

IN THE SUPREME COURT OF PAKISTAN

(Original Jurisdiction)

PRESENT:

MR. JUSTICE SH. AZMAT SAEED
MR. JUSTICE MUSHIR ALAM
MR. JUSTICE MAQBOOL BAQAR
MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL

**CONSTITUTION PETITION NO.29 OF 2017 AND CIVIL
MISC. APPLICATION NO.7669 OF 2017 IN CONSTITUTION
PETITION NO.29 OF 2017**

AND

**CONSTITUTION PETITION NO.36 OF 2017 AND CIVIL
MISC. APPLICATION NO.9965 OF 2017 IN CONSTITUTION
PETITION NO.36 OF 2017**

Const.P.29/2017	Justice Shaukat Aziz Siddiqui Vs. Federation of Pakistan through Secretary Law and Justice, Islamabad
CMA.7669/2017 in Const.P.29/2017	Justice Shaukat Aziz Siddiqui Vs. Federation of Pakistan through Secretary Law and Justice, Islamabad
Const.P.36/2017	Mr. Justice Muhammad Farrukh Irfan Khan Vs. Federation of Pakistan through Secretary Law and Justice, Islamabad and another
CMA.9965/2017 in Const.P.36/2017	Mr. Justice Muhammad Farrukh Irfan Khan Vs. Federation of Pakistan through Secretary Law and Justice, Islamabad and another
For the Petitioner (s) (in Const.29/2017)	: Mr. Muhammad Makhdoom Ali Khan, Sr. ASC Mr. Hamid Khan, Sr. ASC Mr. M.S. Khattak, AOR

For the Petitioner (s) : Mr. Hamid Khan, Sr. ASC
(in Const.P.36/2017) Mr. Hassan Irfan, ASC assisted by
Mr. Ajmal Toor, Advocate &
Ms. Khadija Yasmin Bokhari,
Advocate

On Court Notice on : Mr. Ashtar Ausaf Ali,
behalf of Federation Attorney General for Pakistan
assisted by Barrister Asad Rahim
Khan, Advocate and
Mirza Moiz Baig, Advocate
Mirza Nassar, DAG

Amicus Curie : Mr. Shahid Hamid, Sr. ASC
Mr. Munir A. Malik, Sr. ASC

Date of Hearing : 13th 14th 27th & 28th March, 2018

JUDGMENT

SH. AZMAT SAEED, J.- Through this judgment, it is proposed to adjudicate upon Constitution Petitions No.29 and 36 of 2017, wherein common questions of law have been raised.

2. The Petitioner in Constitution Petition No.29 of 2017 is a sitting Judge of the learned Islamabad High Court, Islamabad. The Respondent, Supreme Judicial Council (SJC), is currently inquiring into allegations of misconduct made against the said Petitioner. In this behalf, the proceedings before the SJC are being held in camera. The aforesaid Petitioner moved an application with the prayer that the proceedings of the SJC be conducted in "Open Court". The SJC vide its Order dated 18.05.2017 dismissed the said application. In the above

circumstances, the Petitioner invoked the Constitutional jurisdiction of this Court by filing the instant Constitution Petition bearing No.29 of 2017, *inter alia*, calling into question the aforesaid Order dated 18.05.2017. The *vires* of the provisions of the Supreme Judicial Council Procedure of Enquiry 2005, more particularly, paragraphs 7 and 13 thereof have also been challenged. It is claimed that the impugned Order and the aforesaid paragraph 13 of the above-said SJC Procedure of Enquiry 2005, offends against the Fundamental Rights of the Petitioner.

3. The Petitioner in Constitution Petition No.36 of 2017, is a sitting Judge of the learned Lahore High Court and incidentally is also facing an inquiry before the SJC on the allegations of misconduct. Such proceedings too are being held in camera. In the above circumstances, a Constitution Petition bearing No.36 of 2017 has been filed also claiming that the proceedings of the SJC be conducted in "Open Court". Furthermore, it is also prayed that the SJC Procedure of Enquiry 2005 may be declared in its entirety to be unconstitutional. Furthermore, the constitution of the SJC has also been called into question and it is contended that one of the

Members is disqualified to participate in such proceedings in view of Article 209(3) of the Constitution of the Islamic Republic of Pakistan, 1973. It is also prayed that all the proceedings taken by the SJC be declared as null and void.

4. In the instant cases, interpretation of the Constitution is obviously involved, therefore, notice under Order XXVII-A of the Civil Procedure Code, 1908 was issued to the learned Attorney General for Pakistan; and for assistance of this Court, two senior and seasoned counsels namely, M/s Shahid Hamid and Munir A. Malik, learned Sr. ASCs were also appointed as Amicus Curies.

5. Mr. Muhammad Makhdoom Ali Khan, learned Sr. ASC appearing on behalf of the Petitioner in Constitution Petition No.29 of 2017 opened his arguments by clarifying that no objection is being raised by him to the constitution of the SJC but his grievance is only limited to the process being employed and the Order dated 03.04.2017. It is his case that two primary questions required adjudication by this Court; firstly, whether the SJC is required by law to conduct an open hearing of the matters entrusted to it; and

secondly, whether the SJC Procedure of Enquiry 2005, is unconstitutional, hence, liable to be struck down. As an ancillary to the second question, the learned Sr. ASC contended that this Court may also consider the possibility of reading down the provisions of the aforesaid SJC Procedure of Enquiry 2005, more particularly, paragraph 13 thereof, requiring a trial in camera.

6. It is further contended by the learned Sr. ASC that though it may have been held by this Court in its earlier judgments that the proceedings before the SJC may not strictly be a right determining exercise but only a fact finding process yet since the matter before the SJC is the alleged misconduct of a sitting Judge of the Superior Court and any findings returned would obviously stigmatized such Judge. Hence, the provisions of Articles 4, 10A and 19A of the Constitution, would be applicable. In this behalf, the learned Sr. ASC also drew the attention of this Court to the provisions of Article 209(8) of the Constitution, which require that the final findings of the SJC would be made public.

7. The learned counsel next contended that the proceedings before the SJC were called into question before this Court in the case reported as Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others (PLD 2010 SC 61). The Petitioner in the said case contested the provisions of holding proceedings in camera and demanded an open hearing. However, this aspect of the matter was left open and not adjudicated upon as is apparent from paragraph 200 of the judgment. Therefore, this Court must necessarily decide the aforesaid question, having directly arisen in the instant *lis*. It is further contended by the learned Sr. ASC that even though the SJC may not be a Court but rather a forum akin to a Departmental or Domestic Tribunal, yet the provisions of Article 10A of the Constitution are attracted to the proceedings before it, in view of the judgment of this Court reported as M.C.B. Bank Limited, Karachi v. Abdul Waheed Abro and others (2016 SCMR 108).

8. The learned counsel added that it is settled law that proceedings which may adversely affect the rights or reputation of a person, in the normal course,

must necessarily be held in an “Open Court” and not by way of secret proceedings. In support of his contentions, the learned Sr. ASC relied upon the judgments reported as Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf (PLD 1963 SC 51), Mairaj Muhammad Khan v. The State (PLD 1978 Karachi 308), Asif Ali Zardari v. Special Judge (Offences in Banks) and 10 others (PLD 1992 Karachi 437), and Mst. Shirin Nazir v. Badruddin Karamali Nazir and another [PLD 1963 (W.P.) Karachi 440]. However, the learned Sr. ASC conceded that in exceptional circumstances even in a criminal or civil trial the proceedings can be held in camera but, he was of the view, that such exceptions are now well defined and settled. It may include matters relating to the State secrets or privacy of persons, more particularly, victims of sexual offences and *qua* matters pertaining to the mental capacity of individuals, further to avoid scandalizing the institutions. It was his case that none of the aforesaid exceptions were applicable to the instant case or catered for in paragraph 13 of the SJC Procedure of Enquiry 2005.

The learned counsel also attempted to distinguish the judgment reported as George Meerabux v. The Attorney General of Belize [2005) 2 AC 513] referred to by the SJC in its Order dated 18.05.2017.

9. The learned counsel, however, was of the view that the proceedings before the SJC consist of two stages; firstly the determination whether *prima facie* any case for proceedings under Article 209 of the Constitution is made out and; secondly the proceedings undertaken by the SJC pursuant to such *prima facie* determination. The learned counsel contended that the first stage should be held in camera in any event to safeguard the reputation of a Judge against whom malicious or frivolous complaints may have been made but in the second stage, the proceedings must necessarily be held in public, especially if the person whose conduct or capacity is being inquired into so desires to avoid any miscarriage of justice.

10. Mr. Hamid Khan, learned Sr. ASC prefaced his submissions with the contention that for all intents and purposes, the conclusions drawn by the SJC sealed the fate of the Judge whose conduct or capacity is being inquired into and no remedy has been provided to him,

therefore, for protection of the rights of such Judge a strict criteria needs to be applied. In the above context, it was contended that it is an universally accepted principle of law that proceedings in an “Open Court” is a *sine qua non* for a fair trial as justice should not only be done but should also be seen to be done. In support of his contentions, the learned counsel referred to the following judgments of the Canadian jurisdiction:

1. A.G. (Nova Scotia) v. MacIntyre, [1982] 1 S.C.R. 175 (183-185-186); and
2. Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480 (para 22)

11. It was further contended that in the event of an in camera proceedings such Judge whose matter is before the SJC would be subjected to character assassination through baseless rumors and innuendo.

12. The learned counsel added that the principle of an open trial has been upheld by this Court in the judgments reported as Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others (PLD 1996 SC 632) and Zulfikar Ali Bhutto v. State (PLD 1979 SC 53). No doubt, it is contended, that there are some limitations to an open trial but, in this behalf, well defined exceptions are set forth in the aforesaid judgments. Said

exceptions to the general principle of an “Open Court” hearing are public safety and security, privacy, abusive conduct of the accused, if the nature of the case is such that open hearing would stultify justice itself and to prevent scandalous and scurrilous allegations against the Judges. In the case at hand, none of the exceptions exist nor have been held to exist in the Order dated 18.05.2017, passed by the SJC.

