IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial
Mr. Justice Maqbool Baqar
Mr. Justice Manzoor Ahmad Malik
Mr. Justice Faisal Arab
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Sajjad Ali Shah
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Munib Akhtar
Mr. Justice Yahya Afridi
Mr. Justice Qazi Muhammad Amin Ahmed

CONSTITUTION PETITION NO.17 & 19 OF 2019 & C.M.A. NO.7417 OF 2019 IN CONST. P. 19 OF 2019 & CONSTITUTION PETITIONS NO.20-30, 32 & 34 OF 2019.

Justice Qazi Faez Isa	***... Petitioner(s)*** ***(in Const.P.17/2019)***
Supreme Court Bar Association thr. its President	***... Petitioner(s)*** ***(in Const.P.19/2019)***
Abid Hassan Minto & another	***... Petitioner(s)*** ***(in Const.P.20/2019)***
Pakistan Bar Council thr. its Vice Chairman	***... Petitioner(s)*** ***(in Const.P.21/2019)***
Abdul Basit, President High Court Bar Association, Quetta.	***... Petitioner(s)*** ***(in Const.P.22/2019)***
Muhammad Asif Reki, President Quetta Bar Association	***... Petitioner(s)*** ***(in Const.P.23/2019)***
Sindh High Court Bar Association thr. its President	***... Petitioner(s)*** ***(in Const.P.24/2019)***
Balochistan Bar Council thr. its Vice Chairman Haji Atta Ullah Langove	***... Petitioner(s)*** ***(in Const.P.25/2019)***
Sindh Bar Council thr. it Secretary	***... Petitioner(s)*** ***(in Const.P.26/2019)***
Hafiz Abdur Rehman Ansari, ASC	***... Petitioner(s)*** ***(in Const.P.27/2019)***

Karachi Bar Association through its President & other — ***... Petitioner(s) (in Const.P.28/2019)***

KPK Bar Council through its Vice Chairman — ***... Petitioner(s) (in Const.P.29/2019)***

Peshawar High Court Bar Association thr. its President — ***... Petitioner(s) (in Const.P.30/2019)***

Shahnawaz Ismail, Vice Chairman Punjab Bar Council — ***... Petitioner(s) (in Const.P.32/2019)***

Pakistan Federal Union of Journalists (PFUJ) thr. its President — ***... Petitioner(s) (in Const.P.34/2019)***

VERSUS

The President of Pakistan and others — ***...Respondent(s) (in Const.P.17, 19, 21-25, 27-30, 32 & 34 of 2019)***

The Supreme Judicial Council thr. its Secretary and others — ***... Respondent(s) (in Const.P.20&26/2019)***

Const. P. No.17 of 2019.

For the petitioner(s) **:** Mr. Munir A. Malik, Sr. ASC.
a/w Mr. Justice Qazi Faez Isa *(appeared in-person on 17.06.2020)*
Mrs. Qazi Faez Isa *(appeared through video link on 18.06.2020)*
Mr. Tariq Mehmood, Sr. ASC.
Mr. Salahuddin Ahmed, ASC.
Ch. Atif Rafiq, ASC.
assisted by:
Barrister Kabir Hashmi &
Barrister Rabi-bin-Tariq.

Mr. Babar Sattar, ASC.
assisted by: Miss Shohan Karimi, Advocate.

Syed Kazim Hassan, ASC.
Mr. Kassim Mir Jat, AOR.

Const. P. No.19 of 2019.

For the petitioner(s) **:** Mr. Hamid Khan, Sr. ASC.
assisted by:
Mr. Naseebullah Tareen, ASC.
Mr. Munir Kakar, ASC.
Mr. Ajmal Ghaffar Toor, Advocate.

Syed Qalb-e-Hassan, ASC.
Mr. Amanullah Kanarani, ASC.

Mr. Rasheed A. Rizvi, Sr. ASC.
assisted by:
Mr. Abbas Rasheed Rizvi, Advocate.
Mr. M.S. Khattak, AOR.

Const. P. No.20 of 2019.

For the petitioner (s) **:** Mr. Bilal Hassan Minto, ASC.
Ms. Hina Jillani, ASC.

