

INDEX

Sl. No.	Contents	Para No.	Pages
1.	Historical Background of general election of 1990 and exercising of power under Article 58(2)(b)	2-3	2-4
2.	Disclosure made by Maj. General (R) Nasirullah Khan Baber on the Floor of the house, regarding distribution of money	4	4-5
3.	Affidavit of Lt. Gen. (R) M. Asad Durrani dt: 24.07.1994 providing logistic support for distribution of money on the instructions of Gen. (R) Mirza Aslam Beg (names of recipients have been provided in para 101 at page 130)	4	5
4.	News clipping of Daily Jang dated 12.06.1996 mentioning the statement of Nasirullah Baber made on the floor of the House and containing the names of recipients.	5	6-7
5.	Letter of Air Marshal (R) Muhammad Asghar Khan dated 16.06.1996 addressed to Mr. Justice Sajjad Ali Shah.	6	7-8
6.	Letter of Lt. Gen. (R) M. Asad Durrani (the then Ambassador of Pakistan to Germany at Bonn) dt: 07.06.1994 addressed to the then PM mentioning the names of remaining recipients	7	8-10
7.	Gen(R) Aslam Beg, Lt. Gen. (R) M. Asad Durrani and Mr. Yunus Habib were arrayed as respondents.	8	10
8.	CMA No.109/97 by Brig. (R) Kamal Alam, naming the officers, involved in the distribution of money	9	10-11
9.	Order dt.18.10.2012 with regard to statement of Brig. (R) Hamid Saeed Akhtar requesting it to be treated as "confidential".	9	11-12
10.	Statement of Brig.(R) Hamid Saeed Akhtar, as well as hand written Diary providing details of accounts/ list of recipients	9	12-15

11.	Statement of Yunus Habib, u/s 161 Cr.P.C naming the recipients is not admissible	10	16
12.	Brief of reply of Mirza Aslam Beg dt.23.02.1997 a/w reproduction of the same wherein he acknowledged the fact that money was provided by Yunus Habib and distributed by Asad Durrani on the direction of Election Cell. (relevant portions have been highlighted for reference)	11	16-25
13.	Observations of petitioner on reply of respondent No.1 about his involvement in the distribution of money, contradicting the defences made by Aslam Beg	12	25-28
14.	Affidavit of Lt. Gen. (R) M. Asad Durrani dated 31.10.1997 explaining his position and confirming the distribution of money.	12	28-29
15.	CMA No.1006/2012 and discussion on reports of Commission on Mehran Bank and HBL Scandals	14-18	30-33
16.	Discussion regarding supply of 'confidential statement' of Lt. Gen. Asad Durrani to PM, Mohtarma Benazir Bhutto, which was not produced in Court.	20	36-37
17.	Observation of Court regarding involvement of Mirza Aslam Beg in disbursement of money and his denial in reply CMA 1973/12.	21	37-38
18.	Affidavit of Mr. Yunus Habib dated 8.3.2012 giving details of his meetings with Gen. (R) Aslam Beg and President Ghulam Ishaq Khan as well as the details about the generation of funds	22	38-42
19.	Counter affidavit of Mirza Aslam Beg dt.9.3.2012 leveling allegations against Yunus Habib	23	42-47
20	Concise statement of Lt. Gen. (R) M. Asad Durrani dated 8.3.2012 clarifying that money was deposited by Yunus Habib in MI accounts and not ISI	24	47

21.	Affidavit of Mr. Yunus Habib dated 10.3.2012 in response to affidavit of respondents No.1 & 2.	24	47-50
22.	CMA No.1034/12 filed by Yunus Habib disclosing the names of persons who did not receive the money directly (Javed Hashmi).	24	50-51
23.	Report of NAB regarding plea-bargain in HBL scam	25	51
24.	Prayers/declarations sought by the petitioner	25	51
25.	Court Proceedings dt.26.6.1997, regarding creation of political cell in ISI, in 1975 and detailed discussion	25-29	51-57
26.	Cross-examination of Nasirullah Babar and Asad Durrani, produced in Court, and Discussed in order dated 08.03.2012	27	54-57
27.	Observation that prima facie cell was functioning in the Presidency	29	57
28.	Notice to Secretary to President and the statements made by officers of the Presidency	30	58
29.	Clarification of Yunus Habib that the amount was withdrawn from HBL and not from Mehran Bank. Detail discussion regarding meetings with Aslam Beg and President Ghulam Ishaq Khan	31	58-59
30.	CMA No.3196 and 4350/12 filed by Roedad Khan denying his involvement in political activity	32	59-60
31.	Discussion regarding establishing of Election Cell in the presidency and distribution of money	32-33	59-61
32.	Allegations of disbursement of money to "Friends" and General Asif Nawaz and exception taken to it by him	34	61
33.	Maintainability: Arguments of Mr. Akram Sheikh Arguments of Salman Akram Raja Discussion	35 36-38 39-41	61 61-64 64-68

34.	Bias Arguments of Attorney General Discussion/findings	42 43-44	69 69-71
35.	Role of President Involvement of President in Politics Findings regarding President's role Use of 58(2)(b) Article 41 and Oath of President Arguments of Attorney General that office of President is a political office Discussion on role of President President is included in service of Pakistan Arguments of AG with regard oath of President similar to PM etc.	45 46-49 50 51-53 54 55 56-74 75-79 80	69 69-80 80 80-84 85-86 86-87 87-102 103-111 111-112
36.	Act of individual or Institution Arguments of Salman Akram Raja Arguments of Attorney General Finding	 81 82 82	 112 112 113
37.	Role of Armed Forces Article 243 and 245 Section 33 of Pakistan Army Act Oath of Armed Forces Observation that distribution of money stands admitted by the respondents. Observation that Political Cell was created in Presidency. Conclusion that President has no authority to create Election Cell Officers are not bound to obey illegal Orders.	83-84 85 86-92 93-95 97 98 99-100	113-115 115-116 116-121 121-123 125 125-126 126-128
38.	Detail of distribution/recipients Concise statement of Asad Durrani through CMA 3307/12 List of recipients as per list attached with affidavit dt: 27.07.94 of Asad Durrani List of recipients given by Asad Durrani in letter dt: 07.06.94 Detail of distribution of money given by Asad Durrani in his concise statement dt:30.07.12 Detail of distribution/recipients given by Hamid Saeed in statement dt:18.10.12 Information regarding drawl/transfer of money at page 163 of paper-book. Account of distribution of money, page 220 & 221 of paper-book. Details/names of beneficiaries given by Yunus Habib in CMA 1034/12 Acknowledgement of Abida Hussain	101 101 101 101 101 101 101 101 101	128-129 130 130-131 131 131-132 132-133 133-135 135 135

39.	Short Order	102	135-140
40.	Thanks to the learned counsel	103	140
41.	Order regarding fixation of case, in respect of 270 million doled out from IB account in the year 2008-09	104	140-141

(Original Jurisdiction)

Mr. Justice Khilji Arif Hussain

Raja Abdul Ghafoor, AOR

For NAB: Mr. Mazhar Ali Chaudhry, DPG
Brig. (R) Hamid Saeed, in person

For HBL: Nemo

Date of Hearing: 19.10.2012.

...

J U D G E M E N T

IFTIKHAR MUHAMMAD CHAUDHRY, CJ. – The instant Human Rights Case was registered under Article 184(3) of the Constitution of Islamic Republic of Pakistan, 1973 [hereinafter referred to as 'the Constitution'] on the basis of letter dated 16.06.1996 written by Air Martial (R) Muhammad Asghar Khan, a former Chief of Air Staff [hereinafter referred to as 'the petitioner'] to the then Chief Justice of Pakistan.

2. For the purposes of disposal of this petition, it is necessary to recapitulate the historical background in which the general elections of 1990 were held. On 17.08.1988, General Zia-ul-Haq (late), Chief of Army Staff who had imposed martial law in the country on 05.07.1977 and later assumed the office of President of Pakistan, died in C-130 airplane crash carrying top military brass of the time and some other notable international figures of the time, few moments before its arrival at the Bahawalpur Military Airbase. General Mirza Aslam Beg, the then Vice Chief of Army Staff [hereinafter referred to as 'respondent No.1'] was also flying to Bahawalpur but in a separate plane and survived. The same day, Mr. Ghulam Ishaq Khan (late), the then Chairman, Senate of Pakistan was sworn in as the Acting President under the Constitution and respondent No.1 was appointed as Chief of Army Staff. On 16.11.1988, general elections were held in the country and Pakistan People's Party (PPP), which captured the

largest number of seats in the National Assembly in comparison to other parties, formed the Federal Government. Mr. Ghulam Ishaq Khan (late) was elected as the new President. Political differences arose between the President and the elected government of Late Mohtarma Benazir Bhutto. On 06.08.1990, the President, in exercise of powers conferred upon him under Article 58(2)(b) of the Constitution, which was inserted by the Eighth Constitutional Amendment, dissolved the National Assembly and dismissed the government on the ground that the Government of the Federation was not being carried out in accordance with the provisions of the Constitution. The dissolution order was challenged before this Court in the case of Ahmed Tariq Rahim v. Federation (PLD 1992 SC 646)], but the same was upheld.

3. Mr. Ghulam Mustafa Jatoi was appointed as the Caretaker Prime Minister and fresh elections were scheduled to be held on 24.10.1990. An electoral alliance of nine political parties, known as the *Islami Jamhoori Ittehad* (IJI), also called Islamic Democratic Alliance won the largest parliamentary seats and formed the government with Mian Muhammad Nawaz Sharif as the Prime Minister of Pakistan. On 19.04.1993, Mr. Ghulam Ishaq Khan invoked Article 58(2)(b) of the Constitution and dissolved the National Assembly on grounds/allegations of mal-administration, corruption, nepotism etc. This led, once again to forming an interim government headed by Caretaker Prime Minister Balakh Sher Mazari. The dissolution order was challenged before the Supreme Court in the case of Mian Nawaz Sharif v. Federation (PLD 1993 SC 473) wherein the exercise of power by the President under Article 58(2)(b) of the Constitution was held to be unconstitutional. In consequence, the National Assembly and the

Government were restored. However, as the political standoff continued, which created a *passé*, the President dissolved the National Assembly on the advice of Prime Minister Mian Muhammad Nawaz Sharif and proceeded on leave as part of the political arrangement. This time, Mr. Waseem Sajjad, the then Chairman Senate became the Acting President under the Constitution while Mr. Moeen Qureshi, a banker from New York was appointed as the Caretaker Prime Minister. Elections were held on 06.10.1993 and the PPP emerged as the biggest winner of seats in the National Assembly and formed government with Mohtarma Benazir Bhutto (late) as the Prime Minister. Mr. Farooq Ahmed Khan Leghari, a political worker of the PPP was elected as the new President of Pakistan. On 06.11.1996, President Farooq Ahmad Khan Leghari too invoked Article 58(2)(b) of the Constitution and dissolved the National Assembly on various charges/allegations.

4. On 11.06.1996, while the PPP government was in office, Maj. General (R) Nasirullah Khan Babar, the then Minister for Interior, made a speech on the Floor of the National Assembly wherein he presented an affidavit dated 24.07.1994, sworn by the former Director General, Inter-Services Intelligence (ISI), Lt. General (R) Asad Durrani [hereinafter referred to as 'respondent No.2'] wherein it was asserted, *inter alia*, that different sums of money were disbursed to various politicians/political parties forming part of IJI to enable them to win election. It may be noted that at the time of making affidavit, respondent No.2 was posted as Ambassador of Pakistan in Bonn, Germany. He stated in the affidavit that in September 1990 while he was posted as DG ISI, he received instructions from respondent No.1,

the then Chief of Army Staff (COAS) "to provide logistic support to the disbursement of donation made by some businessmen of Karachi to the election campaign of IJI". He was also told that the operation had the blessings of the Government and proceeded to act in accordance with the instructions received by him. The contents of his affidavit are reproduced hereinbelow *in extenso*: -

"AFFIDAVIT

I, Lt. Gen. (R) M. Asad Durrani, Muslim, adult, former DG. ISI, presently posted as Ambassador of Pakistan, Bonn, Germany, do hereby my oath and state on solemn affirmation as under:

- (1) In September, 1990, as DG, ISI, I received instructions from the then COAS, (now retired) General Mirza Aslam Beg to provide "logistic support" to the disbursement of donations made by some businessmen of Karachi to the election campaign of IJI. I was told that the operation had the blessings of the Government.
- (2) Accordingly I tasked some officers, and took the following actions:
 - (a) Opened a few cover accounts in Karachi, Quetta and Rawalpindi.
 - (b) Money – eventually 140 million rupees – was deposited in Karachi accounts by one Mr. Yunus Habib.
 - (c) As required amounts were transferred to Quetta and Rawalpindi accounts.
 - (d) A total of 6.0 million rupees were distributed as directed by the COAS or at time directly by the election cell in Presidency.
 - (e) The remaining money was transferred to a special fund.

Distribution of 6.0 million is attached:

--Sd.--
Lt. Gen. (Retd.)
24 July, [***] 94
(M. ASAD DURRANI)

The names of the recipients are detached from his affidavit and shall be noted at an appropriate place.

5. The contents of the speech of the then Minister for Interior/affidavit of respondent No.2 were carried by the daily Jang in its issue of 12.06.1996 as under: -

نواز شریف کی بلوغت و انصاف نے چارج شیٹ قومی اسمبلی میں پیش کر دی

سابق وزیراعظم نے ایک غیر ملکی بینک کے سربراہ کو پاکستان بلاوا اور قرضے کیلئے ہاتھ پھیلا کر 5.5 ملین ڈالر کا قرضہ لیا

انتخابی مہم کیلئے آئی ایس آئی سے 35 لاکھ روپے لئے جنوبی ایشیاء کا امیر ترین آدمی بننے کیلئے قومی خزانے لوٹتے رہے

اپوزیشن لیڈر ایچی ڈی عنوانیوں کو چھپانے کیلئے احتسابی کمیشن کا مطالبہ کر رہے ہیں وفاقی وزیر داخلہ نے دستاویزی ثبوت پیش کر دیے

اسلام آباد (نامہ نگار خصوصی) + اپ (پ) وزیر داخلہ میجر جنرل (ریٹائرڈ) نصیر اللہ بابر نے پیر کو رات گئے قومی اسمبلی میں اپوزیشن لیڈر میاں نواز شریف کے خلاف ایک نئی چارج شیٹ پیش کی ہے جس میں انہوں نے وزیراعظم کی حیثیت سے نواز شریف پر ناجائز مالی فائدہ حاصل کرنے اور بدعنوانیوں میں ملوث ہونے کے الزامات لگائے ہیں۔ وزیر داخلہ نے الزام لگایا کہ نواز شریف نے نیو جرسی میں چودہ ان کمپنی کے نام سے ایک جعلی کمپنی رجسٹر کرائی اور جب وہ 1991 میں وزیراعظم تھے انہوں نے انفلٹ جیٹ بک کے پرنس محمود الفیصل کو سٹیٹ گیسٹ کے طور پر پاکستان بلاوا اور مری میں ان سے قرضہ حاصل کرنے کی بات کی۔ میاں شہباز شریف بھی اس موقع پر موجود تھے۔

میاں نواز شریف نے غیر ملکی ممالک کے آگے ہاتھ پھیلا کر ملک کو شرمندہ کیا مگر وہ خود شرمندہ ہوئے۔ میاں نواز شریف کو اس ملک سے 15.5 ملین ڈالر کا قرضہ مل گیا۔ وزیر داخلہ نے کہا کہ یہ قرضہ چودری شوگر ملز کیلئے استعمال ہوا۔ اس موقع پر قومی اسمبلی میں موجود اپوزیشن باقی صفحہ 6 کا لم 3 پر

ارکان نے نصیر اللہ بابر کے الزامات پر شدید احتجاج کیا اور کہا کہ وزیر داخلہ اس وقت الزامات لگا رہے ہیں جب اپوزیشن کے بیشتر ارکان موجود نہیں۔ وزیر داخلہ نے ایوان میں ایک اور دستاویز پیش کی جس میں آئی ایس آئی کے سابق سربراہ لیفٹنٹ جنرل (ریٹائرڈ) اسد درانی کا حلف نامہ بھی شامل کیا گیا ہے۔ اس دستاویز میں ان سیاستدانوں کے نام شامل کئے گئے ہیں جنہیں اس وقت کے بری فوج کے سربراہ جنرل مرزا اسلم بیک کی ہدایت پر انتخابی مہم کے لئے آئی ایس آئی کی طرف سے فنڈز دیئے گئے تھے۔ یہ فنڈز حبیب بینک کے صوبائی چیف پولس حبیب سے 14 کروڑ روپے کی صورت میں جنرل بیک نے وصول کئے تھے ان میں سے 3.5 ملین روپے نواز شریف کو دیئے گئے۔ جنرل (اسد درانی) کے حلف نامہ میں ان کے مطابق سیاستدانوں کو دی گئی رقم کی تفصیل یہ ہے۔

سرحد میر افضل خان = 10 ملین
پنجاب
نواز شریف = 3.5 ملین

لیفٹنٹ جنرل (ر) رفاقت = 5.6 ملین
جماعت اسلامی (سجے آئی) = 5.0 ملین
عابدہ حسین = 1.0 ملین
الطاف حسن قریشی اور مصطفیٰ صادق = 0.5 ملین
دیگر چھوٹے گروپ = 3.339 ملین
سندھ جوتلی = 5.0 ملین جام صادق = 5.0 ملین جونیجو = 2.5 ملین
پیرگارا = 2.0 ملین مولانا صلاح الدین = 0.3 ملین
دیگر چھوٹے گروپ = 2.4 ملین
بلوچستان
ہمایوں مری (بگٹی کے داماد) = 1.5 ملین
جمالی = 4.0 ملین
کاٹڑ = 1.0 ملین
جام یوسف = 0.75 ملین

نواز شریف اس فہرست میں صف اول پر ہو گئے۔ وہ کسی بھی ملک کے پہلے وزیر اعظم ہو گئے جنہوں نے اپنے مفادات کیلئے اپنے ہی ملک کے قومی خزانے کو لوٹا۔ وزیر داخلہ نے کہا کہ نواز شریف نے جنوبی ایشیاء کا امیر ترین آدمی بننے کا خواب اس وقت دیکھنا شروع کیا جب وہ پنجاب کے وزیر خزانہ بنے اور انہوں نے وہ کچھ کیا جس کی کسی عوامی نمائندہ سے توقع نہیں کی جاسکتی اور جب وہ ملک کے وزیر اعظم بنے اس وقت تک ان کے صنعتی پوزیشنوں کی تعداد 9 سے بڑھ کر 20 ہو چکی تھی۔ وزیر داخلہ نے کہا کہ پوزیشن لیڈر نے اس پر بس نہیں کیا بلکہ انہوں نے لاہور اور مری میں انتہائی عالیشان مکان اور فارم ہاؤس بنائے۔ نواز شریف کے خاندان کے افراد کے مطابق نواز شریف کے لندن اور واشنگٹن میں بھی انتہائی شاندار فلیٹ ہیں انہوں نے کہا کہ پوزیشن لیڈر دعویٰ کرتے ہیں کہ ان کے ہاتھ صاف ہیں اور وہ محبت وطن ہیں مگر انہیں اپنی بدعنوانیوں پر بھی نظر ڈالنی چاہئے۔

کے بلوچ = 0.5 ملین
برنجو = 0.50 ملین
نصیر مینگل = 1.00 ملین

وزیر داخلہ نصیر اللہ بابر نے کہا کہ نواز شریف نیملی نے قومی خزانے کی قیمت پر اپنی صنعتی ایمپائر (اتفاق نوڈنڈری) قائم کی انہوں نے مختلف قرضوں کے علاوہ ہر طریقے سے قومی خزانے کو لوٹا انہوں نے کہا کہ جنوبی ایشیاء کا امیر ترین آدمی بننے کیلئے صنعتی ایمپائر قائم کرنا میاں نواز شریف اور ان کے خاندان کے لوگوں کا خواب تھا۔ احتسابی کمیشن کے قیام کی تجویز کے حوالے سے وزیر داخلہ نصیر اللہ بابر نے کہا کہ نواز شریف کمیشن کے قیام کا مقابلہ اس لئے کر رہے ہیں تاکہ وہ اپنی بدعنوانیوں کو چھپا سکیں۔ انہوں نے کہا کہ پوزیشن لیڈر اس طرح کی باتیں کر کے اپنی بدعنوانیوں کو عوام سے چھپا نہیں سکتے۔ انہوں نے کہا کہ اگر دنیا میں دنیا کے بدعنوان ترین شخص کیلئے سروسے کرایا جائے تو انہیں یقین ہے کہ

6. Air Marshal (R) Muhammad Asghar Khan, a former Chief of Air Staff who had rendered meritorious services as a fighter pilot after his retirement, and had joined politics by forming a political party with the name and style of *Tehrik-e-Istaqlal* Pakistan, in his above referred letter had averred as under: -

"BY TCS

PERSONAL

16th June, 1996

Dear Mr. Justice Sajjad Ali Shah,

I should like to draw your attention to the disclosure by the Minister for Interior in the National Assembly on 11th June, 1996 that General (R) Mirza Aslam Beg, a former Chief of the Army Staff, had drawn Rs. 15 Crores from the Mehran Bank and had distributed this amount to various people prior to the 1990 elections. He disclosed that this had been done through Lt. Gen. (R) Assad Durrani, the Director General of the Inter Services Intelligence Directorate, at that time. General Duran's statement was read out in the National Assembly. I am enclosing a cutting from the Daily 'JANG', Rawalpindi of 12th June, 1996 which gives the details (Encl.1).

The action of General (R) Mirza Aslam Beg and of Lt. Gen. (R) Assad Durrani amounts to gross misconduct and I am writing to ask that you may be pleased to initiate legal proceedings against both these persons who have brought the Armed Forces of Pakistan into disrepute and have been guilty of undermining the discipline of the Armed Forces.

I am also sending a copy of this letter to the Chief of the Army Staff for his information.

Sincerely

Sd/-
(M. Asghar Khan)"

7. Major General (R) Nasirullah Khan Babar, the then Interior Minister had raised the issue of distribution of money to a group of politicians on the floor of the House of the National Assembly by reading out the affidavit of respondent No.2 wherein he had admitted that amounts were distributed to certain persons for the purpose of election campaign of Islami Jamhuri Ittehad (IJI). Prior to the affidavit, respondent No. 2 had sent a handwritten note to the then Prime Minister of Pakistan, wherein he had stated as hereunder: -

"Eyes Only

Embassy of Pakistan
5300 Bonn 2
Rheinallee 24
Telephone 35 20 04
7 June 94

My dear Prime Minister

A few points I want to include in my "confessional statement" handed over to the Director FIA. These could be embarrassing or sensitive.

- a. The recipients included Khar 2 Millions, Hafeez Pirzada 3, Sarwar Cheema 0.5 and Mairaj Khalid 0.2 Millions. The last two were not on the wrong side. It was merely someone's "soft corner" that benefited them.

- b. The remaining 80 Ms were either deposited in the ISI's 'K' fund (60 M) or given to Director External Intelligence for special operations (perhaps the saving face of this disgraceful exercise, but it is delicate information).
- c. The operation not only had the "blessings" of the President and the whole hearted participation of the caretaker PM, but was also in the knowledge of the Army High Command. The last mentioned will be the defence of many of us including Gen. Beg (who took his colleagues in "confidence") but that is the name that we have to protect.

The point that I have "wargamed" in my mind very often is: what is the object of this exercise?

- a. If it is to target the opposition; "it might be their legitimate right to take donations, especially if they came through "sacred channels". Some embarrassment is possible, but a few millions are peanuts now a days.
- b. If the idea is to put Gen. Beg on the mat; "he was merely providing "logistic support" to donations made by a community "under instructions" from the Government and with the "consent" of the military high command." In any case, I understand he is implicated in some other deals in the same case.
- c. GIK could pretend ignorance, as indeed he never involved himself directly.
- d. Of course one has to meet the genuine ends of law. In that case, let us take care of the sensitivities like special operations and possibly that of the Army.

It was for these reasons that I desperately wanted to see you before leaving. I also wanted to talk about my farewell meetings with the COAS. In the meantime, you must have met often enough and worked and what is in the best interest of the country.

I keep praying that all these natural, and man made calamities are only to strengthen us in our resolve and not in any way reflective of our collective sins.

With best regards and respects

Yours sincerely

Sd/-
Asad"

8. General (R) Mirza Aslam Beg, former Chief of Army Staff, Lt. Gen. (R) Asad Durrani, Ex-DG, ISI and Mr. Yunus Habib, Ex-Chief Mehran Bank Limited, being the main figures in the alleged scam of distribution of funds to a group of politicians to influence the outcome of the 1990 general elections, were arrayed as respondents No.1 to 3, and notices were issued to them.

9. It is to be noted that one Brig. (R) Kamal Alam Khan sent an application to the then Chief Justice of Pakistan requesting therein that he may be impleaded as a party in the proceedings. The said application was registered as CMA No.109/1997. In the application, he named the following officers of the Armed Forces who, according to him, were part of this operation: -

- (a) Brig (R) Hamid Saeed Akhtar
- (b) Brig (R) Amanullah
- (c) Lt. Col (R) Eqbal Saeed Khan
- (d) Lt. Col (R) Ejaz
- (e) Lt. Col (R) Mir Akbar Ali Khan
- (f) Lt. Col Salman Butt

As per Court order dated 24.02.1997, though the above named officer was allowed to attend the proceedings of the Court but according to Mr. Salman Akram Raja, learned ASC he was not allowed to join the proceedings and now he had passed away. In the said application, as noted, the name of Brig. (R) Hamid Saeed Akhtar was also mentioned. Therefore, on the Court's direction, respondent No.2 furnished his address and notice was issued to him. Accordingly, he appeared and filed a written statement, which was marked as 'confidential', but during hearing he stated that his written statement may not be treated as confidential. For facility of reference, order dated 18.10.2012 is reproduced hereinbelow: -

"Brig. (Retd.) Hamid Saeed has appeared and filed a statement in writing on top of which, word "Confidential" is mentioned. We have pointed out to him that the Court is seized of the information contained in Paras 9 onwards of his statement because the facts mentioned therein pertaining to distribution/donation of funds to a group of politicians/IJI before the 1990's general elections and same are already on the record of the case. *Prima facie*, the contents of Paras 1 to 8 of his statement are not relevant for the purpose of decision of the present case, therefore, if he so wishes, he may claim confidentiality in respect thereof. However, he stated that either a document is to be treated 'confidential' as a whole or not at all. He explained that if Paras 1 to 8 are deleted from his statement, the whole object and purpose he wanted to convey to the Court *vide* Para 9 onwards would not be conveyed. Thus, he has expressed the desire not to treat his statement as 'confidential' and has scored off the word 'confidential' written on the top of the document. He has also stated that he wants to explain the events and dates in respect of disbursement of funds to a group of politicians with the assistance of a diary, which he was

maintaining at the relevant time. He has handed over this document for our perusal in Court."

The statement of Brig. (R) Hamid Saeed dated 18.10.2012 as well as extracts of his handwritten diary, of which he took full responsibility, filed in Court are also reproduced hereinbelow: -

- (1) In 1990 I was commanding an Artillery Brigade in D.I. Khan. In the same year following an indigenous uprising of Kashmiris in the Indian Held Kashmir both India & Pakistan deployed their forces in the border areas. My Brigade had just reached the border area when I received the orders to join regional office of Military Intelligence in Karachi. I talked to the Corps Commander and submitted that I wished to be with my troops during combat. I further pleaded that I had no intelligence back ground or formal training. Corps Commander advised that my services were very urgently required at Karachi to control the deteriorating internal security situation in Sindh. Accordingly I reported to my new duty station and assumed command w.e.f. 23rd July 1990.
- (2) At that time MQM had recently fallen apart from the ruling political party (PPP). PPP workers had resorted to taking revenge from MQM for their political betrayal through the use of force. MQM reacted even more violently through their armed political workers. PPP, MQM, PPI, JI and JSM activists were relentlessly killing each other. The daily death toll was 100-110 besides countless left wounded and incapacitated. PSF, APMSO, IJT and JSQM had taken prisoners, the activists of their rivals and committed horrendous & inhuman atrocities on them e.g. drilling holes in knee joints with the drill machines and burning their delicate parts with electric soldering machines. I immediately held meetings with Mr. Tariq Azeem, Dr. Imran Farooq, and Mr. Saleem Shahzad of MQM, Prof. Ghafoor of JI, Dr. Hameeda Khoro & Mr. Mumtaz Bhotto JSF, Abdul Waheed Aresar of JSQM and Mukhtar Awan of PPI and gave them strong message that if they did not stop killing, arson and looting, army may be forced to step in to restore peace.
- (3) Initially the belligerent forces totally denied their involvement in the unlawful activities. However when irrefutable evidence of their crimes was produced, they took the advice more seriously. Following were the visible effects of intelligence intervention on the security situation in Karachi: -
 - a. Within 1 week killing reduced drastically from 100-110 to 20-30 per day.
 - b. Exchange of prisoners of the belligerent sides was

arranged and this exchange took place at Karachi Corps HQ.

