P L D 2021 Supreme Court 1

Present: Umar Ata Bandial, Maqbool Baqar, Manzoor Ahmad Malik, Faisal Arab, Mazhar Alam Khan Miankhel, Sajjad Ali Shah, Syed Mansoor Ali Shah, Munib Akhtar, Yahya Afridi and Qazi Muhammad Amin Ahmed, JJ

JUSTICE QAZI FAEZ ISA and others---Petitioners

versus

The PRESIDENT OF PAKISTAN and others---Respondents

Constitution Petitions Nos. 17, 19 of 2019 and C.M.A. No.7417 of 2019 in Constitution Petition No. 19 of 2019 in Constitution Petitions Nos.20-30, 32 and 34 of 2019, decided on 19th June, 2020.

Per Umar Ata Bandial; Manzoor Ahmad Malik, Faisal Arab, Mazhar Alam Khan Miankhel, Sajjad Ali Shah, Munib Akhtar and Qazi Muhammad Amin Ahmed, JJ agreeing; Maqbool Baqar, Syed Mansoor Ali Shah and Yahya Afridi, JJ agreeing with regard to quashing of Presidential reference against the judge but dissenting by not joining the majority as to the directions given to the Federal Board of Revenue for initiating proceedings against the judge's wife and children, and for submitting a report of said proceedings to the Supreme Judicial Council. [Majority view]

(a) Constitution of Pakistan---

----Art. 184(3)---Constitutional jurisdiction of the Supreme Court under Art. 184(3) of the Constitution---Scope and pre-requisites---In order to invoke the original jurisdiction of the Supreme Court under Art. 184(3) of the Constitution, the impugned action must be shown to involve a matter of "public importance" arising from the breach of a fundamental right which affected the public at large.

Al-Jehad Trust and another v. Lahore High Court 2011 SCMR 1688 ref.

(b) Constitution of Pakistan---

----Arts. 4, 9, 10-A, 184(3) & 209(5)(b)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner-judge before the Supreme Court calling into question the constitutionality and legality of the reference against him---Maintainability---Fundamental right of the general public which was claimed by the petitioner to be under threat was the derivative right of the independence of the judiciary---Said right was an essential prerequisite for the enjoyment of, inter alia, the principal fundamental right to access justice which was guaranteed to the people by Arts. 4, 9 & 10-A of the Constitution---In the absence of independence of the judiciary, all other facets of the right to access justice were essentially rendered null and void---Unlawful infringements of Art. 209 of the Constitution eroded the independence of the judiciary which was directly connected with the right to access justice---Present petition, therefore, satisfied the two-fold requirements of Art. 184(3) of the Constitution, and was accordingly maintainable.

Sh. Riaz-Ul-Haq v. Federation of Pakistan PLD 2013 SC 501 and Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61 ref.

(c) Constitution of Pakistan---

----Arts. 209(5) & 209(6) & Preamble---'Independence of judiciary' and 'accountability of judges', concepts of---Complementary concepts---Independence of the judiciary was not primarily for the benefit of the Judges, but existed instead to secure the interests, rights and benefits enjoyed by the whole of society---If one were to focus only on the protection of the judiciary from the depredations of the organs of the State (howsoever vitally important and crucial that may be), it would not be the independence of judiciary that would result but rather it would be the rule of Judges without any checks and balances---Accordingly, it was only fitting that judicial independence and accountability were treated as being complementary to each other.

(d) Constitution of Pakistan---

----Arts. 184(3), 209(5)(b) & 211---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Proceedings before Supreme Judicial Council ('the Council')---Bar of jurisdiction of courts---Whether Art. 211 of the Constitution that barred jurisdiction of courts in respect of proceedings before the Council was applicable in the present case---Held, that in present proceedings under Art. 184(3) of the Constitution the Supreme Court was neither adjudicating upon the process of the Council nor quashed its notice issued to the petitioner-judge---In fact, in view of the findings recorded in the present judgment, the Supreme Court had simply abated the notice---Factual information underlying the reference did cast a smear on the petitioner's name and could not be ignored; however, without confronting the owners of the foreign properties the information was at present inchoate to form the basis of proceedings under Art. 209 of the Constitution---In such circumstances, the same must be verified to test the veracity of the inference drawn in the reference about the source of funds---Nevertheless, as the reference had been quashed, the notice issued by the Council had no foundation except for the preliminary factual information contained in the reference---In this situation, the notice had rightly been abated because it also lacked the factual and legal material on which the reference was based---Accordingly, Art. 211 of the Constitution had no application to the available facts of the present case---Constitutional petitions were disposed of.

(e) Constitution of Pakistan---

----Arts. 184(3), 209(5) & 209(6)---Presidential reference against a judge of the Superior Court before the Supreme Judicial Council ('the Council')---Pre-reference proceedings---Whether the Supreme Court could strike down pre-reference proceedings on judicial review grounds---Reasons for quashing the Presidential reference recorded.

Supreme Judicial Council ('the Council') was a unique (and the only) body which could examine the conduct of a Superior Court Judge and decide whether the said Judge was fit to complete his tenure. Reference, which was an executive action under the Constitution, forwarded to the Council should not be struck down on ordinary judicial review grounds such as unreasonableness and proportionality, as doing so would be belittling its status, ignoring its competence and pre-empting its decisions based on appreciation of the record. Giving the power of judicial review to the Supreme Court to set aside pre-reference proceedings would be tantamount to rejecting the capacity and jurisdiction of the Council to adjudicate upon any question of unreasonableness, proportionality or suitability raised in relation to the merits of the President's actions; it would also open the floodgates of litigation by Judges who were the subject of a reference. Such course of action prima facie appeared to be contrary to the meaning of Article 209 of the Constitution which entrusted all matters regarding the merits of a case to a high powered Constitutional domestic forum within the judiciary.

Khan Asfandyar Wali and others v. Federation of Pakistan PLD 2001 SC 607 and Sabir Iqbal v. Cantonment Board, Peshawar PLD 2019 SC 189 ref.

(f) Constitution of Pakistan---

----Arts. 209(5)(b) & 209(8)---Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Art. 209 (8) of the Constitution), Preamble---Supreme

Judicial Council Procedure of Enquiry 2005, R. 3(l)---Supreme Judicial Council ('the Council')---Reference against a judge of the Superior Court on grounds of 'misconduct'---Misconduct---Meaning, scope and standard of proof.

Any conduct of a judge which conflicted with the mandated norms in the Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Article 209 (8) of the Constitution) ['the Code'] could attract scrutiny for possible misconduct. The Code primarily provided guidance to Judges of Superior Courts on the exemplary qualities they must possess, and it expected that Judges would conduct themselves with integrity, propriety and dignity both in their public and private lives and would not engage in controversy. Therefore, conduct that diverged from these qualities would constitute misconduct.

Articles of the Code were non-legal in nature. A violation of any of these Articles would neither sustain a civil lawsuit nor a criminal prosecution. However, an infringement thereof may very well lead to disciplinary proceedings under Article 209(5) of the Constitution. The Code does not only expect impeccable behaviour from a Judge in the courtroom but it also expected him to maintain these high standards of integrity, propriety and dignity outside the Court. Such qualities and conduct were necessary to preserve not only the prestige and honour of the Judge but also the prestige and honour of the institution of the judiciary. [p. 98] Q_1 & R_1

Misconduct was any conduct of the Judge which damaged the public's perception about his ability to discharge his duties or which undermined public confidence in the institution of the judiciary regardless of whether such conduct occurred in the professional arena or in the private life of a Judge. [p. 100] T_1

The Supreme Judicial Council Procedure of Enquiry, 2005 ('the 2005 Rules') had been framed by the Supreme Judicial Council ('the Council') to implement its mandate and regulate its own proceedings, therefore, they carried special force and stood on a higher pedestal than ordinary laws. The 2005 Rules provided guidelines for the conduct of the Council proceedings and the exercise of its jurisdiction. The Council as the constitutionally empowered body had been utilising the criteria of misconduct noted in Rule 3(l) of the 2005 Rules and elaborated upon in the Code to assess the culpability of Superior Court Judges. Rule 3(l)(i) of the 2005 Rules succinctly encapsulated the normative standards of misconduct provided in the Code whilst Rule 3(l)(iii) included an objective criterion that related to a Judge's professional performance. Both criteria were consistent with the Code. [pp. 93, 94] M_1 & N_1

The threshold that constituted misconduct for the purposes of Judges of the Superior Courts should manifest the intent and spirit of Article 209 of the Constitution. Accordingly, the standard for the commission of misconduct must not be so high that it was impossible to allege thus rendering Judges unanswerable for their conduct. On the other hand, the threshold for misconduct must also not be so lenient so as to become a weapon in the hands of disgruntled litigants, interest groups or Executive against honest, competent and independent Judges. [p. 96] O_1

Misconduct recognised under Article 209(5) of the Constitution gave discretion to the Council to determine whether any alleged conduct of a Judge came under the purview of misconduct. It also laid down a high threshold of misconduct to ensure that trivial indiscretions or infractions of the law by Judges or any minor shortcomings in their personal lives did not render them liable to removal proceedings. At the same time it protected the integrity of the judicial institution by allowing for the removal of Judges whose conduct without constituting a violation of a prescribed law was so improper that it rendered such Judge unfit for holding judicial office. [p. 97] P_1

Interpretation of misconduct set out by the Supreme Court in the case of The State v. Mr. Justice Akhlaque Husain (PLD 1960 SC 26) reflected the intent and spirit of Article 209(5) of the Constitution, the Code and the 2005 Rules. [p. 98] S_1

The State v. Mr. Justice Akhlaque Husain PLD 1960 SC 26; Lawrence v. Attorney General of Grenada 2007 UKPC 18 at para-25; Clark v. Vanstone 2004 FCA 1105 and Privy Council in Hearing on the Report of the Chief Justice of Gibraltar 2009 UKPC 43 at para-202 ref.

(g) Constitution of Pakistan---

----Arts. 209(5)(b) & Fifth Sched., Cl. 4---Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Art. 209(8) of the Constitution), Art. II---Federal Service Medical Attendance Rules, 1990, R. 10---Supreme Court Judges (Travelling Allowance) Rules, 1958, Rr. 3(4)(i) & 4(i)---Supreme Court Judges (Leave, Pension and Privileges) Order, 1997, Rr. 20, 21 & 25---UN Economic and Social Council Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct, Cl. 4.7---Family members of a Judge of the Superior Court---Financial affairs---Question as to whether a Judge of the Superior Court needed to be aware/have knowledge of the financial affairs of his independent spouse and adult children---Held, that family members of a Judge were required to be careful (financially, socially and politically), moderate and fair in their dealings and exchange with others so that no controversy arose which may embarrass the Judge---High standards of propriety were expected of a Judge and his family members---Judges were supposed to have knowledge of the financial interests of their family members, however, if they did not, then they were expected to make reasonable efforts to acquire such information, moreso when they were questioned by a competent forum to explain the financial interests of their family members---Accordingly, there was a continuing obligation on a Judge to keep himself informed about the financial interests of his family members.

Judges, like other public office holders, occupied a position of sacred trust. They held positions where they exercised power and authority under the law. Under the Constitution and the law, such a position carried certain benefits and privileges accompanied by obligations and responsibilities. A Judge of the Superior Court was entitled to these perks and benefits which were also enjoyed by his spouse and family. [p. 101] V_1

Generally, every adult individual was recognised in law as an independent entity. However, different principles applied in relation to family members of public office holders. This was because any irresponsible act on the part of a family member may reflect adversely on the Judge. [p. 103] X_1

Entitlements of the Judge which he shared with his family [his spouse and members of his family who were either dependent on him or with whom he had financial dealings ("family members")] also carried certain responsibilities and obligations. One such obligation was the duty to enjoy these privileges with dignity, probity and discretion. Apart from the material benefits enjoyed by a Judge's family members during and after his service, they also received an advantage from the respect and recognition extended, through association, by people who interacted with them. In these circumstances, the family members of a Judge were required to be careful (financially, socially and politically), moderate and fair in their dealings and exchange with others so that no controversy arose which may embarrass the Judge. Although these responsibilities were shared by family members of all public office holders, they applied with particular force to family members of Judges as the latter were expected to be the embodiment of a person who was 'God fearing, law-abiding, abstemious, truthful of tongue, wise in opinion, cautious and forbearing, blameless, and untouched by greed' [Article II of the Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Article 209 (8) of the Constitution]. Accordingly, high standards of propriety were expected of a Judge and his family members. [p. 102] W_1

Suo Motu Case No. 5 of 2012 PLD 2012 SC 664 ref.

A Judge was required to make reasonable efforts to be aware about the financial affairs of his family members. This precaution helped to forewarn him about extraneous influences or vested interests which could compromise not only his independence and credibility but also the purity and honour of the institution to which he belonged. To understand the rationale behind the obligation on Judges to make reasonable efforts to be informed about or to watch over the financial affairs of their family members, one had to understand the nexus of this obligation with the nature of Judges work and the position they occupied in society. Judges exercised pre-eminent authority under the law. They adjudicated disputes between litigants, held parties appearing before them accountable and imposed liabilities and granted relief to such parties. With their authority came an even greater responsibility to decide cases fairly, independently and in accordance with law. In such a situation, it was imperative for a Judge that he should make reasonable efforts to be informed about the financial interests of his family members for the simple reason that if a case came before him which directly or indirectly involved the pecuniary, proprietary or other personal interests of any of his family members, he could recuse himself. [p. 104] Y_1 & Z_1

Government of N.W.F.P v. Dr. Hussain Ahmad Haroon 2003 SCMR 104 ref.

Another equally, if not more, important reason for requiring Judges to be aware of the financial interests of their family members was that the law's intent was to prevent a Judge's family from becoming a conduit to discreetly influence his opinions and views. This assured the Judge's independence and integrity apart from safeguarding the institution of the judiciary. [p. 105] A_2

Judges were supposed to have knowledge of the financial interests of their family members. However, if they did not, then they were expected to make reasonable efforts to acquire such information, moreso when they were questioned by a competent forum to explain the financial interests of their family members. What constituted 'reasonable effort' on the part of Judges would no doubt depend upon the circumstances of each case. However, a plea of lack of knowledge by a Judge in relation to the financial affairs of his family members was untenable in light of the general trend in international practice, the obligations imposed on a Judge under the Code of Conduct for Judges of the Supreme Court and High Courts [framed by the Supreme Judicial Council under Article 209(8) of the Constitution] and the law relating to public office holders including Judges. Accordingly, there was a continuing obligation on a Judge to keep himself informed about the financial interests of his family members. [p. 107] B_2

(h) Mala fides---

----Types of mala fides---'Mala fide in law' and 'malice in fact'---Distinction.

Traditionally, an action actuated with an ulterior purpose to harm another or benefit oneself was classified as an act that was malicious or malice in fact. However, in recent times, the Supreme Court had recognised another category of mala fides, namely, mala fide in law. Even though both were a species of mala fide, yet each had distinct ingredients and consequences. [p. 109] C_2

Said Zaman Khan v. Federation of Pakistan 2017 SCMR 1249 ref.

Apart from the generally recognised category of actions driven by a foul personal motive described as malice in fact, there was another category of reckless action in disregard of the law termed as mala fide in law. The first type of mala fide was attributed to a person whereas the second was levelled against the impugned action. While the former was concerned with a collateral purpose or an evil intention to hurt someone under the pretence of a legal action, the latter dealt with actions that were manifestly illegal or so anomalous that they lacked nexus with the law under which they were taken. Thus it was clear that malice in fact and mala fide in law had different ingredients, the former being comprised of factual elements with the latter being composed of legal features, that needed to be established as such for the respective consequences to ensue. Secondly, an accusation of mala fide in law involved more than errors of misreading the record or non-application of the law or lack of proportionality in the impugned action. Instead, this was a serious allegation of wanton abuse or disregard of the law. However, when an ulterior motive to cause harm was proved then the repercussions of malice in fact followed. It was for this reason that a mere allegation that an action had been taken wrongly could not be grounds to hold that such action suffered from mala fide in law or malice in fact. [p. 110] D_2

Imputing mala fide of either kind to a person or an action was a grave accusation. It should not be made lightly but could only be done when the facts or legal defects justified its use. [p. 110] E_2

(i) Mala fides---

----'Malice in fact'---Scope and standard of proof.

Plea of malice in fact required a high standard of proof. The rationale behind such an approach was that a plea of malice in fact frustrated the process of justice. After a complainant established malice in fact against a person, the entire proceeding by the latter was brought to an end. This resulted in the merits of the case being ignored. Moreover, the reputation of the person, against whom an allegation of malice in fact was made, became tarnished and if the said allegation was proved then his repute was forever ruined. He was made out to be avicious individual who harboured ill-intentions against others. Such were the negative consequences of this plea, if established. This reasoning applied with greater force if such an allegation was made against senior public functionaries of the State. [p. 110] F_2

Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61 ref.

Federation of Pakistan v. Saeed Ahmed Khan and others PLD 1974 SC 151 ref.

An allegation of malice in fact was unlike any other ordinary allegation. It carried with it a stigma for the accused which could not easily be washed away. If a lower standard of proof for malice in fact was adopted, that would open the floodgates for recalcitrant litigants to make such allegations against their opposing side to derail the process of justice and to defame their opponents in Court. Therefore, to limit these allegations to only genuine claims of malice in fact, any person who wished to raise this plea must prove it to the satisfaction of the Court on the basis of positive and cogent evidence. [p. 111] G_2

Moreover, there was also an obligation on litigants to plead the particulars of malice in fact in detail. Vague allegations could not establish a plea of malice in fact. [p. 111] H_2

Federation of Pakistan v.. Saeed Ahmed Khan and others PLD 1974 SC 151 ref.

Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri PLD 1969 SC 14 ref.

Accordingly, to raise the plea of malice in fact, it was necessary for the relevant party to pinpoint the specific incidents/events/actions which demonstrated the malice in fact of the opposing side. [p. 112] I_2

Allegation of malice in fact would be defeated if it was proved that a complaint levelled against a person was true. [p. 118] R_2

(j) Constitution of Pakistan---

----Arts. 184(3) & 209(5)(b)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner-judge before the Supreme Court calling into question the constitutionality and legality of the reference against him---Question as to whether the reference was filed with mala fides (malice in fact) due to a judgment the petitioner-judge had authored in the past [Suo Motu Case No. 7 of 2017 (PLD 2019 SC 318)], wherein he had criticized the ruling political party and one of its coalition partners, and against which judgment said two parties had filed a review petition containing certain adverse remarks against the petitioner---Reasons for quashing the Presidential reference recorded.

Recourse to a review petition was a lawful remedy granted to litigants by the Constitution itself. Reference in question was based on the ownership of petitioner's wife's undeclared foreign properties. With the blemish attached to the ownership of undeclared foreign properties, such ownership automatically attracted speculation about its status and source. Recourse to a lawful remedy under Article 209(5) of the Constitution could not be malicious unless for ill motives an information alleged wrong or distorted or exaggerated facts, or sought relief that was inordinate or extraneous to the undisputed facts. Furthermore, the observations in the judgment [Suo Motu Case No. 7 of 2017 (PLD 2019 SC 318)], given by the petitioner-judge paled in comparison to the remarks passed by the Supreme Court in another judgment Air Marshal (Retd.) Muhammad Asghar Khan v. General (Retd.) Mirza Aslam Baig (PLD 2013 SC 1) in which far stronger observations about the country's politicians and political system failed to draw any adverse reaction from the Federal Government against any Judge. Consequently, no malice in fact was made out on such ground. Constitutional petitions were disposed of. [pp. 112, 113] J_2, K_2 & L_2

(k) Constitution of Pakistan---

----Arts. 184(3) & 209(5)(b)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Reference based on information provided by a journalist---Plea of petitioner-judge that said journalist had a reputation of planting false stories---Question as to whether the reference had been filed against the petitioner-judge with mala fides (malice in fact)---Reasons for quashing the Presidential reference recorded.

When an information against a person (whether a public office holder or a private person) was to be evaluated, it was the substance, veracity and consequence of the information which mattered and not the credibility and credentials of the informant. Receipt of information from any source was cognizable by the Supreme Judicial Council under Article 209(5) of the Constitution and was sufficient to sustain an inquiry against a Judge of the Superior Courts. Word 'any' used in Article 209(5) of the Constitution meant that the antecedents of the informant were irrelevant unless the information was false, concocted, distorted, exaggerated or sought relief that was excessive in relation to the accepted facts. In the present case the underlying information in the reference to the extent of ownership of the foreign properties by the petitioner's wife and children was not disputed by the petitioner. In such circumstances the background of the informant became insignificant. As a result, the plea of malice in fact raised by the petitioner was repelled. [pp. 113, 114] M_2 & N_2

Pakistan Tobacco Company Ltd v. Federation of Pakistan 1999 SCMR 382 ref.

(l) Constitution of Pakistan---

----Arts. 184(3) & 209(5)(b)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Confidentiality of a reference---Scope---Details of the reference leaked to the media---Plea of petitioner-judge that the government and its functionaries were behind such leaks---Whether mala fides of Government functionaries in leaking details of the reference---Reasons for quashing the Presidential reference recorded.

Reference filed against a Superior Court Judge had to be kept confidential. To hold any particular person/authority accountable for revealing the details of a reference, there needed to be at least some material on record that connected the leaks to one or more of such persons/authorities. From the chronology of events and case record of the present case it was not evident as to which event triggered the sudden disclosure of the reference. Although the allegation made against the respondents (Government and its functionaries) in the present case raised suspicion, it was still unsupported by any evidence. Consequently it could not suffice to conclusively hold that either one or more of the respondents leaked the reference to the media. On the basis of speculations and suspicions it could not be determined who leaked the reference, therefore no finding with respect to its disclosure and hence of malice in fact against any of the persons who were aware of its contents could be recorded. [pp. 114, 115, 116] O_2, P_2 & Q_2

Justice Shaukat Aziz Siddiqui and others v. Federation of Pakistan PLD 2018 SC 538 ref.

(m) Constitution of Pakistan---

----Arts. 4, 90, 184(3) & 209(5)(b)---Rules of Business, 1973, R. 2(1)(ii)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Assets Recovery Unit, constitution of---Legality---Question as to whether the constitution of the Assets Recovery Unit, which coordinated the collection of evidence against the petitioner-judge was lawful---Reasons for quashing the Presidential reference recorded.

To determine the legality of Assets Recovery Unit's creation, one had to consider whether the requisite legal actions and procedures for its establishment had been adopted by the person(s) competent and authorised to do so under the law. [p. 120] S_2

The Assets Recovery Unit (ARU) was a coordinating agency which brought under one umbrella the competent statutory authorities to stem the menace of tax evasion, money laundering and corruption in the country. Accordingly, the ARU was essentially executing the policy of the State to curb financial crimes in the country. It was therefore an executive office, in particular an 'Attached Department' of the Cabinet Division, performing executive functions. Having such status, it did not need the backing of an Act to grant validity to its creation and actions as required by Article 4 of the Constitution. [p. 121] T_2

Perusal of Rule 2(1)(ii) of the Rules of Business, 1973 made it clear that for any 'Attached Department' to exist and function, it needed to have a direct relation with a Division and had to be declared by the Federal Government as an 'Attached Department.' The material on record showed that these two essential steps were taken in relation to the creation of ARU. The first of such documents, demonstrating the procedure followed for constituting the ARU as an 'Attached Department,' was the Summary for the Cabinet dated 11-09-2018, followed by a Notification dated 19-09-2018. Said two documents proved that the creation of the ARU as an 'Attached Department' of the Cabinet Division was approved by the Cabinet itself. Article 90 of the Constitution established that the Cabinet with the Prime Minister as its head was the Federal Government. Consequently, it became evident that the approval for the creation of the ARU was given by the Federal Government. As a result, the two-fold requirement listed in Rule 2(1)(ii) of the Rules of Business, 1973 for the constitution of ARU as an 'Attached Department' had been satisfied in the present case. [pp. 121, 122] U_2 & V_2

The ARU did not act directly but instead operated through its members who had been borrowed from various statutory bodies of the country including the Federal Investigation Agency ("FIA"); the National Accountability Bureau ("NAB"); the Federal Board of Revenue ("FBR"); and the State Bank of Pakistan ("SBP"). As a result, the ARU was manned primarily with individuals whose powers and jurisdiction were exercised under a statutory regime. Accordingly, the ARU was simply a coordinating office attached to the Cabinet Division with the main purpose of facilitating the collaborative efforts of the relevant statutory functionaries. It therefore could not be accused of adversely affecting the rights of any citizen without the backing of law. This was made clear by the composition of the ARU and its terms of reference ("TORs") which were also set out in a Notification dated 06-11-2018. Clause 3 of the said TORs confirmed that when it came to dealing with the assets of citizens of Pakistan, the ARU was only authorised to act through its designated officer/member from the relevant department/ agency. Since these designated officers/members were simultaneously serving in statutory agencies, they were vested not only with the powers granted by the relevant statute governing their agency but were also bound by the procedural safeguards and obligations laid down in such a statute. As a result, any action attributed to the ARU in relation to the assets of citizens of Pakistan was taken through competent authorities strictly in accordance with the law. There was no defect in the creation of the Assets Recovery Unit. [pp. 122, 124] W_2 & X_2

(n) Notification---

----Non-publication of notification in Gazette---Effect---In ordinary circumstances, the non-publication of a Notification in the Gazette did not affect its validity except for in limited situations such as when a statute made publication in the Gazette mandatory or where the rights and liabilities of other persons were involved. [p. 125] Y_2

Saghir Ahmed v. Province of Punjab PLD 2004 SC 261 and Bahadur Khan v. Federation of Pakistan 2017 SCMR 2066 ref.

(o) Constitution of Pakistan---

----Arts. 184(3), 199(b)(ii), 209(5)(b) & 260---Rules of Business, 1973, R. 4(6) & Sched. V-A, Sr. No. 1A ---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Special Assistant to Prime Minister (SAPM) on Accountability appointed as Chairman of an Assets Recovery Unit (ARU), which received information about the foreign properties in the name of the petitioner-judge's wife---Question as to whether the appointment of SAPM on Accountability was lawful---Reasons for quashing the Presidential reference recorded.

Rule 4(6) and serial number 1A of Schedule V-A of the Rules of Business, 1973 gave the Prime Minister the power to appoint a Special Assistant with such status and functions as he desired. Office of Special Assistant to the Prime Minister (SAPM) was mentioned in Article 260 of the Constitution as one of the posts that was excluded from the definition of 'Service of Pakistan.' Therefore, at present the post of an SAPM was a political appointment. Accordingly, the said appointment was made in the discretion of the Prime Minister and was not regulated by statute. Court would interfere in such appointment if the Prime Minister exercised his discretionary power 'arbitrarily, unlawfully or in a fanciful manner,' or if the appointment of a person as SAPM suffered from 'cronyism, nepotism or political favour.' In such a situation the appointment would be struck down under Article 199(b)(ii) of the Constitution. As a result, there was a judicial check on the exercise of the Prime Minister's discretion. Nonetheless, such relief could not be claimed in collateral proceedings. [p. 126] Z_2 & A_3

Muhammad Adil Chattha v. Federation of Pakistan (Constitution Petition No. 63 of 2018) and Qazi Hussain Ahmad v. General Pervez Musharraf PLD 2002 SC 853 ref.

In the present case petitioner had neither challenged the appointment of SAPM on Accountability in separate proceedings under Article 199(b)(ii) of the Constitution nor had he placed any material on record which disqualified the incumbent SAPM on Accountability from being appointed to such office. Therefore, without proof of illegal or arbitrary exercise of discretion by the Prime Minister, the Court could not interfere with his decision on this matter. Accordingly, there was no unlawfulness in the appointment of the SAPM on Accountability. [p. 127] B_3

(p) Constitution of Pakistan---

----Arts. 14(1), 184(3) & 209(5)(b)---Right to privacy---Scope---Surveillance---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Tax and property records of the petitioner-judge and his family were accessed/searched to frame the reference against the petitioner---Question as to whether such searches were a breach of the petitioner's and his family's right to privacy enshrined in Art. 14(1) of the Constitution and thus amounted to covert surveillance---Reasons for quashing the Presidential reference recorded.

Surveillance primarily involved the monitoring or recording of a person's movements, conversations or other activities and communication. However, in the present case the petitioner-judge had not produced any evidence which demonstrated that either the petitioner or his family had been monitored or their communications had been intercepted. Only proof which the petitioner referred to was the admission by the respondents that the tax and property records of the petitioner and his family had been accessed from Government and public records. Indeed, there was no allegation that any information was obtained from the petitioner's personal or private records. [p. 128] C_3

Guarantee under Article 14(1) of the Constitution was for the privacy of home and that too subject to law. Such privacy did not extend to the tax and property records of either the petitioner or his family members. [p. 135] J_3

Mohatarma Benazir Bhutto v. President of Pakistan PLD 1998 SC 388 distinguished.

(q) Constitution of Pakistan---

----Art. 260---Service of Pakistan---Scope---Office of Judge of the Superior Court---Such office fell within the category of "Service of Pakistan". [p. 130] D_4

Air Marshal (Retd.) Muhammad Asghar Khan v. General (Retd.) Mirza Aslam Baig PLD 2013 SC 1 ref.

(r) Public servant---

----Person holding judicial office---Such person was a public servant. [p. 131] E_3

Salahuddin v. Frontier Sugar Mills and Distillery Ltd. PLD 1975 SC 244 ref.

(s) Public office---

----Public servant, office of---Main ingredients.

Following are the five main ingredients present in the office of a public servant:

(i) The office was a trust conferred for a public purpose;

(ii) The functions of the office were conferred by law;

(iii) The office involved the exercise of a portion of the sovereign functions of Government whether that be executive, legislative or judicial;

(iv) The term and tenure of the office were determined by law; and

(v) Remuneration was paid from public funds. [p. 132] F_3

(t) Constitution of Pakistan---

----Art. 176---"Public servant"---Scope---Judges of the Supreme Court were public servants. [p. 132] G_3

(u) Constitution of Pakistan---

----Arts. 184(3) & 209(5)(b)---Income Tax Ordinance (XLIX of 2001), S. 216(3)(p)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Tax records of the petitioner-judge and his family disclosed by Federal Board of Revenue to the Assets Recovery Unit of the government---Question as to whether such disclosure was lawful, and whether the exception under S.216(3)(p) of the Income Tax Ordinance, 2001 applied to the petitioner-judge and his wife---Reasons for quashing the Presidential reference recorded.

Section 216(1) of the Income Tax Ordinance, 2001 ('the 2001 Ordinance') declared the tax records of taxpayers to be confidential. However, the same section also contained the exceptions to this general rule. For purposes of present case, the exception found in section 216(3)(p) of the 2001 Ordinance provided that disclosure of tax records was not precluded where the same may be required by any officer or department of the Federal Government or of a Provincial Government for the purpose of 'investigation' into the 'conduct and affairs' of any public servant. Judge of the Supreme Court was a public servant for the purposes of section 216(3)(p) of the 2001 Ordinance. In relation to the Judge of a Superior Court, an 'investigation' into his 'conduct and affairs' could only mean an investigation for the purposes of Article 209 of the Constitution. However, it was critical (for the exception in section 216(3)(p) to be attracted) that the 'investigation' was duly sanctioned and was being carried out in accordance with law at the time that the clause was invoked. If this was not so then clause (p) of section 216(3) could have no application and the information could not be disclosed. In the present case there was no proper investigation for the purposes of Article 209 when the Assets Recovery Unit (ARU) of the government sought the tax information of the petitioner from the Federal Board of Revenue (FBR). Consequently, the exception in section 216(3)(p) of the 2001 Ordinance was not applicable to the facts of the present case. [p. 132] G_3 & H_3

As far as the petitioner's wife, the language of section 216(3)(p) of the 2001 Ordinance suggested that it was not limited only to information relating to the public servant. However, since the jurisdictional prerequisites for carrying out an investigation against the petitioner did not exist, it therefore followed that the request made by the ARU for the tax information and the release of such information by the tax authorities did not fall within the exception contained in section 216(3)(p) of the 2001 Ordinance. As a result, the disclosure by the FBR was contrary to law. Presidential reference against the petitioner was quashed and in consequence thereof the proceedings pending in the Supreme Judicial Council against the petitioner-judge, including the show-cause notice issued to him, stood abated. [pp. 133, 169, 170] I_3, O_4 & P_4

(v) Constitution of Pakistan---

----Art. 209(5)---Reference sent by the President to the Supreme Judicial Council against a Judge of the Superior Court---Standard of proof and care required for a Presidential reference stated.

Article 209(5) of the Constitution only required the President to form an opinion that a Superior Court Judge may have been guilty of misconduct. He did not need to be certain that a Judge was guilty of the conduct alleged. Nevertheless, his opinion must be based on positive and affirmative material and on the assurance that necessary legal and procedural safeguards had been observed in the preparation of the reference. Therefore, for the President to even form a prima facie opinion about a Judge's guilt, the President needed to verify that there had been compliance with the settled rules on authorisation; he needed to obtain proper advice on the contents of the reference from competent persons; and he needed to ascertain that there was sufficient material before him which satisfied the high thresholds of care and proof expected in the preparation of a reference. [p. 136] K_3

Complaint against a Superior Court Judge could be generated in one of three ways: a Presidential reference, a private complaint and the exercise of suo motu jurisdiction by Supreme Judicial Council. Since all three methods were distinct, therefore, the quality of their information/ complaint would also be different. Presidential reference was articulated on a different level compared to a private complaint. When the President, as the Head of State, sent a reference against a Judge, he had at his disposal State agencies and access to competent legal advice. He could utilise these to verify that valid authorization for investigation had been granted and that materials that were relevant and reliable were available to support the reference. However, stating that despite all the machinery of the Federal Government at his command, the President was only required/obliged to send a perfunctory reference which contained legal and factual defects, then nothing would be more harmful to the independence of the judiciary. Such a relaxation would give the Executive the room to send frivolous references with the expectation that if some nexus between the material and the object of Article 209 of the Constitution was demonstrated, the Supreme Judicial Council would itself find substance in the reference. Therefore, to protect and defend the independence of the judiciary, a reference sent by the President must contain authorised, serious, considered and verified information in both respects, legal and factual, in order to possess the gravity that should accompany a Presidential action. [p. 137] L_3 & M_3

(w) Constitution of Pakistan---

----Arts. 48, 90, 184(3) & 209(5)(b)---Rules of Business, R. 15-A, Sched. V-B, Entry No. 35---Procedure for filing a Presidential reference before the Supreme Judicial Council---Scope---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Federal Law Minister providing authorization for investigation conducted prior to the filing of the reference---Whether such authorization was unlawful and could only be provided by the President at his discretion---Reasons for quashing the Presidential reference recorded.

President could not authorise an investigation against a Judge in his own discretion. Sending of a reference was an executive act performed by the Federal Government. To declare that the President was to authorise investigations into Superior Court Judges in his discretion would amount to inviting the President to arrogate powers in complete contradiction of the Constitutional scheme. [p. 143] N_3 & O_3

Under the Constitutional process for performing the executive function of authorising an investigation into an information against a Superior Court Judge, the President should act on the advice of the Prime Minister or the Cabinet under Article 48(1) of the Constitution and not invoke his discretionary power under Article 48(2). [p. 143] P_3

Entire process of a Presidential reference fell under the advice of the Prime Minister according to the Rules of Business, 1973. It was he (i.e. the Prime Minister) who had to advise the President on the steps that needed to be taken in a matter that bore relation to Article 209(5) of the Constitution. As a result, the approval by the President of the advice of the Prime Minister was necessary for commencing an investigation into a complaint made against a Judge of the Superior Court. Initial authorisation by the President on the advice of the Prime Minister to commence an investigation against a Judge in a complaint falling under Article 209(5) was a legal requirement for sustaining the validity of a Presidential reference that was ultimately filed with the Supreme Judicial Council. Such oversight by the highest Constitutional functionaries protected Judges from whimsical and arbitrary interference by Executive authorities in their personal judicial independence and privacy. Without valid authorisation the foundation of the reference suffered from an initial illegality which amounted to a Constitutional violation. Consequently, such an infirmity was fatal to the superstructure that was erected on it. In the present case with regard to the reference there was no such authorisation on record for commencing an investigation against the petitioner-judge. Instead the record showed that the only authorisation sought, for probing the complaint against the petitioner, was from the Law Minister who under any interpretation of the Constitution had no jurisdiction in such behalf. The competent authorities, namely, the Prime Minister and the President were never approached by the Ministry of Law for the requisite authorization. As a result the present reference was defective and illegal. Presidential reference against the petitioner was quashed and in consequence thereof the proceedings pending in the Supreme Judicial Council against the petitioner-judge, including the show-cause notice issued to him, stood abated. [pp. 145, 146, 168, 169, 170] R_3, S_3, T_3, J_4, O_4 & P_4

Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61 ref.

(x) Constitution of Pakistan---

----Arts. 99(2) & 99(3)---Rules of Business, 1973---Said Rules were constitutionally mandated rules and must be followed by the Government in carrying out its functions. [p. 144] Q_3

Messrs Mustafa Impex, Karachi v. The Government of Pakistan PLD 2016 SC 808 ref.

(y) Constitution of Pakistan---

----Arts. 4, 10A, 184(3) & 209(5)(b)---Income Tax Ordinance (XLIX of 2001), Ss. 116(1)(b) & 116(2)---Foreign Exchange Regulation Act (VII of 1947) S. 5---Anti-Money Laundering Act (VII of 2010), Ss. 2(q), 2(s) & 3 & Sched., section XIIA---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Allegations in the reference, validity of---Whether there was any substance in the allegations contained within the reference---Reasons for quashing the Presidential reference recorded.

Counsel for the Government did not make any submissions on the petitioner's alleged violation of the provisions of Foreign Exchange Regulation Act, 1947. In fact, he did not even nominate the relevant provisions of the said law. There was also no material, before the Court, which supported the said bald allegation of a violation of the claimed foreign exchange regime under Foreign Exchange Regulation Act, 1947. Allegation of violating the provisions of the said Act was unsubstantiated assumption neither backed by evidence nor supported by the relevant provision that was allegedly breached. As such, it could not be sustained. [pp. 149, 169] U_3, V_3 & M_4

Next allegation levelled against the petitioner was that of money laundering. The primary legislation governing said subject matter was the Anti-Money Laundering Act, 2010 ('the 2010 Act'). Reading of sections 2 and 3 of the 2010 Act provided that a necessary element of the offence of money laundering was the commission of a predicate offence. The execution of this offence gave birth to the proceeds of crime, the movement of which attracted the criminal conduct of money laundering. Therefore, without the commission of a predicate offence there could be no offence of money laundering. In the present case, the main allegation against the petitioner was that he had failed to declare the foreign properties owned by his wife and children in his wealth statements. The contents of a wealth statement were provided in Section 116(1) of the Income Tax Ordinance, 2001 ('the 2001 Ordinance'). In order to attract the offence of money laundering the non-declaration of assets under Section 116 of the 2001 Ordinance must constitute a predicate offence. Only then may the allegation of money laundering be made against the petitioner. Perusal of section XIIA of Schedule to the 2010 Act revealed that the non-declaration of assets by a taxpayer under the 2001 Ordinance was not a predicate offence under 2010 Act. The reference had not alleged the commission of any specific predicate offence under the 2010 Act by any person. Therefore, prima facie no case of money laundering could be made out against the petitioner on such count. [pp. 150, 169] W_3 & L_4

Equally, it was relevant to note that the four sections of the 2001 Ordinance were only inserted in the Schedule to the 2010 Act as predicate offences on 20-05-2016 whereas the foreign properties were purchased by the petitioner's family in 2011 and 2013. Consequently, it was an established fact that before 2016, violations of the 2001 Ordinance could not form the basis of a money laundering allegation. [p. 151] X_3

There was no allegation or material on record suggesting that the petitioner or his wife transferred money to the foreign country via illegal means/methods. [p. 152] Y_3

Primary allegation in the reference against the petitioner was his failure to disclose the foreign properties of his wife and children in his wealth statement. In the reference it was alleged that this obligation was imposed on the petitioner by virtue of Section 116(1)(b) of the 2001 Ordinance. No notice was ever issued to the petitioner or his wife under section 116(1). Petitioner's wife did receive notices for the years 2015, 2017 and 2018 but those were issued under section 114(4) of the 2001 Ordinance for her failure to file her tax returns. Moreover, on a perusal of the reference it became evident that the entire case under section 116 of the 2001 Ordinance rested on the opinion of an Assistant Commissioner (Inland Revenue) who stated that the petitioner was liable to disclose the foreign properties of his wife and children. Such opinion and that of the respondent-Government was based on a literal reading of section 116(1)(b). Such interpretation of the section 116(1)(b) had never been tested judicially before. Indeed, counsel for the Government candidly acknowledged that there was no case-law in our jurisprudence on the subject of declaration by a taxpayer of the assets of his spouse and children under section 116(1)(b).On an examination of the (several) instructions published by Federal Board of Revenue (FBR) for completing a wealth statement in tax years subsequent to 2013, it could be noticed that the FBR was itself unsure about the true interpretation of section 116(1)(b) of the Ordinance. Amongst all of the varying constructions of section 116(1)(b), there was also the overriding difficulty that the language of section 116(1)(b) was open to more than one interpretation. [pp. 154, 155, 156, 168] A_4, B_4, C_4 & K_4

Neither the Government nor the petitioner produced any case-law or other relevant material to support their respective interpretations of Section 116(1)(b). Even the FBR's own instructions on completing a wealth statement form were unclear and had wavered from year to year. Accordingly, the respondents' decision to charge the petitioner with a violation of section 116 of the 2001 Ordinance on the basis of an interpretation that was devoid of judicial consideration let alone approval, and which lacked any definitive and consistent departmental practice was conjectural. In such a situation, it would be better if this matter was determined in the first instance by the hierarchy of specialised fora specified in the 2001 Ordinance. [p. 157] D_4

To establish the source of funds for the acquisition of the foreign properties, the requirements of due process under Article 4 and Article 10A of the Constitution mandated that the first person concerned, namely, petitioner's wife ought to be given an opportunity through sending a notice to explain her sources of funding for the foreign properties and the reasons for not declaring such properties in her wealth statement. Without granting such opportunity/notice, the framing of the reference against the petitioner was premature, hypothetical, and impulsive. Presidential reference against the petitioner was quashed and in consequence thereof the proceedings pending in the Supreme Judicial Council against the petitioner-judge, including the show-cause notice issued to him, stood abated. [pp. 159, 169, 170] E_4, O_4 & P_4

(z) Interpretation of statutes---

----Special laws---Scope---When a special law regulated a particular subject area then another law enacted for a different special purpose could not affect the subject matter governed by the former special law---Statutes which were not pari materia could not govern each other's interpretation. [p. 152] Z_3

Ghulam Mustafa Jatoi v. Additional District and Sessions Judge 1994 SCMR 1299 and Halsbury's Laws of England (Volume 96, 2018) ref.

(aa) Constitution of Pakistan---

----Arts. 48(1), 184(3) & 209(5)(b)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---President to form an opinion in terms of Art. 209(5) of the Constitution before sending the reference to the Supreme Judicial Council---Meaning and scope---Whether the President could seek advise from those involved in investigating or framing the reference---Reasons for quashing the Presidential reference recorded.

Sub-Article (5) of Article 209 of the Constitution provided that before directing the Supreme Judicial Council ('the Council') to hold an inquiry against a Supreme Court Judge, the President should have formed the opinion that the said Judge may be guilty of misconduct. However, the basis upon and the means by which the President needed to form his opinion was not readily discernible from Article 209(5) of the Constitution. Although it was not for the Court to specify a list of persons from whom legal advice may be sought by the President, however, there were certain persons who should not be approached by the President for legal advice on a reference under Article 209 of the Constitution. Fairness and objectivity dictated that those involved in the investigation and framing of the reference

may brief the President but could not advise him on whether it was maintainable and appropriate for inquiry by the Council. This was because there was a clear conflict of interest for the architects of the reference to opine on the weaknesses of their work. But this was precisely what happened in the present reference. The President discussed the reference and its legal aspects with the Attorney General and the Law Minister. As senior functionaries of the Federal Government, both said persons were admittedly involved in the framing of the reference against the petitioner. Under Article 209(5) of the Constitution, the opinion formed by the President was expected to be considered, fair and objective. President's power clearly granted him the jurisdiction to evaluate the worth of the advice tendered to him. If he was so inclined he may require the same to be reconsidered once by the Prime Minister. In order to be objective and fair the President should rely upon counsel and legal experts not linked with the framing of the reference or working for the Federal Government. President's opinion in the present reference was influenced by the inadmissible advice of individuals who were involved in the preparation of the reference. In these circumstances, it could not be said that the President formed an informed opinion in terms of Article 209(5) of the Constitution, therefore, the reference against the petitioner was defective. Presidential reference against the petitioner was quashed and in consequence thereof the proceedings pending in the Supreme Judicial Council against the petitioner-judge, including the show-cause notice issued to him, stood abated. Constitutional petitions were disposed of.
[pp. 161, 163, 169, 170] F_4, G_4, N_4, O_4 & P_4

Federation of Pakistan v. Haji Muhammad Saifullah Khan PLD 1989 SC 166 ref.

(bb) Constitution of Pakistan---

----Arts. 48(1) &209(5)---Rules of Business, 1973, Sched. V-B---Presidential reference against a judge of the Superior Court sent to the Supreme Judicial Council---Advice of Prime Minister received by the President---Scope---In the filing of a reference the President was bound to act on the advice of the Prime Minister and not the Cabinet---If the reference was substantive, cogent, coherent, rational and lawful, then the President simply had to record his assent, and there was no additional obligation on him to set out his separate reasons---However, if the reference was defective factually and/or legally then the President must state his reasons for disagreement and call for reconsideration of the matter by the Prime Minister in the light of those reasons---If the President subsequently disagreed even with the reconsidered advice, then he was bound by Art. 48(1) to endorse the said advice leaving it for the Supreme Judicial Council to analyse the merits of the reference sent by the President. [p. 167] H_3

(cc) Constitution of Pakistan---

----Art. 209(5)---Presidential reference sent to the Supreme Judicial Council against a Judge of the Superior Court---Pre-requisites---Federal Government must set out its reasons for preparing and sending a reference against a Judge of the Superior Court---In fact, the summary and statement of reference prepared by the Ministry of Law for the Prime Minister and the President were the documents which contained these reasons---Said documents contained the crux of the reference against a Superior Court Judge, therefore they needed to be factually and legally complete---Failure to comply with such requirement would render the reference unsustainable. [p. 168] I_4

(dd) Constitution of Pakistan---

----Arts. 184(3) & 209(5)(b)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Supreme Court unanimously quashed the reference and declared that the same was of no legal effect whatsoever, and in consequence thereof the proceedings pending in the Supreme Judicial Council ("Council") against the petitioner-judge, including the show-cause notice issued to him, stood abated---Supreme Court (with a majority of 7 to 3) gave directions to the Commissioner, Inland Revenue and Federal Board of Revenue to inquire into and seek explanation from the spouse and children of the petitioner as to the nature and source of the funds whereby the three subject properties in a foreign country were acquired in their names, and also send a report in such regard to the Supreme Judicial Council, which had the powers if it considered justified, to commence proceedings against the petitioner in exercise of its suo motu jurisdiction---Reasons for referring the matter to the Federal Board of Revenue notwithstanding the quashing of the Presidential reference.

[Note: The directions can be found in the short order of the present judgment reported as (Mr.) Justice Qazi Faez Isa and

14 others v. The President of Pakistan and others (PLD 2020 SC 346), headnote (b)]

Notwithstanding the quashing of the Presidential reference against the petitioner-judge, the decision to direct the Federal Board of Revenue (FBR) to commence tax proceedings against the petitioner's wife and children was primarily based on two grounds: to establish that Judges of the Superior Court were answerable for allegations casting aspersions not only on their personal integrity but also on the integrity of the institution; and to honour the petitioner's plea that his wife and children, who were independent taxpayers, should first be asked about their source of funds for the acquisition of the foreign properties. [pp. 170, 172] Q_4 & T_4

The illegalities in the present reference were a result of its careless and casual preparation. These errors or defects did not erase petitioner's wife's ownership of the foreign properties, the primary fact which formed the basis of the reference and which was not denied by the petitioner. Whilst the ownership of the foreign properties was not disputed, the source of funds for their purchase and the mode by which these funds were transferred abroad required explanation. Otherwise, an unexplained investment by the spouse of a Judge of the Superior Courts, who was a holder of public office, compromised the integrity of the Judge and ultimately the probity and credibility of the institution which he served. Rather than allowing the disturbing allegation against the petitioner and his family to circulate and attract innuendos thereby injuring the reputation and integrity of both the petitioner and the Supreme Court, the fair, impartial and transparent route was to allow petitioner's wife and her children to disclose the source of their funds to the relevant authorities, namely, the FBR. Such a transparent course of action was consistent with the Code of Conduct for Judges of the Supreme Court and High Courts, the maintenance of institutional integrity and the image of Judges as the neutral and independent arbiters of law and justice. [p. 171] R_4

By referring the issue of source of funding to the FBR for verification from petitioner's wife and his children, the Supreme Court had chosen the path which in the first place should have been taken by the Government and its functionaries but which was casually ignored by them. By sending the matter to the FBR the Court had assured the substantive and procedural rights of each party under the Income Tax Ordinance, 2001. These rights and the right of the petitioner's family to appeal against adverse orders had specifically been preserved. Additionally, it was directed that only appropriate proceedings for undeclared or unexplained assets be initiated against the petitioner's family which should be concluded within a reasonable timeline. Therefore, by such referral to the FBR the controversy surrounding the allegation in the reference would be settled. [p. 172] S_4 & U_4

Supreme Court had also directed the Chairman FBR to submit his report, regarding the proceedings before the Commissioner (Inland Revenue), to the Supreme Judicial Council ('the Council') for its consideration. This was done to give the Council a chance, if it so wished, to commence proceedings against the petitioner in exercise of its suo motu jurisdiction. However, the direction issued to the Chairman FBR in no way obliged the Council to take any action based on the report. The Council may do so of its own volition if it considered that the report justified any action against the petitioner. Consequently, the Chairman FBR's report was a piece of information to be evaluated by the Council in its suo motu jurisdiction. The Council may if so inclined in the exercise of its suo motu jurisdiction conferred by the Constitution take into consideration any proceedings before the tax authorities or orders passed by them. [pp. 172, 173] V_4 & W_4

Per Faisal Arab, J; agreeing with the majority view regarding quashing of Presidential reference against the judge and the directions given to the Federal Board of Revenue for initiating proceedings against the judge's wife and children, but giving his own views on the interpretation of Article 48 of the Constitution, section 116(1)(b) of Income Tax Ordinance, 2001 and on the plea of mala fide raised by the petitioner.

(ee) Constitution of Pakistan---

----Art. 209(5)---Presidential reference against a judge of the Superior Court sent to the Supreme Judicial Council ('the Council')---Information against the judge---President and the Council had to judge whether such information was credible before initiating an inquiry---Had the Constitutional safeguard of formation of opinion on a particular information not been made a condition precedent, no judge would be able to work with the freedom and confidence required of him in discharge of the obligation of his or her office.

Use of the words 'from any source' appearing in Article 209(5) of the Constitution allowed information to come from a member of the general public or a government functionary or that which was based on a finding of fact of a judicial forum. No specific route from which information was to come had been laid down in the Constitution. While leaving the door wide open for the information to come in from any source, Article 209 (5) of the Constitution had also ensured that receipt of any and every information per se should not trigger inquiry against a Judge and only such information was to become actionable on which either the Supreme Judicial Council ('the Council') or the President had formed the opinion that the matter needed to be inquired into. The informant had no right to seek that the President or the Council must conduct inquiry on the information that had been placed by him before any of them. The Constitution had left such decision in its entirety in the hands of the Council and the President. Until either of them considered any information to be convincing enough to call for an inquiry only then the Council could embark upon the inquiry otherwise not. [p. 178] X_4

Had the Constitutional safeguard of formation of opinion on a particular information not been made a condition precedent, no judge would be able to work with the freedom and confidence required of him in discharge of the obligation of his or her office. On every kind of complaint made against them the Judges would remain unendingly entangled in putting up their defence in one inquiry after another and correspondingly the members of the Council would also be perpetually engaged in conducting inquiries upon whatever information was placed before them by any informant, crippling them from performing their normal judicial function. Apprehending such drawback, the Constitution had given primacy to the opinion that was formed on the information by either of the two opinion-makers (i.e. the President and the Council) described in Article 209 (5) of the Constitution. It was for this reason that when the Constitution admitted information from any source, it basically said that let there be search for the truth if in the opinion of any of the two opinion makers there was substance in the information regardless of the source. There was no independence of judiciary if there was no effective mechanism for its accountability. [p. 178] Y_4

(ff) Constitution of Pakistan---

----Art. 209(5)---Presidential reference against a judge of the Superior Court sent to the Supreme Judicial Council ('the Council')---Report submitted by the Council to the President---Discretion of President to accept or reject the report---Scope.

Once a matter was referred by the President to the Supreme Judicial Council ('the Council') to conduct an inquiry then it became a constitutional obligation of the Council to first conduct the inquiry and then submit its report to the President. Once that was done and in its report the Council returned its findings of guilt or otherwise, it was then for the President to either accept the report or reject it. He may not agree on removing a judge as Clause (6) of Article 209 of the Constitution used the word 'may', which clothed the President with such discretion. Where the Council exonerated a judge of the charges framed against him, in that eventuality the matter ended there. The exoneration brought the whole proceedings to an end which no more remained open to challenge, not even by the President by seeking judicial review before the Supreme Court [p. 179] Z_4

(gg) Constitution of Pakistan---

----Arts. 184(3), 209(5) & 211 ---Presidential reference against a judge of the Superior Court sent to the Supreme Judicial Council ('the Council')---Bar of jurisdiction under Article 211 of the Constitution---Scope and purpose.

The Supreme Court on its judicial side could not examine the merits of the allegations contained in a reference on account of the constitutional bar contained in Article 211 of the Constitution, which though appeared to be a clog on judicial review but if such a bar was not implanted through a constitutional provision, it would have deprived the most important organ, the Supreme Judicial Council ('the Council'), of its vital powers in discharging its constitutional responsibility of inquiring into the conduct of Judges of the Superior Courts in an effective and efficient manner. In the face of the bar contained in Article 211, if any interference by the Supreme Court on the merits of the controversy gained currency, every Judge against whom the Council was to conduct inquiry would first come to the Supreme Court and seek examination of the credibility of the informant as well as of the merits of the information. If the Supreme Court was to first give its findings on the adequacy of the allegations or credibility of the informant and then decide whether to allow or restrain the Council from proceeding with the inquiry, it would be deviating from the scheme devised under the Constitution for the accountability of the judges of the Superior Judiciary. It would also set a very dangerous precedent for actions that may be taken under Article 209(5) of the Constitution in future. In every case the credentials of the informant and not the worth of the information disclosed against a judge would be examined first on the judicial side of the Supreme Court. Invasion of this Constitutional power by any Court would not only amount to demonstrating mistrust in the forum created exclusively for the accountability of judges but would also be in disregard of the Constitutional mandate contained in Article 211. Hence, where decision to conduct inquiry had been taken in terms of Article 209(5) of the Constitution, the allegations made against a sitting Judge could only be proved or disproved before the Council and not before a court through a judicial pronouncement. Any judicial interference that amounted to stifling the very function which the Constitution had assigned exclusively to the Council would be violative of Article 211 of the Constitution. [p. 179] A_5

(hh) Civil Procedure Code (V of 1908)---

----O. VI, R. 2---Pleadings---Scope---Pleadings were to be confined to a statement of material facts; it shall be presumed that reliance would be placed on such facts and what legal effects emerged from such facts need not be stated in the pleadings in order to seek the relief---Failure to state the legal effects, therefore, could not even be regarded as an omission in law much less fatal to any legal proceedings---In fact stating legal effects in the pleadings was regarded as lack of regard for the rules of pleadings. [p. 181] B_5

Budho v. Ghulam Shah PLD 1963 SC 553 ref.