Const. P. No.21 of 2019.

For the petitioner (s) **:** Sardar Muhammad Aslam, ASC.
Syed Amjad Ali Shah, ASC.
Mr. Kamran Murtaza, Sr. ASC.
Mr. Azam Nazeer Tarar, ASC.
Mr. Abid Saqi, ASC.

Hafiz M. Idrees, ASC.
Mr. Salman Akram Raja, ASC.
assisted by:
Mr. Asad Ladha, Advocate &
Malik Ghulam Sabir, Advocate.

Syed Rifaqat Hussain Shah, AOR.

Const. P. No.22 of 2019.

For the petitioner (s) **:** Mr. Naseebullah Tareen, ASC.
Syed Amjad Ali Shah, ASC.

Const. P. No.23 of 2019.

For the petitioner (s) **:** Mr. Hamid Khan, Sr. ASC.
assisted by:
Mr. Naseebullah Tareen, ASC.
Mr. Munir Kakar, ASC.
Mr. Ajmal Ghaffar Toor, Advocate
Mr. Asif Reki, Advocate.

Sh. Ahsan-ud-Din, ASC.
Mr. Khushal Kansi, ASC.

Const. P. No.24 of 2019.

For the petitioner (s) **:** Mr. Rasheed A. Rizvi, Sr. ASC.
assisted by:
Mr. Abbas Rasheed Rizvi, Advocate.
Mr. M. Aqil, ASC.
Mr. Kassim Mir Jat, AOR.

Const. P. No.25 of 2019.

For the petitioner (s) : Mr. Hamid Khan, Sr. ASC.
assisted by:
Mr. Naseebullah Tareen, ASC.
Mr. Munir Kakar, ASC.
Mr. Ajmal Ghaffar Toor, Advocate

Mr. Rashid A. Rizvi, Sr. ASC.
assisted by: Mr. Abbas Rasheed Rizvi, Advocate.

Const. P. No.26 of 2019.

For the petitioner (s) : Mian Raza Rabbani, Sr. ASC.
assisted by:
Mr. Zeshan Abdullah, Advocate.
Mr. Saalim Salim Ansari, ASC.

Const. P. No.27 of 2019.

For the petitioner (s) : Hafiz Abdul Rehman Ansari, ASC.
Mr. Taufiq Asif, ASC.
Syed Rifaqat Hussain Shah, AOR.

Const. P. No.28 of 2019.

For the petitioner (s) : Mr. Rasheed A. Rizvi, Sr. ASC.
assisted by:
Mr. Abbas Rasheed Rizvi, Advocate.
Syed Haider Imam, ASC.

Const. P. No.29 of 2019.

For the petitioner (s) : Syed Iftikhar Hussain Gillani, Sr. ASC.
assisted by:
Barrister Saad M. Buttar
Barrister Jibran Gillani &
Miss Ramsha Hayat, Advocate.

Mr. Abdul Latif Afridi, ASC.
Mr. Tariq Khan Hoti, ASC.

Const. P. No.30 of 2019.

For the petitioner (s) : Syed Iftikhar Hussain Gillani, Sr. ASC.
assisted by:
Barrister Saad M. Buttar
Barrister Jibran Gillani &
Miss Ramsha Hayat, Advocate.

Mr. Abdul Latif Afridi, ASC.
Mr. Tariq Khan Hoti, ASC.

Const. P. No.32 of 2019.

For the petitioner (s)	:	Mr. Hamid Khan, Sr. ASC. assisted by: Mr. Naseebullah Tareen, ASC. Mr. Munir Kakar, ASC. Mr. Ajmal Ghaffar Toor, Advocate. Mr. M.S. Khattak, AOR.

Const. P. No.34 of 2019.