- (4) All the above was achieved through negotiations and dialogue. Not a single bullet was fired, nobody was kept in illegal confinement and no torture was committed to extract information. The importance of my primary task i.e. intelligence & counter *intelligence* operations far outweighed my involvement in the internal security matters but at that time internal security had assumed greater importance.
- (5) Soon after, the provincial Govt launched a police operation against Mohajir populace residing in Pukka Qila Hyderabad on a day when the PM, COAS and Karachi Corps Commander were on tour abroad and the army units were out annual exercise. In this operation police killed dozens of men, women & children. The matter was reported to higher echelons. The president Mr. Ghulam Ishaq Khan ordered the Army to intervene and stop *this* carnage. Station Commander Hyderabad gathered about 300 soldiers from the personnel left behind for guard duties and reached the site. On his intervention police force withdrew. PM Benazir Bhutto on return to Pakistan gave a press statement that "Army had supplied POF made weapons to Mohajirs". Police had besieged Pukka Qila to recover these weapons. When police force was about to reach the cache in Pukka Qila, Army stepped in and took away the weapons in military vehicles". Everybody was shocked by this statement.
- (6) After this mayhem MRC (Mohajir Rabita Committee) gave a press statement that they (Mohajirs) were being forced to look towards India for the protection of their rights. India readily responded to this call by stating that Mohajirs were India's ex-citizens and India was obliged to ensure their safety and protection against state terrorism and genocide. Such statements reminded one of the Indian interventions in former East Pakistan which finally resulted in the dismemberment of our country.
- (7) Earlier that year, the PM had also publicly criticized the army for crossing the red line by enriching uranium to a level which was not acceptable to big powers. She also gave an interview to BBC in which she mentioned of her support to India in crushing Khalistan Movement. Sometime later PM criticized the Army for conducting the annual exercise in the Sindh province without her consent. ISPR had to clarify through a press release that under the law COAS was not obliged to seek anyone's permission for conducting training exercises in any part of the country. All such events were reported by the print media.
- (8) During the same year the government also gave attractive jobs to Al-Zulfiqar activists in Railways, PIA, Customs, KPT, Immigration, Excise & Taxation and other sensitive departments, thus endangering national security. These activists of AZO had been imparted proper training by India in sabotage, arson, bomb blasts, mass killing and other acts of terrorism. The authentic record of these

terrorists was available with all the intelligence agencies. All these matters were reported to higher ups through normal command channels.

- (9) General perception of the common man was that the ruling party had got the votes but lacked the vision to run the country. Something appeared to be in the offing. On 16th August 1990 President Ghulam Ishaq Khan dissolved the PPP Govt using power under Article 58 (2) (b). In Sindh an interim Government was formed under Jam Sadiq Ali as the Chief Minister.
 - a. On 12 September 1990 DG MI Maj. Gen Muhammad Asad Durrani visited Karachi and gave following directions to me: -
 - b. Open six accounts in different banks and send me the title and number of each account.
 - c. Keep on monitoring these accounts. Some funds shall be deposited in these accounts from time to time. You will keep me updated regarding the balance in each account on weekly basis.
- (10) All transactions in these accounts shall be treated as secret. You will be personally responsible to me for their accounting and no information in this regard shall be shared with any unauthorized person. Services of a grade-1 staff officer may be used for opening and handling of these accounts.
- (11) In compliance with these directions six accounts were opened in different banks. Funds started pouring in from 16th September 1990 onwards. By 22nd October 1990, Rs. 140 Million had been received in these accounts. Thereafter following amounts were remitted as ordered by DGMI: -
 - a. Rs.40 Million to GHQ account.
 - b. Rs.10.5 Million to regional office of MI Quetta.
 - c. Rs.5 Million to interim PM Mr. Ghulam Mustafa Jatoi
 - d. Rs.5. Million to interim CM Sindh Mr. Jam Sadiq Ali
 - e. Rs.2.5 Million to Mr. Muhammad Khan Junejo.
 - f. Rs.3 Million to Mr. Abdul Hafeez Pirzada
 - g. Rs.2 Million to Mr. Sibghat-Ullah Pir sahib Pagara.
 - h. Rs.03 Million to Mr. Muzaffar Hussain Shah.
 - i. Rs.03 Million to Mr. Muzaffar Hussain Shah
 - j. Rs.0.3 Million to Mr. Ghulam Ali Nizamani.
 - k. Rs.02 Million to Mr. Arbab Ghulam Rahim
 - l. Rs.03 Million to Mr. Salah-ud-Din (Takbeer).

- m. Rs.05 Million to Mr. Yousaf Haroon
- n. Rs.3,828 Million to Sindh Regimental Centre, and also used for construction of men's living barracks, interrogation cells
- (12) The remaining balance of Rs.67, 628,511/- including interest was later on sent to GHQ along with up to date bank statements. I would like to state that during my service with the Military Intelligence, I was of the opinion that the funds were coming from GHQ.
- (13) In 1991 I learnt through news media that one Mr. Yunus Habib had been arrested for fraud in Habib Bank Ltd. At that occasion Gen. Durrani rang me up to explore the possibility of having him bailed out. He said that the COAS had desired to have him bailed out because he had been helpful in doing a work of national importance. I showed my inability to do so because this case was sub judice. In September 1991 I was posted out from MI to Kharian. Finally I retired from service in December 1994.
- (14) In 1994, during the second tenure of PPP government, when Gen. Durrani gave an affidavit to the court and the matter became public, I for the first time learnt through the news media that these funds were stated to have been provided by Mr. Yunus Habib.

Sd/-
Brig (R) Hamid Saeed Akhtar
18 Oct 2012"

Red Finally Sign by

Green Capital Amount

LIBL Clifton Br (1726)

19310014/- (1.25) 500,000/-

19068111/50 (1.25) 500,000/-

241902/50

LIBL Clifton Br (7300-8)

18394395/68 (1.12) 500,000/-

18189014/50 (1.12) 500,000/-

205379/18

NBP, Avasi Tower (1938-2)

29398691/31 (1.38) 8997824/50

28997824/50

400866.81

SL, I.I. Chundrigar (A/c 35433/3)

19376.44

19064/50

331/94

22344/50 (-) 3080/-

MCB, Clifton Br - (A/c No. 030437)

506231/54 (1.74) 697574/00

497574/-

8707/54

19310014/-

67628776.97

Capital Amount 66771889.00

Interest 857187.97

Total 67628776.97

Balance amount 66774269.00 ✓

Bank Commission out of A/c etc. (-) 67632056.97

Finally Remitted 2/91 3845.84

67628511.43 ✓

19568111.50

19189014.50

28997824.50

22344.50

497574.00

68274869.00

1503280.00

66771889.00

2238112

Filed in Court

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10. As regards the statement under Section 161 Cr.P.C., of Mr. Yunus Habib [hereinafter referred to as 'respondent No.3'], it may be mentioned that such statement is not per se, admissible under the *Qanoon-e-Shahadat* Order, 1984 as proof of the facts stated therein unless the same are otherwise proved in a court of law in accordance with law. But here reference is being made to it as the Mehran Bank Scandal report containing the said statement has been made part of the record. It is also to be noted that investigation would be required to be made in respect of distribution of the sums of money paid before the 1990 general elections after withdrawal thereof from HBL or subsequent thereto from the Mehran Bank Ltd, as in the year 1990, it was Habib Bank Ltd and not Mehran Bank, from where these amounts were drawn.

11. Respondent No.1, filed his reply on 23.02.1997 through Mr. Muhammad Akram Sheikh, Sr. ASC stating therein, *inter alia*, that in the year 1990 when the National Assembly was dissolved and a Caretaker Government was formed to hold elections within 90 days, an Election Cell was set up in the Presidency, which functioned directly under the then President (late Ghulam Ishaq Khan) and was managed by M/s Roedad Khan and Ijalal Haider Zaidi. It was further stated that uptill 1975, the ISI was responsible for countering intelligence and strategic operational intelligence and functioned under the Joint Services Secretariat. In 1975, the then Prime Minister Mr. Zulfikar Ali Bhutto, created a Political Cell within the ISI, as a result whereof it was made responsible to the Chief Executive, i.e. the Prime Minister/President for all matters of national and political intelligence. After establishment of the Higher Defence Organization in 1976, the

ISI continued to be responsible to the Chief Executive while the Joint Staff Headquarters maintained administrative control only. He further stated that the ISI used to support the candidates during election under the direction of the Chief Executive of the Government. The receipt of the amount by ISI from respondent No.3 in 1990 was also under the direction of the Chief Executive. DG, ISI also informed him that the funds so received were properly handled and accounts were maintained, and that the then President was briefed by him on this matter. He averred that the aforesaid statement of Gen. (R) Nasirullah Khan Babar was self-contradictory inasmuch as on 20.04.1994 the latter had stated on the floor of the National Assembly that a sum of Rs.140 million was given to him (General Beg) whereas in his aforesaid statement he had alleged that the said amount was in fact distributed amongst the politicians and various other persons. He averred that Maj. General (R) Nasirullah Khan Babar knew that the said amount was not given to the answering respondent for his personal use and he also knew that Mehran Bank was not in existence in 1990. Relevant portions from the said reply are reproduced hereinbelow: -

(1) That the answering respondent never received the alleged amount from Mr. Yunus Habib, respondent No. 3 in person or through any other means and emphatically denies the allegation made by Maj. General (R) Nasirullah Babar, the then Interior Minister on the floor of the National Assembly on 20th April, 1994. The answering respondent promptly denied the allegations made through a press release (Exhibit A-I) which was published in various newspapers.

"The fact of matter is that no such amount was paid to answering respondent nor was it placed in any army account, rather the amount was paid in the I.S.I's account as donation by Yunus Habib and his community. This was deposited by Yunus Habib directly in the accounts of a government agency.

which maintained full details of all transactions according to the policy and laid down procedures of the Government". (Exhibit A-2 attached). The Daily "The News" of 10th April 1994 carried the following story:

"It was briefly reported last week that Yunus Habib had deposited Rs. 140 million in an account mentioned by the then COAS, General Aslam Beg. It was initially thought that the money went to Beg's organization called Friends, but in a brief statement to the press, a few days ago, the former COAS disclosed that the donation actually went to an account run by a secret service. The NIU investigations confirmed Beg's statement as it was revealed that the money was deposited in a secret account run by the Military Intelligence (MI) Directorate.

(2) That in early September, Mr. Yunus Habib then serving in the Habib Bank Ltd., as Zonal Chief had called on the answering respondent and informed him that he was under instructions from the President's Election cell to make available a sum of Rs. 140 million for supporting the Elections of 1990. He had stated that he will be available to collect this amount through his own efforts from his community as donations and that he was under the instructions of the Election Cell to place this amount at the disposal of the Director General Inter Services Intelligence who would handle this amount as per instructions of the President's Election Cell.

(3) That in 1990 when the National Assembly was dissolved and the Government of Mrs. Benazir Bhutto was dismissed. Care Taker Government was formed to hold elections within 90 days. The then President Mr. Ghulam Ishaq Khan had formed an Election Cell directly under him, and managed by Mr. Roedad Khan / Mr. Ijlal Haider Zaidi.

(4) That letter on the answering respondent was informed by the Director General Inter Services Intelligence that various cover accounts were opened by Inter Services Intelligence and the amount of Rs.140 million was deposited in those accounts directly by Mr. Yunus Habib. Director General Inter Services Intelligence made arrangements to distribute these amounts amongst the politicians belonging to various political parties and persons as instructed by the Election Cell.

(5) That the fact that the amount of Rs. 140 million was made available on the instructions of the Election Cell was confirmed by Mr. Yunus Habib in his voluntary statement made by him during enquiry in connection with Mehran Bank Scam. In his statement he has conceded that: -

"That Rs. 140 million donation to the "Military Intelligence" Yunus revealed that donation was approved by the Board of Directors of the Habib Bank Ltd. And the bank had fulfilled all formalities. In a vague answer he said that the request was initially made by President Ghulam Ishaq Khan, who had communicated to him through General Beg that the Government of Pakistan needed money to hold elections in the country. Yunus said, that donation was also in the full knowledge of Ijlal Hyde Zaidi and Roedad Khan" (Exhibit A-3 attached.)

(6) That the allegation that funds were deposited in the in the Military Intelligence was absolutely wrong. The cover account were opened by 202 Survey Section under the command of Inter Services Intelligence since August 1990. Therefore, 202 Survey Section, a unit of the Army for all political and technical purposes, was under the command of Inter Services Intelligence and functioned as per of ISI organization which was the "competent authority" to task it.

(7) That until 1975 the Inter Services Intelligence Organization was responsible to the 3 services for countering intelligence and strategic operational intelligence and functioned under the Joint Services Secretariat.

In 1975, Mr. Zulfikar Ali Bhutto, the then Prime Minister, created a Political Cell within the ISI Organization. As a result, the ISI was made responsible to the Chief Executive, i.e. The Prime Minister/ President for all matters of national and political intelligence. After the establishment of the Higher Defence Organization in 1976, ISI continued to be responsible to the Chief Executive,

while the Joint Staff Headquarter, maintained administrative control only. This was the situation which existed in 1990 and continues even today.

(8) That ISI draws its manpower from three services, with Army taking the major share. About 7% to 8% are civilians. It is headed by any Army Officer in uniform except for the period of Benazir Bhutto's first tenure, when Lt. Gen. Shamsur Rehman Kallu, a retired officer, was appointed DG ISI in 1989, who relinquished the job when Benazir Government was dismissed in 1990. He was replaced by Lt. Gen Mohammad Asad Durrani, in August 1990.

It is submitted that the amount in question, was Rs. 140 million and not Rs. 15 Crore (150 Million) as mentioned in the petition. This is doubtful misrepresentation of the facts.

(9) Furthermore, the name of Mehran Bank mentioned in the petition is again a misquotation of fact. This Bank has neither been mentioned in the press report of daily "The Jang" of 12 June, 1996 which formed the basis of the petition, nor the Mehran Bank existed in 1990. The petitioner made no efforts to ascertain the facts, before filing the petition in the Supreme Court. His hasty action, without confirming the authenticity of the press report, is expressive of a mala fide intention, especially, when the petitioner is the head of a political party, namely Awami Qiadat Party and at the time of petition (June 1996) was fully involved in organizing his party.

(10) That it is in the knowledge of the answering respondent that it was the practice with the ISI to support the candidates during the elections under the directions of the Chief Executive of the Government. The receipt of this amount by ISI from Yunus Habib in 1990 was also under the directions of the Chief Executive. DG ISI also informed the answering respondent that funds so received were properly handled and the account were maintained, and

that the President Mr. Ghulam Ishaq Khan was briefed by him on this matter.

(11) That the answering respondent was also informed by the DG ISI that the policy for financial support to the candidates was laid down by the President's Election Cell and that the DG ISI was acting on their behalf and made payments to various politicians and persons as directed.

(12) That by late November, 1990 the DG ISI Lt. Gen. Muhammad Asad Durrani informed the answering respondent that out of Rs. 140 million deposited in the ISI accounts, approximately Rs. 60 million were spent for election purposes and for acquisition of election intelligence, while the remaining amount of Rs. 80 million was deposited in the accounts of the Special Funds of ISI.

(13) That during this period, in his meeting with the President, Mr. Ghulam Ishaq Khan, the answering respondent had inform him about the donations made by Yunus Habib and its utilization by DG ISI under instructions of the President's Political Cell.

(14) That on 20 April, 1994 the then Interior Minister Mr. Nasirullah Babar made the disclosure in the National Assembly as reported in the "The Daily Muslim" dated 21st April, 1994:

"That Yunus Habib, the Chief Operator of Mehran Bank Limited (MBL) misappropriated Rs.2.10 billion through a number of fake accounts"

"The Interior Minister told the House that Yunus Habib gave Rs.140 million to Mirza Aslam Beg, the former COAS in 1991" Rs.70 million to late Jam Sadiq Ali Khan, the then CM Sindh, Rs.20 Million to Altaf Hussain, the MQM Chief, and huge amount to other politicians".

(Exhibit-C attached.)

(15) That *mala fide* intentions of Maj. General (R) Nasirullah Babar were further supported by the fact that while divulging this information, the Interior Minister

claimed to have in his possession a computer diskette which contained the full information with respect to the disbursement of the funds arranged by Yunus Habib, but during the proceedings of the Mehran Bank Judicial Commission, the existence of such a diskette was completely denied.

"A very important computer diskette of the jailed banker Yunus Habib and some vital documents seized by the Federal Investigation Agency (FIA) during its search of Habib's residence and from the possession of his most trusted confidante Salim Sattar in the last week of March of this year are now missing from the FIA record. Senior Federal Interior Ministry and FIA sources confirmed this to the News Intelligence Unit (NIU) in his computer diskette Yunus Habib had maintained complete details of the pay-offs made from various fictitious accounts at Habib Bank Limited (HBL) and Mehran Bank Limited (MBL) to politicians, bureaucrats and to a dozen FIA officials. In a recent move the FIA has decided to deny the existence of the Computer diskette before the Judicial Commission." *(Exhibit-D attached)*.

(16) That two years later Maj. Gen. Nasirullah Babar, the then Interior Minister made a self contradictory statement in the Assembly on Monday 11 June 1996:

"Interior Minister Nasirullah Babar and told the National assembly on June 11 that Mirza Aslam Beg had drawn Rs.15 Crores from the Mehran Bank and had distributed this amount to various people prior to the 1990 elections (Exhibit-e attached)

(17) That above statement contradicts the previous allegation, because in his earlier statement made on the floor of the National assembly on 20 April 1994, he had

alleged that the amount of Rs.140 million was given to the answering respondent, who misappropriated the amount for himself, while in his subsequent allegation made on June 11, 1996 on the floor of National Assembly it was alleged that the amount of Rs.140 million, was in fact distributed amongst the politicians and other personalities. It is amazing as to how the facts were distorted, knowing fully well that the said amount was not given to the answering respondent for his personal use and also he knew fully well, that the Mehran Bank was not in existence in 1990. This act of his amount to deliberate disinformation for mala fide intentions to cause discredit and disrepute to the answering respondent.

(18) That the above fact clearly brings out the fact that the then Interior Minister, Maj. General Nasirullah Babar, holding official classified information, relating to ISI activities, used it for political ends of his party, thus violating the "Official Secrets Act". In doing so, he has brought two important national institutions i.e. Pakistan Army and ISI in disrepute.

(19) The Nasirullah Babar also intentionally denied information to the Judicial Commission and failed to produced the computer diskette, he claimed to have, in the National Assembly. (Exhibit-D attached).

(20) That the petitioner has made following allegations:

- a) Actions of General Mirza Aslam Beg and Lt. General Muhammad Asad Durrani amounted to gross misconduct.
- b) Both have brought the Armed Forces of Pakistan into disrepute.
- c) Both have been guilty of undermining the discipline of the Armed Forces.

G R O U N D S

- (a) That the answering respondent did have the knowledge about the transaction of Rs. 140 million but had no other involvement regarding the

disbursement of this amount nor did he receive directly or indirectly any portion of this amount.

- (b) That the amount of Rs. 140 million so donated by Yunus Habib was deposited directly in the accounts maintained by the ISI, who properly maintained the accounts.
- (c) That DG ISI acted within the limits of the "lawful command" received from the President's Election Cell. Definition of "lawful command" as interpreted by Pakistan Army Act Section 33 Note b(3) is:
"A superior can give a command for the purpose of maintaining good order or suppressing a disturbance or for the execution of a military duty or regulation".

and

Pakistan Army Act Section 33 Notes b(11):

"A civilian cannot give a "lawful command" under this sub-section to a soldier employed under him; but it may well be the soldier's duty as such to do the act indicated"

- (d) That a full account maintained of all the payments made by the DG ISI and no amount was misappropriated or misused.
- (e) That actions of answering respondent and General Asad Durrani did not amount to gross misconduct. Orders were carried out under a lawful command.
- (f) That doing so, the answering respondent and General Asad Durrani have not brought the Armed Forces of Pakistan into disrepute nor they are guilty of undermining the discipline of the Armed forces.
- (g) That Air Marshal (R) Mohammad Asghar Khan has acted out of personal grudge and for political gains by approaching the Honourable Supreme Court of Pakistan to take action against the answering respondent at this juncture when the answering respondent was fully involved in organizing his political party and participation in the general elections 1997 as political main stream.
- (h) That Air Marshal (R) Asghar Khan has acted irresponsibly in that he failed to investigate the matter properly and in hot haste, proceeded to level charges against the answering respondent as based on unfounded reports of the news papers. This act of

the petitioner amounts to character assassination with intent to cause political damage and to bring into disrepute the name of the answering respondent.

- (i) That the disclosure made by Maj. General Nasirullah Babar on the floor of the National Assembly on 20 April 1994 and on June 11, 1996 was in patent violation of the Official Secrets Act, as well as a malicious act, with intent to bring into disrepute the name of the answering respondent and to cause political damage to his reputation and other members of the political parties while not disclosing the name of the politicians belonging to his own party." [Underlining provided for emphasis]

Few concluding Paras from the reply being informal have not been reproduced hereinabove.

12. On 11.06.1997, in response to the reply filed by respondent No.1, the petitioner filed his observations as under: -

"OBSERVATIONS OF PETITIONER ON REPLY OF
RESPONDENT NO.1

Respectfully Sheweth: -

- (1) That being the Chief of the Army Staff at the time, the Respondent by being directly involved in the disbursement of public money and in its misuse for political purpose has infringed on the fundamental rights of the citizens of Pakistan. Further by thus involving the Armed Forces in politics, the Respondent has affected adversely the morale and the fighting efficiency of the Armed Forces, reduced its defense capability, affected adversely the security of the country and has thus created conditions which infringe on their human and fundamental rights.
- (2) That the Petitioner has brought this matter before this Honourable Court also with the purpose of seeking a judgment which would set an example for other and improve the discipline and fighting efficiency of the Armed Forces. It would also be beneficial for their morale.
- (3) That Para 4 of the Respondent's reply regarding sub-clause 3 of article 199 of the 1973 Constitution relates to terms and conditions of service of a person subject to military law and is not relevant to this case.
- (4) The Petitioner sent a copy of his letter to the Chief of

the Army Staff purely for information. The Chief of the Army Staff is not the only competent authority and proper person to look into the allegation and take any action thereupon' as stated by the Respondent. Because the Respondent was the Chief of the Army Staff and the present incumbent to this post was his subordinate, it would be appropriate if this case is dealt with by this Honourable Court.

- (5) This Respondent has stated in Para 6 of his reply that the funds were deposited with the I.S. Intelligence which has been denied by the Secretary, Ministry of Defence. The Respondent has further stated that he was aware of Lt. Gen. (R) Asad Durrani having received the money and distributed it (Para 12 of Respondent's reply) to various people. Lt. Gen. (R) Asad Durrani though head of an organization which was, according to the Respondent under 'Chief Executive', was still a serving Army Officer, subject to the service discipline and military law. His conduct should therefore have been of direct concern to the Chief of the Army Staff. To have been aware of all this going on and not to have taken any action itself amounts to abetting the crime. However, the Respondent in Para 17 of his reply states that the amount was not given to him 'for his personal use'. This is admission that he did receive the amount.
- (6) In Para 21(c) and 21(e) of his reply, the Respondent has stated the orders to collect and distribute funds were carried out under a 'lawful command/ The interpretation of the Pakistan Army Act Section 33 Note B(3) as quoted in Para 21(c) of the Respondent's reply is erroneous. This relates to suppressing of a disturbance and Section 33 Note b(11) quoted in the same Para of the Respondent's reply i.e. Para 21(c) is also irrelevant. This states that 'a civilian cannot give a lawful command under this sub-section to a soldier employed under him but it may well be the soldier's duty as such to do the act as indicated'.
- (7) A person subject to military law is only required to obey 'lawful commands and it is in fact his duty to disobey an unlawful order or an unlawful command. The onus for deciding what is lawful and what is an unlawful command rests on the individual. Recent history is replete with examples where soldiers have been punished for carrying out unlawful commands. In the Nuremberg trials held after World War II for the killing of Jews by German soldiers, the plea put forward was similar to that being put forward by the Respondent that what was done was in response to a 'lawful' command. In the Nuremberg

trial, the Germans soldiers accused of murder pleaded that they had only carried out the orders of their superior officers. The Court awarded the death sentences to those who carried out these illegal orders.

- (8) In my own case when I had barely two years service and was stationed in Hyderabad Sindh, during the 'Hur disturbances', and the Marshal Law of 1942, I was ordered personally by Maj. General Richardson, the Marshal Law Administrator Sindh, to lead a flight of aircraft and machine-gun the caravan of the Pir of Pagara which was moving east of Sanghar. I took the flight of 4 aircrafts as ordered but when I saw that the camel caravan comprised unarmed men, women and children I refused to carry out the orders and returned without firing a shot. When asked to explain, I told the General who was waiting at the airfield for our return that to shoot unarmed civilians was not a lawful command and I would not obey it. What followed is not relevant to this case.
- (9) Throughout my political career I have practiced the same philosophy and have called upon the police to obey only lawful commands. I have been stopped illegally on numerous occasions and either detained or removed hundred of miles away illegally. On one occasion, in the company of the Late Mian Mahmud Ali Kasuri, Bar-at-Law, M. Anwar, Bar-at-Law and Miss Rabia Qari, I was stopped illegally from walking on Fane Road near the Lahore High Court, Lahore. We resisted this illegal order but not before we had told the police officers that their orders was illegal and since we were not violating the law the police force under their command was duty bound to disobey it.
- (10) In the Nawab Ahmed Khan murder case, four policemen were given the death sentence for carrying out unlawful orders. More recently in the Tando Bahawal case a Major was sentenced to death for giving unlawful orders and some servicemen were given long sentences for obeying unlawful commands of their superior officers.
- (11) It is my submission that the Chief of the Army Staff should have set an example and should himself have carried out only lawful orders. He should also have ensured that others subjects to military law did the same.
- (12) The Respondent has also stated that I have acted out of personal grudge and mala fide intentions. I have no personal grudge against the respondent and

have moved this august Court so that an example should be set for the Armed Forces so that they may in future concentrate on their main function, not obey unlawful commands and not involve themselves in politics which infringe on human rights and national security.

-Sd.-
(M. Asghar Khan)
PETITIONER"

11.06.1997

Respondent No.2 filed in Court affidavit dated 31.10.1997, which reads as under: -

"AFFIDAVIT OF LT. GEN. (R) M. ASAD DURRANI

I, Lt. Gen (R) M. Asad Durrani S/o Dost Mohammad Durrani (late), resident of 189-E, Gulraiz II, Chaklala, Rawalpindi, do hereby solemnly affirm and declare as under: -

- (1) In April 1994, there was a press release issued on behalf of Gen. (R) Mirza Aslam Beg that one Mr. Yunus Habib and his community had donated Rupees One Hundred Forty Million and Mr. Habib deposited this amount in the account of a government agency. It was later reported in the press that Gen. Beg had further elaborated that the ISI had spent Rupees Sixty Million out of this donation for "political intelligence" prior to the 1990 election, and put the rest in a special fund. At that time I was the Director General of ISI and Gen. Beg confirmed to me that these statements had been given.
- (2) In May 1994, I took up my assignment as Pakistan's Ambassador to Germany. In early June 1994, I was contacted by Maj. Gen. (R) Nasirullah Khan Babar, the Interior Minister who told me that a commission of inquiry had been constituted to ascertain the facts regarding Gen. Beg's statement. He also added that he had discussed with General A. Waheed at that time the COAS, who after consulting with the JAG assured army's cooperation. Gen. Babar said that a Director of FIA was on his way to take my statement. He also added that he had discussed with General A. Waheed at that time the COAS, who after consulting with the JAG assured army's cooperation. Gen. Babar said that a Director of FIA was on his way to take my statement.
- (3) On 6th of June 1994, Mr. Rehman Malik, a Director in FIA, contacted me in Bonn and presented a letter from the Director General, FIA asking me for necessary details. I talked to Gen. Babar and pointed

out that there were certain sensitivities of the case and he suggested that I could address a confidential statement to the Prime Minister. I agreed.

- (4) I wrote down a hand-written "eyes only" letter to the Prime Minister, providing the information. I also pointed out the implications that I believed were of sensitive nature and requested for discrete handling. Mr. Rehman Malik came back to Germany after a few weeks. My statement had been typed out on a court paper and I was required to sign it for perusal by the commission. I was told that it had the approval of the chief executive and that the matter would be handled confidentially. I Signed the prepared statement which was given to me by Mr. Rehman Malik, Director FIA.
- (5) For the next about two years, I heard nothing more on the subject till the press reported that the Interior Minister Mr. Nasirullah Khan Babar had made a statement in the National Assembly referring to an affidavit that he said was given by me.
- (6) The statement was got signed by me by Mr. Rehman Malik under special circumstances and I was given the assurance that the matter would be dealt with confidentially. I do not know under what circumstances the then Interior Minister made the statement in the National Assembly. I was unaware about his intentions that are known to him.
- (7) The affidavit was got signed from me on the understanding that it would only be used for specific purpose. Having recommended that the information be treated confidentially, I humbly submit to this Honourable Court that I am unable to comment on the contents of the affidavit in an open court because I am bound by the official secret act. I am of course, prepared to answer your questions in your Chamber or in camera proceedings.
- (8) I am proceeding to Germany to take part in a seminar in the first week of November 1997, that had been scheduled long time ago and I am, therefore, unable to personally attend the proceedings. I will be back by the 16th of November 1997.