(ii) Income Tax Ordinance (XLIX of 2001)---

----Ss. 116(1)(b)---Public office holder/tax payer---Wealth statement---Assets and liabilities of the tax payer's spouse, minor children, and other dependents, declaration of---Perusal of S.116(1)(b) of the Income Tax Ordinance, 2001 revealed that the wealth in the names of the taxpayer's spouse or minor children had to be declared on account of mere existence of such relationship with the taxpayer---Dependency of such relations on the taxpayers was not a condition precedent---Scope and purpose of S.116(1)(b) of the Income Tax Ordinance, 2001. [Minority view]

Apart from detecting tax evasions on undeclared incomes, the declarations made under section 116 of the Income Tax Ordinance, 2001 ('the 2001 Ordinance') could also be used by a forum that was entrusted with the function to initiate disciplinary proceedings against a public office holder in order to ascertain whether his undeclared assets were acquired beyond his known sources of income. In that sense the declarations made under section 116(1)(b) became a 'relevant fact' in order to prove a 'fact in issue' which was possessing assets beyond means. So, the utility of the declaration made under section 116 was not restricted to detecting probable tax evasion only but it could be utilized by a forum, other than income tax authorities, to examine the legitimacy of the source from which an asset was acquired when it came to examining the conduct of a public office holder. [p. 182] C_5

The source of undeclared asset must reconcile with the legitimate source of income of the holder of high public office or of the member of his or her household, in whose name the asset stood. Unless it was so demonstrated, non-disclosure was likely to cast doubts on his or her integrity and honesty and could be taken as an act of concealment of an illegal source from which the undeclared asset was acquired. Thus, in the context of accountability of a public office holder, the declaration under section 116(1)(b) of the 2001 Ordinance by itself was not a 'fact in issue' but only a 'relevant fact' which could be used to seek explanation with regard to source of acquisition of undeclared assets that stood either in the name of the public office holder or his spouse or children or any other person dependent upon him. No claim of privacy or privilege could justify withholding of financial disclosure that was relevant in such accountability process. Thus, the declaration of assets and liabilities made under section 116(1)(b) could be used as a 'relevant fact' before both the forums i.e. income tax authorities and the forum that was empowered to take disciplinary action against a holder of public office, as the object and purpose of both the forums was distinct. [p. 183] D_5

Declaration under section 116(1)(b) of the 2001 Ordinance had nothing to do with the spouse's financial dependency or otherwise on the resident taxpayer. Income tax law was not concerned with whether the spouse of a resident taxpayer was dependent or was a person of means. All that it intended was that no tax evasion took place by hiding one's undeclared source of income in the names of taxpayer's loved ones. Husband and wife were both presumptive heirs of each other. Any property in the name of any of them was also inheritable by their children. Hence, wealth in the name of taxpayer's spouse, irrespective of his or her own means of income, had to be declared on account of mere existence of such relationship with the taxpayer. If dependency of spouse of a public office holder was made a criterion, it may give rise to scenarios where a resident taxpayer may purchase property in the name of his or her spouse who was financially well off and was living as a member of the taxpayer's household and a property in his or her name remained undeclared and when such a fact got disclosed, the public office holder in order to avoid disciplinary proceedings would take the plea that his or her spouse was a person of means and not dependent on him or her, therefore, information about the source of acquisition of undeclared asset was not required to be divulged by him or her under section 116 of the 2001 Ordinance. [p. 184] E_5 & F_5

What section 116(1) (b) intended to mean was that the wealth in the names of the taxpayer's spouse or minor children had to be declared on account of mere existence of such relationship with the taxpayer. The dependency of such relations on the taxpayers was not a condition precedent. A resident taxpayer even in an action taken under the 2001 Ordinance, could not take the stand that unless his or her spouse was shown to be dependent on him or her, there was no legal obligation to declare the assets that stood in their names under section 116(1)(b) of the 2001 Ordinance. [p. 185] G_5

(jj) Constitution of Pakistan---

----Arts. 184(3) & 209(5)(b)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner-judge before the Supreme Court calling into question the constitutionality and legality of the reference against him---Plea of mala fides raised by the petitioner---Question as to whether the reference against the petitioner could be quashed by the Supreme Court on grounds of mala fides based on the judgment reported as Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61 ref.)---Reasons for quashing the Presidential reference recorded. [Minority view]

As regards plea of mala fide, only on one occasion in the past the Supreme Court interfered with the proceedings of the Supreme Judicial Council ('the Council'). This happened in the case of Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 Supreme Court 61). Even in that case the merits of allegations made in the Presidential reference against the then Chief Justice of the Supreme Court were not made basis for nullifying the proceedings but the Supreme Court noticed quite pronounced acts of mala fide on the part of the then President who under the then existing provisions of Article 209 (5) of the Constitution was the sole opinion-maker to initiate the inquiry. Presidential reference was not quashed by the Supreme Court on the basis of the allegations contained therein but because the Chief Justice's removal from his office was on account of his refusal to give assurance to the then President that his candidature in (military) uniform in the said elections would not be judicially invalidated. Hence, the unholy haste in first seeking resignation of the then Chief Justice under coercion followed by his mistreatment and forcible removal from office and then sudden convening of the meeting of the Supreme Judicial Council ('the Council') on one and the same day clearly demonstrated utter mala fide on the part of the then President who himself was the sole opinion-maker under Article 209(5) of the Constitution to refer the matter to the Council. That was the background that led to the quashment of the reference against the then Chief Justice by the Supreme Court. However in the present case the petitioner-judge had not alleged mala fide against the President but had raised such a plea only against the informant and the persons who processed the information forming basis of the reference. The present case was thus not even remotely close to what treatment was meted out to the then Chief Justice. [pp. 186, 187] H_5 & I_5

(kk) Constitution of Pakistan---

----Arts. 48(1), 48(2), 184(3) & 209(5)---Presidential reference before the Supreme Judicial Council---Scope---Discretion and independent opinion of the President---Scope---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Whether the President was bound to act on advice of the Prime Minister in terms of Art. 48(1) of the Constitution---Reasons for quashing the Presidential reference recorded. [Minority view]

From the contents of Article 209 (5) of the Constitution, it became clear that in forming his opinion the President was not dependent on the advice of the Prime Minister or the Cabinet. He could form opinion on any information that may have come to him from any other source. This was so as the Judiciary was separate and distinct from the Executive branch of the Government. It had to remain completely separate and uninfluenced by any decision of the Executive in the running of its affairs. So while examining the power of the President to call for inquiry under Clause (5) of Article 209 of the Constitution, it clearly indicated that the President had to act in his own discretion to which he was entitled to by virtue of Article 48(2) of the Constitution. All that the executive could do was to place information which it considered actionable before the President and then it was for him to either seek any further information or consider the information already provided sufficient enough to refer the matter to the Supreme Judicial Council for inquiry without being burdened with the constraints of Article 48 (1) of the Constitution. The Executive on its part could not compel the President by advising him on the strength of Article 48 (1) of the Constitution to send the reference proposed by it to the Supreme Judicial Council for inquiry against a judge of the superior judiciary. [p. 188] J_5 & K_5

In the present case the contents of the summary prepared for the Prime Minister in respect of reference against the petitioner showed that it was proposed to the Prime Minister to advice the

President to direct the Supreme Judicial Council to probe into the allegations in terms of Article 209(5) of the Constitution, and after such inquiry submit a report to the President under Article 209(6) of the Constitution. The summary was then endorsed by the Prime Minister and placed before the President. The President acted on such advice and signed the reference, which was then sent to the Supreme Judicial Council to conduct inquiry against the petitioner under Article 209(5) of the Constitution. Thus, nothing was left for the President to decide on his own in terms of Article 209(5) of the Constitution. From what transpired from the whole process, it became abundantly clear that the President acted on the summary in terms of Article 48(1) of the Constitution and signed the reference considering the advice to be binding on him. Thus, the decision of filing the Reference was not based on President's own independent opinion. The Reference not being based on President's own independent opinion, the same was submitted to the Supreme Judicial Council beyond the contemplation of the provisions of Article 209(5) of the Constitution and thus was not maintainable in law. [p. 189] L5

(ll) Constitution of Pakistan---

----Art. 209(5)---Reference before the Supreme Judicial Council against a judge of the Superior Courts---Information provided to the President or the Supreme Judicial Council by an informant---Credibility and motivation of the informant---Jurisdiction of the Supreme Judicial Council did not depend upon what motivated the informant to place the information on the desk of one of the two opinion makers (i.e the President or the Supreme Judicial Council) who found it to be credible enough to call for an inquiry---Function of the Supreme Judicial Council was to search for the credibility of the information rather than the credibility or motivation of the informant. [p. 191] M_5 & O_5

(mm) Constitution of Pakistan---

----Art. 209(5)---Reference before the Supreme Judicial Council against a judge of the Superior Courts---Filing of the Reference becoming public news---Such news becoming public would not be enough to vitiate the proceedings before the Supreme Judicial Council. [p. 191] N_5

Per Yahya Afridi, J; agreeing with the majority view to the extent of quashing of the Presidential reference against the judge but finding the Constitutional petition filed by the judge under Article 184(3) of the Constitution as not maintainable, and also disagreeing with the majority view regarding directions given to the Federal Board of Revenue for initiating proceedings against the judge's wife and children, and for submitting a report of said proceedings to the Supreme Judicial Council. [Minority view]

(nn) Constitution of Pakistan---

----Arts. 184(3) & 188---Original jurisdiction of the Supreme Court under Art. 184(3) of the Constitution---Scope---Order passed by the Supreme Court under Art. 184(3) of the Constitution was final and not appealable---Only medium of challenge available to a person aggrieved of such an order was the limited jurisdiction of the Supreme Court under review. [p. 193] P_5

(oo) Constitution of Pakistan---

----Art. 184(3)---Original jurisdiction of the Supreme Court under Article 184(3) of the Constitution---Pre-requisites -- Matter of public importance---Meaning and scope---Matter of public importance encompassed any issue affecting the legal rights or liabilities of the public or the community at large, and it was not restricted to an individual or a group of individuals, how so large the group might be. [p. 194] Q_5

Anwar Aziz v. Federation of Pakistan PLD 2001 SC 49; Abdul Wahab v. HBL 2013 SCMR 1383; Asad Ali v. Federation of Pakistan PLD 1998 SC 161; Miss Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 and 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 ref.

(pp) Constitution of Pakistan---

----Art. 184(3)---Original jurisdiction of the Supreme Court under Art. 184(3) of the Constitution---Pre-requisites---Matter of public importance---Scope---Independence of judiciary---Independence of the judiciary with all its legal, social and political implications was a matter of public importance. [p. 195] R_5

Asad Ali v. Federation of Pakistan PLD 1998 SC 161; Al-Jehad Trust v. Lahore High Court 2011 SCMR 1688; Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others PLD 2010 SC 61 ref.

(qq) Constitution of Pakistan---

----Arts. 178, 184(3), 209(5)(b) & Third Sched.---Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Art. 209 (8) of the Constitution), Arts. II, III, V, VI & Preamble---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner-judge before the Supreme Court calling into question the constitutionality and legality of the reference against him---Maintainability---Whether present petition was maintainable, and whether it involved the enforcement of a Fundamental Right of the petitioner---Reasons for finding present Constitutional petition as not maintainable recorded. [Minority view]

Petitioner was a Judge of the Supreme Court and had assumed the office by taking an oath under the Constitution. The oath declared, inter alia, that the judge would abide by the Code of Conduct for Judges of the Supreme Court and High Courts [framed by the Supreme Judicial Council under Article 209 (8) of the Constitution] ('the Code'). On taking an oath, a Judge accepted to assume a constitutional position with all its trappings; be it the privileges and facilities attached therewith or the duties and obligations. Accordingly, where the declaration of his oath commanded him to avoid an act, the sitting Judge was constitutionally obligated under the oath to abstain therefrom. This act of self-restraint by the sitting Judge would not infringe or compromise his fundamental rights but only moderate the exercise of enforcing the same. And thus, once a person took an oath under the Constitution, he by his conduct subjected all rights and privileges available to him under the Constitution and the law, which may be contrary to or not in consonance with the behaviour expected of a sitting Judge, as prescribed under the Code. Consequently, the fundamental rights of a sitting Judge shall remain eclipsed, so far as their enforcement was not in consonance with the terms of his oath. [p. 196] S_5 & T_5

The Code demanded a Judge to be "cautious and forbearing"; "to keep his conduct in all things, official and private, free from impropriety"; to avoid publicity and "not engage in public controversy"; and most important and relevant to the present matter, "endeavour to avoid, as far as possible, either on his behalf or on behalf of others, in litigation". [p. 197] U_5

The subject matter of the present litigation, in pith and substance, revolved around allegations of impropriety. That being so, seeking to enforce the fundamental rights to challenge the very charges against him to be ultra vires, and that too without withstanding the prescribed enquiry would negate the very spirit of the oath taken by the petitioner-judge. [p. 198] V_5

Present petition was not maintainable. It starkly lacked one of the essential conditions - enforcement of fundamental rights - for the Supreme Court to invoke its original jurisdiction under Article 184(3) of the Constitution. Moreso, when the positive exercise of the said jurisdiction by the Supreme Court would in effect thaw the process of accountability of one holding a public office, be it a judge of the Supreme Court. Accordingly, the present petition being bereft of essential constitutional requirements was non-maintainable, and thus, must fail. [p. 198] W_5

(rr) Constitution of Pakistan---

----Arts. 10-A, 178, 184(3), 209(5)(b) & Preamble---Presidential reference against a judge of the Supreme Court pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the judge's tax returns---

Constitutional petitions filed by different Bar Councils, Bar Associations and lawyers ('the petitioners') before the Supreme Court calling into question the constitutionality and legality of the reference against the judge---Maintainability---Whether the petitions were maintainable---Reasons for finding the present petitions as maintainable recorded.

In essence, present petitions sought the enforcement of the fundamental rights i.e. access to justice and a fair and independent judiciary. These issues were matters of public importance.

For seeking matters of public importance relating to the enforcement of fundamental rights in the original constitutional jurisdiction of the Supreme Court, the general petitioner need not be an aggrieved person in the strict sense. And more importantly, the present petitioners, unlike a sitting Judge of the superior court, were not shackled by any legal restrain of a constitutional oath to invoke the original constitutional jurisdiction of the Supreme Court. Resultantly, the present petitioners fulfilled the two mandated condition precedents to invoke the constitutional court of the Supreme Court under Article 184(3) of the Constitution. Present petitions were held to be maintainable. [p. 199] X_5

Al-Jehad Trust v. President of Pakistan PLD 2000 SC 84; Suo Motu Action Regarding Eligibility of Chairman and Members of Sindh Public Service Commission 2017 PLC (C.S.) 984; Miss Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 and Pakistan Muslim League (N) through Khawaja Muhammad Asif v. Federation of Pakistan PLD 2007 SC 642 ref.

(ss) Constitution of Pakistan---

----Arts. 48(1), 48(2), 184(3) & 209(5)---Presidential reference before the Supreme Judicial Council---Discretion and independent opinion of the President---Scope---Presidential reference against a judge of the Supreme Court pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the judge's tax returns---Constitutional petitions filed by different Bar Councils, Bar Associations and lawyers before the Supreme Court calling into question the constitutionality and legality of the reference against the judge---Whether the President was bound to act on advice of the Prime Minister in regard to the reference in terms of Art. 48(1) of the Constitution---Reasons for quashing the Presidential reference recorded. [Minority view]

Constitutional mandate of the President under Article 209(5) of the Constitution was to form an "opinion", whether misconduct was made out against the Judge, and if so, then a reference was to be sent for an enquiry to the Supreme Judicial Council ('the Council'). This decision or for that matter, the "opinion" was to be based on the "information" received from "any source". The "advice" of the Prime Minister when received by the President, would only be an "information" received from a "source", and thus lost its efficacy as an "advice", within the contemplation of clause (1) of Article 48 of the Constitution. In such circumstances, the "advice" of the Prime Minister would then fall within the exception to the general rule, as envisaged under clause (2) of Article 48 of the Constitution; where the President would have to apply his independent mind on the matter and then act accordingly. [p. 202] A_6

In the present case based on the complaint of a journalist, a summary was prepared and then moved by the Ministry of Law, and finally placed before the President, with the "advice" of the Prime Minister. The President signed and approved the summary with his handwritten note in terms that reflected, firstly, that the "advice" of the Prime Minister was unconditionally approved by the President; secondly, the approval so made by the President was without his independent application of mind on the "information" contained in the summary regarding the alleged misconduct against the judge; and finally, that, there was no formulation of an "opinion" by the President regarding the sufficiency of the "information" to constitute misconduct against the judge to file a reference. [pp. 200, 201] Y_5 & Z_5

The decision-making process leading to the President sending a reference to the Council under Article 209(5) deserved careful and thorough deliberation by the President. Given the facts relating to the opinion formed by the President in the present case, it demonstrated grossly negligent attitude lacking any application of mind. Instead of applying his independent mind to the seriously important matter placed before him, the President blindly accepted and followed the "advice" of the Prime Minister to send the reference to the Council. The formation of the "opinion" by the President was muddied by the blatant and uncalled for obedience to the "advice" of the Prime Minister. [p. 203] B_6

The President had grossly failed to discharge his constitutional obligations as ordained under Article 209(5) of the Constitution. Since the very foundation of the "opinion" formed by the President was based on the non-exercise of lawful jurisdiction, therefore the 'superstructure' built thereon, the signing and sending of the reference to the Council would lack legal sanction and be without lawful authority, and thus ultra vires of the Constitution. Consequently, the proceedings before the Council in furtherance of the Presidential reference against the judge stood abated. [p. 203] C_6

(tt) Constitution of Pakistan---

----Arts. 48(1), 48(2), 184(3) & 209(5)---Presidential reference before the Supreme Judicial Council---Information against the judge obtained and disclosed unlawfully---Effect---Information, obtained and disclosed unlawfully, if admitted would fall within the mischief of "information from any source"---Thus, it would remain the discretion of the Supreme Judicial Council to decide whether based on the admitted information, it would suo motu proceed against a sitting Judge or otherwise. [p. 205] D_6

(uu) Constitution of Pakistan---

----Arts. 14(1), 184(3) & 209(5)(b)---Right to privacy---Scope---Surveillance---Presidential reference against a judge of the Supreme Court pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the judge's tax returns---Constitutional petitions filed by different Bar Councils, Bar Associations and lawyers ('the petitioners') before the Supreme Court calling into question the constitutionality and legality of the reference against the judge---Tax and property records of the judge and his family were accessed/ searched to frame the reference against him---Whether such searches amounted to unlawful surveillance---Reasons for quashing the Presidential reference recorded.

Had the information regarding the foreign properties owned by the family members of the judge not been freely and legally accessible, then it would have sufficed to establish the allegation of obtaining the said information through surveillance. The counsel for the Government was able to demonstrate that the information regarding any property in the foreign country (United Kingdom), including the one owned by the family members of the judge could be retrieved or accessed through internet searches. And further, placing on record, a copy of the title of the said foreign properties, pre-dating the complaint against the judge, and that too, from the relevant and competent authority under the laws of the foreign country (United Kingdom) confirmed that the requisite search under the laws of the foreign country (United Kingdom) had already been carried out. Hence, the stance of the petitioners regarding mala fide of the Federal Government did not cross the legal threshold to saddle it with the responsibility of unlawfully obtaining the said information by surveillance. [p. 205] E_6

(vv) Constitution of Pakistan---

----Arts. 184(3) & 209(5)(b)---Income Tax Ordinance (XLIX of 2001), Ss. 198, 199 & 216(3)(p)---Presidential reference against a judge of the Supreme Court pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the judge's tax returns---Constitutional petition filed by different Bar Councils, Bar Associations and lawyers before the Supreme Court calling into question the constitutionality and legality of the reference against the judge---Law Minister directed the Chairman, Assets Recovery Unit (ARU), to seek verification of the ownership of the foreign properties from the income tax returns of the judge or his wife---Accordingly Chairman ARU sought confidential information of the judge and his wife from the Federal Board of Revenue (FBR) of particulars of the income tax returns filed and maintained under Income Tax Ordinance, 2001 ("the 2001 Ordinance")---Said information was disclosed by the Chairman FBR to Chairman ARU; and finally, the said confidential information was further passed on by Chairman ARU to the Law Minister and was then made the basis for the Presidential reference---Question as to whether disclosure of such confidential information was lawful, and whether the exception under S.216(3)(p) of the Income Tax Ordinance, 2001 applied to the judge and his wife---Reasons for quashing the Presidential reference recorded.

Income Tax Ordinance, 2001("the 2001 Ordinance") expressly provided for confidentiality of information recorded in the income tax returns of an assessee. The income tax officials, who were the custodian of the said information, were commanded under the law to jealously guard the same, and in case of any breach thereof, the offender was to face penal consequences under the Ordinance. However, this confidentiality of information would in no way prevent the competent income tax officials to seek from the assessee, the source of funds for the acquisition of any assets. In case, the competent income tax official was not satisfied with the explanation for the source of funds, he could departmentally proceed against the assessee for non-declaration and misdeclaration of assets under the enabling provisions of the 2001 Ordinance. [pp. 206, 207] F_6 & G_6

Law Minister and the Chairman ARU lacked the mandate to initiate an enquiry against a sitting Judge of the Supreme Court, as the legal domain to do so rested solely with the Supreme Judicial Council, and none other. Even otherwise, the information relating to income tax returns of the judge's wife would not fall within the scope of the purported enquiry of a "public servant" envisaged under section 216(3)(p) of the 2001 Ordinance. The particulars of the wife's income tax returns would remain immune from such permissible disclosures and thus retain its confidentiality. The legal position would have been otherwise, had the wife consented to allow such disclosure, which she did not or had the competent tax authorities initiated proceedings against her under the 2001 Ordinance, which they never did. [p. 209] I_6

In the present case, once the income tax officials had information regarding the alleged undeclared assets of the judge's wife, they despite having ample authority to legally proceed against her under the 2001 Ordinance, opted to proceed unlawfully by disclosing confidential information to unauthorized persons. Thus, prima facie, keeping in view the chain of directions emanating from the Law Minister leading to the unlawful disclosures of confidential information by the income tax officials, all persons at different rungs of the governmental hierarchy, who were part of this unlawful disclosure of confidential information, had exposed themselves to penal prosecution for commission of offences under section 198 read with section 199 and section 216 (1) of the Ordinance. The direction of the Law Minister and the Chairman ARU to solicit, obtain and receive, confidential information regarding the income tax returns of the judge and his wife, prima facia, exposed them to criminal prosecution for having committed an offence under section 199 read with sections 198 and 216(1) of the 2001 Ordinance. Similarly, the fact that the then Chairman FBR and the income tax officials having not refused the illegal directions of the Law Minister and Chairman ARU, and passing on confidential information to them, prima facie, exposed them not only to departmental action but also to penal consequences under section 198 read with section 216(1) of the 2001 Ordinance. Accordingly, the present Chairman, FBR should ensure that the entire record of the present case was placed before the FBR to proceed under the law, against the Law Minister, the Chairman ARU, the then Chairman, FBR and all the concerned income tax officers qua their role in ordering to inquire into, solicit, disclose and receive confidential information relating to the income tax returns of the judge and his wife. [Minority view] [pp. 207, 210] H_6 & L_6

Since the entire process leading to the filing of the Presidential reference was in violation of the law and the Constitution, the sending of the same to the Supreme Judicial Council lacked legal sanction and was without lawful authority, and thus ultra vires of the Constitution. Consequently, the proceedings before the Supreme Judicial Council in furtherance of the Presidential reference against the judge stood abated. [p. 211] M_6

Any directions by the Supreme Court to the tax authorities with specific time spans and setting the procedure for the income tax officials to proceed against the judge's wife, would amount to parallel legislation, when the 2001 Ordinance provided a framework for all such matters. More so, when such directions had been made against a person who was not a party to the present petitions. In the circumstances, any such directions of the Supreme Court would amount to prosecute her, and that too without providing her with an effective opportunity of hearing. [Minority view] [p. 209] J_6

(ww) Constitution of Pakistan---

----Art. 248---Constitutional office holders---Illegal acts---Immunity from prosecution----Scope---No protection was extended to holders of constitutional office from prosecution for their illegal acts. [p. 209] K_6

Ch. Zahur Ilahi's case PLD 1975 SC 383; Aman Ullah Khan's case PLD 1990 SC 1092; Nawabzada Muhammad Umar Khan's case 1992 SCMR 2450; Baz Muhammad Kakar v. Federation of Pakistan through Ministry of Law and Justice, Islamabad PLD 2012 SC 870 and Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others PLD 2010 SC 61 ref.

Per Syed Mansoor Ali Shah, J; agreeing with the majority view to the extent of quashing of the Presidential reference against the judge but with his own views and also disagreeing with the majority view regarding directions given to the Federal Board of Revenue for initiating proceedings against the judge's wife and children, and for submitting a report of said proceedings to the Supreme Judicial Council. [Minority view]

(xx) Constitution of Pakistan---

----Arts. 184(3), 209(5) & 211---Presidential reference against a judge of the Superior Court sent to the Supreme Judicial Council ('the Council')---Bar of jurisdiction under Art. 211 of the Constitution---Scope and purpose.

A Presidential reference competently filed by the President against a constitutional court judge should not ordinarily be made subject to scrutiny in judicial review by any Constitutional Court including the Supreme Court, unless the extraordinary circumstances demanded such intervention in the interest of justice and fair play. [p. 218] P_6

Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61 ref.

The proceedings before the Supreme Judicial Council ('the Council'), its report to the President and the removal of the judge by the President under Article 209 could not be called in question in any court of law under Article 211 of the Constitution, unless the removal of the judge was without jurisdiction, mala fide or coram non judice. A limited judicial review on said three grounds was not affected by Article 211, as no ouster clause could keep the actions taken without jurisdiction, mala fide or coram non judice, beyond the scrutiny of the constitutional courts. Article 211 of the Constitution gave immunity to proceedings before the Council till the removal of the judge by the President. However, proceedings and steps taken before the matter landed before the Council escape the immunity under Article 211. [p. 217] N_6

Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61 ref.

All acts preceding the proceedings before the Council were not hit by the ouster clause of Article 211. They were, therefore, subject to standard judicial review like any other executive or administrative act, on the grounds of substantive illegality, procedural impropriety and decisional irrationality. [p. 218] O_6

Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61 ref.

(yy) Constitution of Pakistan---

----Art. 209(5) ---Supreme Judicial Council ('the Council')---Complaint against judge of the Superior Courts---Council was the only constitutional forum available to inquire into the conduct or capacity of a constitutional court judge.

Only constitutional forum available to inquire into the conduct or capacity of a constitutional court judge was the Supreme Judicial Council ('the Council'). So the Government, its Ministries, Divisions, Departments or Attached Departments and their officers were not authorized to entertain any complaint against a constitutional court judge, let alone proceed and collect evidence to supplement the complaint. They could at best return the complaint to the complainant and guide him to approach the constitutional forums under Article 209 of the Constitution. [p. 218] Q_6

Where any Ministry, Division, Attached Department or Department of the Government, in the course of its normal business, discovered some adverse information against a constitutional court judge that may attract impeachable misconduct, in addition to the legal proceedings under the relevant law, the concerned Department etc., in such situation, should at first proceed against the constitutional court judge on the basis of the adverse information in accordance with the law under which it functioned. For example, if it was the Federal Board of Revenue (FBR) that discovered such an information, it could proceed against the judge under the tax laws and the judge would have a right to defend himself in accordance with law. Only when these proceedings came to a close after exhausting all the legal and judicial avenues and it was finally held that the judge had violated the law, the FBR may, in the interest of judicial accountability, send this information to the Federal Government through the Division with which it was attached under the Rules of Business, 1973 ("ROB") for information and necessary action. It would then finally rest with the Federal Government i.e., the Cabinet, to decide if the violation of law amounted to impeachable misconduct and whether the Federal Government should proceed against the constitutional court judge and place the "information" before the President. Such process found its justification from the foundational constitutional principles like independence of judiciary, rule of law and parliamentary democracy. [p. 219] R_6

(zz) Constitution of Pakistan---

----Arts. 184(3) & 209(5)(b)---Rules of Business, 1973, R. 14 ---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Assets Recovery Unit purportedly established vide a Cabinet notification coordinated the collection of evidence against the petitioner-judge---Question as to whether the ARU could have entertained and investigated the complaint against the petitioner-judge---Reasons for quashing the Presidential reference recorded. [Minority view]

The complainant could only have approached the constitutional forums provided under Article 209(5) of the Constitution and could not have filed the complaint before any other office or authority. Therefore, the very act of approaching the Assets Recovery Unit (ARU) was per se unconstitutional and illegal. It was to be noted with concern and suspicion that how did the complainant, a citizen of the country, planned on filing the complaint against a constitutional court judge before the ARU, which had no public interface or the legal mandate to deal with such a matter and had earlier never conducted any inquiry for the accountability of a constitutional court judge. There was surprisingly nothing on the record to show how the complainant found out about ARU. The ARU was not a Ministry or Division of any Ministry of the Federal Government, or an Attached Department, neither was it a statutory authority nor had the notification of its establishment been published in the official gazette for public information. The ARU, therefore, for all practical purposes did not legally exist for the world outside the Prime Minister's Office. However, the complainant instead of approaching the Supreme Judicial Council ('the Council'), which would have ordinarily come to the mind of a citizen, particularly in view of the publicly known recent removal of a High Court Judge by the President on the recommendation of the Council, approached the ARU for the accountability of judges. This looked more odd especially when the complainant claimed to be a journalist. Such an unusual step by the complainant raised eyebrows about the credibility of the complaint and the bona fide of the complainant. [p. 219] S_6

The Chairman, ARU on receiving the complaint from the complainant acted with surprising agility and activated his team to collect evidence of the alleged foreign properties. The ARU, which was to work under the Cabinet Division as per decision of the Cabinet, did not make any formal request to the Law and Justice Division through the Secretary, Cabinet Division for consultation on the matter in accordance with Rule 14 of the Rules of Business, 1973 ('the ROB'), despite noting in minutes of its meeting held on 15-04-2019 that the matter was sensitive as it related to the Judges of the Superior Judiciary. The informal discussion and consultation made by the Chairman and Members of the ARU with the Law Minister on 16-04-2019, and the oral advice of the Law Minister in that discussion carried no value in the eyes of law. The Law Minister, who was a distinguished constitutional lawyer, also did not realize the importance of his advice, even oral, and gave a "go ahead" to the ARU for inquiring into the veracity of the allegations made in the complaint against judges of the constitutional courts. The Chairman, ARU who was also a Barrister-at-law, and not a layman, knew well that an oral advice of the Law Minister was nothing in the eyes of law and he should have ascertained his legal authority to inquire into the allegations made against Judges of Constitutional Courts, before initiating the inquiry into the allegations made in the complaint. But both of them paid no heed to the constitutional mandate of Article 209 of the Constitution, and initiated the process of inquiring into the allegations. The Presidential reference against the petitioner judge was quashed, and as a result the proceedings, including the show cause notice, before the Supreme Judicial Council stood abated. [p. 224] Y_6

(aaa) Constitution of Pakistan---

----Arts. 82(2), 84, 99(3), 184(3), 209(5)(b) & 240(a)---Rules of Business, 1973, Rr. 2(1)(ii), 4(4), 4(5), 16(1)(m) & Sched. III---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Assets Recovery Unit purportedly established vide a Cabinet notification coordinated the collection of evidence against the petitioner-judge---Question as to what was the legal and budgetary status of the Assets Recovery Unit and that of its Chairman---Reasons for quashing the Presidential reference recorded. [Minority view]

The Assets Recovery Unit (ARU) was purportedly established by the Cabinet vide notification dated 06-11-2018. The Federation had defended the establishment of the ARU by the Cabinet, by referring to the provisions of Rules 4(5) and 16(1)(m) of the Rules of Business, 1973 ('the ROB'). The Federation argued that Rule 4(5) empowered the Prime Minister to establish agencies and offices for conducting the business of the Federal Government, and under Rule (16)(1)(m) the Cabinet had power to decide any matter referred to it by the Prime Minister, and that the Prime Minister referred the matter of establishing the ARU to the Cabinet, and the Cabinet thus competently approved the establishment of the ARU. [p. 220] T_6

Bare reading of the provisions of Rule 4(5) of the ROB made it clear that the said Rule did not empower the Prime Minister to establish new agencies or offices; it simply authorized him to refer the business of the Government to already established agencies and offices under the law. The word "determine" had been used in the Rule in the context of allocation or entrustment of the business of Government and not for the power to establish a new agency or office. In the absence of any power to establish a new agency or office, reference of the matter to the Cabinet under Rule 16(1)(m) by the Prime Minister was inconsequential, as the Cabinet also did not enjoy any such power. The scope of the ROB could not extend to creation of agencies or offices to perform functions in relation to any matter to which the executive authority of the Federation extended. Such agencies or offices could be established only by or under some law enacted by the Parliament on the subject over which it had the legislative power under the Constitution. The creation of the ARU by the Cabinet, could not be sustained treating it as an Attached Department of the Cabinet Division also. The Departments that had been declared as Attached Departments to particular Divisions were created by or under the law, and not by the Federal Government. The Federal Government, as per Rules 2(1)(ii) and 4(4) of ROB, could only declare them attached with a particular Division, but could not create them. [p. 220] U_6

The Terms of Reference (TORs) of the ARU defined its role and powers. The ARU did not pass as a coordinating agency or office under its TORs for the following reasons: first, as per its notification it was established as an entity separate from the Departments whose officials had been made its Members and also addressed as such in its TORs; second, there was no mention of its coordinating role in the TORs; third, the powers and functions had been prescribed in the TORs as that of the ARU, and not of its Members; and fourth, but most importantly, the ARU was conferred such wide and extensive powers which even its Members did not enjoy under the laws of their parent institutions, e.g., it was empowered to request any intelligence agency under the Government for assistance in obtaining any information on any subject within and outside the country, and authorized to seek assistance and information from law enforcement agencies and other Government departments, including the information relating to bank accounts, companies record, revenue record, travel record, NADRA record etc. With such intrusive investigative powers, the ARU could not be said to be an innocuous coordinating agency, office or unit. The establishment of the ARU was, therefore, absolutely without lawful authority. In the absence of any legal status of the ARU, its Chairman and Members also had no legal position or status. [p. 221] V_6

The appointment of the Chairman, ARU by the Cabinet was not backed by any law including any rule of the ROB. Even otherwise, the ROB made under Article 99(3) of the Constitution could not provide for creation of posts in connection with the affairs of the Federation. Such power must be conferred by some law enacted under Article 240(a) of the Constitution. Article 99(3) empowered the Federal Government to make rules only on two subjects: firstly, for the allocation of the business of the Federal Government to its different components, i.e., the Ministries; and secondly, for the transaction of that business. The Rules made under such power could regulate the procedural modalities of allocation and transaction of the business, i.e., by which Ministry or Division of a Ministry and how a matter was to be taken up and dealt with; such Rules could not grant substantive power to create posts in connection with the affairs of the Federation. The expression "allocation and transaction" of the business did not by any stretch of imagination imply such power. Thus, the appointment of the Chairman, ARU by the Cabinet was without lawful authority. [p. 222] X_6

Mustafa Impex v. Government of Pakistan PLD 2016 SC 808 ref.

Funds could be allocated for any Government activity only by the National Assembly in the Annual Budget Grants under Article 82(2) of the Constitution or supplementary and excess budget grants under Article 84 of the Constitution. The Annual Budget Statements for the relevant financial years 2018-19 and 2019-20 did not mention the allocation of any budget for the expenditure of ARU. The amounts as approved in the budget passed by the National Assembly could be utilized only for the purpose specified in the budget statement. Any re-appropriation of funds or their utilization for some other purpose was not justified under the Constitution; for this purpose, the supplementary budget statement had to be placed before the National Assembly following the procedure provided in Article 84 of the Constitution. Persons making the unauthorized expenditure from the Federal Consolidated Fund were personally responsible for that expenditure. The ARU, therefore, had no budgetary support and therefore did not pass for an executive authority. In such background, role of the ARU became more suspicious and raised the questions: who funded the investigation and the transnational surveillance of the petitioner judge; who paid for the law expert of the ARU; who paid for collecting information from the land registry of the foreign country and websites, which only provided access to information after payment; and who was funding the entire operation. These unanswered questions cast doubts on the bona fides of the Government and the Prime Minister, who was the Chief Executive of the Federation. The Presidential reference against the petitioner judge was quashed, and as a result the proceedings, including the show cause notice, before the Supreme Judicial Council stood abated. [p. 222] W_6

Action Against Distribution of Development Funds PLD 2014 SC 131; Mustafa Impex v. Government of Pakistan PLD 2016 SC 808 and Ram Jawaya v. State of Punjab AIR 1955 SC 549 ref.

(bbb) Constitution of Pakistan---

----Arts. 9, 14(1), 184(3) & 209(5)(b)---National Database and Registration Authority Ordinance (VIII of 2000), S. 28---Income Tax Ordinance (XLIX of 2001), S. 216---Government Servants (Conduct) Rules, 1964, R. 18---Investigation for Fair Trial Act (I of 2013), S.35---Right to privacy---Scope---Surveillance---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Property records and information relating to the petitioner-judge and his family were accessed/searched by the Assets Recovery Unit using different sources, including websites, to frame the reference against the petitioner---Question as to whether the information obtained through such searches was breach of the petitioner's and his family's right to privacy, dignity and personal liberty enshrined in the Constitution and amounted to covert surveillance---Reasons for quashing the Presidential reference recorded. [Minority view]

Chairman and legal expert of the Assets Recovery Unit (ARU) asserted that the details of those residing in any immovable property in the foreign country (United Kingdom) could be accessed through open source websites; that once the address was located, the owner of that immovable property could be found through open source such as the land registry website. However, it was important to note that said websites were not free or open source websites. To access the information from the websites, an account with username and password needed to be created, payment was to be made by debit/credit card, the website acknowledged the payment of charges by email, and sent the requested information by email. The Federation in defence did not produce any record of the searches made on the said websites: What and how many addresses were found and under whose names? Who created the account? Who made the payment of charges? What were the payment or credit card details? Who received the acknowledgement of payment and the requested information and at whose email address? More importantly, there was no evidence of what information was received that was allegedly used for searching on the land registry website. A paid source, which required registration and payment before allowing access to information, was not an open source as claimed by the Federation. It showed that no such search was conducted for tracing the properties through those websites; rather the details of the properties were gathered through covert surveillance of the petitioner judge and his family. Covert surveillance and interception were offensively intrusive investigative tools only available to intelligence agencies in the country. [p. 227] Z_6

The omission of the Federation and of the Chairman and legal expert, ARU to produce the website record as to procuring the address of the foreign properties of the spouse and children of the petitioner judge gave rise to a presumption that the legal expert, ARU never searched the addresses of the properties through the website. Even otherwise, the Chairman and legal expert, ARU in their concise statement made a general statement that an immovable property could be located through open source websites, but they did not make any specific and categorical statement therein that the foreign properties of the family of the petitioner judge were located by that method. [p. 227] A_7

Surveillance was permitted in the limited area of anti-state or terrorist activities and that too under judicial and executive oversight. Outside such limited area, surveillance was constitutionally prohibited. Intelligence agencies did not enjoy a free hand in conducting surveillance but are subject to strict rules of compliance and oversight by the court. The fact that the ARU did not possess the resources or the technical capacity to carry out surveillance of the petitioner and his family and the interception of their communications, gave credence to the stance of the petitioner that the surveillance was carried out in connivance and in collaboration with the intelligence agencies. The possibility of such happening, therefore, could not be ruled out in the absence of any other evidence furnished by ARU or the Law Minister. It was but obvious that in the present case the information about the addresses of properties were obtained through no other means but through covert surveillance and interception of the intelligence agencies which gathered the information from the private zone of privacy enjoyed by the petitioner judge and his family, without any authorization of law and by trampling over the constitutional guarantees of privacy, personal freedom and dignity. The issue of unlawful surveillance and invasion of privacy of the petitioner judge and his family was far more critical and graver than the information procured by the ARU. It was a naked threat to personal liberty, privacy and dignity guaranteed to the citizens under the Constitution. [pp. 228, 230, 233] B_7, E_7 & J_7

Employees of National Database and Registration Authority (NADRA), who were legally enjoined under section 28 of the National Database and Registration Authority Ordinance, 2000 not to communicate to any person any information acquired by them in the course of their employment, committed violation of that command of the law by making compliance with the command of the Chairman, ARU in communicating to the Chairman and other Members of the ARU the NADRA record relating to the petitioner and his family. Likewise, Member of the ARU from Federal Board of Revenue (FBR) committed violation of section 216 of the Income Tax Ordinance, 2001 by disclosing the tax records of the petitioner and his spouse to the Chairman and other Members of the ARU. While Member of the ARU from the Federal Investigation Agency (FIA) breached Rule 18 of the Government Servants (Conduct) Rules, 1964 by making unauthorized communication of the official documents and information as to the passport/visa record and travelling history of the petitioner and his family. The Chairman and Legal Expert, ARU procured the information regarding the foreign properties by offending the fundamental rights of personal liberty, privacy and dignity of the petitioner and his family by procuring personal information regarding the foreign properties without the sanction of any law through covert surveillance and interception, and also by violating the confidentiality provisions of the National Database and Registration Authority Ordinance, 2000 and the Income Tax Ordinance, 2001. These actions of the Chairman and legal expert of ARU also attracted criminal liability under section 35 of Investigation for Fair Trial Act, 2013. For these illegal actions, the authorities concerned must initiate criminal and disciplinary proceedings against the Chairman, legal expert and Members of the ARU, as well as, the defaulting officials of FBR and NADRA under their respective laws. [pp. 236, 237, 240] M_7, N_7, O_7 & R_8

The admission and reliance on the material (evidence) illegally collected by the ARU without any enabling law empowering it to do so, in flagrant violation of the fundamental rights of the petitioner and his family was inadmissible, therefore, the Law Minister and Prime Minister could not have relied and acted upon it, for making the "summary" and advising the President. [pp. 240, 241] R_7 & S_7

The complainant journalist also appeared before the Court but did not explain his source of information regarding the foreign properties belonging to the petitioner's family. The complainant appeared to be a proxy, who could not have discovered the addresses of the foreign properties. After putting together, the facts relating to the information given by the complainant it was easy to discern that the complainant was fed the information to generate the complaint. Whoever fed him the information were the real actors of the present case. The Presidential reference against the petitioner judge was quashed, and as a result the proceedings, including the show cause notice, before the Supreme Judicial Council stood abated. [p. 229] C_7 & D_7

(ccc) Constitution of Pakistan---

----Arts. 9, 14(1) & 25---Right to privacy---Scope---Illegal surveillance by State agencies, impact of---Privacy affirmed the agency and autonomy of the individual and the right of every person to have the freedom and liberty to live a life of dignity---Privacy required that all information about a person was fundamentally his own, only for him to communicate or retain for himself---Privacy attached to the person and not to the place where it was associated---Intrusion by the State into the sanctum of personal space, other than for a larger public purpose, was violative of the constitutional guarantees---Right to privacy was deeply intertwined with the right to life, right to personal liberty and right to dignity---Illegal and illegitimate surveillance, by both State and private actors, had the impact of intrusion into the private lives of citizens, not only violating their constitutional rights but also intruding on the very personhood, privacy and personal liberty of those surveilled---Surveillance had disparate impact, violating principles of non-discrimination and equality as enshrined in the Constitution---Illegally procured private information amassed by the agencies could be used to manipulate and blackmail people for promoting political agendas; this crippled human security and dismantled democracy, lowering it slowly into an abyss of totalitarianism---Concept of privacy and social impact of illegal surveillance explained.
[pp. 230, 231, 232, 235] F_7, G_7, H_7, I_7 & K_7

Michael C. James, A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe, Connecticut Journal of International Law, p.261, Vol. 29, Issue 2, (Spring 2014); John Stuart Mill, On Liberty, Batoche Books, p.13, (1859); [5 Coke 91: 1 Sm LC (13th Edn.) 104 at p. 105]; Warren and Brandeis, The Right to Privacy, Harvard Law Review, p. 193, (1890), Vol. 4, No. 5; 277 U.S.438, 478 (1928); Lawrence Lessig, Code and Other Laws of Cyberspace, p.153-55 (1999); Artavia Murillo ET AL. ("In Vitro Fertilization") v. Costa Rica (2012), Inter-Am. Ct. H.R. (Ser.C) No.257; Benazir Bhutto v. President of Pakistan PLD 1998 SC 388 and Jeffrey Rosen, The Unwanted Gaze: The Destruction of Privacy in America (2000) ref.

(ddd) Constitution of Pakistan---

----Arts. 9 & 14(1)---Right to personal liberty and privacy---Scope---Duty of State institutions/authorities with respect to personal information of citizens.

Rights to personal liberty and privacy under Articles 9 and 14 of the Constitution imposed a constitutional obligation on State authorities to protect the privacy and personal freedom of the citizens unless the law expressly authorized them to do otherwise in exceptional circumstances. In the absence of any law to the contrary, the rights to privacy and personal freedom became absolute and stood to protect the privacy and personal freedom of the citizen. No Government institution was to disclose the personal information of any citizen unless the law authorized the institution to do so. In the absence of any specific law, the umbrella of constitutional guarantees would come to cover and protect the citizen.
[p. 236] L_7

(eee) Qanun-e-Shahadat (10 of 1984)---

----Preamble---Constitution of Pakistan, Art. 14(1)---Illegally collected evidence, admissibility of---Principles regarding the admission or exclusion of evidence obtained in violation of the constitutional rights. [Minority view]

The Irish Supreme Court in the case DPP v. JC [2015] IESC 31 laid down the following principles with regard to the admission or exclusion of the evidence obtained in violation of the constitutional rights, in order to balance the legitimate competing public interests: (i) The onus was on the prosecution to establish the admissibility of all evidence; (ii) If a claim was raised that evidence was obtained in breach of constitutional rights, the onus was on the prosecution to establish either that there was no unconstitutionality, or that despite any interference with constitutional rights the evidence should still be admitted; (iii) Where evidence was obtained in deliberate and conscious violation of constitutional rights, it should be excluded except in exceptional circumstances; (iv) Where evidence was taken in breach of constitutional rights, there was a presumption in favour of exclusion, which could be rebutted by evidence that the breach of rights was either inadvertent or derived from subsequent legal developments; and (v) Whether or not a breach of constitutional rights was deliberate and conscious required analysis of the conduct or state of mind of the individual who actually gathered the evidence, as well as, any senior official or officials within the investigating or enforcement authority concerned who was involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence-gathering of the type concerned. [p. 239] P_7

Neil M. Richards, The Dangers of Surveillance, Harvard Law Review, p.1935, Vol.126, (2013); [2006] 2 AC 221; [1970] HCA 21; [1978] HCA 22; 116 U.S. 616 (1886); 367 US 643 (1961) and [2015] IESC 31 ref.

Above stated principles as to inadmissibility of the illegally collected evidence had developed mostly in the cases where there was a law that regulated a constitutional right, but that law was not followed or was violated in the process of collecting evidence. The courts have held such evidence to be generally inadmissible, with few exceptions, mainly with the reason that the admission of such evidence would compromise the integrity of the judicial process and bring the administration of justice into disrepute. There was no hindrance in adopting the said principles in our jurisdiction. [p. 240] Q_7

(fff) Constitution of Pakistan---

----Arts. 48(1), 48(2), 184(3) & 209(5)---Rules of Business, Sched. V-B, Entry No. 35---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Prime Minister placing information/advice before the President with regard to misconduct of a judge---Independent opinion of the President---Scope---Entry 35 in Sched. V-B to the Rules of Business, 1973---Ultra vires the Constitution---Whether under Art. 209(5) of the Constitution, the President was to form his personal "opinion" or to act on the "advice" of the Cabinet or the Prime Minister as envisaged under Article 48(1) of the Constitution---Reasons for quashing the Presidential reference recorded. [Minority view]

The President was to examine the "information" placed before him under Article 209(5) as Head of State, acting as an arbiter between the two branches of the State, discharging his function as a person representing the unity of the Republic. Personal opinion of the President under Article 209(5) actualized the non-partisan role of the President and provided a check on any partisan adventurism by the Government of the day against the judiciary. If the President was just a rubber stamp acting on the advice of the Cabinet, a hostile Government could, theoretically, file references against a number of judges of the constitutional courts, resulting in initiation of inquiries against all of them. The "information" placed before the President under Article 209(5) was to be processed into a reference only if the President formed an opinion that the information made out a case for inquiry against the judge. [p. 244] T_7 & U_7

While the Constitution vested the President with the power to form an "opinion", it was difficult to imagine that this power was to be exercised by him in a mindless and mechanical manner, thus reducing him to just a rubber-stamp, who upon receiving information was to simply direct the Council to inquire into the conduct of a constitutional court judge. [p. 245] V_7

Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61, paras 107 and 196 ref.

Entry 35 in Schedule V-B to the Rules of Business, 1973 that provided that President was to act on advice of the Prime Minister for making a reference to the Supreme Judicial Council under Article 209(5) of the Constitution was, therefore, ultra vires the Constitution. [p. 246] W_7

In the present case, the President did not apply his mind and form his own opinion on the "information" received; he simply approved the advice of the Prime Minister and signed the draft

Reference submitted with that advice. The formation of opinion and the direction to the Supreme Judicial Council to hold an inquiry was, therefore, not that of the President; both these acts were made without jurisdiction and were coram non judice, and thus unconstitutional and of no legal effect. [p. 246] X_7

(ggg) Constitution of Pakistan---

----Arts.184(3) & 209(5)(b)---Income Tax Ordinance (XLIX of 2001), Ss. 111, 114, 116(1)(b), 116A & 120(3)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns (wealth statement)---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Whether petitioner-judge was obliged under S.116(1)(b) of the Income Tax Ordinance, 2001 to declare the assets and liabilities of his spouse and children in his wealth statement---Reasons for quashing the Presidential reference recorded. [Minority view]

Section 116(1), of the Income Tax Ordinance, 2001 (the 2001 Ordinance') simply provided for issuance of notice to a taxpayer for filing the wealth tax statement or wealth reconciliation statement along with the income tax return and provided for particulars to be included in such a statement. In case a taxpayer had already filed the said statements along with his return, section 116(1) appeared to have no relevance. It was not the case of the Federation that the petitioner failed to file the wealth tax statement or wealth reconciliation statement. In case the said statements were deficient or incorrect, the tax department could issue notice to the taxpayer under section 120(3) and consider the case in the light of Section 111 of the 2001 Ordinance. No such notice or proceedings were initiated by the Federal Board of Revenue (FBR) against the petitioner. Directly leveling allegation of violation of section 116(1)(b) against the petitioner in such background was misconceived besides being premature. [p. 247] Y_7

One foreign property was purchased by the spouse of the petitioner in the year 2004, before his elevation to the Bench of the High Court in 2009; this property was therefore completely irrelevant for forming opinion of misconduct and making the reference against the petitioner. The other two foreign properties were acquired by the spouse and children of the petitioner in the year 2013, after his said elevation; they were, therefore, to be declared in the tax year 2013 by the petitioner if there was any legal obligation on him, at that time, to do so. The children of the petitioner were not minors in the year 2013; therefore, no question as to his obligation to declare their assets arose under section 116(1)(b). The current dispute related to his alleged obligation to declare the assets of his spouse only. Therefore, the question was whether the petitioner was under any legal obligation to declare the foreign assets of his spouse in his wealth statement along with his tax returns filed in the tax year 2013. The simple and straightforward answer as per FBR's own interpretation that was in vogue in 2013 was that he was not. The FBR, in the wealth statement form prescribed for the tax year 2013, required a taxpayer to declare the assets of his or her spouse if he or she had not filed income-tax return and wealth statement independently. It was an admitted fact that the spouse of the petitioner had filed her income-tax return and wealth statement independently, in the year 2013. It, therefore, appeared that there was no legal obligation on the petitioner to declare the assets of his spouse in his wealth statement as per the requirement of the FBR prevailing in the year 2013. [pp. 248, 249] Z_7 & B_8

PLD 2017 SC 265 ref.

The FBR's second interpretation expressed in the form prescribed for the tax year 2015 was that a taxpayer was required to declare only those assets of his or her spouse which had been acquired by funds provided by that taxpayer. There was neither any allegation in, nor was any material annexed with, the "summary" initiated for forming the opinion of misconduct against the petitioner that the funds for purchase of the foreign assets were provided by the petitioner to his spouse. No opinion of misconduct against the petitioner, thus, could have been made on the basis of these two departmental interpretations of the provisions of section 116(1)(b) of the 2001 Ordinance. [p. 248] A8

In terms of the scheme envisaged in the 2001 Ordinance, once an asset was claimed by a person to have been sourced by him or her and, more so, such asset was also declared in the statutory declaration/wealth statement by that person, then only that person could be questioned and required to explain the source of acquiring such asset by the tax authorities. In the event that person failed to properly explain the source, an addition could be made in his or her income and that added income was taxed accordingly. Under no circumstances, any other person could be made directly or indirectly part of such proceedings. Thus, no opinion of misconduct against the petitioner could have been formed on the basis of even such interpretation of the provisions of section 116(1)(b) of the 2001 Ordinance. [p. 250] C8

Another interpretation of section 116(1) of the 2001 Ordinance suggested by the Federation was that every individual resident taxpayer was to mention the assets of his or her spouse in the wealth statement irrespective of the fact that the latter was or was not his or her "dependent". Section 114 of the 2001 Ordinance required that the tax return for any tax year had to be accompanied by the wealth statement required under section 116. In case a wealth statement was not filed or was deficient, the income tax return filed was not considered complete. In case of any deficiency, the Commissioner, FBR was empowered to issue a notice to the taxpayer under section 120(3), informing the deficiency and providing him time to rectify it. If it was cured during the given time, the tax return was considered complete and accepted. Therefore, if the Commissioner, FBR had been of the view, as per the interpretation suggested by the Federation, that the petitioner was under legal obligation to declare the assets acquired by his spouse in the year 2013, in his wealth statement filed with tax return of 2013, he should have issued notice to the petitioner specifying the defect and providing him time to rectify it. The petitioner, in that case, could have defended that notice on all legal grounds available to him including the interpretation proposed by him as well as the interpretations put to the provisions of section 116(1)(b) by the FBR itself in the forms prescribed for wealth statement. No such notice, however, was issued to the petitioner. [p. 250] D8

It was also important to highlight that Section 116A of the 2001 Ordinance which required a resident individual taxpayer to furnish statement of foreign assets, was inserted in the 2001 Ordinance in the year 2018 by the Finance Act, 2018. This amendment made in the year 2018 prima facie showed that there was earlier no obligation on a resident individual taxpayer to furnish such statement of even his own foreign assets, much less the foreign assets of his spouse and children. The Presidential reference against the petitioner judge was quashed, and as a result the proceedings, including the show cause notice, before the Supreme Judicial Council stood abated. [p. 251] E8

(hhh)Constitution of Pakistan---

----Arts. 12, 184(3) & 209(5)(b)---Anti-Money Laundering Act (VII of 2010), Sched., section XIIA---Income Tax Ordinance (XLIX of 2001), Ss. 192, 192A, 194 & 199---Foreign Exchange Regulation Act (VII of 1947) Ss. 4 & 5---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Whether the petitioner violated any provisions of Anti-Money Laundering Act, 2010 or the Foreign Exchange Regulation Act, 1947---Reasons for quashing the Presidential reference recorded. [Minority view]

The Federation argued that being a case of 'concealed income', the case against the petitioner-judge also fell under the Anti-Money Laundering Act, 2019 (AMLA) by referring to sections 192, 192A, 194 and 199 of Income Tax Ordinance, 2001 ('the 2001 Ordinance') mentioned in in section XIIA of the Schedule to the AMLA. The said sections in the Schedule of AMLA were inserted vide Notification

No. SRO 425(I)/2016 dated 14-05-2016 through which offences under sections 192, 192A, 194 and 199 of the 2001 Ordinance were listed as "predicate offences" for the purposes of invocation of the AMLA. In the present case, admittedly all three foreign properties were acquired prior to 14-05-2016; therefore, the AMLA was not applicable at all. Furthermore, principle of prohibiting retrospective punishment was a guaranteed fundamental right under Article 12 of the Constitution. Even otherwise, it was clear that the Legislature had put a precondition that 'tax sought to be evaded is ten million rupees or more' in all the four said sections of 2001 Ordinance mentioned in AMLA. Thus, for the invocation of the AMLA the law presupposed conclusion of proceedings under the relevant provisions of the 2001 Ordinance to determine the said threshold and that too in relation to tax liability for the period on or after 14-05-2016. No such determination had taken place in the present case; hence, there was no application of the AMLA. [p. 251] F_8

The Foreign Exchange Regulation Act, 1947 (FERA) provided for regulation of payments and dealings in foreign exchange and securities, and the import and export of currency and bullion. Sections 4 and 5 of the FERA provided that no one could deal in foreign exchange except through an authorized dealer and imposed restrictions on transfer of money outside Pakistan. There was no evidence on the record that established or even prima facie showed any violation of the FERA against the petitioner. The Federation pointed out no violation of the FERA, even during the arguments. The Presidential reference against the petitioner judge was quashed, and as a result the proceedings, including the show cause notice, before the Supreme Judicial Council stood abated. [p. 252] G_8

(iii) Constitution of Pakistan---

----Arts. 209(5)(b) & 209(8)---Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Article 209 (8) of the Constitution), Preamble---Reference against a judge of the Superior Court on grounds of 'misconduct'---Impeachable misconduct---Meaning. [Minority view]

Impeachable misconduct was when there was a violation of law or violation of the Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Article 209(8) of the Constitution) ['the Code'] that was so grave that it ruptured judicial integrity, tarnished public confidence and pulled down legitimacy of the judicial institution. Short of this, it might be misconduct but not impeachable misconduct. It was commonsensical that not every infraction led to removal of a constitutional court judge or constituted impeachable misconduct. The best test was to see if the judicial integrity of a judge had been undermined resulting in lowering the public confidence and trust in the judiciary, thus impairing impartiality and legitimacy of the judicial institution. [p. 254] H_8

(jjj) Constitution of Pakistan---

----Art. 209(8)---Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Art. 209(8) of the Constitution), Preamble---Standards under the said Code extended to the judge and judge alone---Said Code had no jurisdiction over or concern with the family, relatives and friends of the judge---Judge could not be made vicariously liable for the conduct of his family. [Minority view]

Judicial integrity and the Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Article 209(8) of the Constitution) ['the Code'] were judge specific, largely covering judicial conduct and partly his personal behavior. The standards under the Code extended to the judge and judge alone. The Code had no jurisdiction over or concern with the family, relatives and friends of the judge. [p. 254] I_8

The Code was a judge specific document and did not extend to family members and in no event, held a judge vicariously responsible for the conduct of his family - his spouse and children - who were independent, natural and legal persons in their own right and could do whatever they wanted. "Conduct" and "misconduct" were personal to a judge under the Code. Like any other citizen, a judge could not be held accountable for the conduct of someone else, there was no such thing as vicarious responsibility of a judge, unless the law required it or there was evidence that the wrongdoings of the judge had been concealed behind the family facade. [p. 255] J_8

Judges were not to be taken as supporting or endorsing their spouse's or partner's conduct if they did not publicly dissociate themselves from it. The law should recognize that they were independent actors and that the deeds of one were not to be visited on the other. [p. 255] K_8

Hearing on the Report of the Chief Justice of Gibraltar, [2009] UKPC 43. (4-3 minority view) ref.