For the petitioner (s)	:	Mr. Rasheed A. Rizvi, Sr. ASC. assisted by: Mr. Abbas Rasheed Rizvi, Advocate.
For respondents (2&8)	:	Dr. Farogh Naseem, Sr. ASC a/w Ch. Ishtiaq Ahmed Khan, Addl. AG Mr. Sajeel Sheryar Swati, ASC. assisted by: Barrister Maleeka Ali Bukhari Ch. Hassan Murtza Mann, Adv. Mr. Shahid Naseem Gondal, Adv.
For respondent No. 1	:	Mr. Sohail Mehmood, DAG.
For respondent No.3	:	Mr. Aamir Rehman, Addl. AG.
For respondent No. 4	:	Mr. Irfan Qadir, ASC
For respondent No.9	:	Dr. Khalid Ranjha, Sr. ASC a/w Mr. Sajeel Sheryar Sawati, ASC.
For respondent No.10	:	Abdul Waheed Dogar *(in-person).*
For respondent No.11	:	Waheed Shahzad Butt *(in-person).*
For Supreme Judicial Council	:	Mr. Arbab Arif, Secretary, SJC/ Khawaja Daud Ahmad, Secretary SJC.
Dates of hearing	:	17.09.2019; 24.09.2019; 08.10.2019; 14.10.2019; 15.10.2019; 21.10.2019; 28.10.2019; 29.10.2019; 04.11.2019; 05.11.2019; 06.11.2019; 11.11.2019; 12.11.2019; 13.11.2019; 18.11.2019; 19.11.2019; 27.11.2019; 28.11.2019; 02.12.2019; 03.12.2019; 04.12.2019; 16.12.2019; 17.12.2019; 18.12.2019; 19.12.2019; 20.01.2020; 21.01.2020; 22.01.2020; 27.01.2020; 28.01.2020; 29.01.2020; 03.02.2020; 17.02.2020; 18.02.2020; 19.02.2020; 24.02.2020;

02.06.2020; 03.06.2020; 04.06.2020; 11.06.2020; 12.06.2020; 15.06.2020; 16.06.2020; 17.06.2020; 18.06.2020 & 19.06.2020.

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."
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> 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 Vs. 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 Baluchistan 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:

> "Page106: …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 Vs. President of Pakistan and others (Const. P. No. 19 of 2019);

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

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

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

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

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

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

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

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

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

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

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

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

xiv. Pakistan Federal Union of Journalists Vs. 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 Vs. 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:

> **"O R D E R**
>
> 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 CP 17/2019 (including the show-cause notice dated 17.07.2019 issued to him) stand abated.
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> 2. Mr. Justice Yahya Afridi dismisses CP 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 moto 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 moto 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 alongwith 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 Vs. 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 Vs. 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 Vs. 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 **CJP** 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 **CJP** case (s*upra*), 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 **CJP** 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."
>
> (e*mphasis supplied*)

21. However, learned counsel's reliance on the **CJP** case (s*upra*) 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 **CJP** case (s*upra*), 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 Vs. 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."
>
> (e*mphasis 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 Vs. 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 **CJP** 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 Vs. 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 Vs. 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."
>
> (e*mphasis 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 Baluchistan 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 Vs. 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 Vs. 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 Vs. 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."
>
> (e*mphasis supplied*)

This dictum was followed and approved in the **Shaukat Ali** case (s*upra*) 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."
>
> (e*mphasis 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 **CJP** 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 for 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 Court 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 25HM^3 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."
>
> (e*mphasis 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 (s*upra*) 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 Vs. 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 financial 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 Vs. Begum Agha Abdul Karim Shorish Kashmiri** (PLD 1969 SC 14) and **Federation of Pakistan Vs. 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 Vs. 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 **CJP** case (s*upra*) 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."
>
> (e*mphasis 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 (s*upra*) 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 Vs. 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 Vs.**

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 Vs. 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 leveled 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 Vs. 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."
>
> (e*mphasis supplied*)