13. The second limb of the arguments of the learned counsel was that the SJC Procedure of Enquiry 2005 is *ultra vires* to the Constitution and, therefore, non-est in the eye of law, including paragraph 13 thereof pertaining to in camera proceedings. It is the case of the learned Sr. ASC that the SJC is the creation of the Constitution and can only claim such powers as are conferred upon it by the Constitution and such powers include the authority to issue a Code of Conduct and summon the witnesses. However, no power to frame rules has been conferred upon the SJC. It is added that where the Constitution intended that an Institution created by it should be conferred rule making power, the appropriate enabling provisions stand incorporated in the Constitution. Reference, in this behalf, may be made,

inter alia, to Articles 67, 72, 87, 99, 139, 175A(4), 175A(17), 191, 202, 203J and 204(3) of the Constitution. Thus, it is contended, the SJC has no power to make any rule with regard to its procedure, therefore, the SJC Procedure of Enquiry 2005 is in excess of the powers available with the SJC under the Constitution, hence, *ultra vires* thereof. The learned counsel further reiterated that to hold that the SJC has rule making power would require reading words and expressions into the Constitution which is not permitted by law. In support of his contentions, the learned Sr. ASC relied upon the judgments reported as Pir Sabir Shah v. Shad Muhammad Khan, Member Provincial Assembly, N.-W.F.P. and another (PLD 1995 SC 66) and In the matter of Reference by the President of Pakistan under Article 162 of the Constitution of Islamic Republic of Pakistan [(PLD 1957 SC (Pak.) 219)].

14. In the above context, it was further contended that currently, no rules governing the procedure to be followed by the SJC have been framed in accordance with the Constitution and the law. And such void needs to be supplied by the Parliament as has been done in India through the enactment of “The Judges (Inquiry) Act,

1968”. It is further contended by the learned counsel that in absence of such rules or procedure, the SJC is at a “disadvantage”. Upon being asked to explain as to what he meant, after some hesitation, Mr. Hamid Khan, learned Sr. ASC submitted that the SJC could not conduct any proceeding against a Judge of a Superior Court or any other person in the absence of lawfully framed rules of procedure.

15. The learned counsel further contended that the case reported as The President-Referring Authority v. Mr. Justice Shaukat Ali (PLD 1971 SC 585) cannot be used as a precedent in the *lis* at hand, as the proceedings in the said case, were conducted when the Constitution stood abrogated. The SJC had been constituted under President's Order No.14 of 1970 and was conducting its proceedings under the Supreme Judicial Council (Investment of Powers) Order, 1970, President's Order No.20 of 1970 and the Judges (Compulsory Leave) Order, 1970 the President's Order No.27 of 1970. Reference in the said case had been filed under Article 128 of the 1962 Constitution read with the Provisional Constitution Order of 1969. With the change in law, the judgment in the case of Mr. Justice Shaukat Ali (*supra*) has lost its

relevance. It is further contended that the case of Chief Justice of Pakistan Iftikhar Muhammad Chaudhry (*supra*) is equally inapplicable in view of the addition of Article 10A of the Constitution.

16. The learned counsel also took exception to rule 7 of the SJC Procedure of Enquiry 2005 to contend that clause (5) of Article 209 of the Constitution requires that the decision to proceed or not to proceed against a particular person was vested with the SJC, while by virtue of rule 7 *ibid* such powers have been delegated to one Member of the SJC. Hence, the proceedings against the Petitioners initiated in terms of rule 7 *ibid* are *ultra vires* and illegal.

17. With reference to the composition of the SJC, it was contended by the learned counsel that one of its Members is himself the subject of the inquiry before the SJC, hence, debarred from being its Member in view of the provisions of Article 209(3) of the Constitution, which cannot be interpreted narrowly and must be given a wider meaning. In support of such contentions, the learned counsel relied upon the judgments of this Court reported as Pir Sabir Shah (*supra*) and In the matter of Reference by the President of Pakistan under Article 162

of the Constitution of Islamic Republic of Pakistan
(*supra*).

18. Mr. Munir A. Malik, the learned Sr. ASC an Amicus Curie was of the view that some of the various issues involved in this case have already been settled by a larger Bench of this Court in the case reported as Chief Justice of Pakistan Iftikhar Muhammad Chaudhry (*supra*), holding that the SJC is not a Court. It is at best a fact finding domestic forum set up by the Constitution to look into the conduct and capacity of the Judges of the Superior Courts. The SJC conducts an inquiry as opposed to a trial. Such an inquiry is only a fact finding and not a right determining exercise. It was emphasized that this Court by way of the aforesaid judgment has accepted/approved the interpretation of law as held in the case reported as Mr. Justice Shaukat Ali (*supra*), including the view that the SJC Report is not right determining as it is only recommendatory in nature and not binding on the President. In this behalf, reference was also made to the judgments of this Court reported as Khan Asfandyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others (PLD 2001 SC 607) and Malik Asad Ali and others v.

Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs, Islamabad and others (PLD 1998 SC 161).

19. Unlike Article 209 of the Constitution of the Islamic Republic of Pakistan, 1973 in terms of Article 124 of the Indian Constitution, Article 169 of the Pakistani Constitution of 1956; and Article 317 of the Indian Constitution (relating to the Public Service Commission), the inquiry is conducted by a Council or a Committee composed of Judges but not by the Court itself. Furthermore, the Indian Supreme Court in the matter of Reference under Article 317(1) of the Constitution of India (1983) 4 SCC 258 at pages 263-64 Para 7 & 8) has held that the findings of this Court under Article 317 of the Constitution are binding.

20. The learned Sr. ASC further contended that even though there is no express power conferred by the Constitution on the SJC to frame its Rules, it would have the “implied power” to regulate its own Procedure. There is no bar in Articles 209 and 210 of the Constitution upon the SJC to lay down its own Procedure, which is just and equitable including for holding in camera proceedings as has been held in the cases of Faqiri Vasu

v. State of Uttar Pradesh and others (2008) 2 SCC 409), State of Karnataka v. Vishwabharathi House Building Coop. Society and others (2003) 2 SCC 412), Reserve Bank of India and others v. Peerless General Finance and Investment Company Ltd and another (1996)1 SCC 642) and Muhammad Anayet Gondal v. The Registrar, Lahore High Court, Lahore and another (2015 SCMR 821).

Where a law confers jurisdiction it impliedly also grants the power of doing all such acts and to employ all such means as are essential and necessary for the exercise of such jurisdiction. Therefore, the SJC Procedure of Enquiry 2005 is covered by the doctrine of “implied powers”.

Without prejudice to the above, it was contended that the SJC Procedure of Enquiry 2005 are mere administrative and internal guidelines and, therefore, strictly not binding on the SJC in view of the cases reported as The State of Assam and another v. Ajit Kumar Sarma and others (AIR 1965 SC 1196) and Punjab Healthcare Commission v. Musthaq Ahmed Ch. And others (PLD 2016 Lahore 237). Thus, the framing by the SJC of the Procedure of Enquiry 2005 is not

unconstitutional and in any event are not binding on the SJC.

21. In answer to the question raised as to whether in camera proceedings before the SJC were violative of minimum standards of due process or Article 10A of the Constitution, it was contended, that since the SJC does not determine civil rights but only makes a recommendation to the President, the answer must be in the negative. Furthermore, in camera proceedings have to be distinguished from “secret proceedings” and the minimum standards of due process do not prohibit fair hearing through the in camera proceedings. The laws of many Countries contain provisions for holding judicial accountability proceedings in camera. However, there is no universal consensus on this issue. Judicial accountability through in camera proceedings is not necessarily violation of due process but cannot also be said that it is a “best practice”. It is a matter of Constitutional choice depending on the facts and circumstances of a particular Country. It was contended that the constitutionality of in camera proceedings have been upheld in the following cases, Privy Council Appeal No.9 of 2003 (Belize Judgment) and Land Mark

Communications, Inc. v. Commonwealth of Virginia (1978 435 US 829). In India, the Courts have even held that the accused Judge is not entitled to a copy of the Report submitted by the Committee of Judges unless Parliament takes further action on such Report [Sarojini Ramaswami (MRS) v. Union of India and others (1992) 4 SCC 506)]. This, it was added further reinforces the non-binding/non-right creating nature of the Committee of Judges.

22. The learned Amicus Curie stated that free access to justice is a Fundamental Right of the people of Pakistan and such a right is dependent upon an independent judiciary. There can be no concept of Independence of Judiciary unless it consists of persons in whose integrity, the people can repose their confidence. The only safeguard, in this behalf, after appointment, is the proceedings under Article 209 of the Constitution, which jurisdiction has very sparingly been exercised in the last 70 years, thus, in order to ensure the continuing confidence of the people in the judiciary, it would perhaps be appropriate that the proceedings of the SJC are conducted in an "Open Court". If the proceedings are conducted in camera, there is a possibility that it may

be presumed that an errant Judge has been protected by his peers.

23. Mr. Shahid Hamid, learned Sr. ASC, who is also an Amicus Curie, stated that the SJC is a Constitutional body, the authority whereof is not limited to inquire into the conduct of the Judges alone but includes within its ambit other high officials, like the Chief Election Commissioner and the Members of the Election Commission of Pakistan (ECP), who can only be removed by the SJC in view of Article 215 of the Constitution. The jurisdiction of the SJC, also includes the matters relating to the Auditor General of Pakistan, the Wafaqi Mohtasib and the various other Ombudsmen. The SJC is, therefore, not a domestic forum for the Superior Court Judges only but also a forum for determining whether or not a number of other public officials should continue to hold such Office, if charged with misconduct, etc.