(kkk) Constitution of Pakistan---

----Arts. 184(3), 204(2)(b)& 209(5)(b)---Supreme Judicial Council Procedure of Enquiry 2005, R. 13---Contempt of Court Ordinance (V of 2003), Ss. 3 & 4---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Confidentiality of the reference---Details of proceedings of the reference publicized by the President and reported by the media---Proceedings by the President were to kept confidential---Reasons for quashing the Presidential reference recorded. [Minority view]

Paragraph 13 of the Supreme Judicial Council Procedure of Enquiry 2005 provided for the proceedings of the Supreme Judicial Council ('the Council') to be conducted in camera and also banned reporting the proceedings of the Council. There was an absolute restriction of confidentiality on the process of preliminary assessment of the allegations made against a constitutional court judge. Such restriction equally applied to publicizing the reference filed by the President and the allegations made therein. In the context of publicizing, proceedings of preliminary assessment of "information" conducted by the President was similar and equal to proceedings by the Supreme Judicial Council ('the Council'). Therefore, if the proceedings were to be conducted by the Council in camera, then so should be the proceedings by the President. [pp. 255, 256] L_8 & M_8

Under Article 204(2)(b) of the Constitution, the constitutional courts had power to punish any person who scandalized the Court or otherwise did anything which tended to bring the Court or a Judge of the Court into hatred, ridicule or contempt. Publicizing a complaint or reference and the allegations made therein, of which veracity was yet to be determined after inquiry by the Council, definitely tended to bring the Judge into hatred, ridicule and contempt, and thus attracted the provisions of Article 204 of the Constitution and the Contempt of Court Ordinance, 2003. In the present case, it was a matter of record that the reference was publicized even when it had not yet been placed before the Council for preliminary consideration, as the filing of the reference and the allegations made therein against the petitioner was published in several newspapers and later during the proceedings before the Council the matter was discussed in press conferences and TV talk shows by the Government Ministers and even by the President. The act of publicizing the filing of the reference against the petitioner and of the allegations made therein, was clearly unconstitutional and fell within the scope of the provisions of Article 204 of the Constitution and the Contempt of Court Ordinance, 2003. The fact as to who leaked and publicised the matter was disputed and could not be resolved in the present proceedings, but the matter could not be left unnoticed and allowed to go unchecked. Such omission would encourage repetition of the mischief in future. Thus, the present matter was to be left to the discretion of the Chief Justice who was pater familias of the judiciary and was to protect its prestige, honour, reputation and integrity, to initiate appropriate proceedings for a thorough inquiry of the matter so that the right to fair trial of the persons involved in publicizing the reference and the allegations made therein, may not be infringed.

[pp. 256, 257, 263] N_8, O_8 & S_8

(lll) Mala fides---

----Types of mala fides---'Mala fide of law' and 'mala fide of fact'---Distinction.

Mala fide of law was constituted when a person inflicted an injury upon another person in flagrant contravention of the law; he was not allowed to say that he did so with an innocent mind. He was taken to know the law and act within the law. He may, therefore, be guilty of mala fide of law, although so far as the state of mind was concerned, he acted ignorantly and in that sense innocently. Thus, action of an authority was tainted with mala fide of law when it took the action which was so unreasonable, improbable or blatantly illegal that it ceased to be an action contemplated by the law under which it was purportedly taken, or took the action by violating the mandatory procedural requirements or without satisfying the jurisdictional requirements, or took the action which no reasonable person could have taken on the basis of the available material. On the other hand, an unlawful action done designedly, willfully or wantonly and not accidently, thoughtlessly or negligently fell within the domain of mala fide of fact. In such case, the action was taken in bad faith either to hurt the person against whom the action was taken or to benefit oneself or another, or in colourable exercise of powers for collateral or ulterior purposes not authorized by the law under which the action was purportedly taken. If the act suffered from mala fide of law, the mischief was corrected by nullifying the act; mala fide of fact, however, further entailed the consequences of making the actor accountable also. [p. 257] P_8

West Pakistan v. Begum Shorish Kashmiri PLD 1969 SC 14; Sarwar v. Punjab 1990 SCMR 999; Said Zaman v. Federation 2017 SCMR 1249; Abdul Rauf v. Abdul Hamid PLD 1965 SC 671 and Federation v. Saeed Ahmad PLD 1974 SC 151 ref.

(mmm) Qanun-e-Shahadat (10 of 1984)---

----Art.129(e)---Presumption of correctness attached to an official act---Scope---Public functionary, mala fide of---Proof.

Mala fide was difficult to prove against a public functionary because there was a presumption of regularity with regard to all official acts under Article 129(e) of the Qanun-e-Shahadat, 1984.However, this presumption of regularity was available only to official acts done by a person or authority competent to do that. The presumption of regularity could not be attached to the acts done by the persons and authorities who had no legal authority to do those acts, rather a reverse presumption for lack of bona fide arose. In such a case, the onus to prove mala fide did not remain as high. Mala fide was inferential by construct. It could be drawn from direct or circumstantial evidence. The Court carefully took into consideration the surrounding circumstances of the action; the conduct of the persons involved; the object and purpose to be achieved; and the nature of the illegality. The court, in a way, reconstructed the whole act and its backdrop, and then evaluated the fides of the action and its actors. If mala fide on the part of the actors was apparent on the face of record, then the court of law seized with the matter was not supposed to shut its eyes from taking notice thereof. While full faith was given to public acts and record of the Government, this assumption was overturned if mala fide was borne out from the record. [p. 258] Q_8

Federation v. Saeed Ahmad PLD 1974 SC 151 ref.

(nnn) Constitution of Pakistan---

----Arts. 10A, 184(3) & 209(5)(b)---Income Tax Ordinance (XLIX of 2001), Ss. 116(1)(b) & 122---Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Art. 209(8) of the Constitution), Preamble---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns (wealth statement)---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Supreme Court unanimously quashed the reference and declared that the same was of no legal effect whatsoever, and in consequence thereof the proceedings pending in the Supreme Judicial Council

("Council") against the petitioner-judge, including the show-cause notice issued to him, stood abated---Supreme Court (with a majority of 7 to 3) gave directions to the Commissioner, Inland Revenue and Federal Board of Revenue to inquire into and seek explanation from the spouse and children of the petitioner as to the nature and source of the funds whereby the three subject properties in a foreign country were acquired in their names, and also send a report in such regard to the Supreme Judicial Council, which had the powers to, if it considered justified, to commence proceedings against the petitioner in exercise of its suo motu jurisdiction---His Lordship (Syed Mansoor Ali Shah, J) observed that after quashing of the Presidential reference against the petitioner, the case set out against him came to an end---Reasons given by His Lordship for not agreeing with the majority view as to the directions given to the Federal Board of Revenue after the reference had been quashed. [Minority view]

[Note: The directions can be found in the short order of the present judgment reported as (Mr. Justice Qazi Faez Isa and 14 others v The President of Pakistan and others (PLD 2020 SC 346), headnote (b)]

The spouse and children of the petitioner like all other citizens of the country were independent persons and enjoyed an inalienable right to the protection of law. As they were not party to the instant proceedings and were never summoned or made a party to the proceedings by the Court, any adverse order against them, would deprive them of their inalienable right to due process under the Constitution and the law, and would contravene the well-entrenched and deep-rooted principle of audi alteram partem. After the reference against the petitioner was unanimously quashed by the Court, the case set out against the petitioner came to an end. In the absence of any allegations of corruption against the petitioner or of his holding foreign properties in the names of his wife and children as a trustee or a benamidar, the Supreme Court, and for that matter the Supreme Judicial Council ('the Council'), had no concern with the assets and properties of the spouse and the children of the petitioner. [p. 263] T_8

The Federal Board of Revenue (FBR) did not require any direction from the Supreme Court for taking any proceedings against any individual (including a constitutional court judge or his spouse and children) for a tax violation under the Income Tax Ordinance, 2001 ('the 2001 Ordinance'), if any. Similarly, the Council was also free and independent to exercise its suo moto jurisdiction against any judge of the constitutional courts when so required. It was nobody's case that either the FBR or the Council were reluctant or unwilling to perform their functions under the law and the Constitution. [p. 264] U_8

Under Section 122 of the 2001 Ordinance an assessment order could not be reopened after a lapse of five years by the FBR. Also, the directions in the majority view regulating the Tax Commissioner to function and perform his duties within a prescribed time-line, which was not so provided under the 2001 Ordinance amounted to entering the realm of judicial legislation. [p. 264] V_8

The direction to the Chairman, FBR to send the report to the Council would make the Chairman, FBR a complainant and the report a new complaint. The FBR was an organ and instrumentality of the Federal Government and was not empowered to directly approach the President under Article 209 of the Constitution unless the Federal Government i.e., the Cabinet, approved to place such information before the Council through the President. [p. 264] W_8

The Supreme Court could not direct someone to file a complaint against a constitutional court judge before the Council and then make the Council consider the said complaint. This would have a far reaching effect as it would dismantle the independence and neutrality of the Council and the constitutional scheme under Article 209 that safeguarded a constitutional court judge. It also flouted the right to fair trial under Article 10A of the Constitution. [p. 265] X_8

The observation in the majority view that the right to appeal under the 2001 Ordinance would be available to the spouse and children of the petitioner while simultaneously, the Council may also commence proceedings - could lead to conflicting results and thereby, may render the appeal under the 2001 Ordinance otiose and futile. Besides, the Council did not enjoy any power to issue directions to any judicial or a quasi-judicial forum to speed up pending matters against a constitutional court judge. [p. 265] Y_8

The proceedings initiated through the majority view after the quashment of the reference against the petitioner would mean that the Council must now consider if a judge could be made vicariously liable for misconduct for his family's affairs, a concept that was alien to the Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Article 209(8) of the Constitution) and had nothing to do with judicial integrity. [p. 265] Z_8

Per Maqbool Baqar, J; agreeing with the majority view to the extent of quashing of the Presidential reference against the judge but with his own views and also disagreeing with the majority view regarding directions given to the Federal Board of Revenue for initiating proceedings against the judge's wife and children, and for submitting a report of said proceedings to the Supreme Judicial Council. [Minority view]

(ooo) Constitution of Pakistan---

----Arts. 14(1), 90, 91, 184(3) & 209(5)(b)---Rules of Business, 1973, R. 20(6)---Income Tax Ordinance (XLIX of 2001), Ss. 116(1)(b), 198 & 216---National Database and Registration Authority Ordinance (VIII of 2000), Ss. 28 & 29---Government Servants (Conduct) Rules, 1964, R. 18---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council ('the Council') in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner-judge before the Supreme Court calling into question the constitutionality and legality of the reference against him---Held, that the purported reference was based on actual malice and ill-will harboured against the petitioner-judge by the concerned State functionaries on account of a judgment the petitioner-judge had authored in the past [Suo Motu Case No. 7 of 2017 (PLD 2019 SC 318)], wherein he had criticized the ruling political party and one of its coalition partners---Purported reference did not allege any dishonesty or corruption in the acquisition of the foreign properties and it was also not alleged that the petitioner did not have sufficient tax paid/white money to acquire the said properties, if he wanted to---Nothing was placed on the record to show that there had been any money laundering or that the petitioner failed to pay any tax due---Joint reading of Ss.114 & 116 of the Income Tax Ordinance 2001 ('the 2001 Ordinance') showed that the petitioner was not at all required to declare the assets of his non-dependent wife, and children, nor was there any other provision in the 2001 Ordinance creating any such obligation on the petitioner requiring him to disclose the assets of his non-dependent wife and children along with his income returns---Prime Minister bypassed the Cabinet altogether and sent his purported advice to the President for forwarding the purported reference to the Council, without the sanction of the Cabinet---President had not applied his independent mind while forwarding to the Council the purported reference---Assets Recovery Unit (ARU) and its Chairman were bereft of any legal status and had absolutely no power or authority to collect the material in connection with the purported reference---Information about the petitioner and his family available with the Federal Board of Revenue (FBR) and National Database and Registration Authority (NADRA) was freely accessed, obtained and shared by/with the ARU and the media in violation of the respective statutory provisions relating to confidentiality and statutory prohibition on sharing such information---Complainant-journalist who informed the Chairman ARU of the foreign properties belonging to the petitioner's family was merely a proxy who was set up by the Government itself---Whole account of "complaint" followed by an "investigation" was to cover up the fact that the information about the foreign properties was, in fact, obtained by government agencies through covert surveillance---Petitioner's image was systematically damaged through selected leaks and press conferences by members of the Cabinet in relation to the reference---All illegal acts leading upto the filing of the reference were collusive involving at the very least the President, Prime Minister, Law Minister, Chairman Assets Recovery Unit (ARU) and the Attorney General---Malice could be inferred from their deeds and actions and the surrounding context---Law Minister, the Chairman ARU and officials of Federal Investigation Agency (FIA) were additionally liable under the relevant provisions of Income Tax Ordinance, 2001 ('the 2001 Ordinance') and the National Database and Registration Authority Ordinance, 2000 (NADRA Ordinance) for illegally obtaining/disclosing personal and confidential information of the petitioner and his family---Prime Minister himself was also liable under the 2001 Ordinance and NADRA Ordinance as it was on his orders and that of his team that the illegalities in relation to the reference were committed---Prime Minister was also liable for sending the purported advice to the President, which in the facts and circumstances of the case was infected with malice---Whereas, the then, Special Assistant to the Prime Minister on Information was liable for committing contempt of Court for the uncalled for and disrespectful comments she made in her press conference relating to the reference---Purported reference against the petitioner was quashed and the proceedings and the show cause notice in relation thereto stood abated---Illegalities and violations of the Constitution and relevant laws committed from the stage of pre-reference investigation/ proceedings to the filing of the Presidential reference before the Supreme Judicial Council stated in detail. [Minority view] [pp. 270, 271, 272, 276, 277, 278, 281, 286, 293, 294, 295, 298, 299, 300, 302, 303, 305, 306, 310] A_9, B_9, C_9, D_9, E_9, F_9, G_9, H_9, K_9, N_9, Q_9, R_9, S_9, T_9, U_9, V_9, W_9, X_9, Y_9, Z_9, A_{10}, B_{10}, C_{10}, D_{10}, E_{10}, F_{10} & K_{10}

Messrs Mustafa Impex v. Government of Pakistan PLD 2016 SC 808; Mohtarma Benazir Bhutto's case PLD 1998 SC 388; Muhammad Yousuf v. Abdul Qayyum PLD 2016 SC 478, 483; State v. Ataullah Mengal PLD 1967 SC 78, 91; Shahbaz Khan's case PLD 2016 SC 1, 9; Aftab Ahmed Memon v. Chairman NAB 2019 YLR 1865, 1870; Khawaja Ahmed Hassan's case 2005 SCMR 186 and Jan e Alam v. State PLD 1965 SC 640 ref.

(ppp) Income Tax Ordinance (XLIX of 2001)---

----S. 116(1)(b)---Wealth statement---Assets in name of non-dependent spouse and children acquired by them through their own resources, disclosure of---Filer/taxpayer was certainly not required to disclose such assets of his independent spouse and children through the wealth statement that he/she was required to file along with his/her income return. [Minority view] [p. 282] I_9

(qqq) Interpretation of statutes---

----Notifications---Beneficial notifications, executive orders and instructions had retrospective effect. [p. 283] J_9

Messrs Army Welfare Sugar Mills Ltd. and others v. Federation of Pakistan and others 1992 SCMR 1652 and Elahi Cotton Mills Ltd. and others v. Federation through Secretary, Ministry of Finance, Islamabad and others PLD 1997 SC 582 ref.

(rrr) Constitution of Pakistan---

----Arts. 48(2) & 209(5)(b)---Presidential reference against a judge of the Superior Courts---President to form an 'opinion' in terms of Art. 209(5) of the Constitution before sending the reference to the Supreme Judicial Council---Meaning and scope---Whether the President could apply his independent mind or had to act on the advice of the Prime Minister---Held, that no concept of any "advice" was present in the constitutional scheme of initiating and maintaining any proceedings against a Judge---Article 209(5) of the Constitution, recognised the role of only two offices/entities, the President, and the Supreme Judicial Council ('the Council')---Prime Minister had absolutely no role or participation in the entire process---Term "advice" was alien to the proceedings under Article 209---Article 209(5) of the Constitution did not state that President had to form an opinion on the advice of the Prime Minister, thus, it was the exclusive domain and prerogative of the President to form an opinion, whether or not to send the matter to the Council for it to hold an inquiry---President must personally and independently apply his mind as to whether a Judge had committed misconduct and, if so, whether it justified the sending of reference against him. [Minority view] [pp. 287, 288] L_9 & M_9

(sss) Constitution of Pakistan---

----Arts. 4 & 14(1)---Right to privacy---Scope---Surveillance---Collection of evidence through surveillance---Scope and permissibility. [Minority view]

State functionary could only embark upon the investigation or collection of material about a citizen under (i) the authority of an enabling law, (ii) by a functionary designated under the law; and (iii) only for a justifiable cause or reason. [p. 291] O_9

The State had no business to pry upon or collect personal information about its citizen, unless there was a just cause and legitimate purpose for doing so. No State functionary could embark upon an investigation or collection of material without the sanction of an enabling law, and even where such sanction and authority was available, the power and mandate thereunder was well regulated; neither could such power be exercised whimsically, nor could it travel beyond certain specified limits, and was always designed to be invoked/exercised under certain specified circumstances, and only where grounds and reasons justifying such exercise occurred or existed, and in a just, fair and a reasonable manner. Non-compliance of such prescription shall render the investigation, or collection of material, violative of Articles 4 and 14 of the Constitution. [p. 291] P_9

(ttt) Interpretation of statutes---

----Similar words in two different statutes---Interpretation of a word or a phrase could not be transported from one statute to another---Comparing the language of one statute with that employed in another was unsafe, even though the subjects covered by the two may involve similarities. [p. 307] G_{10}

Ghulam Mustafa Jatoi v. Additional and Sessions Judge 1994 SCMR 1299 and Federation of Pakistan through Secretary, Ministry of Finance v. Haji Mohammad Sadiq and others 2007 PTD 67 ref.

(uuu) Islamic law---

----Husband and wife---Individual ownership of property---Doctrine of proximity---Applicability---Separation of entities of the spouses regarding the holding of separate properties by them individually was clearly ordained in the Holy Quran---Islam stipulated separate identities of the spouses particularly in relation to their entitlement for holding of their properties separately from one another---Doctrine of proximity did not apply to the properties of spouses. [pp. 308, 309] H_{10} & I_{10}

Verse 7 of Surah An Nisa; Verses 11 and 12 of Surah An Nisa; Verse 32 of Surah An Nisa and Verse 176 of Surah An Nisa ref.

(vvv) Constitution of Pakistan---

----Arts. 184(3) & 209(5)(b)---Income Tax Ordinance (XLIX of 2001), Ss. 116(1)(b) & 122---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns (wealth statement)---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Supreme Court unanimously quashed the reference and declared that the same was of no legal effect whatsoever, and in consequence thereof the proceedings pending in the Supreme Judicial Council ("Council") against the petitioner-judge, including the show-cause notice issued to him, stood abated---Supreme Court (with a majority of 7 to 3) gave directions to the Commissioner, Inland Revenue and Federal Board of Revenue (FBR) to inquire into and seek explanation from the spouse and children of the petitioner as to the nature and source of the funds whereby the three subject properties in a foreign country were acquired in their names, and also send a report in such regard to the Supreme Judicial Council, which had the powers to, if it considered justified, to commence proceedings against the petitioner in exercise of its suo motu jurisdiction---His Lordship observed that after quashing of the Presidential reference against the petitioner, there was absolutely no justification for the said directions to the FBR as they were beyond the scope of the petition---Reasons given by His Lordship (Maqbool Baqar, J) for not agreeing with the majority view as to the directions given to the Federal Board of Revenue after the reference had been quashed. [Minority view]

[Note: The directions can be found in the short order of the present judgment reported as (Mr. Justice Qazi Faez Isa and 14 others v. The President of Pakistan and others (PLD 2020 SC 346), headnote (b)]

Upon quashment of the purported reference and abatement of the proceedings in relation thereto, and in view of the clear finding that the petitioner had not misconducted himself and had no concern, either with the foreign properties held by his spouse and children, or their tax affairs, if any, no question of public importance with reference to the fundamental right, amenable before the Supreme Court under Article 184(3) of the Constitution, remained to be decided, or dealt with. The directions given to the Federal Board of Revenue by the majority view after quashment of the reference were extraneous to the present proceedings. [pp. 283, 287, 309, 310] J_{10} & L_{10}

The properties having been acquired by the wife and children of the petitioner in the tax years 2004 and 2013, and five years period of limitation prescribed by law for opening of the tax assessment with regard thereto having expired several years before, they could not be lawfully required to furnish the source of funds for acquiring the said properties, or any income information for the said years. The assessments that had attained finality with the afflux of time could not be ordered to be re-opened. The Federal Board of Revenue's (FBR's) reopening the same shall be in violation of the legal prohibition and disability. Such would also violate the vested rights of the petitioner's wife and children. The directions given by the majority view required the wife and children of the petitioner to do what the law did not oblige them to do. [p. 288, 291, 311] M_{10} & P_{10}

The directions to FBR given in the majority view had been passed against the persons (the wife and children of the petitioner) who were neither before the Court nor were they put to notice. No opportunity was provided to them to submit as to why the FBR be not so directed. The wife and children being private citizens, their tax matters had no nexus with the essential pre-requisite for invoking and maintaining any proceedings under Article 184(3) of the Constitution, and were thus not amenable to the proceedings that were invoked thereunder. The role and jurisdiction of the Supreme Judicial Council ('the Council')was limited to the matters relating to the conduct and capability of the superior Court Judges; it was not mandated to delve into the affairs of someone who was not a judge of a superior Court. The directions in in the majority view tended to stretch the scope of the Council beyond its mandated jurisdiction, it rather vested in the Council the jurisdiction and authority not granted to it by the constitution. [p. 291] N_{10} & O_{10}

The directions to FBR in the majority view tended to create an anomalous situation, for they provided that the proceedings before the Council as contemplated thereby, shall not be effected by the filing or pendency of any appeal under the Income Tax Ordinance, 2001 ('the 2001 Ordinance') against the order/report of the Commissioner, or against any order made or decision taken at any appellate stage, as in the event the Council, on the basis of the report submitted by the Commissioner, recommended removal of the petitioner, but subsequently the petitioner succeeded in his challenge to the order of the Commissioner, and the said report was found not sustainable, the time for the retrieval may have passed, as by then the petitioner may have reached the age of superannuation. Even otherwise the damage inflicted upon the petitioner, and suffered by the Supreme Court, would be irretrievable. In the reverse scenario where the Council may not agree with the findings of the Commissioner, but such findings were upheld by forums before which the Commissioner's finding may be amenable to correction, an anomalous and embarrassing situation may arise for the Council. [p. 312] R_{10}

(www) Administration of justice---

----Courts could not and should not create any right, liability or obligation that was not founded in law. [p. 312] Q_{10}

State v. Ziaur Rehman PLD 1973 SC 49 ref.

Munir A. Malik, Senior Advocate Supreme Court along with Justice Qazi Faez Isa (appeared in person on 17.06.2020), Mrs. Qazi Faez Isa (appeared through video link on 18.06.2020), Tariq Mehmood, Senior Advocate Supreme Court, Salahuddin Ahmed, Advocate Supreme Court, Ch. Atif Rafiq, Advocate Supreme Court assisted by: Barrister Kabir Hashmi and Barrister Rabi-bin-Tariq; Babar Sattar, Advocate Supreme Court, assisted by: Miss Shohan Karimi, Advocate, Syed Kazim Hassan, Advocate Supreme Court and Kassim Mir Jat, Advocate-on-Record for Petitioners (in Constitutional Petition No.17 of 2019).

Hamid Khan, Senior Advocate Supreme Court, assisted by: Naseebullah Tareen, Advocate Supreme Court, Munir Kakar, Advocate Supreme Court and Ajmal Ghaffar Toor, Advocate; Syed Qalb-e-Hassan, Advocate Supreme Court, Amanullah Kanarani, Advocate Supreme Court, Rasheed A. Rizvi, Senior Advocate Supreme Court assisted by: Abbas Rasheed Rizvi, Advocate and M.S. Khattak, Advocate-on-Record for Petitioners (in Constitutional Petition No. 19 of 2019).

Bilal Hassan Minto, Advocate Supreme Court and Ms. Hina Jillani, Advocate Supreme Court for Petitioner (in Constitutional Petition No. 20 of 2019).

Sardar Muhammad Aslam, Advocate Supreme Court, Syed Amjad Ali Shah, Advocate Supreme Court, Kamran Murtaza, Senior Advocate Supreme Court, Azam Nazeer Tarar, Advocate Supreme Court Abid Saqi, Advocate Supreme Court, Hafiz M. Idrees, Advocate Supreme Court, Salman Akram Raja, Advocate Supreme Court assisted by: Asad Ladha, Advocate, Malik Ghulam Sabir, Advocate and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioners (in Constitutional Petition No. 21 of 2019).

Naseebullah Tareen, Advocate Supreme Court and Syed Amjad Ali Shah, Advocate Supreme Court for Petitioners (in Constitutional Petition No. 22 of 2019).

Hamid Khan, Senior Advocate Supreme Court, assisted by: Naseebullah Tareen, Advocate Supreme Court, Munir Kakar, Advocate Supreme Court, Ajmal Ghaffar Toor, Advocate, Asif Reki, Advocate, Sh. Ahsan-ud-Din, Advocate Supreme Court and Khushal Kansi, Advocate Supreme Court for Petitioners (in Constitutional Petition No. 23 of 2019).

Rasheed A. Rizvi, Senior Advocate Supreme Court, assisted by: Abbas Rasheed Rizvi, Advocate and M. Aqil, Advocate Supreme Court, Kassim Mir Jat, Advocate-on-Record for Petitioners (in Constitutional Petition No. 24 of 2019).

Hamid Khan, Senior Advocate Supreme Court, assisted by: Naseebullah Tareen, Advocate Supreme Court, Munir Kakar, Advocate Supreme Court and Ajmal Ghaffar Toor, Advocate, Rashid A. Rizvi, Senior Advocate Supreme Court, assisted by: Abbas Rasheed Rizvi, Advocate for Petitioners (in Constitutional Petition No. 25 of 2019).

Mian Raza Rabbani, Senior Advocate Supreme Court, assisted by: Zeshan Abdullah, Advocate and Saalim Salim Ansari, Advocate Supreme Court for Petitioners (in Constitutional Petition No. 26 of 2019).

Hafiz Abdul Rehman Ansari, Advocate Supreme Court, Taufiq Asif, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioners (in Constitutional Petition No. 27 of 2019).

Rasheed A. Rizvi, Senior Advocate Supreme Court, assisted by: Abbas Rasheed Rizvi, Advocate and Syed Haider Imam, Advocate Supreme Court for Petitioners (in Constitutional Petition No. 28 of 2019).

Syed Iftikhar Hussain Gillani, Senior Advocate Supreme Court, assisted by: Barrister Saad M. Buttar, Barrister Jibran Gillani and Miss Ramsha Hayat, Advocate, Abdul Latif Afridi, Advocate Supreme Court and Tariq Khan Hoti, Advocate Supreme Court for Petitioners (in Constitutional No. 29 of 2010).

Syed Iftikhar Hussain Gillani, Senior Advocate Supreme Court, assisted by: Barrister Saad M. Buttar, Barrister Jibran Gillani and Miss Ramsha Hayat, Advocate, Abdul Latif Afridi, Advocate

Supreme Court and Tariq Khan Hoti, Advocate Supreme Court for Petitioners (in Constitution Petition No. 30 of 2019).

Hamid Khan, Senior Advocate Supreme Court, assisted by: Naseebullah Tareen, Advocate Supreme Court, Munir Kakar, Advocate Supreme Court and Ajmal Ghaffar Toor, Advocate, M.S. Khattak, Advocate-on-Record for Petitioners (in Constitutional Petition No. 32 of 2019).

Rasheed A. Rizvi, Senior Advocate Supreme Court, assisted by: Abbas Rasheed Rizvi, Advocate for Petitioners (in Constitutional Petition No. 34 of 2019).

Dr. Farogh Naseem, Senior Advocate Supreme Court along with Ch. Ishtiaq Ahmed Khan, Addl. A.G., Sajeel Sheryar Swati, Advocate Supreme Court assisted by: Barrister Maleeka Ali Bukhari, Ch. Hassan Murtza Mann, Advocate and Shahid Naseem Gondal, Advocate for Respondents Nos. 2 and 8.

Sohail Mehmood, DAG. for Respondent No.1.

Aamir Rehman, Addl. AG. for Respondent No. 3.

Irfan Qadir, Advocate Supreme Court for Respondent No.4.

Dr. Khalid Ranjha, Senior Advocate Supreme Court along with Sajeel Sheryar Sawati, Advocate Supreme Court for Respondent No.9.

Respondent No.10 (in-person).

Respondent No.11 (in-person).

Arbab Arif, Secretary, SJC/Khawaja Daud Ahmad, Secretary SJC for Supreme Judicial Council.

Dates of hearing: 17th, 24th September, 8th, 14th, 15th, 21st, 28th, 29th, October, 4th, 5th, 6th, 11th, 12th, 13th 18th, 19th, 27th, 28th November; 2nd, 3rd, 4th, 16th, 17th 18th, 19th December, 2019; 20th 21st, 22nd, 27th, 28th, 29th January, 3rd, 17th, 18th, 19th, 24th February, 2nd, 3rd, 4th, 11th, 12th, 15th, 16th, 17th, 18th and 19th June, 2020.

JUDGMENT

UMAR ATA BANDIAL, J.---

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> "Surah An Nisa, Verse 135: O YOU who have attained to faith! Be ever steadfast in upholding equity, bearing witness to the truth for the sake of God, even though it be against your own selves or your parents and kinsfolk. Whether the person concerned be rich or poor, God's claim takes precedence over [the claims of] either of them. Do not, then, follow your own desires, lest you swerve from justice: for if you distort [the truth], behold, God is indeed aware of all that you do."

Translation by Muhammad Asad

(emphasis supplied)

Justice is an article of faith in our religion, whether that may be against our kith and kin or against the rich or poor. However, justice is an abstract concept attainable only where the scales of justice are held by persons (the Judges) who balance these equitably without regard to their personal desires. Indeed, the latter is the duty of the Superior Judiciary by virtue of their Oath to dispense justice without any fear or favour, affection or ill-will (ref: Third Schedule to the Constitution, Oath for Judges of the Superior Courts). This serves as proof that Judges of the Superior Courts are bound to be impartial and are entitled to be independent in the dispensation of justice.

2. In fact, an impartial and independent judiciary is universally recognised as a core value of any civilised democracy. This is evidenced by the international conventions that protect this value as a fundamental right of the people (ref: United Nations Basic Principles on the Independence of Judiciary and The (Montreal) Universal Declaration on the Independence of Justice). The significance of an independent judiciary is also deeply embedded in Pakistan with the Constitution itself guaranteeing in its Preamble that:

> "...the independence of the judiciary shall be fully secured;"

Even this Court in its pronouncements on the meaningful working of the Constitutional scheme of trichotomy of powers has many a times reaffirmed that the judiciary must enjoy the confidence of the litigants and the general public in its impartiality and commitment to dispense justice in accordance with law. A prerequisite for these attributes is the guarantee of the independence of the judiciary, a fact which this Court acknowledged in the case of Muhammad Aslam Awan v. Federation of Pakistan (2014 SCMR 1289). The relevant portion which can be found at para-2 is produced below:

> "2: Judicial independence both of the individual Judge and of the Judiciary as an institution is essential so that those who bring their causes/cases before the Judges and the public in general have confidence that their cases would be decided justly and in accordance with law. Judicial independence is one of the foundational values of the Constitution of Islamic Republic of Pakistan which is based on trichotomy of powers in which the functions of each organ of the State have been constitutionally delineated. The very Preamble of the Constitution pledges "wherein the independence of judiciary shall be fully secured". The Constitution makers conferred this independence because they wanted the Judges to "do right to all manner of people, according to law, without fear or favour, affection or ill-will" (Oath of office of Judges). The fundamental rights guaranteed under the Constitution cannot be secured unless Judiciary is independent because the enforcement of these rights has been left to Judiciary in terms of Articles 184(3) and 199 of the Constitution and the relevant law. Judiciary has not been made part of the Executive or the Legislature (Article 7). The separation of Judiciary from the Executive was made a Constitutional mandate (Article 175(3))."

(emphasis supplied)

It is in this context that Justice Qazi Faez Isa ("the petitioner") submits that he has filed the present Constitution Petition No. 17 of 2019 ("petition") seeking to protect this basic fundamental right of the Pakistani people from unlawful interference by the Executive authorities. To our minds, the primary duty of the Bench in all matters, including the present petition, is to do justice impartially in accordance with law without compromising our independence.

FACTS

3. In the above background, we may now set out the events which led to the filing of this petition. The petitioner is a serving Judge of the Supreme Court. Prior to this he was appointed directly as Chief Justice of Balochistan High Court on 05.08.2009, following which he was elevated to the Supreme Court on 05.09.2014. The petitioner has thus been holding public office since the later part of 2009. On 10.04.2019, Respondent No. 4, Mirza Shahzad Akbar, Chairman Assets Recovery Unit ("ARU"), received a letter from a journalist, one Mr. Abdul Waheed Dogar ("Mr. Dogar") . The letter alleged that the petitioner had certain properties in the United Kingdom owned in the name of his wife, ("Mrs. Isa"), which he had not declared. Attached with this letter was a document detailing one of the properties, 40 Oakdale Road, London, E11 4DL. However, the respondents only produced this document once they commenced their arguments on 02.06.2020. Thereafter, the Chairman ARU met with the Law Minister on 16.04.2019 who authorised the ARU to investigate into the matter on the basis of the above mentioned information. This is recalled in the former's letter dated 10.05.2019 addressed to the Law Minister.

4. After the grant of the aforenoted authorisation on 16.04.2019, certain inquiries were made by ARU to confirm the veracity of the allegations levelled against the petitioner by Mr. Dogar: firstly, the legal expert of ARU, Barrister Zia Ul Mustafa Nasim, was asked to find out whether the petitioner owned any properties in the United Kingdom in the name of Mrs. Isa and secondly, the Chairman of Federal Board of Revenue ("FBR") was approached for examining the tax records of the petitioner and Mrs. Isa to determine whether any foreign properties had been declared in their wealth statements.

5. On 08.05.2019, the legal expert of ARU conveyed to the Chairman ARU that there were three properties in the United Kingdom belonging to Mrs. Isa and her children. Their details are as follows:

i. 50 Coniston Court which was originally leased to the petitioner's wife in 2004 for a sum of 236,000 and was later renewed in October 2011 with the daughter added as a co-lessee;

ii. 40 Oakdale Road which was purchased by the wife and daughter on 27.03.2013 for a sum of 245,000; and

iii. 90 Adelaide Road which was purchased by the wife and son on 28.06.2013 for a sum of 270,000 ("London Properties").

Subsequently, on 10.05.2019 the Assistant Commissioner (Inland Revenue) confirmed to the Commissioner (Inland Revenue) that neither the petitioner nor Mrs. Isa had declared these properties in their wealth statements. Additionally, he revealed that Mrs. Isa had stopped filing her tax returns from the tax year 2015 and onwards.

6. On receipt of this information, the Chairman of ARU wrote a memorandum to the Law Minister on 10.05.2019 apprising him about the recent findings. On the basis of this material, claimed to demonstrate the petitioner's ownership of undeclared foreign assets, the Ministry of Law and Justice on 17.05.2019 prepared a summary for the Prime Minister ("PM"). This summary recommended the PM to advise the President to file a Reference under Article 209(5) of the Constitution before the Supreme Judicial Council ("SJC") alleging misconduct against the petitioner. On 20.05.2019 the President approved and signed the Reference (this was later numbered as SJC Reference No. 1 of 2019) which was filed with Secretary SJC on 23.05.2019. The primary allegation in the Reference against the petitioner was that he had violated Section 116 of the Income Tax Ordinance, 2001 ("the Ordinance") by not declaring the London Properties of Mrs. Isa and his children in his wealth statements. The Reference also alleged that the source of funds for purchasing these properties was not accounted for which meant that the aspect of money laundering could not be ruled out.

7. Consequent to the Reference being filed, the SJC by a formal intimation dated 14.06.2019 directed the petitioner to respond to the three allegations contained in the Reference (ref: Const. P. No. 17 of 2019, Part II), particularly:

"Page 106: ...the factum of ownership of the relevant properties mentioned in the Reference, the source of funds utilized for their acquisition and the mode of transfer of such funds."

(emphasis supplied)

The petitioner filed his Preliminary Response on 28.06.2019 in which he admitted that the London Properties were owned by his wife, who he claimed was a financially independent taxpayer, and his adult children (ref: page 128, Const. P. No. 17 of 2019, Part II). However, no explanation was provided for the other two questions posed by the SJC. As a result, the SJC by its order dated 02.07.2019 asked the former learned Attorney General ("AG") to assist the Council on the next date of hearing on 12.07.2019. Consequently, the AG filed a Rejoinder before the SJC on 11.07.2019. After considering the Preliminary Response of the petitioner and the Rejoinder and documents filed by the AG, on 12.07.2019 the SJC ordered the issuance of a Show Cause Notice ("SCN") to the petitioner. The SCN was issued on 17.07.2019. In his Interim Reply to the SCN dated 31.07.2019, the petitioner categorically rejected being the owner, both actual and ostensible, of the London Properties and further denied all knowledge of their particulars. Thereafter, he filed the present petition bearing the number Const. P. 17 of 2019 under Article 184(3) of the Constitution on 07.08.2019 with the following prayer:

A. Declare that Reference No. 1 and Reference No. 427 are not maintainable and non-est dismiss the same;

B. Declare that Reference No. 1 and Reference No. 427 are mala fide, filed with malice aforethought, filed for ulterior motives and to achieve a collateral purpose and therefore are not maintainable and liable to be dismissed;

C. Declare that proceeding any further with Reference No. 1 and Reference No. 427 undermines the independence of the judiciary, which independence is secured under the Constitution;

D. Declare that as Reference No. 1 has been filed by proxy it is not maintainable and cannot be entertained;

E. Declare that as there is every likelihood for this petition succeeding the Hon'ble Supreme Judicial Council be restrained from proceeding in the matter of Reference No. 1 and Reference No. 427 till the disposal of this Petition;

F. Declare that in camera proceedings of the Hon'ble Council in the context of this case are without lawful authority and in breach of fundamental rights;

G. Grant any other, further or better relief to which the Petitioner may be entitled to and which this Hon'ble Court deems fit and proper to grant under Article 184 (3) of the Constitution.

8. The above noted prayer in the petition is preceded by fifty-four questions of law. The main contentions formulated by the learned counsel for the petitioner are as follows:

i. There was no legal obligation on the petitioner to disclose the London Properties of his wife and children;

ii. The alleged misconduct has no nexus with the office of the petitioner;

iii. The Reference is a mala fide and colourable exercise of power;

iv. The petitioner and his family were subjected to covert State surveillance;

v. The evidence against the petitioner was collected illegally;

vi. The ARU was constituted without any legal authority;

vii. There was no authorisation from the President to collect material in support of the complaint;

viii. The President did not form his opinion in terms of Article 209(5) of the Constitution;

ix. No approval of the Federal Cabinet was taken prior to the filing of the Reference before the SJC;

x. There is no substance to the allegations levelled against the petitioner in the Reference; and

xi. The members of the SJC harbour bias against the petitioner (however, learned counsel for the petitioner did not press this argument during oral submissions).

On the factual plane, learned counsel for the petitioner repeatedly contended that because the London Properties are held in the names of the petitioner's financially independent taxpayer wife and adult children, the tax authorities should question them about the source of funds and the mode of their transfer, instead of harassing the petitioner through a Presidential reference filed under Article 209 of the Constitution.

9. Subsequent to the filing of Const. P. No. 17 of 2019 before this Court, the following Constitution Petitions were also filed by the Bar Councils and Associations and concerned citizens of Pakistan to defend the integrity of the petitioner:

i. Supreme Court Bar Association v. President of Pakistan and others (Const. P. No. 19 of 2019);

ii. Abid Hassan Minto and another v. Supreme Judicial Council through its Secretary and others (Const. P. No. 20 of 2019);

iii. Pakistan Bar Council v. President of Pakistan (Const. P. No. 21 of 2019);

iv. Abdul Basit President High Court Bar Association Quetta v. President of Pakistan (Const. P. No. 22 of 2019);

v. Muhammad Asif Reki President Quetta Bar Association v. President of Pakistan (Const. P. No. 23 of 2019);

vi. Sindh High Court Bar Association v. President of Pakistan (Const. P. No. 24 of 2019);

vii. Balochistan Bar Council v. President of Pakistan (Const. P. No. 25 of 2019);

viii. Sindh Bar Council v. Supreme Judicial Council through its Secretary (Const. P. No. 26 of 2019);

ix. Hafiz Abdur Rehman Ansari v. President of Pakistan (Const. P. No. 27 of 2019);

x. Karachi Bar Association v. President of Pakistan (Const. P. No. 28 of 2019);

xi. KPK Bar Council v. President of Pakistan (Const. P. No. 29 of 2019);

xii. Peshawar High Court Bar Association v. President of Pakistan (Const. P. No. 30 of 2019);

xiii. Punjab Bar Council v. President of Pakistan (Const. P. No. 32 of 2019); and

xiv. Pakistan Federal Union of Journalists v. President of Pakistan (Const. P. No. 34 of 2019).

These connected petitions primarily raised similar contentions as those agitated by the petitioner, namely, the non-application of mind by the President, mala fides on the part of the respondents in the framing and preparation of the Reference, the precise nature and scope of Article 209(5) of the Constitution, the unlawful creation of the ARU and the necessity of protecting the independence of the judiciary. In the interests of justice, these petitions were clubbed together and were heard along with the main petition filed by the petitioner.

10. In rebuttal to the petitioner's pleas and without assailing his integrity, the respondents submitted the following objections and contentions:

i. The petition is not maintainable for failing to cross the bar under Article 211 of the Constitution both in respect of the pre-reference proceedings and the unchallenged SCN issued by the SJC;

ii. The term misconduct is an inclusive term which includes not only conduct which violates the law but also conduct which is unbecoming of an officer;

iii. The conduct of the petitioner has to be viewed in light of the obligations laid out in the Code of Conduct;

iv. There is no ulterior purpose behind the filing of the Reference;

v. There has been no covert surveillance of the petitioner or his family or any breach of their right to privacy;

vi. There has been no illegal collection of evidence;

vii. The ARU has been properly constituted;

viii. The President has formed his opinion in accordance with law; and

ix. There is merit in the allegations levelled against the petitioner in the Reference.

11. At the outset, we would like to mention that the first hearing for this petition commenced on 17.09.2019 in front of a seven member Bench. However, learned counsel for the petitioner filed an objection application against two learned Judges of the Bench, namely, Justice Sardar Tariq Masood and Justice Ijaz ul Ahsan. He submitted that an adverse outcome for the petitioner, i.e. removal from office, would benefit both the learned Judges in the following manner: Justice Sardar Tariq Masood would become Chief Justice for six months in the year 2023 while Justice Ijaz ul Ahsan would thereafter see his tenure as Chief Justice increase from ten months to seventeen months. Accordingly, he requested the two learned Judges to recuse themselves from hearing this petition. The remaining five members of the Bench unanimously disapproved of this application of the learned counsel in their order dated 17.09.2019 reported as Justice Qazi Faez Isa v. The President of Pakistan (2019 SCMR 1875):

> "5: ... The submissions made by the learned counsel, however, do not disclose such an interest. On the other hand, the suggestion is that a tangible interest may accrue four years later. It involves a contingent, prospective and speculative interest. No precedent to hold such a future contingency to be a disqualifying factor for a Judge has been cited by the learned counsel. His plea is accordingly laden with contingencies and possibly fails the test of a "real likelihood" of prejudice from any Member of this Bench [Asif Ali Zardari v. State (PLD 2001 SC 568 at p.592)]. As such the submissions made by learned counsel prima facie do not carry weight."

(emphasis supplied)

However, Justice Sardar Tariq Masood, immediately, and Justice Ijaz ul Ahsan, with strong reservations, recused themselves from the Bench to maintain the purity, dignity and sanctity of this Court. For convenience, a portion from the note penned by Justice Ijaz ul Ahsan is reproduced below:

> "2: However, in view of the reservations, unfortunately expressed on behalf of the petitioner, who is a brother Judge of this Court, which are neither justified nor have any basis whatsoever in

fact, I do not consider it appropriate to hear these petitions, lest the petitioner entertain the remotest possibility of even a notional element of partiality or bias on my part."

(emphasis supplied)

It was in these circumstances that the file of this case was placed before the (then) Chief Justice to constitute a Full Court of eligible Judges who were neither members of the SJC nor were objected to by the petitioner.

12. As a result, a Bench comprising of ten learned Judges was formed which heard this petition for approximately 10 months, during which period learned counsel for the petitioner argued their case across 18 hearings, learned counsel in the connected petitions argued their cases across 10 hearings and learned counsel for the respondents argued his case across 13 hearings. Subsequently, this Court passed a short order on 19.06.2020 which is reproduced below for convenience:

"ORDER

For detailed reasons to be recorded later and subject to any orders made or directions given therein (if any), these petitions are allowed and disposed of in the following terms:

1. Subject to what is stated below, the Order of the Court is that Reference No. 1 of 2019 is declared to be of no legal effect whatsoever and stands quashed, and in consequence thereof the proceedings pending in the Supreme Judicial Council ("Council") against the Petitioner in C.P. 17/2019 (including the show-cause notice dated 17.07.2019 issued to him) stand abated.

2. Mr. Justice Yahya Afridi dismisses C.P. 17/2019 and disposes of the other petitions in terms as stated in para 1 herein above.

3. Mr. Justice Umar Ata Bandial, Mr. Justice Manzoor Ahmad Malik, Mr. Justice Faisal Arab, Mr. Justice Mazhar Alam Khan Miankhel, Mr. Justice Sajjad Ali Shah, Mr. Justice Munib Akhtar and Mr. Justice Qazi Muhammad Amin Ahmed make the following orders as the further Order of the Court (paras 4 to 11 herein below):

4. Within 7 days of this Order, the concerned Commissioner of Inland Revenue shall himself (and not some other officer exercising delegated powers) issue appropriate notices under the Income Tax Ordinance, 2001 ("2001 Ordinance") to the spouse and children of the Petitioner to offer an explanation regarding the nature and source of the funds (separately for each property) whereby the three properties in the United Kingdom (viz., No. 40, Oakdale Road, London E11 4DL; No. 90, Adelaide Road, London E10 5NW; and No. 50, Coniston Court, Kendal Street, London W2 2AN) that are in the names of the spouse and the children were acquired. For purposes of this Order the Commissioner Inland Revenue having jurisdiction over the spouse of the Petitioner (who must be a Commissioner exercising jurisdiction and performing functions at Islamabad) shall be deemed also to be the Commissioner having jurisdiction over the children. (The spouse and children are herein after referred to as "the respondents".) Any notices issued or proceedings taken (or proposed to be issued or taken) under the 2001 Ordinance in relation to any of the respondents in respect, or on account, of the properties aforesaid prior to the date of this Order stand terminated forthwith.

5. The notices shall be served at the official residence of the Petitioner at Islamabad through courier service and such other means as may be considered appropriate and shall be deemed served on the respondents when received at the said address.

6. The respondents shall furnish their replies to the notices along with such material and record as is deemed appropriate. In case any of them is outside the country, it shall be the responsibility of such person to timely file a response, and the proceedings before the Commissioner shall not be adjourned or delayed for the reason of non-availability in Pakistan of such person.

7. Upon receipt of the replies (and of such additional material/ record as may be filed in response to such clarification or explanation, if any, as the Commissioner may, in writing, have sought), the Commissioner shall give an opportunity of hearing to the respondents in person or through

an authorized representative/ counsel and shall thereupon make an order in accordance with the 2001 Ordinance.

8. The proceedings shall be concluded before the Commissioner within 60 days of the date of receipt of the notices as aforesaid, and the order shall be issued by him within 75 days of the said date of receipt, and no adjournment or extension in time whatsoever shall be given as affects or extends the aforesaid periods.

9. Within 7 days of the issuance of the order by the Commissioner, the Chairman, Federal Board of Revenue ("FBR") shall submit a report (to be personally signed by him) to the Council through its Secretary (i.e., the Registrar of the Supreme Court) regarding the proceedings as aforesaid, appending thereto the entire record of the said proceedings. The Secretary shall forthwith place such report before the Chairman of the Council (i.e., the Hon'ble Chief Justice of Pakistan) who shall, in such manner as is deemed appropriate, have the report laid before the Council for such perusal, consideration, action, order or proceedings, if any, in relation to the Petitioner as the Council may determine. The receipt of the report, the laying of it before the Council and the action/ proceedings, if any, or orders or directions, if any, as may be taken, made or given by the Council thereon shall be deemed, for purposes of Article 209 of the Constitution, to be in exercise of the suo motu jurisdiction as is conferred by that Article on the Council.

10. If, within 100 days from the date of this Order, no report as aforesaid is received by the Secretary from the Chairman, FBR, he shall inform the Chairman of the Council accordingly and shall, if so directed by him, write to the Chairman, FBR requiring an explanation as to why the report has not been received. If in reply the report is filed, then the matter shall proceed in terms of para 9 herein above. If a reply is received without the report or no reply is received, then the Secretary shall bring such fact to the attention of the Chairman of the Council who may direct that the matter be placed before the Council for such perusal, consideration, action, order or proceedings, if any, in relation to the Petitioner (or any other person as deemed appropriate) as the Council may determine. The action/ proceedings, if any, or orders or directions, if any, as may be taken, made or given by the Council shall be deemed, for purposes of Article 209 of the Constitution, to be in exercise of the suo motu jurisdiction as is conferred by that Article on the Council. Without prejudice to the foregoing, if at any stage the report is received from the Chairman, FBR, then the matter shall in any case proceed (or be deemed to proceed, as the case may be) in terms of para 9 herein above.

11. For the removal of any doubts, it is clarified that any of the proceedings under the 2001 Ordinance as herein contemplated on the one hand, and before the Council in terms of paras 9 or 10 herein above on the other, are distinct and separate from each other. Accordingly, nothing contained in this Order shall affect or prejudice the right(s) of appeal of any of the respondents under the 2001 Ordinance, if they feel aggrieved by the order made by the Commissioner or (as the case may be) any order made or decision taken at any appellate stage. Any such appeal(s) shall be decided on the merits, in accordance with the 2001 Ordinance. At the same time (and needless to say), the consideration by the Council of any matter placed before it under either paras 9 or 10 herein above shall not be affected by the filing or pendency of any appeal as aforesaid. But the Council may, if it deems appropriate, notice such appellate proceedings or orders/ decisions and may (for purposes only of the matter before it) make such orders or give such directions in relation thereto as it deems appropriate.

12. Mr. Justice Maqbool Baqar, Mr. Justice Mansoor Ali Shah and Mr. Justice Yahya Afridi join in the Order of the Court only to the extent of para 1 herein above, and also make their own order.

Order per Maqbool Baqar, Syed Mansoor Ali Shah and Yahya Afridi, JJ.

13. For the reasons to be recorded later and without limiting our jurisdiction in any manner to appropriately enlarge the scope of or make appropriate declarations and directions in the

detailed judgment, subject to para 15 hereunder, we hold the above petitions maintainable and allow the same. One of the outcomes of such declaration is that the Reference filed by the President of Pakistan against the Petitioner (Mr. Justice Qazi Faez Isa) is quashed, and as a result the proceedings along with the Show Cause Notice issued by Supreme Judicial Council stand abated.

14. One of our pivotal Constitutional values is that the independence of judiciary shall be fully secured. The same Constitution also ordains that to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. Therefore, it is reiterated that in our constitutional democracy, neither the petitioner judge, nor any other judge, or any individual or any institution, is above the law. The doors of the constitutional forum i.e., Supreme Judicial Council are always open, either on its own motion or for anyone who has a genuine and a bonafide grievance, amenable to the jurisdiction of the Council against a Judge of the Constitutional Court. At the same time, it is equally important, that a Judge like any other citizen of Pakistan enjoys the inalienable constitutional right to be treated in accordance with law. These fundamental values are to be protected at all cost in order to uphold the majesty and supremacy of the Constitution and to honour the people of Pakistan who have adopted and given to themselves this Constitution.

15. Yahya Afridi, J. has however found Constitutional Petition No. 17/2019 as non-maintainable.

Herein below are the detailed reasons for this short order.