Para-14 of the above noted judgment was approved by this Court in **Messrs Mustafa Impex, Karachi Vs. 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 N0. 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 Vs. 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 Vs. 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 Vs. 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 Vs. 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 SAPM 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 Vs. Pakistan** (PLD 1992 SC 96), **Kuruma v The Queen** ([1955] AC 197) and **R.M Malkani Vs. 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 sub-section (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 (**"PPC"**). On a perusal of the PPC, it becomes clear that the predecessor tax laws are referring to Section 21 of the PPC 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 PPC 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 PPC 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 Vs. Frontier Sugar Mills & 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 trust 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 Vs. 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."
>
> (e*mphasis 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 (s*upra*), 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 (s*upra*). 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 **CJP** case (s*upra*) 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;"
>
> (e*mphasis 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 **CJP** 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 **CJP** 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 **CJP** case (s*upra*) 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 (s*upra*) 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."
>
> (e*mphasis 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 afore-mentioned 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, alongwith his tax returns, intentionally and deliberately concealing the above three properties, notwithstanding that all along u/s 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 afore-mentioned 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..."
>
> (e*mphasis 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 sub-section (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 inserted 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 sub-section (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 Vs. Additional District & 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 & 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 & 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 & Arslan Isa Khoso	40 Oakdale Road London E11 4DL	GBP 245,000	27.03.2013)
3	Ms Zarina Montserrat & 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 Vs. 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 **CJP** 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 **CJP** case (s*upra*) 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 Art 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 Vs. 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 inter-provincial 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 **CJP** 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 **CJP** case (*supra*) is distinguishable from the facts and circumstances of the present case. In the **CJP** 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 s*uo 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.

JUDGE

JUDGE

JUDGE

JUDGE

JUDGE

JUDGE

JUDGE

Islamabad,
19.06.2020.
Irshad Hussain/Meher LC

APPROVED FOR REPORTING.

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Faisal Arab, J.- I have had the privilege to go through the judgment proposed to be delivered by my learned brother Umar Ata Bandial, J and except for my view on Article 48 of the Constitution, Section 116 of Income Tax Ordinance, 2001 and on the plea of *mala fide* I respectfully agree with the same. I also intend to add my own reasons in support of the main judgment.

Facts:

2. The origin of the Reference No.1 of 2019 filed by the President against the petitioner can be found in the letter dated 10.04.2019, which one Abdul Waheed Dogar, stating himself to be an investigative journalist, wrote to the Chairman, Asset Recovery Unit, Prime Minister's Secretariat, Islamabad. In this letter, Abdul Waheed Dogar claims that he has laid hands on documentary evidence showing three Judges, including the petitioner, own properties abroad in the names of their relatives. The details of the foreign properties were said to be attached with the letter. The Law Minister was informed about this letter, who advised the Chairman, Asset Recovery Unit, to verify the information contained therein. In the process of verification, the Director General, International Taxes, Federal Board of Revenue confirmed from the tax records that no property located abroad has been declared either by the petitioner or his wife in terms of Section 116 (1) (b) of the Income Tax Ordinance, 2001. From further verification from the Land Registry in London, it transpired that three properties (i) 50 Coniston Court, Kendal Street, London W2 2AN acquired in the year 2011 (ii) 90 Adelaide Road, London E10 5NW acquired in the year 2013 and (iii) 40 Oakdale Road, London E11 4DL also acquired in the year 2013 stand in the joint names of the petitioner's wife and children (hereinafter "London Properties"). Later, it has come on record that the first of these properties was initially acquired in the year 2004 in the name of the petitioner's wife only and in the year 2011 the petitioner's daughter was made co-owner along-with his wife. The second property acquired in the year 2013 stands in the

joint names of the petitioner's wife and son and the third, also acquired in the year 2013, stands in the joint names of the petitioner's wife and daughter.

3. After the process of verification of the London properties was completed in the manner stated above, the Law Ministry placed a summary along-with a draft of the Presidential Reference before the Prime Minister, which summary was endorsed by him on 17.05.2019 and was then placed before the President under Article 48 (1) of the Constitution, advising him to direct the Supreme Judicial Council under Article 209 (5) of the Constitution to inquire into the non-disclosure of foreign assets. The draft of the Presidential Reference was also appended with the Prime Minister's advice, which the President was asked to sign. 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.