24. With regard to the status of the SJC Procedure of Enquiry 2005, the learned Sr. ASC stated that the Constitution is a living organic document. The interpretation of its provisions cannot be static and frozen at a particular point of time. A reference was made to Article 218(3) of the Constitution to contend that the

said provision does not by itself empower the ECP to make rules authorizing it to give effect to the said provision, however, in the case of Workers' Party Pakistan through Akhtar Hussain, Advocate, General Secretary and 6 others v. Federation of Pakistan and 2 others (PLD 2012 SC 681), this Court relied upon the text of Article 218(3) of the Constitution alone to hold that the ECP could make the rules itself.

The above view, it was contended, was clarified and reaffirmed by this Court in the case reported as Workers Party Pakistan through General Secretary and 6 others v. Federation of Pakistan and 2 others (PLD 2013 SC 406).

25. The SJC, it was added, is a Constitutional body certainly no less and arguable higher in status than the ECP. The rules made by the ECP to perform its Constitutional duty under Article 218(3) of the Constitution have statutory force. Thus, the SJC Procedure of Enquiry 2005 made by SJC to perform its Constitutional duty under Article 209 of the Constitution should also be deemed to have statutory force.

26. It was also the case of the learned Sr. ASC that the SJC cannot possibly be regarded as a mere fact finding body. Can the President remove a Superior Court

Judge notwithstanding the SJC's Report that he is not guilty of misconduct? Similarly, can the President refuse to remove a Superior Court Judge despite the SJC's finding that such Judge is guilty of misconduct? The SJC Reports have binding force except perhaps in a rare case where the President is persuaded to take a different view on the basis of material not considered by the SJC. Thus, the procedure followed by the SJC cannot be regarded as a non-statutory internal Rules of Procedure of an administrative forum. It is added that though the SJC Procedure of Enquiry 2005 have statutory force yet its various provisions must be compliant with all the Fundamental Rights. If the SJC Procedure of Enquiry 2005 did not have statutory force it is difficult to see why it needs to be compliant with all the Fundamental Rights.

27. It is further added by the learned Sr. ASC that before insertion of Articles 10A and 19A in the Constitution through the 18th Amendment Act, 2010, the Articles 4, 8, 9, 14 and 25 of the Constitution required that every person was entitled to an open trial unless there were compelling national or public interest considerations for a degree of secrecy. *Prima facie*, the provisions of paragraph 13 of the SJC Procedure of

Enquiry 2005 that the SJC proceedings shall not be open to public and shall not be reported unless directed otherwise appear to be in conflict with Articles 4, 8, 9, 14 and 25 of the Constitution. It is next added that the right of a Superior Court Judge to hold and continue in office unless it is determined through due process of law that he is physically or mentally incapacitated or guilty of misconduct cannot be regarded as anything other than a civil right.

28. It is also the case of the learned Sr. ASC that the question whether or not a Superior Court Judge is guilty of misconduct or is mentally or physically incapacitated is undoubtedly a matter of public importance, as it pertains to the administration of justice. Thus, the only question is whether the restrictions placed on the public's right to know by paragraph 13 of the SJC Procedure of Enquiry 2005 is a reasonable restriction or not?

29. It is contended that an open trial at all stages and the people's right to know all matters of public importance are not absolute rights. They are subject to the exceptions which may pertain to the whole of a particular trial or part of it. For example, the public may

be barred from a trial of a suspect charged with an offence in connection with sensitive military secrets or of State security. Reference was made to the decision dated 09.02.2016 of the United Kingdom Court of Appeal reported as Guardian News and Media Limited and others v. Erol Incedal [(2016) EWCA Crim 11]. In rape cases in camera proceedings may be held to protect the dignity of the victims. In mental health cases, in camera proceedings may be necessary to protect the identity of the patients. Similar considerations may govern guardianship cases. Even in corruption cases, it may be necessary to restrict access to information relating to Treaties with Foreign Governments. However, even after consideration of all the matters it does not appear reasonable to impose restrictions on the inquiry proceedings against a Superior Court Judge, more particularly, when he himself desires not to avail the protection of such restrictions. It is further added that it cannot possibly be imagined that the SJC inquiry will be other than absolutely free, fair and impartial or that the SJC will not ensure due process in the inquiry. However, justice has also to be seen to be done. If the inquiry proceedings are open to public there will no room for any

doubt that the inquiry has not been free, fair and impartial and that due process of law was not observed.

30. It is next added that the SJC Procedure of Enquiry 2005 needs to contain a degree of flexibility where, in the peculiar circumstances of a case, it may be necessary to restrict access to proceedings at the inquiry stage. All this could be achieved by appropriately amending paragraph 13(1)(3).

31. The learned Sr. ASC concluded that this Court may consider holding and declaring that the Constitutional powers and mandate conferred on the SJC under Article 209 of the Constitution necessarily includes the power to make rules for the effective implementation of its provisions and the SJC Procedure of Enquiry 2005 must be deemed to have statutory force and its provisions ought to be compliant with all Fundamental Rights guaranteed by the Constitution. The right of a Superior Court Judge to continue in office is a civil right and entitled to protection conferred by the Fundamental Rights guaranteed by the Constitution. The question whether or not a Superior Court Judge should continue in office in the face of charge(s) of misconduct is a matter of public importance and the general public has a right of

access to the SJC proceedings; Articles 4, 8, 9, 10A, 14, 19A and 25 of the Constitution and the principles of natural justice required that all proceedings of the SJC should be open to public unless the SJC determines otherwise in the peculiar circumstances of a case. Even in such a case, the SJC may release the record of in camera proceedings at the conclusion of the inquiry and the SJC must amend paragraph 13 of its Procedure of Enquiry, 2005 in accordance with the above declarations.

32. Mr. Ashtar Ausaf Ali, learned Attorney General for Pakistan by relying upon the judgments of this Court reported as Khan Asfandar Wali and others (*supra*), Mr. Justice Shaukat Ali (*supra*) and Chief Justice of Pakistan Iftikhar Muhammad Chaudhry (*supra*), contended that the SJC is a unique Institution. However, it is not a Court. Similarly, it is now a well settled principle of law that the proceedings before the SJC do not constitute a trial for determination of civil rights or criminal liability. Such proceedings are a fact finding inquiry only. Hence, Article 10A of the Constitution is inapplicable to such proceedings. It was also the case of the learned Attorney General for Pakistan that an appropriate forum for determination of rights is this Court whose jurisdiction

can be invoked on the grounds and in the circumstances set forth in the case reported as Chief Justice of Pakistan Iftikhar Muhammad Chaudhry (*supra*).

33. The learned Attorney General for Pakistan referred to the judgment of this Court reported as Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and 16 others (PLD 1993 SC 341) to contend that this Court has placed reliance upon Willoughby a Constitution of United States, Second Edition, Vol. 11 at page 1709 where the term “due process of law” has been summarized as follows:

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

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

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

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

34. Reference was also made to the judgment of this Court reported as The University of Dacca through its Vice-Chancellor and the Registrar, University of Dacca v. Zakir Ahmed (PLD 1965 SC 90) wherein it was held that in disciplinary proceedings the rules of natural

justice must be observed and such procedure is followed as has been laid down in the SJC Procedure of Enquiry 2005 which is in accordance with the law and the standards of due process referred to above and no exception can be taken thereto.

35. The Supreme Judicial Council's Order dated 18.05.2017, it was contended, is based, *inter alia*, on the judgments of this Court in the cases reported as The President v. Mr. Justice Shaukat Ali (*supra*) and Chief Justice of Pakistan Iftikhar Muhammad Chaudhry (*supra*).

36. Similar proceedings in foreign jurisdiction are also held in camera. Reliance is placed on the cases reported as George Meerabux (*supra*), Kentucky State Bar Association v. Taylor [482 S.W.2d 574 (Ky.Ct.App.1972)] and McCartney v. Commission on Judicial Qualifications [12 Cal. 3d 512 (Supreme Court of California)].

37. More recently, it was agreed by consensus in the Mount Scopus International Standards of Judicial Independence, consolidated in 2015 that disciplinary proceedings pertaining to the Judges ought to be held in camera.

38. Therefore, in camera proceedings not only comply with the rules of natural justice but also conform to international standards on the subject matter. It was contended that neither the rights of the individual nor the canons of natural justice or fairness can be said to be violated by conducting such proceedings in camera. All procedural fairness is accorded to the Judges in question and thus any claim of violation of natural justice is untenable in view of the law and the international practices.

39. It is submitted that proceedings before the SJC carry implications on the administration of justice and the Independence of Judiciary. The purpose of conducting said proceedings in camera, are two-fold: firstly, they protect the Petitioners from a whispering campaign and secondly they shield complainants from unwanted and unwarranted publicity. A public trial would give rise to murmurs and whispers about the Petitioner's integrity and propriety. Such murmurs while a Judge remains in Office are likely to embarrass not only an individual Judge, but the administration of justice as a whole. Moreover, in camera nature of these proceedings allows complainants and witnesses to

approach the SJC without fear of recrimination. To allow such proceedings to be conducted publicly would not only adversely affect the Independence of the Judiciary but would also dissuade complainants from approaching the SJC.

40. Moreover, it was added, a domestic fact finding forum, unlike a Court of Law, is not constrained by a Code of Procedure, thus, has no requirement to conduct its proceedings openly. A perusal of the aforesaid precedents reveals that the SJC has legitimate reasons for keeping its proceedings in camera, since the same has nexus with the protection of complainants and the Independence of Judiciary.