MAINTAINABILITY

13. The first matter which requires our consideration is the issue of maintainability of this petition under Article 184(3) of the Constitution. Although no objection has been raised by the learned counsel for the respondents in this regard, it is still the bounden duty of this Court to establish the requisite jurisdictional facts under Article 184(3) regardless of whether the said point has been agitated or not. An examination of the jurisprudence of this Court makes it clear that in order to invoke its original jurisdiction under Article 184(3) of the Constitution, the impugned action must be shown to involve a matter of public importance arising from the breach of a fundamental right which affects the public at large. These Constitutional criteria have been reiterated in the case of Al-Jehad Trust and another v. Lahore High Court (2011 SCMR 1688) in which this Court held:

"11: ...unless the matter is of public importance relating to the enforcement of any of the fundamental rights conferred by Part II, Chapter 1 of the Constitution (Articles 8 to 28), the jurisdiction of the Court under Article 184(3) of the Constitution, cannot be invoked. The mere importance of a matter, without enforcement of any fundamental right or reference to a fundamental right without any public importance, will not attract the jurisdiction of this Court under Article 184(3) of the Constitution."

14. The fundamental right of the general public which is claimed by the petitioner to be under threat is the derivative right of the independence of the judiciary. This right is an essential prerequisite for the enjoyment of, inter alia, the principal fundamental right to access justice which is guaranteed to the people of Pakistan by Articles 4, 9 and 10-A of the Constitution. This Court in Sh. Riaz-Ul-Haq v. Federation of Pakistan (PLD 2013 SC 501) observed that:

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

15. It will be useful at this stage to consider in greater detail the independence of the judiciary, in the absence of which all other facets of the right to access justice are essentially rendered null and void. Indeed, the constitutional necessity of an independent judiciary for providing such access to justice to

the public has been elaborated succinctly in the case of Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61):

"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-a-vis, inter alia, their service and the tenure thereof, the independence of judiciary would be a mere delusion and a chimera;..."

Two crucial points emerge from the above quoted passage:

i. Firstly, it holds that any unlawful interference with Article 179 of the Constitution (which fixes the tenure of the Judges of the Supreme Court and sets the retiring age at 65 years), and any illegal bypass of the mechanism set out in Article 209 of the Constitution (which provides the procedure for the removal of Superior Court Judges) is an interference with the right to access justice. This is because such breaches erode the independence of the judiciary.

ii. Secondly, it affirms that although each individual Judge is guaranteed the right to be independent by the Constitution, it is in essence the judiciary as a whole whose independence has to be secured and protected.

Learned counsel for both the petitioner and the Bar Councils and Associations were at pains to stress this last point. It was emphasised by the latter that their principled stand was not just for the petitioner rather it was for the institution. It was the assault and targeting of the judiciary and the grave dangers which this posed to the right to access justice that compelled the Bar Councils and Associations to file the connected petitions.

16. However, in focusing on protecting Judges from the clutches of the Executive, learned counsel have failed to notice that the counterpoise of this fundamental right is judicial accountability. This necessarily follows from the indisputable fact that the independence of the judiciary is not primarily for the benefit of the Judges, but exists instead to secure the interests, rights and benefits enjoyed by the whole of society. Therefore, if one were to focus only on the protection of the judiciary from the depredations of the organs of the State (howsoever vitally important and crucial that may be), it will not be the independence of judiciary that will result but rather it would be the rule of Judges without any checks and balances. Accordingly, it is only fitting that judicial independence and accountability are treated as being complementary to each other. With that being said, it has to be kept in mind that the petitioner has alleged that there have been serious violations of Article 209(5) of the Constitution in the preparation of the Reference against him. As we have already observed, unlawful infringements of Article 209 erode the independence of the judiciary which is directly connected with the right to access justice. Therefore, the present petition satisfies the two-fold requirement of Article 184(3) of the Constitution.

17. Be that as it may, learned counsel for the respondents has objected to the maintainability of the petition on the ground that the SJC has taken cognizance of the Reference by issuing a SCN to the petitioner. This happened after SJC took into consideration the petitioner's Preliminary Response dated 28.06.2019 and Interim Reply dated 31.07.2019 on the merits of the Reference. However, as our short order dated 19.06.2020 has declared the Reference to be of no legal effect, this contention of the learned counsel is misplaced. The SCN issued by the SJC to the petitioner is premised on grounds given in the Reference. These have been held by us to suffer from serious illegalities. Notwithstanding the fact that the veracity and substance of the underlying factual information of ownership of the London Properties is not denied and remains intact, the SCN cannot survive on its own. This is for two reasons: firstly, although the factual matrix set out in the Reference attributes misconduct to the petitioner, the information contained in it without more is insufficient to sustain a reference for the removal of a Judge of the Superior Courts. Secondly, the allegations in the SCN that are derived from the Reference are

discredited by the same illegalities that invalidate the grounds of the Reference. Therefore, the SCN stands abated.

18. Learned counsel for the respondents has countered this line of reasoning by invoking the ouster clause contained in Article 211 of the Constitution. For ease of reference, this provision is produced below:

"211. Bar of Jurisdiction. The proceedings before the Council, its report to the President and the removal of a Judge under clause (6) of Article 209 shall not be called in question in any court."

He has submitted that Article 211 ibid mandates that proceedings before the SJC are to be accorded a high degree of respect. He urged that such deference was confirmed in the Chief Justice of Pakistan case (supra) which limited a challenge to the proceedings before the SJC to the following grounds:

"102: Having thus looked into the question of jurisdiction of this Court vis-a-vis the Supreme Judicial Council, I would conclude as under:--

(c) that the ouster clause of Article 211 of the Constitution would not protect acts which were mala fide or coram non judice or were acts taken without jurisdiction;"

19. He argued that because learned counsel for the petitioner did not press any of the three grounds mentioned in the Chief Justice of Pakistan case (supra), namely, coram non judice or actions that are mala fide or without jurisdiction, against the SJC during oral submissions, this Bench could not quash the SCN issued to the petitioner. While we are in complete agreement with the learned counsel's submission so far as it deals with the degree of respect to be afforded to the SJC and the sanctity attached to its proceedings, we cannot accept the conclusion that he has drawn from this argument. Such reasoning fails to grasp the crucial point that we have neither adjudicated upon the process of the SJC nor quashed its SCN issued to the petitioner. In fact, in view of the findings recorded in this judgment, we have simply abated the SCN. It is true that the factual information underlying the Reference casts a smear on the petitioner's name and cannot be ignored; however, without confronting the owners of the London Properties the information is at present inchoate to form the basis of proceedings under Article 209 of the Constitution. In these circumstances, we have agreed with the petitioner's plea that the same must be verified to test the veracity of the inference drawn in the Reference about the source of funds. Nevertheless, as the latter has been quashed, the SCN issued by the SJC has no foundation except for the preliminary factual information contained in the Reference. In this situation, the SCN has rightly been abated because it also lacks the factual and legal material on which the Reference was based. Accordingly, Article 211 has no application to the available facts of the present case.

20. Before parting with this area of discussion, we would like to clarify a very crucial aspect of this case that we believe has led to some confusion: namely, what standard of review ought to be applied by the Court for determining whether a reference filed before the SJC is legal or not. During oral submissions, learned counsel for the petitioner relied upon the Chief Justice of Pakistan case (supra) to argue that pre-reference proceedings can be struck down on judicial review grounds. The relevant portion from the judgment is produced below:

"70: Having thus examined all aspects of this question, I would conclude and would consequently declare:--

..

(d) that the said matters not hit by the mischief of Article 211 and mentioned above, would be subject to examination, scrutiny and judicial review like any other executive or administrative act."

(emphasis supplied)

21. However, learned counsel's reliance on the Chief Justice of Pakistan case (supra) for this point is of minor significance. In that case the Full Bench quashed the reference against the (then) Chief Justice on the ground of malice in fact. Nowhere does the judgment use any of the judicial review

grounds to set aside the reference. Nonetheless, out of respect for the Larger Bench hearing the Chief Justice of Pakistan case (supra), we can only convey our reservations and not our disagreement with the aforesaid observation.

22. Be that as it may, it is by now well-settled that SJC is a unique (and the only) body which can examine the conduct of a Superior Court Judge and decide whether the said Judge is fit to complete his tenure. Reliance in this regard is placed on the case of Khan Asfandyar Wali and others v. Federation of Pakistan (PLD 2001 SC 607):

> "Page 946: The Supreme Judicial Council is a unique institution, which comprises the senior most Judges in judicial hierarchy and entrusted with the onerous responsibility of deciding complaints that are referred to it through references by the President alone. It is an essential prerequisite of the independence of judiciary that there is put in place a system of accountability. It should, therefore, be the endeavour of the Judges of the Superior Courts to make the Code fully applicable and ensure that it is strictly adhered to. As held in the case of Zafar Ali Shah (supra), the Judges of the Superior Courts are not immune from accountability. They are accountable only in the manner laid down under Article 209 of the Constitution."

(emphasis supplied)

It may be noticed from the above quoted passage that the sanctity and uniqueness of the SJC is enhanced by its composition. It is comprised of the three senior most Judges in the country and the two senior most Chief Justices of the High Courts (ref: Article 209(2) of the Constitution). Indeed, the significant impact of the SJC's composition on the removal process of Judges was acknowledged in The President v. Mr. Justice Shaukat Ali (PLD 1971 SC 585):

> "Page 602: ...The forum [SJC] 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."

This dictum was subsequently approved in the Chief Justice of Pakistan case (supra) at para-98. However, if we hold today that a reference, which is an executive action under the Constitution, forwarded to the SJC can be struck down on ordinary judicial review grounds such as unreasonableness and proportionality we will be belittling its status, ignoring its competence and pre-empting its decisions based on appreciation of the record. We should endeavour to avoid taking any such step which goes against the spirit and intent of the Constitution. But this is precisely the course of action we will be choosing if the standard of judicial review is adopted to examine the legality of pre-reference proceedings. To exemplify this standard reliance is placed on the decision in Sabir Iqbal v. Cantonment Board, Peshawar (PLD 2019 SC 189):

> "5: ... The court can examine and judicially review the executive discretion exercised by the authorized officer on the ground of proportionality. Alongside reasonableness, proportionality is now a central standard directing the action of the executive branch... Proportionality is a standard that examines the relationship between the objective the executive branch wishes to achieve, which has the potential of infringing upon a human right, and the means it has chosen in order to achieve that infringing objective. The fiduciary duty, from which the administrative duty of fairness and administrative reasonableness are derived, demands administrative proportionality as well... An administrative measure must not be more drastic than necessary or to sum up in a phrase - not taking a sledgehammer to crack a nut. According to De Smith's Judicial Review, the standards of proportionality and unreasonableness are inextricably intertwined. Unreasonableness contains two elements of proportionality when it requires the weight of relevant considerations to be fairly balanced and when it forbids unduly oppressive decisions. Under the first element, proportionality is a test requiring the decision- maker to maintain a fair balance. Under this category the courts evaluate whether manifestly disproportionate weight has been attached to one or other considerations relevant to the

decision. The second element is that the courts consider whether there has been a disproportionate interference with the claimants rights or interests. A more sophisticated version of proportionality provides for a structured test. Here the courts ask first whether the measure, which is being challenged, is suitable to attaining the identified ends (the test of suitability). Suitability here includes the notion of "rational connection" between the means and ends. The next step asks whether the measure is necessary and whether a less restrictive or onerous method could have been adopted (the test of necessity - requiring minimum impairment of the rights or interest in question)."

(emphasis supplied)

23. It may be noticed from the above quoted passage that the scope of judicial review is not only vast but may also be intertwined with the merits of a case. We have already observed that SJC is the only constitutional authority which can examine the conduct of a Judge of the Superior Courts. Therefore, giving the power of judicial review to this Court to set aside pre-reference proceedings will be tantamount to rejecting the capacity and jurisdiction of the SJC to adjudicate upon any question of unreasonableness, proportionality or suitability raised in relation to the merits of the President's actions. It will also open the floodgates of litigation by Judges who are the subject of a Reference. This prima facie appears to be contrary to the meaning of Article 209 of the Constitution which entrusts all matters regarding the merits of a case to a high powered Constitutional domestic forum within the judiciary. It is also pertinent to mention here that even learned counsel for the petitioner challenged the pre-Reference proceedings in the present case on the grounds of mala fides and not judicial review.

THE CASE AGAINST THE PETITIONER

24. Before examining the questions of law raised in this petition, it will be useful to consider the provisions of Article 209 of the Constitution under which the present Reference has been filed:

"209. Supreme Judicial Council.

(1) There shall be a Supreme Judicial Council of Pakistan, in this Chapter referred to as the Council.

(2) The Council shall consist of,

(a) the Chief Justice of Pakistan;

(b) the two next most senior Judges of the Supreme Court; and

(c) the two most senior Chief Justices of High Courts.

Explanation:- For the purpose of this clause, the inter se seniority of the Chief Justices of the High Courts shall be determined with reference to their dates of appointment as Chief Justice [otherwise than as acting Chief Justice], and in case the dates of such appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts.

(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.

(4) If, upon any matter inquired into by the Council, there is a difference of opinion amongst its members, the opinion of the majority shall prevail, and the report of the Council to the President shall be expressed in terms of the view of the majority.

(5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court-

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct, the President shall direct the Council to, or the Council may, on its own motion, inquire into the matter."

(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion,

(a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and

(b) that he should be removed from office, the President may remove the Judge from office.

(7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article.

(8) The Council shall issue a code of conduct to be observed by Judges of the Supreme Court and of the High Courts."

(emphasis supplied)

25. It may be noticed from the above quoted sub-Article 209(5) that proceedings by the SJC may be initiated on grounds of misconduct or physical or mental incapacity of a Superior Court Judge. In the present case, the Reference has alleged misconduct on the part of the petitioner to seek his removal from office. It is specifically alleged that the petitioner has committed a violation of Section 116 of the Ordinance. This has led to the question of source of funds, the violation of the money laundering regime and the provisions of Foreign Exchange Regulation Act, 1947 ("FERA").

26. Although seemingly straightforward, the word 'misconduct' has drawn extensive arguments from both sides. Moreover, despite the significance of this term, it has so far escaped a comprehensive definition. Article 209(5) of the Constitution, which is the primary provision dealing with the removal of Superior Court Judges, does not define it. Even the Code of Conduct ("CoC") issued under Article 209(8) of the Constitution to regulate the conduct of Superior Court Judges does not attribute any meaning to this term. However, it does prescribe the norms and standards of good judicial and personal behaviour expected of Judges. Therefore, any conduct which conflicts with the mandated norms in the CoC can attract scrutiny for possible misconduct. For instance, the CoC observes that the prime duty of a Judge of the Superior Courts 'is to present before the public an image of justice of the nation' (ref: Preamble of CoC). It also makes reference to the Oath of the Judges and their solemn duty to uphold and submit to the Constitution and the law (ref: Preamble of CoC). Therefore, simply put the CoC expects that Judges will conduct themselves with integrity, propriety and dignity both in their public and private lives and will not engage in controversy. It would be useful at this stage to set out what these generic terms actually entail:

"Chambers Dictionary

Page 471: Dignity: elevation of mind or character;

Page 869: Integrity: uprightness; honesty; purity.

Page 1376: Propriety: conformity with good manners; conformity with convention in language and conduct;"

It thus becomes clear that the CoC primarily provides guidance to Judges of Superior Courts on the exemplary qualities they must possess. Therefore, conduct that diverges from these qualities would constitute misconduct. However, ultimately the CoC is silent about the meaning of misconduct. Be that as it may, the Supreme Judicial Council Procedure of Enquiry, 2005 ("2005 Rules"), framed by the SJC, has drawn wisdom from case-law and the CoC to state certain general standards for Judges of the Superior Courts, namely:

"3. Definitions:

In the present Procedure, unless the context provides otherwise, the following expressions used in the Procedure will have the meaning as assigned to them hereunder;

....

(l) "Misconduct", includes,

(i) conduct unbecoming of a Judge,

(ii) is in disregard of the Code of Conduct issued under Article 209(8) of the Constitution of Islamic Republic of Pakistan,

(iii) is found to be inefficient or has ceased to be efficient."

27. In practical terms, Rule 3(l)(i) succinctly encapsulates the normative standards of misconduct provided in the CoC whilst Rule 3(l) (iii) includes an objective criterion that relates to a Judge's professional performance. Both criteria are consistent with the CoC and are primarily explanatory rather than definitional. The sanctity of the 2005 Rules can be traced to their Constitutional origin as these have been framed by the SJC in the exercise of its implied power to facilitate its own proceedings. Such status of the 2005 Rules has been affirmed by this Court in Justice Shaukat Aziz Siddiqui v. Federation of Pakistan (PLD 2018 SC 538) at para-60 which is produced below:

"60: 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."

(emphasis supplied)

Since the 2005 Rules have been framed by the SJC to implement its mandate and regulate its own proceedings, these carry special force and thus stand on a higher pedestal than ordinary laws. These Rules provide guidelines for the conduct of SJC proceedings and the exercise of its jurisdiction. Indeed, the SJC as the constitutionally empowered body has been utilising the criteria of misconduct noted in Rule 3(l) of the 2005 Rules and elaborated upon in the CoC to assess the culpability of Superior Court Judges.

28. To assist us on this matter learned counsel for the petitioner, Mr. Babar Sattar, submitted that the CoC imposes two separate obligations on Superior Court Judges: duties that are peculiar to judicial conduct and responsibilities that are specific to personal conduct. It was his case that it is only conduct which is connected with the office of a Judge that can form the basis of a Reference against the petitioner under Article 209(5) of the Constitution. Any other wrong committed by the petitioner in his personal life which has no connection whatsoever with his office can only be visited upon by penalties provided for the wrong committed under the relevant law. He further argued that only such misconduct of the petitioner is cognizable by the SJC that is committed during the former's current service as a Supreme Court Judge. Any misconduct committed previously by the petitioner during his tenure as the Chief Justice of Baluchistan High Court stands absolved. Next, he canvassed the proposition that the petitioner is only responsible for his own personal conduct and not that of his independent wife and children. On this analysis, learned counsel concluded that none of the allegations contained in the Reference satisfied the test of misconduct propounded by him. The London Properties he stated were owned by the Mrs. Isa and her children. Therefore, any justification for an alleged violation of the relevant law in Section 116 of the Ordinance and any explanation for the source of funds had to be sought from the petitioner's family and not the petitioner himself. In so far as the allegations of money laundering or FERA were concerned, learned counsel stated that there was simply no material before the Law Minister, PM and President which justified the inclusion of these charges in the Reference against the petitioner.

29. On the converse, learned counsel for the respondents, relying on case-law from Pakistan and India, argued that the test for misconduct is not whether it violates any prescribed law or rules, rather the test is whether the conduct alleged is wrong, or improper or fails to conform with the standards and norms expected of a Judge. This he submitted would include not only the professional conduct of a Judge but also his conduct in private life (whether that be his own conduct or the conduct of his family members). Furthermore, he stated such a test is concerned only with the gravity of the alleged misconduct and not the era in which such misconduct is said to have been committed. Therefore, in his

opinion the factual matrix narrated in the Reference prima facie did disclose a case of misconduct against the petitioner. He stated that the London Properties were acquired in the names of the petitioner's family members at a time when the petitioner was the Chief Justice of Balochistan High Court i.e. he was a public office holder. Moreover, neither Mrs. Isa nor the petitioner had declared these properties in their wealth statements filed with the Inland Revenue authorities. Proof of this could be found in the Assistant Commissioner's (Inland Revenue) letter dated 10.05.2019. However, he argued the evidence which called for a Reference of misconduct to be filed were the tax returns of Mrs. Isa and the petitioner. The former's returns showed that she did not have sufficient funds for the purchase of these properties (the children have not filed any tax returns), while the latter's returns disclosed that he in fact did possess surplus funds. As a result, he submitted that such non-declaration of the London Properties on the part of the petitioner and Mrs. Isa coupled with their respective financial position, and the plain meaning of Section 116(1)(b) of the Ordinance supported the presumption that it was actually the petitioner who had financed these properties. Accordingly, an answer had to be provided by the petitioner about the source of funds to rule out any violation of Section 116 of the Ordinance and the money laundering regime. Such an answer could only be sought by the SJC which is why the Reference was filed against the petitioner.

30. In our considered view, to determine whether the facts of this case warranted the filing of a Reference alleging misconduct against the petitioner, the substance of the term 'misconduct' needs to be examined. Article 209(5) of the Constitution sets out misconduct as one of the two grounds of removal of a Superior Court Judge. Therefore, any meaning ascribed to misconduct should be consistent with the object of Article 209. Two decisions describe the purpose of Article 209 succinctly. The first is the case of Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324) in which Justice Manzoor Hussain Sial held that:

> "Page 537: Undoubtedly, Article 209 guarantees the tenure of office of a Judge and explicitly secures the independence of Judiciary, which is dominant intent of the Constitution..."

The second case is Syed Zafar Ali Shah v. General Pervaiz Musharraf (PLD 2000 SC 869) in which this Court observed:

> "Page 1211: Clearly, the Judges of the Superior Judiciary enjoy constitutional guarantee against arbitrary removal. They can be removed only by following the procedure laid down in Article 209 of the Constitution by filing an appropriate reference before the Supreme Judicial Council and not otherwise."

It thus becomes obvious that Article 209 serves two purposes:

i. It provides security of tenure to Superior Court Judges by allowing them to be judged by their own peers thus insulating the removal process from the clutches of the Executive; and

ii. It also holds Superior Court Judges accountable for their wrongdoings by providing a mechanism for their removal.

The aforenoted two purposes are evidenced by Article 209(7) of the Constitution which reads:

> "209. Supreme Judicial Council
>
> (7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article."

In the above background, Article 209(5) limits the grounds of unfitness for the removal of Judges while Article 209(7) guarantees that honest, competent and independent Judges do not become the target of a hostile Government/ Executive. Therefore, the threshold that constitutes misconduct for the purposes of Judges of the Superior Courts should manifest this intent and spirit of Article 209 of the Constitution. Accordingly, the standard for the commission of misconduct must not be so high that it is impossible to allege thus rendering Judges unanswerable for their conduct. On the other hand, the threshold for misconduct must also not be so lenient so as to become a weapon in the hands of disgruntled litigants, interest groups or Executive against honest, competent and independent Judges.

31. Against this background, one can now examine the features of misconduct recognised under Article 209(5) of the Constitution. The starting point in this regard should be the seminal judgment of this Court in The State v. Mr. Justice Akhlaque Husain (PLD 1960 SC 26). The relevant portion is reproduced below:

> Page 32: "... the word "misbehaviour" must be understood in its ordinary sense, viz. as implying misconduct, that is to say, conduct which is unbecoming of a Judge or renders him unfit for the performance of the duties of his office, or is calculated to destroy public confidence in him... We cannot therefore accept the respondent's contention that it is only on proof of misconduct in respect of a judicial proceeding or in respect of office or on proof of conviction that a High Court Judge may be removed and that no other conduct, however infamous or scandalous, or whatever defect of character it might disclose, can ever be a ground for his removal."
>
> (emphasis supplied)

This dictum was followed and approved in the Shaukat Ali case (supra) at page 623. Since the formulation is non-exhaustive, it gives discretion to the SJC to determine whether any alleged conduct of a Judge comes under the purview of misconduct. It also lays down a high threshold of misconduct to ensure that trivial indiscretions or infractions of the law by Judges or any minor shortcomings in their personal lives do not render them liable to removal proceedings. At the same time it protects the integrity of the judicial institution by allowing for the removal of Judges whose conduct without constituting a violation of a prescribed law is so improper that it renders such Judge unfit for holding judicial office. In fact, the meaning of misconduct gathered from the CoC also exemplifies this construction. As noted above, although the CoC does not contain a definition of misconduct, it does contain norms, conventions and guidance (reflected in its Articles) on the standards to be met by Superior Court Judges in their professional and private lives. What is notable about such guidance is that it hardly incorporates any legal obligations in the Code. Instead the Articles primarily consist of ethical guidelines and traditional norms and standards expected of a Judge. For instance, the Preamble to the CoC reads as follows:

> "...To be a living embodiment of these powers, functions, and obligations calls for possession of the highest qualities of intellect and character. Equally, it imposes patterns of behavior, which are the hall-mark of distinction of a Judge among his fellow-men."

Likewise, Article III observes:

> "Article-III: To be above reproach, and for this purpose to keep his conduct in all things, official and private, free from impropriety is expected of a Judge."

Similarly, Article V states:

> "Article-V: Functioning as he does in full view of the public, a Judge gets thereby all the publicity that is good for him. He should not seek more. In particular, he should not engage in any public controversy, least of all on a political question, notwithstanding that it involves a question of law."

Lastly, we have Article VI which requires:

> "Article-VI: A Judge should endeavor to avoid, as far as possible, being involved, either on his own behalf or on behalf of others, in litigation or in matters which are liable to lead to litigation such as industry, trade or speculative transactions.
>
> To employ the influence of his position to gain undue advantage, whether immediate or future, is a grave fault.
>
> A Judge must avoid incurring financial or other obligations to private institutions or persons such as may embarrass him in the performance of his functions."
>
> (emphasis supplied)

32. It may be noticed that the above Articles of the CoC are non-legal in nature. A violation of any of these Articles would neither sustain a civil lawsuit nor a criminal prosecution. However, an

infringement thereof may very well lead to disciplinary proceedings under Article 209(5) of the Constitution. But, this is not the only remarkable feature of the CoC. For instance, on a careful examination of Article III, it can be observed that it expects Superior Court Judges to keep their conduct in all aspects of their lives, including private life, free from impropriety. Furthermore, Article VI calls upon Judges to avoid litigation and to be diligent in their financial affairs to minimise the chance of any embarrassment in the performance of their functions. This very clearly means that the CoC does not only expect impeccable behaviour from a Judge in the courtroom but it also expects him to maintain these high standards of integrity, propriety and dignity outside the Court. Such qualities and conduct are necessary to preserve not only the prestige and honour of the Judge but also the prestige and honour of the institution of the judiciary. Therefore, the contention of the learned counsel for the petitioner that the allegations against the petitioner pertain to his personal life and so cannot become the basis for a Reference has no force. Accordingly, there is no doubt in our minds that the interpretation of misconduct set out by this Court in the Justice Akhlaque Hussain case (supra) reflects the intent and spirit of Article 209(5) of the Constitution, the CoC and the 2005 Rules.

33. Additionally, the threshold of misconduct adopted by this Court and approved by the SJC is also similar to the tests used by Disciplinary Committees and Parliaments of foreign jurisdictions for the removal of Judges. For example, the requirement of upholding the confidence of the public is not unique to our Courts. In fact, it is a criterion which is applied across the world to enforce accountability of Judges and other public office holders. In Lawrence v. Attorney General of Grenada (2007 UKPC 18 at para-25) the Privy Council approved a passage from Clark v. Vanstone (2004 FCA 1105) in which the Federal Court of Australia held:

> "Para 85: ...For present purposes, the important proposition to be drawn from these expressions of opinion is that, in a case in which the term 'misbehaviour' is used with reference to the holder of an office, the content of its meaning is to be determined by reference to the effect of the conduct on the capacity of the person to continue to hold the office. In turn, the capacity to continue to hold an office has two aspects. The conduct of the person concerned might be such that it affects directly the person's ability to carry out the office. Alternatively, or in addition, it may affect the perceptions of others in relation to the office, so that any purported performance of the duties of the office will be perceived widely as corrupt, improper or inimical to the interests of the persons, or the organisation, for whose benefit the functions of the office are performed."

(emphasis supplied)

This passage was cited again with approval by the majority of the Privy Council in Hearing on the Report of the Chief Justice of Gibraltar (2009 UKPC 43 at para-202). Even in the United States, where the process of impeachment of Judges is initiated by a Resolution of the House of Representatives ("House"), the Report dated 10.05.1989 accompanying the Resolution to Impeach United States District Judge Walter L. Nixon, Jr (ref: Report No. 101) stated:

> "Page 12: ...thus, from an historical perspective the question of what conduct by a Federal judge constitutes an impeachable offense has evolved to the position where the focus is now on public confidence in the integrity and impartiality of the judiciary. When a judge's conduct calls into questions his or her integrity or impartiality, Congress must consider whether impeachment and removal of the judge from office is necessary to protect the integrity of the judicial branch and uphold the public trust."

(emphasis supplied)

Likewise in Australia, Sir George Bush sitting in the Parliamentary Commission inquiring into the alleged misconduct of Justice Lionel Keith Murphy, Judge High Court of Australia, held:

> "Page 8: If [judges] conduct, even in matters remote from their work, is such that it would be judged by the standards of the time to throw doubt on their own suitability to continue in office, or to

undermine their authority as judges or the standing of their courts, it may be appropriate to remove them."

(emphasis supplied)

Even in the Justice Shaukat Ali case (supra), the SJC observed that:

"Page 602: ...It [inquiry by SJC] is simply the conduct of a Judge which is to be properly reviewed in the interest of the purity and honour of the judiciary..."

This dictum was later cited with approval in the Chief Justice of Pakistan case (supra) at para-98. These tests, therefore, not only affirm this Court's interpretation of misconduct but also (again) dispel the contention of the learned counsel for the petitioner that only conduct which has a nexus with the petitioner's office can be the basis of an information under Article 209(5) of the Constitution. In fact, misconduct is any conduct of the Judge which damages the publics perception about his ability to discharge his duties or which undermines public confidence in the institution of the judiciary regardless of whether such conduct occurs in the professional arena or in the private life of a Judge.

34. As far the learned counsel's contention that the petitioner can only be removed for misconduct committed during his tenure as a Supreme Court Judge, it will suffice to reproduce what the House held in its report dated 08.07.1912 against Robert Wodrow Archbald, Judge of the United States Court of Appeal for the Third Circuit (Pennsylvania, New Jersey, Delaware and Virgin Islands) (ref: Report No. 946):

"Page 175: It is indeed anomalous if the Congress is powerless to remove a[n] ... unfit Federal judge from office because his... misdemeanor, however vicious or reprehensible, may have occurred during his tenure in some other judicial office under the Government of the United States prior to his appointment to the particular office from which he is sought to be ousted by impeachment, although he may have held a Federal judgeship continuously from the time of the commission of his offenses. Surely the House of Representatives will not recognize nor the Senate apply such a narrow and technical construction of the constitutional provisions relating to impeachments."

(emphasis supplied)

Similarly, the House in its report dated 04.03.2010 against G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana (ref: Report 427) noted that the critical question which needs to be addressed by the House and Congress is whether the alleged misconduct demonstrates a lack of integrity and judgment in the Judge which makes him unsuitable to continue to perform the functions of his post. The timing of the misconduct is irrelevant to such a determination (page 19) . Indeed, by accepting the contention of the learned counsel for the petitioner that a time bar should be imported into the process of judicial accountability, we would be granting immunity to Judges who have committed serious misconduct in their previous posts. This would be contrary to the demand for transparency and fairness in the accountability of Judges, especially when it is self-evident that previous behaviour of a Judge is a reflection of his character, disposition and professional or private ethics. Therefore, the submission of the learned counsel that the alleged misconduct of the petitioner has become a past and closed transaction because it was committed during his time as a High Court Judge is incorrect.

35. Lastly, learned counsel for the petitioner also raised the argument that the petitioner was not accountable for the financial affairs of his independent wife and adult children. While there is no cavil to the proposition that "the days are long gone when a husband and wife were treated as one person in law and the husband was that person" (ref: Chief Justice of Gibraltar case (supra) at para-257), the fact of the matter is that when it comes to public office holders the situation is different. Judges, like other public office holders, occupy a position of sacred trust. They hold positions where they exercise power and authority under the law. Under the Constitution and the law, such a position carries certain benefits and privileges accompanied by obligations and responsibilities. A Judge of the Superior Court is

entitled to these perks and benefits which are also enjoyed by his spouse and family. Some of these benefits and privileges available to the spouse and family of a Judge of the Superior Courts are:

A. During Service

i. A medical allowance (ref: Rule 10 of The Federal Service Medical Attendance Rules, 1990);

ii. A travel allowance (ref: Rules 3(4)(i) and 4(i) of The Supreme Court Judges (Travelling Allowance) Rules, 1958); and

iii. The use of a Government maintained residence and an official car at the residence (Rules 20, and 21 of Supreme Court Judges (Leave, Pension and Privileges) Order, 1997) .

B. After Service

i. A pension to the spouse after the death of the Judge (ref: Clause 4 of the Fifth Schedule to the Constitution)

ii. A medical allowance (ref: Rule 10 of The Federal Service Medical Attendance Rules, 1990);

iii. The services of a driver and an orderly (ref: Rule 25 Supreme Court Judges (Leave, Pension and Privileges) Order, 1997); and

iv. 3000 free local telephone calls per month, 2000 units of electricity and 25HM3 of gas per month, free supply of water and 300 litres of petrol per month (ref: Rule 25 Supreme Court Judges (Leave, Pension and Privileges) Order, 1997).

36. As alluded above, these entitlements of the Judge which he shares with his family [his spouse and members of his family who are either dependent on him or with whom he has financial dealings ("family members")] also carry certain responsibilities and obligations. One such obligation is the duty to enjoy these privileges with dignity, probity and discretion. Apart from the material benefits enjoyed by a Judge's family members during and after his service, they also receive an advantage from the respect and recognition extended, through association, by people who interact with them. In these circumstances, the family members of a Judge are required to be careful (financially, socially and politically), moderate and fair in their dealings and exchange with others so that no controversy arises which may embarrass the Judge. Although these responsibilities are shared by family members of all public office holders, they apply with particular force to family members of Judges as the latter are expected to be the embodiment of a person who is 'God-fearing, law-abiding, abstemious, truthful of tongue, wise in opinion, cautious and forbearing, blameless, and untouched by greed' (ref: Article II of CoC). Accordingly, high standards of propriety are expected of a Judge and his family members. This is precisely why in a case of impropriety alleged against the son of a learned Judge, Justice Khilji Arif Hussain observed in Suo Motu Case No. 5 of 2012 (PLD 2012 SC 664) that:

"Page 679: Although family members of public functionaries are, properly speaking, not performing State functions, the alleged facts of this case highlight the necessity of extreme caution and discretion in their private and public dealings and conduct."

37. Generally, every adult individual is recognised in law as an independent entity. However, different principles apply in relation to family members of public office holders. This is because any irresponsible act on the part of a family member may reflect adversely on the Judge. This approach is recognised by the Judicial Codes of Conduct of various countries. The Guide to Judicial Conduct for Australian Judges states:

"Page 41: ...Issues involving a judge's relatives, especially close relatives, can give rise to particularly difficult questions... There are likely to be situations in which the activities or careers of relatives attract consideration of the principles identified in the Guide, because the situation presents an issue under the Guide which the judge must address... The response by a judge to such matters will depend on the particular circumstances. Matters affecting a spouse's or partner's career or appointment will, for example, call for consideration of public attitudes or perceptions, the kind of activity the partner engages in, the other persons present or participating... These are examples only. In the end, each situation must be resolved by the judge applying the principles identified in the Guide. A central issue will always be whether and how the situation might reflect adversely on the judge or the judiciary or might diminish public confidence in them."

(emphasis supplied)

Taking the connection between a Judge and his family in financial matters a step closer are the Bangalore Principles of Judicial Conduct ("Principles") which were drafted in 2001 and endorsed in 2002 by the Judicial Group on Strengthening Judicial Integrity (a body consisting of senior Judges from various legal systems of the world). These principles were later endorsed by the United Nations Economic and Social Council on 27.07.2006 in its Resolution 2006/23:

"Resolution

2006/23

Strengthening basic principles of judicial conduct

..

1. Invites Member States, consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct, annexed to the present resolution, when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary; ..."

Under the heading of propriety, Rule 4.7 of the Principles reads:

"Value 4: PROPRIETY

Principle: Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

..

4.7: A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family."

To remove any doubts about what constitutes the family of a Judge, the Principles define a Judge's family to include:

"DEFINITIONS

"Judge's family" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household."

An obligation similar to the one set out in Rule 4.7 is also present in Canon 3(C)(2) of the United States Code of Conduct for Federal Judges. In essence, the above obligations require a Judge to make reasonable efforts to be aware about the financial affairs of his family members. This precaution helps to forewarn him about extraneous influences or vested interests which can compromise not only his independence and credibility but also in the words of this Court in Justice Shaukat Ali's case (supra) the "purity and honour" of the institution to which he belongs.

38. At first glance an obligation to remain informed about the financial affairs of one's family members seems archaic because modern jurisprudence emphasises the protection of the rights of the individual against the State and society. However, to understand the rationale behind the obligation on Judges to make reasonable efforts to be informed about or to watch over the financial affairs of their family members, one has to understand the nexus of this obligation with the nature of Judges work and the position they occupy in society. As has been held above, Judges exercise pre-eminent authority under the law. They adjudicate disputes between litigants, hold parties appearing before them accountable and impose liabilities and grant relief to such parties. With their authority comes an even greater responsibility to decide cases fairly, independently and in accordance with law. In such a situation, it is imperative for a Judge that he should make reasonable efforts to be informed about the financial interests of his family members for the simple reason that if a case comes before him which

directly or indirectly involves the pecuniary, proprietary or other personal interests of any of his family members, he can recuse himself. Such recusal is a manifestation of the now well-established principle of law (ref: Government of N.W.F.P v. Dr. Hussain Ahmad Haroon 2003 SCMR 104):

"Page 110: It is an age-old fundamental principle of law that justice should not only be done but manifestly and undoubtedly it should seen to have been done. To achieve this objective/goal it is of prime importance that a Judge/person equipped with the authority of decision should not be having any sort of personal interest in the outcome of the matter under issue before him."

(emphasis supplied)

However, this is not the only object behind imposing such a burdensome obligation on Judges. Another equally, if not more, important reason for requiring Judges to be aware of the financial interests of their family members is that the law's intent is to prevent a Judge's family from becoming a conduit to discreetly influence his opinions and views. This assures the Judges independence and integrity apart from safeguarding the institution of the judiciary.

39. Likewise, the recently enacted Foreign Assets (Declaration and Repatriation) Act, 2018 ("the Act") also provides a rationale for imposing such an obligation on Judges of the Superior Courts. This piece of legislation provides an advantageous scheme to Pakistani citizens to disclose their undeclared foreign assets subject to payment of tax at a nominal rate set out in the Schedule to the Act. The object of the Act is to bring such assets on record in the documented tax economy. For obvious reasons, holders of public office are not eligible to avail this tax incentive. The significance of this Act for our purposes is that it treats the assets of the spouse and dependent children and the assets of the public office holder as identical. A Judge of the Superior Courts is included in the category of holder of public office. For ease of reference, the relevant Sections of the Act are produced below:

"2. Definitions.---(1) In this Act, unless there is anything repugnant in the subject or context,-

.

(h) "holder of public office" means a person who is or has been, during the preceding ten years,-

.

(iv) the Chief Justice or, as the case may be, a Judge of the Supreme Court, Federal Shariat Court, a High Court or a Judicial Officer whether exercising judicial or other functions or Chairman or member of a Law Commission, Chairman or Member of the Council of Islamic Ideology;

..

4. Application.---(1) The provisions of this Act shall apply to-(a) all citizens of Pakistan wherever they may be, except holders of public office, their spouses and dependent children;"

(emphasis supplied)

40. Accordingly, neither public office holders nor their spouses and dependent children can avail the benefit of this scheme. The purpose of such an exclusion is to ensure that public office holders do not use their family members as a conduit to whiten their undeclared wealth. There is no relief in tax amnesty schemes even if the spouse is independent. This is a legal incident or consequence of being a holder of public office and introduces an element of transparent accountability in the financial matters of such officers.

41. Indeed, the Reference alludes to this element of financial accountability by implying that the London Properties are benami owned. However, it cites no evidence to support this contention. Nevertheless, during the course of his submissions, learned counsel for the petitioner submitted, after inquiring from his client, that the latter did not gift any amount of money to his family members during the preceding tax years. In any case, the elements of benami (or the evidence in support of it) need not be discussed here because it is not for us to determine at present whether the petitioner's family is his benamidar. This is a factual determination that can only be made by the competent forum after examining all the evidence. Nonetheless, unless the source of funding for the London Properties is duly explained by the petitioner's family, it will allow the resulting public controversy to continue which is

neither beneficial for the petitioner in his personal capacity as a Judge nor for the institution of which he is a part.

42. Therefore, having seen that Judges are not as insulated from the conduct of their family members as are ordinary private citizens, we need to consider the extent of the obligation on Judges to be aware of the finan-cial interests of their family members. Both the UN Resolution 2006/23 (endorsing the Principles) and the United States Code of Conduct simply state that Judges need to make reasonable efforts to be informed about the financial interests of their family members. However, neither elaborate upon the scope of this obligation. Consequently, its ambit needs to be determined. To begin with, Oxford Dictionary has defined the term 'informed' in the following manner:

"Oxford Dictionary:

Informed: Having or showing knowledge of a subject or situation."

It, therefore, becomes clear that Judges are supposed to have knowledge of the financial interests of their family members. However, if they do not, then they are expected to make reasonable efforts to acquire such information, more so when they are questioned by a competent forum to explain the financial interests of their family members. What constitutes 'reasonable effort' on the part of Judges will no doubt depend upon the circumstances of each case. However, a plea of lack of knowledge by a Judge in relation to the financial affairs of his family members is untenable in light of the general trend in international practice, the obligations imposed on a Judge under the CoC and the law relating to public office holders including Judges. Accordingly, there is a continuing obligation on a Judge to keep himself informed about the financial interests of his family members. This view is consistent with the Preamble of the CoC which emphasises that Judges of the Superior Courts of the country are role models for their fellow men and women. Such an elevated standard of conduct is demanded from Judges so that the institution of the judiciary enjoys the trust and confidence of the nation for its integrity, probity, independence and transparency.

MALA FIDES

43. Having dealt with the preliminary matters arising out of this petition, we may now consider each plea of the petitioner in detail. This petition was primarily filed by the petitioner for the purposes of declaring the Reference null and void. Therefore, the bulk of the submissions of the learned counsel for the petitioner were centred around the contention that the filing of the Reference was a colourable and mala fide exercise of power. He submitted that the whole process was tainted with malice aforethought. He attributed this to the petitioner's judgment in Suo Motu Case No.7 of 2017 (PLD 2019 SC 318) ("Dharna Judgment") announced on 06.02.2019. In that case, the petitioner had passed adverse remarks against the two political parties that are presently the leading members of the ruling coalition in the Federal Government: Pakistan Tehreek-e-Insaf ("PTI") and Muttahida Qaumi Movement ("MQM"). Additionally, he had also made critical observations about the Army. The relevant extracts from this judgment are produced below:

"24: The leadership of TLP must have noted that despite the daylight slaughter of innocents on the streets of Karachi on 12th May, 2007 its principal conspirators and beneficiaries were not punished. They must also have noted that when PTI-PAT had camped in the Red Zone for several months they had achieved the setting up of a judicial inquiry commission. Though the findings of the Inquiry Commission had rebutted PTI's allegations no adverse consequences followed. PTI's leadership did not even tender an apology, let alone clean up the area or pay to clean and restore it. Instead PTI received a lot of free publicity.

53: For the reasons mentioned above this case is disposed of with the following declarations and directions:

..

(15) The Constitution emphatically prohibits members of the Armed Forces from engaging in any kind of political activity, which includes supporting a political party, faction or individual. The

Government of Pakistan through the Ministry of Defence and the respective Chiefs of the Army, the Navy and the Air Force are directed to initiate action against the personnel under their command who are found to have violated their oath."

44. Learned counsel argued that this judgment, and in particular these remarks, angered the ruling coalition. This could be gathered from the review petitions filed by PTI and MQM against the Dharna Judgment. Both review petitions demanded the petitioner's removal from office under Article 209(5) of the Constitution for committing misconduct. He asserted that these review petitions were a coordinated exercise by PTI and MQM to oust the petitioner since they contained almost verbatim language and were even filed in Court on the same date. In addition, learned counsel also cited various other events/actions which he argued highlighted the mala fides behind the Reference. Briefly these are:

i. The use of a proxy complainant, Mr. Dogar;

ii. The leaking of the Reference and its contents to the media;

iii. The derogatory statements made by Mrs. Firdous Ashiq Awan, Special Assistant to Prime Minister ("SAPM") on Information and Broadcasting, about the petitioner;

iv. The haste with which action was taken against the petitioner after the Dharna Judgment; and

v. The charged language used by the AG in his Rejoinder to the SJC.

45. From the opposing side, learned counsel for the respondents negated all claims of mala fides levelled by the petitioner. He submitted that the allegations in their present form were too vague to satisfy the high threshold of mala fide and that the petitioner had failed to discharge the burden of proof. He maintained throughout the course of oral arguments that the Reference was simply filed to ensure judicial accountability and that there was no ulterior motive of the Federal Government. He submitted that he had the highest respect for the petitioner whom he considered an elder brother.

46. We have carefully examined the record and the relevant case-law and have arrived at a conclusion. However, before we discuss the merits of our decision on this complex and fiercely debated issue, we would like to first set out what mala fides actually entail. There is an abundance of case-law on mala fides rendered by this Court in landmark judgments, such as the case of Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14) and Federation of Pakistan v. Saeed Ahmed Khan and others (PLD 1974 SC 151). However, there is still lack of uniformity in its definition and on the standard of proof that a party needs to satisfy in order to establish its claim of mala fide.

47. First and foremost, we shall examine the meaning of mala fide in the legal context. Traditionally, an action actuated with an ulterior purpose to harm another or benefit oneself is classified as an act that is malicious or malice in fact. However, in (relatively) recent times, this Court has recognised another category of mala fides, namely, mala fide in law. Even though both are a species of mala fide, yet each has distinct ingredients and consequences. A recent judgment of this Court in Said Zaman Khan v. Federation of Pakistan (2017 SCMR 1249) has studied not only the entire case-law on the subject but has also analysed the essential yet different ingredients of both mala fide in law and malice in fact. It would be useful at this stage to reproduce the relevant portions from the said judgment:

"82: ...where any action is taken or order passed not with the intention of fulfilling its mandate or to achieve its purpose but is inspired by a collateral purpose or instigated by a personal motive to wrongfully hurt somebody or benefit oneself or another, it is said to suffer from malice of facts. In such cases, the seat of the malice or bad faith is the evil mind of the person taking the action be it spite or personal bias or ulterior motive."

"83: ...where an action taken is so unreasonable, improbable or blatantly illegal that it ceases to be an action countenanced or contemplated by the law under which it is purportedly taken malice will be implied and [the] act would be deemed to suffer from malice in law or constructive malice. Strict proof of bad faith or collateral propose in such cases may not be required."

"90: ... The mere allegation that an action has been taken wrongly is not sufficient to establish mala fide of facts. Specific allegations of the collateral purpose or an ulterior motive must be made and proved to the satisfaction of the Court."

48. The crux of our analysis will be focused on malice in fact since the petitioner has primarily levelled allegations of ulterior motives against the respondents. However, to present a complete picture of mala fides, two general points of importance from the above quoted observations need to be stated. First, that apart from the generally recognised category of actions driven by a foul personal motive described here as malice in fact, there is another category of reckless action in disregard of the law termed as mala fide in law. The first type of mala fide is attributed to a person whereas the second is levelled against the impugned action. While the former is concerned with a collateral purpose or an evil intention to hurt someone under the pretence of a legal action, the latter deals with actions that are manifestly illegal or so anomalous that they lack nexus with the law under which they are taken. Thus it becomes clear that malice in fact and mala fide in law have different ingredients, the former being comprised of factual elements with the latter being composed of legal features, that need to be established as such for the respective consequences to ensue. Secondly, it is clarified that an accusation of mala fide in law involves more than errors of misreading the record or non-application of the law or lack of proportionality in the impugned action. Instead, this is a serious allegation of wanton abuse or disregard of the law. However, when an ulterior motive to cause harm is proved then the repercussions of malice in fact follow. It is for this reason that a mere allegation that an action has been taken wrongly cannot be grounds to hold that such action suffers from mala fide in law or malice in fact. This is also consistent with the view propounded in para-90 of the Said Zaman case (supra).

49. The aforementioned discussion confirms that imputing mala fide of either kind to a person or an action is a grave accusation. It should not be made lightly but can only be done when the facts or legal defects justify its use. In the present case, the petitioner has alleged bad faith and ulterior motives to the respondents personally. This amounts to a plea of malice in fact which requires a high standard of proof. The rationale behind such an approach is that a plea of malice in fact frustrates the process of justice. After a complainant establishes malice in fact against a person, the entire proceeding by the latter is brought to an end. This results in the merits of the case being ignored. Moreover, the reputation of the person, against whom an allegation of malice in fact is made, becomes tarnished and if the said allegation is proved then his repute is forever ruined. He is made out to be a vicious individual who harbours ill-intentions against others. Such are the negative consequences of this plea, if established. This reasoning applies with greater force if such an allegation is made against senior public functionaries of the State. Indeed, it was for this very reason that Justice Muhammad Nawaz Abbasi in his concurring note in the Chief Justice of Pakistan case (supra) held as follows:

"Page 216: ...In view thereof the mala fide of fact in the normal circumstances is required to be established through the positive evidence and not merely on the basis of allegations but the personal malice of a person in official position can be examined in the context as to whether the action in official capacity was extraneous and for collateral purpose which was taken in bad faith or such an action was in good faith."

(emphasis supplied)

Similarly, this Court in the Saeed Ahmed Khan case (supra) observed:

Page 170: male fides is one of the most difficult things to prove and the onus is entirely upon the person alleging mala fides to establish it, because, there is, to start with, a presumption of regularity with regard to all official acts, and until that presumption is rebutted, the action cannot be challenged merely upon a vague allegation of mal [a] fides."

(emphasis supplied)

50. We are in complete agreement with the views expounded by the members of this Court in the above noted judgments. An allegation of malice in fact is unlike any other ordinary allegation. It carries

with it a stigma for the accused which cannot easily be washed away. If a lower standard of proof for malice in fact is adopted, that would open the floodgates for recalcitrant litigants to make such allegations against their opposing side to derail the process of justice and to defame their opponents in Court. Therefore, to limit these allegations to only genuine claims of malice in fact, we hold that any person who wishes to raise this plea must prove it to the satisfaction of the Court on the basis of positive and cogent evidence.

51. Moreover, there is also an obligation on litigants to plead the particulars of malice in fact in detail. This, has already been alluded to in the Saeed Ahmed Khan case (supra) wherein it was held that vague allegations cannot establish a plea of malice in fact. Such a duty was imposed more explicitly on parties by this Court in the Begum Agha Shorish Kashmiri case (supra). The relevant portion is reproduced below:

> "Page 35: mala fide must be pleaded with particularity and once one kind of mala fide is alleged, the detenu should not be allowed to adduce proof of any other kind of mala fide. Enquiries are not to be launched merely on the basis of vague and indefinite allegations."

(emphasis supplied)

Accordingly, to raise this plea, it is necessary for the relevant party to pinpoint the specific incidents/ events/ actions which demonstrate the malice in fact of the opposing side.

52. With the foregoing background, we shall now consider each allegation raised by the petitioner to determine whether it crosses the threshold of malice in fact or not.

53. Firstly, an allegation has been made that this Reference is a direct consequence of the Dharna Judgment. The malice in fact is statedly evidenced by the review petitions filed by the coalition parties in the Federal Government before this Court. However, the recourse to a review petition is a lawful remedy granted to litigants by Article 188 of the Constitution. It, therefore, cannot be used as evidence for proving the malice in fact of the respondents. As far as the charged language used against the petitioner is concerned, it is noted that the review petition filed by PTI, which has been relied upon by the petitioner, was objected to by the office and was subsequently withdrawn. Its revision, as accepted by the learned counsel, does not contain any adverse averments against the petitioner. With respect to the review petition filed by MQM, undoubtedly it does contain the resentful remark that action needs be taken against the petitioner under Articles III, IV and V of the Code of Conduct. Such language has no place in any petition before this Court. However, the fact that the Dharna Judgment criticised the conduct of PTI and MQM without giving the two political parties a hearing may have disenchanted some members of the MQM party. Yet even such a feeling cannot justify the brazen accusations in the review petition.

54. Be that as it may, learned counsel for the petitioner contended that having availed the appropriate legal remedy of review, MQM, a minority member of the coalition government was so reviled by the Dharna Judgment that it influenced the Federal Government to file a Reference against the petitioner. This view seems implausible and does not demonstrate the plea of malice in fact urged by the petitioner. The Reference is based on Mrs. Isa's ownership of undeclared London Properties. With the blemish attached to the ownership of undeclared foreign properties, such ownership automatically attracts speculation about its status and source. In fact, in the year 2017 the SJC took cognizance of a similar information in the case of another learned Judge who resigned his office. Even the respondents' correspondence on the record shows that the SJC simultaneously received a Presidential reference on the same ground against another learned Judge of the High Court. In this perspective the filing of the present Reference cannot be held to suffer from malice in fact.

55. Indeed, recourse to a lawful remedy under Article 209(5) of the Constitution cannot be malicious unless for ill-motives an information alleges wrong or distorted or exaggerated facts, or seeks relief that is inordinate or extraneous to the undisputed facts. Furthermore, the observations in the Dharna Judgment pale in comparison to the remarks passed by this Court in Air Marshal (Retd.) Muhammad

Asghar Khan v. General (Retd.) Mirza Aslam Baig (PLD 2013 SC 1) in which far stronger observations about our politicians and political system failed to draw any adverse reaction from the Federal Government against any Judge. Consequently, no malice in fact is made out on this ground.

56. The learned counsel for the petitioner next attacked the initiation of the Reference for being tainted with malice in fact as the complaint against the petitioner was filed by Mr. Dogar who has a reputation of planting false stories. He stated that the respondents did not make even the slightest effort to check the credibility of Mr. Dogar and instead accepted his complaint at face value. He submitted that considering the sensitivity of the matter and the fact that the complaint was against a sitting Judge of the Supreme Court, the respondents should at the bare minimum have scrutinised the antecedents of Mr. Dogar.

57. However, such an argument ignores the general law of the land that when an information against a person (whether a public office holder or a private person) is to be evaluated, it is the substance, veracity and consequence of the information which matters and not the credibility and credentials of the informant. Reference in this regard can be made to the decision in Pakistan Tobacco Company Ltd v. Federation of Pakistan (1999 SCMR 382) in which this Court observed:

"10: We are inclined to hold that the question whether a particular Constitution petition filed under Article 184(3) of the Constitution directly in this Court is maintainable is to be examined not on the basis as to who has filed the same, but the above question is to be determined with reference to the controversy raised in the Constitution petition, and if the controversy involves a question of public importance with reference to the enforcement of any of the Fundamental Rights the same will be sustainable."

58. In the present case, the information supplied by Mr. Dogar is not denied by the petitioner to the extent of ownership of the London Properties by Mrs. Isa and her children. This adds weight to the Court's observation in the above cited case. Although in the Pakistan Tobacco case (supra) this Court was mainly concerned with the maintainability of a petition filed under Article 184(3) of the Constitution, we consider that the same principles also apply to an information filed before the SJC under Article 209(5). The reason is that the receipt of information from any source is cognizable by the SJC under Article 209(5) of the Constitution and is sufficient to sustain an inquiry against a Judge of the Superior Courts. The word 'any' means that the antecedents of the informant are irrelevant unless the information is false, concocted, distorted, exaggerated or seeks relief that is excessive in relation to the accepted facts. As previously noted, the underlying information in the Reference to the extent of ownership of the London Properties by Mrs. Isa and her children is not disputed by the petitioner. Therefore, in such circumstances the background of the informant becomes insignificant. As a result, even this ground does not support the plea of malice in fact raised by the petitioner.

59. The next objection of the learned counsel for the petitioner was about the leaking of the Reference and its contents to the media. He urged that the disclosure was engineered by the respondents which constituted a violation of Rule 13 of the 2005 Rules. This provision is reproduced below:

"13. 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."

There is no cavil with the proposition that a reference filed against a Superior Court Judge has to be kept confidential. The rationale for adopting such a course of action has been provided in this Court's judgment in Justice Shaukat Aziz Siddiqui and others v. Federation of Pakistan (PLD 2018 SC 538). For convenience, the relevant portion is reproduced below:

"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 Caesar'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."