The contents of this affidavit are true and correct to the best of my knowledge and belief. Nothing has been stated incorrect nor concealed, as required by Law.

Islamabad
31.10.1997

Sd/-
Deponent
Lt. Gen. (R) M. Asad

Durrani"

13. Respondent No.1 filed CMA 1006/2012, wherein it was stated that two Commissions of Inquiry, one on the Mehran Bank Scandal and the other on Habib Bank were presided over by Hon'ble Judges of superior courts, but, till date these two reports have not been made public. He prayed for issuance of appropriate direction to the Federation, the learned Attorney General and the Registrar to make available statements recorded in camera and reports of two Commissions of Inquiry to him on the condition, assurance and undertaking of confidentiality of the same from the public domain and only to be used for properly defending the respondent in the case. In view of the prayer so made, directions were issued to the learned Attorney General for producing copies of the reports.

14. It may be noted that Federal Government on having taken notice of allegations vide SRO No.617(1)1994 dated 17.06.1994 appointed a Commission of inquiry under Pakistan Commissions of Inquiry Act, 1956 to inquire into the matters relating to Mehran Bank, specified in the said notification as the terms of reference, comprising following: -

- (1) Mr. Justice Abdul Qadeer Chaudhry
Judge, Supreme Court of Pakistan
- (2) Mr. Justice Zia Mahmood Mirza
Judge, Supreme Court of Pakistan
- (3) Mr. Justice (Retd.) Z.A. Chana
Form Judge, High Court of Sindh
- (4) Mr. Justice Nazir Ahmed Bhatti
Judge, Federal Shariat court; and
- (5) Mr. Justice Qazi Muhammad Farooq
Judge Pehsawar High Court

15. The Commission completed its task and submitted the report. Unfortunately despite Court's direction, the report was not made available. However, in the meanwhile, Mr. Hamid Mir, a renowned journalist/anchor person working for private TV channel (GEO Network), handed over a copy of such report to Mr. Salman Akram Raja, learned counsel for the petitioner and also to the Court for perusal. We intended to seek its authenticity from the Law Ministry, but the Ministry did not do so on the pretext that its original was not available with it. As regards the inquiry report relating to Habib Bank Ltd. Scam. In pursuance of such scam an amount of Rs.140 million was withdrawn by respondent No.3 for handing over to the Election Cell created in 1990 before election, in the Presidency for the purpose of extending financial support to certain favoured candidates contesting the election. It may be noted that the Commission on HBL was headed by Mr. Justice Muhammad Ilyas, who submitted an interim report on 22.04.1997. It is mentioned in the interim report that Mr. Justice Muhammad Munir Khan was originally Chairman of the Commission appointed by the Federal Government, whereas Mr. Justice Raja Abdul Aziz Bhatti, Judge Lahore High Court and Mr. Justice Sardar Muhammad Raza Khan, Judge Peshawar High Court were its Members. Its term, however, was extended from time to time with the result that total period consumed by the original Commission was about one year. After sad demise of Mr. Justice Muhammad Munir Khan, the Commission was re-constituted on 29.01.1997 with Mr. Justice Muhammad Ilyas (former Judge of Supreme Court) as Chairman and Mr. Justice Javed Nawaz Gandapur and Mr. Justice Faqir Muhammad Khokhar as its Members. The Commission inquired from the Secretary of the Ministry of Law as to whether the new

Commission was required to hold *de-novo* inquiry or to proceed with the inquiry from the stage where it was left by the original Commission. Be that as it may, the Commission did not complete its report, as is evident from the report dated 17.05.2012 submitted on behalf of the Ministry of Law and Justice *vide* CMA No.2096/12 wherein it is stated that report of Commission in the affairs of Mehran Bank Ltd, is not available. As regards the report on Habib Bank Scam, it was submitted that Mr. Justice (R) Muhammad Ilyas, Chairman, HBL Inquiry Commission *vide* letter dated 22.04.1997 sent only an interim report, and did not send the final report to the Ministry. A copy of the interim report is annexed with the above CMA. Therefore, *vide* order dated 17.05.2012, the President HBL was directed to appear in person and to produce the statement/ledger showing the withdrawal of the amount on the direction of the then Vice President HBL, respondent No.3 and also to assist the Court as to whether any other material was available, which showed that those amounts were taken out without adopting the proper procedure as alleged, for the purpose of distribution to certain politicians and others before the 1990 general elections. Likewise the Governor, State Bank of Pakistan was also asked to look into the matter and if some information in that behalf was available with him, he would share the same with the Court. Accordingly, *vide* CMAs No.2372/2012 and 2373/2012, a copy of the reply submitted by Habib Bank Ltd. to the Secretary Commission of Inquiry (in two parts) was filed. Similarly, the Governor, State Bank of Pakistan through CMA No.2374/2012 also filed a statement along with certain documents.

16. It is to be noted that the HBL in its reply has mentioned about the withdrawal/deposit of Rs.140 million from Habib Bank Ltd.

under the instruction of respondent No.3. Likewise, the Governor, State Bank of Pakistan in his statement dated 01.06.2012 has confirmed that "*the HBL Reports, inter alia, deal with the issue of 'withdrawal & deposit of Rs.140.000 (M) from HBL under the instructions of Mr. Yunus Habib.'* It is submitted that the details given in HBL Reports appear to be correct". The factum of withdrawal and deposit as well as disbursement has also been confirmed by Brig. (R) Hamid Saeed Akhtar in his non-confidential report noted hereinabove. Besides confirmation of the same, respondent No.2 in his affidavit has also confirmed the same.

17. In this regard, it is noteworthy that CMA 785/97 dated 22.10.1997 was filed by Mr. Akhtar Ali Chaudhry, AOR on behalf of Ministry of Law for holding the proceedings of the case 'in camera', *inter alia* stating therein as follows: -

"3. In the Petition, filed by Air Marshal (Retd.) Mohammad Ashgar Khan, it has been alleged that some money was disbursed to Gen. (Retd.) Mirza Aslam Beg by the ISI. An affidavit of Lt. General (Retd.) Mr. Asad Durrani, former Director General, ISI, has also been placed on record to allege the distribution of funds to the former Chief of Army Staff (COAS) and others as donation to the election campaign in September/October, 1990, which fact has been denied in the letter of Secretary, Defence, Government of Pakistan, addressed to the Attorney General for Pakistan on 25.6.1997. However, regardless of the truth or otherwise of the allegations, if the proceedings are held in the open court, it may not be in national interest as well as in the interest of highly sensitive Institution of the Country. Accordingly, prayer is herein-made for holding the proceedings of the case in Camera by this Hon'ble Court."

Respondent No.1 vehemently opposed the request by filing the reply in the CMA noted above through his counsel, *inter alia*, contending as under: -

"2. Para 2 is incorrect. This learned court is not holding any proceeding with to the working of Inter Services Intelligence Bureau. The Honourable court is only looking into the Political Cell of this institution which was opened by virtue of an executive order in 1975 by Mr. Zulfikar Ali Bhutto, a former Prime Minister of Pakistan. This Political Cell as per the press reports have allegedly manipulated people's right to form associations under Article 17 of the Constitution and have also reportedly acted to frustrate the will of the citizens of the Country. It is, therefore, in the interest of the national security that a disputed Political Cell be treated differently and distinctly from rest of the institution and may also be dealt with separately so as to rid political process of the country from undesirable, unhealthy and extraneous influence. The work of ISI is not at all in question or the subject matter of probe or adjudication by this honorable court. The only question which falls for the determination of the Honourable Supreme Court is as to whether the public funds which are property to 130 million people of Pakistan and are deposited with the banks could be siphoned to manipulate people will during elections. This, by no stretch of imagination or interpretation could be extended to include in the domain of the national security issues. Therefore, the issue raised in paragraph 2 demonstrates an obvious confusion and lack of comprehension of the substance of subject matter of inquiry by the court.

3. Contents of Para 3 are absolutely incorrect hence denied. In the letter of Air Marshal (Retd.) M. Asghar Khan which has been treated as a petition by this learned court, disbursement of money to respondent has never been alleged. Even the alleged affidavit of Lt. Gen. (Retd.) M. Asad Durrani is not part of the record. Regardless of the defence taken by the Government of Pakistan, none of the above referred issues relate to the national security. The proceedings in camera because such proceedings give rise

to suspicions, speculations and mistrusts. Disbursement of money to individuals for politics does not make the issue as sensitive or one pertaining to the national security. If at any stage of the proceedings it is found that any issue relating to defence of the country or working of the ISI in its national security pursuits comes under question that specific situation may be dealt with differently otherwise the request for holding camera proceeding in arbitrary desire which cannot be countenanced."

18. In pursuance of above reply filed by respondent No.1, his statement was recorded on oath in open court on 16.06.1997, wherein he reaffirmed the contents of his reply and reiterated that the ISI had been created by the Government of Pakistan, which was directly answerable/responsible to the three Services through JCS till 1975. In 1975 the then Prime Minister of Pakistan through an executive order, created a political cell within the Organization of ISI and by virtue of that change in the working of ISI it came directly under the control of the Chief Executive, particularly on political matters and for all the security matters concerning the armed forces, ISI, reported to the Joint Chiefs of Staff Committee. According to him, that position continued till that date i.e. 16.06.1997. He explained that ISI had been virtually divided into two parts, namely; political wing and other wing concerning matters relating to counter and strategic intelligence of the Armed Forces. During the regime of General Zia-ul-Haq, ISI was reporting in all matters to the President, who by virtue of his office as Chief Martial Law Administrator and President of Pakistan controlled its office. He further explained that after the general elections of 1988, ISI was completely free from the influence of Army and since then is virtually under the control of Chief Executive while remaining

responsible to JCSC. In 1990 when the money was donated by respondent No.3, ISI was acting under the direction of the higher authorities. As Chief of Army Staff at that time when he was informed of this matter, his only concern was that the money received by the ISI was utilized properly and an account was maintained and beyond that, he had no concern with that money. Thereafter, on a question put by the learned counsel for the petitioner, he stated as under: -

“Although the Director General, ISI is an officer in uniform but the Chief of Army Staff has no authority to take action against him. The head of ISI was a person from Army of which I was head at the relevant time.”

19. On 24.02.1997, the Ministry of Defence filed in Court a letter dated 22.02.1997, wherein it was stated that according to information provided by the ISI, it did not receive any amount during September/October 1990, therefore, the question of distribution of same to the politicians, as stated by respondent No.2, did not arise. Since the said statement contradicted the statement made by Maj. Gen. (R) Nasirullah Khan Babar on the floor of the National Assembly, therefore, the Court *vide* order dated 24.02.1997, summoned the record of proceeding of National Assembly dated 11.06.1997 in which Maj. Gen. (R) Nasirullah Khan Babar had made the statement in question. On 26.03.1997, record of proceedings was produced and it was observed that no specific amount had been mentioned allegedly received by respondent No.2. However, the petitioner produced a copy of affidavit of respondent No.2, which contained a recital regarding distribution of 60 million rupees as per direction of the COAS/election cell. Later, on court's direction, Maj. General (R) Nasirullah Khan Babar and respondent No.2 filed their statements in the shape of affidavits. However, a perusal of the Court orders dated 23.10.1997, 27.10.1997

and 06.11.1997 reveals that the Court had taken judicial notice of the facts stated by both of them in their affidavits. The order sheet of 19 & 20.11.1997 also shows that their cross-examination was made by holding proceedings in camera. On having gone through the order-sheet, it appears that proceedings to the extent of cross-examination of these persons were completed. However, portion of the record regarding their cross-examination has not been de-classified by this Court.

20. As regards the request made by the learned counsel for respondent No.1 to supply copy of the 'confidential statement' of respondent No.2, referred to by him in his handwritten letter to the Prime Minister dated 07.06.1994, it may be mentioned that no such statement was brought on record by either of the parties, therefore, it was not possible to supply the same. As for the request of respondent No.1 made *vide* CMA No.1006/2012 to supply copy of cross-examination on the statements of Maj. General (R) Nasirullah Khan Babar and respondent No.2, the request was not acceded to because the Court had decided not to make their statements public and we were of the opinion that if the matter could be decided to the extent of relief sought by the petitioner Air Marshal Asghar Khan, there would be no necessity to rely upon the proceedings held in Camera.

21. It is to be noted that during proceedings on 25.04.2012 following observations were made: -

"3. We have undertaken some deliberations and during course whereof, it transpired that Gen (R) Mirza Aslam Beg in his concise statement had also taken the position of possessing knowledge about the distribution of this amount and maintaining the account by the ISI. *Inter alia*,

in the concise statement, one of the factors also finds mention to the effect that full account was maintained *qua* all the payments made by the then Director General, ISI and no amount was misappropriated or misused."

As such, Mr. Muhammad Akram Sheikh, learned ASC appearing for respondent No.1 was required to furnish details of such accounts before the next date of hearing. Thus, CMA No.1973/2012 was filed by respondent No.1 under his own signature wherein it was stated that he had been maintaining from the very outset that he had absolutely no involvement in the disbursement of donation ordered by President of Pakistan Ghulam Ishaq Khan and that he merely possessed knowledge of the same being the Commander of Armed forces.

22. The respondent No.3 whose name has been repeated time and again in the pleadings, was never asked to file reply, as such, during instant hearing he was issued notice, in response whereof, he appeared and filed affidavit dated 08.03.2012 to the following effect: -

"Affidavit for Supreme Court

I, Mohammad Yunus A. Habib S/o A. Habib resident of II-A-I, Main Sunset Boulevard, DHA Phase II Ext Karachi, give sworn statement which follows as under: -

- (1) That Air Marshal (R) Mohammad Asghar Khan filed a petition (Human Rights Case No.19/1996 in the Supreme Court of Pakistan and that deponent is respondent along with Gen (R) Mirza Aslam Beg, Ex Chief of Army Staff and Lt. Gen. (R) Asad Durani, Ex DG I.S.I
- (2) That the Honourable Apex Court issued a notice to appear on 8th March 2012 at 9.00 a.m.
- (3) That back in 1979/80 when I was serving as Vice President of Habib Bank Ltd. and posted at Karachi, I

had met Brig (later) General Mirza Aslam Beg at the residence of Brig. Qamar-ul-Islam. One (Brig. Mohammad Aslam was also present).

- (4) The above meeting translated into personal friendship between Gen (R) Mirza Aslam Beg and myself.
- (5) Gen (R) Mirza Aslam Beg and I frequently talked to each other. To the best of my memory Gen Beg called me in March 1990 and asked that late President Ghulam Ishaq Khan has asked to arrange Rupees 350.00 Million (Thirty five crores) well before the election which could be held at any time in GREAT NATIONAL INTEREST.
- (6) Few months later I was invited as a guest in installation ceremony of Col in Chief (General Beg).
- (7) That President Ghulam Ishaq Khan was the Chief Guest but in actual fact I was treated like the Chief Guest.
- (8) That I enclosed a photo taken on that occasion in which I was flanked by late President on the left and Gen Beg on the right which proof above statement.
- (9) That ours Bank (Habib Bank Ltd) was a Nationalized Bank and that I was holding the position of SEVP and Member Board and Provincial Chief of the said Bank.
- (10) During this occasion a meeting was held in which Gen Beg introduced myself to late President Ghulam Ishaq Khan and told him that as per your desired I have discussed with Mr. Yunus Habib for the arrangement of required funds.
- (11) After approximately 45 to 60 days later General Beg telephoned me and asked that late President Ghulam Ishaq Khan wants to have a meeting with me in which President was to be assured that Funds between 35 to 40 crores will be managed.
- (12) As far as I can recall the meeting was held most probably at Balochistan house Islamabad.

- (13) During the meeting in which only (3) of us (President, Gen Beg and myself) were present , President inquired of me for the arrangement of 35 to 40 crores for the Great National Interest to which I told the President that arrangement for such a huge amount was not possible through legal means and manipulation shall be needed for this purpose. The President directed that whatever is required should be done for the National Cause.
- (14) That on 29th Sep 1990 a meeting was held most probably Q block of Islamabad Secretariat. In this meeting late Attorney General Aziz Munshi and Mr. Roedad Khan (who was probably Chief of Cell to initiate cases against President Asif Ali Zardari and Mohtarma late Benazir Bhutto. During the said meeting I was personally pressurized by Mr. Roedad Khan to lodge a complain against President Asif Ali Zardari to which I refused.
- (15) When I went back to Karachi I was arrested from the Airport and FIA Cell and I was informed I have been arrested on the orders of Mr. Roedad Khan and I was again pressurized for the same purpose (Ref Faizi Ali Kazmi case) but I again refused.
- (16) I was kept in FIA Cell for (5) to (6) days and I was informed that I have not yet arranged required funds.
- (17) That I have met Mr. Ijlal Haider Zaidi a couple of times in the office of Gen Beg and he was also fully aware.
- (18) That during the days when I was under the custody of FIA I came to the conclusion that I have to arrange the funds by hook or crook (The term frequently used by President & Gen Beg). I was bulled out through the courtesy of Jam Sadiq Ali.
- (19) That the loans worth Rs.148 crores were sanctioned by Provincial Committee and Executive Committee of the Habib Bank Ltd in the name of my Friends and

Business Acquaintances (Yousuf Memon and Rafiq Moor, etc. etc.)

- (20) Gen Beg and Col Akbar I.S.I detachment provided certain accounts in various Banks i.e. UBL, Allied Bank and MCB, in which Funds were to be deposited.
- (21) Brig Hamid Saeed I.S.I detachment Karachi was detailed Coordinator/ Supervisor of the operation.
- (22) The deposited amount was informed by me to Gen Beg and Brig Hamid Saeed and counterfoils of the deposit slips were handed over to Col Akbar and photocopy of counterfoils to Mr. Yousuf Memon.
- (23) A total Rs.(34) crores out of Rs.148 crores were disbursed as under: -
 - i. 140 million through Gen Beg as detailed above.
 - ii. 70 million to Mr. Jam Sadiq Ali, the then Chief Minister Sindh.
 - iii. 15 million to Pir Pagara Sahib through late Jam Sadiq Ali.
 - iv. 70 million were paid to Mr. Yousuf Memon on the instance of the President/Gen Beg for the politicians who did not want to get money directly from ISI.

Some funds were given for Army welfare scheme the exact details. I did not know the remaining amount were utilized for purchase of properties etc. etc. and a portion of these funds were also given to business acquaintances who facilitated/provided their names for as directors/companies.

- (24) A total of Rupees 3450.00 millions (three point 45 Billion) have been paid back to the Bankers, and a sum of Rs.1150.00 million is yet to be paid to Habib Bank Ltd against with a 32 Acres of land com/industrial/Residential plots for which a case is pending with Honourable Supreme Court.

- (25) That this case has been scandalized as Mehran Gate whereas the fact of the matter is that the money was taken out of Habib Bank Ltd and Mehran Bank was not yet born.
- (26) That however when the matter came to Surface in 1994 I was then Chief Operating Officer of Mehran Bank Ltd however I enjoying the full powers of Chief Executive of Mehran Bank Ltd because of my huge investment in the Bank.
- (27) When Mohtarma Benazir Bhutto Shaheed came to power in the 2nd tenure and came to know that I was used against her in the election by providing huge amount she ordered to close the Mehran Bank and also ordered to arrest me.
- (28) THAT I SPENT (4) YEARS IN JAIL FOR SERVING SO CALLED SUPREME NATIONAL INTEREST. I NEVER KNEW THE EXACT PURPOSE AS TO HOW THE MONEY WAS TO BE UTILIZED.
- (29) That I was an employee of the Nationalized Bank and under the circumstances had no option but to obey the President and the COAS in the name of Supreme National Interest.
- (30) I apologise my involvement and throw myself at the mercy of this Honourable Court.

That above is to the best of my knowledge & believe.

Mohammad Yunus Habib
Sd/—
Dt. 08/03/2012"

23. In view of the allegations contained in the affidavit of respondent No.3, respondent No.1, on 09.03.2012, filed a counter-affidavit in the following terms: -

"COUNTER AFFIDAVIT OF GENERAL (R) MIRZA ASLAM BEG, DEPONENT/RESPONDENT NO.1, IN RESPONSE TO THE AFFIDAVIT FOR MR. YUNUS A. HABIB

I, General (R) Mirza Aslam Beg, hereby do solemnly affirm and state on oath as under:

- (1) That the deponent hereby sincerely, firmly and honestly denies all the contents of the affidavit sworn by Mr. Yunus A. Habib, on 8th of March, 2012.
- (2) That the affidavit filed by Mr. Yunus A. Habib, before this Honourable Court, on 8th March 2012, is a "bolt from the blue" and brings out something only to scandalise the proceedings pending before this August Court since 1996.
- (3) This is a totally mala fide attempt to dramatise and scandalize the sanctity of the proceedings pending before this Honourable Court, which have been given a new direction by the sinister intelligence behind this whole affair.
- (4) That Mr. Yunus Habib has tired to malign the former President of Pakistan Ghulam Ishaq Khan, posthumously, myself, and several others in this sordid game of mixing politics with justice, with the sordid intent to obstruct the wheel of justice.
- (5) That in response to the allegations of Yunus A. Habib, a self condemned perjurer, I consider it proper to bring on record for the kind attention of this honourable Court, the disappearance of the statements of Gen. Assad Durani, and Maj. General ® N. K. Babar recorded by this Hon'ble Court in camera but not yet found. This fact supports the respondent deponent's apprehension that the "vested interests, which carry the legacy of the vendetta of the lady" – Prime Minister Benazir Bhutto – against the respondent deponent, for allegedly causing the fall of her government in 1990, continue to haunt him and endeavour to interfere with even the record of this August Court.
- (6) That the respondent deponent would also draw the attention of this Hon'ble Court, some crucial facts to recall the past proceedings for proper perspective.

- a. Judgment was reserved by a learned bench headed by Chief Justice Mr. Justice Saiduzzaman Siddiqui on 19.5.1999, but the proceedings were subsequently re-opened by the Chief Justice on 08.10.1999, when the following order was passed:

"After judgment was reserved in the case, the office pointed out that the statements of two witnesses (Maj. General (R) Nasirullah Babar and Lt. Gen. (R) Asad Durani) recorded in the case during in-camera proceedings were neither signed by the witnesses nor by the learned Judges who conducted in-camera proceedings. According, the two witnesses were called in

the chamber before one of us (justice Saiduzzaman Siddiqui) on 2.6.1999 and shown the record of their respective evidence. The two witnesses after going through their statements confirmed the correctness of their statements and signed the same.

Thereafter, Maj. Gen. (R) Nasirullah Babar filed an application in the office under Order V Rule 1 (19), 1980, along with several documents, praying that Sardar Farooq Ahmed Khan Leghari be summoned in the case to produce the computer disk in respect of all accounts maintained in the Mehran Bank and specifically his own accounts and his evidence be also recorded. As judgment in the case was reserved, the office sent the application for orders in the chambers. The above application filed by Maj. Gen. (R) Nasirullah Babar could not be heard and disposed of due to summer vacations. As the application filed by Mr. Nasirullah Babar is to be disposed of before final decision of the case, the office is directed to fix the application in Court on 11.10.1999 at 1 p.m. after notice to all the parties and the learned Attorney General."

The case was last fixed according to record on 12-10-1999, i.e. the day of Military Takeover by Gen. Musharraf, on which day the following order was passed: -

"Learned Attorney General submits that he has received the copy of C.M.A. 1072/99 today and request for time to file reply thereto. Learned Counsel for respondent No. 1 states that his client is out of country. He also requests for time. Adjourned to a date in office.

- b. In 1997, I recorded my statement in 'Open Court'. I was questioned by the petitioner's lawyer. But regretfully, the statements of Lt General Asad Durrani and N.K. Babar were recorded in camera. My defence counsel Mr. Akram Sheikh was present and I had no access to these statements, till I got the call-up notice from this apex court, to appear for hearing on 8th March 2012.
- c. My Defence Counsel Mr. Akram Sheikh gave me the copy of Lt Gen Asad Durrani's affidavit, but could not find Gen: Nasirullah Babar's

statement, which was sealed and kept in safe custody of the court.

- d. The respondent deponent/application was summoned in a petition alleging commission of misconduct by the respondent deponent/applicant and Gen. Asad Durrani, but the respondent deponent/applicant himself volunteered to submit that this allegation would not attract enforcement of any fundamental right falling within the jurisdiction of this Hon'ble Court and way back in 1997 in his concise statement as well as his reply to CMA No. 785 of 1997 stated:-

"That this Hon'ble Court could very competently look at the working of political cell of the ISI which was opened by virtue of an executive order in 1975 by Mr. Zulfikar Ali Bhutto, a former Prime Minister of Pakistan. This political Cell as per the press reports has allegedly manipulated people's right to form Associations under Article 17 of the Constitution and has also reportedly acted to frustrate the will of the citizens of the country. It is, therefore, in the interest of the national security that a disputed Political Cell be treated differently and distinctly from rest of the institution and may also be dealt with separately so as to rid political process of the country from undesirable, unhealthy and extraneous influence."

- (7) That the respondent deponent/applicant may also refer to paragraph 14 of his concise statement/reply on behalf of respondent No. 1, which is reproduced here under: -

"14. That on 20 April, 1994 the then Interior Minister Mr. Nasirullah Babar made the disclosure in the National Assembly as reported in the "The Daily Muslim" dated 21st April, 1994:

"That Yunus Habib, the Chief Operator of Mehran Bank Limited (MBL) misappropriated Rs. 2.10 billion through a number of fake accounts.

"The Interior Minister told the House that Yunus Habib gave Rs. 140 million to Mirza Aslam Beg, the former COAS in 1991" Rs. 70 million to late Jam Sadiq Ali Khan, the then CM Sindh, Rs. 20 Million to Altaf Hussain, the MQM Chief, and huge amount to other politicians".

All these allegations have been dealt with and vehemently denied by the respondent deponent/applicant in his concise statement as trumped up charges by Interior Minister of Pakistan Peoples Party government. It is also part of the record that Mr. Rehman Malik traveled to Germany twice to scandalize the issue subject matter of this petition, which was first blasted by Maj. Gen ® N.K. Babar on the floor of the National Assembly.

- (8) In the earlier statement quoted to have been made by Mr. Yunus Habib there was no mention of Rs. 1800 million and other allegations that he talks about now and claims that he was directed to produce this amount "by hook or by crook".
- (9) That in fact he has tried to develop a new story, to cover-up his own crimes of having siphoned-of Rs. 1800million from Habib Bank/Mehran Bank for which he was prosecuted, jailed and made to pay almost double the amount of over Rs. 3 billion. Thus, 'politics' and 'crime' mingled together to create space for denial of justice.
- (10) That I find myself handicapped in properly replying to the affidavit filed by Mr. Yunus Habib, without having in hand the report of Mehran Bank Scandal Commission and Habib Bank Scandal Commission and crave indulgence of this Hon'ble Court to direct the Federal Government of Pakistan Peoples Party to supply me a copy of the same, so that I may submit my detailed response to malicious, prompted, and absolutely false allegation so far as the respondent deponent/applicant is concerned.
- (11) That the applicant/respondent deponent takes this opportunity for placing before this Hon'ble Court the consistent attitude of various PPP governments towards the judiciary and armed forces and they do not spare any opportunity to tarnish the image of these two institutions.
- (12) That I have no doubt in my mind whatsoever that the bundle of lies put together by Mr. Yunus Habib in his affidavit is inspired by political expediency of the vested interests and Yunus Habib's effort to sanctify his sordid deals, by linking-up the matter with "fund raising for elections, in national interest."
- (13) That this affidavit is a cover-up for his own crime, he was found guilty of and punished for under the law. It was a separate matte, which has been dealt with by the Habib Bank and Mehran Bank Commissions of Enquiries.
- (14) That in submitting this counter affidavit I sincerely thank this Hon'ble Court, for making me complete my 'hat-trick', of appearing thrice before this apex court – first before Chief Justice M. Afzal Zullah, second time before Chief Justice Sajjad Ali Shah and now before this Honourable court, under the dynamic

leadership of Chief Justice Iftikhar Muhammad Chaudhry. This is an honour, bestowed on me – which no other COAS can possibly claim.

And yet, I wonder: “Jane kis jurm ki paye hay saza yad naheen.” (Why I am being punished, I know not)

Submitted with respect by

SWORN at Islamabad this day of 09.03.2012

Sd/-
Respondent Deponent
General (R) Mirza Aslam Beg.”

