

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

**Jawwad S. Khawaja, J.**

It is an unfortunate facet of our history that during the 64 years since Pakistan's independence in 1947, the people of Pakistan have been, at times, disserved by a non-inclusive governance paradigm where information critical to them has been withheld from them.

"And ye shall know the Truth, and the Truth shall set you free" (John8:32), Thus spake Hazrat Isa, the Messiah and champion of the oppressed. In the same vein, the Persian savant Hakeem Sinai Ghaznavi said: "embrace the truth and become free of grief and torment". It is these Biblical and sage sentiments and other similar sensibilities which appear to have inspired an important change in the Constitution - the recent incorporation of Article 19A in the Chapter on fundamental rights. The said Article stipulates that "every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law". Most petitioners and respondents, and their learned counsel seem to have ignored or glossed over the significance of this major constitutional change. While the circumstances in which these cases arise have been elaborated in fair detail in the reasoning of Hon'ble the Chief Justice, I only reiterate this salient aspect of the case.

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

3. Major events in our history in the past six decades since 1947 have included the dismemberment of the country in 1971 and the murder of one incumbent and one former Prime Minister of Pakistan. We have witnessed the extraordinary case of those in the seats of governance in December 1971 informing us that all was going well in East Pakistan even after the surrender of forces in Dhaka. The results of probes into such events have almost invariably been withheld from the people of Pakistan or, at times, selectively disclosed. The people in quest of the truth have mostly been left with conjectures, rumors and half truths. Concealment of information has, in turn led to a distorted history of the country and to a destabilizing division in the polity.

4. This paradigm has shifted through the recent incorporation of Article 19A in the Constitution. By virtue of the said Article the right of a citizen to have information "in all matters of public importance" is made a fundamental right which is guaranteed by the Constitution. Article 184 (3) of the Constitution

stipulates, inter alia, that this Court shall have jurisdiction to pass an order in a case “if it considers that a question of public importance with reference to the enforcement of any of the fundamental rights conferred by Chapter I of Part II [of the Constitution] is involved”.

Article 184 (3) read in conjunction with Article 19A has empowered the citizens of Pakistan by making access to information a justice able right of the People rather than being largesse bestowed by the State at its whim. Article 19A has thus, enabled every citizen to become independent of power centres which, heretofore, have been in control of information on matters of public importance.

5. Many of the arguments that came up during the hearing of these petitions are premised on a lack of appreciation not just for this aspect of our constitutional law, but also for the intrinsic worth of Truth as a value in itself. What, it may be asked, is the intrinsic worth of information as a stand-alone fundamental right?

The answer to this is simple. The very essence of a democratic dispensation is informed choice. It is through such choice that the political sovereign, the People of Pakistan acquire the ability to reward or punish their elected representatives or aspirants to elected office, when it is time for the People to exercise their choice. If information on matters of public importance is not made available to citizens, it is obvious they will not have the ability to evaluate available choices. Information on matters of public importance thus, is foundational bedrock of representative democracy and the accountability of chosen representatives of the people. It is in this context, both historical and conceptual, that the fundamental right to information has to be seen. Through Article 19A in the Constitution, the citizens of Pakistan have also been freed from the caprice of a sorry fate and have become independent of whistle-blowers in foreign lands or the magnanimity of the likes of WikiLeaks or biographies of political actors, to get to the information they are now entitled to as of right under the Constitution. This provides for and makes good a crucial missing element of responsible state governance in our Constitutional scheme.

6. At this point it is necessary to highlight an important aspect of our Constitution which is often overlooked. The Constitution of 1973 has not been bestowed as a matter of grace on the People of Pakistan by a monarch or a foreign Parliament as, for instance, is the case with Canada, Australia and a number of other countries. Our Constitutional Order has been established by “the will of the people of Pakistan”. All State functionaries have to understand that in a very real sense, they are employed in the service of the People of Pakistan and are paid for by them. The loyalty, therefore, of these State functionaries has to be to the Constitutional Order established by the People. Once this context is understood, the issue in these petitions stands greatly simplified.

There is no contention between the parties arrayed before us that the Memo and the events surrounding it are “matters of public importance”. The parties are also agreed that these events should be probed. It is, therefore, clear that a petition under Article 184 (3) to enforce the fundamental right granted by Article 19A is maintainable.

7. We are cognizant that there may be situations where the Government may want to justify non-disclosure of information on a matter of public importance.

That plea, however, does not arise and nor has it been taken in these cases. It is, therefore, not necessary to comment on the same as a mere speculative exercise. Learned ASC for Mr. Haqqani contended that these petitions raise a political question and the Court should, therefore, avoid deciding the same.

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

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

It is couched in restrictive language and reads as under:-

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

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

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

9. It is clear from a reading of Article 19A and section 3 (1) *ibid*, that the Constitutional right is much broader and more assertive than the statutory right which by its own terms is restricted to disclosure of official record only.

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

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

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

(Jawwad S. Khawaja)