41. Concise statements have been filed on behalf of the Federation of Pakistan through which it is contended that the SJC Procedure of Enquiry 2005, has not statutory force and this vacuum needs to be filled by the Parliament and the matter be referred to it. It has also been stated that Article 10A of the Constitution and the other provisions i.e. the Fundamental Rights are applicable to the proceedings before the SJC.

42. Mr. Hamid Khan, learned Sr. ASC took exception to the contentions of the learned Attorney

General for Pakistan which were apparently in conflict with the concise statements filed on behalf of the Federation of Pakistan. It was his case that the contentions of the learned Attorney General for Pakistan are not on instructions of the Federation i.e. his client. The learned Attorney General for Pakistan contended that he has appeared before this Court pursuant to a notice under Order XXVII-A CPC and has made his submissions in such capacity. He further asserted that the Federation was only a proforma Respondent in the instant proceedings.

43. Heard. Record perused.

44. At the very outset, it may be appropriate to remind ourselves that while interpreting any provision of the Constitution or for that matter even the law it is imperative that the said provision be contextualized in its proper perspective keeping in view its genesis and more importantly, the purpose sought to be achieved by its enactment.

45. There can be no escape from the obvious fact that access to justice is a Fundamental Right of the people of Pakistan guaranteed under the Constitution. There can be no concept of access to justice without an

Independent Judiciary. The jurisprudence, both nationally and internationally which has evolved over the ages, around the concept of Independence of the Judiciary recognizes that the security of tenure of Judges is a critical pre-condition for such independence. This is a universally accepted principle and has also been laid down by a larger Bench of this Court in the case reported as Chief Justice of Pakistan Iftikhar Muhammad Chaudhry (*supra*) in the following terms:

“60. I would, therefore, conclude and hold that access to justice was a Fundamental Right which the Constitution had guaranteed to the people; that the existence of an independent and vibrant judiciary was indispensable and crucial for the enjoyment of the said constitutional assurance and in the absence thereof, this right would be a mere illusion; that without security to the Judges of the Superior Courts vis-à-vis, inter alia, their service and the tenure thereof, ...”

(underlining is for emphasis)

46. Historically, the Fundamental Rights of the people require protection from the excess of the Executive and the Vested Interest, both commercial and political. In order to safeguard the Fundamental Rights of the people guaranteed under the Constitution, the Independence of Judiciary obviously must be insulated from the onslaught of the Executive and such vested Interests,

who are past masters at Institutional Capture. Thus, the security of tenure of Judges more so those of the Superior Courts is imperative and, therefore, adequate safeguards in this behalf are provided including by enacting what appears to be a rather cumbersome and strict process for their removal. This cardinal principle is reflected in the Constitutional dispensation of almost all Democratic countries peopled by citizens and not subjects. The exceptions, in this behalf, are almost always found in countries either under Military Dictatorships or ruled by Fascist regimes. The said safeguard is reflected in our Constitution under Article 209. It is no coincidence that each and every time a Military Dictatorship is imposed in Pakistan and a Constitutional “deviation” occurs an essential feature of the new dispensation is the promulgation of some Pseudo Legal Instrument enabling the removal of Judges by the Executive without the necessity of resorting to the provisions of Article 209 of the Constitution. Reference, in this behalf, may be made to “The Oath of Office (Judges) Order, 2000” and “The Oath of Office (Judges) Order, 2007”. With its independence crushed the judiciary is subjugated and the Fundamental Rights of

the people including the right to access to justice evaporates.

47. Incidentally, other Constitutional Institutions and Legal Offices bestowed or mandated with the responsibility of enforcing Constitutional obligations or enforcing the rights of the people against the Executive have also been granted such security of tenure by requiring removal of the incumbents thereof through the SJC created under Article 209 of the Constitution. These Offices, *inter alia*, includes Chief Election Commissioner and the Members of the Election Commission of Pakistan who can only be removed by the SJC in view of Article 215 of the Constitution. The jurisdiction of the SJC also includes the matters relating to the removal of the Auditor General of Pakistan under Article 268(5) of the Constitution. Similarly, Section 5 of the Federal Ombudsmen Institutional Reforms Act, 2013 (Act of 2013) provides that an Ombudsman may be removed from Office through the SJC. As per Section 2(b) and (c) of the Act of 2013 Ombudsman means an Ombudsman appointed under the Wafaqi Mohtasib (Ombudsman) Order, 1983 (P.O. No.1 of 1983), the Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000; The

Insurance Ordinance, 2000; The Banking Companies Ordinance, 1962; and The Protection against Harassment of Women at the Workplace Act, 2010.

48. The aforesaid leaves no manner of doubt that the primary purpose of Article 209 of the Constitution is to ensure the security of tenure of those who can only be removed thereunder. It is in the above context and backdrop, the provisions of Article 209 of the Constitution must necessarily be interpreted and applied without allowing ourselves to be distracted by the intensity of the real or perceived difficulties that may currently exist.

49. However, it does not mean that those falling within the ambit of Article 209 of the Constitution are secret cows beyond the pale of accountability. If a person loses or abandons the necessary attributes of a Judge of integrity, probity, legal expertise and mental balance then he is not entitled to any security of tenure and must be weeded out post-haste with surgical precision through due process in terms of Article 209 of the Constitution. Such removal is necessary to preserve the Independence of Judiciary. Accountability strengthens rather than weakens institutions.

50. The status and nature of proceedings before the SJC have come up for adjudication on more than one occasions before this Court. In the case reported as Chief Justice of Pakistan Iftikhar Muhammad Chaudhry (*supra*), a larger Bench of this Court after examining all preceding pronouncements by this Court on the subject settled several aspects of the matters at hand. In the aforesaid judgment, it was observed as follows:

“96. The conclusion is thus inevitable that the Supreme Judicial Council is a forum created by the Constitution but the Constitution itself has refused to grant it the status of a court.”

It was also held as follows:

“97. Although, having discovered the verdict of the Constitution itself about the status of the S.J.C., it may no longer be necessary to say anything more on the subject but it may be of some help to mention the further insight provided to us by the Constitution vis-a-vis the said issue. The proceedings which take place before the S.J.C. have been described, by Article 209 of the Constitution, as an inquiry and not a trial. It is too well known by now that an inquiry is only a fact-finding and not a right-determining exercise and further that the courts ordinarily hold trials and finally pronounce upon the rights of the parties if the proceedings were of a civil nature or declare the guilt or innocence of the accused persons if the proceedings were of a criminal or a quasi-criminal nature. The courts of law deliver judgments and pass orders which are final, enforceable and executable and do not submit reports. But according to clause (6) of the

abovementioned Article 209, what is produced by the S.J.C. as a result of the proceedings taken by it is only a report which is to be submitted/sent to the President. Although the opinion of the S.J.C. about the fitness of a Judge receives **quietus** but it has no power to make a final pronouncement which could **PROPRIO VIGORE** be binding on and create rights and obligations between the parties and consequently could not order removal of a Judge from office who is found unfit by it to hold the said office. In fact, as declared by this Court in the case of KHAN ASFAND YAR WALI (PLD 2001 SC 607) and in the case of MALIK ASAD (PLD 1998 SC 161), the findings of the S.J.C. and its report to the President were only "recommendatory in nature". It may be added that if the intention of the framers of the Constitution was to have the inquiry in question conducted by a court then it would be absurd to expect the Constitution to first create a Council and then to expect us to stretch all limits and confer the status of a court on the said Council for the said purpose when the same object could have been achieved by assigning the said task to an already existing court like it had been done through Article 169 of the 1956 Constitution which had cast this obligation on the Supreme Court itself with respect to the High Court Judges."

(bold for emphasis)

In the aforesaid judgment, it was also held that:

"98. Having thus examined the relevant legal and constitutional provisions and also having surveyed the case law, I am of the opinion that the true status of the Supreme Judicial Council is the one suggested by Syed Sharif-ud-Din Pirzada, the learned Sr. ASC appearing for the President of Pakistan while placing reliance on MR. JUSTICE SHAUKAT ALI'S CASE (PLD 1971 SC 585 at 602) wherein the said status had been determined as

under:--

"Moreover, an inquiry into the conduct of a Judge is neither a criminal indictment nor even a quasi-criminal proceedings, but it is, in our opinion, mainly an ADMINISTRATIVE PROCEEDINGS conducted by a DOMESTIC FORUM to examine the professional fitness of a Judge. The subject-matter of these proceedings is neither civil rights and duties nor criminal liabilities. It is simply the conduct of a Judge which is to be properly reviewed in the interest of the purity and honour of the judiciary. The FORUM consists of Judges of superior courts who also belong to the same profession. To be tried by one's peers is a protection because they understand one's difficulties, problems and the situation in which one was. DOCTORS, ARCHITECTS, ACCOUNTANTS AND LAWYERS aim at having and have THEIR DOMESTIC TRIBUNALS, that is to say, the tribunals which Judge their conduct are manned by their own peers."?

It was also held as follows:

"99. ... hold that while the Supreme Judicial Council may have some attributes and trappings of a court of law but it was neither intended by the Constitution to be a court nor could any such status be conferred on it in view of the relevant constitutional provisions. It is, at best, a fact-finding domestic forum set up by the Constitution to look into the affairs of the Judges of the Superior Judiciary. I may, however, add that the said Council is entitled to the highest of respect because at least three of its members are the most senior Judges of the country. ..."

51. The relevant provisions of the Constitution, more particularly, Articles 209, 210 and 211 when examined in the light of the judgment handed down by a larger Bench of this Court in the case reported as Chief Justice of Pakistan Iftikhar Muhammad Choudhary (*supra*) and the previous pronouncements on the subject noted and quoted with approval in the aforesaid judgment, the relevant portions whereof have been reproduced in *extenso* hereinabove could reveal that:

firstly, the SJC is a Unique Forum created by the Constitution;

secondly, the SJC is not a Court though it may exhibit some of its trappings including the power to punish for contempt;

thirdly, the proceedings before the SJC are essentially a fact finding inquiry;

fourthly, the SJC is akin to a domestic forum and it conducts administrative proceedings regarding the question of conduct or capacity of a Judge, who is to be judged by his own peers; and

fifthly, the findings of SJC are recommendatory in nature and do not enjoy the status, a right determining

judgment handed down by a Civil or Criminal Court which is *per se* final, enforceable or executable;

sixthly though, the SJC cannot itself remove a Judge on the basis of its findings but any conclusion drawn has been bestowed with an element of quietus i.e. finality.