24. Respondent No.2 also filed a concise statement dated 08.03.2012, which reads as under: -

CONCISE STATEMENT ON BEHALF OF RESPONDENT NO. 2
LT. GENERAL (R) M. ASAD DURRANI

Respectfully Sheweth,

1. That on 8th March, 2012, the Hon’ble Chief Justice of Pakistan directed me to give my comments on the affidavit submitted by Mr. Yunus Habib, during the hearing of HRC No. 19/1996 (Air Marshal Asghar Khan v. Gen Aslam Beg. These are as under: -
2. Mr. Yunus Habib did deposit Rs. 140 million (Para No. 23 (1) of the affidavit) in various branches (Para No. 20) in the accounts opened, on my orders, by Brig. Hamid Saeed (heading M.I and not I.S.I. formation in Karachi)
3. This fact was also mentioned by me in the affidavit that I had signed and handed over to Mr. Rehman Malik, the then D.G. F.I.A. on 07.06.1994 in Germany.
4. I have no information on any other issue raised by Mr. Yunus Habib in the affidavit.

It is therefore respectfully prayed that concise statement may kindly be placed on record in the interest of justice.

Dated: 08.03.2012
Durrani”

Lt. General (R) M. Asad

Respondent No.3, in response to the above counter-affidavit of respondent No.1 dated 09.03.2012 and concise statement of

respondent No.2 dated 08.03.2012 filed affidavit dated 10.03.2012, which reads as under: -

"AFFIDAVIT in response of affidavit of General (R) Mirza Aslam Beg dated 9th March 2012 and Lt Gen (R) M. Asad Durrani dated 8th March, 2012

In the Supreme Court of Pakistan

I, Muhammad Yunus A. Habib s/o A. Habib resident of 11-A-1 Main Sunset Boulevard, DHA Phase II Extension Karachi give SWORN Statement which follows as under: -

Gen. (R) Mirza Aslam Beg

- (1) In reply to Para (2) of the affidavit, it is submitted that I submitted the affidavit dated 8.3.2012 in the Honourable Supreme Court of Pakistan with all Sincerely, Honesty to bring the truth on record and there is no Question of Scandalizing the highest Court of the Country (Supreme Court of Pakistan) headed by the Chief Justice of Pakistan, Justice Iftikhar Chaudhry, arises.
- (2) I have no interest in dramatizing this case and just want to speak truth before this Honourable Court (before death) to enable and empowered this Honourable Court to reach at correct conclusion. It is further stated at ever since this case filed by Air Marshal Asghar Khan in the Supreme Court of Pakistan, I never met any official of any Civil or Military Intelligence and never met any Political figure of any Political Party till I deposited my affidavit in this Honourable Court on 8th March 2012. Only Gen (R) Mirza Aslam beg spoke to me in the last about (2) years only (4) to (5) times. (This is in reply to Para (3) of affidavit)
- (3) In reply to Para (4) of the affidavit again I have no interest in the politics of the Country and can never think to malign any person and obstruct the Court of

Justice. The Photo Submitted by me in the affidavit dated 8/3/2012 is proof of the fact that the President and Gen (R) Beg pampered me to the extent that I should not refuse to their order.

- (4) In reply to Para (8) it is submitted that in my previous affidavit, I stated that Rupees 1480 million (One hundred forty eight crores) were taken out of Habib Bank Ltd and not Rupees 1800 Million as stated by Gen (R) Aslam Beg.
- (5) In reply to Para (9) it is stated that Gen (R) Aslam Beg has mixed up Habib Bank and Mehran Bank whereas to the best of my knowledge and understanding, the filed by Air Marshall (R) Asghar Khan portions to use of money in the Edition in 1990 to block the victory of PPP Govt. and, therefore, I restricted my disclosure of facts confined to Habib Bank Ltd and did not touch the issue of Mehran Bank except Rs. 150 Million paid to Late Jam Sadiq Ali for licence (as a separate note on the affidavit).
- (6) I am ready to file the affidavit in case of Mehran Bank if a case is filed in the Supreme Court of Pakistan or the Supreme Court itself orders to submit the affidavit in this respect.
- (7) It is correct to the extent that I paid a sum of Rupees amount to more than (3) Billion. I actually have so far paid Rupees 345 crores and only Rs.115 crores is to be paid to Habib Bank Ltd, this amount can be easily paid out of sale proceeds of plot for 32 Acres situated at Gulshan-e-Iqbal Block 9. I am 100% sure that the case will be decided in my favour because City District Govt. has taken back its claim that it paid any amount against this plot to Evacuee Trust.
- (8) In reply to Para 12 & 13 my submission in the above paragraphs reiterated.

Lt. Gen. (R) M. Asad Durrani

- (1) In reply to Para (2) it is submitted that Brig. Hamid Saeed and Col. Akbar were introduced to me as ISI officers. However, after affidavit of Gen (R) Durrani the word ISI in Para 20 & 21 may kindly be deleted from my previous affidavit dated 8th March 2012. That above is to best of my knowledge and belief.

Muhammad Yunus Habib
Sd/-
10.03.2012"

In the meanwhile, respondent No.3 also filed CMA No.1034 of 2012 wherein he stated that in his affidavit dated 08.03.2012 reproduced hereinabove, he had disclosed that Rs.70 million were distributed through Mr. Yousaf Memon, Advocate amongst those politicians who did not want to get money directly from ISI. That Mr. Yousaf Memon Advocate in two different TV Programmes of GEO News channel (one by Kamran Khan and the other by Nazir Laghari) admitted that a house was purchased in F-6/2 Islamabad in the name of Mr. Javed Hashmi. He also admitted that 50% of the amount was invested in the purchase of house (Kasim 1 al-Multan). That after release from jail, he contacted the officials of State Bank of Pakistan and Habib Bank Ltd. for settlement of liabilities, desired to settle the liabilities with facilitation of NAB to which he agreed. Thus, against a loan of Rs.148 crores, settlement was reached at Rs. 300 crores (original amount of loan/advances of Rs.148 crores and markup/interest of Rs.152 crores). Out of the said liability, he had paid Rs.185 crores, which means that the principal liability of Rs.148 crores has already been paid while Rs.37 crores have been paid towards markup and only a sum of rupees Rs.115 crores was outstanding on account of markup/interest. He prayed for appointment of a Judicial Commission to effect recovery of the amount disbursed through ISI and Mr. Yousaf Memon Advocate,

adjust the same towards the settlement of HBL's liability; or in the alternative, the responsibility of recovery of said money may be assigned to the NAB, which is already engaged in the case.

25. In pursuance of Court notice, learned Deputy Prosecutor General, NAB appeared and submitted a report pointing out that following the process of plea bargain under the NAO, settlement of account had already taken place with HBL. Be that as it may, the Court while being seized with the matter regarding distribution of the amounts through election cell would not be extending the scope of proceeding so as to settle the personal accounts of respondent No.3 and would confine itself only to the extent of the prayers/declarations sought by the learned counsel for the petitioner, which are as under: -

- (a) All members, including Defence Army Officers who are respondents, who acted so as to interfere with and maneuver the electoral process in any manner, including through disbursement of funds subverted the Constitution.
- (b) No member of the Armed Forces is obliged to obey a command in violation of his oath of his office and cannot take the defence of command of the superiors.
- (c) Receiving secret funds and non-disclosure thereof constitutes serious electoral fraud with consequences under the electoral laws.
- (d) A direction to the Federation to initiate appropriate proceedings under criminal and election laws against the alleged givers and recipients of funds for political purposes including the respondents and the various persons named in Lt. Gen (R) Durrani's letter to PM dated 7.6.94 and affidavit dated 24.7.94."

26. On 26.06.1997, the then learned Attorney General produced in Court original letter dated 25.06.1997 addressed to him

by the Secretary Defence along with the document under which ISI was created. However, while placing the said document before the Court, he claimed privilege, which was allowed for the time being and the document was returned to him on the same date. This fact was mentioned in the order dated 26.06.1997 wherein it was observed that it appeared from the contents of the letter addressed to the learned Attorney General that a political cell was created in the ISI in May, 1975, which was still in existence. When the Court inquired from the learned Attorney General as to whether the Government intended to continue with the political cell in the ISI, he requested for time to seek specific instructions. The matter was then taken up on 23.10.1997 and 26.07.1997, but no response came up in that behalf. As such, on 27.10.1997 again learned Attorney General was asked to inform the Court whether the Federal Government wanted to retain the political cell in the ISI as was directed on 26.07.1997. However, despite repeated directions, the learned Attorney General failed to file any response of the Government regarding retaining of the political cell in the ISI. However, on 09.03.2012, the respondent No.2, while changing his earlier stance, stated in Court that there was no political cell in the ISI, but political work might have been done by certain designated persons. On 17.05.2012, the learned Attorney General was asked to procure notification of 1975 issued by the then Chief Executive in pursuance whereof a political cell was created in the ISI as alleged by the respondents. When the case was taken up on 04.06.2012, the learned Attorney General stated that copy of said notification would be produced on the next date of hearing. However, on the next date, i.e. 22.06.2012, he stated that despite his efforts, he could not succeed in getting the said notification traced, whereas Commander Shehbaz,

Director (Law), Ministry of Defence stated that according to his information the notification was issued by the Cabinet Division and he would try to get a copy of the same from the said Division. He, too, failed to produce the same on the next date of hearing, i.e., 16.07.2012 when he stated that no such notification was available in the Ministry of Defence. In the circumstances, *vide* order dated 13.09.2012, the Secretary, Ministry of Defence, Government of Pakistan was directed to file a statement in writing in that behalf and also to explain as to whether presently any such cell was working in the ISI or any other agency controlled by the Defence Ministry. Likewise, Secretary, Ministry of Interior was also directed to make a similar statement in respect of IB and all other agencies controlled by the said Ministry. On the next date of hearing, i.e., 03.10.2012, the learned Attorney General placed on record letter dated 28.09.2012 addressed to him by the Ministry of Defence stating therein that *no political cell is functioning in the Directorate General, Inter Services Intelligence or any other Agency working under the administrative control of Ministry of Defence*. On 04.10.2012, the Interior Secretary submitted a written statement wherein it was stated that *IB/ISI are not working under the administrative control of Ministry of Interior. Furthermore, no other agency under the administrative control of Ministry of Interior is running any political cell*.

27. On 16.06.1997, the statement of the respondent No.1 was recorded and petitioner's counsel Mr. Habib-ul-Wahab Al-Khari, ASC cross-examined him. Learned Attorney General for Pakistan, appearing on Court notice, filed an application requesting for in-camera hearing of the case. Both Mr. Nasirullah Khan Babar and the respondent No. 2

filed their detailed affidavits stating therein all the facts which they wanted to state, as such, only cross-examination was to be made. The Court, *vide* order dated 06.11.1997, decided to record the further statement of these persons in-camera. As such, proceedings were held in camera in which cross-examination of said persons was recorded. On 19.05.1999, the arguments were completed and judgment was reserved for orders. However, afterwards, office pointed out that the statements of Maj. Gen. (R) Nasirullah Khan Babar and the respondent No. 2, recorded in-camera, were not signed by the witnesses nor by the learned Judges who conducted in-camera proceedings. Accordingly, on 02.06.1999, both the witness were called in Chambers before Mr. Justice Saiduzzaman Siddiqui, J., as he then was (later CJ). The witnesses, after going through their statements, verified the correctness of their statements and signed the same. Similarly, as per order dated 27.05.1998, a sealed cover report on the working of ISI (parts IV & V) was also filed in Court. Later on, it was pointed out that the statements of said witnesses, recorded in camera as well as the report on the working of ISI were not available on record. As such, *vide* order dated 29.02.2012, office was directed to trace out the same and produce in Court in sealed envelope. On the next date of hearing i.e. 08.03.2012, the requisite documents were produced in Court by the Court Associate in sealed envelopes. The same were opened, seen, and returned to him with the direction to deposit the same with the Registrar of this Court. Relevant portion from the order dated 08.03.2012 reads as under: -

"In obedience to order dated 29.02.2012, the office has placed on record a sealed envelop under the cover "TOP SECRETE" "REPORT OF THE COMMISSION TO REVIEW THE WORKING OF SECURITY & INTELLIGENCE AGENCIES". The envelop has been opened in Court, which contains four

folders Part-II (Report of the Commission to Review the Working of Security & Intelligence Agencies (MARCH – 1989); Part-III (Correspondence); again Part-II (photocopy of the same report of the Commission (March-1989); and again Part-III (Correspondence).

2. A perusal of the same indicates that the Report of the Commission to Review the Working of Security & Intelligence Agencies has not been filed. However, Comdr. Muhammad Hussain Shahbaz, Director (Legal), representing Ministry of Defence, is allowed to go through these documents in the office of Registrar of this Court, who shall facilitate him in this behalf. He is directed to file the requisite reports pertaining to the year 1990 as well as up-to-date reports on the Working of Security & Intelligence Agencies. In the interest of nation, these documents shall be kept CONFIDENTIAL.

3. The envelop produced before us has been given to Mr. Rafaqat Hussain, CA/Branch Incharge, Civil-II, who shall handover the same to Registrar of this Court, who shall put them under seal.

4. Another envelop has been produced, which contains the following items: -

"Item No.1

1. 2 Audio Cassettes relating to HRC.19/1996 containing detail, as under: -

Cassette No.1: Dated 20.11.1997 timings 10.30 to 11.00 a.m.

Cassette No.2: Dated 25.11.1997 timing, 10 am to 11 am and 11.30 to 1.00 pm. (side A) dated 26.11.1997 timings 11:45 am to 1:15 pm (side B)

Item No.2

File No.1: Consisting 3 pages in original

Page No.1:

(Note dated 28.5.1999 of the then Additional Registrar with regard to obtaining the orders of HJ (1) whether Lt. General ® Nasirullah Babar and Lt. General ® Asad Durrani may be asked to read their statements and sign them in the presence of an officer of this Court).

Page No.2:

Note dated 1.6.1999 regarding submission of unsigned statements/cross-examination of Maj. (R) Nasirullah Babar and Lt. General Asad Durrani to the then HJ(1)

Page No.3:

Order dated 2.6.1999 of Justice Saiduzzaman Siddiqui

File No.2 in original:

Srl. Nos	Detail (All in original)	Pages
1	Cross examination of Maj. Gen.(R) Nasirullah Babar by Gen. Mirza Aslam Beg	1-3
2	Explanation of Gen Babar with regard to his cross examination	4
3	Cross examination of Maj. Gen. (R) Nasirullah Babar by Habib-ul-Wahab ul-Khairi (in Urdu)	5-9
4	Cross examination of Maj. Gen. (R) Nasirullah Babar by Mr. Muhammad Akram Sheikh.	10-21
5	Cross examination of Lt. Gen.(R) Asad Durrani	22-25
6	Cross examination of Lt. Gen.(R) Asad Durrani by Habib-ul-Wahab-ul-Khairi	26-33
7	Cross examination of Lt. Gen.(R) Asad Durrani by Maj. Gen.(R) Nasirullah Babar	34-35

Item No.3:Copy No.08 of 11 Copies: -

Folder with regard to the report of the commission to review the working of Security and Intelligence Agencies (March-1989) submitted by (i). Air Chief Marshal Zulfiqar Ali Khan, Chairman, (ii). S.K. Mahmud, Secretary Interior, Member, (iii). Mr. M.A.K. Chaudhry, Member and (iv) Air Commodore Muhammad Yamin, Secretary. (Pages 1-57).

Item No.4:

ADO letter No.RC/1/89 dated 27.3.1989 addressed to the Mohtarma Benazir Bhutto, Prime Minister of Pakistan, Prime Minister's Secretariat, Rawalpindi by the Air Chief Marshal, Zulfiqar Ali Khan along with its synopsis of the Commissioner's Report for facility of reference. (Pages 1-8)".

5. The office has also made efforts to find out as to whether examination-in-chief of Gen.(R) Nasirullah Khan Babar and Lt. Gen.(R) Asad Durrani was recorded; according to the report, no such document is available on record. However, Mr. Salman Akram Raja, learned ASC, appearing for the petitioner, states that they were subjected to cross-examination on the affidavits, which have already been filed. As these proceedings were drawn in camera, therefore, the same be sealed and are handed over to Mr. Rafaqat Hussain for depositing the same with the Registrar. As regards proceedings drawn by the office of Registrar to locate these documents, the same are also made part of the record and are ordered to be deposited with the Registrar."

28. Mr. Muhammad Akram Sheikh, learned counsel for respondent No.1, with reference to the order dated 26.06.1997, stated that a political cell was created in the ISI in May, 1975 and the document creating the said cell was shown to the Court, which was returned after examination. Thus, conclusion can be drawn that a political cell was working in the ISI since May, 1975 onward and at initial stage documents were shown, which now have been withheld.

29. It is to be noted that as per contents of various documents/pleadings, it is, *prima facie*, evident that a cell was allegedly functioning in the Presidency in the year 1990 under the supervision of then President of Pakistan Ghulam Ishaq Khan (late) and M/s Roedad Khan and Ijlal Haider were in charge/looking after the affairs of such cell. Inasmuch as, it is also on record that at one point of time when Mr. Farooq Ahmad Khan Leghari (late) was the President of Pakistan, some consultation took place between him, late Mohtarma Benazir Bhutto, the then Prime Minister and late Maj. Gen. (R) Nasirullah Khan Babar wherein the affairs of the cell constituted to support alliance of political parties were discussed.

30. It may be observed that the President, under Article 41(1) of the Constitution, being the head of the State represents the unity of the Republic, whereas by virtue of Article 243(2) of the Constitution, he is the Supreme Commander of the Armed Forces of Pakistan. Therefore, the President was not supposed to be undertaking any activities in pursuance whereof a particular group of the political parties might be allegedly supported in the name of national interest. On the request of learned counsel for the petitioner, it was deemed appropriate to implead the office of President as party through Secretary to the President *vide* order dated 04.10.2012. On the next date of hearing i.e. 15.10.2012, Malik Asif Hayat, Secretary to the President of Pakistan, in response to the notice, appeared and requested for time. On 17.10.2012, he again appeared and stated that as per present record, no concrete information was available about any election cell having ever been created in the Presidency. However, efforts were being made to lay hand upon any such file. He also stated that as the Military Secretary to the President was also in possession of some record of Presidency, information in that behalf, if any, would be placed before the Court after consulting his office. On 18.10.2012, Mr. Arshad Ali Chaudhry, Director Legal, President House appeared and filed a statement on behalf of Military Secretary to the President stating therein that the record available in the President's Secretariat (Personal) was searched, but no document/file pertaining to the cell allegedly set up in the Presidency in the year 1990 or thereafter was found.

31. Respondent No.3 has clarified in his affidavit that it was not the Mehran Bank, but the Habib Bank from where the alleged

amount was drawn for distribution amongst a group of politicians, who were intending to contest election from the platform of IJI. He has stated that respondent No.1 frequently talked to him. In March 1990, Gen. (R) Mirza Aslam Beg called him and stated that late President Ghulam Ishaq Khan had asked to arrange Rs.350 Million (thirty five crores) well before the election, which would be held at any time in the greater national interest. A few months later, he was invited as a guest in the installation ceremony of Colonel-in-Chief of respondent No.1. In the said function, President Ghulam Ishaq Khan was the Chief Guest, but in actual fact he (respondent No.3) was treated like the Chief Guest. During the period when he was holding the position of SEVP and Member Board of Governors as well as Regional Chief of HBL, a meeting was held in which respondent No.1 introduced him to President Ghulam Ishaq Khan (late) and told him (President) that as per his desire he had discussed with him (respondent No.3) matter regarding arrangement of required funds. He further stated that after approximately 45 to 60 days, respondent No.1 told him on telephone that President Ghulam Ishaq Khan (late) wanted to have a meeting with him, in which President was to be assured that funds between Rs.35 to 40 crores would be arranged. A meeting was held probably at Balochistan House, Islamabad, in which only three persons, namely, President, respondent No.1 and he (respondent No.3) were present. The President directed that the requisite funds be managed by all means in the national interest.

32. Mr. Roedad Khan, by means of CMA 3196/2012 filed a rejoinder to the reply of the respondent No.1 and a supplementary statement through CMA No. 4350/2012 wherein he denied his

involvement in the distribution of funds in any manner whatsoever. According to him, he had never been a member of any such cell, that he had met respondent No. 2 only once in the office of the Military Secretary to the President, but had never met respondent No.1 during the relevant period.

33. From a perusal of the replies/affidavits filed by respondents No.1, 2 & 3, which have been reproduced hereinabove, it is clear that the then President Mr. Ghulam Ishaq Khan had formed an Election Cell directly under his supervision. According to respondent No. 3, he was informed by respondent No.1 that he was under instruction from the President's Election Cell to make available a sum of Rs.140 million for supporting the 1990 elections and to place this amount at the disposal of the respondent No.2, who would handle it as per instruction of the President's Election Cell. The amount was not deposited in the MI account, rather various cover accounts were opened by 202 Survey Section (Brig. Hamid Saeed) under the command of ISI and an amount of Rs.140 million was deposited in those accounts directly by respondent No.3. Respondent No.2 under instruction from respondent No.1 made arrangements to distribute this amount amongst the politicians belonging to various political parties and other persons as instructed by the alleged election cell. Respondent No.1, in a meeting with President Ghulam Ishaq Khan, brought to his knowledge the fact of donation made by the respondent No. 3 and its utilization by the respondent No. 2 under instruction of the President's Election Cell. Respondent No.1 was fully on board in the whole exercise. The policy of financial support to the candidates was laid down by the President's Election Cell and respondent No. 2

was acting under its command and making payments as directed from time to time. Out of Rs.140 million deposited in the cover accounts, approximately Rs.60 million were spent for election purposes and for acquisition of election intelligence, while the remaining amount of Rs.80 million was deposited in the accounts of the special funds of ISI.

34. There was a document, though yet to be proved, which indicated that about Rs.30 million were deposited under the instruction of the respondent No.1 in the account of an organization in the name and style of "Friends" and General Asif Nawaz Janjua, the then COAS had taken exception to the deposit of the said amount in that account. As such, on 17.10.2012, Commander Hussain Shahbaz, representative of Ministry of Defence was asked to inquire from the concerned quarters and submit as to whether the remaining amount was available in the said account, or the same had been spent, and if so, what were the details thereof? But, despite availing opportunity, needful was not done.

35. Now in the presence of the above material, it would be proper to first decide the question of maintainability of the petition raised by Mr. Muhammad Akram Sheikh, Sr. ASC, learned counsel for respondent No.1 who argued that the instant petition was filed alleging commission of misconduct by the respondents No.1 & 2, which would not attract the jurisdiction of this Court under Article 184(3) of the Constitution, which is available in a case involving a question of public importance with reference to enforcement of any of the Fundamental Rights. He submitted that he had raised this objection in the year 1997 in his concise statement as well as in his reply to CMA No. 785 of 1997.

36. In response to the above, Mr. Salman Akram Raja, learned ASC has argued that the instant proceedings do raise a question of great public importance with reference to enforcement of various Fundamental Rights of the citizens guaranteed under the Constitution of Pakistan, 1973, e.g., the right to information (Article 19A); the right of association (Article 17), etc., which have been infringed in the instant case. He has placed reliance upon following judgments: -

- a) Benazir Bhutto v. The Federation (PLD 1988 SC 416) at 518-533.
- b) Mian Nawaz Sharif v. The President (PLD 1993 SC 473) at 558, 559.
- c) Nawabzada Iftikhar Ahmad Khan Bar v. Chief Election Commissioner Islamabad (PLD 2010 SC 817) at 826.
- d) Muhammad Rizwan Gill v. Nadia Aziz (PLD 2010 SC 828) at 838.
- e) Workers' Party Pakistan v. Federation of Pakistan (PLD 2012 SC 681) at Paras 38, 46, 49.

37. The learned counsel also argued that it is established in the instant proceedings that the democratic process was interfered with at the relevant time by certain functionaries of the State in derogation of the fundamental rights of the citizens guaranteed under Article 17 read with Article 2A of the Constitution, which is tantamount to subversion of the Constitution. Those included, *inter alia*, the respondents No.1 & 2 and a number of their subordinate officers, such as Brig (R) Hamid Saeed, then head of MI in Sindh and others, who were tasked with the distribution of funds and whose names would be available with the respondent No. 2 and Brig (R) Hamid Saeed.

38. The learned counsel argued that in the light of law laid down in Mian Nawaz Sharif's case (*supra*), on account of the admission

made by the respondents, there was a concerted attempt to subvert Article 17 and thereby to subvert the Constitution. He further argued that in enforcing fundamental rights of the people, this Court has not only made the requisite declarations, but has also issued necessary directions to the concerned agencies to initiate action against all those liable under applicable civil, electoral and criminal laws. In this behalf, he has placed reliance on the following cases: -

- a) Alleged Corruption in Rental Power Plants (2012 SCMR 773). National Accountability Bureau asked to carry out prosecution.
- b) NRO Implementation proceedings (2012 SCMR 1434), (PLD 2012 SC 866).
- c) Watan Party v. The Federation (Memo Matter) (PLD 2012 SC 292). High powered commission formed.

He also argued that this Court, in exercise of its jurisdiction under Article 184(3) of the Constitution, is competent to mould the relief to be granted in the matter before it in accordance with the facts and circumstances that come to light during the proceedings. In support of the above proposition, he has referred to the following cases: -

- a) Watan Party v. The Federation (Memo matter), PLD 2012 SC 292 at page 359, 360.
- b) Watan Party v. The Federation, (Karachi Suo Motu), PLD 2011 SC 997 at 1055, 1112.
- c) Shahid Orakzai v. The Federation, PLD 2011 SC 365, Para 28.
- d) Mst. Amatul Begum v. Muhammad Ibrahim Sheikh, 2004 SCMR 1934, Para 8.

The learned counsel further submitted that instant proceedings are not adversarial, inasmuch as these are being used to lay before the people of Pakistan things that had happened in the past with a view to avoiding same or similar constitutional violations in future. Article 19A of the Constitution guarantees the right to information. The petitioner in the instant case is merely an informer and as the information

develops, it would be for the Court to grant relief. As regards the relief that can be provided under Article 184(3), learned counsel has referred to Shahid Orakzai v. Pakistan through Secretary Law (PLD 2011 SC 365) wherein this Court has held as under: -

"28. as cancellation of the respondent's earlier appointment and his fresh appointment as Chairman, National Accountability Bureau had come about during the pendency and hearing of the present petitions and as the said development had been brought to the notice of this Court by the Federation of Pakistan itself, therefore, we had decided to treat that development as a part of the pending issue and had decided to determine its effect on the same without requiring the petitioners to amend their petitions in respect of such development. There is no gainsaying the fact that the law is by now quite settled that a Court seized of a matter cannot only take notice of any relevant development taking place during the pendency of the lis but it can also mould the relief to be granted keeping in view such development and none of the learned counsel representing different parties to the present petitions has disputed that legal position or has objected to the course adopted by us in that regard."

39. We have heard the learned counsel for the petitioner, respondent No.1 and the learned Attorney General. In the context of the present case, the observation of Mr. Justice Muhammad Afzal Zullah, J, as he then was, (later Chief Justice) in Benazir Bhutto's case (PLD 1988 SC 416) that Article 17(2) of the Constitution provides a basic guarantee to the citizen against usurpation of his will to freely participate in the affairs and governance of Pakistan through political activity relating thereto, is very pertinent. In Benazir Bhutto v. Federation of Pakistan (PLD 1989 SC 66), Justice Nasim Hasan Shah, in his note of concurrence held that "the right to form or be a member of a political party" guaranteed under Article 17(2) of the Constitution includes the right to contest and participate in the elections. In Mian Muhammad Nawaz Sharif's case (*supra*) this Court relying upon Benazir Bhutto's case (*supra*) held that in the scheme of the

Constitution, the guarantee “to form a political party” must be deemed to comprise also the right by that political party to form the Government, wherever the said political party possesses the requisite majority in the Assembly. It was further held that if the lawful functioning of a Government or political party is frustrated by an unlawful order, such an order is an impediment in the healthy functioning of the political party and would, therefore, constitute an infringement of the fundamental right conferred by Article 17(2). The same view was reiterated by this Court in the case of Muhammad Nasir Mahmood v. Federation of Pakistan (PLD 2009 SC 107). Recently, this Court, in Workers’ Party Pakistan’s case (*supra*), has held, *inter alia*, that Article 2A expressly lays down that “...principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed” in the State of Pakistan and that the protection and advancement of these principles is an integral objective and an essential feature of the Pakistani constitutional Order. It was also held that this constitutional Order declares that “the authority [is] to be exercised by the people of Pakistan”. By guaranteeing the observance of ‘principles of democracy’ in Pakistan and mandating that the “State shall exercise its powers and authority through the chosen representatives of the people” the Constitution envisages that this authority is to be exercised by and through a representative and democratic government. Furthermore, by establishing and enumerating the powers and manner in which the legislature is to function, Parts II and III of the Constitution cement ‘democracy’ as the chosen system of the people and a fundamental constitutional dictate. This symbiotic relationship between ‘democracy’ as a governing system and the objective of ‘advancing and protecting

Fundamental Rights, as enunciated by Islam', it was held, preserves and reinforces both these constitutional dictates as cardinal features of the Constitution. In the above perspective, it was reiterated that the freedom of association, as enunciated by Article 17 of the Constitution, confers a Fundamental right on every individual to partake in the political governance of the State, whilst concurrently reinforcing the constitutional mandate to protect and advance this right through a democratic State. Article 51(6)(a) of the Constitution mandates that the representatives of the people "shall be elected by direct and free vote, in accordance with law", therefore, fair, free, honest and just elections are *sine qua non* for strengthening of democracy. It was also noted that the right to form a political party under Article 17 of the Constitution includes the right to participate in free and fair election and to form government if such party is successful because 'participation' in the electioneering process necessarily implies that every person and every group in society may genuinely take part in the process of elections, as voter and candidate, without constraint, coercion, unlawful inducement or subjugation. Consequently, any unconstitutional curtailment of the right to participate in election, and to form government, is tantamount to an abridgement of the right under Article 17(2) of the Constitution. Thus, it has been emphasized that a combined reading of Article 17(2) and Article 25 of the Constitution mandates a 'level playing field' for electioneering processes. The principle of free and fair elections was also highlighted in the Indian jurisdiction in the case of Smt. Indira Nehru Gandhi v. Raj Narain (AIR 1972 SC 1302) = [(1975) Supp. 1 SCC 1] wherein the Court struck down even a constitutional amendment on the ground that it was violative of the said principle. Later, in People's Union for

Civil Liberties v. Union of India (2009) it was held that democracy contemplates that elections should be free and fair and the voters should be in a position to vote for the candidates of their choice.