(emphasis supplied)

60. The reasoning in the Shaukat Aziz case (supra) has also been echoed by the learned counsel for the petitioner who has lamented the loss of reputation suffered by the petitioner and the harassment which he and his family have had to endure. One can appreciate the ordeal that the petitioner and his family may have lived through from the speculative media coverage on the Reference. Nevertheless, to hold any particular respondent accountable for revealing the details of the Reference, there needs to be at least some material on record that connects the leaks to one or more of the respondents. The chronology of events reveal that the Reference was signed on 20.05.2019 by the President; and it was filed by the Secretary Law with the SJC on Thursday, 23.05.2019. However, it was only on Tuesday, 28.05.2019 that news of the Reference broke out on social media, and by 29.05.2019 most news channels and papers in the country had reported on it. It was also on 28.05.2019 that the petitioner wrote the first of his letters to the President, inter alia, requesting a copy of the Reference. This letter too was leaked the next day on the media (as was the second letter written by the petitioner on 03.06.2019) . In this chain of events, another occurrence came to light as disclosed in paragraph 43 of the petition. Shortly after the filing of the Reference, a meeting took place between the petitioner and the (then) Chairman of SJC (former Chief Justice of Pakistan). The petitioner's application CMA No 7931/19 quotes in its paragraph 20 an order by the SJC dated 19.08.2019 passed in another proceedings against the petitioner:

"Pages 20-21: The above mentioned meeting of the respondent-Judge with the Chief Justice of Pakistan shows that the respondent-Judge not only knew about filing of the Reference against him by the President but also about the actual contents thereof and the allegations levelled therein before he had started writing successive letters to the President on the subject professing his ignorance about the same."

61. The petitioner has not disputed the aforesaid meeting being held prior to 28.05.2019. As a result, it is clear that the petitioner had read the Reference and was aware of the allegations made against him. Therefore, before the Reference was leaked, probably on 28.05.2019, only a handful of individuals knew of its existence: the Law Minister, AG, President, PM, (then) Chairman SJC, (then) Secretary SJC and the petitioner himself. The date of the media report about the Reference is significant. Which fresh event triggered the sudden disclosure of the Reference is not evident from the record. Therefore, although the allegation made against the respondents raises suspicion, it is still unsupported by any evidence. Consequently it cannot suffice to conclusively hold that either one or more of the respondents leaked the Reference to the media. Since we cannot on the basis of speculations and suspicions determine who leaked the Reference, therefore no finding with respect to its disclosure and hence of malice in fact against any of the persons who were aware of its contents can be recorded. Be that as it

may, learned counsel for the petitioner also raised issue with Mrs. Firdous Ashiq Awan's press conference on 30.05.2019. He criticised the derogatory manner in which she discussed the Reference against the petitioner and argued that this was irrefutable proof of the respondents' ill-will against the petitioner. We are in agreement with learned counsel that the press conference was in bad taste. Even though, by 30.05.2019 the news about the Reference was already in the public domain, Mrs. Awan used the information for political point scoring. It is not the petitioner's case that she had any role in preparing or framing the Reference. Therefore, her press conference cannot have any consequences vis a vis the Reference. However, even if the poor choice of words used by Mrs. Awan cannot on their own amount to malice in fact, their hostile and scandalous content during the press conference prima facie shows that she was deriding the petitioner (or was at least attempting to). By such conduct she violated not only Rule 13 of the 2005 Rules but also prima facie breached Article 204 of the Constitution by committing contempt against a sitting Judge of the Supreme Court. Consequently, she should be made answerable for her conduct under Article 204(2)(b) of the Constitution through independent proceedings.

62. Learned counsel for the petitioner next objected to the unusual despatch with which the respondents investigated, prepared and filed the Reference against the petitioner. He submitted that the complaint dated 10.04.2019 was received by Chairman ARU on 12.04.2019. Within four days of its receipt, Chairman ARU met the Law Minister who authorised the investigation against the petitioner. In about a month the entire investigation was completed, with 10.05.2019 being the busiest day. Thereafter, in ten days, on 20.05.2019 the President had signed the Reference. Learned counsel submitted that the completion of the investigation and the preparation of the Reference against the petitioner in such a short period of time strongly indicated ulterior motives on the part of the respondents. With respect to the learned counsel, we are unclear as to how this timeline conveys any ill-motives of the respondents in the matter. The information received by Chairman ARU in the PM's Secretariat was not any routine complaint. It was against a sitting Judge of the Supreme Court and thus received prompt attention from the ARU and the concerned officers of the Federal Government. It must also be said that in such sensitive matters, expeditious action is to be preferred so that if the information is baseless it can be filed without delay. Allowing the affair to linger may expose the process to untoward manipulation and may prejudice the institution and the learned Judge under complaint. But even if we disregard the foregoing view, the crucial question is how does departmental alacrity in the finalisation of the Reference demonstrate malice in fact of the respondents. There is no evidence of falsity of the material collected or of misrepresented facts being alleged by the respondents. Their expedition has no doubt resulted in legal errors (which are discussed below). However, this is still no ground for imputing malice in fact against the respondents. Therefore, this allegation of the petitioner is also without merit.

63. Finally, learned counsel for the petitioner took strong objection to the language used by the AG in his written Rejoinder to the petitioner's Preliminary Response filed before the SJC. He stated that this was clear evidence of the AG's hatred for the petitioner. He read out portions from the Rejoinder in Court, some of which are quoted in the petitioner's pleadings. A few of these are reproduced below:

> "It seems that the Respondent has two mental issues. Firstly, he has a self-persecution phobia; and secondly he considers himself a legend in his own mind, fully bestowed with honesty, integrity and competence and considers the rest of the world as dishonest and incompetent."
>
> "the Respondent craves for self-praise and cheap publicity."
>
> "the Respondent appears to be drenched in self-praise."

We would like to record our disapproval of the language used by the AG for a Judge of the Supreme Court. That being said, the brazen language is not used in the Reference but in the Rejoinder which answers the objections of the petitioner to the Reference. These objections include criticism of the AG's competence which can be found in the Preliminary Response. The AG may have made his harsh remarks about the petitioner in retaliation to the prickly comments made about him. Be that as it may, since the remarks, notwithstanding their indiscretion, were made in the Rejoinder as opposed to in the Reference, these did not form part of the record before the President. As a result, they did not influence the decision of the President to forward the Reference to the SJC for an inquiry. Therefore, being subsequent to the preparation of the Reference and its summary, the AG's remarks cannot be said to reveal malice in fact in the filing of the Reference.

64. Our conclusion about the absence of malice in fact in the filing of the Reference is reaffirmed by the petitioner's admission that the London properties are indeed owned by his wife and children. This is because it is now well-established in other areas of the law that an allegation of malice in fact gets defeated if it is proved that a complaint levelled against a person is true. Accordingly, we hold that the allegations of malice in fact levelled by the petitioner against the respondents fail.

CONSTITUTION OF ASSETS RECOVERY UNIT

65. Learned counsel for the petitioner next criticised the collection of evidence coordinated by the ARU for being unknown to the laws of Pakistan. He stated that the ARU finds no mention in the Constitution, any Act of Parliament or even the Rules of Business, 1973 ("ROB"). Instead, he submitted the ARU was created by the issuance of a Notification dated 06.11.2018 which the Government has not published in the Gazette. He contended that the entire functioning/working of the ARU was shrouded in a cloak of secrecy, notwithstanding that it seemed to be vested with unlimited powers that infringed upon the fundamental rights of the people of Pakistan.

66. Conversely, learned counsel for the respondents submitted that the ARU has been legally constituted. To support his contention he relied on two judgments of this Court reported as 2018 SCMR 574 and PLD 2018 SC 686 ("Foreign Currency Accounts Cases"), which he argued provided the impetus for creating the ARU to act as a coordinating agency between the different finance related institutions of the country to exercise oversight on economic matters of public importance. The purpose and object of the ARU, he urged, was to recover unlawful assets abroad which may have been created via funds obtained through money laundering, corruption or tax evasion. He relied on Rule 16(1)(m) of ROB read with the Notifications issued by the Cabinet Division to demonstrate that ARU had been created with the approval of the Federal Government in accordance with law.

67. In our considered view, the Foreign Currency Accounts Cases provide a backdrop for examining the legality of the ARU. These judgments noticed that a staggering amount of US$ 15.23 billion was transferred overseas, in the financial year 2016-2017, from private bank accounts without obtaining any explanation or proof that the remitted funds had been lawfully earned and taxed. Such transfers were in addition to the funds that may have been sent through covert hundi and hawala instruments. The detrimental effect on the national economy of such transfers cannot be exaggerated. These negative effects were also recognised by this Court in the Foreign Currency Accounts Case reported as PLD 2018 SC 686:

> "5: ...Clearly, both types of outflows have a huge impact on the stability of the foreign exchange reserves of the country and adversely affect the exchange rates of the Pakistani Rupee. Also as a result, the national economy can become vulnerable to pressure due to foreign currency obligations of the State; can suffer undue and disruptive inflation and can drain the exchequer of substantial amounts of tax on account of escaped income and wealth."

However, it must be observed here that the judgments in these cases did not specifically state the need for a body like the ARU to be created. The relevant extract from the judgment reported as PLD 2018 SC 686 is produced below:

> "11: Having said that, it is observed that any measures taken by the Federal Government in the public interest to protect the foreign exchange reserves of the country and to bring the hitherto undeclared foreign assets within the tax net are welcomed by the Court. Nevertheless, there are other deficiencies of the current tax laws and in the regulatory framework for the holding and

transfer of foreign exchange that promote the accumulation of undeclared foreign assets and corresponding income. These have been highlighted by the Committee but remain unaddressed by the Federal Government. They require careful attention and deliberation by the concerned authorities. Let the Federal Government, FBR and the State Bank of Pakistan state their respective positions about these matters pointed out by the Committee and indicate if any reform is proposed to correct or remedy the same."

(emphasis supplied)

68. It can thus be observed that the Foreign Currency Accounts Cases did not consider or decide the legality of the status of the ARU established vide Notification dated 06.11.2018. At best, these judgments support reform in the tax and regulatory mechanism of foreign currency accounts and enhanced monitoring of foreign exchange transfers from Pakistan. Therefore, to determine the legality of ARU's creation, one has to consider whether the requisite legal actions and procedures for its establishment have been adopted by the person(s) competent and authorised to do so under the law.

69. In this context, learned counsel for the petitioner's primary grievance against the ARU was that no Act of Parliament had created it or conferred powers on it therefore it was void ab initio. However, this argument of the learned counsel appears to misconstrue the scope of Executive power under the Constitution. The nature and ambit of such power has been considered by the Indian Supreme Court in the case of Rai Sahib Ram Jawaya Kapur and others v. The State of Punjab (AIR 1955 SC 549):

"14: It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.

15: The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State."

(emphasis supplied)

Para-14 of the above noted judgment was approved by this Court in Messrs Mustafa Impex, Karachi v. The Government of Pakistan (PLD 2016 SC 808 at para-69).

70. It can be noticed from these rulings that ordinarily executive functions involve the execution of law and policy and the supervision of the general administration of the State. As already stated above, the ARU is a coordinating agency which brings under one umbrella the competent statutory authorities to stem the menace of tax evasion, money laundering and corruption in our country. Accordingly, the ARU is essentially executing the policy of the State to curb financial crimes in the country. It is therefore an executive office, in particular an 'Attached Department' of the Cabinet Division, performing executive functions. Having such status, it does not need the backing of an Act to grant validity to its creation and actions as required by Article 4 of the Constitution. Evidence for this can be found in the ROB:

"2. Definitions.---(1) In these rules, unless there is anything repugnant in the subject or context:

..

(ii) "Attached Department" means a Department which has direct relation with a Division and has been declared as such by the Federal Government;"

71. A perusal of Rule 2(1)(ii) makes it clear that for any 'Attached Department' to exist and function, it needs to have a direct relation with a Division and has to be declared by the Federal Government as an 'Attached Department.' The material on record shows that these two essential steps were taken in relation to the creation of ARU. The first of such documents, demonstrating the procedure followed for constituting the ARU as an 'Attached Department,' is the Summary for the Cabinet dated 11.09.2018:

"CABINET DIVISION

SUBJECT: ASSETS RECOVERY UNIT (ARU)

..

3. In view of the above, and in pursuance of earlier decision of the Cabinet [05.09.2018], the following is submitted for consideration and approval of the Cabinet:

..

c. Placement of ARU, under Cabinet Division, to be housed in the Prime Minister's House;"

This was followed by the Notification dated 19.09.2018:

"CABINET SECRETARIAT

CABINET DIVISION

..

No. 643(S)/2018-Cab. The Cabinet, in its meetings held on 5th and 13th September, 2018, vide cases No. 546/35/2018 and No. 556/36/2018, decided to establish the Assets Recovery Unit (ARU) under Cabinet Division, to be housed in the Prime Minister's Office, Islamabad."

The above Notifications prove that the creation of the ARU as an 'Attached Department' of the Cabinet Division was approved by the Cabinet itself. Article 90 of the Constitution establishes that the Cabinet with the PM as its head is the Federal Government. It reads as follows:

"90. The Federal Government:

(1) Subject to the Constitution, the executive authority of the Federation shall be exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the Federal Ministers, which shall act through the Prime Minister, who shall be the chief executive of the Federation."

(emphasis supplied)

Consequently, it becomes evident that the approval for the creation of the ARU was given by the Federal Government. As a result, the two-fold requirement listed in Rule 2 (1) (ii) of the ROB for the constitution of ARU as an 'Attached Department' has been satisfied in the present case.

72. Be that as it may, learned counsel's main objection against the ARU was its alleged interference with the rights and liabilities of individuals in the absence of any statute granting it such a power. However, the Notification dated 06.11.2018 issued by the Cabinet Division shows that the ARU does not act directly but instead operates through its members who have been borrowed from various statutory bodies of the country. These include:

i. The Federal Investigation Agency ("FIA");

ii. The National Accountability Bureau ("NAB");

iii. The FBR; and

iv. The State Bank of Pakistan ("SBP") .

As a result, the ARU is manned primarily with individuals whose powers and jurisdiction are exercised under a statutory regime. Accordingly, the ARU is simply a coordinating office attached to the Cabinet Division with the main purpose of facilitating the collaborative efforts of the relevant statutory functionaries. It therefore cannot be accused of adversely affecting the rights of any Pakistani citizen without the backing of law. This is made clear by the composition of the ARU and its terms of reference ("TORs") which are also set out in the above noted Notification dated 06.11.2018:

"CABINET DIVISION

..

NOTIFICATION

No. F.32/CM/2018-Cab. The Cabinet, in its meeting held on 5th September, 2018, vide case No.546/35/2018, approved the Establishment of Assets Recovery Unit for implementation of Recovery of Unlawful Assets Abroad.

2. The composition and terms of reference of Assets Recovery Unit shall be as follows:

A. Composition:

1.	SAPM on Accountability.	Chairman
2.	Senior Officer from Federal Investigation Agency (FIA).	Member
3.	Senior Officer from National Accountability Bureau (NAB).	Member
4.	Senior Officer from Federal Board of Revenue (FBR).	Member
5.	Senior Officer from State Bank of Pakistan (SBP).	Member
6.	2/3 Experts from private sector with expertise in forensic accounting, anti-money laundering, international criminal laws and transactional legal systems.	Members
7.	Any other officer/agency/ firm/ or individual if so required by the Unit on temporary or permanent basis may be co-opted by the Unit.	

B. Terms of Reference:

..

3. Assets Recovery Unit designated officers from relevant organization/ department/ other law enforcement agencies like NAB, FIA or FBR shall with consultation/ support of relevant LEA, trace/detect and pursue repatriation of unlawful assets from abroad. For this purpose, ARU may seek help/assistance of foreign governments/firms/lawyers or individuals if so required."

TOR 3 confirms that when it comes to dealing with the assets of Pakistani citizens, the ARU is only authorised to act through its designated officer/member from the relevant department/ agency. Since these designated officers/ members are simultaneously serving in statutory agencies, they are vested not only with the powers granted by the relevant statute governing their agency but are also bound by the procedural safeguards and obligations laid down in such a statute. As a result, any action attributed to the ARU in relation to the assets of Pakistani citizens is taken through competent authorities strictly in accordance with the law.

73. As far as the issue of non-publication of the Notification dated 06.11.2018, setting out the composition and TORs of the ARU, is concerned, this Court in the case of Saghir Ahmed v. Province of Punjab (PLD 2004 SC 261) has observed:

"9: It depends on the language employed in a particular statute as to whether the provisions regarding publication of a statutory instrument or a notification in the Official Gazette are to be treated as mandatory or directory.

10. Even otherwise, the provisions of a statute for the publication or a notification in official Gazette are generally regarded by the Courts as directory and where their strict non-compliance does not provide any consequences. The legal certainty also requires that ordinarily a statutory instrument should not be treated as invalid because of a failure on the part of public functionaries to publish it in the official Gazette. There may be many things done on the basis of such an instrument. It would seem unfortunate were these things held to be invalid if it were at some stage discovered that there had been a failure by a public authority to go meticulously by the manner and mode of publication of an instrument or notification in the Official Gazette.

...

11. However, no hard and fast rule of universal application can be laid down on the legal effect of non-publication of a notification in the official Gazette. In certain cases, keeping in view the nature and object of a particular statute and to carry out the legislative intent, the provisions

for the publication of a notification in the official Gazette can be treated to be mandatory in nature where rights or liabilities of other persons are involved. ..."

(emphasis supplied)

The above quoted para-10 was subsequently affirmed by this Court in Bahadur Khan v. Federation of Pakistan (2017 SCMR 2066 at para-12). What can be noticed from the quoted passage is that in ordinary circumstances, the non-publication of a Notification in the gazette does not affect its validity except for in limited situations such as when a statute makes publication in the gazette mandatory or where the rights and liabilities of other persons are involved. In the present case before us there is no statute which makes publication of the Notification creating the ARU mandatory. Furthermore, wherever the rights and liabilities of citizens are affected, the existing statutory mechanisms are utilised to ensure actions taken are in accordance with the law. Even in the Reference against the petitioner, the material on record demonstrates that all intrusive actions were taken by officers belonging to the relevant statutory agencies. For example, the tax records of the petitioner were examined by the Assistant Commissioner (Inland Revenue), and the identification documents and travel records were accessed by Director FIA. Therefore, since none of the exceptions to non-publication apply to the facts of the present case, we find that there is no illegality that persuades us to hold that the publication of the Notifications dated 20.08.2018 and 06.11.2018 in the gazette was mandatory.

74. Next, learned counsel for the petitioner attacked the appointment of Mirza Shahzad Akbar as SAPM on Accountability. In response, learned counsel for the respondents relied on Rule 4(6) and serial number 1A of Schedule V-A of the ROB to defend the said appointment. For the sake of convenience, these are reproduced below:

"4. Organization of Divisions.

.

(6): There may be a Special Assistant or Special Assistants to the Prime Minister with such status and functions as may be determined by the Prime Minister.

.

Schedule V-A

[Rule 15(1)(g)(h)]

LIST OF CASES TO BE SUBMITTED TO THE PRIME MINISTER FOR HIS ORDERS

.

1A. Appointment, resignation and removal of Special Assistants to the Prime Minister and of persons holding the Minister's status without Cabinet rank, determination of their salaries, allowances and privileges."

It may be noticed from these provisions that they give the PM the power to appoint a Special Assistant with such status and functions as he desires. However, learned counsel for the petitioner disputed this assertion and questioned the appointment of Mirza Shahzad Akbar, Respondent No. 8, as SAPM by a simple Notification dated 20.08.2018, which reads as follows:

"No. 2-8/2018-Min-I.---In terms of rule 4(6) of the Rules of Business, 1973 read with serial number 1A of Schedule V-A of the said Rules, the Prime Minister has been pleased to appoint, with immediate effect, Mirza Shahzad Akbar as Special Assistant to the Prime Minister on Accountability, with the status of Minister of State."

He lamented that nothing was known about the educational qualifications or expertise of Mirza Shahzad Akbar. Even the process followed to select him from among other qualified persons as SAPM on Accountability was non-transparent. These questions of the learned counsel are addressed in this Court's judgment dated 26.12.2018 given in Muhammad Adil Chattha v. Federation of Pakistan (Constitution Petition No. 63 of 2018). The relevant portion at paragraph 14 is reproduced below:

"14: In view of the fact that the qualifications and antecedents for appointment of a Special Assistant to the Prime Minister are neither mentioned in the Constitution nor in the Rules of Business. It appears to have been left at the discretion of the Prime Minister of Pakistan on the basis of his subjective assessment about the ability of a person to perform the functions that the Prime Minister requires him to perform for such appointment..."

75. The above noted observations were made in the context that no substantive provisions of the Constitution create the office of SAPM. However, the said office is mentioned in Article 260 of the Constitution as one of the posts that is excluded from the definition of 'Service of Pakistan.' Therefore, at present the post of an SAPM is a political appointment. Accordingly, the said appointment is made in the discretion of the PM and is not regulated by statute. This aspect is highlighted by Rule 4(6) and serial number 1A of Schedule V-A of the ROB. However, it was observed in the Adil Chattha case (supra) that the Court will interfere if the PM exercises his discretionary power 'arbitrarily, unlawfully or in a fanciful manner,' or if the appointment of a person as SAPM suffers from 'cronyism, nepotism or political favour.' In such a situation the appointment will be struck down under Article 199(b)(ii) of the Constitution. As a result, there is a judicial check on the exercise of the PM's discretion. Nonetheless, this relief cannot be claimed in collateral proceedings, a principle which has been affirmed many a times by this Court. For instance, in the case of Qazi Hussain Ahmad v. General Pervez Musharraf (PLD 2002 SC 853) it was observed:

"73: ... No challenge muchless effective was thrown to the assumption of office of President by him and even in these petitions the challenge has been made only peripherally and collaterally while challenging the Referendum Order. It is well-settled that a writ of quo warranto cannot be brought through collateral attack. Such a relief has to be claimed directly. We are fortified in this behalf by the judgment of this Court in Pir Sabir Shah's case (PLD 1994 SC 738). Not only in this case but also in other cases it was held that for orderly and good governance validity of the appointment of incumbent of public office cannot be impugned through collateral proceedings."

(emphasis supplied)

The learned counsel for the petitioner has neither challenged the appointment of Respondent No.8 as SAMP Accountability in separate proceedings under Article 199(b)(ii) of the Constitution nor has he placed any material on record which disqualifies Mirza Shahzad Akbar from being appointed to this office. Therefore, without proof of illegal or arbitrary exercise of discretion by the PM, we cannot interfere with his decision on this matter.

76. In the light of our discussion, we declare that there is neither any fatal defect in the creation of ARU nor is there any unlawfulness in the appointment of Mirza Shahzad Akbar as SAPM Accountability.

SURVEILLANCE AND ILLEGALLY COLLECTED EVIDENCE

77. The learned counsel for the petitioner also criticised the respondents' method of collection of evidence in the present case. He stated that the tax and property records of the petitioner and his family were accessed to frame the Reference against the petitioner, a fact admitted by the respondents. These searches he alleged were a breach of the petitioner's and his family's right to privacy enshrined in Article 14(1) of the Constitution and thus amounted to covert surveillance. He, therefore, urged this Court to hold that such evidence had become inadmissible in all related future proceedings. Conversely, learned counsel for the respondents, without prejudice to his denial that there had been any illegality in the collection of evidence in the instant case, cited case-law from Pakistan, United Kingdom and India to demonstrate that the method of collection of evidence, irrespective of whether it was secured lawfully or otherwise, was no bar to its admissibility. Specifically, he relied on the following cases: Messrs Bisvil Spinners (Pvt.) Ltd. v. Pakistan (PLD 1992 SC 96), Kuruma v. The Queen ([1955] AC 197) and R.M. Malkani v. State of Maharashtra (AIR 1973 SC 157).

78. At the very outset it becomes clear that this plea of the petitioner raises two distinct issues: surveillance and illegal collection of evidence. To have a coherent discussion of each aspect of the

petitioner's plea, the two issues are dealt with separately. Before arriving at any decision on the allegation of covert surveillance pressed by the petitioner, it needs to be understood what actions actually constitute surveillance. A comprehensive definition is not available in our laws but can be found in Section 48(2) of the UK's Regulation of Investigatory Powers Act, 2000:

"48 Interpretation of Part II

..

(2) Subject to subsection (3), in this Part "surveillance" includes-

(a) monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications;

(b) recording anything monitored, observed or listened to in the course of surveillance; and

(c) surveillance by or with the assistance of a surveillance device."

It may be noticed from the above mentioned provision that surveillance primarily involves the monitoring or recording of a person's movements, conversations or other activities and communication. However, in the present case the learned counsel for the petitioner has not produced any evidence before us which demonstrates that either the petitioner or his family have been monitored or their communications have been intercepted in the above manner.

79. In fact, the only proof which learned counsel has referred to is the admission by the respondents that the tax and property records of the petitioner and his family have been accessed from Government and public records. Indeed, there is no allegation that any information was obtained from the petitioner's personal or private records. However, during arguments learned counsel for the petitioner denied that this distinction made any difference to his primary contention of invasion of privacy and unlawful surveillance because of what is now commonly known as the 'Marcel principle.' This principle has been aptly explained by the UK Supreme Court in Regina (Ingenious Media Holdings plc) v Revenue and Customs Commissioner ([2016] 1 WLR 4164):

"17: It is a well established principle of the law of confidentiality that where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes"

Nevertheless, it may also be noted that the 'Marcel Principle' is not absolute and can be deviated from. In fact, the House of Lords in Hamilton v Naviede ([1995] 2 AC 75) conceded this point when Lord Browne-Wilkinson speaking for the Court held:

"Page 102: In my view, where information has been obtained under statutory powers the duty of confidence owed on the Marcel principle cannot operate so as to prevent the person obtaining the information from disclosing it to those persons to whom the statutory provisions either require or authorise him to make disclosure."

The petitioner's case ignores the above mentioned qualification to the 'Marcel Principle.'

80. Starting first with Section 216(1) of the Ordinance: this provision declares the tax records of taxpayers to be confidential. However, the same Section also contains the exceptions to this general rule. For our purposes, the exception found in Section 216(3)(p) is most relevant. It is produced below for reference:

"216. Disclosure of information by a public servant

..

(3) Nothing contained in subsection (1) shall preclude the disclosure of any such particulars -

..

(p) as may be required by any officer or department of the Federal Government or of a Provincial Government for the purpose of investigation into the conduct and affairs of any public servant, or to a Court in connection with any prosecution of the public servant arising out of any such investigation;"

(emphasis supplied)

The learned counsel for the petitioner has strongly resisted the application of Section 216(3)(p) ibid to the facts of this case. He submitted that the petitioner is not a public servant for the purposes of the Ordinance. Therefore, his tax records could not be sought by an officer of the Federal Government for the purposes of an investigation. To fortify his submission, he stated that a Judge of the Supreme Court did not fall within the definition of "Service of Pakistan" laid down in Article 260 of the Constitution. For convenience, this provision is reproduced below:

"260 Definitions. (1) In the Constitution, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them, that is to say, "Service of Pakistan" means any service, post or office in connection with the affairs of the Federation or of a Province, and includes an All-Pakistan Service, service in the Armed Forces and any other service declared to be a service of Pakistan by or under Act of [Majlis-e-Shoora (Parliament)] or of a Provincial Assembly, but does not include service as Speaker, Deputy Speaker, Chairman, Deputy Chairman, Prime Minister, Federal Minister, Minister of State, Chief Minister, Provincial Minister [,Attorney-General, [Advocate-General,] Parliamentary Secretary] [, Chairman or member of a Law Commission, Chairman or member of the Council of Islamic Ideology, Special Assistant to the Prime Minister, Adviser to the Prime Minister, Special Assistant to Chief Minister, Adviser to a Chief Minister] or member of a House or a Provincial Assembly;"

(emphasis supplied)

81. It may be observed from Article 260 quoted above that Judges of the Superior Courts are not explicitly included in the 'Service of Pakistan.' However, the essential features of such service are provided in Article 260 ibid. These have been interpreted by this Court to include the office of Judges of Superior Courts within the category of 'Service of Pakistan.' Reliance is placed on the case of Asghar Khan (supra) wherein it was observed:

"78: Besides the office of the President, the Judges and Chief Justices of the superior courts are also included in the scope of service of Pakistan by failing to make reference to them among the exclusions from service of Pakistan in Article 260."

(emphasis supplied)

Accordingly, Judges of the Supreme Court are engaged in the 'Service of Pakistan.' However, the exception to the confidentiality of tax records under Section 216(3)(p) of the Ordinance is available only where disclosure is required for the purposes of an 'investigation into the conduct and affairs of any public servant by any officer or department of the Federal Government.' Therefore, it needs to be determined what the terms 'investigation' and 'public servant' mean. If we examine the expression 'public servant' first, it becomes clear on a perusal of the Ordinance that this word has not been defined in the said law. However, it does find mention in the tax statutes that preceded the Ordinance, namely, the Income Tax Act, 1922 and the Income Tax Ordinance, 1979 ("predecessor tax laws"). Section 2(13) of the former and Section 2(36) of the latter described the term 'public servant' to have the same meaning as that ascribed to it by the Pakistan Penal Code, 1860 ("P.P.C."). On a perusal of the P.P.C., it becomes clear that the predecessor tax laws are referring to Section 21 of the P.P.C. which reads:

""21. "Public Servant" The words "public servant" denotes a person falling under any of the descriptions herein after following, namely:-

First: [omitted]

Second: Every Commissioned Officer in the Military, Naval or Air Forces of Pakistan while serving under the Federal Government or any Provincial Government;

Third: Every Judge;"

82. A Judge is an appointee under law of a Court or a Tribunal. Such law may be enacted either by the Federation or the Province. Section 21 of P.P.C. declares every Judge in Pakistan to be a public

servant. Therefore, a person holding judicial office is a public servant. Since Judges of the Superior Courts are appointed under the Constitution, it is only logical that the definition of public servant in Section 21 of the P.P.C. includes such Judges. As a result, it follows from well-established rules of interpretation (which need not be set out here) that the expression 'public servant' continues to bear the same meaning in the Ordinance as it did in the predecessor tax laws. Nevertheless, while in ordinary circumstances this would be sufficient to settle the debate on the question of whether Judges are public servants, in light of the constitutional importance of this petition it is advisable if this question is answered conclusively by applying the features of public office, set out by this Court, to the office of a Judge of the Superior Courts. Reference is made to the judgment of this Court in Salahuddin v. Frontier Sugar Mills and Distillery Ltd. (PLD 1975 SC 244) which quotes the following passage from Ferris's Extraordinary Legal Remedies, 1925 Edn, page 145, with approval:

"Pages 258-259: "a public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. It is a trust conferred by public authority for a public purpose, embracing the ideas of tenure, duration emolument and duties. A public officer is thus to be distinguished from a mere employment or agency resting on contract, to which such powers and functions are not attached . . . . . The determining factor, the test, is whether the office involves a delegation of some of the sovereign functions of Government, either executive, legislative or judicial, to be exercised by the holder for the public benefit. Unless his powers are of this nature, he is not a public officer.""

(emphasis supplied)

83. It becomes plain from the above cited dictum that there are five main ingredients present in the office of a public servant. These are:

a. The office is a trut conferred for a public purpose;

b. The functions of the office are conferred by law;

c. The office involves the exercise of a portion of the sovereign functions of Government whether that be executive, legislative or judicial;

d. The term and tenure of the office are determined by law; and

e. Remuneration is paid from public funds.

84. When the office of a Judge of the Supreme Court is scrutinised against these ingredients, it becomes obvious that Judges of this Court are indeed public servants. Their office is created by the Constitution and so are the jurisdiction and powers that they possess. They perform an essential governmental function: the administration of justice for the benefit of the public at large. They have a fixed tenure, prescribed by Article 179 of the Constitution and their emoluments are paid from the Federal Consolidated Fund under Article 81 of the Constitution. As a result, there is no doubt that a Judge of the Supreme Court is a public servant for the purposes of Section 216(3) (p) of the Ordinance. We then have the terms 'investigation' and 'officer or department of Federal Government.' In our view, these expressions are not intended to be used in a narrow, technical or pedantic manner. Instead, they are to be given a natural, though contextual, meaning. For instance, the term 'investigation' is not to be used only in the sense in which it is defined in Section 4(1)(l) of the Code of Criminal Procedure, 1898. In fact, in relation to the Judge of a Superior Court, an 'investigation' into his 'conduct and affairs' can only mean an investigation for the purposes of Article 209 of the Constitution. However, it is critical (for the exception in Section 216(3)(p) to be attracted) that the 'investigation' is duly sanctioned and is being carried out in accordance with law at the time that the clause is invoked. If this is not so then clause (p) can have no application and the information cannot be disclosed. As will become clear later on in the judgment, there was no proper investigation for the purposes of Article 209 when the ARU

sought the tax information of the petitioner from the FBR. Consequently, the exception in Section 216(3)(p) of the Ordinance is not applicable to the facts of the case.

85. As far as Mrs. Isa is concerned, the language of clause (p) suggests that it is not limited only to information relating to the public servant. Instead, provided that the other conditions laid down therein are met, this clause also applies to any other taxpayer as long as it can be shown that there is a real, direct and substantial connection/ nexus between the information sought in relation to the latter and the investigation underway into the conduct and affairs of the public servant. And, ipso facto, unless tax information is sought in respect of the public servant no such information of any taxpayer can be accessed. Hence, the exception under Section 216(3)(p) of the Ordinance also applies to Mrs. Isa. However, as already noted (and which will be discussed in detail later on) the jurisdictional prerequisites for carrying out an investigation against the petitioner did not exist. It therefore follows that the request made by the ARU for the tax information and the release of such information by the tax authorities did not fall within the exception contained in clause (p) . As a result, the disclosure was contrary to law.

86. Be that as it may, our conclusion that the petitioner or his spouse did not disclose the London Properties in their wealth statements is not based on the tax information unlawfully harvested by the respondents. Rather, in the case of the petitioner, we have relied on the stance taken by him in his pleadings that he has no connection whatsoever with the London Properties. It logically follows then that he did not declare these properties in his wealth statements. With respect to Mrs. Isa, we have based our decision on the oral statement she made in Court through video link on 18.06.2020 (elaborated more fully below) that prior to 2018 she had not declared the London Properties in her wealth statements. As a result, in these circumstances when we have not taken into consideration the tax information collected illegally by the respondents, we do not deem it necessary to pass any definitive finding on whether, and if so, in which circumstances and to what extent, such information is admissible in a court of law.

87. Finally, there is the property search carried out by the respondents in the United Kingdom. Although during the initial stage of oral arguments, learned counsel for the petitioner vehemently argued that these searches were a violation of the right to privacy, he later accepted that the property searches were in fact carried out from the public record. It would be useful at this stage to set out the procedure for such property searches. Essentially, the entire operation consists of a two-step process. In the first step, the name of the relevant person is searched on the open source website 192.com which gives a list of the addresses of the potential properties owned by the said person. Subsequently, these addresses are entered into the UK Land Registry website, on the payment of a fee (3 for each property search), which gives the details of not only the property but also the name of the owner. It is by now well-established that the UK Land Registry is an open source. This is corroborated by Section 66 of the Land Registration Act, 2002 which reads:

"66 Inspection of the registers etc

(1) Any person may inspect and make copies of, or of any part of-

(a) the register of title,

(b) any document kept by the registrar which is referred to in the register of title,

(c) any other document kept by the registrar which relates to an application to him, or

(d) the register of cautions against first registration."

(emphasis supplied)

Accordingly, the argument of the learned counsel for the petitioner that the property search was a violation of the right to privacy has become a moot point because it is now obvious that in searching these records the respondents have not violated any law. Indeed, there is no law to violate since property records are open to the public (and have been since 03.12.1990). Consequently, no confidentiality attaches to such records. Clearly then, the acts of the officers of ARU and the Federal

Government in accessing the property records of the petitioner and his family cannot be classified as either invasion of privacy or covert surveillance.

88. While reaching this decision, we have been conscious of Article 14(1) of the Constitution produced herein below:

"14 Inviolability of dignity of man, etc.

(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable."

However, it is pertinent to mention here that the guarantee under Article 14(1) is for the privacy of home and that too subject to law. Such privacy does not extend to the tax and property records of either the petitioner or his family members. Moreover, learned counsel's reliance on the case of Mohatarma Benazir Bhutto v. President of Pakistan (PLD 1998 SC 388) to support his contention of covert surveillance and a violation of the right to privacy is misplaced. The facts of that case are distinguishable from the facts of the present case. In the former it was established that the homes, Chambers and telephones of Judges of the Superior Courts were tapped and bugged:

"27: The list of persons whose telephones were tapped and were under surveillance consists of Judges of the superior Courts including the Chief Justice of Pakistan, Chief Justice of the Federal Shariat Court, Chief Justice of the High Court of Balochistan, Chief Justice and Judges of the High Courts of Lahore and Sindh, rest houses and Chambers of the Judges were all subjected to such illegal act which will make a respectable nation to hang its head in shame...

28. The tapping and eaves-dropping of the telephones of the Judges of the superior or the subordinate Courts interferes in the discharge of duties and decision of cases, which a Judge is bound to do under law and the Constitution. A bug was planted in the Chambers of the Hon'ble Chief Justice of Pakistan wherever he was, bugs were also planted in the Judges' rest houses, their privacy in home, Chambers or in the rest houses was all under surveillance by illegal intrusion. It is a matter of common knowledge that the Judges while hearing the cases in a Bench usually discuss the merits and demerits in chambers and in privacy. They also dictate their judgments in their Chambers where no intrusion or interference is allowed. By tapping and bugging the Chambers and homes of the Judges, interference is made in the proper discharge of duties which is wholly destructive of the independence of judiciary and its ability to function as a coordinate branch and pillar of the State."

(emphasis supplied)

However, no similar allegation has been levelled by the petitioner against the respondents. Therefore, while it was correct to hold that there had been unlawful surveillance and a violation of Article 14(1) of the Constitution in the Benazir Bhutto case (supra), giving the same ruling on the facts of the instant case will be tantamount to stretching the ratio decidendi of that case beyond its ambit. Consequently, we find that learned counsel's invocation of Article 14(1) in the present circumstances is erroneous.

DEFECTS IN THE REFERENCE

89. A strong objection was also raised by learned counsel for the petitioner about the defects inherent in the preparation of the Reference. This submission covered three main aspects: lack of authorisation by the President for investigating the affairs of the petitioner, the complete bypass of the judicial tax hierarchy by the Government before making out a case under Section 116 of the Ordinance against the petitioner and the non-application of mind by the President in sending the Reference to the SJC. In addressing us on these points, learned counsel for the petitioner adopted the findings of this Court given in the CJP case (supra). He argued that all stages of a Presidential reference prior to the SJC proceedings could be struck down on ordinary judicial review grounds (albeit he only pressed the ground of mala fide when touching upon the validity of the pre-SJC proceedings). He submitted that the Reference suffered from serious violations of law and procedure which rendered it liable to be quashed.

90. On the other hand, learned counsel for the respondents began his submissions with the contention that a Presidential reference needed to satisfy only a very low threshold of correctness, and that merely a prima facie case needed to be established by the respondents on the accuracy of the contents of the Reference. He further submitted that this Court could not analyse in any detail the opinion formed by the President in deciding to send the Reference to the SJC; instead we were only limited to examining whether there was some material before the President which had nexus with the object of Article 209 of the Constitution. In simple terms, learned counsel stated that only the 'structural elements' of the Reference could be looked into by this Court and any errors, whether minor or major, could not invalidate the opinion of the President as long as there existed some material which showed that a Superior Court Judge may have been guilty of misconduct. However, learned counsel for the respondents did not address the Bench on the critical issue of authorisation of an investigation against a Judge.

91. Before giving our findings on the defects in the Reference, highlighted by learned counsel for the petitioner, we would like to address the submission of learned counsel for the respondents that a Presidential reference needs to satisfy only a very low threshold of factual and legal correctness with regard to its contents. In our considered view, learned counsel has conflated a low burden of proof with a low standard of care. It is true that Article 209(5) of the Constitution only requires the President to form an opinion that a Superior Court Judge may have been guilty of misconduct. He does not need to be certain that a Judge is guilty of the conduct alleged. Nevertheless, his opinion must be based on positive and affirmative material and on the assurance that necessary legal and procedural safeguards have been observed in the preparation of the reference. Therefore, for the President to even form a prima facie opinion about a Judge's guilt, the President needs to verify that there has been compliance with the settled rules on authorisation; he needs to obtain proper advice on the contents of the reference from competent persons; and he needs to ascertain that there is sufficient material before him which satisfies the high thresholds of care and proof expected in the preparation of a reference.

92. At this stage it would be appropriate to consider why we have set out this requirement of a high standard of care and proof for the formulation of a reference. It needs to be kept in mind that a complaint against a Superior Court Judge can be generated in one of three ways: a Presidential reference, a private complaint and the exercise of suo motu jurisdiction by SJC. Since all three methods are distinct, therefore, the quality of their information/ complaint will also be different. Take for instance a complaint by an ordinary citizen. It is a certainty that when an individual files a complaint against a Judge, he will only be able to provide primitive or half-baked information. This is because an individual only has limited resources at his disposal. He cannot be expected to unearth all the necessary information needed to fully document his complaint. However, a Presidential reference is articulated on a different level compared to a private complaint. When the President, as the Head of State, sends a reference against a Judge, he has at his disposal State agencies and access to competent legal advice. He can utilise these to verify that valid authorisation for investigation has been granted and that materials that are relevant and reliable under the test laid down in Bisvil Spinners (supra) are available to support the reference. However, if this Court were to lay down that despite all the machinery of the Federal Government at his command, the President is only required/ obliged to send a perfunctory reference which contains legal and factual defects, then nothing will be more harmful to the independence of the judiciary. Such a relaxation will give the Executive the room to send frivolous references with the expectation that if some nexus between the material and the object of Article 209 of the Constitution is demonstrated, the SJC will itself find substance in the reference. Therefore, to protect and defend the independence of the judiciary, we hold that a reference sent by the President must contain authorised, serious, considered and verified information in both respects, legal and factual, in order to possess the gravity that should accompany a Presidential action.

AUTHORISATION FOR INVESTIGATION

93. Having determined that a reference needs to be thorough, it now needs to be decided whether the Reference against the petitioner satisfies this test. One of the basic objections to the validity of the Reference is the lack of authorisation for investigation conducted prior to the Reference's filing. Learned counsel for the petitioner submitted that the Chief Justice of Pakistan case (supra) is authority for the proposition that authorisation for investigating the affairs of the petitioner (or for that matter any other Superior Court Judge) could only have come from the President himself. The relevant portion from the judgment is produced below:

"64: A perusal of the above-quoted provisions of Article 209 would reveal that... clauses (5) and (6) of the said Article 209 tell us of various steps of the exercise leading to the removal of a Superior Court Judge... Reverting back to the various steps mentioned above, I would summarize the same as under:

(i) receipt of information by the President, from any source, about the mental or physical incapacity of a Judge or of his being guilty of misconduct;

(ii) collection of material in support of the said information;

(iii) formation of opinion by the President that such a Judge may well be incapable as above-mentioned or may have committed misconduct;

(iv) the consequent direction (generally called the Reference) by the President to the Council to inquire into the matter;"

(emphasis supplied)

94. Learned counsel argued that the above passage confirms that the only purpose for ensuring that information against a Judge is received by the President is to obtain his permission to proceed with the investigation to collect material in support of the said information. However, as the record shows this was not done. Instead, when the complaint of Mr.Dogar was received, the Chairman of ARU obtained the authorisation of the Law Minister on 16.04.2019 to commence an investigation against the petitioner. This is evident from the letter of the Chairman ARU dated 10.05.2019. However, such authorisation is against the law enunciated in the Chief Justice of Pakistan case (supra), and therefore cannot stand. The only reasoning advanced by learned counsel for the respondents to defend the act of the Law Minister authorising the investigation against the petitioner was item 21(10) of Schedule II of ROB which reads:

"Schedule II

[Rule 3(3)]

DISTRIBUTION OF BUSINESS AMONG THE DIVISIONS

..

21. Law and Justice Division

..

(10) Federal Government functions in regard to the... Supreme Judicial Council..."

However, this is a very widely worded provision which deals with the allocation of business and not the vesting of power in the Law Minister to authorise investigations against Superior Court Judges. Indeed, the ROB do not at all deal with the matter of investigations against Judges of the Superior Courts. Consequently, this issue has to be resolved by interpreting the relevant Constitutional provisions. While the Chief Justice of Pakistan case (supra) does not make an explicit statement to the effect that authorisation for investigation must be granted by the President, the sequence of steps given in para-64 (reproduced above) of that judgment interpret Article 209(5) of the Constitution as granting the President such a power. However, logic dictates that the President cannot personally assess accusatory information against a Judge and instead requires assistance and advice in the matter. In this respect, there is no law that lays down the procedure for obtaining such support for the President. Therefore, in such a situation the Constitutional principles become relevant. To gather the Constitutional intent as to who is the competent authority for authorising an investigation against a

Superior Court Judge, Article 209(5) of the Constitution should be the starting point of the discussion. For convenience, this sub-Article is reproduced below:

"209. Supreme Judicial Council.

..

(5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court-

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct, the President shall direct the Council to, or the Council may, on its own motion, inquire into the matter."

95. It can be noticed that Article 209 involves only two Constitutional authorities in the initiation and consideration of a reference against a Superior Court Judge: the SJC and the President. The SJC only becomes involved in the proceedings once the reference is forwarded to it by the President. The observation in the Chief Justice of Pakistan case (supra) about the collection of material in support of the information against a Judge has been referred above. Although the case was decided on the ground of mala fide of facts, however, the observation about collection of material against a Judge provides useful guidance. Under the Constitutional scheme the President cannot personally be responsible for authorising an investigation into an allegation against a Judge. He does not exercise his official functions as he desires but instead acts on the advice of the PM or the Cabinet under Article 48(1) except for in situations where the Constitution has directed him to act in his discretion under Article 48(2). However, the sequence of steps noted in para-64 of the CJP judgment (supra) does not deal with the constitutional mechanism under which the President may authorise collection of material against a Judge of the Superior Courts. At present there are three methods under Article 48 of the Constitution by which the President may possibly authorise such an investigation. To dilate further on this matter, it would be appropriate to read Article 48:

"48. President to act on advice, etc. (1) In the exercise of his functions, the President shall act on and in accordance with the advice of the Cabinet or the Prime Minister:

Provided that [after fifteen days] the President may require the Cabinet or as the case may be, the Prime Minister to reconsider such advice, either generally or otherwise, and the President shall, within ten days, act in accordance with the advice tendered after such reconsideration.

(2) Notwithstanding anything contained in clause (1), the President shall act in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so and the validity of anything done by the President in his discretion shall not be called in question on any ground whatsoever."

96. It may be noticed that the President may be required by the Constitution to act on the advice of the PM or Cabinet under sub-Article (1) of Article 48 or to act in his own discretion under sub-Article (2) of the said Article. It is an appealing hypothesis that the President should act in his discretion when authorising an investigation against a Superior Court Judge. Indeed, there is force in the proposition that the removal process of Judges must be as isolated from the Executive as possible. However, this conclusion conflicts with the Constitutional scheme. Security of tenure of Judges and independence of the judiciary are most certainly assured by our Constitution. However, these can be enforced in accordance with the Constitutional scheme for the functioning of the Federal Government which has significantly been altered by the 18th Amendment passed in the year 2010. A salient feature of this Constitutional Amendment is that it resets the balance of powers and functions between the President and the PM. Before this Amendment, several provisions in the Constitution allowed the President to carry out functions in his discretion. Some provisions are quoted to illustrate the point:

"48. President to act on advice, etc.

..

(6) If, at any time, the President, in his discretion, or on the advice of the Prime Minister, considers that it is desirable that any matter of national importance should be referred to a referendum, the President may cause the matter to be referred to a referendum in the form of a question that is capable of being answered either by "Yes" or "No".

58. Dissolution of the National Assembly

..

(2) Notwithstanding anything contained in clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion,:-

(a) a vote of no-confidence having been passed against the Prime Minister, no other member of the National Assembly is likely to command the confidence of the majority of the members of the National Assembly in accordance with the provisions of the Constitution as ascertained in a session of the National Assembly summoned for the purpose; or

(b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

91. Cabinet

..

(2) The President shall in his discretion appoint from amongst the members of the National Assembly a Prime Minister who, in his opinion, is most likely to command the confidence of the majority of the members of the National Assembly."

(emphasis supplied)

After the 18th Amendment, almost all of the discretionary powers of the President have either been omitted or have been made exercisable on the advice of the PM or the Cabinet. The above mentioned provisions stand amended as follows:

"48. President to act on advice, etc.

..

(6) If at any time the Prime Minister considers it necessary to hold a referendum on any matter of national importance, he may refer the matter to a joint sitting of the Majlis-e-Shoora (Parliament) and if it is approved in a joint sitting, the Prime Minister may cause such matter to be referred to a referendum in the form of a question that is capable of being answered by either "Yes" or "No".

58. Dissolution of National Assembly

..

(2) Notwithstanding anything contained in clause (2) or Article 48, the President may dissolve the National Assembly in his discretion where, a vote of no-confidence having been passed against the Prime Minister, no other member of the National Assembly commands the confidence of the majority of the members of the National Assembly in accordance with the provisions of the Constitution, as ascertained in a session of the National Assembly summoned for the purpose.

91. Cabinet

..

(4) The Prime Minister shall be elected by the votes of the majority of the total membership of the National Assembly..."

(emphasis supplied)

97. The only exception to this change, brought about by the 18th Amendment, is Article 58(2) which read with Article 91(7) of the Constitution still allows the President to dissolve the National Assembly in his discretion if a vote of no-confidence has been passed against the sitting PM and no other member of National Assembly commands the confidence of the majority. As a result, while the substance of Article 48(2) has remained the same, the subject matters governed by this Constitutional provision have been substantially curtailed. Therefore, to hold that the President can authorise an investigation

against a Judge in his own discretion will be doing violence to the language of the Constitution. It is our considered view that Article 48(2) only applies where the President is specifically authorised by the Constitution to act in his discretion. No such command is given to the President in Article 209(5) of the Constitution which governs the removal of Judges.

98. Moreover, the sending of a reference is an executive act performed by the Federal Government. To declare that the President is to authorise investigations into Superior Court Judges in his discretion would amount to inviting the President to arrogate powers in complete contradiction of the Constitutional scheme. The 18th Amendment has shifted the Government's decision making in the working of the State. Evidence of this shift can be found in Article 90 of the Constitution which prior to the 18th Amendment read as follows:

"90. Exercise of executive authority of the Federation.

(1) The executive authority of the Federation shall vest in the President and shall be exercised by him, either directly or through officers subordinate to him, in accordance with the Constitution"

However, after the 18th Amendment, this provision has been significantly modified. For ease of reference, it is produced below:

"90. The Federal Government:

(1) Subject to the Constitution, the executive authority of the Federation shall be exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the Federal Ministers, which shall act through the Prime Minister, who shall be the chief executive of the Federation.

(2) In the performance of his functions under the Constitution, the Prime Minister may act either directly or through the Federal Ministers."

99. It may be noticed that Article 90 no longer vests the executive authority of the Federation in the President nor is it exercised by him. Instead, executive authority is now exercisable by the Federal Government, consisting of the PM and the Federal Ministers, in the President's name. Therefore, the President has been replaced as the central figure of the State by the PM. As a result, under the Constitutional process for performing the executive function of authorising an investigation into an information against a Superior Court Judge, the President should act on the advice of the PM or the Cabinet under Article 48(1) of the Constitution and not invoke his discretionary power under Article 48(2).

100. Nevertheless, upon whose advice is the President to act under Article 48(1) of the Constitution. That Article simply states that the President is to act on the advice of either the Cabinet or the PM. Even Article 91(1) simply reiterates the two advising authorities nominated in Article 48(1). Article 90(1) clarifies that the Federal Government shall act through the PM unless the latter requires, under Article 90(2), his functions to be performed through the Federal Ministers. As a result, the Constitution omits to provide any guidelines or criteria to distinguish the executive functions that are to be performed under the advice of the Cabinet and those which are to be performed under the advice of the PM. It leaves that business to be determined by the Federal Government according to its requirements and exigencies from time to time.

101. Accordingly, Article 99(3) of the Constitution empowers the Federal Government to make rules for the allocation and transaction of its business. In exercise of such power, the Federal Government has framed the ROB that serve as a source of guidance on the instant subject. The ROB are constitutionally mandated rules and must be followed by the Government in carrying out its functions. The mandatory status of the ROB was affirmed by this Court in the case of Mustafa Impex (supra):

"50: The Constitution confers vast powers on the Government for the transaction of executive business. There is no reason to suppose, or believe, that the framers of the Constitution intended, in disregard of the explicit language employed, that the Federal Government could, in its discretion, either follow, or not follow, the provisions of the Rules of Business. The framer of rules [Federal Government] is as much bound by the content thereof as anyone else is subject thereto. These are basic precepts of constitutional interpretation. To allow the Executive to depart from the language of the Rules, in its discretion, would be to permit, and legitimize, unconstitutional executive actions. Quite independently of the above, there is ample case law stressing the importance of a structured exercise of discretionary power. In this case the discretionary executive powers have already been fettered by the Constitution. The framing of rules for this purpose is inextricably linked to the guided exercise of official power. The following of the Rules of Business is a salutary exercise intended to enhance, and amplify, concepts of good governance. We have no doubt that it is mandatory and binding on the Government, and so hold."

(emphasis supplied)

Consequently, Rule 15-A of the ROB specifies the procedure to be followed for functions that are required by the Constitution to be performed by the President. For sake of convenience, it is reproduced below:

"15-A. Reference to the President.---(1) Notwithstanding the provisions made in these rules, where in terms of any provision of the Constitution any function is to be performed or any orders have to be issued by the President or his specific approval is required, the Division concerned shall incorporate a paragraph to this effect in the summary entitled as "Summary for the Prime Minister". The Prime Minister shall render his advice and submit the case to the President. After the President has seen and approved the case, it shall be returned to the Prime Minister. The cases to which this sub-rule applies are enumerated in Schedule V-B.

(2) Notwithstanding the provisions made in these rules, where in terms of any provisions of the Constitution, any function is to be performed or any orders have to be issued by the President in his discretion, the Division concerned shall submit the case to the President through the Prime Minister in the form of a self-contained, concise and objective summary entitled as "Summary for the President" stating the relevant facts and points for decision prepared on the same lines as prescribed in these rules for a Summary for the Cabinet, except that only one copy will be required which may not be printed. This procedure will not, however, be applicable where the President has conveyed the decision to the Prime Minster for issuing orders in respect of cases in his discretion. The cases to which this sub-rule applies are enumerated in Schedule VI."

(emphasis supplied)

102. It may be noticed that Rule 15-A(1) deals with cases that require the orders or approval of the President on the advice of the PM. Accordingly, the same Rule refers to Schedule V-B which sets out the list of cases in which the PM's advice is to be tendered. Serial number 35 of Schedule V-B reads: "Reference to Supreme Judicial Council." It is thus patent that the entire process of a Presidential reference falls under the advice of the PM according to the ROB. It is he who has to advise the President on the steps that need to be taken in a matter that bears relation to Article 209(5) of the Constitution. As a result, the approval by the President of the advice of the PM is necessary for commencing an investigation into a complaint made against a Judge of the Superior Court.

103. However, in the present Reference before us there is no such authorisation on record for commencing an investigation against the petitioner. Instead the record shows that the only authorisation sought, for probing the complaint against the petitioner, was from the Law Minister who under any interpretation of the Constitution had no jurisdiction in this behalf. The competent authorities, namely, the PM and the President were never approached by the Ministry of Law for the requisite authorisation envisaged by the CJP (supra) judgment. Both constitutional authorities got involved in the process after all the material had already been collected. The initial authorisation by

the President on the advice of the PM to commence an investigation against a Judge in a complaint falling under Article 209(5) is a legal requirement for sustaining the validity of a Presidential reference that is ultimately filed with the SJC. Such oversight by the highest Constitutional functionaries protects Judges from whimsical and arbitrary interference by Executive authorities in their personal judicial independence and privacy. Without valid authorisation the foundation of the Reference suffers from an initial illegality which amounts to a Constitutional violation. Consequently, such an infirmity is fatal to the superstructure that is erected on it. As a result, this Reference is illegal and falls to the ground.

