as under:-

> "*(2) The audit of the accounts of the Federal and of the Provincial Governments and the accounts of any authority or body established by, or under the control of, the Federal or Provincial Government shall be conducted by the Auditor-General, who shall determine the extent and nature of such audit".* (underlining for emphasis is ours)

11. By virtue of the amended Article, the audit of accounts of the Federal and the Provincial Governments must be conducted by the Auditor General, who is also to determine the extent and nature of the said audit. The Constitution does not recognize any exception to the provisions of Article 170(2) *ibid.* In this view of the matter the Consolidated Fund and Public Accounts cannot remain unaudited. The provisions of the two statutes of 2001, which are relevant in this case, can now be examined. The terms of appointment in service of the Auditor General have been given in Section 4 of the Auditor General's (Functions, Powers and Terms & Conditions of Service) Ordinance, 2001. It has also been expressly stipulated in section 7 of the statute that *"the Auditor-General shall on the basis of such audit as he may consider appropriate and necessary, certify the accounts, compiled and prepared by Controller-General of Account …"*. Section 8 of the statute is also extremely relevant. It directs and mandates the Auditor General to *"audit all expenditure from the Consolidated Fund of the Federation … and to ascertain whether the moneys shown in the accounts as having been disbursed were legally available for, and applicable to, the service or purpose to which they have been applied or charged and whether the expenditure conforms to the authority which governs it…."*(emphasis provided). Section 8(b) of the statute requires the Auditor-General to *"audit all transactions of the Federation and of the Provinces relating to Public Accounts* (emphasis provided)*"*. It thus becomes abundantly clear that where the amount is charged on the Consolidated Fund or relates to the Public Accounts of the Federation or of the Provinces, the same must be audited by the Auditor-General without exception.

12. The powers of the Auditor General in connection with the audit of accounts have been given in Section 14 of the aforesaid statute. This legal provision stipulates that *"the Auditor-General shall, in connection with the performance of his duties under this Ordinance, have authority:-- (a) to inspect any office of the accounts, under the control of the Federation or of a Province … (b) to require that any accounts, books, papers and other documents which deal with, or form, the basis of or otherwise relevant to the transactions to which his duties in respect of audit*

extend, shall be sent to such place as he may direct for his inspection…". It is not necessary to reproduce the entire text of the aforesaid Ordinance or of the Controller General of Accounts (Appointment, Functions & Powers) Ordinance, 2001 because the same are clear and do not exclude any amount forming part of the Consolidated Fund or the Public Account from audit.

13. As we have noted above sub-Article (2) of Article 170 of the Constitution was added by the 18th Amendment which amply empowers and directs the Auditor General to fulfill his constitutional obligation as watchdog of the people of Pakistan. It is only through audit that it can be ensured that the hard earned income of citizens of this country is being spent for lawful purposes. Without the audit specified by the Constitution and the two statutes, referred to hereinabove, there can be little or no room for any transparency. Absence of audit by the Auditor General, apart from being violative of the Constitution and law, is a sure and certain invitation to corruption and lack of accountability.

14. We have already noted in our judgment in *Watan Party and others vs. Federation of Pakistan and others* (PLD 2012 SC 292) that Article 19A of the Constitution, which also has been added through the 18th Amendment, constitutes a major advance of fundamental rights and is essential for the effective functioning of democracy. In that judgment, we held that "[t]*he 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."* It was noted that democracy itself becomes meaningless if the electorate is not provided the information, which can enable it to exercise its right to franchise on the basis of informed choice. It is through their choice that the electorate rewards good governance and punishes bad governance and maladministration.

15. The necessity for passing a detailed interlocutory order has arisen because our previous orders have neither been read nor complied with and the fundamental issues raised therein have not been addressed. We are concerned that without proper assistance on behalf of the Federation, it might suffer. We are, therefore, adjourning the matter to 9.5.2013 to enable the Federal Government to render proper assistance. We would also direct a senior functionary of the Auditor General's Office to be present in Court on the next date of hearing.

Adjourned. To come up on **09.05.2013** for further hearing.

Judge

Judge

Judge

Islamabad,
07.05.2013.
Irshad Hussain /*