52. The questions that have arisen in the *lis* at hand, as can be identified from the submissions of the learned counsels which have been referred to above, need to be adjudicated upon in the light of the aforesaid observations in a manner that complements and supplements the judgment of the larger Bench of this Court handed down in the case of Chief Justice of Pakistan Iftikhar Muhammad Chaudhry (*supra*).

53. Adverting first to the challenge thrown to the *vires* and validity in the SJC Procedure of Enquiry 2005, it has been noted that the first limb of the contentions of the learned counsel for the Petitioners, in this behalf, is that no rule making power has been conferred upon the SJC and it has been further contended that where the framers of the Constitution wished to do so such power was specifically conferred and, in this behalf, reference was made to the various provisions of the Constitution

i.e. Articles 67, 72, 87, 99, 139, 175A(4), 175A(17), 191, 202, 203J and 204(3).

54. The Supreme Judicial Council has been created by and conferred with the jurisdiction through Article 209 of the Constitution. It is settled law that where a law (more so the Constitution) confers jurisdiction it impliedly also grants the power to do all such acts and employs all such means as are essential and necessary for the exercise of such jurisdiction. This principle of “implied power” is based on the well known legal maxim “*Cui Jurisdictio Data Est, Ea Quoque Concessa Esse Videntur, Sine Quibus Jurisdictio Explicari Non Potuit*” i.e. “To whomsoever a jurisdiction is given, those things are also supposed to be granted, without which the jurisdiction cannot be exercised.” Reference, in this behalf, may be made to “N S Bindra’s Interpretation of Statutes”, (Tenth Edition at page 642).

55. Similarly, in “Statutory Interpretation” by Francis Bennion in Fourth Edition at page 429 with regard to implied and ancillary powers, it is stated:

“... that ‘whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*’. ...”

The aforesaid legal maxim and the principle of “implied power” is well established in our jurisprudence. This Court in the case of Muhammad Anayet Gondal (*supra*), observed that:

“5. ... Even otherwise, it is a settled principle of law that where a statute confers a jurisdiction on a Court or Tribunal it also confers by implication the powers which are reasonably incidental and ancillary to effective exercise of jurisdiction. ...”

56. In the case of Ahmad Khan v. Commissioner, Rawalpindi Division and another [PLD 1965 (W.P.) Peshawar 65], it was observed that:

“6. ... It is one of the cardinal rules of construction that where an Act confers a jurisdiction it impliedly also grants the power of doing all such acts or employ such means which are essentially necessary to its execution. This cardinal rule is based on the doctrine of “implied powers” which in turn is embodied in the maxim “*Quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest*”. The full and true import of this maxim has been lucidly expressed in *Fanton v. Hameton* (1) (**11 Moo. P C c. 347**), which is as follows:-

“Whenever anything is authorised and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorised in express terms be also done, then that something else will be supplied by necessary intendment. ...”

57. In the case reported as Commissioner, Khairpur Division, Khairpur and another v. Ali Sher Sarki (PLD 1971 SC 242), this Court held that under the West Pakistan Control of Goondas Ordinance, 1959, the Commissioner had the power to grant interlocutory relief, though not expressly provided for. This principle was reiterated in the case of Sind Employees' Social Security Institution and another v. Adamjee Cotton Mills Ltd. (PLD 1975 SC 32).

58. The Indian Supreme Court in its judgment reported as State of Punjab v. Salil Sabhlok and others [(2013) 5 SCC 1 at page 33], held as follows:

“39. ... A reading of Article 316 of the Constitution would show that it confers power on the Governor of the State to appoint the Chairman and other Members of a Public Service Commission. It has been held by this Court in *Mohinder Singh Gill v. Chief Election Commr.*, that an authority has implied powers to make available and carry in to effect powers expressly conferred on it. Thus, under Article 316 of the Constitution, the Governor of a State has not only the express power of appointing the Chairman and other Members of the Public Service Commission but also the implied powers to lay down the procedure for appointment of Chairman and Members of the Public Service Commission and the High Court cannot under Article 226 of the Constitution usurp this constitutional power of the Government and lay down the procedure for appointment of the Chairman and

other Members of the Public Service Commission. ...”

(underlining for emphasis)

Reference, in this behalf, may be made to the observations of this Court in the judgment reported as Workers’ Party Pakistan through Akhtar Hussain, Advocate, General Secretary and 6 others v. Federation of Pakistan and 2 others (PLD 2012 SC 681), which reads as follows:

“The Election Commission is empowered to frame rules to ensure that the elections are conducted justly, fairly, honestly and in accordance with the law and that corrupt practices should be guarded against. There is unanimity of views on various suggested courses of action. Therefore, we direct the Election Commission to frame rules and issue instructions to provide legal sanction to these measures and implement the same to achieve the ultimate objective of fair, free, just and honest elections.”

A close scrutiny of the aforesaid observations would reveal that the same are more than just a reference to the rule making power envisaged by Section 107 of the Representation of the People Act, 1976 (RoPA of 1976) and in fact embodies the implied incidental and ancillary power of the ECP to ensure due fulfillment of its Constitutional mandate.

59. It appears to be well settled principle of law that when a jurisdiction is conferred by any law, then power of doing all that is necessary for the exercise of such jurisdiction, is also implied in it. With regard to a forum vested with the authority to return a finding or an adjudication, after a fact finding exercise the most primary and elemental of such incidental powers would be the authority to formulate its procedure. The word “Procedure” has been defined in the Corpus Juris Secundum (1951), Volume LXXII, at Page 971 in the following words:

“PROCEDURE. The word “procedure” is defined generally as meaning a course or mode of action; the act or manner of proceeding or moving forward; the manner of proceeding or acting; progress, process, operation, conduct, a step taken, an act performed, a proceeding.

In law the “procedure” signifies the means whereby the court reaches out to restore rights and remedy wrongs, and in this sense the term is defined as used in the phrase “practice and procedure” ...”

60. In the case of Muhammad Ijaz Ahmad Chaudhry Vs. Mumtaz Ahmad Tarar and others (2016 SCMR 1), this principle was reiterated in the following words:

“12. ... Another principle of general application is that every procedure that promotes the administration of justice is

permissible unless it is expressly prohibited. Reference in this behalf can be made to H.M. Saya & Co. v. Wazir Ali Industries Ltd. (PLD 1969 SC 65). ...”

The aforesaid leaves no manner of doubt that where the Constitution creates a forum (SJC) vested with the jurisdiction of accountability of the Judges of the Superior Courts and holders of other high Offices as mentioned in the Constitution or the law, such forum (SJC) has implied and ancillary power to give effect to the mandate of the Constitution, more particularly, by devising its own procedure. Such implied power stands conferred even upon administrative and Domestic Tribunals created or conceived by sub-Constitutional legislation and the other statutory instruments. It is difficult to accept the contentions of the learned counsel to the contrary, as it would amount to reducing the SJC a forum created by the Constitution to a status lower than that of a Domestic Tribunal formed by a Sub-Constitutional Statue or rules framed thereunder.

61. Thus, no exception can be taken to the validity or *vires* of the SJC Procedure of Enquiry 2005 on this ground.

62. A desperate attempt was made to argue that in the absence of rule making power of the SJC, such voids

having not been filled by appropriate legislation by the Parliament, the SJC cannot function or in other words proceed against the Petitioners. This aspect of the matter has been dealt herein above as has already been held that the SJC has the implied power to fulfill its Constitutional mandate including by formulating its own procedure. Furthermore, if the contention of the learned counsel is accepted, it would reduce Articles 209, 210 and 211 of the Constitution to a dead letter and therefore redundant.

63. In various judgments of this Court, it has been held that there can be no interpretation of the Constitution which may lead to redundancy of any of its provision. In the case of Chief Justice of Pakistan Iftikhar Muhammad Chaudhry (supra), it was observed that:

“68. ... Every student of law is expected to know the principle which is too well established by now that no redundancy or surplusage could ever be attributed to a draftsman much less to the one drafting the Constitution. ...”

Similarly, in the case reported as Regarding Pensionary Benefits of the Judges of Superior Courts from the date of their Respective Retirements, Irrespective of their Length of Service as Such Judges, etc. (PLD 2013 SC 829), it was observed as follows:

“69. ... when we revert to some well recognized principles of interpretation of statute, we find the following basic principles outlined for this purpose.

- g. It is a cardinal rule of construction of statutes that no words are to be added or omitted or treated as surplusage or redundant.”

64. In the case of Shahid Nabi Malik and another Vs. Chief Election Commissioner, Islamabad and 7 others (PLD 1997 SC 32), it was observed by this Court that:

“6. ... it is well-established principle that while interpreting a Constitutional provision it must be remembered that a Constitution unlike a statute cannot be changed or amended frequently. A document of such a basic nature is not merely the imprisonment of past but is also alive to the future aspiration and need of the nation. Therefore, while interpreting a Constitutional document it must be read and considered as a whole to discover the true intention of its framers. It is for these reasons that no redundancy, surplusage, absurdity or inconsistency can be attributed to the framers of the Constitution. ...”

(underlining is for emphasis)

65. Thus, the contentions of the learned Sr. ASC offend against the most elemental principles of settled law pertaining to interpretation of the Constitution as has been repeatedly and consistently laid down by this Court.