VALIDITY OF ALLEGATIONS IN THE REFERENCE

104. It is now important to consider the substance of the allegations made in the Reference filed against the petitioner. It would be appropriate at this stage to produce the relevant portions from this Reference:

"9. Mr. Justice Qazi Faez Isa was elevated as the Chief Justice of the Baluchistan High Court on 5 August 2009 (see PLD 2010 Journal 1 at p.3). One of the aforementioned properties has been acquired in the year 2011, while two have been acquired in the year 2013. Since 2011 till date Justice Qazi Faez Isa has filed wealth statements, along with his tax returns, intentionally and deliberately concealing the above three properties, notwithstanding that all along under section 116(1)(b) of the 2001 Ordinance he was under a direct legal and juridical obligation to have declared the said properties. His wife also filed a wealth statement for the tax year 2014, and failed to declare the said properties.

..

11. Apart from the fact that the failure of Justice Qazi Faez Isa to declare the aforementioned foreign properties of his wife in his successive wealth statements violates section 116(1)(b) of the 2001 Ordinance, the same also gives rise to the following issues:-

(a) the source to acquire the afore-stated expensive properties is not accounted for;

(b) whether the properties as afore-stated were acquired through money laundering, is an aspect which cannot be ruled out.

12. By not declaring the afore-stated properties and accounting for them, the respective wealth conciliation statements filed by Justice Qazi Faez Isa are also totally incorrect and tainted with concealments. Hence, a clear violation of Section 116(2) and other penal provisions of the 2001 Ordinance are also made out.

..

16. A Judge of the Superior Court who omits to intentionally declare three expensive London properties jointly owned by his spouse and children, violates Section 116 of the 2001 Ordinance. The tax records of the learned Judge and his spouse are absolutely silent about the source through which the said properties had been acquired and how and from where the funds were made available to purchase the said properties, without violating the money laundering regime and the Foreign Exchange Regulation Act, 1947..."

(emphasis supplied)

From a perusal of the above quoted excerpts it becomes clear that the Reference (repeatedly) emphasises that the petitioner has violated Section 116 of the Ordinance, the money laundering regime and FERA. These in turn raise questions about the source of funds used for acquiring the London Properties.

105. Similarly, the SCN issued by the SJC has also levelled corresponding allegations against the petitioner; and while we cannot examine the validity of the SCN issued by the SJC unless the bar under Article 211 is crossed, however, to appreciate the scope of the allegations in the Reference we are reproducing the said allegations in the SCN:

"(g) That allegedly the failure of your lordship to declare the afore-mentioned foreign properties of your wife in your lordship's successive wealth statements violates section 116(1)(b) of the 2001 Ordinance, and gives rise to the following issues:-

(a) the source to acquire the afore-stated expensive properties is not accounted for;

(b) whether the properties as afore-stated were acquired through money laundering, is an aspect which cannot be ruled out.

..

(i) Thus there is nothing on record to suggest that your lordship's wife and children had independent sources of income and that such funds were validly available with them to purchase the three foreign properties;

..

(k) That from the aforesaid it appears that at the relevant point of time of the purchase of the three properties your lordship's wife and the children were your dependents or at least were not possessed of known sources of income or pecuniary resources sufficient for acquisition of the properties in question. It appears that the said properties were concealed from the Income Tax Authorities in Pakistan. Furthermore, your lordship's worthy wife and children, in the context of the matter, are sufficiently connected to you, so as to put you, as a Judge of the superior Court of Pakistan, under a direct obligation to give a money trail of the three properties so as to establish that the source of funds and transfer thereof was not in violation of law.

..

o) That allegedly the tax records of your

lordship and your lordship's spouse are absolutely silent about the source through which the said foreign properties had been acquired and how and from where the funds were made available to purchase the said properties, without violating the money laundering regime and the Foreign Exchange Regulation Act, 1947."

(emphasis supplied)

An examination of these extracts reveal that the main purpose of the SJC for initiating an inquiry against the petitioner was to establish the source of funding of the allegedly concealed London Properties. This is therefore further evidence that the removal proceedings against the petitioner were aimed not at alleged tax default but at determining where the funds for the London Properties came from.

106. Taking up the other grounds of action against the petitioner first, we would like to make it clear that learned counsel for the respondents did not make any submissions on the petitioner's alleged violation of the provisions of FERA. In fact, he did not even nominate the relevant provisions of the said law. There is also no material, before us, which supports the said bald allegation of a violation of the claimed foreign exchange regime under FERA. As a result, we have no doubt that this particular charge is completely without merit. It is, therefore, surprising that the Law Minister, the PM and the President all failed to notice the non-existent case made out against the petitioner for allegedly violating the provisions of FERA. The filing of a Presidential reference under Article 209(5) is a solemn matter. It has grave consequences for the Judge against whom such a reference is prepared. It prima facie constitutes an interference with the security of tenure guaranteed to Judges of the Supreme Court under Article 179 of the Constitution. Therefore, the allegation levelled in a reference should be based on cogent evidence and sound legal analysis. A Presidential reference cannot be filed on assumptions. However, in the present case, the allegation of violating the provisions of FERA against the petitioner is exactly that: an unsubstantiated assumption neither backed by evidence nor supported by the relevant rule that was allegedly breached. As such, it cannot be sustained.

107. In this context, the next allegation levelled against the petitioner is that of money laundering. The primary legislation governing this subject matter is the Anti-Money Laundering Act, 2010

("AMLA") . Section 2(q), (s) and Section 3 of this Act define the offence of money laundering. These are produced below:

"2 Definitions.---In this Act, unless there is anything repugnant in the subject or context,-

..

(q) "proceeds of crime" means any property derived or obtained directly or indirectly by any person from the commission of a predicate offence or a foreign serious offence;

(s) "predicate offence" means an offence specified in the Schedule to this Act;

3 Offence of money laundering.---A person shall be guilty of offence of money laundering, if the person:-

(a) acquires, converts, possesses, uses or transfers property, knowing or having reason to believe that such property is proceeds of crime;

(b) conceals or disguises the true nature, origin, location, disposition, movement or ownership of property, knowing or having reason to believe that such property is proceeds of crime;

(c) holds or possesses on behalf of any other person any property knowing or having reason to believe that such property is proceeds of crime; or

(d) participates in, associates, conspires to commit, attempts to commit, aids, abets, facilitates, or counsels the commission of the acts specified in clauses (a), (b) and (c).

..

Explanation II.- For the purposes of proving an offence under this section, the conviction of an accused for the respective predicate offence shall not be required."

It may be noticed from a reading of both Sections 2 and 3 that a necessary element of the offence of money laundering is the commission of a predicate offence. The execution of this offence gives birth to the proceeds of crime, the movement of which attracts the criminal conduct of money laundering. Therefore, without the commission of a predicate offence there can be no offence of money laundering. However, not every statutory violation is a predicate offence; AMLA recognises this by setting out in its Schedule a list of statutory offences that constitute a predicate offence for the purposes of money laundering. In the present case, the main allegation against the petitioner is that he has failed to declare the London Properties owned by his wife and children in his wealth statements. The contents of a wealth statement are provided in Section 116(1) of the Ordinance. For the moment, ignoring our view that the said provision is vague about a taxpayer's obligation to disclose the assets of a financially independent spouse, it is clear that in order to attract the offence of money laundering the non-declaration of assets under Section 116 ibid must constitute a predicate offence. Only then may the allegation of money laundering be made against the petitioner. In this regard, the offences incorporated from the Ordinance to the Schedule to AMLA have to be examined. The gist of these offences is reproduced below:

""THE SCHEDULE"

..

Section XIIA The Income Tax Ordinance, 2001

192 Prosecution for false statement in verification- where tax sought to be evaded is ten million rupees or more[;]

192A Prosecution for concealment of Income-where tax sought to be evaded is ten million rupees or more[;]

Note: for the purposes of this Section, concealment of income includes any act referred to in subsection (1) of section 111 (unexplained income or assets)

194 Prosecution for improper use of National Tax Number [Certificate}- where tax sought to be evaded is ten million rupees or more[;]

199 Prosecution for abetment - where tax sought to be evaded is ten million rupees or more."

A perusal of the Schedule reveals that the non-declaration of assets by a taxpayer under the Ordinance is not a predicate offence under AMLA. Therefore, prima facie no case of money laundering can be made out against the petitioner on this count.

108. Be that as it may, it is a matter of record that the Reference has not alleged the commission of any specific predicate offence under AMLA by any person. Nevertheless, assuming for the sake of argument that the petitioner is under an obligation to list the assets of his wife in his wealth statement, the only predicate offence that appears remotely relevant to the case against him is under Section 192 of the Ordinance. Nonetheless, even though Section 3 of AMLA specifies that the commission of the offence of money laundering is not dependent upon the conviction of the petitioner for a predicate offence, it at least requires that a specific predicate offence be alleged. However, no predicate offence has been alleged against the petitioner in the Reference. Nor has any evidence been placed on record which may prima facie support the allegation of money laundering. In the above factual scenario, an allegation of money laundering against the petitioner is entirely fictional at this stage. The said allegation is therefore without merit.

109. Equally, it is relevant to note that the four sections of the Ordinance were only insertecd in the Schedule to AMLA as predicate offences on 20.05.2016 whereas the London Properties were purchased by the petitioner's family in 2011 and 2013. Consequently, it is an established fact that before 2016, violations of the Ordinance could not form the basis of a money laundering allegation. This proposition is backed by Article 12 of the Constitution:

"12. Protection against retrospective punishment

(1) No law shall authorize the punishment of a person:-

(a) for an act or omission that was not punishable by law at the time of the act or omission;"

110. The Constitution itself grants protection to individuals from retrospective punishment. Therefore, reliance by learned counsel for the respondents on an amendment made in 2016 to seek removal of the petitioner for acts committed in 2011 and 2013 appears to be improper. This will continue to be so unless the application of Section 192 is interpreted otherwise by the competent forum under the Ordinance.

111. Possibly, for the above mentioned reasons, learned counsel for the respondents submitted that the Reference does not allege that the petitioner has violated the provisions of AMLA. Instead, he argued the Reference simply refers to a violation of the money laundering regime in general. To support his contention he relied on certain Circulars and Notifications issued by SBP under FERA, some of which are produced below:

"Notification No. F.E. 2/98-SB

Dated the 21st July, 1998

In exercise of the powers conferred by subsection (2) of Section 8 of the Foreign Exchange Regulation Act, 1947 (Act No. VII of 1947), and in supersession of State Bank of Pakistan Notification No. F.E. 1/91-SB dated 26th February, 1991, the State Bank of Pakistan is pleased to permit:-

..

b. Any person maintaining an account expressed in a foreign currency, and held under any permission, general or otherwise, granted by the State Bank of Pakistan to take or send out of Pakistan, cheques or drafts drawn on such account.

F.E. Circular No. 17

..

No transfer of funds abroad shall be made through illegal channels such "Hundi system". All transfer of funds shall take place through banking channels, following the instructions given to the banks from time to time for the purpose."

After examining the above noted Circulars and Notifications, it is unclear how these help the respondents prove the charge of money laundering against the petitioner. There is no allegation or material on record suggesting that the petitioner or Mrs. Isa transferred money to the United Kingdom via illegal means/methods. Therefore, this novel argument is theoretical and speculative in content. The contention also lacks force for the simple reason that the offence of money laundering is governed by a special law, AMLA, since 2010. It is by now well-established that when a special law regulates a particular subject area then another law enacted for a different special purpose cannot affect the subject matter governed by the former special law. This is a principle of construction recognised by our Superior Courts. For instance, in the case of Ghulam Mustafa Jatoi v. Additional District and Sessions Judge (1994 SCMR 1299) this Court approved the principle that statutes which are not pari materia cannot govern each other's interpretation:

"11: In this regard, it may be pertinent to refer to the case of Mahbub Ahmad v. First Additional District Judge and another (PLD 1976 Karachi 978)... It may be advantageous to reproduce the relevant portion which contains in para. 8 thereof and which reads as follows:--

8. "... It may also be pointed out that unless the provision is 'pari materia', it is not correct to construe a provision with reference to another provision in a different Act, for it is the language of the provision which is the determining factor."

12. Reference may also be made to the case of Mrs. M. Waterfield v. C.E. Lee Anan and another (PLD 1957 (W.P.) Lahore 882) and the case of Salah Muhammad v. Muhammad Roz and others (PLD 1962 (W.P.) Lahore 68). In both the cases, it has been held by Division Benches of the Lahore High Court that a statute cannot be interpreted in the light of language used in another statute except when the language which has to be interpreted is, in the context, open to more meanings than one.

13. We may also refer to the case of Hari Khemu Gawali v. The Deputy Commissioner of Police, Bombay and another (PLD 1957 SC (India) 90), in which the Indian Supreme Court has inter alia held that it is not safe to pronounce judgment on the provision of one Act with reference to decision dealing with the other Acts which are not pari materia."

(emphasis supplied)

Even Halsbury's Laws of England (Volume 96, 2018) has affirmed this viewpoint:

"809: Comparison between Acts not in pari materia or the decisions on them affords no reliable guide to their construction, since the same words used in different statutory codes may have different meanings in each code, according to the intentions of the Acts and the mischiefs they are designed to prevent."

112. It is, therefore, only logical that Circulars and Notifications (which are only subordinate legislation) issued under FERA cannot control the subject of money laundering defined and governed by AMLA. However, learned counsel for the respondents also relied upon the Anti-Money Laundering Regulations, 2008 ("2008 Regulations") to argue that the charge of money laundering in the Reference was simply an allusion to the regime in general. But this reliance of learned counsel is flawed because these were framed under the Anti-Money Laundering Ordinances of 2007 and 2009 ("AML Ordinances"). These AML Ordinances did not recognise the conduct attributed to the petitioner as a predicate offence. Consequently, reference to the 2008 Regulations is of no assistance to the respondents in justifying their allegation of money laundering against the petitioner.

113. This brings us to the primary allegation in the Reference against the petitioner: his failure to disclose the London Properties of his wife and children in his wealth statement. In the Reference it is alleged that this obligation is imposed on the petitioner by virtue of Section 116(1)(b) of the Ordinance. However, learned counsel for the petitioner submitted that no such obligation could be imposed on the petitioner under Section 116(1)(b) because this provision only applies to the assets and liabilities of a dependent spouse and minor children of a declarant taxpayer. On the other hand, the petitioner's wife

is a financially independent taxpayer and their children are adults. They possessed these attributes even when the properties in question were acquired. Learned counsel also stated that no notice had been received either by the petitioner or Mrs. Isa under Section 116(1) of the Ordinance, therefore, it was not legally possible to level a charge of non-declaration of assets against the petitioner.

114. We have examined the record which reveals that indeed no notice was ever issued to Mrs. Isa or the petitioner under Section 116(1). Mrs. Isa did receive notices for the years 2015, 2017 and 2018 but those were issued under Section 114(4) of the Ordinance for her failure to file her tax returns. Moreover, on a perusal of the Reference it became evident that the entire case under Section 116 of the Ordinance rested on the opinion of an Assistant Commissioner (Inland Revenue) who thought that the petitioner was liable to disclose the London Properties of his wife and children. This is evidenced from para-7 of the Reference:

"7. The precise observations recorded by the learned Assistant Commissioner (IR) in his letter bearing No. 112 dated 10th May, 2019 (see Attachment VIII and IX) addressed to the Commissioner (IR), AEOI/International Taxes Zone, Large Taxpayers' Unit, Islamabad as follows:-

"(e) Offshore Properties

The properties' documents in respect of which are attached with the complaint are as under:-

#	Owners	Property	Value	Purchase date
1	Ms. Sehar Isa Khoso and Ms. Zarina Montserrat Khoso Carrera	90 Adelaide Road London E10 5NW	GBP 270,000	28.06.2013 (transferred 08.07.2013)
2	Ms. Zarina Montserrat Khoso Carrera and Arslan Isa Khoso	40 Oakdale Road London E11 4DL	GBP 245,000	27.03.2013
3	Ms. Zarina Montserrat and Ms. Sehar Isa Khoso	50 Coniston Court, Kendal Street, London W2 2AN		20.10.2011

(B) Findings:--

(i) That, Mr. Justice Qazi Faez Isa did not declare the above offshore properties owned by his wife (and children).

(ii) That, Mrs. Sarina Isa Khoso is wife of Mr. Justice Qazi Isa as per CINC 42301- 9722154-2, who also file her tax return for Tax year 2014.

(iii) That, Mr. Justice Qazi was liable to declare the above offshore properties as per provisions of Section 116(1)(b) which mandate every taxpayer to file the Wealth Statement in the prescribed format declaring therein "the total assets and liabilities of the persons and his spouse, minor children, and other dependents."

(iv) That, Mrs. Sarina M. Isa (wife), Sehar Isa Khoso (daughter), and Arslan Isa Khoso (son) also did not declare the above properties since they did not file their tax declarations for the Tax Year 2014-2018.""

115. It appears from this extract that the mainstay of the respondents' allegation against the petitioner under Section 116 of the Ordinance is based on a literal reading of Section 116(1)(b) ibid. The respondents' interpretation of the said provision has never been tested judicially before. Indeed, during arguments learned counsel for the respondents candidly acknowledged that there was no case-law in our jurisprudence on the subject of declaration by a taxpayer of the assets of his spouse and children under Section 116(1)(b). However, learned counsel did provide us with the wealth statement form issued by the tax authorities under the Income Tax Rules, 2002 for the tax year 2013. What is notable about this form is that it only required a taxpayer to declare the assets of his spouse who had not filed a return of income along with a wealth statement independently. Moreover, only the assets of

minor children had to be disclosed. It is an admitted fact that Mrs. Isa filed a return and wealth statement in the tax year 2013. As such, it seems that in the tax year 2013 the petitioner was under no obligation to declare the London Properties in his wealth statement. However, this is only the tip of the ice-berg. On an examination of the (several) instructions published by FBR for completing a wealth statement in subsequent tax years, we have noticed that the FBR is itself unsure about the true interpretation of Section 116(1)(b) of the Ordinance. At this stage, it would be appropriate to reproduce this provision:

"116. Wealth Statement.---(1) [The] Commissioner may, by notice in writing, require any person [being an individual] to furnish, on the date specified in the notice, a statement (hereinafter referred to as the "wealth statement") in the prescribed form and verified in the prescribed manner giving particulars of -

.

(b) the total assets and liabilities of the person's spouse, minor children, and other dependents as on the date or dates specified in such notice"

116. As already mentioned above, in the tax year 2013 the FBR expected taxpayers to only declare assets of a spouse who had not filed a return and wealth statement. However, in the tax year 2015, FBR altered the scope of this duty. It asked taxpayers to declare only those assets of their spouse and minor children which had been created by funds provided by the taxpayer. In 2016, FBR again changed its interpretation of Section 116(1)(b). Now a taxpayer had to declare the assets of his spouse and minor children, whether in Pakistan or abroad, if they had been created by funds provided by the taxpayer. It is this last interpretation which has continued till date. Amongst all of these varying constructions of Section 116(1)(b), there is also the overriding difficulty that the language of Section 116(1)(b) is open to more than one interpretation. In fact, it is perhaps for this reason that both the parties before us have come up with completely divergent analyses of Section 116(1)(b). The respondents have opted for the literal interpretation under which no condition of dependency is attached to the term "spouse" because each and every word in Section 116(1)(b) is given its ordinary and natural meaning. This would indicate that taxpayers are obligated to give particulars of the total assets and liabilities of their spouses, irrespective of whether the said spouses are independent or dependent. However, learned counsel for the petitioner chose a different route. He applied the principle of statutory interpretation called noscitur a sociis. This Court in Ghulam Rasool v. Muhammad Hayat (PLD 1984 Supreme Court 385) defined the aforementioned principle as follows:

"Page 390: ...Nevertheless, there is a rule of interpretation well-understood and recognised in law and it is of noscitur ex soci[i]s. Maxwell on Interpretation Statutes (12th Edn., page 289) explains it as follows :- "Where two or more words which are susceptible of analogous meaning are coupled together noscitur ex soci[i]s they are understood to be used in their cognate sense. They take as it were the colour from each other the meaning of the more general being restricted to a sense analogous to that of less general."

Crawford on Statutory Construction (p. 325) comments on this rule of interpretation as follows- "In order to ascertain the meaning of any word or phrase that is ambiguous or susceptible to more than one meaning the Court may properly resort to the other words with which the ambiguous word is associated in the statute. Accordingly, if several words are connected by a copulative conjunction a presumption arises that they are of the same class unless of course a contrary intention is indicated. On the other hand, the maxim noscitur ex soc[i]is is not to be applied where the meaning of a word is clear and unambiguous. Nor is it to be used so as to render general words useless. Like all other principles of construction it is to be used only as an instrumentality for determining the intent of the Legislature where it is in doubt.""

(emphasis supplied)

Under the above noted construction, the petitioner would only be obligated to give particulars of the total assets and liabilities of his dependent spouse because the term spouse would draw its characteristics from the other words used in Section 116(1)(b), namely, the terms 'minor children' and 'other dependents.' Nonetheless, as is evident from the above quoted passage, even this method of interpretation is not absolute.

117. Be that as it may, we are not inclined to decide this issue on the basis of either the respondents' present interpretation of Section 116(1)(b) or on the basis of the petitioner's interpretation of the said provision. Neither have produced any case-law or other relevant material to support their respective versions of Section 116(1)(b). Even the FBR's own instructions on completing a wealth statement form are unclear and have wavered from year to year. In such a situation, we consider that it would be better if this matter is determined in the first instance by the hierarchy of specialised fora specified in the Ordinance.

118. However, it has become plain that the respondents have framed the Reference against the petitioner on the untested opinion of an Assistant Commissioner (Inland Revenue) without giving much weight to the fact that their interpretation of the law in this area is unsupported by authority. Accordingly, the respondents' decision to charge the petitioner with a violation of Section 116 of the Ordinance on the basis of an interpretation that is devoid of judicial consideration let alone approval, and which lacks any definitive and consistent departmental practice is conjectural. When confronted, learned counsel for the respondents submitted that the Reference was not based solely on an alleged violation of Section 116 of the Ordinance. Instead, he argued that Section 116 was just a reference point in presenting the respondents reservations about the alleged conduct of the petitioner. He stated that the real case against the petitioner rested on violations of Articles II and III of the Code of Conduct. That the respondents concern was not the discharge of tax liability by the family of the petitioner but the source that had funded the purchase of the London Properties. With all due respect to learned counsel, this argument prematurely assumes both the lack of funds with Mrs. Isa and the commission of misconduct by the petitioner. According to our understanding of the duties of a Judge under the CoC, noted and discussed earlier in this judgment, a Judge may be made answerable for the financial affairs of his family members. However, we do not consider that such liability accrues in respect of speculative allegations. As the following narrative will confirm, this is precisely what the respondents attempted to achieve by preparing the present Reference.

119. On 17.06.2020, the petitioner of his own volition appeared in Court during the course of submissions by learned counsel for the respondents. He sought permission for Mrs. Isa to orally apprise the Court through video link about the improprieties committed by the respondents in preparing the complaint against her as she could not file an application or affidavit or provide documents to explain her position because she did not have a lawyer. Being personally affected by our proceedings, she sought to make a statement without oath through video link from her home. The Bench briefly conferred on the said request and in exercise of its jurisdiction under Article 187 of the Constitution to do complete justice granted her permission to address the Court on 18.06.2020. In her address to the Court, Mrs. Isa complained that neither she nor her authorised representative (AR) had been served with notices by the tax authorities under Section 114 of the Ordinance. These were apparently mailed to her outdated address at Patel Court, Bath Island, even though her new address, Phase II DHA was on the record of the tax authorities. She stated that the required amount of foreign currency was transferred through banking channels, a fact which was in the knowledge of the SBP, and that the tax authorities were aware that apart from her income from taxable sources she also had a stream of non-taxable agricultural income from agricultural land situated in Jacobabad, Sindh and Nasirabad, Baluchistan. We informed her that we could not hear or decide upon the merits which was an issue that could only be determined by the SJC. However, it became clear to us that Mrs. Isa was prima facie willing to offer an explanation for the source of funds used to purchase the London Properties. But

such explanation had not been called for or considered by the tax authorities. As a result, the Reference was prepared against the petitioner in the absence of any determination by the tax authorities on the liability of either the petitioner or Mrs. Isa.

120. Consequently, the plea of the respondents that the case against the petitioner rests on his alleged violations of the CoC and not his infringements of Section 116 of the Ordinance subtly improves their original stance. However, to establish the source of funds for the acquisition of the London Properties, the requirements of due process under Article 4 and Article 10A of the Constitution mandate that the first person concerned, namely, Mrs. Isa ought to be given an opportunity to explain her sources of funding for the London Properties and the reasons for not declaring such properties in her wealth statement. Without granting such opportunity, the framing of the Reference against the petitioner was premature, hypothetical and impulsive. Accordingly, even this allegation against the petitioner is entirely presumptive.

APPLICATION OF MIND BY THE PRESIDENT

121. Another flaw in the Reference highlighted by the learned counsel for the petitioner is the President's failure to form an opinion in terms of Article 209(5) of the Constitution. For convenience, this provision is again reproduced:

"209. Supreme Judicial Council.

..

(5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court-

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct,

the President shall direct the Council to, or the Council may, on its own motion, inquire into the matter."

(emphasis supplied)

Sub-Article (5) of Article 209 of the Constitution makes it plain that before directing the SJC to hold an inquiry against a Supreme Court Judge, the President should have formed the opinion that the said Judge may be guilty of misconduct. However, the basis upon and the means by which the President needs to form his opinion is not readily discernible from Article 209(5). To comprehend the meaning and object of this function of the President, one needs to consider the nature of powers and functions that the President possesses under the Constitution. In the first instance, an analysis of the President's responsibility to form an opinion rendered in the additional note by Justice Chaudhry Ijaz Ahmed in the Chief Justice of Pakistan case (supra) indicates one point of view:

"Page 247: Sub-Article (5) of Article 209 casts duty upon the President of Pakistan to form his opinion after receiving information qua the judges of the superior courts with regard to physical or mental incapacity to perform duties of his office or has been guilty of misconduct. The President of Pakistan has to form his opinion after application of mind reasonably, objectively with cogent reasons based on relevant material in good faith after application of mind."

(emphasis supplied)

Based on the facts and needs of that case, the said learned Judge concluded that the President's failure to perform his Constitutional duty had fatal consequences:

"Page 246: The perusal of record shows that neither the President nor the Prime Minister under the mandatory provisions of the Constitution has deliberated upon the matter and formed opinion by applying their independent mind. Hence, non-application of mind and non- formation of opinion is fatal and render the subsequent proceedings void."

122. It may be noted at the outset that the above noted view is not shared by the majority judgment in the Chief Justice of Pakistan case (supra) which is silent about the substance of the President's

opinion and the procedure for arriving at such an opinion under Article 209(5). However, during oral submissions, learned counsel for the petitioner argued that unlike the above quoted view the President had simply followed the PM's advice for sending the Reference to the SJC. In doing so he had not formed an opinion as required by Article 209(5) of the Constitution. Accordingly, the Reference framed against the petitioner lacked an essential Constitutional ingredient under Article 209(5), namely, the application of mind by the President. It was therefore seriously deficient. To support his contention, he relied on paragraph 18 of the Reference (ref: Const. P. No. 17 of 2019, Part II) which reads as under:

> "Page 80: As per the advice of the Prime Minister I have formed an opinion that Mr. Justice Qazi Faez Isa may have been guilty of misconduct; hence I hereby direct the Supreme Judicial Council to inquire into the matter..."

123. On the other hand, learned counsel for the respondents argued that the President had correctly formed his opinion as envisaged by Article 209(5) of the Constitution. He submitted that the President was provided with a comprehensive summary from the Ministry of Law and Justice along with all the relevant attachments and the PM's advice. He stated in Court that the President discussed the Reference with the Law Minister, a statement which he elaborated upon in his written arguments. It seems that after the Reference was sent to the President he not only reviewed it with the PM but also with the Law Secretary, the AG and the Law Minister. Input was also sought from Secretary to the President.

124. The Reference as it was sent to the President contained multiple allegations against the petitioner. These allegations involved both pure questions of law and mixed questions of law and fact. One such question was: whether the petitioner Judge (or for that matter any other citizen of Pakistan) is obligated under Section 116 of the Ordinance to declare the assets of his independent spouse? Another issue that arose was: whether the funds employed by Mrs. Isa to purchase the London Properties comprised proceeds of crime in order to involve the commission of the offence of money laundering under AMLA? To ponder over these matters or indeed to form an opinion on them required legal knowledge which the President admittedly himself does not possess. In such a situation, it became incumbent upon him to seek legal advice from persons who were well-versed in tax and financial matters.

125. Although it is not for this Court to specify a list of persons from whom legal advice may be sought by the President, however, we can set out the persons who should not be approached by the President for legal advice on a reference under Article 209 of the Constitution. Fairness and objectivity dictate that those involved in the investigation and framing of the reference may brief the President but cannot advise him on whether it is maintainable and appropriate for inquiry by the SJC. This is because there is a clear conflict of interest for the architects of the reference to opine on the weaknesses of their work. But this is precisely what happened in the present Reference. The President discussed the Reference and its legal aspects with the AG and the Law Minister. As senior functionaries of the Federal Government, both gentlemen were admittedly involved in the framing of the Reference against the petitioner. Under Article 209(5) of the Constitution, the opinion formed by the President is expected to be considered, fair and objective. This is because under Article 48(1) ibid the President has the power to return the advice by the PM or the Cabinet for reconsideration. In order to be objective and fair he should rely upon counsel and legal experts not linked with the framing of the reference or working for the Federal Government. Irrespective of whether such qualities, which have to form part of the President's opinion, are present in the officers of the Federal Government, their consultation becomes questionable on grounds of conflict of interest. The fact that the President also received legal input from his Secretary is unhelpful because the respondents do not claim his legal advice to have been rendered in writing. The President's failure to note under Article 48(1) a defect of gross illegality in the Reference, namely, an assumed view of Section 116 of the Ordinance and AMLA, suggests that the legal basis of the allegations made therein were not tested. We reckon that this happened because the President's opinion was influenced by the inadmissible advice of individuals who were involved in

the preparation of the Reference. In these circumstances, it cannot be said that the President formed an informed opinion in terms of Article 209(5) of the Constitution.

126. Under the Constitutional scheme, one needs to understand the reason for the President's responsibility to apply his mind to form an opinion under Article 209(5). The starting point for such an examination should be this Constitutional provision itself. What is of significance for us is that after the 18th Amendment, Article 209(5) is the only provision in the Constitution which requires the President to form his opinion. However, prior to the 18th Amendment, Article 58(2) (reproduced under the heading 'Authorisation for Investigation') of the Constitution also imposed the same obligation on the President.

127. On a careful perusal of these Articles, it becomes clear that there is a distinction between the "opinion" to be formed by the President under the two provisions. Article 209(5) of the Constitution simply requires the President to form an opinion whereas Article 58(2) ibid required the President to form his opinion in the exercise of his discretion. Consequently, the President's opinion under Article 209(5) is directed by sub-Article (1) of Article 48 whereas his opinion under Article 58(2) was controlled by sub-Article (2) of Article 48. To understand why the application of mind is inherent in the formation of opinion under Article 209(5), we need to appreciate the meaning assigned to the President's opinion formed under a discretionary power as specified in Article 58(2). In this regard, reliance is placed on the case of Federation of Pakistan v. Haji Muhammad Saifullah Khan (PLD 1989 SC 166) wherein the Court settled the debate on this matter:

> "Pages 189-190: The discretion conferred by Article 58(2)(b) of the Constitution on the President cannot, therefore, be regarded to be an absolute but is to be deemed to be a qualified one, in the sense that it is circumscribed by the object of the law that confers it. It must further be noted that the reading of the provisions of Articles 48(2) and 58(2) shows that the President has to first form his opinion, objectively and then, it is open to him to exercise his discretion one way or the other, i.e. either to dissolve the Assembly or to decline to dissolve it... An obligation is cast on the President by the aforesaid Constitutional provision that before exercising his discretion he has to form his 'opinion' that a situation of the kind envisaged in Article 58(2)(b) has arisen which necessitates the grave step of dissolving the National Assembly... Thus, though the President can make his own assessment of the situation as to the course of action to be followed but his opinion must be founded on some material."

(emphasis supplied)

The above quoted excerpt establishes that notwithstanding the element of discretion which was available to the President under Article 58(2), his opinion had to be based on some material and had to be objective. There is no reason why the President's opinion under Article 209(5) (which is not accompanied by any discretion) should not be governed by the same stringent principles. When the President is performing his function under Article 209(5) he is ultimately bound by the advice of the PM or the Cabinet as the case may be under sub-Article (1) of Article 48. However, the proviso to Article 48(1) ibid authorises the President to return, within fifteen days, the advice for reconsideration. Therefore, the President's power clearly grants him the jurisdiction to evaluate the worth of the advice tendered to him. If he is so inclined he may require the same to be reconsidered once by the PM or the Cabinet. Consequently, even Article 48(1) envisages that the President when performing his functions under this provision will apply his mind to the information before him. Otherwise the purpose of inserting a proviso, which permits the President to return the advice, becomes redundant if the President only has to mechanically agree with the PM or Cabinet.

128. Moreover, it has been noted above that the object of Article 209(5) is to protect the security of tenure of Superior Court Judges. Therefore, this Constitutional provision is intrinsically connected with the independence of judiciary. We have already observed that an independent judiciary is critical to the survival of a just democracy. By requiring the President, as the highest Constitutional authority in

the country, to apply his mind and form an objective opinion in the exercise of his jurisdiction under the proviso to Article 48(1) of the Constitution before sending a reference to the SJC for inquiry, it is ensured that this fundamental right of the people is protected from arbitrary interference by the Executive.

129. Be that as it may, learned counsel's submission that the President had not formed an opinion in terms of Article 209(5) of the Constitution was focused on the fact that the President had solely based his opinion on the advice of the PM. Since his initial contention, that the President's opinion under Article 209(5) ought to be formed in the exercise of Presidential discretion under Article 48(2), conflicted with the 18th Amendment to the Constitution, learned counsel for the petitioner argued that the public importance of a reference under Article 209(5) was such that it required advice to the President to be tendered by the Cabinet rather than the PM. However, the short and simple answer to the said objection of learned counsel can be found in the ROB which provides in its Schedule V-B, serial number 35 that matters relating to 'Reference to Supreme Judicial Council' be approved by the President on the advice of the PM. The rationale for this rule becomes evident when the list of cases requiring Cabinet approval is examined. This list is contained in Rule 16(1) of the ROB:

16. Cases to be brought before the Cabinet.---(1) The following cases shall be brought before the Cabinet:-

(a) proposals for legislation, official or non-official, including money bills;

(b) promulgation and revocation of Ordinances;

(c) the budgetary position and proposals before the presentation of an Annual Budget Statement and a Supplementary Budget Statement or an Excess Budget Statement under Articles 80 and 84;

(d) proposals for levy, abolition, remission, alteration or regulation of any tax and floatation of loans;

(e) a reference to the Supreme Court for advice on a question of law under clause (1) of Article 186;

(f) generation of electricity and laying of interprovincial transmission lines;

(g) omitted vide S.R.O 368(1)/2010 dated 1st June 1, 2010

(h) proposals for signing of negotiated instruments with foreign countries and approval for ratification of the instruments:

(i) important reports and documents required to be laid before the Assembly or Senate;

(j) cases involving vital political, economic and administrative policies;

Note.- Cases of this nature shall first be brought to the notice of the Prime Minister by the Minister-in-Charge. The Prime Minister will decide whether any such case should be brought before the Cabinet.

(k) case which the Minister-in-Charge considers important enough for discussion in the Cabinet;

(l) other cases required to be referred to the Cabinet under the provisions of these rules; and

(m) any case desired by the Prime Minister to be referred to the Cabinet.

(emphasis supplied)

A perusal of this provision reveals that the matters which are placed before the Cabinet for approval mainly consist of proposals for legislation and issues pertaining to the economy such as fiscal, budgetary and monetary proposals including proposals for levy or abolition of taxes. Issues involving vital political, economic and administrative policies, international treaties and agreements and any case so desired by the Minister-in-Charge or the PM are also referred to the Cabinet. Accordingly, generally matters that affect a large section of the public or relations between the Federation and the Provinces in the political, economic and administrative area fall within the scope of Cabinet advice.

130. A similar mandate for Cabinet decisions also exists in foreign democratic jurisdictions. In Australia the Cabinet Handbook (13th Edn) sets out the following issues which require the Cabinet's deliberation:

"SECTION 4

CABINET BUSINESS

Matters for Cabinet Consideration

..

72: The following is an indication of the kind of issues that would normally require consideration by the Cabinet:

a. Proposals relating to the delivery of the Government's priorities

b. Significant or controversial policy issues

c. Proposals affecting the Government's financial position, or important financial commitments

d. Proposals that are challenging to implement due to their complexity or timeline for delivery

e. Significant matters affecting state and territory government relations

f. The most significant international business, including international treaties and agreements

g. National emergencies, including any decision to take military action

h. Proposals that affect Australia's constitutional arrangements

i. Proposals requiring significant new or amendments to legislation or regulations

j. Any significant or controversial exercise of a minister's statutory power

k. Significant Government appointments"

(emphasis supplied)

131. A comparable list of subject matters is also found in other foreign jurisdictions such as Canada, United Kingdom and New Zealand. What is significant for our purposes is that these lists demonstrate a consistent international practice that only issues that have a wholesale and widespread effect on the State, its society and political economy belong to the category of cases that need consideration by the Cabinet. The other spheres of State functions which lack the above features may be performed on the advice of the PM with the involvement of Cabinet not being necessary. Advice in relation to the filing of a reference is a function of the President which falls in the latter category. It is neither a legislative measure nor a political, economic or administrative proposal. It is also not a policy decision. As such it lacks the features that qualify for consideration from and debate by the Cabinet. In fact, if one examines in detail Schedule V-B of the ROB, it becomes plain that not only matters pertaining to the Supreme Judicial Council for the removal of Judges of the Superior Courts but also the removal of persons holding other key Constitutional Posts are decided on the advice of the PM:

"SCHEDULE V-B

[Rule 15-A(1)]

LIST OF CASES REQUIRING ORDERS OF
THE PRESIDENT ON THE ADVICE OF THE
PRIME MINISTER

..

2D. Appointment, resignation and removal of Provincial Governors, determination of their salaries, allowances and privileges

..

19. Auditor General of Pakistan:

(i) Appointment, removal, term of office and terms and conditions of service;

33. Federal Shariat Court: number of Judges, their appointments, transfer, resignation, removal, allowances and privileges.

..

35. Reference to Supreme Judicial Council.

36D. Council of Islamic Ideology:

(i) Appointment, resignation and removal of members and Chairman,"

(emphasis supplied)

132. Consequently, keeping in view the nature of cases which are deliberated upon by the Cabinet and the fact that the PM is consistently the single Constitutional authority who advises the President with regards to the removal of persons in Constitutional Posts, we hold that in the filing of a reference the President is bound to act on the advice of the PM and not the Cabinet. Therefore, it is only logical that in deciding whether to send the Reference against the petitioner to the SJC the President relied on the advice of the PM.

133. Furthermore, if the reference is substantive, cogent, coherent, rational and lawful, then the President simply has to record his assent. There is no additional obligation on him to set out his separate reasons. However, if the reference is defective factually and/or legally then the President must state his reasons for disagreement and call for reconsideration of the matter by the PM in the light of those reasons. If the President subsequently disagrees even with the reconsidered advice, then he is bound by Article 48(1) to endorse the said advice leaving it for the SJC to analyse the merits of the reference sent by the President.

134. It is pertinent to state here that the above discussion means that the Federal Government must set out its reasons for preparing and sending a reference against a Judge of the Superior Court. In fact, the summary and statement of reference prepared by the Ministry of Law for the PM and the President are the documents which contain these reasons. It is these documents which contain the crux of the reference against a Superior Court Judge, and therefore they need to be factually and legally complete. Failure to comply with this requirement will render the reference unsustainable.

135. Be that as it may, the crucial question remains whether in light of what has been discussed above, it can be said that the President applied his mind to the facts alleged in the Reference against the petitioner. As noted previously in this section, the President in forming his opinion sought the advice of the Law Minister and AG, both of whom were involved in the preparation of the Reference and therefore had a conflict of interest. Additionally, we have held under the heading 'Validity of the Allegations in the Reference' that the accusations against the petitioner have been made prematurely in the absence of statutory notice to Mrs. Isa to explain her sources of funds. Likewise, there was no evidence to support the allegations made under FERA and AMLA. Both these facts went unnoticed by the President. Consequently, keeping in view these circumstances, we find that the independent application of mind by the President is lacking in the present case. Instead he has followed the advice tendered to him without ascertaining its correctness. This is contrary to the requirements of both Article 209(5) and Article 48(1) of the Constitution and therefore renders the Reference defective.

CONCLUSION FOR DEFECTS IN THE REFERENCE

136. In the light of our discussion, noted above, it has become clear that there are multiple defects in the Reference. Briefly, these are:

i. No authorisation for investigating the affairs of the petitioner was given by the President and PM. Instead the authorisation of the Law Minister was obtained;

ii. No notice was issued to Mrs. Isa as required under Section 116(1) of the Ordinance prior to the filing of the Reference;

iii. The petitioner was presumed to be under the obligation to declare the assets of his independent wife and adult children on the basis of an unsettled and disputed interpretation of Section 116(1)(b) of the Ordinance;

iv. There was neither any evidence nor the nomination of a predicate offence in the Reference to support the allegation of money laundering against the petitioner;

v. Likewise, there was no evidence that the petitioner had violated the regime under FERA and even the relevant provisions from the said law were not specified in the Reference;

vi. The President received inadmissible advice from the AG and Law Minister, the chief architects of the Reference, on the strengths and weaknesses of the Reference;

vii. The President did not get considered, fair and objective advice from a third party on the questions of law noted in the Reference;

viii. The President failed to notice the various legal and procedural defects in the Reference;

ix. The President did not form a considered opinion under Article 209(5) of the Constitution;

x. As there was no valid authorisation for the investigation (noted in i above), the respondents illegally accessed the tax records of the petitioner and Mrs. Isa; and

xi. Mrs. Awan made contemptuous remarks about the petitioner in public.

These illegal acts of the respondents depict their utter disregard of the law. Filing a reference under Article 209 of the Constitution that is signed by the President and which presents a charge sheet against a Judge of the Superior Courts is a matter requiring utmost prudence and caution by its framers. However, in the present case the actions of the respondents have violated not only the express provisions of the Constitution, the ROB, the Ordinance and AMLA but have also ignored the law laid down in the Chief Justice of Pakistan case (supra) which specifically set out certain safeguards to protect Superior Court Judges from arbitrary actions of the Executive. Therefore in essence, the respondents have paid scant attention to the mandate of the relevant laws governing the field of Presidential references. In these circumstances, the errors committed by them in the preparation and framing of the Reference cannot be termed as mere illegalities. Instead, in the context of Article 209 their errors amount to a wanton disregard of the law. Being arbitrary and illegal these act have ceased to be actions contemplated by any of the applicable laws such as the Constitution and the Ordinance (amongst others). As a result, although the preparation and framing of the Reference against the petitioner is not patently motivated with malice in fact, the scale and degree of the illegalities are such that the Reference is deemed to be tainted with mala fide in law. For this reason, the Reference is hereby quashed.

SHOW CAUSE NOTICE ISSUED BY THE SUPREME JUDICIAL COUNCIL

137. We have already observed in this judgment that the SCN dated 17.07.2019 issued by the SJC is almost entirely based upon the information given and the resulting allegations made in the Reference. In the preceding paragraphs we have struck down and quashed the Reference for being legally defective. The SCN issued by the SJC derives its substance from this quashed Reference. Therefore, except for the underlying factual information of Mrs. Isa's ownership of the undeclared London Properties, the remaining contents of the said Reference are without foundation. Accordingly, the narrative in the notice alleging misconduct against the petitioner and the subsequent direction to file a response have lost force and cannot be sustained. Even the not denied/admitted underlying information about ownership of the London Properties by Mrs. Isa and her children requires further probe by the respondents on the point of absence of declared lawful sources for the purchase of such properties to maintain a Reference against the petitioner. As a result, the notice dated 17.07.2019 cannot survive in limbo and must abate. Indeed, without the Reference the SCN is just a "blank piece of paper" (ref: R (on the application of Miller) v. The Prime Minister [2019 UKSC 41 at para-69]) which cannot become the basis for any subsequent inquiry against the petitioner. Consequently, the ongoing proceedings against the petitioner in the SJC also stand abated.

REFERRAL TO FEDERAL BOARD OF REVENUE

138. It would now be appropriate to elaborate upon our reasons for directing the FBR to commence tax proceedings against Mrs. Isa and her children, notwithstanding our order to quash the Reference against the petitioner. Our decision to take such a step was primarily based on two grounds: to establish that Judges of the Superior Court are answerable for allegations casting aspersions not only on their personal integrity but also on the integrity of the institution; and to honour the petitioner's plea that the allegation of absence of source of funds and money laundering must be first put to Mrs. Isa who is an independent taxpayer.

139. Since the start of these proceedings all the learned counsel in the present and connected petitions have termed their case a struggle for the independence of the judiciary. Learned counsel for the petitioner repeatedly urged before this Court that unless the Reference against the petitioner was quashed, it would undermine the independence of the judiciary. However, what has escaped the attention of learned counsel during this intense discourse is another equally important fundamental principle of the Constitution, namely, the accountability of the Judges of the Superior Courts. An independent judiciary is certainly a necessity for any civilised society governed by laws to prosper and thrive. But in utmost good faith neither Judges nor the institution can retain the public trust when serious stigmas are cast on their integrity. Recalling the quotation from the Holy Quran at the start of this judgment, the institution cannot be perceived to be ignoring an unpleasant allegation of undeclared foreign assets of a family member of a Judge.

140. In this regard, it may be mentioned that the Chief Justice of Pakistan case (supra) is distinguishable from the facts and circumstances of the present case. In the Chief Justice of Pakistan case (supra) this Court quashed the reference against the (then) Chief Justice Iftikhar Muhammad Chaudhry and brought the matter to an end without further action on the information contained in the reference against him. It is not at all difficult to understand why the Larger Bench in that case adopted such a course of action. It is because the reference filed against the (then) Chief Justice was established on record to be so manifestly motivated by the malice in fact of the military ruler at the time that the allegations against the former were rendered insignificant.

141. However, in the present case no finding of malice in fact has been given. It is true that the Reference suffers from grave legal defects. But the consequences of illegality of an impugned action are different from those following a finding of malice in fact. The illegalities in the present Reference are a result of its careless and casual preparation. These errors or defects do not erase Mrs. Isa's ownership of the London Properties, the primary fact which forms the basis of the Reference and which is not denied by the petitioner. Whilst the ownership of the London Properties is not disputed, the source of funds for their purchase and the mode by which these funds were transferred abroad require explanation. Otherwise, an unexplained investment by the spouse of a Judge of the Superior Courts, who is a holder of public office, compromises the integrity of the learned Judge and ultimately the probity and credibility of the institution which he serves.

142. Rather than allowing the disturbing allegation against the petitioner and his family to circulate and attract innuendos thereby injuring the reputation and integrity of both the petitioner and this Court, we adopted the fair, impartial and transparent route of allowing Mrs. Isa and her children to disclose the source of their funds to the relevant authorities, namely, the FBR. Such a transparent course of action is consistent with the CoC, the maintenance of institutional integrity and the image of Judges as the neutral and independent arbiters of law and justice. The matter of undeclared and unexplained foreign wealth of public office holders bears a stigma in Pakistan that these assets have been acquired unlawfully (a stigma which applies with even greater force since the PANAMA leaks on 03.04.2016). Therefore, every public office holder including Judges of the Superior Courts, officers of the armed forces, elected representatives and public servants are accountable under the law. Indeed, neither the institution of the judiciary nor the other institutions of Pakistan can tolerate a contrary perception. Consequently, all public office holders remain accountable under their applicable legislation on misconduct. By referring the issue of source of funding to the FBR for verification from Mrs. Isa and her children, we have chosen the path which in the first place should have been taken by the respondents but which was casually ignored by them. Therefore, by this referral the controversy surrounding the allegation in the Reference will be settled.

143. It may be mentioned here that our decision to refer the matter for verification to the FBR grants the petitioner's plea from the very start of the proceedings that his wife and children should be asked about their source of funds for the acquisition of the London Properties. This was reiterated by learned

counsel for the petitioner during arguments. He submitted that a determination by the tax authorities was essential to ensure that the due process rights of the petitioner and his family under Article 10A of the Constitution were not violated. Mrs. Isa also adopted a similar stance in her statement, given through video link, on 18.06.2020 to the Court. To our minds the FBR being the premier tax authority in Pakistan is the most well equipped to deal with questions of a financial nature. It not only maintains the complete tax records of taxpayers, including those of Mrs. Isa's, but also employs personnel who are well-versed in comprehending and analysing financial and tax records.

144. Moreover, as our short order bears out, by sending the matter to the FBR we have assured the substantive and procedural rights of each party under the Ordinance. These rights and the right of the petitioner's family to appeal against adverse orders have specifically been preserved. Additionally, we have ordered that only appropriate proceedings for undeclared or unexplained assets be initiated against the petitioner's family which should be concluded within a reasonable timeline.

SUO MOTU JURISDICTION OF SUPREME JUDICIAL COUNCIL

145. Next, we in our short order also directed the Chairman FBR to submit his report, regarding the proceedings before the Commissioner (Inland Revenue), to the SJC for its consideration. This was done to give SJC the chance, if it so wished, to commence proceedings against the petitioner in exercise of its suo motu jurisdiction. However, it is reiterated that our short order dated 19.06.2020 merely issues a direction to the Chairman FBR and in no way obliges the SJC to take any action based on the report. The SJC may do so of its own volition if it considers that the report justifies any action against the petitioner. But it may also file the report if it finds that the same contains no substance/ merit. The SJC is the only constitutional body which can examine the conduct of a Superior Court Judge. Therefore our direction for the disclosure of the findings and the record of the verification proceedings by the FBR to the SJC acknowledges the latter's exclusive jurisdiction in this matter. Consequently, the Chairman FBR's report is a piece of information to be evaluated by the SJC in its suo motu jurisdiction.

146. At the same time our short order has preserved the rights of the affected taxpayers, Mrs. Isa and her children, under the Ordinance. This includes the right to appeal against the decision of the Commissioner or against any other adverse order passed at the appellate stage. To our minds, the two directions, namely, the filing of the report by the Chairman FBR before the SJC and the protection of the affected persons right to appeal, issued by us were necessary in the interests of justice. The jurisdiction of the FBR is concerned with taxing income whereas the jurisdiction of the SJC is related only with the misconduct of a Judge. Therefore, the proceedings and/or the outcome before one forum do not affect those of the other forum. However, the SJC may if so inclined in the exercise of its suo motu jurisdiction conferred by the Constitution take into consideration any proceedings before the tax authorities or orders passed by them.

CONCLUSION

147. These then are the detailed reasons for our findings recorded in the short order dated 19.06.2020.

148. Before parting with our judgment, we would like to thank learned counsel for the petitioner in Const. P. No. 17 of 2019 and the connected petitions as well as learned counsel for the respondents, whose names are recorded in the title of the judgment, for their invaluable assistance to the Court. We also express our appreciation to all the learned counsel who appeared before us for presenting their well-reasoned arguments with grace and respect and for giving a patient ear to the questions posed by the Hon'ble members of the Bench.

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DISSENT NOTE

<u>Syed Mansoor Ali Shah, J.-</u>

<u>Introduction</u>

While it appears that this case is about the independence and accountability of a judge, it is truly about the independence and accountability of our institutions. It raises the questions: Are we governed by the Constitution and the Rule of Law or can the Government of the day conveniently get off the constitutional rails to suit its ends and come prying into the private lives of its citizens in disregard of their constitutional rights? Can a Special Assistant[1] to the Prime Minister, acting as Chairman, ARU,[2] assume a role larger than the statutory institutions of the State and spearhead investigation and surveillance into the life and conduct of a judge of the highest constitutional court, sidestepping the prescribed constitutional process? Can the Special Assistant wield power over statutory institutions like FBR, NADRA and FIA without any sanction of law? Can a Law Minister, ignore the law, the Constitution and the statutory institutions of the State and permit ARU to entertain, investigate and collect evidence on a private complaint against a constitutional court judge? Is the Law Minister justified to place a Summary based upon the evidence so collected, before the Prime Minister for approval? Is there a level of responsibility expected of the Prime Minister, who is the Chief Executive of the Federation and Head of the Cabinet, in approving

Summaries placed before him? In a matter no less serious than the removal of a judge of the highest court in the land, was the Prime Minister required to inquire how the "information" placed before him was collected and whether the information collected actually made out a case of "misconduct" against the Petitioner Judge or is the Prime Minister to impetuously approve Summaries without any application of mind? Can Government in a constitutional democracy be driven by personal bias, malice, intolerance and bigotry or should an institutional process run it with collegiality, transparency, fairness, openness, diversity and inclusiveness as its hallmarks? Are we to expand our frontiers of freedom as we mature into a democracy and strengthen our constitutional guarantees

[1] The substantive legal post of Chairman, ARU, is that of a Special Assistant to the Prime Minister.

[2] Asset Recovery Unit (discussed in detail later)

with renewed confidence and enthusiasm or regress into darkness by permitting unconstitutional acts that allow muffling of a critical judicial voice in the name of judicial accountability? This case makes us think, whether we want our future generations to descend into a dystopia or grow up into a vibrant democracy with an understanding and conviction that "in a democracy, the State is neither with us nor against us. It is us."[3]

2. I concurred with the conclusion of the Majority recorded in the Short Order dated 19.6.2020, whereby the Reference filed against Justice Qazi Faez Isa was quashed and the subsequent proceedings before the Supreme Judicial Council stood abated. I have gone through the Majority Judgment and, with respect, hold a different view of the Constitution, the law and the facts of the case and have been unable to subscribe to the logic and reasoning of the Majority view. I have, therefore, penned my own reasons for quashing the Reference. I am also unable to agree with the directions[4] issued by the Majority in the Short Order and have given reasons for my dissent later in the judgment.

Judicial Independence and Judicial Accountability

3. "I have always thought…that the greatest scourge of angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt or a dependent judiciary," said John Marshall.[5] Judicial independence and judicial accountability are two sides of the same coin and one cannot co-exist without the other. Therefore, to compromise on judicial accountability is to compromise on our freedoms guaranteed under the Constitution; the Rule of Law; Independence of Judiciary; and Democracy itself. We all know that the court cannot buy support for its decisions by spending money or use force to coerce obedience of its decrees. The court's power lies in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the judiciary as fit to determine what the law means and to declare what it demands. The court's concern with legitimacy is not for the sake of the court but for the sake of the nation to which it is

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[3] Jonathan Sumption, Trials of the State: Law and the Decline of Politics (2019).

[4] Paragraphs 4-11 of the Short Order dated 19.06.2020.

[5] Fourth Chief Justice of the United States Supreme Court (1801-1835) - see Fazal Karim, Judicial Review of Public Actions, p.282, Vol-1 (2nd ed.).

responsible.[6] Foundations of judicial institution stand on public confidence and public trust that lend it legitimacy and public acceptance. Institutional legitimacy of the judiciary, in turn, is grounded in judicial integrity of the judges. According to John Marshall, ignorance, corruption and dependence of a judge are the evils that tarnish judicial integrity; Our Constitution also lays down the measure of judicial integrity of a judge. While taking oath a constitutional court judge makes a solemn promise before God that he will discharge his duties and perform his functions honestly and faithfully in accordance with the Constitution and the law; that he will not allow his personal interest to influence his official conduct or decisions; that he will abide by the code of conduct issued by the Supreme Judicial Council; and that he will always preserve, protect and defend the Constitution. This is the constitutional requirement of judicial integrity. A judge is to always tread the path of the Constitution and the law, must possess strength of character to never give in to external influence for personal benefit, and must be bold and courageous to always stand for the Constitution and to preserve, protect and defend it. Any compromise on this sacred promise with God, is to comprise judicial integrity.