40. As already mentioned above, President Ghulam Ishaq Khan dismissed the PPP Government on 06.08.1990 in exercise of powers conferred upon him under Article 58(2)(b) of the Constitution. Fresh Elections were scheduled to be held on 24.10.1990 and Mr. Ghulam Mustafa Jatoi (late) was made the Caretaker Prime Minister. In order to contest the elections against PPP, a political alliance namely IJI was formed. The then President of Pakistan Ghulam Ishaq Khan, having disputes/rivalry with PPP, supported IJI through the Election Cell established in the President House. For that purpose, funds were arranged and the same were distributed to various politicians/political parties through ISI/IB. In this way, the elections of 1990 were maneuvered and as stated by learned counsel for the petitioner, the PPP got half the number of seats in the National Assembly as compared to the seats won by it in the previous elections. Thus, allegedly people were deprived of their fundamental right under Article 17 of the Constitution to participate in a free, fair and just election, particularly in the constitution of national or provincial assemblies where interference was made by a person not below the status of a functionary who was head of the State and symbol of unity as per Article 41(1) of the Constitution, thus succeeded in forming government through a group of political parties of his choice.

41. It is to be noted that the instant proceedings were initiated on a letter addressed to the then Chief Justice by a political worker, who earlier happened to be an officer and Chief of the Pakistan Air

Force, bringing into Court's notice certain actions of the highest functionaries including the then Head of State, Chief of Army Staff and Director General, ISI. The allegation mainly was that they, with *mala fide* intention, and with the object of benefiting a particular group of politicians, had interfered in the electoral process, whereby the fundamental right of the people at large of electing their representatives by fair, free and just election, was violated. In order to determine the correctness of the allegation, the matter was registered as Human Rights case and notices were issued to the persons allegedly involved in the distribution of funds. There is a clear admission by all that sums were disbursed to a group of politicians by individuals, who were members of the Armed Forces, in particular ISI and MI with a view to maneuvering the election results in derogation of the Fundamental Right guaranteed under Article 17(2) of the Constitution as interpreted by this Court in the above referred judgments. This case is of great significance and the Court, in exercise of its jurisdiction under Article 184(3) of the Constitution is called upon to discharge its responsibility of enforcing Fundamental Rights of the people guaranteed under the Constitution. Thus objection on maintainability of the petition is discarded and it is held that the same is maintainable. It may also be observed that these proceedings being in the nature of public interest litigation are inquisitorial, and not adversarial, therefore, this Court is not called upon to issue notices to all and sundry allegedly involved in the matter. It is well settled that this Court has ample powers and jurisdiction to adjudicate upon a case if it falls within the ambit of inquisitorial proceedings. Reference in this behalf may be made to the cases of Watan Party v. Federation of Pakistan (PLD 2011 SC 997), All Pakistan Newspapers Society v.

Federation of Pakistan (PLD 2012 SC 1) and Workers' Party Pakistan's case (*supra*).

42. The learned Attorney General argued that there was a strong appearance of bias on the part of the Hon'ble Judges constituting the present Bench, therefore, according to him, if justice was to be seen to be done, then all the three Hon'ble Members may consider the propriety of recusing themselves from the Bench, and the Hon'ble Chief Justice may constitute a larger bench, excluding the present three Hon'ble Members of the Bench.

43. The questions involved in the instant case have to be dealt with in view of the material brought before this Court already referred to hereinbefore, therefore, before undertaking the exercise we consider it appropriate to deal with the arguments of the learned Attorney General in respect of bias on the part of the Judges and his request for constitution of larger Bench.

44. A somewhat similar objection was raised in Pakistan v. Abdul Wali Khan (1975 PSCR 1) regarding the sitting of the two Judges on the Bench hearing that case wherein, at page 214 of the report, it was observed as follows: -

"As regards the objection taken to the constitution of the Bench, learned counsel were informed on the very first day that no party to a litigation can claim the right to be tried by a particular Judge or Judges of his choice. In the case of superior Courts it is entirely a matter for the Judge or Judges concerned to decide as to whether they will or will not sit in that particular case. Mr. Wali Khan has been informed that both the learned Judges, against whom the objection has been raised, have now recorded minutes in writing which have been placed on the record of these proceedings to say that they do not feel embarrassed in sitting to hear this proceeding. The objection based purely on conjectures is, therefore, in our view, unwarranted. Judges concerned are fully conscious of their own responsibilities. There is nothing to show that they are in any way disqualified from sitting to hear this reference. The objection is, accordingly, overruled."

In the case of Asad Ali v. Federation of Pakistan (PLD 1998 SC 161) it has been held as under: -

"... .. Mere apprehension in the mind of a litigant that he may not get justice such as is based on inferences drawn from circumstantial indications will not justify the raising of the plea. The facts adduced must be such that the conclusion of bias follow necessarily therefrom on no weaker ground can any person be permitted to attack the impartiality of a superior Court and consequently should the proof fail to satisfy the requisite standard, he may be found in contempt " (The underlining is by us) S.A. Rehman, J. who was also one of the Members of the Bench which heard M.H. Khondker's case (*supra*), concluded as, follows, on the plea of bias by a party against a Judge of Supreme Court: -

Reference may also be made to the Canons of Professional Conduct and Etiquette of the Pakistan Bar Council, Chapter III (Duty to the Court) thereof reads as follows: -

(1) It is the duty of an Advocate to maintain towards the Court a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamour. At the same time whenever there is a proper ground for complaint against a judicial officer, it is the right and duty of an Advocate to ventilate such grievances and seek redress thereof legally and to protect complainant and person affected.

It is thus well settled that in the case of superior Courts it is entirely a matter for the concerned Judges to decide as to whether they will or will not sit in any particular case. In the instant case, the objection raised by the learned Attorney General is based purely on conjectures and is unwarranted, particularly when the learned Attorney General himself has been appearing in the instant case and participating in the proceedings ever since its hearing was taken up by the present Bench in April this year. During this period, the case was heard on more than

30 dates. Be that as it may, the Members of the present Bench are fully conscious of their responsibilities and are capable of dispensing justice without fear or favour, ill-will or affection. The objection of the learned Attorney General is untenable and is overruled.

45. It is also established in the instant proceedings that the then President directly involved himself in the matter of first arranging funds from an illegal source and then getting the same disbursed to a group of political parties and various other persons through the members of Armed Forces in the name of great national interest with a view to influence the election results in derogation of the people's right to freely choose their representatives. The Court is, thus, called upon to dilate upon the role of President in the scheme of the Constitution.

46. Historically, there is no gain saying that the office of President, both during military and civil governments, has been indulging in politics. There have been constitutional deviations, from time to time, due to which parliamentary system was weakened and could not flourish in the country as envisaged by the Constitution. The political stalemate has been summarized by this court in the case of Sindh High Court Bar v. Federation of Pakistan (PLD 2009 SC 879) as under: -

"17. ... The first major event in this behalf was the dissolution of the Constituent Assembly of Pakistan by Governor-General Ghulam Muhammad in 1954, ... This act of the Governor-General was challenged by Moulvi Tamizuddin Khan, President of the Constituent Assembly, in the Chief Court of Sindh. The Chief Court of Sindh allowed the petition and declared the dissolution of the Assembly as illegal. It was held that the Acts of the Constituent Assembly when it did not function as the Federal Legislature did not require the Governor-General's assent. The Federation of Pakistan challenged the judgment of the Sindh Chief Court before the Federal Court. The Federal Court reversed the judgment of the Sindh Chief Court on the ground that the assent of the

Governor-General was necessary to the validity of all the laws and the amendments made in the Government of India Act, 1935. The Court held that since section 223-A of the Government of India Act under which the Chief Court of Sindh assumed jurisdiction to issue the writs did not receive assent of the Governor-General, it was not yet law, and that, therefore, the Chief Court had no jurisdiction to issue the writs.

23. Next case of significant relevance was the *Reference by H. E. The Governor-General* reported as PLD 1955 FC 435. The Federal Court having held in *Maulvi Tamizuddin Khan's case* that assent of the Governor-General was necessary to all laws passed by the Constituent Assembly, the Governor-General sought to validate such Acts by indicating his assent, with retrospective operation, by means of the Emergency Powers Ordinance, 1955 (Ordinance No. IX of 1955) issued under section 42 of the Government of India Act, 1935. The Federal Court in *Usif Patel's case*, however, declared that the Acts mentioned in the Schedule to that Ordinance could not be validated under section 42 of the Government of India Act, 1935, nor could retrospective effect be given to them. A noteworthy fact was that the Constituent Assembly had ceased to function, having already been dissolved by the Governor-General by a Proclamation on 24th October 1954, and no legislature competent to validate these Acts was in existence.

24. The Governor-General made a Reference to the Federal Court under section 213 of the Government of India Act, 1935 asking for the Court's opinion on the question whether there was any provision in the Constitution or any rule of law applicable to the situation by which the Governor-General could, by Order or otherwise, declare that all orders made, decisions taken, and other acts done under those laws, should be valid and enforceable and those laws, which could not without danger to the State be removed from the existing legal system, should be treated as part of the law of the land until the question of their validation was determined by the new Constituent Convention.

25. The answer returned by the Federal Court (by majority) was that in the situation presented by the Reference, the Governor-General had, during the interim period, the power under the common law of civil or state necessity of retrospectively validating the laws listed in the Schedule to the Emergency Powers Ordinance, 1955, and all those laws, until the question of their validation was decided upon by the Constituent Assembly, were, during the aforesaid period, valid and enforceable in the same way as if they had been valid from the date on which they purported to come into force.

The case of State v. Dosso (PLD 1958 SC 533) was commented as under: -

"28. The Supreme Court, on the basis of the theory propounded by Hans Kelsen, accorded legitimacy to the assumption of power by General Ayub Khan holding that *coup d'état* was a legitimate means to bring about change in the government and particularly so when the new order brought about by the change had been accepted by the people. It was held that where a Constitution and the national legal order under it was disrupted by an abrupt political change not within the contemplation of the Constitution, then such a change would be a revolution and its legal effect would not only be the destruction of the Constitution but also the validity of the national legal order, irrespective of how or by whom such a change was brought about. In the result, in accordance with the judgments of the majority, the proceedings for writs in each of these cases were held to have abated. The result was that the directions made and the writs issued by the High Court were set aside."

The case of Asma Jilani v. Government of the Punjab (PLD 1972 SC 139) was discussed as under: -

"32. It was held that Kelsen's theory was, by no means, a universally accepted theory nor was it a theory which could claim to have become a basic doctrine of the science of modern jurisprudence, nor did Kelsen ever attempt to formulate any theory which favoured totalitarianism.

33. The seizing of power by Yahya Khan having been declared by the Supreme Court to be entirely illegal, question arose whether everything (legislative measures and other acts) done during his illegal regime, whether good or bad, could be treated in the same manner and branded as illegal and of no effect."

Regarding the next constitutional deviation, which occurred in 1977, this Court, in the case of Begum Nusrat Bhutto v. Chief of Army Staff (PLD 1977 SC 657) held that the Armed Forces of Pakistan, headed by the Chief of Army Staff, General Mohammad Zia-ul-Haq intervened to save the country from further chaos and bloodshed, to safeguard its integrity and sovereignty, and to separate the warring factions which had brought the country to the brink of disaster. It was held that this

undoubtedly was an extra-constitutional step, but was dictated by considerations of State necessity and welfare of the people. Then the validity of constitutional deviation of 1999 was considered by this Court in the case of Syed Zafar Ali v. Federation of Pakistan (PLD 2000 SC 869) and by the Short Order dated 12.05.2000, the action of 12.10.1999 was validated on the basis of the doctrine of State necessity and the principle of *salus populi est suprema lex* as embodied in Begum Nusrat Bhutto's case. It was also held that General Pervez Musharraf was entitled to perform all acts or legislative measures, which were in accordance with, or could have been made under the Constitution, including the power to amend it and to perform all such measures as would establish or lead to the establishment of his declared objectives. As to the power to amend the Constitution, it was held that constitutional amendments could be resorted to only if the Constitution failed to provide a solution for attainment of his declared objectives, but no amendment shall be made in the salient features of the Constitution, i.e. independence of judiciary, federalism, parliamentary form of government blended with Islamic provisions; and last but not the least, three years' period from the date of Army takeover, viz., 12th October, 1999 was allowed to him for achieving his declared objectives. ... The review petition against the above judgment was filed by Mr. Wasim Sajjad, but the same was dismissed *vide* judgment reported as Wasim Sajjad v. Federation of Pakistan (PLD 2001 SC 233). It is important to note that General (R) Pervez Musharraf promulgated the President's Succession Order 2001 (Chief Executive's Order No. III of 2001) on 20.06.2001 in pursuance whereof Mr. Muhammad Rafiq Tarar, President of Pakistan was ousted from office and he himself assumed that office on 21.06.2001.

47. The last major event in the successive constitutional deviations was the imposition of emergency and promulgation of PCO on 03.11.2007, which was dealt with by this Court in Sindh High Court Bar Association's case. For the first time in our Constitutional history, a 7-Member Bench of this Court passed a restraint order against the imposition of emergency and enforcement of PCO on the very day and the Judges of the Superior Courts refused to make oath under the new dispensation. This sparked an enthusiastic lawyers' movement, which was joined in and supported by members of civil society and media, which continued demanding restoration of judiciary unconstitutionally deposed on 03.11.2007. Consequently, on 16.03.2009 Government of Pakistan restored the judiciary. Thereafter, a number of petitions were filed before this Court challenging action of President/Chief of Army Staff, General (R) Pervez Musharraf. This Court on 31.07.2009 accepted the petitions *vide* its judgment in Sindh High Court Bar Association's case wherein it was held, *inter alia*, as under: -

"22. As a consequence thereof: -

- i) the Chief Justice of Pakistan; the Judges of the Supreme Court of Pakistan; any Chief Justice of any of the High Courts and the Judges of the High Courts who were declared to have ceased to hold their respective offices in pursuance of the afore-mentioned alleged judgments or any other such judgment and on account of the instruments mentioned in Para 21 above, shall be deemed never to have ceased to be such Judges, irrespective of any notification issued regarding their reappointment or restoration;
- ii) it is declared that the office of the Chief Justice of Pakistan never fell vacant on November 3, 2007 and as a consequence thereof it is further declared that the appointment of Mr. Justice Abdul Hameed Dogar as the Chief Justice of Pakistan was un-constitutional; *void ab initio* and of no legal effect;

Provided that subject to whatever is contained hereinafter, the said un-constitutional appointment of Mr.

Justice Abdul Hameed Dogar as the Chief Justice of Pakistan shall not affect the validity of any administrative or financial acts performed by him or of any oath made before him in the ordinary course of the affairs of the said office;

iii) since Mr. Justice Abdul Hameed Dogar was never a constitutional Chief Justice of Pakistan, therefore, all appointments of Judges of the Supreme Court of Pakistan, of the Chief Justices of the High Courts and of the Judges of the High Courts made, in consultation with him, during the period that he, un-constitutionally, held the said office from 3.11.2007 to 22.3.2009 (both days inclusive) are hereby declared to be un-constitutional, *void ab initio* and of no legal effect and such appointees shall cease to hold office forthwith;

Provided that the Judges so un-constitutionally appointed to the Supreme Court while holding the offices as Judges of any of the High Courts shall revert back as Judges of the respective High Courts subject to their age of superannuation and like-wise, the Judges of the High Courts, who were District and Sessions Judges before their said un-constitutional elevation to the High Courts shall revert back as District and Sessions Judge subject to limitation of superannuation;

iv) the Judges of the Supreme Court of Pakistan, if any, the Chief Justices of the High Court, if any, and the Judges of any of the High Courts, if any, who stood appointed to the said offices prior to 3.11.2007 but who made oath or took oath of their respective offices in disobedience to the order passed by a Seven Member Bench of the Supreme Court of Pakistan on 3.11.2007 in C.M.A.No.2869 of 2007 in Constitution Petition No.73 of 2007, shall be proceeded against under Article 209 of the Constitution. The Secretary of the Law Division of the Government of Pakistan shall take steps in the matter accordingly;

Provided that nothing hereinabove shall affect those Judges who though had been appointed as Judges/Chief Justices of any of the High Courts between 3.11.2007 to 22.3.2009 but had subsequently been appointed afresh to other offices in consultation with or with the approval of or with the consent of the Constitutional Chief Justice of Pakistan;

v) any judgments delivered or orders made or any decrees passed by any Bench of the Supreme Court or of any of the High Courts which comprised of or which included the afore-described Judges whose appointments had been declared *void ab initio*, are protected on the principle laid down in MALIK ASAD ALI'S CASE (PLD 1998 SC 161);

vi) since the Constitution (Amendment) Order, 2007 being the President's Order No.5 of 2007 and the Islamabad High Court (Establishment) Order being President's Order No.7 of 2007 establishing Islamabad High Court for the Federal Capital Territory, have been declared to be un-constitutional and of no legal effect, therefore, the said Islamabad High Court shall cease to exist forthwith. All judicial matters pending before the said High Court before the passing of this order shall revert/stand transferred to the courts which had jurisdiction in the said matters before the promulgation of afore-mentioned President's Order No.5 of 2007 and President's Order No.7 of 2007 promulgated on 14th December, 2007. The Judges of the said Court shall, as a consequence thereof, cease to be Judges except such Judges or the Chief Justice of the said court, who prior to their appointments in the said Islamabad High Court, were Judges of some other High Court who shall revert to the court of which they were originally the Judges, subject to their age of superannuation. The officers and employees of the said Court shall also cease to hold their respective appointments and shall become part of the Federal Government Surplus Pool for their further appointments. However, if any such officer or employee was an officer or an employee of some other court or department or office, such officers or employees shall revert to their respective courts, departments or offices to which they belonged before joining the service in the Islamabad High court, subject again to their age of superannuation;

We would like to mention here that establishment of a High Court or a Federal Court for the Federal Capital Territory might be a desirable act but it is unfortunate that such a step was taken in an un-constitutional and a highly objectionable manner. We may, therefore, add that notwithstanding what has been declared and ordered above, the relevant and competent authorities may take steps to establish such a court in accordance with the Constitution/the law;

vii) the Ordinances promulgated by the President or a Governor of a Province before 3.11.2007 which were given permanence by the Provisional Constitution Order No.1 of 2007 as also the Ordinances issued by the President or a Governor between 3.11.2007 and 15.12.2007 (both days inclusive) which were also, like-wise given permanence through the same instrument and which legislative measures along with the said Provisional Constitution Order had been validated by the afore-mentioned judgment delivered in TIKKA IQBAL MUHAMAD KHAN'S CASE, stand shorn of their purported permanence on account of our afore-mentioned declarations. Since on account of the said judgment in TIKKA IQBAL MUHAMMAD KHAN'S CASE purporting to be a judgment of this Court, the presumption that the said Ordinances were valid laws

not requiring approval of the Parliament or the respective Provincial Assemblies in terms of Article 89 or 128 of the Constitution and since it is today that this Court has attributed invalidity to the said legislative instruments, therefore, the period of 120 days and 90 days mentioned respectively in the said Article 89 and the said Article 128 of the Constitution, would be deemed to commence to run from today and steps may be taken to place the said Ordinances before the Parliament or the respective Provincial Assemblies in accordance with law;

viii) since the Constitution, through its Article 176, authorises only the Parliament to determine the number of Judges of the Supreme Court of Pakistan and since the Parliament had so done through the Supreme Court (Number of Judges) Act XXXIII of 1997, therefore, the increase in the strength of the Judges through the Finance Act of 2008 which Act was not passed by the Parliament but was passed only by the National Assembly would be deemed to be valid only for financial purposes and not for the purposes of Article 176 of the Constitution. It is resultantly declared that the number of Judges of the Supreme Court for purposes of the said Article 176 shall continue to remain sixteen;

ix) in the Code of Conduct prescribed for the Judges of the Superior Courts in terms of Article 209(8) of the Constitution, a new clause shall be added commanding that no such Judge shall, hereinafter, offer any support in whatever manner to any un-constitutional functionary who acquires power otherwise than through the modes envisaged by the Constitution and that any violation of the said clause would be deemed to be misconduct in terms of the said Article 209 of the Constitution;

x) in view of our findings above regarding Mr. Justice Abdul Hameed Dogar not being a constitutional and a valid consultee, the notification dated 26.8.2008 and the notification dated 15.9.2008 extending the term of office of Mr. Justice Abdur Rasheed Kalwar and of Mr. Justice Zafar Ahmed Khan Sherwani as Additional Judges of the High Court of Sindh are declared to be un-constitutional and of no legal effect;

xi) that the court acknowledges and respects the mandate given by the sovereign authority i.e. electorate to the democratically elected Government on 18th February, 2008 and would continue to jealously guard the principle of trichotomy of powers enshrined in the Constitution, which is the essence of the rule of law. Any declaration made in this judgment shall not in any manner affect the General Elections held and the Government formed as a result thereof i.e. the President, the Prime Minister, the Parliament, the Provincial Governments, anything done by these institutions in the discharge of their functions. These

acts are fully protected in terms of the age old of principle of *Salus populi est suprema lex* reflected in PLD 1972 SC 139;

xii) Before parting with the judgment, we would like to reiterate that to defend, protect and uphold the Constitution is the sacred function of the Supreme Court. The Constitution in its preamble, *inter alia*, mandates that there shall be democratic governance in the country, "wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed; wherein the independence of judiciary shall be fully secured." While rendering this judgment, these abiding values have weighed with us. We are sanguine that the current democratic dispensation comprising of the President, Prime Minister and the Parliament shall equally uphold these values and the mandate of their oaths."

48. It is significant to note that in pursuance of above judgment, the Hon'ble Judges of the superior Courts subjected themselves to constitutional command for not supporting any unconstitutional order to govern this country. Prior to it, the military adventurers had been ruling this country off and on in the name of so-called doctrine of necessity or State necessity.

49. It is to be observed that during the time when the country was being governed unconstitutionally, Judiciary and Parliament both had been facilitating the adventurers as noted hereinabove, but in the Sindh High Court Bar Association's case all the previous judgments were revisited and it was finally held that any unconstitutional act of the Martial Law Authorities could not be validated by the Judiciary and in future, the Hon'ble Judges of the Superior Courts shall not take oath under any unconstitutional dispensation. It was also held that in the Code of Conduct prescribed for the Judges of the Superior Courts in terms of Article 209(8) of the Constitution, a new clause would be added commanding that no such Judge shall, hereinafter, offer any support in whatever manner to any un-constitutional functionary who

acquires power otherwise than through the modes envisaged by the Constitution and that any violation of the said clause would be deemed to be misconduct in terms of Article 209 of the Constitution. In pursuance of above dictum, the Supreme Judicial Council constituted under Article 209 of the Constitution amended the Code of Conduct of the Judges and incorporated Article IX therein, as under: -

“No Judge of the superior judiciary shall render support in any manner whatsoever, including taking or administering oath in violation of the oath of office prescribed in the Third Schedule to the Constitution, to any authority that acquires power otherwise than through the modes envisaged by the Constitution of Pakistan.”

50. Thus, having covered a long distance, during which country was faced with unconstitutional era and judiciary was also being alleged to support military adventurers, ultimately, for all times to come, the Judiciary as an institution decided not to support any unconstitutional regime in future. The object is to strengthen the institutions of Parliament/democratic system of government as envisaged by the Constitution, wherein the State is to exercise its powers and authority through the chosen representatives of the people (Article 2A of the Constitution).

51. It may be seen that the military regimes besides derailing the parliamentary system of government, from time to time, also mutilated constitutional provisions, particularly, with reference to instant case, by introducing Article 58(2)(b) by the Eighth Constitutional Amendment, 1985 and Seventeenth Constitutional Amendment, 2003. By means of these Constitutional Amendments, the President was made stronger and the Parliamentary system of

government was converted into semi-Presidential type, as instead of strengthening the Prime Minister of Pakistan, who is the chief executive of the country and Leader of the House in terms of Article 91 of the Constitution, the powers were shifted to the President of Pakistan who was empowered to dissolve the National Assembly under the defunct Article 58(2)(b) of the Constitution.

52. Unfortunately, the National Assembly, comprising chosen representatives of the people was subjected to dissolution in the years of 1988, 1990, 1993 and 1996 in exercise of power under Article 58(2)(b) of the Constitution, as a consequence whereof along with the Assemblies the Government of Pakistan at the center and Provincial Assemblies in the Provinces were also dissolved. However, fortunately, the present Parliament in 18th Constitutional Amendment has repealed almost of those amendments in the Constitution, which were introduced during unconstitutional eras, headed by Army Generals in uniform. What could be more unfortunate for the nation that from 1977 to 1988 and October 1999 to December 2007, the President of Pakistan had been, in uniform of Pak Army, purportedly functioning as civilian President of Pakistan against constitutional precepts.

53. The result of conferring powers on the President of Pakistan under Eighth Constitutional Amendment created an atmosphere due to which the office of the President remained pitched against the political parties with full impunity, without realizing constitutional sanctity of the President's office, which is the symbol of unity of the Republic and as the head of the State as per Article 41 of the Constitution. The dissolutions of Assemblies by the President as ordered from time to time under Article 58(2)(b) of the Constitution

were dealt with by this Court in Federation of Pakistan v. Haji Saifullah Khan (PLD 1989 SC 166), Kh. Ahmed Tariq Rahim v. Federation of Pakistan (PLD 1992 SC 646), Mian Muhammad Nawaz Sharif's case (*supra*), Mohtarma Benazir Bhutto v. President of Pakistan (PLD 1998 SC 388) and Syed Zafar Ali Shah's case (*supra*). A brief account of the said cases is given in the case of Qazi Hussain Ahmed v. General Pervez Musharraf (PLD 2002 SC 853) as under: -

"19. On 29th May 1988, General Muhammad Zia-ul-Haq dissolved the National Assembly and dismissed the government of Mr. Muhammad Khan Junejo under Article 58(2)(b) of the Constitution. The dissolution of the National Assembly was challenged in the Lahore High Court under its constitutional jurisdiction and through the judgment reported as Kh. Muhammad Sharif v. Federation of Pakistan (PLD 1988 Lahore 725), the dissolution of the Assembly was declared illegal and the matter then came to this Court in appeal. On 17th August 1988, General Muhammad Zia-ul-Haq died in an air crash and Ghulam Ishaq Khan, the then Chairman of the Senate assumed the office of the President of Pakistan. This Court vide judgment reported as Federation of Pakistan v. Haji Saifullah Khan (PLD 1989 SC 166), which was delivered on 5th October, 1988, upheld the judgment of the Lahore High Court but declined to grant the relief of restoration of the Assembly on the ground that the whole nation had been geared up for election scheduled for 16th and 19th November, 1988.

20. As a result of the 1988 election, Pakistan Peoples Party led by Mohtarma Benazir Bhutto formed government at the centre while Islami Jamhuri Ittehad (IJI) with Pakistan Muslim League being its major component, led by Mian Muhammad Nawaz Sharif formed government in the Province of Punjab. Since the two leaders did not see eye to eye with each other, a state of constant confrontation existed. The two of them were not even ready to meet each other, what to talk of negotiating or settling issues and having consensus on questions of national importance.

21. On 6th August, 1990, Mr. Ghulam Ishaq Khan, the then President of Pakistan, levelled various charges including corruption and mal-administration, violations of the Constitution, etc., dissolved the National Assembly, dismissed the government of Mohtarma Benazir Bhutto under Article 58(2)(b) of the Constitution and ordered fresh election. The order of dissolution was challenged before all the four High Courts. However, the cases from Balochistan and Sindh were consolidated and heard by the

High Court of Sindh. Likewise, the cases from NWFP and Lahore were consolidated and heard by the Lahore High Court. Both the High Courts in their separate judgments, distinguished *Haji Saifullah Khan's case* and upheld the order of dissolution of assemblies and observed that the President was justified in forming the opinion that the government of the Federation was not being carried on in accordance with the Constitution. The matter came to this Court in appeal in the case reported as *Kh. Ahmed Tariq Rahim v. Federation of Pakistan* (PLD 1992 SC 646) but the Court refused to grant leave to appeal against the judgments of the High Courts and consequently the dissolution order was maintained.