66. An objection has been raised by Mr. Hamid Khan, learned Sr. ASC to the constitution of the SJC,

conducting the proceedings against the Petitioners. The learned Sr. ASC has advanced an interpretation of Article 209(3) of the Constitution to canvass the point of view that any Member of the SJC as mentioned in Article 209(2) whose conduct or capacity is the subject matter of an inquiry before the SJC cannot act as a Member of the SJC even in proceedings against a third party. It is his point of view that Article 209(3) of the Constitution like other provisions of the Constitution should be interpreted broadly and not narrowly to limit its import merely to avoid an obvious situation of a person being the Judge of his own cause.

67. Article 209(3) of the Constitution is reproduced hereunder for ease of reference:

“209. (3) If at any time the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or any other cause, then-

- (a) if such member is a Judge of the Supreme Court, the Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b) of clause (2), and
- (b) if such member is the Chief Justice of a High Court, the Chief Justice of another High Court who is next in seniority amongst the Chief Justices of the remaining High Courts,

shall act as a member of the Council
in his place.”

A perusal of the aforesaid provisions makes it clear and obvious that it not only precludes a person from being a Judge in his own cause but more importantly, caters for the situation in its entirety where a Member of the SJC as mentioned in Article 209(2) of the Constitution himself the subject matter of an inquiry, by identifying the person who will act in substitution of such Member. This aspect of the matter, which is self-evident, perhaps, has escaped the notice of the learned counsel.

68. The question whether a Judge under inquiry can be temporarily stopped from performing his judicial or official functions came up before a larger Bench of this Court in the case reported as Chief Justice of Pakistan Iftikhar Muhammad Chaudhry (*supra*) wherein it was observed as follows:

“132. ... It may be added that even a temporary disability cast on a Judge in the matter of discharging his constitutional and official obligations as such amounted to “REMOVAL” from office and was not permitted by our Constitution.”

(underlining is for emphasis)

69. To act as a Member of the SJC is an official function of a Judge and in view of the dictum as laid

down by this Court reproduced herein above restraining a Judge from being a Member of the SJC would amount to his removal, which is not permissible under the law, except as a consequence of, a final verdict by the SJC in terms of Article 209 of the Constitution. Thus, no matter how broadly or narrowly interpreted Article 209(3) of the Constitution, the contentions of the learned Sr. ASC that a Judge who is the subject matter of an inquiry before the SJC cannot sit as a Member thereof in respect of the proceedings against another person is misconceived as it is not only contrary to the words and expressions employed in Article 209(3) of the Constitution itself but also the law as laid down by this Court in the case of Chief Justice of Pakistan Iftikhar Muhammad Chaudhry (*supra*) referred to and reproduced herein above.

70. The learned Sr. ASC also focused on paragraph 7 of the SJC Procedure of Enquiry 2005 and contended that by way of the aforesaid provisions, the power to determine whether a complaint, *prima facie*, discloses grounds for proceeding under Article 209 of the Constitution has been delegated to a Member of the SJC, which is contrary to the provisions of Article 209 of the Constitution. We are afraid that the contentions of the

learned counsel are wholly misconceived. No doubt, preliminary spadework may be undertaken by a Member of the SJC but the decision to proceed or not to proceed against a Judge is in the sole and exclusive domain of the SJC itself and has not been delegated to anybody. The aforesaid is obvious from the provisions of paragraph 7 (1)(b) of the SJC Procedure of Enquiry 2005, which reads as follows:

“7. Procedure for scrutinizing information:-(1) Once any information in respect of enquiry into the conduct of a Judge is received by any Member or the Council, it shall be presented to the Chairman of the Council, who ; shall

- (a)
- (b) if the Council is satisfied that the information *prima facie* discloses sufficient material for an enquiry, it shall proceed to consider the same.”

Reference, in this behalf, may also be made to paragraph 9(1) of the SJC Procedure of Enquiry 2005, which reads as follows:-

“9. (1) If the Council decides to proceed against a Judge, a show cause notice shall be issued to him alongwith supporting material calling upon him to explain his conduct within 14 days.”

The aforesaid provisions are a complete and obvious answer to the contentions of the learned counsel.

71. It has been noted with some interest that Mr. Hamid Khan, learned Sr. ASC for the Petitioners attempted to draw strength from the concise statements purportedly filed by the Federal Government to contend that the Procedure of the SJC can and needs to be regulated through an Act of Parliament. The concise statement i.e. Civil Misc. Application No.8647 of 2017 in Constitution Petition No.29 of 2017 has been purportedly filed by Respondent No.1 i.e. the Federation of Pakistan through the learned Attorney General for Pakistan. As mentioned above, the Attorney General for Pakistan has disowned this concise statement and stated that the Federation is only a proforma Respondent. Civil Misc. Application No.2528 of 2018 has been filed in Constitution Petition No.36 of 2017, which is identical to the concise statement referred to above. This too has been filed on behalf of the Federation but incidentally not through the learned Attorney General for Pakistan but through an "Attorney". It bears stamp and purported signatures of one Muhammad Kamran, Section Officer, Ministry of Law & Justice, Government of Pakistan, Islamabad. It is not clear on whose instructions the said Muhammad Kamran, Section Officer has filed this

concise statement purporting or at least attempting to support the Petitioners. Some provisions of the Constitution and the International Instruments have reproduced without any worthwhile value addition. In view of the rather simplistic and redundantly nature of its contents and in view of the contentions of the learned Attorney General for Pakistan, we find it unnecessary even to comment upon these concise statements.

72. However, it has been noticed that it is stated therein that the matter be referred to the Parliament for framing the law to govern the Procedure of the SJC. A reference was also made by Mr. Hamid Khan, learned Sr. ASC to the Judges (Inquiry) Act, 1968, in India as an example of supplying of procedure by the Parliament in respect of the disciplinary proceedings against a serving Judge of a Superior Court.

73. As we have already noted above that with regard to the process of accountability of Judges, a special Constitutional Forum of SJC has been created by the Constitution. The proceedings before it are administrative in nature where a Judge is judged by his own peers. Though the findings which may be recommendatory in nature but the same have bestowed

with an element of quietus or collusiveness as is obvious from the judgments of this Court referred to and reproduced herein above. Thus, in our Constitution, a conscience effort has been successfully made to insulate this process from undue influence of subjugation by other two Organs of the State.

74. In India, a different path has been chosen and the power to impeach a Judge was conferred upon the Parliament. The procedure, in this behalf, was supplied in the Act of Parliament i.e. The Judges (Inquiry), Act, 1968. The aforesaid Act has been promulgated in India in terms of Article 124(5) of the Constitution of India, which reads as under:-

“124. (5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).”

75. A perusal of our Constitution reveals that no such parallel provision exists in our Constitution. A glance at the Legislative List also does not, *prima facie*, conclusively settle the matter. In the circumstances, if any such legislation is enacted, more particularly, if by it an attempt is made by the other institution of the State to infiltrate and influence the process under Article 209

of the Constitution in the garb of procedure such a law may be of questionable constitutionality, both with regard to legislative competence and for being violative of the principles of Independence of Judiciary.

76. We have noted that the SJC, a forum constituted by the Constitution is vested with the implied power to do all such things necessary to fulfill its mandate, more particularly, to design and formulate the procedure itself. However, such procedure must be just and fair as has been held by this Court in its judgment reported as The University of Dacca through its Vice-Chancellor and another v. Zakir Ahmed (PLD 1965 SC 90) in the following terms (para E to G at pp 103-104):

“ From a careful review of the decisions cited before us it appears that wherever any person or body of persons is empowered to take decisions after *ex post facto* investigation into facts which would result in consequences affecting the person, property or other right of another person, then in the absence of any express words in the enactment giving such power excluding the application of the principles of natural justice, the Courts of law are inclined generally to imply that the power so given is coupled with the duty to act in accordance with such principles of natural justice as may be applicable in the facts and circumstances of a given case.

What these principles of natural justice are it is not possible to lay down with any exactness, for, they have been variously defined in various cases, as was

pointed out by the Judicial Committee in the case of the *University of Ceylon v. Fernando*. Tucker, L.J., said in *Russel v. Duke of Norfolk* (1) “the requirements of a natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the Tribunal is acting, the subject-matter that is being dealt with, and so forth.” Nevertheless, the general consensus of judicial opinion seems to be that, in order to ensure the “elementary and essential principles of fairness” as a matter of necessary implication, the person sought to be affected must at least be made aware of the nature of the allegations against him, he should be given a fair opportunity to make any relevant statement putting forward his own case and “to correct or controvert any relevant statement brought forward to his prejudice.” Of course, the person, body or authority concerned must act in good faith, but it would appear that it is not bound to treat the matter as if it was a trial or to administer oath or examine witnesses in presence of the person accused or give him facility for cross-examining the witnesses against him or even to serve a formal charge-sheet upon him. Such a person or authority can obtain information in any way it thinks fit, provided it gives a fair opportunity to the person sought to be affected to correct or contradict any relevant statement prejudicial to him. In other words, “in order to act justly and to reach just ends by just means” the Courts insist that the person or authority should have adopted the above “elementary and essential principles” unless the same had been expressly excluded by the enactment empowering him to so act.”