Scope of Article 209 of the Constitution:

4. Clause 5 of Article 209 reads '*If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or a High Court ……. (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.*' The use of the words '*from any source'* appearing in Article 209(5) allows information to come from a member of the general public or a government functionary or is based on a finding of fact of a judicial forum. No specific route from which information is to come has 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 has also ensured that receipt of any and every information *per se* should not trigger inquiry against a Judge and only such information is to become actionable on which either the Supreme Judicial Council or the President has formed the opinion

that the matter needs to be inquired into. The informant has no right to seek that the President or the Supreme Judicial Council must conduct inquiry on the information that has been placed by him before any of them. The Constitution has left such decision in its entirety in the hands of the Supreme Judicial Council and the President. Until either of them consider any information to be convincing enough to call for an inquiry only then the Supreme Judicial Council could embark upon the inquiry otherwise not.

5. 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 Supreme Judicial Council would also be perpetually engaged in conducting inquiries upon whatever information is placed before them by any informant, crippling them from performing their normal judicial function. Apprehending this drawback, the Constitution has given primacy to the opinion that is formed on the information by either of the two opinion-makers described in Article 209 (5) of the Constitution. It is for this reason that when the Constitution admits information from any source, it basically says let there be search for the truth if in the opinion of any of the two opinion makers there is substance in the information regardless of the source as there is no independence of judiciary if there is no effective mechanism for its accountability.

6. Article 209 (6) of the Constitution is also of considerable importance. It reads '*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 the President may remove the Judge from office.' The words "… *after inquiring into the matter* …" are significant. It means once a matter is referred by the President to the Supreme Judicial Council to conduct inquiry then it becomes a constitutional obligation of the Supreme Judicial Council to first conduct the inquiry and then submit its report to the President. Once that is done and in its report returns its findings of guilt or otherwise, it is 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 uses the word 'may', which clothes the President with such discretion. For removal of doubt, it may be clarified that where the Supreme Judicial Council exonerates a judge of the charges framed against him, in that eventuality the matter ends there. The exoneration brings the whole proceedings to an end which no more remains open to challenge, not even by the President by seeking judicial review before this Court. To quote an example from a matter from foreign jurisdiction, this happened in the case of a Judge of the Supreme Court of India where under the Indian Constitution, the Inquiry Committee (whose role can be equated with the role of Supreme Judicial Council) found Justice V. Ramaswami guilty of misconduct but the Indian Parliament (whose role under our Constitutional scheme is equal to the role which our President exercises in such matters) did not accept the recommendation of the Inquiry Committee as the majority voted against removal. With the result that Justice Ramaswami continued in his office until he superannuated.

7. Then there is Article 209 (7) of the Constitution which states *'A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article'.* This means that the only forum of accountability of a Judge of the Superior Judiciary is the Supreme Judicial Council and no other. This has been done keeping in mind the independence of the judiciary so that no forum other than

the one provided in the Constitution i.e. the Supreme Judicial Council decides with regard to misconduct or incapacity of a judge of the Superior Judiciary. The framers of the 1973 Constitution under Article 209 (7) clearly entrusted the power to inquire into the conduct of a Judge of the Superior Judiciary in the exclusive hands of the Supreme Judicial Council so that the process is expeditiously concluded one way or the other.

Scope of Article 211 of the Constitution:

8. This Court on its judicial side cannot examine the merits of the allegations on account of the constitutional bar contained in Article 211 of the Constitution, which though appears 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, 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 this Court on the merits of the controversy gains currency, every Judge against whom the Supreme Judicial Council is to conduct inquiry would first come to this Court and seek examination of the credibility of the informant as well as of the merits of the information. If this 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 Supreme Judicial 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 this 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 has been taken in terms of Article 209 (5) of the Constitution, the allegations made against a sitting Judge can only be proved or disproved before the Supreme Judicial Council and not before a court through a judicial pronouncement. Any judicial interference that amounts to stifling the very function which the Constitution has assigned exclusively to the Supreme Judicial Council would be violative of Article 211 of the Constitution.