4. While judicial accountability is critical for upholding the legitimacy of the judicial institution, equally important is the right of a Judge to enjoy the protection of law and to be treated in accordance with law. Judicial accountability, like any other accountability, must be according to the standards of due process guaranteed under Article 4 of the Constitution. We must remember that public confidence and public trust in the legitimacy of the judicial institution can only be attained when judges decide without fear or favour, in accordance with law, even while sitting in judgment over the affairs of their own colleague. While dealing with judicial accountability we are not to project a forced image of self- accountability to win accolades of the public or make extra effort to win over public confidence. We are to simply decide in accordance with the Constitution and the law – come what may.

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[6] see: Planned Parenthood v. Casey, 505 U.S. 833 (1992)

Brief Facts

5. Justice Qazi Faez Isa ("Petitioner Judge") being part of a two Member Bench of this Court authored judgment in Suo Motu Case No.7 of 2017, known as *Faizabad Dharna* case,[7] decided on **February 6, 2019**, and made certain observations therein as to the 2014 *Dharna* of the current main ruling political party (PTI), the role of the coalition ruling party (MQM) at the time of Karachi incident of 2007, and the interference by the Military Intelligence Agencies in politics and freedom of Media. It was also directed in the judgment that proceedings should be taken against military officers who had violated their oath of office by engaging in political activity. Several review petitions were filed against that judgment, including the petitions by the PTI, MQM, and Ministry of Defense, Government of Pakistan, in **March, 2019**. The Ministry's petition sought for expunction of the observations and directions made regarding the Military Intelligence Agencies and its officers. The PTI and MQM (the political parties currently in Government), in their review petitions, asserted that the Petitioner Judge by making the objectionable observations in the judgment had violated his Oath of Office and Code of Conduct for Judges and was liable to be removed from office under Article 209 of the Constitution. This assertion of removal was made only against the Petitioner Judge, and not against the other learned Member of the Bench.

6. Soon thereafter, one Abdul Waheed Dogar ("Complainant") made a complaint titled "Accountability of Judges" to the Asset Recovery Unit ("ARU"), housed in the Prime Minister's Office, on **April 10, 2019**, against the Petitioner Judge and two other judges of the constitutional courts. The complainant alleged that these judges owned offshore properties. A meeting of the ARU was held on **April 15, 2019** to discuss the complaint at the residence of the Chairman, ARU in the Minister's Colony, Islamabad, and it was decided in that meeting that since the matter pertained to the Judges of Superior Judiciary the opinion of the Law Minister should be sought. The Chairman and certain Members of the ARU met the Law Minister in his office on **April 16, 2019** who advised orally that before taking any further action, the ARU should check

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[7] PLD 2019 SC 318.

the veracity of the allegations contained in the complaint. No formal correspondence took place between the ARU and the Law Ministry, in this regard. The Chairman, ARU, after that meeting, tasked Barrister Zia Naseem, Legal Expert of the ARU, to verify the property details attached with the complaint, and further conduct a wider property search in the names of persons mentioned in the complaint and of their family members. He also tasked Mr. Muhammad Rizwan, Member of the ARU from FIA, to obtain identification documents of persons mentioned in the complaint, copies of their CNICs and passports, all visas, if any, family tree and travel history. On the suggestion of Mr. Muhammad Ashfaq Ahmad, Member of the ARU from FBR, the Chairman decided to forward the complaint through a formal letter to the Chairman, FBR for assessment and analysis into declaration of assets of persons mentioned in the complaint. The Legal Expert of ARU submitted his report about UK properties in the name of the spouse and children of the Petitioner Judge, on **May 8, 2019**. The Member of ARU from FIA submitted his report on **May 10, 2019**. Assistant Commissioner (IR), Commissioner (IR), and DG, (International Taxes)/Member of ARU from FBR, all three, submitted their reports on **May 10, 2019**. The Chairman, ARU then made his final Report on **May 10, 2019** after examining all the reports and record submitted to him by the Legal Expert and Members of the ARU, and dispatched it to the Law Minister on the very same day, i.e., **May 10, 2019**. The Report also mentioned a meeting of the Chairman, ARU with the complainant held to inquire into the allegations made in the complaint.

7. The Chairman, ARU thus investigated the complaint; located properties in the UK, and obtained reports regarding record of the Petitioner Judge and his family from the FBR, NADRA and FIA. He found that there were three properties in the names of the spouse and children of the Petitioner Judge in UK having been purchased in the years 2004 and 2013 and that those properties had not been declared by the Petitioner Judge and his family in their tax returns. One property was initially reported to have been purchased in 2011, but later on after filing of the Reference it was reported to have been purchased in the year 2004. The Chairman, ARU did not consider it fit to inquire into the alleged properties of

one other judge mentioned in the complaint after noting in the minutes of meeting held on April 16, 2019 that the said judge had already resigned.

8. The Chairman, ARU, as mentioned earlier, submitted his report of the said investigation conducted on the complaint to the Law Minister on **May 10, 2019**. The Law Ministry, made a "Summary for the Prime Minister", on **May 17, 2019**, proposing to the Prime Minister to advise the President, under Article 48(1) of the Constitution, to form an opinion that the Petitioner Judge may be guilty of misconduct and direct the Council under Article 209(5) of the Constitution to inquire into the matter. The basis for the proposal was stated in the Summary as under:

> "A judge of the Superior Court who omits to intentionally declare three expensive London properties jointly owned by his spouse and children, violates Section 116 of the 2001 Ordinance. The tax records of the learned Judge and his spouse are absolutely silent about the sources through which the said properties had been acquired and how and from where the funds were made available to purchase the said properties, without violating the money laundering regime and the Foreign Exchange Regulation Act, 1947. The said mis-declaration seems glaring. Thus, the said Judge i.e. Justice Qazi Faez Isa appears to have committed gross misconduct and is liable to be removed upon the recommendations of the Supreme Judicial Council in terms of Article 209 of Constitution."

The draft Reference was also annexed with the Summary. On the same day, i.e., **May 17, 2019** the Prime Minister, accordingly, advised the President to form his opinion, direct the Council and sign the draft Reference. The President approved the Prime Minister's advice and signed the Reference on **May 20, 2019**. The Secretary, Ministry of Law and Justice forwarded the Reference to the Supreme Judicial Council ("Council") on **May 23, 2019**. The Secretary, Council placed the Reference before the Chairman, Council, on **May 29, 2019**, and the Chairman, Council made an order to convene the meeting of the Council for **June 14, 2019** to consider the matter. Even though the matter had not yet been taken up in the meeting of the Council for preliminary consideration, several newspapers published the filing of the Reference and the allegations made therein against the Petitioner Judge on May 28, 29, 30, 31, and June 1 and 3, 2019. Later during the proceedings before the Council the matter was discussed in press conferences and TV talk shows by the Government Ministers and even by the President of Pakistan.

Issues

9. The constitutional and legal issues I would address are as follows:

i. Could the Asset Recovery Unit (ARU) entertain and investigate a complaint against the conduct of a constitutional court judge under the law and Constitution?

ii. Was the ARU established with lawful authority under the law and Constitution? And what was the legal status of its Chairman?

iii. Did the ARU collect evidence in support of the allegations made in the complaint against the Petitioner Judge in accordance with the law and Constitution?

iv. If the answer to the above question is in the negative, could the Law Minister and the Prime Minister rely and act upon such evidence?

v. Was the President to form his independent personal "opinion", or to form the "opinion" on and in accordance with the advice of the Prime Minister, under Article 209(5) of the Constitution, on the "information" placed before him?

vi. Could an opinion as to the commission of misconduct be reasonably made against the Petitioner Judge, on the "information" given in the "Summary" and material annexed therewith?

vii. Does publicizing the act of sending the Reference against the Petitioner Judge and of the contents thereof attract proceedings under Article 204 of the Constitution and Contempt of Court Ordinance, 2003?

viii. Were the acts of entertaining the complaint, inquiring into and collecting evidence on the allegations, and making and filing of the Reference against the Petitioner Judge, *malafide*?

I endeavour to deal with these issues as per my humble understanding of the law and Constitution.

Constitutional Process for Removal of a Constitutional Court Judge

10. Article 209 of the Constitution provides the process for the removal of a constitutional court judge. A special constitutional forum - Supreme Judicial Council - has been vested with the exclusive jurisdiction under the Constitution to inquire into the capacity and conduct of a constitutional court judge, and

recommend his removal. The Council is a collegium of judges headed by the Chief Justice of Pakistan and consisting of two next most senior judges of the Supreme Court and two most senior Chief Justices of High Courts. The process of the Council is set in motion when "information from any source" against a constitutional court judge reaches the President or the Council. Either of the two gatekeepers, as the case may be, principally verifies and assesses the gravity of the allegations and forms an "opinion" whether the matter calls for "inquiry" into the capacity or conduct of the judge by the Council.

11. The proceedings before the Council, its report to the President and the removal of the judge by the President under Article 209 cannot be called in question in any court of law under Article 211, unless the removal of the judge is without jurisdiction, *malafide* or *coram non judice*. A limited judicial review on these three grounds is not affected by Article 211, as no ouster clause can keep the actions taken without jurisdiction, *malafide* or *coram non judice*, beyond the scrutiny of the constitutional courts.[8] Article 211 gives immunity to proceedings before the Council till the removal of the judge by the President. However, proceedings and steps taken before the matter lands before the Council escape the immunity under Article 211. In the present case, there were several steps that preceded the proceedings before the Council: the filing of complaint ('information') by the complainant before the ARU; the entertainment of the complaint by the ARU; the mode and manner of dealing with the complaint by the ARU and Law Ministry; the investigation and collection of evidence to supplement and document the complaint by the ARU; the preparation of "Summary" for making the Reference by the Law Ministry; the advice of the Prime Minister on the Summary; and the approval of that advice by the President. All these acts preceded the proceedings before the Council and are not hit by the ouster clause of Article 211. They are, therefore, subject to standard judicial review like any other executive or administrative act, on the grounds of substantive illegality, procedural impropriety and

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[8] see CJP Iftikhar Chaudhry v. President of Pakistan, PLD 2010 SC 61, per Khalil-ur-Rehman Ramday, J, paras 78, 80, 83 and 85.

decisional irrationality.[9] In a democracy governed by the rule of law, where arbitrariness in any form is eschewed, no Government or authority has the right to do whatever it pleases; where the rule of law prevails, there is nothing like unfettered discretion or unaccountable action.[10] It is, however, underlined that a Reference competently filed by the President against a constitutional court judge should not ordinarily be made subject to scrutiny in judicial review by any Constitutional Court including this Court, unless the extraordinary circumstances demand such intervention in the interest of justice and fair play.[11]

12. While a citizen (a private person) can always directly approach these forums by placing the information before them, it is important to understand how the Government (Federal, Provincial or Local) or its Ministries, Divisions, Departments and officials place such "information" or complaint against a judge of a constitutional court before the President. Can any Ministry, Division, Attached Department or Department of the Government on receiving any information against a constitutional court judge, entertain it and proceed with it, or start collecting evidence or verify the contents of the complaint? The answer to this is in the negative in the light of Article 209(7) of the Constitution, which mandates that the only constitutional forum available to inquire into the conduct or capacity of a constitutional court judge is the Council. So the Governments, its Ministries, Divisions, Departments or Attached Departments and their officers are not authorized to entertain any complaint against a constitutional court judge, let alone proceed and collect evidence to supplement the complaint. They can at best return the complaint to the complainant and guide him to approach the constitutional forums under Article 209 of the Constitution.

13. Let us take a situation where any Ministry, Division, Attached Department or Department of the Government, in the course of its normal business, discovers some adverse information against a constitutional court judge that may attract impeachable misconduct, in addition to the legal proceedings under the relevant

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[9] See Ibid, para 70.

[10] see State of W.B v. Debasish Mukherjee, (2011) 14 SCC 187.

[11] See CJP Iftikhar Chauhdry case (supra), Per Muhammad Nawaz Abbasi, J. p.215.

law. The concerned Department etc., in such situation, should at first proceed against the constitutional court judge on the basis of the adverse information in accordance with the law under which it functions. For example, if it is the FBR that discovers such an information, it can proceed against the judge under the tax laws and the judge will have a right to defend himself in accordance with law. Only when these proceedings come to a close after exhausting all the legal and judicial avenues and it is finally held that the judge has violated the law, the FBR may, in the interest of judicial accountability, send this information to the Federal Government through the Division with which it is attached under the Rules of Business, 1973 ("ROB") for information and necessary action. It will then finally rest with the Federal Government i.e., the Cabinet, to decide if the violation of law amounts to impeachable misconduct and whether the Federal Government should proceed against the constitutional court judge and place the "information" before the President. Such process finds its justification from the foundational constitutional principles like independence of judiciary, rule of law and parliamentary democracy.

Entertainment of Complaint by ARU

14. First and foremost, the complainant could only have approached the constitutional forums provided under Article 209(5) of the Constitution and could not have filed the complaint before any other office or authority. Therefore, the very act of approaching the ARU was *per se* unconstitutional and illegal. It is noted with concern and suspicion that how did the complainant, a citizen of this country, plan on filing the complaint against a constitutional court judge before the ARU, which had no public interface or the legal mandate to deal with such a matter and had earlier never conducted any inquiry for the accountability of a constitutional court judge. There is surprisingly nothing on the record to show how the complainant found out about ARU. The ARU was not a Ministry or Division of any Ministry of the Federal Government, or an Attached Department, neither was it a statutory authority nor had the notification of its establishment been published in the official gazette for public information. The ARU, therefore, for all practical purposes did not legally exist for the world outside the Prime Minister's Office. However, the

complainant instead of approaching the Council, which would have ordinarily come to the mind of a citizen, particularly in view of the publically known recent removal of a High Court Judge by the President on the recommendation of the Council,[12] approached the ARU for the accountability of judges. This looks more odd especially when the complainant claims to be a journalist. Such an unusual step by the complainant raises eyebrows about the credibility of the complaint and the *bonafide* of the complainant.

<u>*Legal Status of ARU*</u>

15. The ARU was established by the Cabinet vide Notification dated 06.11.2018. The Federation has defended the establishment of the ARU by the Cabinet, by referring to the provisions of Rules 4(5) and 16(1)(m) of the ROB. The submission made on behalf of the Federation was that Rule 4(5) empowers the Prime Minister to establish agencies and offices for conducting the business of the Federal Government, and under Rule (16)(1)(m) the Cabinet has power to decide any matter referred to it by the Prime Minister. The Prime Minister referred the matter of establishing the ARU to the Cabinet, and the Cabinet thus competently approved the establishment of the ARU. Rules 4(5) and 16(1)(m) of ROB are reproduced here for ready reference:

> **4. Organization of Divisions.**
>
> ....
>
> (5) The business of Government, other than the business done in the Federal Secretariat or the Attached Departments, shall be conducted through such agencies and offices as the Prime Minister may determine from time to time.
>
> **16. Cases to be brought before the Cabinet.**--(1) The following cases shall be brought before the Cabinet:-
> ....
>
> ....
>
> (m) any case desired by the Prime Minister to be referred to the Cabinet.

Bare reading of the provisions of Rule 4(5) makes it clear that the said Rule does not empower the Prime Minister to establish new agencies or offices; it simply authorizes him to refer the business of the Government to already established agencies and offices under the law. The word “determine” has been used in the Rule in the context of allocation or entrustment of the business of Government and not for the power to establish a new agency or office. In the

[12] Justice Shaukat Siddiqui's case, Report of the Council dated 11.10.2018.

absence of any power to establish a new agency or office, reference of the matter to the Cabinet under Rule 16(1)(m) by the Prime Minister is inconsequential, as the Cabinet also does not enjoy any such power. The scope of the ROB made under Article 99(3) of the Constitution cannot extend to creation of agencies or offices to perform functions in relation to any matter to which the executive authority of the Federation extends. Such agencies or offices can be established only by or under some law enacted by the Parliament on the subject over which it has the legislative power under the Constitution. The creation of the ARU by the Cabinet, cannot be sustained treating it as an Attached Department of the Cabinet Division also. The Departments that have been declared as Attached Departments to particular Divisions are created by or under the law, and not by the Federal Government.[13] The Federal Government, as per Rules 2(1)(ii) and 4(4) of ROB, can only declare them attached with a particular Division, but cannot create them. The Terms of Reference (TORs) of the ARU define its role and powers. The ARU does not pass as a coordinating agency or office under the TORs for the following reasons: first, as per its Notification it was established as an entity separate from the Departments whose officials have been made its Members and also addressed as such in its TORs; second, there is no mention of its coordinating role in the TORs; third, the powers and functions have been prescribed in the TORs as that of the ARU, and not of its Members; and fourth, but most importantly, the ARU was conferred such wide and extensive powers which even its Members did not enjoy under the laws of their parent institutions, e.g., it was empowered to request any intelligence agency under the Government of Pakistan for assistance in obtaining any information on any subject within and outside the country,[14] and authorized to seek assistance and information from Law Enforcement Agencies and other Government Departments, including the information relating to bank accounts, companies record, revenue record, travel record, NADRA record etc.[15] With such intrusive investigative powers, the ARU cannot be said to be an innocuous coordinating agency, office or unit. The

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[13] See ROB, Schedule III.

[14] TOR No. 7.

[15] TOR No.8.

establishment of the ARU was, therefore, absolutely without lawful authority, and is hereby so declared. In the absence of any legal status of the ARU, its Chairman and Members also have no legal position or status.

<u>*Budgetary Status of ARU*</u>

16. It is important to see how the ARU was being funded. Were the funds allocated for the functioning of ARU duly reflected in the Annual Budget? Funds can be allocated for any Government activity only by the National Assembly in the Annual Budget Grants under Article 82(2) or supplementary and excess budget grants under Article 84 of the Constitution. The Annual Budget Statements for the financial years 2018-19 and 2019-20 do not mention the allocation of any budget for the expenditure of ARU. The power of the Federal Government, i.e., the Cabinet, under Article 82(3) is only recommendatory, and provisional under Article 84, both are subject to the assent by the National Assembly. The amounts as approved in the budget passed by the National Assembly can be utilized only for the purpose specified in the budget statement. Any re-appropriation of funds or their utilization for some other purpose is not justified under the Constitution; for this purpose, the supplementary budget statement has to be placed before the National Assembly following the procedure provided in Article 84 of the Constitution. Persons making the unauthorized expenditure from the Federal Consolidated Fund are personally responsible for that expenditure.[16] The ARU, therefore, had no budgetary support and therefore does not pass for an executive authority. In this background, role of the ARU becomes more suspicious and raises the questions: who funded the investigation and the transnational surveillance of the Petitioner Judge; who paid for the Law Expert of the ARU; who paid for collecting information from the UK HM Land Registry or *192.com,* which are not open source, as one has to pay and register to access information; who was funding the entire operation. These unanswered questions cast doubts on the *bonafides* of the

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[16] See Case of Action against Distribution of Development Funds, PLD 2014 SC 131; Mustafa Impex v. Govt. of Pakistan, PLD 2016 SC 808 and Ram Jawaya v. State of Punjab, AIR 1955 SC 549.

Government and the Prime Minister, the Chief Executive of the Federation.

Legal Status of the Chairman, ARU

17. The appointment of the Chairman, ARU by the Cabinet is not backed by any law including any rule of the ROB. Even otherwise, the ROB made under Article 99(3) of the Constitution cannot provide for creation of posts in connection with the affairs of the Federation. Such power must be conferred by some law enacted under Article 240(a) of the Constitution. Article 99(3) empowers the Federal Government to make rules only on two subjects: firstly, for the allocation of the business of the Federal Government to its different components, i.e., the Ministries; and secondly, for the transaction of that business. The Rules made under this power can regulate the procedural modalities of allocation and transaction of the business, i.e., by which Ministry or Division of a Ministry and how a matter is to be taken up and dealt with; such Rules cannot grant substantive power to create posts in connection with the affairs of the Federation.[17] The expression "allocation and transaction" of the business does not by any stretch of imagination imply such power. Thus, the appointment of the Chairman, ARU by the Cabinet was without lawful authority, and is so declared.

18. The prior appointment of the Chairman, ARU as Special Assistant to the Prime Minister on Accountability with the status of Minister of State, under Rule 4(6) of the ROB also appears to be questionable. The Constitution has prescribed a limitation for the total number of the Federal Ministers and Ministers of State: second proviso to Article 93 mandates that the total strength of the Cabinet, including Ministers of State, shall not exceed eleven percent of the total membership of Majlis-e-Shoora (Parliament). This command of the Constitution cannot be circumvented and made redundant by doing a thing indirectly that cannot be done directly. The Constitution has envisaged the Federal Government consisting of the Prime Minister and the Federal Ministers to exercise the executive authority of the Federation,[18] and has allowed assistance in exercise of that authority by appointment of

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[17] See Mustafa Impex v. Govt. of Pakistan, PLD 2016 SC 808.

[18] The Constitution of the Islamic Republic of Pakistan, 1973, Article 90(1).

the Ministers of State[19] and the Advisers.[20] The Constitution does not provide for appointment of any Special Assistant to the Prime Minister. The scope of the Rules of Business made under Article 99(3), as above explained, is restricted only to the "allocation and transaction" of the business of the Government. The vires of Rule 4(6) of the ROB that empowers the Prime Minister to appoint Special Assistant, therefore, needs serious examination. This matter, however, is not directly in issue in the present case; therefore, it is left to be decided in an appropriate case some other time.

19. The ARU was, as aforesaid, neither supported by any law nor recognized by the ROB as a functional part of the Federal Government. It was at best an internal part of the Prime Minister's Office and possessed no legal status more than that of the status of its Chairman, i.e., the Special Assistant to the Prime Minster. Such an internal unit or wing or cell under the Cabinet Division and in the Prime Minister's Office had no power to deal with or pry into the affairs of a third party and more so of a citizen who at all times enjoys an inalienable right to the protection of law and the constitutional guarantee of fundamental rights. Without the backing of an enabling law, the ARU or the Chairman, ARU had no power or jurisdiction to deal or interact with any third party. There is no power inherent in the Executive; the Constitution and the law are the only source of its powers and duties.[21] No office or authority of the Executive can take any action detrimental to the life, liberty, body, reputation or property of any person except in accordance with law as mandated by Article 4 of the Constitution. Inspite of no legal standing, the ARU and its Chairman had arrogated to themselves the role of avatars of accountability, drawing their legal authority and power from the Terms of Reference (TORs) approved by the Cabinet. The TORs of the ARU, which set out various inquisitorial and investigative functions regarding the life, liberty, reputation and property of the citizens of Pakistan, have absolutely no legal value. The ARU, it is stated as a matter of example, was not even entitled to proceed against a peon at the Prime Minister's Office. However, audacity of the Chairman,

[19] Ibid., Article 92(1).

[20] Ibid., Article 93(1).

[21] See Muslim League v. Federation, PLD 2007 SC 642.

ARU had no bounds and he, on a vague complaint, without any authorization from any constitutional or legal source, started investigation into the affairs of a judge of the highest constitutional court of the land. A Special Assistant, a contractual employee, serving at the pleasure of the Prime Minister had no authority or power to embark upon this inquisition. It is not reasonable to accept that the Special Assistant to the Prime Minister or the Law Minister could have performed all these acts without any kind of tacit authorization from the Prime Minister. This misplaced overzealousness besides being illegal and without jurisdiction is also speaking, and speaks loudly, that there was more to it than meets the eye.

Investigation of the Complaint by the ARU

20. The Chairman, ARU on receiving the complaint from the complainant acted with surprising agility and unleashed his team to collect evidence of the alleged foreign properties. The ARU, which was to work under the Cabinet Division as per decision of the Cabinet, did not make any formal request to the Law and Justice Division through the Secretary, Cabinet Division for consultation on the matter in accordance with Rule 14 of the ROB, despite noting in minutes of its meeting held on April 15, 2019 that the matter was sensitive as it related to the Judges of the Superior Judiciary. The informal discussion and consultation made by the Chairman and Members of the ARU with the Law Minister on April 16, 2019, and the oral advice of the Law Minister in that discussion carries no value in the eyes of law. The Law Minister, who was a distinguished constitutional lawyer, also did not realize the importance of his advice, even oral, and gave a “go ahead” to the ARU for inquiring into the veracity of the allegations made in the complaint against judges of the constitutional courts. The Chairman, ARU who was also a Barrister-at-law, and not a layman, knew well that an oral advice of the Law Minister was nothing in the eyes of law and he should have ascertained his legal authority to inquire into the allegations made against Judges of Constitutional Courts, before initiating the inquiry into the allegations made in the complaint. But both of them paid no heed to the constitutional mandate of Article 209 of the Constitution, and initiated the process of inquiring into the allegations made in

the complaint in such a manner which even the Council could not have done if the complaint had been made to it. This cannot be taken to be an innocent mistake by persons of such a legal caliber and standing.

21. The Chairman ARU, after the discussion with the Law Minister, on his own initiated the inquiry against the alleged properties of the judges of the constitutional courts and their family members. He tasked his team to procure the family records of the Petitioner Judge from NADRA and also their travelling history and the tax record from FIA and FBR, respectively. This fact is evident from the minutes of the meeting held on April 16, 2019 by the Chairman and Members of ARU with the Law Minister; there is no mention of discussion among the Members of the ARU on how to proceed further in the matter, or making of the decision by consensus or majority view of the Members. The Chairman, ARU did not obtain the opinion of or consult with the other Members of ARU. However, the other Members of ARU supplied information on the Petitioner Judge and his family without the authorization of law. It is clear from the minutes of the meeting that ARU was being run by the Chairman, ARU, and the other Members of ARU, even though representing statutory authorities, acted illegally and with alarming servitude.

22. Astonishingly, the Chairman, ARU on the oral advice of the Law Minister, decided not to inquire into the alleged foreign properties of another judge[22] mentioned in the complaint on the ground that the said judge had already resigned. This selective treatment unveils the true objective of the proceedings conducted by the Chairman, ARU and the Law Minister: to conduct a judicial witch-hunt rather than to recover alleged unlawful foreign assets and properties. Had the Chairman, ARU been acting for recovery of the alleged illegally acquired foreign assets of the Judges as per the so-called mandate of the ARU, the fact that a judge had resigned could have made no difference for taking legal proceedings for the recovery of his alleged illegally acquired foreign properties.

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[22] Justice Farrukh Irfan Khan of the Lahore High Court.

Searching and Locating the Foreign Properties by the Legal Expert, ARU

23. This is the most sensitive, disturbing and scary part of the case for any law-abiding citizen and for a country governed by the rule of law. It is an admitted fact between the parties that ownership of an immovable property in UK can be traced through UK HM Land Registry's official website, only by giving its address (property number) and not by simply citing the name of the owner. This information was not supplied by the complainant and was not available on the record of FBR or any other office or authority in Pakistan. The critical question that requires explanation is, how did the complainant or the ARU find out the addresses of the UK properties, so that they could access UK HM Land Registry? Answer to this question will answer whether we have a Government of law or Government of men.

24. The Petitioner Judge asserted in his constitutional petition that the information forming the basis of the Reference was gathered through covert surveillance in stark violation of his and his family's fundamental rights of privacy and dignity. The response of the Federation in its concise statement was a simple denial to this assertion of the Petitioner Judge; no details were mentioned as to how the UK properties in the name of the spouse and children of the Petitioner Judge were located. The report dated May 8, 2019 of the Legal Expert, ARU annexed with the concise statement only stated that after an asset search the properties had been found registered in names of the persons mentioned in that report. This report was also silent as to how that property search was conducted. Who carried out the search? How was the search carried out? Who paid for it and when, especially when ARU has not sanctioned budget? What was discovered in the search? No evidence to this effect has been placed before us. These are questions that go unanswered and are deeply worrying in a State that is governed by the Rule of Law.

25. It was much after the counsel of the Petitioner Judge had completed his arguments that on June 1, 2020 the Chairman, ARU and the Legal Expert, ARU filed their concise statement, and in that statement they asserted that the details of those residing in

any immovable property in the UK can be accessed through open source websites such as *192.com* and *ukphonebook.com*; that once the address is located, the owner of that immovable property can be found through open source such as the UK HM Land Registry. They further stated that there had been no covert surveillance of the Petitioner Judge or his family. The Petitioner Judge filed a CMA in response to the said concise statement of the Chairman and Legal Expert, ARU. He stated therein that *192.com*, *ukphonebook.com*, and UK HM Land registry websites are not free or open source websites. He elaborated that to access the information from the website *192.com*, an account with username and password need to be created, payment is to be made by debit/credit card, the website acknowledges the payment of charges by email, and sends the requested information by email, and likewise is the procedure of accessing information from the UK HM Land Registry website. The Federation in defence did not produce any record of the searches made on those websites: What and how many addresses were found and under whose names? Who created the account? Who made the payment of charges? What were the payment or credit card details? Who received the acknowledgement of payment and the requested information and at whose email address? More importantly, there is no evidence of what information was received that was allegedly carried to UK HM Land Registry. The Federation has papered over the gaps by referring to *192.com,* which is not sufficient, unless details are furnished regarding the information retrieved from the said site. It is underlined that a paid source, which requires registration and payment before allowing access to information, is not an open source as claimed by the Federation. It shows that no such search was conducted for tracing the properties through those websites; rather the details of the properties were gathered through covert surveillance of the Petitioner Judge and his family. Covert surveillance and interception are offensively intrusive investigative tools only available to intelligence agencies in the country.[23]

26. Article 129(g) of the Qanun-e-Shahadat Order, 1984 allows the Court to presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who

[23] *See* Investigation For Fair Trial Act, 2013

withholds it. When a party withholds best evidence available with him without any sufficient cause, an adverse presumption is drawn against that party, irrespective of who bears the onus of proof,[24] that the evidence withheld must have been against his version.[25] Thus, the omission of the Federation and of the Chairman and Legal Expert, ARU to produce the said record as to procuring the address of the UK properties of the spouse and children of the Petitioner Judge through the *192.com* website gives rise to a presumption that the Legal Expert, ARU never searched the addresses of the properties through the *192.com* website. Even otherwise, the Chairman and Legal Expert, ARU in their concise statement made a general statement that an immovable property can be located through open source websites, but they did not make any specific and categorical statement therein that the UK properties of the family of the Petitioner Judge were located by that method. The ARU was not equipped to carry out surveillance or interception without the assistance of the intelligence agencies, for which it had been authorized in the TORs by the Cabinet without any lawful authority as discussed above. It is underlined that intelligence agencies were also aggrieved of the *Faizabad Dharna* judgment as it carried adverse observations regarding their role and activity. That is why the review petitions were filed by the Ministry of Defense on behalf of the intelligence agencies. Further, it is evident from the report dated June 26, 2019 of the Legal Expert, ARU that he hired a Tracing Agent firm to trace the residents of the properties over the years, and not to trace the addresses of the properties.

27. While regular inquiry and investigation is limited to reaching out to lawful and visible evidence existing at the time, covert surveillance and interception are modern intrusive investigative tools for discovering and creating evidence against a person by encroaching upon his privacy and personal liberty. While investigation is the collection of the available record and mostly after notice to the person under investigation, surveillance is far more secretive and clandestine operation which is designed to intrude into the private recesses of one's life, the confidential zone

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[24] *See* Murugesam Pillai v. Manickavasaka Desika, (1917) I.L.R. 40.

[25] Rameshwar Singh v. Rajit Lal, AIR 1929 PC 95; Hiralal v. Badkulal, AIR 1953 SC 225; and, Muhammad Zubair v. State, 2007 SCMR 437.

that stands protected under the constitutional guarantees of the right to privacy and personal liberty. It is for this reason that surveillance is permitted in the limited area of anti-state or terrorist activities and that too under judicial and executive oversight. Outside this limited area, surveillance is constitutionally prohibited. Intelligence agencies do not enjoy a free hand in conducting surveillance but are subject to strict rules of compliance and oversight by the court. In the absence of any other evidence furnished by ARU or the Law Minister, it is but obvious that in this case the information about the addresses of properties were obtained through no other means but through covert surveillance and interception of the intelligence agencies which gathered the information from the private zone of privacy enjoyed by the Petitioner Judge and his family, without any authorization of law and by brutally trampling over the constitutional guarantees of privacy, personal freedom and dignity. To trivialize the right to privacy by saying that the judge has nothing to hide is "no different than saying you don't care about free speech because you have nothing to say."[26] The mode and manner of procurement of information regarding the three UK properties cannot be lightly dismissed; in it lays the destiny of our people and the future course of our country.

28. The complainant is a party to these proceedings. He also appeared before us, but did not explain his source of information or cleared the allegations leveled against him. The complainant appears to be a proxy, who could not have discovered the addresses of the three foreign properties. This inference is further supported from the following facts. The complaint allegedly annexed the copy of title record of one foreign property of the spouse of the Petitioner Judge, with his complaint. That copy of the title record was tendered by the Federation in Court, with the concise statement of the Chairman and Legal Expert, ARU on June 1, 2020 belatedly as mentioned above. The notable aspect of this copy of the title record is that it bears the Spanish name of the spouse of the Petitioner Judge, which as per stance of the Federation came to surface when the Member of ARU from FIA obtained her NADRA record, passport record and travelling history

[26] Edward Snowden, Permanent Record.

record. It is alarming to imagine how the complainant had come to know of the Spanish name of the spouse of the Petitioner Judge and how on earth he got the access to the address of that property. When the complaint does not mention either. The Chairman, ARU stated in his report that he met the complainant but did not mention in that report how the complainant had known the Spanish name of the spouse of the Petitioner Judge and got the address of that property. To cover up these gaping omissions, the Federation took the stance during arguments that the complainant was a journalist and no journalist tells, or can be compelled to tell, the source of his information. The stance is misconceived; it has been taken without appreciating the fact that the complainant had not got published an investigative story in any newspaper, he had rather made a complaint for action against the judges of constitutional courts for their alleged misconduct. His status was that of a complainant, and not of a journalist, in making the complaint. It is no rocket science to put the facts together to discern that the complainant was fed the information to generate the complaint. Whoever fed him the information are the real actors of this saga. The credentials of the complainant give further credence to this story; he was an unknown journalist with rather dubious reputation. Report of the Chairman ARU dated May 10, 2019 compiled after thorough investigation of the allegations made in the complaint and submitted to the Law Minister goes silent as to why the complainant wanted to file the complaint, what was his source of information, what newspapers he worked for, and did his complaint qualify to hide behind the code of ethics of journalists.

29. This aspect of the case as to the unlawful procurement of the information through unlawful surveillance of the Petitioner Judge and his family is deeply worrying and shakes the foundations of a democratic society based on the rule of law. The issue of unlawful surveillance and invasion of privacy of the Petitioner Judge and his family is far more critical and grave than the information procured by the ARU. It is a naked threat to personal liberty, privacy and dignity guaranteed to the citizens under the Constitution. In order to appreciate the gravity of the constitutional violation committed by the ARU or its Chairman, it is important to understand the concept of privacy and personal freedom in a constitutional

democracy that protects our private lives, our friendships, our relationships, our thoughts and our very sense of being, which no State has the power to touch or encroach.

Concept of Privacy

30. The Greek philosopher Aristotle spoke of a division between the public sphere of political affairs (which he termed the *polis*) and the personal sphere of human life (termed *oikos*).[27] This dichotomy may provide an early recognition of "a confidential zone on behalf of the citizen."[28] Activities in the private realm are more appropriately reserved for "private reflection, familial relations and self-determination."[29] John Stuart Mill in his essay, 'On Liberty' (1859) gave expression to the private zone in one's life; "The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."[30] Sir Edward Coke, perhaps the most influential English jurist of all time, famously declared in *Semayne case*[31] "that the house of everyone is to him as his Castle and Fortress as well for his defence against injury and violence, as for his repose." Justice Stephen Breyer in his book writes that "by privacy, I mean a person's power to control what others can come to know about him or her."[32] In the most famous essay on privacy ever written, published in the *Harvard Law Review* in 1890, Louis Brandeis and Samuel D Warren referred to the principle of the right to an "inviolate personality," and said that it was a part of the more general "right to be let alone."[33] Later Justice Louis Brandeis expressed the right to privacy in his dissent in *Olmstead v. United States*[34] in the terms that a core of freedom and liberty from which the human being had to be free from intrusion. The right to be let alone is a reflection of the inviolable nature of the human personality. "Privacy

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[27] *Justice K.S. Puttaswamy (Retd) v. Union of India,* AIR 2017 SC 4161.

[28] Michael C. James, A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe, *Connecticut Journal of International Law, p.261, Vol.29, Issue 2,* (Spring 2014)

[29] Ibid, at page 262

[30] John Stuart Mill, *On Liberty*, Batoche Books, p.13, (1859).

[31] [5 Coke 91: 1 Sm LC (13th Edn.) 104 at p. 105]

[32] Justice Stephen Breyer (Associate Judge of the United States Supreme Court) in *Active Liberty*

p.66

[33] Warren and Brandeis, The Right to Privacy, *Harvard Law Review, p.193,* (1890), Vol. 4, No. 5.

[34] 277 U.S.438, 478 (1928)

is…essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy."[35] Privacy therefore affirms the agency and autonomy of the individual and the right of every person to have the freedom and liberty to live a life of dignity. Privacy requires that all information about a person is fundamentally his own, only for him to communicate or retain for himself. The concept of private life includes the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world.[36] "The freedom of a country can only be measured by its respect for the rights of its citizens, and … these rights are in fact limitations of state power that define exactly where and when a government may not infringe into that domain of personal or individual freedoms that during the American Revolution was called "liberty" and during the Internet Revolution is called "privacy."[37]

31. Recognizing and protecting the zone of privacy is the freedom and liberty our Constitution holds dear. Privacy attaches to the person and not to the place where it is associated. Home under Article 14 of the Constitution is not only the physical house but the entire treasure of personal life of a human being.[38] The intrusion by the State into the sanctum of personal space, other than for a larger public purpose, is violative of the constitutional guarantees. Right to privacy is deeply intertwined with the right to life, right to personal liberty and right to dignity. "Arguing that you don't care about the right to privacy because you have nothing to hide is no different than saying you don't care about free speech because you have nothing to say."[39] This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny and protected against "unwanted gaze,"[40] unless they act in an unlawful manner.

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[35] Lawrence Lessig, Code and Other Laws of Cyberspace, p.153–55 (1999).

[36] Artavia Murillo ET AL. ("In Vitro Fertilization") v. Costa Rica (2012), Inter-Am. Ct. H.R. (Ser.C) No.257

[37] Edward Snowden, Permanent Record.

[38] see Benazir Bhutto v. President of Pakistan, PLD 1998 SC 388.

[39] Edward Snowden, Permanent Record.

[40] Jeffrey Rosen, The Unwanted Gaze: The Destruction of Privacy in America (2000).

Social Impact of Violation of Privacy.

32. Illegal and illegitimate surveillance, by both State and private actors, has the impact of intrusion into the private lives of citizens, not only violating their constitutional rights but also intruding on the very personhood, privacy and personal liberty of those surveilled. Surveillance has disparate impact, violating principles of non-discrimination and equality as enshrined in our Constitution. Writing for the Harvard Law Review in 2013, Neil Richards stated that surveillance has a chilling effect on the exercise of our civil liberties.[41] Furthermore, surveillance is often exercised as a power by the watcher over the watched, as a form of control. "This disparity creates the risk of a variety of harms, such as discrimination, coercion, and the threat of selective enforcement, where critics of the government can be prosecuted or blackmailed for wrongdoing unrelated to the purpose of the surveillance."[42] Surveillance and illegitimate intrusions into privacy impact the essential work that journalists, academics and activists do. Undue surveillance can lead to a chilling effect on those critical of State institutions and societal norms. Undue interference with individual's privacy can both directly and indirectly limit the free development and exchange of ideas.[43]

33. In fledgling democracies, where institutional development is still finding its feet and the concept of rule of law has not firmly taken ground, special care is required to ensure that law enforcement and intelligence agencies fully comply with the law dealing with surveillance and interception. Any laxity or concession given to these agencies to step outside the law and collect evidence, can be a serious threat to constitutional guarantees of the people, in particular, and to democracy, in general. International experience[44] tells us that unconstitutional and illegally procured private information amassed by the agencies can be used to manipulate and blackmail people for promoting political agendas.

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[41] Neil M. Richards, The Dangers of Surveillance, Harvard Law Review, p.1935, vol.126, (2013).

[42] Ibid

[43] *see* Digital Rights Foundation (DRF), Impact and Legality of Surveillance, A Policy Brief (2020). https://digitalrightsfoundation.pk/wp-content/uploads/2020/10/Impact-and-Legality-of-Surveillance-Final-Document-14.10.2020-1.pdf

[44] *See* Bolo Bhi, Surveillance, Interception and Evidence Gathering: Local Law and International Precedents, A Research Paper (2020). https://bolobhi.org/surveillance-interception-and-evidence-gathering-local-law-and-international-precedents/

This cripples human security and dismantles democracy, lowering it slowly into an abyss of totalitarianism. Any unconstitutional intrusion and unlawful collection of reels of unauthorized private data can make any law enforcement or intelligence agency become a Frankenstein – indestructible and uncontrollable. Infringing the foundational principle of separation of powers. In a parliamentary democracy with inbuilt checks and balances the question of who will guard the guards does not arise and should not arise.

34. Intercepted material through "surveillance" includes data, information or material in any documented form, whether written or recorded, through audio visual device, CCTV, still photography, observation or any other mode or technique. And, "interception" on communication medium includes: emails, SMS, IPDR (internet protocol detail record) or CDR (Call detail record) and any form of computer based or call phone based communication using wired or wireless or IP (internet protocol) based media or gadgetry.[45] The fact that the ARU did not possess the resources or the technical capacity to carry out surveillance of the Petitioner Judge and his family and the interception of their communications, gives credence to the stance of the Petitioner Judge that the surveillance was carried out in connivance and in collaboration with the intelligence agencies. The possibility of such happening, therefore, cannot be ruled out in the absence of any other evidence to the contrary, on the record.

Investigation for Fair Trial Act, 2013

35. The only law referred to us during arguments that allows surveillance of persons by the Law Enforcement and Intelligence Agencies is the Investigation for Fair Trial Act, 2013 ("IFTA"). The Legislature in the preamble provides that "being mindful that the existing laws neither comprehensively provide for nor specifically regulate, advance and modern, investigative techniques such as covert surveillance and human intelligence, property interference, wiretapping and communication interception that are used extensively in other jurisdictions to successfully prevent the offences and as an indispensable aid to the law enforcement and

[45] The Investigation for Fair Trial Act, 2013, section 3(g).

administration of justice."[46] It further provides that "in order to neutralize and prevent the threat or any attempt to carry out scheduled offences it is necessary that the law enforcement and other agencies be given certain authorizations to obtain evidence in time and only in accordance with law[47]." Regarding the evidence so collected the preamble provides that "it is also in order to declare the admissibility and use of the material obtained during lawful investigation under the present law, in the judicial proceedings and all other legal proceedings or process to ensure fair trial.[48]" The IFTA requires a notified officer to make an application under the Act, if there is reason to believe that a person may be associated with or is likely to act in a manner that constitutes a scheduled offence. However, the officer is required to obtain a warrant from court for surveillance or interception. Prior to obtaining a warrant, the officer is required to prepare a report with supporting material, present it to the Minister (Federal Minister for Interior) for permission and then move the application before a judge for issuance of the warrant. A warrant under the Act is to be issued by a judge of the High Court in chamber. Section 8 of IFTA lists the requirements the officer must meet when seeking permission for surveillance or interception, whereas Section 10 pertains to what is to be considered by the judge when issuing a warrant. The duration of the warrant under Section 14 of the IFTA is 60 days. It may be re-issued for another 60 days after a fresh application is made and reasons presented by the officer, for why the earlier time period was insufficient. If the request by the applicant is deemed arbitrary by the judge, under Section 15 of the law, departmental action can be recommended against the officer. Under Section 22 of the Act, the authorized officer is required to certify that the evidence collected is strictly in accordance with the warrant and has not been tampered with or altered, before turning it over to the investigating officer.

36. The IFTA, thus, provides that intelligence agencies can carry out surveillance and interception of a suspect to gather information regarding anti-state or terrorist activities and that too after obtaining a warrant from a Judge of the High Court

[46] Ibid, preamble.

[47] Ibid.

[48] ibid

concerned. Intelligence agencies therefore do not have a *carte blanche* to probe into the lives of ordinary men and women of this country. These agencies are regulated by law and are subject to law. In 2013, a coalition of civil society organizations developed *"International Principles on the Application of Human Rights to Communications Surveillance"* highlighting a human rights approach to surveillance. These principles, though not adopted by any State party, the principles highlight the ways in which international human rights law applies to surveillance practices. The principles are 1) legality: "any imitation to the right to privacy must be prescribed by law"; 2) legitimate aim: "laws should only permit communications surveillance by specified State authorities to achieve a legitimate aim that corresponds to a predominantly important legal interest that is necessary in a democratic society. Any measure must not be applied in a manner which discriminates on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;" 3) necessity: "strictly and demonstrably necessary to achieve a legitimate aim"; 4) adequacy: "must be appropriate to fulfill the specific legitimate aim identified;" 5) proportionality: "should be regarded as a highly intrusive act that interferes with the rights to privacy and freedom of opinion and expression, threatening the foundations of a democratic society"; 6) competent judicial authority: "determinations related to communications surveillance must be made by a competent judicial authority that is impartial and independent"; 7) due process: "that lawful procedures that govern any interference with human rights are properly enumerated in law, consistently practiced, and available to the general public"; 8) user notification: "individuals should be notified of a decision authorizing communications surveillance with enough time and information to enable them to appeal the decision"; 9) transparency: "about the use and scope of communications surveillance techniques and powers"; 10) public oversight: "establish independent oversight mechanisms to ensure transparency and accountability of communications surveillance";

11) integrity of communications and systems: "States should not compel service providers or hardware or software vendors to build surveillance or monitoring capability into their systems, or to

collect or retain particular information purely for State surveillance purposes”; 12) safeguards for international cooperation: “States may not use mutual legal assistance processes and foreign requests for protected information to circumvent domestic legal restrictions on communications surveillance”; 13) safeguards against illegitimate access: “enact legislation criminalizing illegal communications surveillance by public or private actors.”[49]

37. Any covert surveillance or interception of the citizens of Pakistan other than under IFTA is starkly offensive to their fundamental rights of privacy and personal liberty. There is no law in the country that authorizes any law enforcement or intelligence agency to pry into the privacy of home to dig out private family information through targeted surveillance, and to use it against them to achieve various ends. Any such surveillance into the inviolate private core of human life seriously threatens normal human existence as it clogs their freedoms and distorts the meaning of our constitutional democracy founded on the rule of law promised by our founding fathers. Such intrusion and encroachment into the private life of a citizen by the State actors totally demolishes the scheme of fundamental rights under the Constitution. Fundamental rights of privacy, personal liberty and dignity provide a bar against intrusion into the private life of a citizen through surveillance; which aims to continuously fish for something adverse against a citizen and then to use it against him when required. These are tricks of a totalitarian State and not the ways of an elected Government of a constitutional democracy which must rest its governance on the rule of law and supremacy of the Constitution.

Information Procured from NADRA, FBR & FIA by the ARU

38. The Member of the ARU from FIA, Assistant Commissioner (Inland Revenue), Commissioner (Inland Revenue), and DG (International Taxes)/Member of ARU from FBR, all four, submitted their reports on May 10, 2019. Rights to personal liberty

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[49] Electronic Frontier Foundation, Necessary & Proportionate: International Principles on the Application of Human Rights Law to Communications Surveillance, (2014). Also see: Bolo Bhi, Surveillance, Interception and Evidence Gathering: Local Law and International Precedents, A Research Paper (2020)

and privacy under Articles 9 and 14 of the Constitution impose a constitutional obligation on State authorities to protect the privacy and personal freedom of the citizens unless the law expressly authorizes them to do otherwise in exceptional circumstances. In the absence of any law to the contrary, the rights to privacy and personal freedom become absolute and stand to protect the privacy and personal freedom of the citizen. No Government institution is to disclose the personal information of any citizen unless the law authorizes the institution to do so. In the absence of any specific law, the umbrella of constitutional guarantees will come to cover and protect the citizen. Employees of NADRA, who were legally enjoined under section 28 of the NADRA Ordinance, 2000 not to communicate to any person any information acquired by them in the course of their employment, committed violation of that command of the law by making compliance with the command of the Chairman, ARU in communicating to the Chairman and other Members of the ARU the NADRA record relating to the Petitioner Judge and his family. Likewise, Member of the ARU from FBR committed violation of section 216 of the ITO, 2000 by disclosing the tax records of the Petitioner Judge and his spouse to the Chairman and other Members of the ARU. While Member of the ARU from the FIA breached Rule 18 of the Government Servants (Conduct) Rules, 1964 by making unauthorized communication of the official documents and information as to the passport/visa record and travelling history of the Petitioner Judge and his family. It is astonishing that information which even the Prime Minister, any Federal Minister or the Cabinet could not solicit under the law was being made available to the Chairman, ARU by the officials of NADRA, FBR and FIA. At the cost of repetition, the Chairman, ARU examined all the reports and record submitted to him on May 10, 2019, made his final Report on May 10, 2019 and submitted it to the Law Minister on the very same day, i.e., May 10, 2019. All proceedings stand concluded in one day. This hurried exercise being against the normal course of business also points towards lack of *bonafide* in the whole process and proceedings.

39. The Chairman and Legal Expert, ARU procured the information regarding the UK Properties by offending the fundamental rights of personal liberty, privacy and dignity of the

Petitioner Judge and his family by procuring personal information regarding the UK Properties without the sanction of any law through covert surveillance and interception, and also by violating the confidentiality provisions of the NADRA Ordinance and the ITO. These actions of the Chairman and Legal Expert of ARU also attract criminal liability under section 35 of IFTA. The ARU thus did not collect the evidence in support of the allegations made in the complaint against the Petitioner Judge, in accordance with the law and Constitution. Additionally, when the very establishment of the ARU and appointment of its Chairman were without any lawful authority, all the acts done by the Chairman, Legal Expert and Members of the ARU as to the investigation and collection of evidence in support of the allegations made in the complaint were also without lawful authority and are so declared. For these illegal actions, the authorities concerned must initiate criminal and disciplinary proceedings against the Chairman, Legal Expert and Members of the ARU, as well as, the deafulting officials of FBR and NADRA under the IFTA, ITO and NADRA Ordinance, 2000.

<u>Reliance on the Illegally Collected Evidence by the Law Minister and Prime Minister</u>

40. The Law Minister, a distinguished lawyer, did not raise any objection to the investigation and surveillance conducted by the ARU for accountability of a constitutional court judge, on receiving the report of the Chairman, ARU. He rather relied upon the evidence illegally collected in that inquiry for making the "Summary for the Prime Minister", and proposing to the Prime Minister to advise the President to form an opinion that the Petitioner Judge may be guilty of misconduct and direct the Council to inquire into the matter under Article 209 of the Constitution. Likewise, the Prime Minister also without asking the Law Minister or the Chairman ARU as to under what authority of law the ARU conducted inquiry into and collected evidence on the allegations made in a complaint against a constitutional court judge, advised the President on the basis of that illegally collected evidence to form the opinion, direct the Council and sign the draft Reference. It is important to assess whether the evidence/material collected by the ARU, passed on to the Law Minster and further put up before the Prime Minister was legally admissible.

Exclusionary Rule- Admissibility of Illegally Collected Evidence

41. Under the classic common law, the test of admissibility of evidence was whether it is relevant to the matter in issue. If it is, it is admissible, and the Court is not concerned with how it was obtained.[50] The law of evidence, i.e., the Evidence Act, 1872 (now Qanun-e-Shahdat Order, 1984) did not deal with the possibility of procurement of evidence through illegal and unconstitutional surveillance offending the fundamental rights of privacy, personal liberty and dignity. It also did not envisage that the right to a fair trial would be guaranteed as a fundamental right under the Constitution. There has, however, been a great shift in application of the said rule in major common law jurisdictions, with recognition of the importance of civil rights and liberties of the citizens in a State governed by the Rule of Law.

42. In United Kingdom, the mother of common law, Lord Hoffman has observed in *A v. Secretary of State*[51] that "the courts will not shut their eyes to the way the accused was brought before the court or the evidence of the guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonor the administration of justice, if the proceedings were to be entertained or the evidence admitted. In such a case the proceedings may be stayed or the evidence rejected on the ground that there would otherwise be an abuse of process of the court".

43. In Australia, Barwick CJ speaking for the Court in *R v. Ireland,*[52] held that when evidence is procured by unlawful or unfair acts, the judge has a discretion to reject the evidence. In the exercise of that discretion, the learned Chief Justice said, "the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion". This statement of

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[50] See Kuruma v. Queen, 1955 AC 197; Pooran Mal v. Director of Inspection, AIR 1974 SC 348; and, Bisvil Spinners v Pakistan, PLD 1992 SC 96.

[51] [2006] 2 AC 221.

[52] [1970] HCA 21.

law was reaffirmed by the High Court of Australia in *Bunning v Cross*.[53]

44. In United States, the Fourth Amendment to the US Constitution guarantees the privacy rights by declaring that "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized". A right to be free from unreasonable searches and seizures is though declared by the Fourth Amendment, but how one is to translate the guarantee into concrete terms is not specified. Several possible methods of enforcement were considered by the US Courts over time; however, the US Supreme Court has settled the one as an effective means to make real the right, which is called the Exclusionary Rule. Under this Rule, the evidence seized in violation of the Fourth Amendment rights is excluded by the US Courts. Exclusion of evidence as a remedy for Fourth Amendment right violation was founded in *Boyd v. United States*,[54] and was developed in later cases. In *Mapp v Ohio*,[55] the US Supreme Court held that to admit evidence obtained in violation of the right would be, in effect, to "grant the right but in reality to withhold its privilege and enjoyment", and explained that the exclusionary rule is designed "to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it".

45. In Canada, the principle governing the exclusion of evidence obtained in violation of the charter rights and freedoms has been codified. Section 24(2) of the Canadian Charter of Rights and Freedoms declares that where a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

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[53] [1978] HCA 22.

[54] 116 U.S. 616 (1886).

[55] 367 US 643 (1961).

46. The Irish Supreme Court has in *DPP v. JC*[56] laid down the following principles with regard to the admission or exclusion of the evidence obtained in violation of the constitutional rights, in order to balance the legitimate competing public interests: (i) The onus is on the prosecution to establish the admissibility of all evidence; (ii) If a claim is raised that evidence was obtained in breach of constitutional rights, the onus is on the prosecution to establish either (a) that there was no unconstitutionality, or (b) that despite any interference with constitutional rights the evidence should still be admitted; (iii) Where evidence is obtained in deliberate and conscious violation of constitutional rights, it should be excluded except in exceptional circumstances; (iv) Where evidence was taken in breach of constitutional rights, there is a presumption in favour of exclusion, which can be rebutted by evidence that the breach of rights was either (a) inadvertent or (b) derived from subsequent legal developments; and (v) Whether or not a breach of constitutional rights was deliberate and conscious requires analysis of the conduct or state of mind of the individual who actually gathered the evidence, as well as, any senior official or officials within the investigating or enforcement authority concerned who was involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence-gathering of the type concerned.