77. There can also be no escape from the fact that a conclusion drawn by the SJC would obviously stigmatize the Judge, whose capacity or conduct is being inquired

into. Furthermore, as has been held by a larger Bench of this Court in the case of Chief Justice of Pakistan Iftikhar Muhammad Chaudry's case (*supra*) noted above, the proceedings before the SJC though essentially fact finding in nature and recommendatory in effect are nevertheless bestowed with an element of quietus or finality, which aspect of the matter can never be over emphasized or lost sight of. In this view of the matter, the necessity for fairness and fair play, in the procedure adopted becomes all the more imperative. There is no serious dispute between the counsel appearing before us, in this behalf, as none of them did or could have canvassed that the procedure to be adopted by the SJC can be unfair or unjust. This is obviously essential in order to ensure security of tenure of the Judge which is, as already stated above, is the primary purpose of Article 209 of the Constitution. The controversy perhaps pertains to the standards of due process, which need to be observed and whether the SJC Procedure of Enquiry 2005, more particularly, paragraph 13 thereof meets such standards. There also appears to be a consensus amongst the learned counsel, learned Attorney General for Pakistan and the learned Amicus Curiae that except

for the disputed paragraph 13 of the SJC Procedure of Enquiry 2005, the remaining procedure is compliant with the universally accepted principles of due process including as reflected in our Constitution and the various pronouncements by this Court. The Judge whose conduct or capacity is the subject matter of proceedings under Article 209 of the Constitution is issued a notice informing him of the allegations against him. He is afforded a right of hearing, the findings are based on evidence, which are recorded in his presence. He is also afforded the right to cross examine the witnesses and produce evidence in his defence. He has a right to be represented by a counsel of his own choice. He is informed of the findings. Thus, there is no dispute or controversy, in this behalf, except with regard to paragraph 13 of the SJC Procedure of Enquiry 2005 which is reproduced hereunder for ease of reference:-

“Proceedings of the Council not to be reported.- (1) Proceedings of the Council shall be conducted in camera and shall not be open to public.

(2) Only the findings of the proceedings shall be allowed to be reported.

(3) Proceedings of the meetings of the Council or any other steps that Council may take shall not be reported, unless directed otherwise.”

78. It is now settled law that rather than a literal approach a purposive approach to interpretation must be adopted. In this behalf, this Court in its judgment reported as Dr. Raja Aamer Zaman v. Omar Ayub Khan and others (2015 SCMR 1303) held as follows:-

“8. ... The Courts in Pakistan have always preferred a purposive rather than a literal interpretation of Statutory Instruments. Reliance in this behalf may be made to the judgments, reported as Hudabiya Engineering (Pvt) Limited v. Pakistan through Secretary, Ministry of Interior, Government of Pakistan and 6 others (PLD 1998 Lahore 90) and Federation of Pakistan through Ministry of Finance and others v. Messrs Noori Trading Corporation (Private) Limited and 14 others (1992 SCMR 710).”

79. A similar view has been taken by this Court in the cases reported as Messrs Gadoon Textile Mills and 814 others v. WAPDA and others (1997 SCMR 641), Rana Aamer Raza Ashfaq and another v. Dr. Minhaj Ahmad Khan and another (2012 SCMR 6) and Muhammad Nawaz Chandio v. Muhammad Ismail Rahu and others (2016 SCMR 875).

80. Thus, we must attempt to discover the purpose and true intent of paragraph 13 of the SJC Procedure of Enquiry 2005, which alone would hold the key to its proper contextualized interpretation. Various countries of the world have chosen either of two paths with regard to

the process of accountability of Superior Court Judges. Broadly speaking, one path is through an open process including through a proceeding before a forum outside the judiciary e.g. Parliament in the full gaze of the public eye while the other path is of an insulated process of being dealt with by one's own peers. Our Constitutional Dispensation in principle has adopted the latter course of action. The framers of the Constitution of 1973 appear to have made a value judgment that such a course of action is best suited to our societal and cultural ethos, where allegations are routinely made against all and sundry without any qualms about the truthfulness or otherwise of such allegations. Perhaps the framers of the Constitution may have been inspired, in this behalf, by the mystical saint of Kasur who said that we live in the "Age of Suspicion", where people immediately believe the worst about others. It is said that the Judges like Ceasar's wives ought to be above suspicion. An allegation no matter how baseless, if permitted to be made public, such Judge and his capacity to dispense justice would be irreparably prejudiced. It is perhaps being sensitive to this aspect of the matter, Mr. Muhammad Makhdoom Ali Khan, learned Sr. ASC urged that the first part of the

process before the SJC i.e. in terms of paragraphs 7 and 8 of determining whether there was, *prima facie*, sufficient material to proceed against the Judge, should be, in its entirety, conducted in camera without any information pertaining thereto reaching the public domain, as obviously if the allegations are allowed to be made public and subsequently found not worthy of being proceeded with, the said Judge and his reputation would be tarnished irreparably making it impossible for the Judge in question to perform his judicial functions on the one hand and would belittle the judiciary as a whole on the other. This for all intents and purposes would amount to stopping a Judge from performing his official functions. Consequently, unless adequate provisions exist for keeping malicious and baseless accusation from being publicized not only the security of tenure of the Judge would be jeopardized but also the Independence of Judiciary would be compromised. Thus, it is not too difficult to fathom than the purpose of paragraph 13 of the SJC Procedure of Enquiry 2005 is to protect, both the Judge whose conduct and capacity is to be inquired into and the Institution of the judiciary. This interpretation

appears to be obvious and not seriously contested by the other learned counsel for the Petitioners.

81. The practice of in camera hearings in matters of judicial accountability is not novel; rather it has found endorsement by Legal Practitioners from all over the world. The First World Conference on the Independence of Justice held at Montreal on 10th June, 1983 adopted a Universal Declaration on the Independence of Justice. It relates to International Judges as well as National Judges. On the question of “Discipline and Removal”, it is recommended as under:

“2:35 The proceedings for discipline of Judges shall ensure fairness to the Judge and the opportunity of a full hearing.

2.36 With the exception of proceedings before the legislature, the proceedings for discipline and removal shall be held in camera. The Judge, may however, request that the hearing be held in public, subject to a final and reasoned disposition of this request by the disciplinary Tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.”

82. At this juncture, it may be appropriate to refer paragraph 5.2 of the International Project of Judicial Independence of the International Association of Judicial Independence and World Peace (Mount Scopus International Standards of Judicial Independence)

presented by the learned Attorney General for Pakistan, which reads as follows:

“5.2 With the exception of proceedings before the Legislature, the procedure for discipline should be held *in camera*. The judge may however request that the hearing be held in public and such request should be respected, subject to expeditious, final and reasoned disposition of this request by the disciplinary tribunal, Judgments in disciplinary proceedings, whether held in camera or in public, may be published.”

83. Before we venture to interpret paragraph 13 of the above in the context of the *lis* at hand it may be appropriate to recapitulate, in this behalf, the learned counsels for the Petitioners, who, by relying upon the judgments, both from our jurisdiction and abroad contended that an open trial is generally considered to be a *sine qua non* for due process and for a just and fair determination of rights. In the alternative paragraph 13 is for the benefit of the Petitioners they can always waive such benefit and privilege. There can be no cavil with the said proposition when examined in its indivisible entirety. In the context of its purposive interpretation of paragraph 13, the possibility of a person waiving his right of in camera proceedings cannot be excluded more so when examined in the context in paragraph 13(3) of the SJC Procedure of Enquiry 2005. However, such waiver is

neither absolute nor can totally trump the discretion and jurisdiction of the SJC in this behalf.

To what extent such principles are attracted to proceedings before the SJC. Be that as it may, such proceedings necessarily be conducted fairly, justly and in accordance with the principles of Natural Justice in all its amplitude as stated herein above.

84. Before proceeding further, it may be pertinent to point out at this juncture that at the cost of repetition that the SJC is not a Court but more akin to a Domestic Tribunal, whose proceedings primarily are administrative in nature. The concept of openness attributable to a Court does not necessarily apply in its entire amplitude to administrative proceedings before Domestic Tribunal. The inquiry before the SJC is not a spectator sport nor can there be any requirement of proceedings being conducted in a Courtroom. We need to keep reminding ourselves that the SJC is not a Court but a Domestic Tribunal conducting administrative proceedings.

85. Be that as it may, the antithesis of an open trial is not in camera proceedings but a “secret trial”. This distinction was very ably drawn by Mr. Munir A. Malik, learned Sr. ASC an Amicus Curiae. Such “secret trial”

usually means prosecution of an unknown person for an unknown charge with unknown findings based on unknown evidence conducted without counsel. The final verdict alone may be disclosed through a dead body, which may or may not be handed over to the near and dear ones. Such trials are associated with the purges in the Soviet Union in the 1930's. In camera proceedings, on the other hand, pertain to the proceedings conducted by excluding unrelated persons, which course of action is not unknown to our jurisprudence.

86. Though as a general principle, the proceedings that determine civil rights of the parties or the criminal liability of an accused are held in "Open Court", as justice should not only be done but should also be seen to be done. We have already noticed that the SJC is a Domestic Tribunal and the proceedings before it are essentially administrative in nature yet even if the SJC Procedure of Enquiry 2005 is subjected to the highest possible standard i.e. of a criminal trial, it would be noticed that Section 352 Cr.P.C., in this behalf, though enjoins an open trial but its proviso empowers the Presiding Officer to hold the trial in camera by excluding the public at large from its proceedings. It is in the above

backdrop, that none of the counsel at the bar urged that in no eventuality the proceedings before the SJC could be held in camera. The only matter in issue was the conditions which necessitated or permitted the same existed as in certain circumstances, public or private interest may demand that such proceedings be held in camera.