22. The general election held in 1990 returned Mian Muhammad Nawaz Sharif to power with Mohtarma Benazir Bhutto sitting on the opposition benches. The two of them continued indulging in confrontation. Differences arose between Mian Muhammad Nawaz Sharif and Mr. Ghulam Ishaq Khan, the then President of Pakistan. On 18th April, 1993 the then President dissolved the National Assembly and dismissed the government of Mian Muhammad Nawaz Sharif under Article 58(2)(b) of the Constitution. The matter came before this Court in the case reported as *Mian Muhammad Nawaz Sharif v. President of Pakistan* (PLD 1993 SC 473) and by majority of 10 to 1, this Court held that the order of dissolution did not fall within the ambit of the powers conferred on the President under Article 58(2)(b) of the Constitution and other enabling powers available to him in that behalf and in consequence the National Assembly, Prime Minister and the Cabinet were restored. However, in the peculiar situation then obtaining, Mian Muhammad Nawaz Sharif advised the then President to dissolve the assemblies on 18th July, 1993.

23. In the election held in October 1993, Mohtarma Benazir Bhutto with the help of allied parties again came to power and Mr. Farooq Ahmed Khan Leghari was elected as President of Pakistan while Mian Muhammad Nawaz Sharif formed the opposition. The degree of tension between the two old rivals rather increased. On 5th November, 1996, President Farooq Ahmed Khan Leghari dissolved the National Assembly and dismissed the government of Mohtarma Benazir Bhutto under Article 58(2)(b) of the Constitution. This dissolution was also challenged in this Court in the case reported as *Mohtarma Benazir Bhutto v. President of Pakistan* (PLD 1998 SC 388), but it was held that the action of the President was legal and constitutional.

24. In the election held in February 1997, Mian Muhammad Nawaz Sharif returned to power with a thumping majority in the Assemblies with Mohtarma Benazir Bhutto as the opposition leader. Mian Muhammad Nawaz Sharif continued his policies of confrontation not

only with the opposition but also with other institutions of the State including judiciary and the armed forces. The former Chief of Army Staff, General Jehangir Karamat suggested the formation of National Security Council, which was not taken in good taste by the Prime Minister and resultantly the then Chief of Army Staff had to quit. With the Constitution (Thirteenth Amendment) Act, 1997, Article 58(2)(b) was repealed and the power to appoint Services Chiefs vested with the Prime Minister and thus Mian Muhammad Nawaz Sharif, after the resignation of General Jehangir Karamat, appointed General Pervez Musharraf as the Chief of Army Staff.

25. Differences between the Prime Minister and the Chief of Army Staff General Pervez Musharraf arose on the Kargil issue. At one point of time, it seemed that the tension has come to an end when General Pervez Musharraf was appointed as Chairman, Joint Chiefs of Staff Committee. However, a few days later, the Prime Minister issued order of removal of General Pervez Musharraf when the latter was returning from an official tour to Sri Lanka and appointed Lt. General Ziauddin Butt as the Chief of Army Staff. This act of the Prime Minister was resented by the Pakistan Army and was construed as interference in the Army affairs and an attempt to politicize and destabilize it. The then Prime Minister had directed that the plane carrying General Pervez Musharraf to Pakistan be not allowed to land at the Karachi Airport, but due to the prompt action of the Pakistan Army, the Prime Minister could not achieve his objective. Consequently, the Pakistan Army took exception to the action of the Prime Minister and Mian Muhammad Nawaz Sharif was removed and General Pervez Musharraf, Chief of Army Staff took control of the affairs of the country.

26. After takeover of the government by General Pervez Musharraf, on 14th October 1999, a Proclamation of Emergency was issued in pursuance of the deliberations and decisions of the Chiefs of Staff of the Armed Forces and the Corps Commanders of the Pakistan Army. ... The takeover by the Army was challenged in this Court through several Constitution Petitions and the same were disposed of with certain guidelines through a unanimous judgment authored by Irshad Hasan Khan, C.J. (as he then was) in *Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others* (PLD 2000 SC 869)."

The facts noted therein along with the grounds of dissolution of Assemblies have been noted separately in each case.

54. As noted in the preceding paragraphs, in the instant case, in the year 1990 the office of President of Pakistan once again moved “in the name of national interest” and established an Election Cell in the Presidency to support a particular group of politicians, who had formed an alliance to contest election against the political party then in power, i.e. Pakistan Peoples Party as is evident from the record available with us. Considering the overwhelming material brought on record, which has been referred to hereinabove, one of the most important questions with which we have been encountered is as to what was the legal justification for the President of Pakistan, Chief of Army Staff, Director General, ISI and various other officers of the Army to become a party to an unconstitutional and unlawful activity? Regardless of the nature and quantum of powers vested in the President under the Constitution, whether before or after the Eighth and the Seventeenth Constitutional Amendments, the President remains the Head of the State and represents the unity of the Republic, therefore, after having been sworn in as the President of Pakistan, he owes a constitutional duty to represent the unity of the Republic as Head of the State and is not supposed under the Constitution to support any favoured candidate in the elections or a group of political parties like IJI with reference to the instant case. At this stage, it may be pertinent to refer to Article 41(1) of the Constitution, which provides that *there shall be a President of Pakistan who shall be the Head of the State and shall represent the unity of the Republic* as well as to the wording of the oath prescribed for the incumbent of the office of President, which is administered to him before entering upon such office. It reads as under: -

“(In the name of Allah, the most Beneficent, the most Merciful.)

I, _____, do solemnly swear that I am a Muslim and believe in the Unity and Oneness of Almighty Allah, the Books of Allah, the Holy Quran being the last of them, the Prophethood of Muhammad (peace be upon him) as the last of the Prophets and that there can be no Prophet after him, the Day of Judgment, and all the requirements and teachings of the Holy Quran and Sunnah:

That I will bear true faith and allegiance to Pakistan:

That, as President of Pakistan, I will discharge my duties, and perform my functions, honestly, to the best of my ability, faithfully in accordance with the Constitution of the Islamic Republic of Pakistan and the law, and always in the interest of the sovereignty, integrity, solidarity, well- being and prosperity of Pakistan:

That I will not allow my personal interest to influence my official conduct or my official decisions:

That I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan:

That, in all circumstances, I will do right to all manner of people, according to law, without fear or favor, affection or ill- will:

And that I will not directly or indirectly communicate or reveal to any person any matter which shall be brought under my consideration or shall become known to me as President of Pakistan, except as may be required for the due discharge of my duties as President.

May Allah Almighty help and guide me (A'meen).”

55. The learned Attorney General argued that by all means, President’s office is a political office. In this behalf, he has referred to the oaths of the Prime Minister and the Federal Ministers, which are similarly worded and has argued that his oath is no different from that of other holders of constitutional offices. In this respect, he has also drawn our attention to the oath of members of the Armed Forces, which specifically bars political activity, but the political activity is not there in the oath of Judges, but when we see code of conduct, the court will not go into a political question, therefore, judges should not

enter into political questions, or a question of law, which includes a political question. He argued that such words are not there in President's oath. He argued that if a President has sympathies for the party to which he belongs, that is natural. He further argued that the President is not there to destabilize the democracy, government and dissolve the Assemblies. However, if there is evidence against President to rig the elections, it is not permissible. He also argued that it is not the job of the Supreme Court to regulate the office of President, which has no power to add to or subtract anything from what is written in the Constitution. He submitted that the observations of this Court in Muhammad Nawaz Sharif's case relied upon by the learned counsel for the petitioner were made in a different context. He stated that he would adopt the arguments of Mr. S.M. Zafar, Sr. ASC made by him in Pakistan Lawyers Forum v. Federation of Pakistan (PLD 2011 Lahore 382).

56. It may be mentioned here that Parliamentary democracies today exist in one of two forms. They are either Constitutional Monarchies or Republics. Historically speaking, the Monarch represented the State. Parliaments and democracy gained authority through the right to exercise power in the name of the Monarch. Ultimately, Parliaments became the centres of power and authority with the heads and ministers of government being elected from them. The Monarch however, remained the symbol of the state, an icon of its unity and identity, regardless of what faction governed in his name. All functions of state, while exercised and decided by elected governments, were carried out in his name. This included establishing courts, recruiting civil servants, receiving and sending ambassadors,

waging war, etc. Over time, many countries deposed their Monarchs and replaced them with Presidents. The nature and role of the office of Head of State has remained the same, with the governments maintaining the same treatment of dignity, respect and symbolic reverence towards the President as was held for the King. And similarly, the powers of the President have not been available for exercise in his own discretion, but have rather continued to be exercised in his name by elected representatives of the people. The need of a central lynchpin in the political system that represents the State as an entity over and above the partisan squabble of factions and inspires the people as a symbol of sovereign independence has preserved the separation of Head of State and Government in parliamentary systems.

57. The Parliamentary systems of today are also divided into two great legal traditions of the world. The first is the Common Law tradition that emanated from the legal developments in England. And the second is the Civilian Law (or Roman Law) tradition that is prevalent in continental Europe and emanates from the *Corpus Juris Civilis* of Roman Emperor Justinian I. Within these two great systems of law, there are countries that are Parliamentary Constitutional Monarchies while others are Parliamentary Republics, the only difference between them being that the first States are headed by Monarchs while the Heads of State in the latter are Presidents. The relationship between a Head of State and a Government, however, is identical within the traditions.

58. The Common Law is a tradition that was built by the rulings and precedents of the Common Law courts. The common law

gives great preference to tradition, continuity and principles of antiquity that are immortalised by adherence [*Mohammad Sohail v. Govt of NWFP* (1996 PLC CS 364)]. The Civilian system, however, is built on textual sources and reflects reliance on recourse to the written law and its textual rather than historic interpretation. This difference is also highlighted by the nature of statutes in the two systems. The Common Law statutes set a basic premise and depend on precedent for building upon the interpretation and implementation of the law while the civilian system believes in exhaustive codification of principles into writing. This distinction is starkly visible in the mere size of corresponding statutes in either system.

59. The role and nature of the office of President or Monarch is the same in every Parliamentary form of government. What differs is the form in which that role is laid down. In Civil Law countries, the role of the President and restrictions upon his office and person are enumerated in great detail in the Constitutions. Almost all constitutions of Parliamentary Republics in Civil Law Countries contain an article expressly prohibiting the partisan involvement of Presidents with political factions.

60. On the other hand, the relationship of the British Monarch and the British Parliament developed and has sustained with the force of practice and tradition. This is no surprise considering the fact that the United Kingdom and even New Zealand do not have codified constitutions today. The parliamentary system follows the same configuration between Head of State and Parliament in the Common Law world as it does in the Civil Law world. It however regulates that relationship through constitutional conventions that underpin the

system rather than express provisions. Over time, most common law countries adopted written constitutions, yet preserved the unwritten conventions that bind together the codified articles of the constitutions.

61. Out of this tradition, it is interesting to observe that none of the constitutions in the Common Law world (and the former Commonwealth Realm) that adhere to the Parliamentary system contain express provisions barring the Head of State from partisan affiliation. Nor do the oaths of office prescribed therein make reference to the same. Yet, at the same time, the constitutional jurisprudence and legal commentary by jurists in all these countries maintains the same role and position for a Head of State as do constitutions in Civil Law countries maintaining express provisions.

62. In Pakistan additionally we have Article 41 *ibid* which envisages the same Constitutional position. Disregarding the constitutional conventions and common law traditions about the role of the Head of State would render the entire framework and written provisions of the constitutions dysfunctional. It is this reason that while the two systems go about it differently, they ultimately prescribe the exact same role for Presidents and Monarchs in Parliamentary systems of government. The need for a symbolic figurehead who is representative of the State in its majesty is central to the structure of the parliamentary system.

63. The constitutional system of government in Pakistan as laid out in Part III of the Constitution is that of a Parliamentary Republic [*Muhammad Khan Achakzai v. Federation of Pakistan* (PLD 1997 SC 420)]. This distinguishes it from Parliamentary forms that are

not republics e.g. Australia, Canada, New Zealand, UK etc which are parliamentary constitutional monarchies. However, Pakistan, like them also draws important features of its constitutional tradition from the same historical traditions.

64. To seek comparison with other constitutional arrangements, we must also look at other parliamentary republics such as, Turkey, Greece, Italy, Germany, etc. Most of these are also Federations which helps draw closer comparisons with the Role of the Presidents in these countries. However, these countries have their systems of law based in Civilian (Roman) Law and therefore different from Pakistan in terms of their constitutional traditions.

65. The closest comparison can, however, be drawn with countries that are both Parliamentary Republics and also have their constitutional traditions rooted in the Commonwealth that they were once a part of. These include India, Bangladesh, Ireland, Malta, Botswana, Mauritius, etc.

66. The role of a President as Head of State is almost identical in most Parliamentary systems of government. As most of these countries were former Constitutional Monarchies (including Pakistan until 1956 as part of the Commonwealth), or still are, the position closely mimics the figurative position of a symbolic Monarch in parliamentary constitutional monarchies. Some of the key features of a President in a Parliamentary system are:

- Head of State (Article 41)
- Ceremonial/ Figurative head of the executive
- Actions in his name are actually taken by elected governments (Article 48)
- Commander in Chief or Supreme Commander of military forces (Article 243)

- Symbol of Union, Federation or State and thus representative of all State as well as Central Governments (Article 41)
- Indirectly elected (with very few exceptions) (Second Schedule)
- Non-political/ non-partisan in nature of office

It is important to note that all Presidents in Parliamentary Republics are expected to be apolitical/non-partisan and objectively disengaged with any and all affiliations of a political, ethnic, linguistic, or geographic nature. For a discussion on the non-partisan role of the President, refer to *Pakistan Lawyers' Forum v. Federation of Pakistan* (PLD 2011 Lahore 382).

67. This is regardless of whether there are any express provisions forbidding such engagement in the respective constitutions. For example, the Constitutional provisions or the Presidential Oaths prescribed in India, Bangladesh, Ireland, etc., do not have any express provisions forbidding a President from engaging in a Political role or holding a political party office. Yet, all constitutional commentaries, jurisprudence and conventions demand and expect of the President in these countries to refrain from any exhibition of political leanings, preference, bias or association. It is understood that doing so would harm the unity of the State that the President represents. These countries do not have such express provisions because the former commonwealth countries headed by the British Monarch in the past or today have relied upon constitutional norms and conventions to dictate the exclusion of the head of State from all political roles. The Supreme Court of Pakistan has held in *Asad Ali v. Federation of Pakistan* (PLD 1998 SC 161) that a constitutional convention, once established has the same binding effect as a Constitutional provision and that any

breach of such convention can be treated by the court as a breach of the constitution to which the convention relates.

68. An important question that arises in this regard is: Why should Parliamentary Republics like Pakistan which have codified their constitutions as the basis of their system of government continue to adhere to the constitutional conventions especially when their own constitutions contain no express restrictions as found in other countries? The answer is manifest from our own constitutional history. The framers of the Constitution in 1973 had a very clear idea as to the constitutional role and function of the President. Thus we had the first President under the Constitution namely, late Chaudhry Fazal Elahi while the first Chief Executive was late Mr. Zulfikar Ali Bhutto. The President, in line with the wording and spirit of the Constitution was a figurehead representing the unity of the republic as envisaged in Article 41 of the Constitution. He did not perform any executive functions other than to go by the advice of the Prime Minister who was leader of the directly elected National Assembly. We may also add that the historical role of the first President late Chaudhry Fazal Elahi and the first Prime Minister late Mr. Zulfikar Ali Bhutto can and must be seen as a contemporaneous exposition of the role envisaged for the President of the republic. This is particularly significant because the exponents and the framers of the Constitution including late Mr. Zulfikar Ali Bhutto were themselves part of the government and were thus responsible for ensuring that the form of the government was exactly in accordance with the letter and spirit of the Constitution which they had themselves framed. We, therefore, need not look at

foreign constitutions even though the same may be suggestive of the role of President similar to that envisioned in our Constitution.

69. There can be no better or more concrete understanding of the role of the President and the provisions *inter alia*, of Article 41 *ibid*, to demonstrate practically what was envisaged as the role of the President. Thus, as noted above, it is our own constitutional history enacted by no less a group of elected representatives who both framed the Constitution and then implemented it which must inform our understanding of the Constitution and its interpretation. No one could have had a better grasp and comprehension of the apolitical and neutral role of the President than such framers of our Constitution. The historical record also shows that although late Chaudhry Fazal Elahi was originally a member of the Pakistan Peoples Party, after assuming the office of President, he did not indulge in partisan activity of political nature. In any event, consistent with the ethos of a Parliamentary democracy the working relationship between an apolitical and non-partisan head of State and a Prime Minister as Chief Executive under our Constitution would be that which was demonstrated by the first President and the first Prime Minister under the 1973 Constitution. Any deviation from such role would run counter to our constitutional scheme. We have already held in the case titled Province of Sindh vs. Rasheed A. Rizvi (PLD 2012 SC 649), that contemporaneous exposition is a recognized and well understood mode of interpreting a legal text. It "*enjoys a great deal of sanctity and cannot lightly be set aside in favour of a materially different expression*"

70. The aforesaid constitutional norm as expounded by contemporaneous exposition was disfigured and distorted through

unconstitutional intervention by military dictators. They assumed presidential office and thereafter made all out efforts to pervert the letter, spirit and scheme of the original Constitution. This was done *inter alia*, by means of provisions such as Article 58(2)(b) which, as noted above, was meant to subvert our parliamentary democracy by shifting the centre of power from the directly elected House (National Assembly) to a uniformed person holding the office of President. It is as a result of the 18th Amendment that Article 58(2)(b) has been done away with being a deviation from the concept of parliamentary democracy. There has thus been a roll-back of some of the invidious distortions made in the Constitution of 1973. The Constitution thus has to be interpreted on the basis of our own constitutional history and conventions and to ensure the strengthening of parliamentary democracy as originally envisioned. The apolitical role of the President under our Constitution cannot be over emphasized in the light of the historical background narrated above.

71. Such established norms have been made use of by the Superior Courts to interpret the Constitution in important judgments such as *Al-Jehad Trust v. Federation of Pakistan* (PLD 1997 SC 84) and *Sajjad Ali Shah v. Asad Ali* (1999 SCMR 640). It would be impossible to imagine a parliamentary system continuing to be a democracy where an indirectly elected President chose to ignore the advice of government and acted in his own name [*Benazir Bhutto v. President of Pakistan* (PLD 1998 SC 388)].

72. The oaths of office in most of the countries are the same as those prescribed for Heads and Ministers of Government. NONE OF THESE COUNTRIES have express provisions forbidding a political role

for the President, yet their constitutional jurisprudence demands just that. These countries, include Pakistan, India, Bangladesh, Ireland, Canada, Australia.

BANGLADESH:

Article 48.

- (1) *There shall be a President of Bangladesh who shall be elected by members of Parliament in accordance with law.*
- (2) *The President shall, as Head of State, take precedence over all other persons in the State, and shall exercise the powers and perform the duties conferred and imposed on him by this Constitution and by any other law.*

Oath:

THIRD SCHEDULE

[Article 148]

OATHS AND AFFIRMATIONS

*"I,.....,do solemnly swear (or affirm) that I will faithfully discharge the duties of the office of President of Bangladesh according to law :
That I will bear true faith and allegiance to Bangladesh :
That I will preserve, protect and defend the Constitution :
And that I will do right to all manner of people according to law, without fear or favour, affection or ill-will."*

IRELAND:

Article 12.

- 1. *There shall be a President of Ireland (Uachtarán na hÉireann), hereinafter called the President, who shall take precedence over all other persons in the State and who shall exercise and perform the powers and functions conferred on the President by this Constitution and by law.*

.....

.....

- 8. *The President shall enter upon his office by taking and subscribing publicly, in the presence of members of both Houses of the Oireachtas, of Judges of the Supreme Court and of the High Court, and other public personages, the following declaration:*

"In the presence of Almighty God I, do solemnly and sincerely promise and declare that I will maintain the Constitution of Ireland and uphold its laws, that I will fulfil my duties faithfully and conscientiously in accordance with the Constitution and the law, and that I will dedicate my abilities to the service and welfare of the people of Ireland. May God direct and sustain me."

Reference in this behalf may be made to Article 60 of the Constitution of India, which reads as under: -

60. "Every President and every person acting as President or discharging the functions of the President shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of India or, in his absence, the senior-most Judge of the Supreme Court available, an oath or affirmation in the following form, that is to say—

"I, A.B., do swear in the name of God that I will faithfully and solemnly affirm fully execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India".

Dr. Ambedkar, the Chairman of the Drafting Committee of the Indian Constitution is quoted on page 32 of the '*Constituent Assembly Debates: Official Report*', New Delhi: Lok Sabha Secretariat 1999 as follows:

"... the President occupies the same position as the King under the English Constitution. He is the head of the state but not of the Executive. He represents the nation but does not rule the nation. His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made"

The judgment of the Supreme Court of India by Krishna Iyer, J., in the case of *Samsher Singh v. Punjab* (AIR 1974 SC 2192) expounds the role of the President in India which is of great persuasive value for describing the role of President in any Federal Parliamentary Republic with a similar constitutional arrangement such as ours:

"We have, in the President and Governor, a replica of a Constitutional monarch and a Cabinet answerable to

Parliament, substantially embodying the conventions of the British Constitution--not a turn-key project imported from Britain, but an edifice made in India with the know-how of British Constitutionalism.

... What are the basic fabric, the animating spirit, and juridical ideas of our Constitutional structure and dynamics?

The law of our Constitution, any student of Indian political history and of comparative Constitutional systems will agree, is partly eclectic but primarily an Indo-Anglian version of the Westminster model with quasi-federal adaptations, historical modifications, geo-political mutations and homespun traditions--basically a blended brew of the British parliamentary system, and the Government of India Act, 1935 and near-American, nomenclature-wise and in some other respects.

Not the Potomac, but the Thames, fertilises the flow of the Yamuna, if we may adopt a riverine imagery. In this thesis we are fortified by precedents of this Court...

Shri K.M. Munshi expressed the historical reason for the acceptance of the parliamentary system:

"... it is the rule of the majority in the legislature, for it supports its leaders in the Cabinet, which advises the Head of the State, namely, the King or the President. The King or the President is thus placed above party. He is made really the symbol of the impartial dignity of the Constitution.

The power of the Cabinet in England today is no whit less than the powers enjoyed by the President of the United States of America. By reason of the fact that the Prime Minister and the whole Cabinet are members of the Legislature, the conflict between the authority wielding the executive power and the legislature is reduced to minimum; really there is none at all; because, at every moment of time, the Cabinet Subsists only provided it carries with it the support of the majority in the Parliament."

Participating in the same discussion, President Rajendra Prasad said ('Correspondence and Select Documents: August to December 1948', by Rajendra Prasad, page xxii, Preface):

"We have had to reconcile the position of an elected President with an elected legislature, and in doing so, we have adopted more or less, the position of the British monarch for the President.... His position is that of a Constitutional President. Then we come to the Ministers. They are, of course, responsible to the Legislature and tender advice to the President who is bound to act according to that advice. Although there are no specific provisions, so far as I know, in the Constitution itself making it binding on the President

to accept the advice of his Ministers, it is hoped that the convention under which in England the King acts always on the advice of his Ministers will be established in this country also and the President, not so much on account of the written word in the Constitution, but as a result of this very healthy convention, will become a Constitutional President in all matters."

These solemn words were uttered by the President of the Constituent Assembly at the great moment when the motion or final adoption of the Constitution was put to the vote of the Chamber.

The Ambedkar approach, unequivocally accepted, was ('Constituent Assembly of India' – Volume VII, Thursday the 30th December 1948):

"It is the Prime Minister's business, with the support of the Ministers, to rule the country and the President may be permitted now and then to aid and advise the Council of Ministers. Therefore, we should look at the substance and not at the mere phraseology which is the result of conventions."

If the 'inner voice' of the founding fathers may be any guide, it is proved beyond reasonable doubt that the President and, a fortiori, the Governor, enjoy nothing more and nothing less than the status of a Constitutional head in a Cabinet-type government--a few exceptions and marginal reservations apart.

If we hold that in a conflict between the Ministry and the President, the President's voice should prevail in the last resort, either generally or even in a particular class of cases, this, would mean the elimination to that extent of the authority of a Ministry which is continuously subject to control or criticism by the House of the People, in favour of the authority of a President who is not so subject. It would thus result in a reduction of the sphere of 'responsible government'. So important a subtraction must be justified by some express provisions in our Constitution.

Does this reduce the President, under the Indian Constitution, to a figurehead? Far from it, like the King in England, he will still have the right 'to be consulted, to encourage and to warn'. Acting on ministerial advice does not necessarily mean immediate acceptance of the Ministry's first thoughts. The President can state all his objections to any proposed course of action and ask his Ministers in Council, if necessary, to reconsider the matter. It is only in the last resort that he must accept their final advice. It has been observed that the influence of the Crown--and of the House of Lords as well--in England has grown with every curtailment of its legal powers by

convention or statute. A similar result is likely to follow in India too; for, as has been well said, "the voice of reason is more readily heard when it can persuade but no longer coerce". One can conceive of no better future for the President of India than that he should be more and more like the Monarch in England, "eschewing legal power, standing outside the clash of parties and gaining in moral authority." These words of Constitutional wisdom come, from one who played a key role in shaping the framework of the Republic and had no political affiliations.

If the President, in a particular case where his own views differ from those of his Ministers, ultimately accepts their advice in defence to a well-understood convention, then even if the act should result in a breach of some 'fundamental right' or 'directive principle' enunciated in the Constitution, the responsibility will be that of the ministers and not of the President.

Sir Ivor Jennings has acknowledged that 'the President in the Union, or the Governor in a State, is essentially a Constitutional monarch. The machinery of government is essentially British and the whole collection of British Constitutional conventions has apparently been incorporated as conventions.' The text, the author notes, vests vast powers in the President but past history must provide the modus vivendi.

The analysis which appeals to us, in the light of this Court's rulings, accords with the view expressed by Mr. [Arthur Berriedale] Keith in his Preface to 'The King and the Imperial Crown': [the powers and duties of His Majesty] (Longmans, Green and Co, London: 1936):

"It is a conviction of the public in the self-governing Dominions of the Crown that the Governor-General in matters official serves no more distinguished purpose than that of a 'rubber stamp'."

As for the semantic gap between the verbal and the real, even in England as William Paley has explained (The Works of William Paley', by William Paley, Thomas Nelson and Peter Brown, Edinburgh: 1828, page 115):

"There exists a wide difference between the actual state of the government and the theory. When we contemplate the theory of the British government; we see the king vested with ... a power of rejecting laws. Yet when we turn our attention from the legal extent to the actual exercise of royal authority in England we see these formidable prerogatives dwindled into more ceremonies; and in their stead a sure and commanding influence of which the Constitution, it seems, is totally ignorant."

In Blackstone's commentaries on the Laws of England, said Dicey, students might read that the Constitution concentrated all executive power in the hands of the King. 'The language of this passage', he remarked, 'is impressive... It has but one fault: the statements it contains are the direct opposite of the truth'.

The President in India is not at all a glorified cipher. He represents the majesty of the State, is at the apex, though only symbolically, and has rapport with the people and parties, being above politics. His vigilant presence makes for good government if only he uses, what Bagehot described as, 'the right to be consulted, to warn and encourage'. Indeed, Article 78 wisely used, keeps the President in close touch with the Prime Minister on matters of national importance and policy significance, and there is no doubt that the imprint of his personality may chasten and correct the political government, although the actual exercise of the functions entrusted to him by law is in effect and in law carried on by his duly appointed mentors, i.e., the Prime Minister and his colleagues. In short, the President, like the King, has not merely been constitutionally romanticised but actually vested with a pervasive and persuasive role. Political theorists are quite conversant with the dynamic role of the Crown which keeps away from politics and power and yet influences both. While he plays such a role, he is not a rival center of power in any sense and must abide by and act on the advice tendered by his Ministers except in a narrow territory which is sometimes slippery.

73. The above exposition reflects the position in our Constitution and is also strictly in accord with the respective roles of the first President and the first Prime Minister (discussed above) elected under the 1973 Constitution. In our considered opinion, the above judgment is capable of answering the arguments of learned Attorney General that President, under our constitutional provisions, noted hereinabove. Thus, it is held that, "he (President) represents the majesty of the State, is at the apex, though only symbolically, and has rapport with all manner of people and parties, being above politics". Therefore, action of President in the year 1990 supporting his favoured candidates or a group of political parties was against fundamental rights of citizens under Article 17 of the Constitution. Consequently,

opponent political party had to lose allegedly half of the seats in the National Assembly.