47. The above-stated principle as to inadmissibility of the illegally collected evidence has developed mostly in the cases where there was a law that regulated a constitutional right, but that law was not followed or was violated in the process of collecting evidence. The courts have held such evidence to be generally inadmissible, with few exceptions, mainly with the reason that the admission of such evidence would compromise the integrity of the judicial process and bring the administration of justice into disrepute. I concur in the principle, and see no hindrance in adopting it in our jurisdiction. The admission and reliance on the material (evidence) illegally collected by the ARU without any enabling law empowering it to do so, in flagrant violation of the fundamental rights of privacy, liberty, dignity and freedom of movement of the Petitioner Judge and his family, would

[56] [2015] IESC 31.

compromise the integrity of the judicial process and bring the justice system into disrepute. Therefore, such material (evidence) was inadmissible even in view of the above-stated principle established in other common law jurisdictions and did not fall within the exceptions thereto, as the illegal acts done for collecting the material (evidence) were not inadvertent, rather were deliberate and conscious.

Surveillance, where there is no Law

48. The present case, however, poses different questions: What would be the effect of violation of a constitutionally guaranteed fundamental right, which is absolute as it is not regulated by any law? Would the prohibition on admissibility of evidence collected by infringing such right be absolute or be subject to exceptions? While the fundamental right to personal liberty and privacy guaranteed by Articles 9 and 14 of the Constitution are subject to law, there is no law in our country that authorizes any law enforcement or intelligence agency to pry into the privacy of any person through surveillance and interception, except the IFTA. The scope of the IFTA, as discussed above, is also restricted to the surveillance and interception of a person who is suspected to be involved in any terrorist or anti-state activity. Besides this limited scope under the IFTA, no other law regulates the fundamental right of privacy of citizens and allows probe into their lives through surveillance and interception. Thus, in the remaining sphere the right to privacy is absolute, until law is enacted to regulate it. The violation of this sphere of the absolute privacy right makes the inadmissibility of evidence collected in violation thereof also absolute. Absolute right entails absolute prohibition on its violation. The ARU collected evidence by violating the sphere of absolute privacy right of the Petitioner Judge and his family through surveillance, and without backing of any law for its authority to do so. Therefore, such evidence/material was liable to be excluded from consideration without any exception, and the Law Minister and Prime Minister could not have relied and acted upon it, for making the “Summary” and advising the President respectively.

49. The Law Minister opined in the Summary put up before the Prime Minister that the Petitioner Judge appeared to have committed "grave misconduct" by not declaring three London properties owned by his spouse and children and by not explaining the source of their purchase in his tax record, without appreciating, rather ignoring altogether, the fact that no office or authority in Pakistan, under the relevant law, had ever asked the spouse and children of the Petitioner Judge to explain their sources to purchase the said properties and their failure to declare the same in their tax record, if there was any obligation for such declaration under the law.

50. The Prime Minister being the Chief Executive of the Federation, failed to verify and examine the information placed in the Summary before him. Advising the President to proceed against a judge of the highest court of the land required the Prime Minister to exercise due diligence and careful consideration of the contents of the Summary placed before him. It was not just any business he was attending to, he was approving initiation of inquiry against a Supreme Court judge, but he took no pains to see that the ARU, besides being a non-entity had no authority under the law to investigate and collect evidence on a complaint that could not have been entertained by the ARU. He also failed to verify how the addresses of the three foreign properties were discovered and who authorized the ARU to carry out transnational investigation and surveillance and whether any office or authority had asked the spouse and children of the Petitioner Judge to explain the sources of purchase of those properties. Without attending to the above material objections against the information placed before him and without taking due care, he advised the President on the basis of the evidence illegally collected by the Chairman, ARU on the oral advice of the Law Minister, to direct the Council to hold an inquiry against the Petitioner Judge.

Opinion of the President under Article 209 (5) of the Constitution

51. The President also did not question under what authority of law the ARU conducted inquiry into the allegations made in a complaint against a constitutional court judge and whether any office or authority had asked the spouse and children of the

Petitioner Judge to explain the sources of purchase of those properties, and approved the Prime Minister's advice and signed the draft Reference annexed with the Summary without applying his independent mind, exercising his discretion and forming his own opinion. The constitutional question that arises for determination is: whether under Article 209(5) of the Constitution, the President is to form his personal "opinion" or to act on the "advice" of the Cabinet or the Prime Minister as envisaged under Article 48(1) of the Constitution. In order to answer this question, the unique nature of the role of the President under Article 209 (5) needs to be seen and purposively interpreted in the confluence of foundational constitutional principles: parliamentary democracy; separation of powers; independence of judiciary; the rule of law; and neutrality of the office of the President being Head of State and representing unity of the Republic.

52. In a parliamentary democracy, the President is largely a non-executive symbolic leader of the State who does not exercise executive or policymaking power. However, in the same parliamentary democracy a non-executive President may, nevertheless, possess and exercise powers of extraordinary political intervention as a constitutional arbiter or guarantor. This is premised on the principle that underscores that a non-executive President separates the representative embodiment of the permanent institutions of the State from the leader of the incumbent Government. The separation of offices between Head of Government and Head of State, a non-executive President, helps maintain a symbolic separation between the incumbent Government, which is party-political, and the permanent institutions of the State as such, which are supposed to be politically neutral and universal. The President symbolically ensures that the ruling party or the coalition is separate from a non-partisan embodiment of the whole.[57] President is a neutral and an impartial arbiter who while forming his "opinion" under Article 209(5) is to weigh both: the sanctity of a non-partisan judicial institution and the grievance of the political government against the judge in order to give true expression to judicial

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[57] See Elliot Bulmer, Direct Democracy: International IDEA Constitution-Building Primer 3, International Institute for Democracy and Electoral Assistance, (2nd ed. 2017)

independence and judicial accountability. Only someone with the stature and position of a President can perform this challenging role.

53. The existence of judicial independence depends on the existence of legal arrangements that guarantee it. Judicial independence is composed of two foundations: independence of the individual judge and the independence of the judicial branch. The independence of the individual judge means that the judge is subject to no authority other than the law[58]. A judge will have "nothing to influence or control him but God and his conscience."[59] On matters of adjudication, the judge is alone. Second limb of judicial independence is the institutional environment in which the judge operates. It is a protective institutional wall around the individual judge that will guard him against the possibility of any inside or outside influence. A partisan Government or other specialized State institutions, at times, in order to achieve their political ends may try to influence or pressurize judges and invoke the removal process to penalize or intimidate judges. The real aim of proceedings may be to remove a judge whose judgments are considered troublesome by those in authority.[60] At this junction, the protective institutional design that guards the judge against external onslaughts becomes critical. The constitutional scheme of independence of judiciary is not to shut its eyes and ears to the complaints against the judge but to ensure that the judge gets to enjoy his constitutional protections till the last.

54. Separation of powers is the backbone of our democracy. The purpose of separation of powers is to strengthen freedom and prevent the concentration of power in the hands of one government actor in a manner likely to harm the freedom of the individual and other institutions. The principle requires that each branch of the State has a function that is its major function and the other branch should not impinge upon its nucleus. The institutions of the State have to walk the tightrope of checks and balances while

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[58] Aharon Barak, The Judge in a Democracy, Princeton University Press (2006).

[59] Evans v. Gore, 253 U.S. 245, 250 (1919) (quoting John Marshall, *cited at* Debates, Va. Conv. 1829-1831, 616, 619).

[60] See J. van Zyl Smit, The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law), 79-81.

operating in their designated spheres outlined clearly in the Constitution. One branch of the State should not be able to destabilize or weaken the other branch. Constitutional design protects this through the principle of separation of powers and President's role under Article 209(5) actualizes this balance. This is a constitutional principle. It may not be written in the Constitution but it is written within the lines. The courts in a democracy have to give expression to this principle when interpreting the Constitution.

55. One of the basic principles of democracy is the Rule of Law. From the standpoint of democracy, the most important of the meanings is the substantive rule of law. The substantive rule of law is the rule of proper law, which balances the needs of society and the individual and strikes a balance between society's need for political, economic and judicial independence, on the one hand, and the right to personal liberty, and human dignity on the other.[61]

56. Constitution is philosophy, politics, society, and law all rolled into one.[62] Judiciary is the guardian of the Constitution. In interpreting a Constitution, other than the express language of the Constitution, its implied language conveys a meaning between the lines, which is otherwise invisible in words - it is derived from the structure of the Constitution. Any interpretation of the Constitution must be grounded in these foundational principles. Role of the President when considered in the background of these fundamental principles, best assumes the role of an "arbiter" and a "buffer" between a partisan government and a permanent neutral branch of the State, the judiciary. The President is to examine the "information" placed before him under Article 209(5) as Head of State, acting as an arbiter between the two branches of the State, discharging his function as a person representing the unity of the Republic. This unique function of the President is co-equal with the role of the Council under the same clause of Article 209 of the Constitution. Both have to form an "opinion;" both have to perform a somewhat quasi-judicial function; both have to take a decision

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[61] Aharon Barak, The Judge in a Democracy, Princeton University Press (2006).

[62] ibid

on the basis of the information before them. Personal opinion of the President under Article 209(5) actualizes the non-partisan role of the President and provides a check on any partisan adventurism by the Government of the day against the judiciary. If the President is just a rubber stamp acting on the advice of the Cabinet, a hostile Government can, theoretically, file references against a number of judges of the constitutional courts, resulting in initiation of inquiries against all of them. Mere initiation of inquiry against the conduct of the constitutional court judges is enough to tarnish the image of judiciary, and weaken public confidence and public trust the nation reposes in the judicial institution.

57. At a textual level, "information" is placed before the President under Article 209(5). This information is then processed into a Reference only if the President forms an opinion that the information makes out a case for inquiry against the judge. If information is actually an "advice," the words "President is of the opinion" become redundant. Second, it is absurd to conclude that under the same provision, the Council is empowered to form its own "opinion" but the President is not. Under Article 48(2), where the Constitution vests the President with a more personalized task of exercising his "discretion," he performs the same himself and not on the advice of the Cabinet or the Prime Minister. Quite similar is the function of forming an "opinion" which can only be done by the President himself.

58. As a Head of the State, the President is the best person to review the "information" placed against a constitutional court judge by a constituent of the State, be it Federal, Provincial or Local Government. The executive function of the Government is till the placement of "information" before the President. Beyond that, the formation of "opinion" by the President falls outside the realm of the executive function and becomes a more quasi-judicial function in nature. Parallel needs to be drawn between the two streams: the President and the Council. While the Council actualizes this quasi-judicial function through the Supreme Judicial Council Procedure, 2005, the President does no different without such procedure. This leaves no margin for a mechanical act by the President on the advice of the Cabinet.

59. While the Constitution vests the President with the power to form an "opinion", it is difficult to imagine that this power is to be exercised by him in a mindless and mechanical manner, thus reducing him to just a rubber-stamp, who upon receiving information is to simply direct the Council to inquire into the conduct of a constitutional court judge. His role under Article 209(5) is not to execute an executive function, but act as an arbiter on a conflict between two State institutions. Failure of the President to form his "opinion" in this case has resulted in the President rubber stamping unconstitutional and illegal "information" into a Reference by directing the Council to inquire into the matter of the Petitioner Judge. This has compromised the neutrality of the office of the President and besmirched his exalted office. If expression is to be given to the constitutional scheme and foundational principles discussed above, the constitutional role of the President is best actualized as an independent arbiter under Article 209 when he is to form his personal opinion. To this conclusion, I also find support from the majority judgment of a 13- Member Full Court Bench of this Court in C*JP Iftikhar Chaudhry case*.[63] The allegations of *malafide* in that case were made against the President, and the Court accepting those allegations quashed the Reference impugned therein. If the President had to act, in the opinion of the Court, on and in accordance with the advice of the Prime Minister, the proof of *malafide* against the President would not have entailed the result of quashment of the Reference. Further, in summarizing the various steps in the process of making a Reference by the President, the Court mentioned, amongst other steps, receipt of information by the President, formation of opinion by the President and direction (Reference) by the President; no step regarding advice of the Prime Minister was mentioned.[64] Entry 35 in Schedule V-B to the ROB that provides that President is to act on advice of the Prime Minister for making Reference to the Council under Article 209(5) is, therefore, *ultra vires* the Constitution and is so declared.

60. In the present case, the President did not apply his mind and form his own opinion on the "information" received; he simply

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[63] See CJP Iftikhar Chaudhry case (supra) , per Khalil-ur-Rehman Ramday, J, paras 107, 196.

[64] See Ibid., paras 64, 65.

approved the advice of the Prime Minister and signed the draft Reference submitted with that advice. The formation of opinion and the direction to the Council to hold an inquiry was, therefore, not that of the President; both these acts are declared to have been made without jurisdiction and *coram non judice,* and thus unconstitutional and of no legal effect.

"Information" does not constitute Misconduct

61. Without prejudice to the findings and declarations given above that the information (evidence) collected against the Petitioner Judge by the ARU with the blessing of the Law Minister was legally inadmissible, it is underlined that the said information even if considered, does not constitute misconduct. The allegations against the Petitioner Judge in the "information" put up as a "Summary for the Prime Minister" that ultimately took the form of the Reference relate to the alleged violation of the Income Tax Ordinance, 2001 ("ITO"), Anti-Money Laundering Act, 2010 ("AMLA") and the Foreign Exchange Regulation Act, 1947 ("FERA"). There is no charge of corruption or acquisition of the foreign properties by the Petitioner Judge in names of his spouse and children as ostensible owners (*benamidar*). The stance of the Petitioner Judge is that no violation of the said laws is made out against him and no misconduct on his part can be spelt out from the assertions and allegations made in the Reference.

Income Tax Ordinance, 2001

62. The alleged violation of Section 116(1)(b) of the ITO is the mainstay of the Reference filed against the Petitioner Judge. Provisions of the said Section are equivocal, and attract different constructions. There has not yet been any judicial interpretation of it. The parties have, therefore, proposed different interpretations on it. It would be advantageous to cite the provisions of Section 116(1)(b) of the ITO before embarking on discussion on the proposed interpretations, for ready reference:

> **116. Wealth statement**.— (1) The Commissioner may, by notice in writing, require any person being an individual to furnish, on the date specified in the notice, a statement (hereinafter referred to as the "wealth statement") in the prescribed form and verified in the prescribed manner giving particulars of —
>
> ....

> (b) the total assets and liabilities of the person's spouse, minor children, and other dependents as on the date or dates specified in such notice;
>
> (2) Every resident taxpayer being an individual filing a return of income for any tax year shall furnish a wealth statement and wealth reconciliation statement for that year along with such return.

At the outset, it is pointed out that Section 116(1), ITO simply provides for issuance of notice to a taxpayer for filing the wealth tax statement or wealth reconciliation statement alongwith the income tax return and provides for particulars to be included in such a statement. In case a taxpayer has already filed the above statements alongwith his return, Section 116(1) appears to have no relevance. It is not the case of the Federation that the Petitioner Judge failed to file the wealth tax statement or wealth reconciliation statement. In case the said statements are deficient or incorrect, the tax department can issue notice to the taxpayer under Section 120(3) and consider the case in the light of Section 111 of the ITO. No such notice or proceedings were initiated by the FBR against the Petitioner Judge. Directly leveling allegation of violation of Section 116(1)(b) against the Petitioner Judge in this background is misconceived besides being premature.

63. It was argued on behalf of the Petitioner Judge, by referring to the principle of *noscitur a sociis* (known by its associates), that the meaning of the word "spouse" should be determined by considering the words "minor children, and other dependents" with which the former word is associated in clause (b) of Section 116(1). Therefore, an individual resident taxpayer, as per his version, is to mention the assets of his or her spouse in the wealth statement only if the latter is his or her "dependent". The stance of the Federation, on the other hand, was that the word "spouse" should be given its literal meaning. The Legislature has not used the word "dependant" with the word "spouse". Every individual resident taxpayer, as per its stance, is to mention the assets of his or her spouse in the wealth statement irrespective of the fact that the latter is or is not his or her "dependent". The possible interpretations do not end here. Rather, two other interpretations were also put to these provisions by the FBR while prescribing the forms of wealth statement. In the form prescribed for the tax year

2013, a taxpayer was required to declare the assets of his or her spouse if he or she had not filed income-tax return and wealth statement independently; while, in the form prescribed for the tax year 2015, a taxpayer was required to declare only those assets of his or her spouse which had been acquired by funds provided by that taxpayer. There are, as such, at least four possible interpretations of the provisions of Section 116(1)(b) of the ITO.

64. The matter of alleged tax violation has not reached this Court in its usual legal course routing through the tax authorities, tax tribunal and the High Court. I would therefore not give any definite finding on the said, or any other, possible interpretations of Sections 116(1)(b) of the ITO. I would rather examine the reasonability of forming the opinion of commission of misconduct against the Petitioner Judge on the basis of alleged violation of the provisions of Section 116(1)(b), and in doing so would test the formation of opinion on all the said four canvassed interpretations.

65. One foreign property was purchased by the spouse of the Petitioner Judge in the year 2004, before his elevation to the Bench of the Balochistan High Court in 2009; this property was therefore completely irrelevant for forming opinion of misconduct and making the Reference against the Petitioner Judge. The other two foreign properties were acquired by the spouse and children of the Petitioner Judge in the year 2013, after his said elevation; they were, therefore, to be declared in the tax year 2013 by the Petitioner Judge if there was any legal obligation on him, at that time, to do so. The children of the Petitioner Judge were not minors in the year 2013; therefore, no question as to his obligation to declare their assets arises under Section 116(1)(b) of the ITO. The current dispute relates to his alleged obligation to declare the assets of his spouse only. Therefore, the question is whether the Petitioner Judge was under any legal obligation to declare the foreign assets of his spouse in his wealth statement along with his tax returns filed in the tax year 2013. The simple and straightforward answer as per its own interpretation of the FBR that was in vogue in 2013 is that he was not. As afore-mentioned the FBR, in the wealth statement form prescribed for the tax year 2013, required a taxpayer to declare the assets of his or her spouse

if he or she had not filed income-tax return and wealth statement independently. It is an admitted fact that the spouse of the Petitioner Judge had filed her income-tax return and wealth statement independently, in the year 2013. It, therefore, appears that there was no legal obligation on the Petitioner Judge to declare the assets of his spouse in his wealth statement as per the requirement of the FBR prevailing in the year 2013. The departmental second interpretation expressed in the form prescribed for the tax year 2015 is that a taxpayer is required to declare only those assets of his or her spouse which had been acquired by funds provided by that taxpayer. There was neither any allegation in, nor was any material annexed with, the "Summary" initiated for forming the opinion of misconduct against the Petitioner Judge that the funds for purchase of the foreign assets were provided by the Petitioner Judge to his spouse. No opinion of misconduct against the Petitioner Judge, thus, could have been made on the basis of these two departmental interpretations of the provisions of Section 116(1)(b), ITO. It may be pertinent to mention here that though the courts of law are not bound by departmental interpretations and constructions of the laws yet they give due weight and consideration to such interpretations and constructions, and do not disregard them without cogent reasons. Such constructions have their basis in the necessary practice of executive and administrative officers construing statutes to execute and apply them, in advance of the judicial construction. These officers are usually expert on the subject dealt with by the law, and their practical construction of the law provides a sound basis for judicial interpretation.[65]

66. The interpretation offered by the Petitioner Judge is that an individual resident taxpayer is to mention the assets of his or her spouse in the wealth statement if the latter is his or her "dependent". For examining this interpretation, it would be useful to refer that during the hearing, the spouse of the Petitioner Judge requested the Court for allowing her to appear before the Court through video-link and make a statement. Her request was allowed. She then made her statement and referred to certain documents, copies of which were subsequently submitted in

[65] NS Bindra's Interpretation of Statutes, p.859-861 (10th Ed. 2007).

separate sealed envelopes to all Judges sitting in this Full Court Bench the next day. The documents submitted were: (i) copies of income tax returns and wealth statements for Tax Years 2018 and 2019; (ii) title documents in respect of agricultural land owned by her; (iii) evidence of liquid investment with National Savings Centre together with income derived therefrom; and (iv) certificate from a scheduled bank confirming movement of funds in her private foreign currency account etc. The wealth statements submitted by her include the foreign properties owned by her, the non-disclosure whereof in his wealth statements by the Petitioner Judge is the main basis for filing of the Reference against him. The FBR, in response to her statement, also submitted her available tax record. These documents include her income tax returns and wealth statements for various tax years including the Tax Years 2018 and 2019, and statutory notices requiring filing of tax returns for certain years when these were not voluntarily filed. The said documents and record amplify the version of the Petitioner Judge that his spouse is a separate and independent taxpayer/assesse in the records of the FBR, who has been separately and independently filing tax declarations in relation to income derived by her from her own sources. The tax record furnished by the FBR does not rebut this assertion, rather supports the same. In the background of this admitted position, the spouse of the Petitioner Judge cannot be said to be his dependent. Thus, the FBR could not have asked the Petitioner Judge to declare her assets in his wealth statement filed with the tax return in the tax year 2013, and sought explanation from him regarding the sources of purchase of the assets by his spouse. In arriving the conclusion that the spouse of the Petitioner Judge was not his dependent in the year 2013, I am supported by the following observations made in the case of *Imran Khan v. Nawaz Sharif*:[66]

> 126. As far as the issue regarding respondent No.6 namely Mariam Safdar allegedly being a 'dependent' of her father namely Mian Muhammad Nawaz Sharif is concerned I have found that the material produced before us sufficiently established that respondent No.6 was a married lady having grown up children, she was a part of a joint family living in different houses situated in the same compound, she contributed towards some of the expenses incurred by the joint family, <u>she submitted her independent tax returns, she owned sizeable and valuable property in her own name, she was capable of surviving on her</u>

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[66] PLD 2017 SC 265.

> <u>own and, thus, she could not be termed or treated as a 'dependent' of her father merely because she periodically received</u> <u>gifts from her father and brothers.</u> In this view of the matter nothing turned on respondent No.1 not mentioning respondent No.6 as his dependent in the nomination papers filed by him for election to NA-120 before the general elections held in the country in the year 2013. *(emphasis supplied)*

67. In terms of the scheme envisaged in the ITO, once an asset is claimed by a person to have been sourced by him or her and, more so, such asset is also declared in the statutory declaration/wealth statement by that person, then only that person could be questioned and required to explain the source of acquiring such asset by the tax authorities. In the event that person fails to properly explain the source, an addition could be made in his or her income and that added income is taxed accordingly. Under no circumstances, any other person could be made directly or indirectly part of such proceedings. Thus, no opinion of misconduct against the Petitioner Judge could have been formed on the basis of this interpretation of the provisions of Section 116(1)(b), ITO.

68. The interpretation suggested by the Federation is that every individual resident taxpayer is to mention the assets of his or her spouse in the wealth statement irrespective of the fact that the latter is or is not his or her "dependent". Section 114 of the ITO requires that the tax return for any tax year has to be accompanied by the wealth statement required under Section 116. In case a wealth statement is not filed or is deficient, the income tax return filed is not considered complete. In case of any deficiency, the Commissioner, FBR is empowered to issue a notice to the taxpayer under Section 120(3) of the ITO, informing the deficiency and providing him time to rectify it. If it is cured during the given time, the tax return is considered complete and accepted. Therefore, if the Commissioner, FBR had been of the view, as per the interpretation suggested by the Federation, that the Petitioner Judge was under legal obligation to declare the assets acquired by his spouse in the year 2013, in his wealth statement filed with tax return of 2013, he should have issued notice to the Petitioner Judge specifying the defect and providing him time to rectify it. The Petitioner Judge, in that case, could have defended that notice on all legal grounds available to him including the interpretation

proposed by him as well as the interpretations put to the provisions of Section 116(1)(b) by the FBR itself in the forms prescribed for wealth statement. No such notice, however, was issued to the Petitioner Judge. Further, if the Commissioner, FBR on the basis of some "definite information" had been satisfied that that the tax return and wealth statement filed by the Petitioner Judge in the year 2013 were not accurate and some income chargeable to tax had escaped taxation, he could have issued an amended assessment order under Section 122(5) of the ITO, after hearing the Petitioner Judge, within a period of five years prescribed in Section 122(2) of the ITO. No such legal exercise was done. Therefore, without any determination of, or even initiation of legal proceedings on, the alleged violation of Section 116(1)(b) by the Commissioner, FBR either under Section 120 or under Section 122 against the Petitioner Judge, no opinion of misconduct against the Petitioner Judge could have been formed on the basis of the interpretation suggested by the Federation also.

69. In the last on the current head of discussion, I consider it important to highlight that Section 116A which requires a resident individual taxpayer to furnish statement of foreign assets, was inserted in the ITO in the year 2018 by the Finance Act, 2018. This amendment made in the year 2018 *prima facie* shows that there was earlier no obligation on a resident individual taxpayer to furnish such statement of even his own foreign assets, much less the foreign assets of his spouse and children.

Anti-Money Laundering Act, 2010

70. The Federation argued that being a case of 'concealed income', the matter also falls under the AMLA by referring to following entries in the Schedule to the AMLA:

> **Section XIIA The Income Tax Ordinance, 2001**
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> 192. Prosecution for false statement in verification-where tax sought to be evaded is ten million rupees or more
>
> 192A. Prosecution for concealment of Income-where tax sought to be evaded is ten million rupees or more
>
> 194. Prosecution for improper use of National Tax Number Certificate – where tax sought to be evaded is ten million rupees or more

> 199. Prosecution for abetment – where tax sought to be evaded is ten million rupees or more.

The argument is hopelessly misconceived and misdirected. The aforesaid entries in the Schedule were inserted vide Notification No. SRO 425(I)/2016 dated May 14, 2016[67] through which offences under Sections 192, 192A, 194 and 199 of the ITO were listed as "predicate offences" for the purposes of invocation of the AMLA. In the present case, admittedly all three foreign properties were acquired prior to May 14, 2016; therefore, the AMLA is not applicable at all. Needless to mention, that the principle of prohibiting retrospective punishment is a guaranteed fundamental right under Article 12 of the Constitution. Even otherwise, it is manifestly clear that the Legislature has put a precondition that 'tax sought to be evaded is ten million rupees or more' in all the four entries mentioned above. Thus, for the invocation of the AMLA the law presupposes conclusion of proceedings under the relevant provisions of the ITO to determine the said threshold and that too in relation to tax liability for the period on or after May 14, 2016. No such determination has taken place; hence, there is no application of the AMLA to the present case.

Foreign Exchange Regulations Act, 1947

71. The FERA provides for regulation of payments and dealings in foreign exchange and securities, and the import and export of currency and bullion. Sections 4 and 5 of the FERA provide that no one can deal in foreign exchange[68] except through an authorized dealer and imposes restrictions on transfer of money outside Pakistan. There is no evidence on the record that establishes or even *prima facie* shows any violation of the FERA against the Petitioner Judge. The Federation pointed out no violation of the FERA, even during the arguments.

72. In view of the above analysis of the relevant provisions of the ITO, AMLA and FERA, no violation of any provision of those laws is made out against the Petitioner Judge on the basis of the assertions and allegations made in the "information" given in the "Summary for the Prime Minister" that ultimately took the form of

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[67] Published in Official Gazette on May 20, 2016.

[68] Defined in section 2(d) of FERA to mean foreign currency , etc.

the Reference; therefore, no opinion as to the *prima facie* commission of any misconduct by the Petitioner Judge could have reasonably been made on the basis of that "information."

Code of Conduct and Vicarious Responsibility of a Judge

73. A constitutional court judge can be removed from office if he or she commits "misconduct" as provided under Article 209 of the Constitution. "Misconduct" is a constitutional term and must draw its spirit and meaning from the Constitution. It is important that the meaning of constitutional "misconduct," the scheme of the Code of Conduct and the scope of the impeachable misconduct of a constitutional court judge must flow from the standard of judicial integrity set out by the Constitution. The constitutional standard of judicial integrity lies in the oath of a constitutional court judge, as discussed earlier; falling short of it would amount to impeachable misconduct. Under Article 209(8) of the Constitution, the Council issues a Code of Conduct, which is to be observed by the judges of the constitutional courts. This Code of Conduct for the Judges of the Supreme Court and High Courts[69] ("Code") carries additional standards and etiquettes for Judges to follow in order to uphold the prestige and honour of the judicial institution. The Code formulated by the Supreme Judicial Council cannot control the constitutional meaning of the term "misconduct" but provides a helpful guideline. The Code is a basket of judicial obligations, etiquettes, and courtesies of varying degrees and effect, covering both judicial character and judicial behavior of a Judge.[70] While some Articles of the Code directly impinge on judicial integrity, others simply pass as mere guidelines of good behavior, civility and mannerism in conducting the court. It cannot be said that every deviation of the Code, how insignificant it may be, would constitute impeachable misconduct. For example, a judge's failure to decline to act in a case involving his own interest[71] may constitute an impeachable misconduct, while in case a judge who gets a speeding ticket for driving fast and offends the requirement of being law-abiding may not be liable for an impeachable

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[69] Framed under the Constitution of 1962 and amended from time to time. Final version to date is till the last amendment made in the year 2009.

[70] See the preamble to the Code.

[71] Article III of the Code.

misconduct. Similarly, a judge who is not punctilious enough in sitting and rising in court, cannot be removed on this pretext, unless ofcourse, these violations are so frequent and regular that they weigh heavily on the public confidence and legitimacy of the judicial institution. So each case has to be seen in its own peculiar facts after examining the nature of the violation. It is underlined that the Code largely lays down judicial obligations and etiquettes for the Judge in his official capacity. Only Article II of the Code provides generalized yet more personal standards like "a Judge must be God-fearing, law-abiding, abstemious, truthful of tongue, wise in opinion, cautious and forbearing, blameless and untouched by greed." These saintly qualities are personal to the Judge. We must also remember that judges are humans at the end of the day, no matter how glorified and hallowed their office and the Code may make them appear. Chief Justice McLachlin[72] said: "Judges are not living Oracles. They are human beings, trained in the law, who struggle to understand the situations before them and to resolve them in accordance with the law and their conscience."[73] Impeachable misconduct is when there is a violation of law or violation of the Code that is so grave that it ruptures judicial integrity, tarnishes public confidence and pulls down legitimacy of the judicial institution. Short of this, it might be misconduct but not impeachable misconduct. Like under the service laws, gravity of misconduct determines the penalty, which ranges from mere censure all the way to dismissal from service. It is commonsensical that not every infraction leads to removal of a constitutional court judge or constitutes impeachable misconduct. The best test is to see if the judicial integrity of a judge has been undermined resulting in lowering the public confidence and trust in the judiciary, thus impairing impartiality and legitimacy of the judicial institution.

74. Judicial integrity and the Code are judge specific, largely covering judicial conduct and partly his personal behavior. The standards under the Code extend to the judge and judge alone. The Code has no jurisdiction over the family, relatives and friends of the judge. It is certainly ideal but it would be unfair to expect

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[72] Chief Justice of Canada (2000-2017).

[73] Judging in a Democratic State: Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada.

that the spouse and children of the Judge must be equally "God- fearing, law-abiding, abstemious, truthful of tongue, wise in opinion, cautious and forbearing, blameless and untouched by greed." The Code has no concern with the family or friends of the judge. Infact, it is totally impractical to think otherwise. Let us assume that the spouse or the family of a judge were remiss in managing their financial and tax affairs. In the absence of any charge or evidence of corruption against the judge, if the judge had time and again asked his spouse and family to be more careful and responsible in their tax matters, but they for some reason did not do so, what is the judge supposed to do in such a situation? Should the judge abandon his spouse and the family? Does the Code provide an answer? Does the Code expect and require that families of the judges must be exemplary and ideal members of the society? And if they do not come up to the expectation or if there is even the slightest of infraction on their part, the judge is liable for their misconduct? Is this responsibility part and parcel of the terms and conditions of service of a constitutional court judge? I think not. The Code is judge specific document and does not extend to family members and in no event, holds a judge vicariously responsible for the conduct of his family - his spouse and children - who are independent, natural and legal persons in their own right and can do whatever they want. "Conduct" and "misconduct" are personal to a judge under the Code. Like any other citizen, a judge cannot be held accountable for the conduct of someone else, there is no such thing as vicarious responsibility of a judge, unless the law requires it or there is evidence that the wrongdoings of the judge have been concealed behind the family façade. In the case of Chief Justice of Gibraltar,[74] Lord Hope (with whom Lord Rodger and Lady Hale agreed) while answering the question that to what extent, and in what circumstances, is a judge to be held accountable for the actions of his or her spouse or other close relatives, observed: "The days are long gone when a husband and wife were treated as one person in law and the husband was that person. It is not unknown for senior figures in public life to have spouses or partners who pursue their own careers and interests, in the course of which they may say or do

[74] Hearing on the Report of the Chief Justice of Gibraltar, [2009] UKPC 43. (4-3 minority view)

things that, are controversial and embarrassing. Any difficulties that this may give rise to should be resolved between themselves, if they can be resolved at all, in private. Judges are not to be taken as supporting or endorsing their spouse's or partner's conduct if they do not publicly dissociate themselves from it. The law should recognize that they are independent actors and that the deeds of the one are not to be visited on the other." I fully subscribe to his views. Unless the personal or official conduct of the judge threatens public confidence in the judicial institution or the legitimacy of the judicial institution, the question of impeachable misconduct does not begin to arise.

Publicizing the Reference

75. The matter of leaking and publicizing the filing of the Reference against the Petitioner Judge and of the allegations made therein is also of great concern and requires serious consideration. The Council has structured its discretion to process any "information" received in the form of a complaint, to make the preliminary assessment thereof and to conduct the "inquiry" by its Procedure of Inquiry, 2005. Paragraph 13 of the Procedure of Inquiry, 2005 provides for the proceedings of the Council to be conducted *in camera* and also bans reporting the proceedings of the Council. Validity of the Procedure of Inquiry, 2005 particularly of its Paragraph 13 was challenged in *Justice Siddiqui Case*,[75] but was upheld by this Court. Purpose of Paragraph 13 was stated to protect both the Judge whose conduct and capacity is to be inquired into and the institution of the judiciary. The Court held that the necessity of *in camera* proceedings prevails over the right to information provided by Article 19A of the Constitution, and observed that due to an open trial the name of a Judge facing inquiry could be maligned even though the allegations may eventually be rejected by the Council. The Court directed in clear terms that "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*". The Court thus put an absolute restriction of confidentiality on the process of preliminary assessment of the allegations made against a

[75] Shaukat Aziz Siddiqui v. Federation of Pakistan, PLD 2018 SC 538.

constitutional court judge. This restriction, therefore, equally applies to publicizing the Reference filed by the President and the allegations made therein. In the context of publicizing, proceedings of preliminary assessment of "information" conducted by the President is similar and equal to proceedings by the Council. Therefore, if the proceedings are to be conducted by the Council *in camera*, then so should be the proceedings by the President.

76. Under Article 204(2)(b) of the Constitution, the constitutional courts have power to punish any person who scandalizes the Court or otherwise does anything which tends to bring the Court or a Judge of the Court into hatred, ridicule or contempt. Publicizing a complaint or Reference and the allegations made therein, of which veracity is yet to be determined after inquiry by the Council, definitely tends to bring the Judge into hatred, ridicule and contempt, and thus attracts the provisions of Article 204 of the Constitution and the Contempt of Court Ordinance, 2003. Needless to say that hostile publicity of a matter through modern media can orchestrate an unprecedented level of hostility towards a particular individual, and even an institution.[76] The restriction of confidentiality is to achieve a certain objective, i.e., preserving the integrity and honour of the judicial institution by maintaining public confidence. Publicizing a complaint or Reference undermines public confidence in the judiciary and lowers the esteem of the individual judge. The prestige and integrity of the judiciary is thus undermined without any concrete findings of misconduct against a Judge. The restriction is also to preserve, protect and safeguard the authority and dignity of the Judge who continues performing his functions on the Bench during the inquiry against him, as there is no provision in the Constitution to suspend his judicial powers during the inquiry proceedings.[77]

77. In the present case, it is a matter of record that the Reference was publicized even when it had not yet been placed before the Council for preliminary consideration, as the filing of the Reference and the allegations made therein against the Petitioner Judge was

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[76] See David Corker and David Young, Abuse of Process and Fairness in Criminal Proceedings, Butterworths Law (2000).

[77] See Hlophe v. Constitutional Court of South Africa, (2008) ZAGPHC 289; and, Justice Paul Uuter Dery v. Tiger Eye P.I., 2016 SC (J1/29/2015), Ghana Supreme Court.

published in several newspapers on May 28, 29, 30 and 31, and June 1 and 3, 2019 and later during the proceedings before the Council the matter was discussed in press conferences and TV talk shows by the Government Ministers and even by the President of Pakistan. The act of publicizing the filing of the Reference against the Petitioner Judge and of the allegations made therein, is clearly unconstitutional and falls within the scope of the provisions of Article 204 of the Constitution and the Contempt of Court Ordinance, 2003. The fact as to who leaked and publicised this matter is disputed and cannot be resolved in the present proceedings, but the matter cannot be left unnoticed and allowed to go unchecked. Such omission would encourage repetition of the mischief in future. Thus, I would leave the matter to the discretion of the Hon'ble Chief Justice of Pakistan who is *pater familias* of the judiciary and is to protect its prestige, honour, reputation and integrity, to initiate appropriate proceedings for a thorough inquiry of the matter so that the right to fair trial of the persons involved in publicizing the Reference and the allegations made therein, may not be infringed.

Is the Reference Malafide?

78. An administrative authority must act in a *bonafide* manner and should never act for an improper motive or ulterior purpose or contrary to the requirement of the statute or improperly exercise discretion to achieve some ulterior purpose. The determination of the plea of *malafide* involves two questions, namely – (i) whether the administrative action is contrary to the object and requirements of law, and (ii) whether there is a personal bias or an oblique motive. *Malafide* of law is constituted when a person inflicts an injury upon another person in flagrant contravention of the law; he is not allowed to say that he did so with an innocent mind. He is taken to know the law and act within the law. He may, therefore, be guilty of *malafide* of law, although so far as the state of mind is concerned, he acts ignorantly and in that sense innocently. Thus, action of an authority is tainted with *malafide* of law when it takes the action which is so unreasonable, improbable or blatantly illegal that it ceases to be an action contemplated by the law under which it is purportedly taken, or takes the action by

violating the mandatory procedural requirements or without satisfying the jurisdictional requirements, or takes the action which no reasonable person could have taken on the basis of the available material.[78] On the other hand, an unlawful action done designedly, willfully or wantonly and not accidently, thoughtlessly or negligently falls within the domain of *malafide* of fact. In such case, the action is taken in bad faith either to hurt the person against whom the action is taken or to benefit oneself or another, or in colourable exercise of powers for collateral or ulterior purposes not authorized by the law under which the action is purportedly taken.[79] If the act suffers from *malafide* of law, the mischief is corrected by nullifying the act; *malafide* of fact, however, further entails the consequences of making the actor accountable also.

79. It is true that *malafide* is difficult to prove against a public functionary because there is a presumption of regularity with regard to all official acts under Article 129(e) of the Qanun-e- Shahdat Order, 1984.[80] However, this presumption of regularity is available only to official acts done by a person or authority competent to do that. The presumption of regularity cannot be attached to the acts done by the persons and authorities who have no legal authority to do those acts, rather a reverse presumption for lack of *bonafide* arises. In such a case, the onus to prove *malafide* does not remain as high. *Malafide* is inferential by construct. It can be drawn from direct or circumstantial evidence.[81] The Court carefully takes into consideration the surrounding circumstances of the action; the conduct of the persons involved; the object and purpose to be achieved; and the nature of the illegality. The court, in a way, reconstructs the whole act and its backdrop, and then evaluates the *fides* of the action and its actors. If *malafide* on the part of the actors is apparent on the face of record, then the court of law seized with the matter is

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[78] See West Pakistan v. Begum Shorish Kashmiri, PLD 1969 SC 14, 32 (5-MB), per Hamoodur Rahman, J; Sarwar v. Punjab, 1990 SCMR 999, 1001, per Shafiur Rahman, J.; and, Said Zaman v. Federation, 2017 SCMR 1249, 1279-80 (5-MB), per Sh. Azmat Saeed, J.

[79] See Abdul Rauf v. Abdul Hamid, PLD 1965 SC 671, 675 (5-MB), per B. Z. Kaikaus, J.; Federation v. Saeed Ahmad, PLD 1974 SC 151, 170 (4-MB), per Hamoodur Rahman, C. J.,; Said Zaman v. Federation, 2017 SCMR 1249, 1279-80 (5-MB), per Sh. Azmat Saeed, J.

[80] Federation v. Saeed Ahmad, PLD 1974 SC 151.

[81] See CJP Iftikhar Chauhdry case (supra) p.215, Per Muhammad Nawaz Abbasi, J.

not supposed to shut its eyes from taking notice thereof.[82] While full faith is given to public acts and record of the Government, this assumption is overturned if *malafide* is borne out from the record.

80. If we start reading the events after the *Faizabad Dharna* judgment, one is compelled to conclude that the Petitioner Judge was deliberately targeted for his observations and directions made in that judgment, which perhaps were considered hostile and troublesome by those in power. This fact is floating on the record of the review petitions. The vengeance and resentment against the Petitioner Judge is more than visible from the strange and unprecedented assertions made for his removal on the ground of misconduct in the review petitions; soon it took shape of a vague complaint filed before an incompetent authority (ARU) housed in the office of the Prime Minister. The vengeance and resentment continued with the entertainment of the bogus complaint, unauthorized investigation and collection of evidence through the surveillance of the Petitioner Judge and his family, illegally seeking information from statutory institutions and using the illegally collected evidence for making advice to the President to send the Reference against the Petitioner Judge. These extraordinary facts and circumstances in the process of conducting the so-called accountability of the Petitioner Judge may be summarized in sequence, as under:

i. The current ruling parties (PTI and MQM) aggrieved of some observations made by the Petitioner Judge in the *Faizabad Dharna* judgement make an unprecedented and astonishing assertion in their review petitions filed against that judgment that the Petitioner Judge has violated his Oath of Office and Code of Conduct for Judges, and is liable to be removed from office under Article 209 of the Constitution.

ii. The complainant makes the complaint for "Accountability of Judges" to the ARU, housed in the Prime Minister's Office, and not to the Council, in the very next month of filing of those review petitions.

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[82] Hazara Improvement Trust v. Qaisra Elahi, 2005 SCMR 678, p.698.

iii. The Chairman, ARU (substantive post - Special Assistant to the Prime Minister) discusses the matter with the Law Minister informally, without making any formal consultation through the Cabinet Division (under whom the ARU was to function as per decision of the Cabinet) with the Law and Justice Division in accordance with Rule 14 of the ROB.

iv. The Law Minister gives a “go ahead” to the ARU in an informal discussion, without realizing the importance of his advice, even oral, for inquiring into the veracity of the allegations made in the complaint against Judges of the Constitutional Courts.

v. The Chairman, ARU who is a Barrister-at-law, and not a layman, knowing well that an oral advice of the Law Minister has no value in the eye of law and without looking for his own legal authority to inquire into the allegations made against Judges of Constitutional Courts, initiates the inquiry into the allegations made in the complaint.

vi. The Chairman, ARU makes the decision alone to initiate the process of inquiring into the allegations made in the complaint, and does not obtain the opinion of or consults with the Members of the ARU as to whether the institutions they represent can inquire into the allegations made in a complaint against a constitutional court judge.

vii. The Chairman, ARU decides to proceed for accountability of the judges of constitutional courts, and not for recovery of their alleged foreign assets as per the so-called mandate of the ARU, for he decides not to inquire about the alleged properties of another judge named in the same complaint, while noting that the said judge has already resigned.

viii. The Members of the ARU make compliance of the directions of the Chairman, ARU and share with him the confidential information available in the record of their Departments, by violating the provisions of the law under which those Departments function.

ix. The Legal Expert, ARU, who is also a Barrister-at-law, in compliance with the directions of the Chairman, ARU causes surveillance of the Petitioner Judge and his family for locating the properties in London, in violation of their fundamental rights of liberty, privacy, dignity and freedom of movement, and in derogation of the provisions of IFTA.

x. The Member of the ARU from FIA, Assistant Commissioner (Inland Revenue), Commissioner (Inland Revenue), and DG (International Taxes), all four, submit their reports on May 10, 2019. The Chairman, ARU then examines all the reports and record submitted to him on May 10, 2019, makes his final report on May 10, 2019 and submit it to the Law Minister on the very same day, i.e., May 10, 2019. All proceedings stand concluded in one day, with admirable alacrity.

xi. The Law Minister (a distinguished lawyer) does not raise any objection to the inquiry conducted by the ARU for accountability of a constitutional court judge, on receiving the report of the Chairman, ARU. He rather, relying upon the illegally collected evidence in that inquiry, makes a "Summary for the Prime Minister" proposing to the Prime Minister to advise the President to form an opinion that the Petitioner Judge may be guilty of misconduct and direct the Council to inquire into the matter under Article 209 of the Constitution.

xii. The Law Minister opines that the Petitioner Judge appears to have committed "grave misconduct" by not declaring three London properties owned by his spouse and children and by not explaining the source of their purchase in his tax record, without appreciating, rather ignoring, the fact that no office or authority in Pakistan, under the relevant law, has ever asked the spouse and children of the Petitioner Judge to explain their sources to purchase the said properties and their failure to declare the same in their tax record, if there was any obligation to declare the foreign assets under the ITO.

xiii. The Prime Minister remains unaware of the actions of his Special Assistant, the Chairman, ARU working right under his nose at the Prime Minister's Office. Further, the Prime Minister without asking the Law Minister or the Chairman, ARU about their unconstitutional and illegal investigation and evidence collection against a constitutional court judge and without inquiring whether any office or authority had asked the spouse and children of the Petitioner Judge to explain the sources of purchase of those properties and whether the properties owned by the spouse and children of the Petitioner Judge attract any liability of the Petitioner Judge, goes ahead, without any application of mind, to advise the President to form the opinion and direct the Council, and to sign the draft Reference.

xiv. The President also does not ask the said questions and approves the Prime Minister's advice and signs the draft

> Reference annexed with the Summary without applying his independent mind, exercising his discretion and forming his own opinion.

Such blatant violations of the law and Constitution by the Chairman, and Legal Expert of the ARU, the officers of FBR, FIA and NADRA, the Law Minister and the Prime Minister; undue haste in processing the matter; dubious credentials and ring of anonymity around Mr. Dogar (the complainant); oddity of approaching ARU instead of the Council; failure on the part of ARU to convincingly show how they located the addresses of the three UK properties of the family of the Petitioner Judge; afterthought of referring to *192.com* and again failing to show how *192.com* helped; failure of the ARU to show who searched through *192.com* and the UK HM Land Registry, who registered with them and who paid for it; keeping names of those persons in secret; resultant necessary inference of having done the covetous transnational surveillance of the Petitioner Judge and his family to dig out the addresses of the three properties with support of the intelligence agencies; and rushed and mechanical approval of the Summary by the Prime Minister, all these facts and circumstances when read in the background of the assertions made by the current ruling political parties (PTI and MQM) in their review petitions filed against the *Faizabad Dharna* judgment, lead to a clear and a convincing finding that the whole process initiated under the garb of accountability of the Petitioner Judge suffers from more than mere *malafide* of law and jumps up into the realm of *malafide* of fact also. In the present case, other than the legal and constitutional violations, extraneous considerations, as mentioned above, have come to surface, which reflect vindictiveness and ulterior motive. Knowing well that there was no determination of tax violation of the Petitioner Judge and no explanation of the spouse and children of the Petitioner Judge was ever sought, the matter was still pushed ahead with the collateral purpose of defiling the honour of the Petitioner Judge and with the design to pressurize him into resignation or lead to his removal. These facts go beyond *malafide* of law and fall within the ambit of *malafide* of fact as they show bad faith and colourable exercise of powers for collateral or ulterior purposes not authorized by the law under which the actions were purportedly taken. Therefore, the actions of entertainment of the complaint, the investigation and surveillance for the collection of evidence, the putting up of Summary before the Prime Minister by the Law Minister and finally the approval of the Summary by the Prime Minister and placing the "information" before the President under Article 209(5) of the Constitution for removal of the Petitioner Judge from office are found to be tainted with both *malafide* of law and *malafide* of fact. All the Government actors mentioned above are held responsible. As the buck stops with the Prime Minister in a constitutional parliamentary democracy, the major burden of these malicious actions fall on his shoulders who also happens to be the leader of a political party that had filed the review petition with an astonishingly unique prayer seeking ouster of the Petitioner Judge for expressing an independent view.

Held

81. In view of the above findings, all the acts and steps from the entertainment of the complaint till the sanction of the "Summary" for placement of the "information" before the President by the Prime Minister are declared illegal, without jurisdiction, *malafide* of law and fact, and thus unconstitutional and of no legal effect. While, the acts of the President approving the advice of the Prime Minister, and signing and sending the Reference against the Petitioner Judge are declared without jurisdiction and *coram non judice,* and thus unconstitutional and of no legal effect. The outcome of the said declarations is that:

(i) the Reference against the Petitioner Judge is quashed, and as a result the proceedings, including the Show Cause Notice, before the Council stand abated;

(ii) the authorities concerned are directed to initiate criminal and disciplinary proceedings against the Chairman, Legal Expert and Members of the ARU, as well as, against the other defaulting officials of FBR and NADRA for their illegal acts, under the IFTA, ITO and NADRA Ordinance, 2000; and,

(iii) the Registrar of this Court is directed to place the matter before the Hon'ble Chief Justice of Pakistan for considering to initiate appropriate proceedings for a thorough inquiry of the matter of leaking and publicizing the Reference and the allegations made therein, and for taking legal action against the persons found involved therein.

I allow all the constitutional petitions in these terms.

Reasons for my Disagreement with the Short Order[83]

82. Justice Ruth Bader Ginsburg[84] once commented, "Judges disagree without being disagreeable." While this is largely true for us judges, history is not as forgiving. Through Short Order dated 19.06.2020 the Reference against the Petitioner Judge was quashed by unanimous opinion of all the members of this Full Court Bench. However, the Majority added certain directions to the FBR and the Council whereby the Commissioner, FBR was directed to issue notices under ITO to the spouse and children of the Petitioner Judge regarding the acquisition of the three foreign properties. He was also directed to decide the notices and the Chairman FBR was directed to submit a report of the decision to the Council. While the Council was asked to consider the matter by invoking its *suo moto* powers with or without there being a report filed by the Chairman, FBR. All these directions were to be actualized within a specified time-line provided in the Short Order. With respect, I could not persuade myself to concur with these directions. Here under are my reasons for the disagreement.

83. The spouse and children of the Petitioner Judge like all other citizens of Pakistan are independent persons and enjoy an inalienable right to the protection of law. As they were not party to the instant proceedings and were never summoned or made a party to the proceedings by the Court, any adverse order against them, will deprive them of their inalienable right to due process under the Constitution and the law, and will contravene the well- entrenched and deep rooted principle of *audi alteram partem*. The Court cannot go against the grain, values and scheme of our Constitution and the established principles of law. After the Reference against the Petitioner Judge was unanimously quashed by this Full Court Bench, the case set out against the Petitioner Judge came to an end. In the absence of any allegations of corruption against the Petitioner Judge or of his holding foreign properties in the names of his wife and children as a trustee or a *benamidar*, this Court, and for that matter the Council, have no

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[83] Paragraphs 4-11, thereof.

[84] Former Associate Justice of the Supreme Court of the United States (1933-2020)

concern with the assets and properties of the spouse and the children of the Petitioner Judge.

84. The FBR does not require any direction from this Court for taking any proceedings against any individual (including a constitutional court judge or his spouse and children) for a tax violation under the Income Tax Ordinance, 2001, if any. Similarly, the Council is also free and independent to exercise its *suo moto* jurisdiction against any judge of the constitutional courts when so required. It is nobody's case that either the FBR or the Council were reluctant or unwilling to perform their functions under the law and the Constitution.

85. The principle is more than settled that if an Authority has no jurisdiction in the matter under the law, the jurisdiction cannot be conferred on that Authority by an order of the Court.[85] Under Section 122 of ITO an assessment order cannot be reopened after a lapse of five years by the FBR. Also, regulating the Tax Commissioner to function and perform his duties within a prescribed time-line, which is not so provided under the ITO amounts to entering the realm of judicial legislation.

86. With respect, direction to the Chairman, FBR to send the Report to the Council would make the Chairman, FBR a complainant and the Report a new complaint. The FBR is an organ and instrumentality of the Federal Government and is not empowered to directly approach the President under Article 209 of the Constitution unless the Federal Government i.e., the Cabinet, approves to place such information before the Council through the President. The Federal Government of any of its Departments cannot make a complaint or report in relation to the conduct of a judge directly to the Council, and it has to place such a complaint or report in the form of "information" before the President to form his "opinion" and make direction (Reference) in accordance with the provisions of Article 209 (5) of the Constitution. Clear letter of the Constitution cannot be bypassed. A thing required by law to be

[85] See Badshah Begum v. Additional Commissioner, 2003 SCMR 629.

done in a certain manner must be done in the manner as prescribed by law or not to be done at all.[86]

87. This Court cannot, it is submitted with respect, direct someone to file a complaint against a constitutional court judge before the Council and then make the Council consider the said complaint. This would have a far reaching effect as it would dismantle the independence and neutrality of the Council and the constitutional scheme under Article 209 that safeguards a constitutional court judge. It also flouts the right to fair trial under Article 10A of the Constitution. The Council is a constitutional body which enjoys *suo moto* powers to inquire into the conduct and capacity of a judge. Acting on its own motion (*suo moto*) and being asked to act on its own motion (*suo moto*) are two inconsistent and irreconcilable concepts. The Council is structured under the Constitution to exercise its *suo motu* powers independent of any extraneous influence. I am fortified by the observations of Ajmal Mian, C.J. made in *Ikram* case.[87] The learned Chief Justice while declining the prayer, in that case, for issuing direction to the President to make Reference against some constitutional court judges under Article 209(5) of the Constitution observed that Article 209(5) "does not admit filing of a Constitutional petition for a direction to the Supreme Judicial Council or to the President to initiate proceedings of a judicial misconduct against a Judge of a superior Court. ... This Court or a High Court cannot take upon itself the exercise to record even a tentative finding that a particular Judge has committed misconduct warranting filing of a reference against him under Article 209 of the Constitution."

88. In my view, the observation that the right to appeal under the ITO would be available to the spouse and children of the Petitioner Judge while simultaneously, the Council may also commence proceedings - can lead to conflicting results and thereby, may render the appeal under the ITO otiose and futile. Besides, the Council does not enjoy any power to issue directions to any judicial or a quasi-judicial forum to speed up pending matters against a constitutional court judge.

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[86] See Assistant Collector v. Khyber Electric, 2001 SCMR 838; S.M.C. No. 18 of 2010, PLD 2011 SC 927; and, Zia Ur Rehman v. Ahmed Hussain, 2014 SCMR 1015.

[87] Ikram Chaudhry v. Federation, PLD 1998 SC 103, para 11.

89. The proceedings initiated through the short order after the quashment of the Reference against the Petitioner Judge would mean that the Council must now consider if a judge can be made vicariously liable for misconduct for his family's affairs, a concept that is alien to the Code of Conduct and has nothing to do with judicial integrity as discussed above.

<u>*In the end*</u>

90. In our constitutional democracy, it is essential that everyone enjoys his or her domain of freedom, free from Governmental intrusion - lest it aims to check an unlawful activity. Privacy, liberty, autonomy and agency are integral parts of dignity and life and are cherished constitutional values that determine the frontiers of a living constitutional democracy. There can be no compromise on either judicial independence or judicial accountability. These are essential pillars, which together uphold public confidence and legitimacy of the judicial institution. The real and enduring strength of the judiciary, however, is anchored in ruling according to the Constitution and the law without fear or favour, irrespective of public perception and irrespective of who is before the court, an ordinary litigant or a judge of the highest constitutional court of the land. An American poet once said:

The perfect judge fears nothing

- he could go front to front before God;
Before the perfect judge all shall stand back

- life and death shall stand back

- heaven and hell shall stand back.[88]

(Syed Mansoor Ali Shah)[89]
Judge

Islamabad,
the 04th November, 2020.
Approved for Reporting.
Sadaqat

[88] Walt Whitman, "Great are the Myths" in Leaves of Grass.

[89] Before parting I wish to appreciate and acknowledge the valuable assistance rendered by Mr. Zafar Iqbal Khokhar, Research Officer cum Civil Judge, Supreme Court Research Centre. (SCRC)