87. The requirement of an open trial or open justice and the exceptions thereto have evolved over the last Century. The House of Lords in the oft-quoted case reported as Scott v. Scott [1913] AC 417, laid down a rather stringent and relevantly inflexible rule for open justice. In the Century that followed periodically more exceptions to the said rule were recognized by the Courts perhaps by the acknowledgment of competing rights and other considerations as is obvious from the judgment of the Supreme Court of United Kingdom reported as Khuja v. Times Newspapers Limited and others (2017 SCMR 1605). In the latter judgment, the process of the evolution of the exceptions to the general rule of open justice has been charted out in great detail. This Court too has considered this aspect of the matter, even with reference to criminal proceedings in its various cases, including the

judgments reported as Zulfikar Ali Bhutto v. The State (PLD 1979 SC 53), Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others (PLD 1996 SC 632) and Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf (PLD 1963 SC 51). An examination of the aforesaid judicial pronouncements reveals that the recognized reasons for departure from the general principles of an open trial appear to be:-

- (1) For public safety;
- (2) To avoid the disclosure of a secret process or of secret document;
- (3) Where the Court is of the opinion that witnesses are hindered in, or prevented from, giving evidence by the presence of the public;
- (4) The matter falls within the parental jurisdiction of the Court to safeguard the interests of the ward or lunatics;
- (5) To protect the dignity of the victim in matters pertaining to rape and other sexual offences;
- (6) To protect the privacy where necessary in matters pertaining to matrimonial disputes;
- (7) To avoid the making of baseless scandalous and scurrilous allegations so as to defame the Judges and the Courts in order to publicize the same so as to subvert due process.
- (8) Where a party adopts a hostile defiant and abuse attitude in Court; and

- (9) To preserve the decorum and dignity of the Court.

The aforesaid list is obviously not exhausted. Furthermore, the aforesaid exceptions are also obviously subject to the test of reasonability and proportionately. Needless to say such exceptions are not dependent upon the consent of the parties. None of the counsels, not even those appearing on behalf of the Petitioners have really disputed the above mentioned exceptions to general principle of an open trial. It is also not disputed by the learned counsel that even where a person whose conduct and capacity is being inquired into waives his right to an in camera proceedings the SJC may decline such request and conduct its proceedings in camera if any of the exceptions to open justice enumerated above exist.

88. Even otherwise, as per the case of the Petitioner as canvassed by Mr. Muhammad Makhdoom Ali Khan, learned Sr. ASC, the first part of the proceedings before the SJC for the purpose of determining whether a, *prima facie*, case is made out before the proceedings against the Judge in question should be held in camera lest baseless allegations are made public to the detriment of the Judge concerned. The same logic must also extend to the latter

part of the proceedings as a Judge must obviously be presumed to be innocent unless there is an adverse finding returned regarding his capacity and capability by the SJC. The name of the Judge will be dragged through the mid even though the allegations may be eventually rejected by the SJC.

89. Furthermore, as we have already determined the purpose of paragraph 13, it is, *inter alia*, to protect the Judge whose conduct and capacity as is being inquired into from slanders and baseless allegations, we cannot lose sight of the fact that the Members of the SJC are also the Chief Justice and senior Judges of the Supreme Court, the senior most Chief Justices of the High Courts whose persons and reputation too need to be protected from frivolous baseless attacks. This may sound a little strange and perhaps paranoid to the stranger as the person being inquired into is no less a person than a Judge of a Superior Court. However, we stand wiser through experience and, in this behalf, with great regret, we are constrained to refer to the last paragraph of the Report of the SJC in the reference against the Petitioner Mr. Justice Shoukat Ali, referred to and reproduced in the case reported as Chief Justice of

Pakistan Iftikhar Muhammad Chaudhry (supra), which reads as follows:

“Before we part with this report we would like to place on record that although the respondent behaved in a most objectionable manner throughout, we have not allowed this act to influence our decision. This proceeding has been an extremely unpleasant and taxing experience for the Council. The respondent forgot that he was appearing before five of the most experienced Judges in the country, and from the very beginning, either by design or from force of habit, took up an arrogant and insolent attitude. At one stage he even insulted the Council in its face when the Council with great reluctance had to issue a notice for his committal for contempt. It was only through the timely intervention of Mr. Anwar, his counsel that a very ugly situation was avoided, for, otherwise the council would not have hesitated to punish the respondent suitably. He also did not hesitate to falsely and maliciously malign the Council before other Authorities and even attempted at one stage to intimidate the council by threats. Finally, he staged a walk-out even after the evidence was closed. Even so, the Council did not deny Mr. Manzoor Qadir the opportunity to address the Council on the respondent's behalf. Indeed, the Council has throughout, as admitted by Mr. Manzoor Qadir himself, not only shown the maximum amount of consideration but even treated the tantrums of the respondent with the indulgence they did not deserve.”

90. Thus, if there is a reasonable apprehension that the Judge whose capacity or conduct is being inquired into or his lawyers are likely to indulge in

scurrilous and scandalous allegations against the SJC or its Members especially with the intention to publicize the same so as to hamper the SJC from fulfilling its obligations, the SJC can always direct that the proceedings before it be conducted in camera, even if such Judge has waived his privilege of in camera proceedings. Such a course of action would be in accordance with the well recognized and established exceptions to open justice. Such exceptions have been enumerated herein above. In camera proceedings can also be resorted to despite the desire of a person whose conduct and capacity is being inquired into, if any of the aforesaid exceptions, in the information of the SJC exist.

91. The Fundamental Right of freedom of information as conferred and guaranteed by Article 19A of the Constitution was also referred to more so by the amicus curia than the counsel for the Petitioners to contend that the proceedings of the SJC should be held in public. The aforesaid Article is reproduced hereunder for ease of reference:

“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.”

The said Article pertains to the openness and transparency of the Government and its functioning. In order to give effect to this Article “Right of Access to Information Act, 2017”, has been promulgated. The provisions of the said Act need to be looked at very carefully in the context of its applicability to the SJC and the exceptions must be mentioned in the said enactment. The findings of the SJC are made public by virtue of paragraph 13(2) of the SJC Procedure of Enquiry 2005. The issue would only relate to interlocutory orders and proceedings.

Be that as it may, a perusal of the aforementioned Article caters for a right of all the citizens to access of information in all matters of public importance. Though, it may overlap with the independent claim of an accused or a party to litigation to a fair trial through an open justice system but in essence in the context of the *lis* at hand it pertains to the right of access of an unrelated citizen to the proceedings of the SJC. In this context, it is appropriate to point out that by virtue of paragraph 13 of the SJC Procedure of Enquiry 2005, the findings of

the SJC are made public. Thus, the matter is limited to the conduct of the proceedings and interlocutory if any only.

92. The matter of interpretation and application of Fundamental Rights came up for interpretation before this Court in the case reported as Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A. and others v. Federation of Pakistan through Secretary Ministry of Interior and others (PLD 2007 SC 642), wherefrom certain principles, in this behalf, can be gleaned. Firstly, a Fundamental Right may not be absolute. Secondly, in case of contending and conflicting rights, an equilibrium has to be maintained through a harmonious interpretation of the Constitution as an organic whole. And thirdly, individual rights may have to give way to the rights for the benefits of the community at large.

93. Examining Article 19A of the Constitution in the above context reveals that the right conferred thereby is not absolute but subject to regulation and reasonable restriction, as is mentioned therein. The Courts and other Authorities have long recognized the practice of holding proceedings in camera or subject to

other restrictions *qua* disclosure as an exception to the open justice principle. These exceptions are well defined and based on the law or judicial pronouncements. In the instant case, the embargo to release information with regard to unsubstantiated and unproven allegations against a Judge regarding his conduct or capacity is based on the principle not only on protecting the reputation of the Judge which may be sullied beyond redemption even if the allegations are finally rejected but also for the protection of the Institution of judiciary. This exception based on the judgments of this Court referred to above and are necessary for the Independence of Judiciary by insulating it from being blackmailed into subjugation. Thereby very right of access to justice would be at stake. Consequently, the necessity of proceedings in camera before the SJC (not its findings) based on the law as laid down by this Court must prevail over the right of an unconcerned citizen to such information as Article 19A of the Constitution pertains to right to information not right to entertainment through the malicious satisfaction of idle curiosity. If reasons are sufficient for a departure from open justice policy the

same would also be sufficient to be a reasonable restriction of freedom of information.

94. The aforesaid leads to an irresistible conclusion that the SJC is a unique forum created by the Constitution. It is not a Court but more akin to a Domestic Disciplinary Tribunal whose proceedings are administrative in nature and recommendatory in affect.

But its findings have an element of conclusiveness. The SJC Procedure of Enquiry, 2005 reflects the implied authority of the SJC to do all acts and employ all means necessary to exercise the jurisdiction conferred and to fulfill its mandate in accordance with the Constitution, hence, are legally valid and effective in law.

95. Paragraph 7 of the SJC Procedure of Enquiry, 2005 is valid and *intra vires* to the Constitution. Paragraph 13 also does not offend against the Constitution or any provision thereof. The obvious purpose of paragraph 13 is the protection of the rights and reputation of the person whose conduct and capacity is being inquired into and the protection of the Institution of the judiciary, including the Members of the SJC, hence, must be interpreted in such context. Therefore, the process of determination whether any *prima facie*

case has been made for proceedings under Article 209 of the Constitution in any event should be held in camera and the subsequent proceedings should also be held in camera unless the person being inquired into waives such right. However, in such circumstances, since in camera proceedings are not alien to our jurisprudence and can always be resorted to by the SJC even in the absence of the consent of the parties for well defined reasons which have been enumerated in the preceding paragraphs, including (but not limited to) in the eventuality of an apprehension that the person whose conduct and capacity is being inquired into or his counsel may resort to baseless, scandalous and scurrilous allegations against the SJC or any of its in order to publicize the same and thereby frustrate the very proceedings of the SJC.

96. Consequently, the question regarding conduct of proceedings through an open justice as requested by the Petitioners needs to be revisited and decided afresh by the SJC notwithstanding and uninfluenced by its Order dated 18.05.2017 in the light of the observations made herein above.

97. Hence, these Constitution Petitions bearing No.29 and 36 of 2017 are disposed of in the above terms.

Judge

Judge

Judge

Judge

‘APPROVED FOR REPORTING’
*Mahtab and Safdar/**

Judge

Announced on _____ at _____

Judge