74. Reverting to the case in hand, it may be observed that a President of Pakistan before entering upon office, in the oath of his office, solemnly swears that he is a Muslim and believes in the unity and Oneness of Almighty Allah, the Books of Allah, the Holy Quran being the last of them, the last of the Prophets and that there can be no Prophet after him, the Day of Judgment, and all the requirements and teachings of the Holy Quran and Sunnah, that he will not allow his personal interest to influence his official conduct or his official decisions, and that he will do right to all manner of people, according to law, without fear or favour, affection or ill-will. Thus, as the constitutional Head of the State, the incumbent of such a high office is obliged to perform his functions and duties neutrally and impartially. It is pertinent to refer to the observations of Saiduzzaman Siddiqui J in Muhammad Nawaz Sharif's case (*supra*) as under: -

"No doubt, the President as the symbol of the unity of the Federation occupies a neutral position in the Constitution, and in that capacity he is entitled to highest respect and regard by all the functionaries of the State. But it is equally important that in order to protect and preserve the dignity of this high office and this neutral image under the Constitution **the President must keep aloof from all political imbroglio.** If the President is unable to ward off the temptation to keep away from political game or he starts siding with one or the other political element in the Assembly he is likely to lose his image as the neutral arbiter in national affairs and as a symbol of unity of Federation under the Constitution. In the latter event, his conduct may also come under criticism from those who may feel betrayed."

75. In the light of the above discussion, argument so raised by learned Attorney General is repelled and we hold that the President being the symbol of the unity of the Federation occupies a neutral position under the Constitution and is not envisaged by the Constitution to be supporting or backing any particular political party or a group of political parties, or certain individual politicians or candidates contesting election from a given platform to the disadvantage of any other political party, politician, political worker, individual, etc. We respectfully follow and reiterate the enunciation made by this Court in Muhammad Nawaz Sharif's case (*supra*). Learned Attorney General also lost sight of another important aspect of the case, namely, the President of Pakistan after entering into his office obtained the status which falls under the definition of a person who is in the "Service of Pakistan". According to Article 260 of the Constitution, service of Pakistan means *any service, post or office in connection with the affairs of the Federation or of a Province, and includes an All-Pakistan Service, service in the Armed Forces and any other service declared to be a service of Pakistan by or under Act of Majlis-e-Shoora (Parliament) or of a Provincial Assembly, but does not include service as Speaker, Deputy Speaker, Chairman, Deputy Chairman, Prime Minister, Federal Minister, Minister of State, Chief Minister, Provincial Minister, Attorney-General, Advocate-General, Parliamentary Secretary or Chairman or member of a Law Commission, Chairman or member of the Council of Islamic Ideology, Special Assistant to the Prime Minister, Adviser to the Prime Minister, Special Assistant to a Chief Minister, Adviser to a Chief Minister or member of a House or a Provincial Assembly*. The said Article

specifically excludes certain offices from the Service of Pakistan that are listed after the phrase "but does not include". The office of President and the Governors of the provinces are not listed among these exceptions.

76. It is pertinent to mention here that the Constitution of 1956 included the President in the list of exclusions from the Service of Pakistan, while the Constitutions of 1962 as well as the current constitution of 1973 did not include the office of President in the list. There is no provision to the contrary that excludes the office of the President from being subject to the earlier part of the above stated definition, that is, *"Service of Pakistan" means any service, post or office in connection with the affairs of the Federation or of a Province.* Furthermore, the definition elaborates that service of Pakistan includes ANY post or office in addition to a service.

77. The Supreme Court in Salahuddin v Frontier Sugar Mills and Distillery Ltd. (PLD 1975 SC 244) considered the extent of the term "in connection with the affairs of the Federation or a Province" in great detail. Relevant portion from the said judgment is reproduced hereinbelow: -

"Now, what is meant by the phrase "performing functions in connection with the affairs of the Federation or a Province". It is clear that the reference is to governmental or State functions, involving, in one form or another, an element of exercise of public power. The functions may be the traditional police functions of the State, involving the maintenance of law and order and other regulatory activities; or they may comprise functions pertaining to economic development, social welfare, education, public utility services and other State enterprises of an industrial or commercial nature. Ordinarily, these functions would be performed by persons or agencies directly appointed, controlled and financed by the State, i.e., by the Federal Government or a Provincial Government."

The Court further discussed the position of a 'public office' in relation to the phrase service of Pakistan in the following terms: -

"The term 'public office' is defined in Article 290 of the Interim Constitution as including any office in the Service of Pakistan and membership of an Assembly. The phrase 'Service of Pakistan' is defined, in the same Article, as meaning any service, post or office in connection with the affairs of the Federation or of a Province and includes an All-Pakistan Service, any defence service and any other service declared to be a Service of Pakistan by or under Act of the Federal Legislature or of a Provincial Legislature but does not include service as a Speaker, Deputy Speaker or other member of an Assembly. Reading the two definitions together, it becomes clear that the term 'public office', as used in the Interim Constitution, is much wider than the phrase 'Service of Pakistan', and although it includes any office in the Service of Pakistan, it could not really refer to the large number of the posts or appointments held by State functionaries at various levels in the hierarchy of Government."

The English judgment in *Henry Farran Darley v. Reg.* [(1846) 8 ER 520] is also referred which states that: -

"A public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. It is a trust conferred by public authority for a public purpose, embracing the ideas of tenure, duration, emolument and duties. A public officer is thus to be distinguished from a mere employment or agency resting on contract, to which such powers and functions are not attached . . . The determining factor, the test, is whether the office involves a delegation of some of the sovereign functions of government, either executive, legislative or judicial, to be exercised by the holder for the public benefit Unless his powers are of this nature, he is not a public officer."

The above discussion is also strengthened by referring to the following authorities: -

"This view seems to have held the ground throughout. As summed up Ferris (Extraordinary Legal Remedies, 1925 Edition, p. 145), "a public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by

law. It implies a delegation of a portion of the sovereign power. It is a trust conferred by public authority for a public purpose, embracing the ideas of tenure, duration emolument and duties. A public officer is thus to be distinguished from a mere employment or agency resting on contract, to which such powers and functions are not attached The determining factor, the test, is whether the office involves a delegation of some of the sovereign functions of Government, either executive, legislative or judicial, to be exercised by the holder for the public benefit. Unless his powers are of this nature, he is not a public officer.

This definition of the term 'public office', as well as the almost analogous definition given by Halsbury (in Volume 11) have been referred to with approval in *Lahore Central Co-operative Bank Ltd. v. Saifullah Shah* (P L D 1959 S C (Pak.)210), *Pakistan v. Nasim Ahmed* (P L D 1951 SC 445), *Faiz Ahmed v. Registrar, Co-operative Societies* (P L D 1962 S C 315), *Managing Committee of Co-operative Model Town Society Ltd. v. M. Iqbal* (P L D 1963 S C 179), *Masudul Hassan v. Khadim Hussain* (P L D 1963 S C 203), *Zainul Abiain v. Multan Central Co-operative Bank Ltd.* (P L D 1966 S C 445), *Abdul Hafeez v. Chairman, Municipal Corporation* (P L D 1967 Lah. 1251), *R. T. H. Janjua v. National Shipping Corporation* (P L D 1974 S C 146), and *M. U. A. Khan v. Rana M. Sultan* (P L D 1974 S C 228). In all these cases the question had arisen directly or indirectly whether the office in dispute was a public office to which restoration could be ordered by way of mandamus."

78. Besides the office of the President, the Judges and Chief Justices of the superior courts are also included in the scope of service of Pakistan by failing to make reference to them among the exclusions from 'Service of Pakistan' in Article 260. The definition under Article 260 must be read together with Article 63 of the constitution, which reads as under: -

- (1) *A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:*
 - (d) *he holds an office of profit in the service of Pakistan other than an office declared by law not to disqualify its holder;*

According to the above provision, a person is disqualified from being elected or chosen as and from being a member of parliament.

Therefore, whosoever falls within the definition of a person in the “service of Pakistan”, he would be disqualified to contest elections. At the same time, in the wisdom of the constitutional scheme, Article 44(2) expressly declares the person holding the post of President to be re-elected for a second term of office. However, beyond this express provision for re-election, Article 63(1)(d) disqualifies an incumbent of the office of President from being elected to Parliament. This is stressed by the phrase “subject to the constitution” that qualifies the express allowance for the President to contest re-election to the same office. This excludes the re-election of the President from the aforementioned disqualification but does not create an exception for the application of disqualification on the President for being elected to Parliament. This is further subject to the provision of Section 99(1A)(d) of the Representation of the People Act 1976:

“(1A) A person shall be disqualified from being elected as, and from being, a member of an Assembly, if—

(d) he holds an office of profit in the service of Pakistan other than an office declared by law not to disqualify its holder;”

79. The Supreme Court of Pakistan explained the disqualification of a holder of such a public office in Syeda Abida Hussain v. Tribunal for NA 69 (PLD 1994 SC 60) as under: -

“5. ... The authorities under the Representation of the People Act have held, that the petitioner stood disqualified from contesting the election under sub-clause (k), *ibid*. Learned counsel for the petitioner has contested this finding. His case is that sub-clause (k) is applicable only to those persons who are regularly in the service of Pakistan and that the petitioner could not be regarded as such as she was merely performing a contract which she had entered into with the Government of

Pakistan. According to him the test for determining whether a person is or is not in the service of Pakistan lies in discovering whether his terms and conditions of service are regulated by the statute envisaged by Article 240 of the Constitution. Applying this test, he contends, that as the appointment of the petitioner was founded on a contract for a fixed period and her terms and conditions were not regulated by the Civil Servants Act enacted in pursuance of the provision of Article 240, *ibid*, she could not be treated as one in the service of Pakistan. He also points out that she is not covered by the definition of the expression 'civil servant' as given in the Civil Servants Act. He further argues that her case fell under clause (n) of Article 63(1) and as the contract of her employment was no longer in force there was no bar to her being a candidate in the election to the National Assembly.

6. It is difficult to subscribe to the contention of the learned counsel. The expression 'service of Pakistan' has been defined in Article 260(1) of the Constitution. It reads as follows: -

" 'Service of Pakistan' means any service, post or office in connection with the affairs of the Federation or of a Province, and includes an All-Pakistan Service, service in the Armed Forces and any other service declared to be a service of Pakistan by or under Act of Majlis-e-Shoora (Parliament) or of a Provincial Assembly, but does not include service as Speaker, Deputy Speaker, Chairman, Deputy Chairman, Prime Minister, Federal Minister, Minister of State, Chief Minister, Provincial Minister, Attorney-General, Advocate-General, Parliamentary Secretary or Chairman or member of a Law Commission, Chairman or member of the Council of Islamic Ideology, Special Assistant to the Prime Minister, Advisor to the Prime Minister, Special Assistant to a Chief Minister, Adviser to a Chief Minister or member of a House or a Provincial Assembly; "

Learned counsel for the petitioner rightly concedes that the post of an Ambassador is a post in connection with the affairs of the Federation. It will be seen that the definition does not take notice of the manner in which a post in connection with the affairs of the Federation or a Province may be filled. Thus, so far as the inclusion of a post in the service of Pakistan is concerned, it is immaterial whether the holder thereof has come to occupy it through a special contract or in accordance with the recruitment rules framed under the Civil Servants Act; consequently, the mere fact that a person is not a civil servant within the meaning of the Civil Servants Act would not put him beyond the pale of the said Constitutional definition. The contention that the case of the petitioner was covered by sub-clause (n), *ibid*, is entirely misconceived as *ex facie* it does not apply to situations where the relationship of master and servant exists between the parties. Here, the petitioner was a whole-time employee of the Government and except for matters which were specifically provided in the letter of appointment she was governed by the ordinary rules of service applicable to the civil servants. It may perhaps be of interest to mention here that these rules were framed in pursuance of the provisions of Article 240, *ibid*. Thus, the assertion on her behalf that while serving as an Ambassador she could not be treated as one in the service of Pakistan merely because her appointment to the post owed its origin to a special contract cannot be accepted. Admittedly, a period of two years has not passed since she relinquished charge of the said post. Therefore, she has been rightly held to be suffering from the disqualification laid down in clause (k), *ibid*. We find merit in this petition.

The functions and roles designated for the President are limited to those provided for by the constitution. These include the provisions of Article 45, the Presidential grant of pardon; Articles 48, limiting the exercise of Presidential functions to the advice of the cabinet; or Article 56, providing for the President to address either or both Houses

of Parliament etc. It is also important to distinguish the constitutional office of the President from other offices of civil service within the service of Pakistan that are appointed under Article 240 of the Constitution. This distinction is elaborated upon by the Supreme Court in Muhammad Mubeen-us-Salam v. Federation of Pakistan (PLD 2006 SC 602), wherein it has been held as under: -

“Both these expressions [Civil Service and Service of Pakistan] are not synonymous, as declared by this Court in the case of *Registrar, Supreme Court of Pakistan v. Wali Muhammad* [1997 SCMR 141]. Relevant Para. therefrom is reproduced hereinbelow: -

“We would like to mention here that from the trend of arguments at the bar it appeared that two expressions ‘service of Pakistan’ and ‘Civil servants’ were treated as synonymous. This in our opinion is not so. Service of Pakistan is defined in Article 260 of the Constitution as meaning, any service, post or office in connection with the affairs of Federation or a Province. This expression also includes an All Pakistan Service and service in the Armed Forces or any other service declared under an Act of the Parliament or a Provincial Assembly as Service of Pakistan. The terms ‘Civil Servant’ is defined in the Civil Servants Act 1973 as a person, who is a member of an All Pakistan Service or of a civil service of the Federation or a person holding a civil post in connection with the affairs of Federation, including a civil post connected with the defence.”

.....

“On a careful examination of the definitions of ‘Service of Pakistan’ as given in Article 260 of the Constitution and the ‘Civil Servant’ as mentioned in Civil Servants Act, 1973, it would appear that the two expressions are not synonymous. The expression ‘Service of Pakistan’ used in Article 260 of the Constitution has a much wider connotation than the term ‘Civil Servant’ employed in the Civil Servants Act. While a ‘Civil

Servant' is included in the expression `Service of Pakistan', the vice versa is not true. `Civil Servant' as defined in the Civil Servants Act, 1973 is just a category of service of Pakistan mentioned in Article 260 of the Constitution. To illustrate the point, we may mention here that members of Armed Forces though fall in the category of `Service of Pakistan' but they are not civil servants within the meaning of Civil Servants Act and the Service Tribunals Act. The scope of expression `Service of Pakistan' and `Civil Servants' came up for consideration before this Court in the case of *Syeda Abida Hussain v. Tribunal for N.A.* 69 [PLD 1994 SC 60]."

.....

"At this juncture, reference to the case of Qazi Wali Muhammad (ibid) would not be out of context, wherein this Court while examining the status of employees of the Supreme Court has held that " the expression `service of Pakistan' used in Article 260 of the Constitution has a much wider connotation than the term `civil servant' employed in the Civil Servants Act; while the `civil servant' is included in the expression service of Pakistan', the vice versa is not true; `civil servant' as defined in the Civil Servants Act, 1973 is just a category of service of Pakistan mentioned in Article 260 of the Constitution." It was further observed that "to illustrate the point, it is stated that members of Armed Forces though fall in the category of `service of Pakistan' but they are not civil servants within the meaning of Civil Servants Act and the Service Tribunals Act"."

Thus, the above discussion leads us to conclude that the President of Pakistan being in the service of Pakistan, is not supposed to indulge in politics as it has been established in instant case in respect of role of President Ghulam Ishaq Khan.

80. Learned Attorney General contended that there is no difference in the oath of Prime Minister, Ministers, etc., and if they can enter into politics, the President is not prohibited from doing so. We

are not in agreement with him for the reason that all these functionaries do not fall within the definition of persons in the service of Pakistan" in terms of Article 260 of the Constitution, as their cases are covered by exceptions to this constitutional provision. In addition to it, the President is elected indirectly whereas Prime Minister and others are directly elected and they represent their electors.

81. Mr. Salman Akram Raja, ASC for the petitioner has stated that it is established that various actions were taken by the senior most officers of the armed forces without there being any firm legislative basis in the name of supreme national interest, security, etc. Is not stated from where these actions were derived especially, in the circumstances where they were mandated not to engage in the political activities. He argued that these individuals at the highest levels in the Armed Forces were unclear about their mandate what they were required to do, what they should or should not do. There have been attempts in the past to make legislation in this regard. Control and regulation is a legislative function.

82. On the other hand, the learned Attorney General stated that where any of the members of any institution, such as Army, ISI or any other institution observing discipline are involved in any wrongdoing in a chain of command, the institution automatically gets involved. According to him, if the head of an institution is doing anything, to say that the institution is not involved, is not wholly true. The decisions within an institution are given at the top, therefore, in the instant case, responsibility cannot be transferred to the six lac members of the Armed Forces. Here, allegation is on the respondent No.1 who was COAS at the relevant time, respondent No. 2, who was DG, ISI and respondent No. 3, who was EVP/Regional Chief in the HBL.

Therefore, according to the learned Attorney General, it is to be determined as to who was the person at the top who ordered these things to be done because the greatest responsibility shall be his. When these things were being done, all the officers and institutions including, Army, ISI and judiciary became silent spectators and when the elected governments were overthrown, the judiciary became a party to it. It may be observed that any violation of the oath of office or any other illegal act committed by a State functionary is a personal act for which the individual concerned would be liable in accordance with law, and the institution to which such individual may belong would not be involved in it in any way.

83. The role and functions of Armed forces have been discussed in detail in Sindh High Court Bar Association's case (*supra*) wherein it has been observed that on a plain reading of the provisions of Article 245(1), the functions of the Armed Forces can be bifurcated into two categories, namely; they shall defend Pakistan against external aggression or threat of war; and subject to law, act in aid of civil power when called upon to do so. Under clause (1) of Article 243, the control and command of the Armed Forces is vested in the Federal Government, therefore, in the performance of both the categories of functions, the Armed Forces act under the directions of the Federal Government. Thus, the provisions of clause (1A) of Article 243 under which the supreme command of the Armed Forces vests in the President, does not, in any manner, derogate from the power of the Federal Government to require the Armed Forces to defend Pakistan against external aggression or threat of war, or to act in aid of civil power in accordance with law. The Constitution does not envisage any situation where the Armed Forces may act without any direction by the

Federal Government. Clause (3) *ibid*, provides that the President shall, in consultation with the Prime Minister appoint the Chairman, Joint Chiefs of Staff Committee; the Chief of the Army Staff; the Chief of the Naval Staff; and the Chief of the Air Staff. Under Article 244, every member of the Armed Forces makes oath, *inter alia*, to the effect that he will bear true faith and allegiance to Pakistan and uphold the Constitution of Pakistan, and that he will not engage himself in any political activities whatsoever. Any action of the Armed Forces undertaken without a direction by the Federal Government shall be unconstitutional, illegal, *void ab initio* and consequently of no legal effect. Thus, it was held that any member of the Armed Forces, including the Chairman, Joint Chiefs of Staff Committee and the three Service Chiefs, namely, the Chief of Army Staff, the Chief of Naval Staff and the Air Chief, or any person acting under their authority, or on their behalf, who acts in the performance of either of his functions of defending Pakistan against external aggression, or of acting, subject to law, in aid of civil power without any direction by the Federal Government acts in violation of the Constitution and the law and does so at his own risk and cost.

84. In the said judgment, it was further observed that the people of Pakistan are committed and dedicated to preserving democracy achieved by their unremitting struggle against oppression and tyranny, as duly voiced and recognized in the Preamble to the Constitution of the Islamic Republic of Pakistan. The Founder of Pakistan, the Quaid-e-Azam Muhammad Ali Jinnah declared that Pakistan would be a democratic State based on Islamic provisions of social justice. While addressing a gathering of civil officers of Balochistan on 14th February, 1948, he said that *our present*

provisional Constitution based on the fundamental principles of democracy, not bureaucracy or autocracy or dictatorship. Therefore, the military rule, direct or indirect, is to be shunned once and for all. It was wrongly justified in the past and it ought not to be justified in future on any ground, principle, doctrine, or theory whatsoever. Military Rule is against the dignity, honour and glory of the nation that it achieved after sacrifices; and it is against the dignity and honour of each and every soldier of the Armed Forces of Pakistan, who is oath-bound to bear true faith and allegiance to Pakistan and uphold the Constitution. Within the prescribed parameters, a soldier must remain committed to defending Pakistan until the last drop of his blood against external aggression or threat of war, and subject to law, acting in aid of civil power when called upon to do so under the directions of the Federal Government. In the course of the discharge of his duties, a soldier, therefore, is obligated to seeing that the Constitution is upheld, it is not abrogated, it is not subverted, it is not mutilated. If a member of the Armed Forces does any of the above acts, or any other similar act, he violates his oath and renders himself liable to action under and in accordance with the Constitution and the law.

85. Mr. Muhammad Akram Sheikh, Sr. ASC appearing on behalf of the respondent No.1 submitted that his client was bound to follow the orders of the then President of Pakistan in terms of section 33 of the Pakistan Army Act, 1952. For reference the said section is reproduced herein below: -

33. (1) Any person subject to this Act who disobeys in such a manner as to show a wilful defiance of authority a lawful command given personally by his superior officer, knowing or having reason to believe him to be such, shall,

on conviction by court Marshal, be punished with rigorous imprisonment for a term which may extend to fourteen years, or with such less punishment as is in this Act mentioned.

(2) Any person subject to this Act who disobeys the lawful command of his superior officer, knowing or having reason to believe him to be such, shall, on conviction by court Marshal, if he commits such offence on active service, be punished with rigorous imprisonment for a term which may extend to fourteen years, or with such less punishment as is in this Act mentioned; and if he commits such offence not on active service, be punished with rigorous imprisonment for a term which may extend to five years, or with such less punishment as is in this Act mentioned.

86. On the other hand, Mr. Salman Akram Raja, ASC has argued that the President has never had the operational control over the Armed Forces of Pakistan. That always happens on the advice of the Prime Minister through the Defence Ministry. This was not an exigency on the battlefield. In this regard, the head of the Army is no different to a Federal Secretary. He further argued that the COAS takes oath under the Constitution; therefore, it is his responsibility to ascertain what the Constitution says. The duty is much greater as compared to others. In terms of Article 244 of the Constitution, the members of Armed Forces take oath which has been provided in the Third Schedule to the Constitution and is reproduced hereinbelow: -

“Members of the Armed Forces

(In the name of Allah, the most Beneficent, the most Merciful.)

I, _____ do solemnly swear that I will bear true faith and allegiance to Pakistan and uphold the Constitution of the Islamic Republic of Pakistan which

embodies the will of the people, that I will not engage myself in any political activities whatsoever and that I will honestly and faithfully serve Pakistan in the Pakistan Army (or Navy or Air Force) as required by and under the law.
May Allah Almighty help and guide me (A'meen)."

According to him, the members of the Armed Forces are oath bound to uphold the Constitution, which embodies the will of the people. They are under an obligation to ensure that because here they are not on the battlefield.

87. Mr. Justice Ch. Ijaz Ahmed, in his concurring note recorded in the Sindh High Court Bar Association's case, observed that the Constitution of 1973 for the first time has prescribed oath for the members of the Armed Forces, earlier they only took oath prescribed in the Army Act, 1952. While interpreting Article 243 of the Constitution reference was made to the case of Sh. Liaquat Hussain v. Federation of Pakistan [PLD 1999 SC 504] wherein it was held that the personnel of the Armed Forces are under the final administrative control of the Federal Government; and that every member of the Armed Forces has to take oath in the form set out in the Third Schedule in the terms of Article 244. Reference has also been made to the case of Darwesh M. Arbey, Advocate v. Federation of Pakistan Thr. The Law Secretary [PLD 1980 Lah. 206] wherein the Lahore High Court laid down the following principles: -

- (a) Armed Forces which owe allegiance to Pakistan cannot be used for political motive by the party in power.
- (b) It not only is violative of the oath prescribed in the third Schedule which prohibits engagement of the Army in political activities and further tarnishes the image of the Army.

The view has been quoted with approval by this court in the case of Justice Hasnat Ahmed Khan v. Federation of Pakistan (PLD 2011 SC 680).

88. According to Mr. Salman Akram Raja, ASC, it is clear without any doubt that public funds have been plundered and siphoned away at the behest of senior functionaries of the State. These funds have remained unaccounted for. The attempt to take refuge behind the alleged existence of some political cell in the ISI can be no defence, as senior Army officers Gen (R) Beg and Gen (R) Durrani were not constrained by the unknown terms of reference of the so-called Political Cell to act in a manner so as to subvert the Constitution. The fact is that in his statement filed before this Court on 17.10.2012 through CMA 4417/2012, respondent No.2 has clearly stated that he was not even aware of the existence of a political cell in the ISI which he headed. He also stated that a cell might have existed at various times. It is clear that the unlawful operation of September/October 1990 was not an operation in accordance with the terms of reference of some established political cell. This was an unlawful attempt to undermine the electoral process in pursuit of a subjectively held notion of the 'national interest'. He further contended that whatever instructions were there from the then President, these must have been communicated through his associates in an informal way. There exists no institutional record of such communications. These communications, if at all, were in the nature of illegal instigations to violate the constitution in a surreptitious manner and did not even bear the colour of an official order.

89. Learned Attorney General stated that no State functionary, be he President who is the Supreme Commander of the Armed Forces of Pakistan, or the Prime Minister, who is the chief executive of the country, or the Federal Ministers, or anyone else is empowered to give illegal orders. No body can violate the Constitution, nobody can rig the elections. Such a duty is not upon anybody in Pakistan, therefore, the President of Pakistan cannot be isolated in this respect, inasmuch as oath of his office is no different to the other oaths prescribed in the Constitution.

90. Thus, it is held that the President could not have issued any command to the Army Chief or the DG ISI as the President did not have any operational authority with respect to the Armed Forces even after the Eighth Constitutional Amendment. While as per Article 243 of the Constitution, the Supreme Command of the Armed Forces was said to vest in the President, no independent executive authority was given to the President. The said Constitutional Amendment had created two broad categories of functions as regards the President. The first category was that of actions to be performed by the President in accordance with Article 48 on and in accordance with the advice of the Prime Minister. The second category was that of actions to be performed by the President in his discretion upon being satisfied with respect to a particular state of affairs. Reference in this regard may be made to the erstwhile provision of Article 58(2)(b) of the Constitution where the President would act in his discretion. It is clear that the vesting of the Supreme Command in the President did not empower the President, even after the Eighth Amendment, to act in his discretion or upon his satisfaction. Consequently, no question of a command, let alone a lawful command having been made by the

President to make disbursements of money among favoured politicians arises. Without prejudice to the foregoing, only lawful commands are required to be obeyed. All officers who obey unlawful commands are individually liable. All superior officers giving unlawful commands or who fail to prevent unlawful action on the part of their subordinates are liable and culpable. In the event of failure of the relevant State authorities to take action, the rights of the people of Pakistan are to be upheld by this Court making all necessary directions to the functionaries and institutions of the state, including the Election Commission of Pakistan, including the direction to investigate and prosecute.

91. Mr. Muhammad Akram Sheikh, Sr. ASC argued that the respondent No.1 had not taken oath under the Constitution of 1973, therefore, he was not bound by the oath prescribed for the members of Armed Forces in the Third Schedule to the Constitution. On the other hand Mr. Salman Akram Raja, learned ASC for the petitioner argued that the sanctity of the oath of office is inviolable, particularly that of the oath of the members of the Armed Forces of Pakistan prescribed under Article 244 of the Constitution and contained in the Third Schedule thereto.

92. The argument of the learned counsel for the respondent No.1 that the officers of the Armed Forces who had taken oath prior to the coming into force of the Constitution of 1973 could not be held liable for subverting the Constitution is untenable. It is to be noted that Article 5 imposes upon every citizen of Pakistan an inviolable obligation to obey the Constitution. Furthermore, any earlier oath that required allegiance to Pakistan necessarily includes allegiance to the present Constitution of Pakistan. Pakistan as a nation state is defined

by its Constitution. There can be no allegiance to Pakistan without allegiance to the Constitution of Pakistan. Therefore, the respondent No.1 cannot take the position that as Army Chief, he was not required to obey the Constitution. On the sanctity of the oath of office and the obligation not to obey unlawful command in violation of the Constitution and that obedience to the Constitution is the basic duty of all citizens, reference may be made to the following cases: -

- (a) Sind High Court Bar Association v. The Federation (PLD 2009 SC 879) at 1032, Paras 54, 56, 57.
- (b) Hasnat Ahmed Khan v. Federation of Pakistan (PLD 2011 SC 680) at page 731, Para 40.
- (c) Watan Party v. Federation (Law and order situation in Karachi) (PLD 2011 SC 997) at 1022.
- (d) NRO Judgment Implementation: Adnan A. Khawaja v. State [Criminal Miscellaneous Application No. 486 of 2010 in Criminal Appeal No. 22 of 2002 and Suo Moto Case No. 4 of 2010). Order dated 10-01-2012.

93. It may be observed that the distribution of funds to a group of politicians stands admitted by all those who are arrayed as respondents to the instant proceedings. The respondent No. 2, not only in his letter dated 07.06.1994, but also in his affidavit dated 24.07.1994, his concise statement dated 08.03.2012 and the statement made by him while appearing before the Court has consistently taken the stand that he provided logistic support, under instructions from respondent No.1, the then Chief of Army Staff, to the disbursement of donations made by respondent No.3 for the election campaign of IJI. Whereas, respondent No.1, in his reply dated 23.02.1997 to the petition stated that he was informed by respondent No.3 that President's Election Cell had instructed him to make available a sum of Rs.140 million. Later on, he was informed by Lt.

Gen. (R) Durrani that various cover accounts were opened by ISI and Rs.140 million were deposited by respondent No.3 in those accounts. He stated that the DG, ISI had made arrangements for disbursement of the said amount amongst various politicians on the instruction of Election Cell. The respondent No.2 has already owned it. He also stated that in a meeting with the then President, Mr. Ghulam Ishaq Khan, he had informed him about the donations made by respondent No.3 and its utilization by DG, ISI. Respondent No.3, in turn, in his affidavit dated 08.03.2012 has stated that he was asked by respondent No.1 that the then President Ghulam Ishaq Khan had asked him to arrange Rs.350 million (thirty five crores) before the election in GREAT NATIONAL INTEREST. He further stated that respondent No.1 had introduced him to President Ghulam Ishaq Khan and told him (President) that as per his desire, the matter had been discussed with him (respondent No.3) for the arrangement of required funds and ultimately he arranged Rs. 1480 million (148 crores) after loans were sanctioned by Provincial Committee and Executive Committee of the Habib Bank Ltd. in the names of his friends and business acquaintances, namely, Yousuf Memon, Rafiq Moor, etc. etc.

94. A combined reading of the statements/affidavits of respondents No.1 to 3 clearly shows that a certain sum of money was raised by respondent No.3 for the purpose of supporting favoured candidates of a certain political group in the 1990 general elections; the money was raised under instructions received from the Election Cell established in the President's House; the disbursement was carried out under the supervision of respondent No.2 by opening certain accounts. In this behalf, it is noteworthy that in the course of the proceedings, it was alleged that one of the recipients, namely,

Syeda Abida Hussain, as per reports published in the newspapers, had acknowledged receipt of the money.

95. It is also clear from the statements of the above individuals that there was a cell in the Presidency, which was overseeing the aforesaid activity of disbursement of money and some officers of the Presidency under the direct supervision of the President were involved in it. All these three individuals directly or indirectly take the trail to the Presidency/President. In this view of the matter, whether it was done under the verbal instruction of the President himself or someone acting on his behalf and under his direction/guidance discreetly is clear. Respondent No.2 while appearing before the Court made an admission that he had done so, though under direction from respondent No.1. Since he stated that under his supervision, the operation was supervised by Brig. (R) Hamid Saeed of MI, therefore, a notice was issued to him to appear before the Court. Accordingly, he appeared and filed written submissions before the Court, which have already been reproduced hereinabove.

96. Learned counsel for the petitioner further contended that it is not a result of a 1975 memo, that ISI would be having a Political Cell. Reliance on it may be appropriate up to a certain time. According to learned ASC, ISI have been doing things in their own perception of what they thought was in the national interest. The gravity of actions could not have been mandated by a notification of 1975, which are to be seen on their own. The declaration is regarding indiscipline. It is important to know as to how the affairs of the State are carried out. There has to be some semblance of authorization and a legal basis for the action. One of the alleged persons, namely, Mr. Roedad Khan

vehemently denied the existence of such Cell. The court may presume there was no cell as such, otherwise there is nothing to corroborate the existence of the cell. At no point of time in the year 1990, the President was free of the advice of the Prime Minister in such matters as are before us.

97. It has been established on record that in the year 1975, the then Prime Minister/Chief Executive created a Political Cell in the ISI under an executive order, issued in the month of May, 1975. One of its wings was assigned to perform political duties. Presumably, it could have been anything with respect to this aspect, except to assist the Federal Government in its political affairs. We have already noted hereinabove that despite our repeated directions, said notification was not produced and it has been withheld. As far as the performance of functions of intelligence sharing on strategic matters by this organization is concerned, the Armed Forces are discharging their functions to defend the country against internal and external aggression, according to Article 243 of the Constitution. This Court, while exercising its jurisdiction to ascertain as to whether the fundamental rights of voters/electors under Article 17(2) of the Constitution are violated or not, is not supposed to delve into this aspect. However, we have strongly noticed, while looking back towards the historical aspect, in pursuance whereof at various times, Martial Law was imposed by the Armed Forces, thereby derailing the democratic system. A duly elected representative being the Prime Minister or the Chief Executive under no circumstances has power to encourage any political or unconstitutional activities of ISI. In response thereto, its head of department, DG, with full knowledge and information of the then Chief of Army Staff, with illegal orders, blocked

the flow of democratic order instead of allowing the citizens/voters/electors to elect their chosen representatives freely, fairly and justly. Such action by uniformed Generals of the Army not only violated discipline but also brought a bad name to the institution of the Armed Forces while their action negated the constitutional mandate on the subject.

98. Thus, no other conclusion can be drawn except that respondents No.1 and 2, being the Generals of Pakistan Army in uniform, with the connivance of the then President of Pakistan Ghulam Ishaq Khan (late), supported the latter in ensuring the success of favoured candidates or a political party or a group of political parties to achieve the desired result as they indulged into corruption and corrupt practices by furnishing and providing finances to some of the political personalities, alleged in the affidavit of respondents No. 2 & 3. And in this manner, the election process was corrupted and the people of Pakistan were deprived of being represented by their chosen representatives. There is no gain saying, as we have already discussed hereinabove while considering the role of Armed Forces, that a member of the Armed Forces must remain committed to defending Pakistan until the last drop of his blood against external and internal threats and, subject to law, acting in aid of civil power when called upon to do so under the direction of the Federal Government. In the course of discharge of his duties, a soldier, therefore, is obligated to seeing that the Constitution is upheld; it is not abrogated; it is not subverted; it is not mutilated. Thus, in view of such observations, it is held that although the President of Pakistan being the Supreme Commander of the Armed Forces exercises jurisdiction, which has been conferred upon him under the Constitution, he obviously has no

authority to create an election cell or to manage, in any manner, to support a favoured candidate/political party/group of political parties, either by issuing directions to the Armed Forces or to civilians to make efforts for achieving desired results. And if any such illegal order is transmitted, the same is not worthy to be obeyed.

99. It is to be noted that this Court has held time and again that Government functionaries are expected to comply with only those orders/directions of their superiors which are legal and within their competence. Compliance of an illegal or incompetent direction/order can neither be justified on the plea that it came from a superior authority nor could it be defended on the ground that its non-compliance would have exposed the concerned Government servant to the risk of disciplinary action. In this regard reference may be made to the case of Zahid Akhtar v. Government of Punjab (PLD 1995 SC 530), wherein it has been held as under: -

“We need no stress here that a tamed subservient bureaucracy can neither be helpful to Government nor it is expected to inspire public confidence in the administration. Good governance is largely dependent on an upright honest and strong bureaucracy. Therefore, mere submission to the will of superior is not a commendable trait in a bureaucrat. Elected representatives placed as incharge of administrative department of Government are not expected to carry with them a deep insight in the complexities of administration. The duty of a bureaucrat, therefore, is to apprise these elected representatives the nicety of administration and provide them correct' guidance in discharge of their function in accordance with the law. Succumbing to each and every order of direction of such elected functionaries without bringing to their notice the legal infirmities in such orders/directions may sometimes amount to an act of indiscretion on the part of

bureaucrats which may not be justifiable on the plane of hierarchical discipline. It hardly needs to be mentioned that a Government servant is expected to comply only those orders/directions of his superior which are legal and within his competence. Compliance of an illegal or an incompetent direction/order can neither be justified on the plea that it came from a superior authority nor it could be defended on the ground that its non-compliance would have exposed the concerned Government servant to the risk of disciplinary action."

In the case of Muhammad Akhtar Shirani v. Punjab Tex Book Board (2004 SCMR 1077), the same view was reiterated by this Court as under: -

"We have noted with pain that departmental authorities responsible to run its affairs do submit to whims and wishes of their superiors and never feel hesitation in implementing even an illegal order, knowing well that it has no legal sanction and if such order is implemented it is bound to give rise to a number of complications in the future. This Court time and again has emphasized that the departmental functionaries are only obliged to carry out lawful orders of their superiors and if they are being pressurized to implement an illegal order they should have put on record their dissenting note and if such practice is followed chances of issuing/passing illegal orders shall be minimized."

Reference in this behalf may also be made the cases of Province of Punjab v. Ibrar Younas Butt (2004 SCMR 67), Iqbal Hussain v. Province of Sindh (2008 SCMR 105), Government of Pakistan v. Farheen Rashid [2009 PLC (C.S.) 966], Human Rights Cases No.4668 OF 2006, etc. (PLD 2010 SC 759) and Muhammad Afsar v. Malik Muhammad Farooq (2012 SCMR 274).

100. Thus, it is clear that respondents No. 1 & 2 were required to comply with only those orders/directions of their superiors which were legal and within their competence. Compliance with an illegal or an incompetent direction/order from the then President can neither be justified on the plea that it came from a superior authority nor could it be defended on the ground that its non-compliance would have exposed them to the risk of disciplinary/adverse action.

101. From the material, which has come on record during course of the proceedings referred to hereinabove, there is no controversy or dispute that an amount of Rs. 140 million was arranged from HBL through the respondent No. 3 for the purpose of distributing it among certain politicians/individuals before the 1990's general election in the name of 'greater national interest'. It is also proved on record that without logistic support of the respondents No.1 and 2, distribution of the said amount would not have been possible. As regards disbursing the amount to different persons, no convincing and legally acceptable evidence was brought on record by the respondent No. 2. Therefore, in pursuance of order 22.06.2012, he filed concise statement on 30.07.2012 *vide* CMA No. 3307/2012, contents whereof are reproduced as under: -

"Concise statement on behalf of respondent No. 2

That the honourable court *vide* order 22.6.2012 was pleased to observe as under: -

That in the meanwhile, learned counsel appearing for General Retd. Asad Durrani may place on record concise statement, supporting evidence or affidavits explaining the details of the persons to whom allegedly certain amounts were distributed under the directions of the then Army Chief General Aslam Beg and as far as the names of the persons to whom the amount was to be distributed used to

receive from Mr. Ijlal Haider Zaidi, who was heading the team constituted in the presidency by the then President of Pakistan late Ghulam Ishaq Khan.

That the total amount distributed through undersigned was approximately 70 million out of 140 million and the remaining was deposited in the special fund of ISI.

That the answering Respondent assigned this job to officers of the MI, who were cognizant that the money disbursed was for election purpose and they, in turn, distributed the money and apprised the Answering respondent about the distribution.

That names of these offices and some of the classified documents available with the undersigned tender herewith sealed cover will be submitted in Court. The Answering Respondent reckons that thee are of classified nature." [sic.]

As regards the classified nature of the document produced by him, it may be mentioned that it was a mere statement containing names of the persons to whom the amounts were distributed, but without any supporting documents to substantiate the allegation against them. Therefore, after having seen the same, it was returned to him for keeping the same in safe custody to be produced it whenever required. In this view of the matter, the factum of receipt of the money by the individuals named by the respondent No. 2 as per details attached with his affidavit dated 24.07.1994 and in the statement of respondent No. 3 under section 161 Cr.P.C. recorded by FIA in Mehran Bank's case, the same have to be established in accordance with law in a transparent manner through an investigating agency. The alleged names/details of disbursement of money as alleged by respondent No.

2 in annexure to his affidavit, and respondent No. 3 in his above referred statement are given hereinbelow: -

Details/names of the recipients of money given by Lt. Gen. (R) M. Asad Durrani in his affidavit dated 24.07.1994: -

<u>N.W.F.P</u>	- Mir Afzal	- 10 million
<u>PUNJAB</u>	- Nawaz Sharif	-3.5 million
	- Lt. Gen. (R) Rafiqat	-5.6 " (for media)
	- J.I,	-5.0 "
	- Abida Hussain	-1.0 "
	- Altaf Hussain Qureshi & Mustafa Sadiq	-0.5 "
	- Misc. & smaller group	-3.339 "
<u>SINDH</u>	- Jatoi	-5.0 "
	- Jam Sadiq	-5.0 "
	- Junejo	-2.5 "
	- Pir Pagara	-2.0 "
	- Maulana Salah Ud-Din	-0.3 "
	- Misc. & smaller group	-5.4 "
<u>BALUCHISTAN</u>	- Humayun Mari (Bugti's son-in-law)	-1.5
	- Jamali	-4.0 "
	- Kakar	-1.0 "
	- K Baluch	-0.5 "
	- Jam Yousaf	-0.75 "
	- Bazinjo	-0.50 "
	- Nadeem Mengal	-1.00 "
	Through [May be] Golf course:	0.5 m
	Misc. (bank charges: expenses etc.)	1.1117 m

Details/names of the recipients of money given by Lt. Gen. (R) M. Asad Durrani in his letter dated 07.06.1994: -

- (a) Khar 2 Millions, Hafeez Pirzada 3, Sarwar Cheema 0.5 and Mairaj Khalid 0.2 Millions. The last two were not on the wrong side. It was merely someone's "soft corner" that benefited them.
- (b) The remaining 80 Ms were either deposited in the ISI's 'K' fund (60 M) or given to Director External Intelligence for special operations.

Details regarding distribution of money given by Lt. Gen. (R) M. Asad Durrani in his concise statement vide CMA No. 3307/2012 dated 30.07.2012: -

The total amount distributed through undersigned was approximately 70 million out of 140 million and the remaining was deposited in the special fund of ISI.

Respondent No. 2 assigned this job to officers of the MI, who were cognizant that the money disbursed was for election purpose and they, in turn, distributed the money and apprised the Answering respondent about the distribution.

Names of the officers and some of the classified documents available with respondent No2. were produced in Court in sealed cover claiming confidentiality, but the same were returned to him for keeping the same in safe custody to be produced it whenever required.

Details/names of the recipients of money given by Brig. (R) Hamid Saeed Akhtar in his statement dated 18.10.2012 made before the Court: -

In compliance with the directions six accounts were opened in different banks. Funds started pouring in from 16th September 1990 onwards. By 22nd October 1990, Rs. 140 Million had been received in these accounts. Thereafter

following amounts were remitted as ordered by DGMI: -

- | | | |
|----|------------------|----------------------------------------------------------------------------------------------------------|
| a. | Rs.40 Million | to GHQ account. |
| b. | Rs.10.5 Million | to regional office of MI Quetta. |
| c. | Rs.5 Million | to interim PM Mr. Ghulam Mustafa Jatoi |
| d. | Rs.5. Million | to interim CM Sindh Mr. Jam Sadiq Ali |
| e. | Rs.2.5 Million | to Mr. Muhammad Khan Junejo. |
| f. | Rs.3 Million | to Mr. Abdul Hafeez Pirzada |
| g. | Rs.2 Million | to Mr. Sibghat-Ullah Pir sahib Pagara. |
| h. | Rs.03 Million | to Mr. Muzaffar Hussain Shah. |
| i. | Rs.03 Million | to Mr. Muzaffar Hussain Shah |
| j. | Rs.0.3 Million | to Mr. Ghulam Ali Nizamani. |
| k. | Rs.02 Million | to Mr. Arbab Ghulam Rahim |
| l. | Rs.03 Million | to Mr. Salah-ud-Din (Takbeer). |
| m. | Rs.05 Million | to Mr. Yousaf Haroon |
| n. | Rs.3,828 Million | to Sindh Regimental Centre, and also used for construction of men's living barracks, interrogation cells |

The remaining balance of Rs.67, 628,511/- including interest was later on sent to GHQ along with up-to-date bank statements. [I would like to state that during my service with the Military Intelligence, I was of the opinion that the funds were coming from GHQ].

Furthermore, certain other material, though unauthentic and would be required to be proved in accordance with law, has also been placed on record, which gives details concerning drawl and transfer of the money in question as under: -

Details/information concerning drawl and transfer of the amounts in question in the shape of some important points as per document at page 163 of the paper book: -

SOME IMPORTANT POINTS

- (1) Rs. 6.72 were subsequently transferred to GHQ Welfare Fund. Reportedly Rs. 3 Crores approximately were drawn and given to "FRIENDS" under the instruction of Gen. Beg during his last days as Army Chief. The remaining amount is available in the GHQ Welfare Fund.
- (2) Out of 4 crores, 2 crores were given to Punjab and 2 crores to NWFP. The details of expenditures / pay off are available with the commendations of respective MI / Units.
- (3) All the payments in Sindh were made by Lt. Col. Mir Akbar Ali Khan who is under cover appointment in Saudi Arabia.
- (4) 6 to 8 pseudonymous accounts were opened under the instructions of Gen. Beg who accorded verbal approval Survey & construction Group Karachi, whereas the accounts in the name of 202 Survey & Construction Group were not brought to the notice of Gen. Beg.
- (5) The number of said accounts were communicated to Mr. Yunus Habib who deposited Rs. 14 crores through one of his representatives on various dates.
- (6) The details of the amounts spent in Quetta are known to Brig. Amanullah presently heading M.I. Karachi.
- (7) The details of amount distributed among the politician in Punjab are known to Gen. Beg, Gen. Asad Durrani and the then Commandants of the M.I. Units posted in Punjab and NWFP.
- (8) Late Gen. Asif Nawaz also agitated and showed his displeasure on the shifting of the amounts to 'Friends' by Gen. Aslam Beg.

Account of distribution of funds as per documents at pages 220 & 221 of the paper book: -

"POLITICAL AND OTHER PAY OFFS

Yunus Habib, as per his statement recorded under section 161 Cr. P. C. before Investigating Officer at Karachi disclosed Political and other Pay Offs as: -

-	Gen (Retd.) Mirza Aslam Beg	Rs. 140 m
-	Jam Sadiq Ali (the then Chief Minister Sindh)	Rs. 70 m
-	Altaf Hussain (MQM)	Rs. 20 m
-	Yousaf Memon (Advocate) (for disbursement to Javed Hashmi, MNA and others	Rs. 50 m
-	Total:	Rs. 280 m
-	Jam Sadiq Ali (1992)	Rs. 150 m
-	Liaqat Jatoi (1993)	Rs. 01 m
-	Chief Minister Sind Through Imtiaz Sheikh. (1993)	Rs. 12 m
-	Mr. Afaq (MQM) (1993)	Rs. 05 m
-	Chief Minister Sind through Imtiaz Sheikh (1993)	Rs. 01 m
-	Ajmal Khan, Ex Federal Minister (1993)	Rs. 1.4 m
-	Mr. Nawaz Sharif, Ex Prime Minister (1993)	Rs. 3.5 m
-	Mr. Nawaz Sharif, Ex Prime Minister (27-9-90)	Rs. 2.5 m
-	Mr. Jam Mashooq (26-9-93)	Rs. 0.5 m
-	Mr. Dost Mohammad Faizi (26-9-93)	Rs. 1.0 m
-	Mr. Jam Haider (26-9-93)	Rs. 2.0 m
-	Mr. Jam Mashooq (26-9-93)	Rs. 3.0 m"

POLITICAL PAY OFFS TO MR. JAVED HASHMI M. N. A.

- Mr. Javed Hashmi was the partner of M/s ADAGE Advertising (Pvt) Ltd., from 30-10-1986 and resigned on 6-1-1990.
- The following payments were made to Mr. Javed Hashmi through Telegraphic Transfer and the Bank Drafts by Mr. Yousaf Memon (a man in between Yunus Habib and Javed Hashmi) through various bank transfers:

- T.T. from UBL Adamjee Nagar Karachi, on

Date	Drawn at	Drawn by	Amount
11-11-1990	UBL Multan	Javed Hashmi	Rs. 2.5 M
15-12-1990	UBL Multan	Javed Hashmi	Rs. 1.0 M
20-12-1990	UBL Multan	Rahat Malik	Rs. 0.1 M
27-03-1991	UBL Islamabad	Rahat Malik	Rs. 1.0 M
09-4-1991	UBL Islamabad	Rahat Malik	Rs. 2.0 M
12-5-1991	UBL Islamabad	Javaid Hashmi	Rs. 0.3 M

-	T. T. from HBL Ichara, Lahore, on		
10-02-1991	MCB Multan	Khurshid S. Shah.	Rs. 2.5 M
-	Bank Draft from UBL Adamjee Nagar, Karachi, on		
23-02-1991	UBL Multan	Mukhtar Hashmi	Rs. 2.0 M
-	Bank Draft from Faisal Islamic Bank, Karachi, on		
27-04-1991	HLB Multan	Javaid Hashmi	Rs. 1.4 M
		Total:	Rs. 12.8 M
-	According to the statement of Mr. Rahat Malik, the amount drawn by him was handed over to Mr. Javed Hashmi.		
-	Rs. 14.9 million was paid by Mr. M. Yamin in presence of Mr. Yousaf Memon in Oct 1990 in cash to Mr. Javaid Hashmi in Room No.1 of MNA Hostel, Islamabad.		
	G. Total:		Rs. 27.7 M

Details/names of the beneficiaries of money given by Muhammad Yunus A. Habib in CMA No.1034/2012: -

That Mr. Yousaf Memon Advocate in two different TV Programmes of GEO News channel (one by Kamran Khan and the other by Nazir Laghari) admitted that a house was purchased in F-6/2 Islamabad in the name of Mr. Javed Hashmi. He also admitted that 50% of the amount was invested in the purchase of house (Kasim 1 al-Multan).

Admission of one of the recipients: -

In the course of the proceedings, it was alleged that one of the recipients, namely, Syeda Abida Hussain, as per reports published in the newspapers, had acknowledged receipt of the money.

102. **Above are the reasons for our short order of even date whereby the instant petition was disposed of as under: -**

"The Constitution of the Islamic Republic of Pakistan commands that it is the will of the people of Pakistan to establish an order wherein the State shall exercise its powers and authority through the chosen representatives of the people, wherein the principles of democracy, freedom, equality, etc., shall be fully observed, 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. People of Pakistan had been struggling to establish a parliamentary and democratic order since long within the framework of the Constitution and now they foresee a strong system which is established by the passage of time without any threat and which is subject to the constitution and rule of law.

2. The essence of this Human Rights case is based on the fundamental right of citizens enshrined in Article 17 of the Constitution. It raises an important question of public importance to enforce the fundamental rights, *inter alia*, noted hereinabove, therefore, in accordance with the provisions of Article 184(3) of the Constitution, jurisdiction has been assumed and exercised to declare, for the reasons to be recorded later, as under: -

- (1) That citizens of Pakistan as a matter of right are free to elect their representatives in an election process being conducted honestly, justly, fairly and in accordance with law.
- (2) The general election held in the year 1990 was subjected to corruption and corrupt practices as in view of the overwhelming material produced by the parties during hearing it has been established that an "Election Cell" had been created in the Presidency, which was functioning to provide financial assistance to the favoured candidates, or a group of political parties to achieve desired result by polluting election process and to deprive the people of Pakistan from being represented by their chosen representatives.
- (3) A President of Pakistan, in Parliamentary system of government, being head of the State represents the unity of the Republic under Article 41 of the Constitution. And as per the oath of his office in all

circumstances, he will do right to all manner of people, according to law, without fear or favour, affection or ill-will. Thus, holder of office of President of Pakistan, violates the Constitution, if he fails to treat all manner of people equally and without favouring any set, according to law, and as such, creates/provides an occasion which may lead to an action against him under the Constitution and the Law.

- (4) The President of Pakistan, Chief of Army Staff, DG ISI or their subordinates certainly are not supposed to create an Election Cell or to support a political party/ group of political parties, because if they do so, the citizens would fail to elect their representatives in an honest, fair and free process of election, and their actions would negate the constitutional mandate on the subject.
- (5) However, in the instant case it has been established that in the general elections of 1990 an Election Cell was established in the Presidency to influence the elections and was aided by General (R) Mirza Aslam Beg who was the Chief of Army Staff and by General (R) Asad Durrani, the then Director General ISI and they participated in the unlawful activities of the Election Cell in violation of the responsibilities of the Army and ISI as institutions which is an act of individuals but not of institutions represented by them respectively, noted hereinabove.
- (6) ISI or MI may perform their duties as per the laws to safeguard the borders of Pakistan or to provide civil aid to the Federal Government, but such organizations have no role to play in the political activities/politics, for formulation or destabilization of political Governments, nor can they facilitate or show favour to a political party or group of political parties

or politicians individually, in any manner, which may lead in his or their success.

- (7) It has also been established that late Ghulam Ishaq Khan, the then President of Pakistan with the support of General (R) Aslam Beg, General (R) Asad Durrani and others, who were serving in M.I and now either have passed away or have retired, were supporting the functioning of the 'Election Cell', established illegally.
- (8) Mr. M. Yunus A. Habib, the then Chief Executive of Habib Bank Ltd. at the direction and behest of above noted functionaries, arranged/provided Rs.140 million belonging to public exchequer, out of which an amount of Rs.60 million was distributed to politicians, whose incomplete details have been furnished by General (R) Asad Durrani, however, without a thorough probe no adverse order can be passed against them in these proceedings.
- (9) The Armed Forces of Pakistan, under the directions of Federal Government, defend Pakistan against external aggression or threat of war and, subject to law, are to act in aid of civil power when called upon to do so under Article 245 of the Constitution, thus, any extra-constitutional act, calls for action in accordance with the Constitution of Pakistan and the law against the officers/officials of Armed Forces without any discrimination.
- (10) The Armed Forces have always sacrificed their lives for the country to defend any external or internal aggression for which it being an institution is deeply respected by the nation.
- (11) The Armed Forces, in discharge of their functions, seek intelligence and support from ISI, MI, etc., and on account of security threats to the country on its

frontiers or to control internal situations in aid of civil power when called upon to do so. However, ISI, MI or any other Agency like IB have no role to play in the political affairs of the country such as formation or destabilization of government, or interfere in the holding of honest, free and fair elections by Election Commission of Pakistan. Involvement of the officers/members of secret agencies i.e. ISI, MI, IB, etc. in unlawful activities, individually or collectively calls for strict action being, violative of oath of their offices, and if involved, they are liable to be dealt with under the Constitution and the Law.

- (12) Any Election Cell/Political Cell in Presidency or ISI or MI or within their formations shall be abolished immediately and any letter/notification to the extent of creating any such Cell/Department (by any name whatsoever, explained herein, shall stand cancelled forthwith.
- (13) Late Ghulam Ishaq Khan, the then President of Pakistan, General (R) Aslam Beg and General (R) Asad Durrani acted in violation of the Constitution by facilitating a group of politicians and political parties, etc., to ensure their success against the rival candidates in the general election of 1990, for which they secured funds from Mr. Yunus Habib. Their acts have brought a bad name to Pakistan and its Armed Forces as well as secret agencies in the eyes of the nation, therefore, notwithstanding that they may have retired from service, the Federal Government shall take necessary steps under the Constitution and Law against them.
- (14) Similarly, legal proceedings shall be initiated against the politicians, who allegedly have received donations to spend on election campaigns in the

general election of 1990, therefore, transparent investigation on the criminal side shall be initiated by the FIA against all of them and if sufficient evidence is collected, they shall be sent up to face the trial, according to law.

Mr. Yunus Habib shall also be dealt with in the same manner.

(15) Proceedings shall also be launched against the persons specified hereinabove for affecting the recovery of sums received by them with profit thereon by initiating civil proceedings, according to law.

(16) An amount of Rs.80 million, statedly, has been deposited in Account No.313 titled Survey and Construction Group Karachi, maintained by MI, therefore, this amount with profit shall be transferred to Habib Bank Ltd. if the liability of HBL has not been adjusted so far, otherwise, the same may be deposited in the treasury account of Government of Pakistan."

103. Before parting with the detailed reasons noted hereinabove, we place on record our thanks to the learned counsel appearing on behalf of the petitioner, learned counsel representing the respondents No.1 & 3 and learned Attorney General for providing assistance in the decision of the instant case, which was pending since long for one or the other reason.

104. While hearing this case vide order dated 14.03.2012 the attention of the learned Attorney General was drawn towards a news item published on 14.03.2012 in Daily Express Tribune, captioned as *"GOVT WITHDREW MILLIONS FROM INTELLIGENCE BUREAU*

ACCOUNT" complaining therein that an amount of Rs.270 Million were doled out of IB accounts for the purpose of toppling the Government of Punjab in the year 2008-09. Notices were issued to the Publishers, Printers and Reporters of the said newspapers, who produced certain documents to substantiate the allegation reported in the news item. The news item may be registered as CMA and after de-linking the same from instant case, be fixed in Court, with notice to the Publishers, Printers and Reporters of the said newspapers as well as DG, IB and the Attorney General for a date after two weeks.

105. The instant Human Rights case stands disposed of in the above terms.

Iftikhar Muhammad Chaudhry, CJ

Jawwad S. Khawaja, J

Khilji Arif Hussain, J

Islamabad, 19th October, 2012
APPROVED FOR REPORTING