The effect of absence of plea of *benami* ownership or bribery or corruption in the Reference:

9. The petitioner has taken the plea that no allegation of *benami* ownership or bribery or corruption has been alleged against him in the Reference in order to question his integrity and honesty. It would be appropriate to examine the allegations made in paragraphs 11, 12 and 16 of the Reference which in a summarized form are as follows:

> *In the tax records of the petitioner, three London properties standing in the joint names of the petitioner's wife and two children acquired for 751,000 British Pounds in the years 2011 and 2013 have not been declared by him to the tax authorities as required under Section 116 (1) of the Income Tax Ordinance, 2001 and as their source of acquisition is irreconcilable with the petitioner's declared sources of income, nondisclosure is tainted with concealment, raising the questions as to how and from where the funds were made available for their purchase without violating the money laundering regime and Foreign Exchange Regulations Act, 1947.*

10. In any legal proceedings what is sufficient is to plead facts and facts alone, not their legal effects. The terms such as *benami* ownership or corruption or bribery are all legal effects that arise from a set of alleged facts. Once that is done then it is for the adjudicating forum to work out the legal effects emanating from any given set of facts

alleged in any pleadings. The aforesaid rule of pleadings was best explained in the case of *Ala-ud-Din Vs. Mst. Farkhanda Akhtar* PLD 1953 Lahore 131). In this case Kaikaus J, as he then was, held *"... party is to state only the facts and it is for the Court to apply the law and work out the results, though as a matter of convenience and on account of lack of regard for the rules of pleading, legal effects are generally made part of the pleadings"*. In the said judgment, Kakaus, J also explained the rules of pleading through an explicit example which for brevity sake is not reproduced. Then in the case of *Budho Vs. Ghulam Shah* (PLD 1963 SC 553), a five-member bench of this Court reiterated this principle and held that pleadings are 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 emerge from such facts need not be stated in the pleadings in order to seek the relief. Failure to state the legal effects, therefore, cannot 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. Hence, what legal effect emerges from the narration of a set of facts alleged in the Reference was not required to be made part of the Reference.

11. For a moment even if the rules of pleadings are kept aside, one of the allegations made in the Reference is of probable concealment of foreign assets. This allegation was made by drawing inference from the fact that the foreign assets were neither declared by the petitioner nor his wife as required under Section 116 (1) (b) of the Income tax Ordinance, 2001. To draw inference of probable concealment through deductive approach in a chain of reasoning cannot be termed as illogical. Hence, based on the contents of the allegations made in paragraphs 11, 12 and 16 of the Reference, particularly the plea of probable concealment, opinion can be legitimately formed that matter needs to be inquired into.

Scope of Section 116(1) (b) of the Income Tax Ordinance, 2001:

12. With regard to the plea of the petitioner that as the London Properties are not in his name he was not required to declare it in his Wealth Statements in terms of Section 116(1)(b) of the Income Tax Ordinance, 2001, it may be stated that under Section 116(1) (b) of the Income Tax Ordinance, 2001, all resident taxpayers are required to declare any wealth that stands in their names or in the names of their spouses or minor children or persons who are dependent on them. The logic behind seeking such an extended declaration is that the resident taxpayers often purchase properties from their own sources of income not only in their own names but also in the names of their spouses, children as well as those persons who are dependent on them. It is this interconnection between the wealth created from the income of one which stands in the name of another that has made it obligatory upon every resident taxpayer to also declare assets of such persons in whose names the taxpayer is most likely to purchase from his own sources. Keeping this in mind, the provisions of filing wealth statement and wealth reconciliation statement were incorporated in Section 116 (1) & (2) of the Income Tax Ordinance, 2001. When a taxpayer declares his assets under Section 116, such declaration had to reconcile with his declared income.

13. When any asset that has not been declared in terms of Section 116 gets disclosed at any stage, it is likely to give rise to the question whether it is a case of concealment of income from which such asset was acquired. In such eventuality the taxpayer can be called upon by tax authorities to explain the source of its acquisition. If he offers no explanation or the explanation that was offered is found unsatisfactory then the value of the undeclared asset, to the extent it was not satisfactorily explained, through fiction of law is treated as a person's deemed income generated from 'other sources' and added to his already

declared income, if there was any. This is done in terms of Section 111 of the Income Tax Ordinance, 2001. The income tax liability so determined is then recovered along-with applicable penalty under Section 182 of the Income Tax Ordinance, 2001. Once that is done on the basis of deeming provision, the Income Tax authorities cannot travel beyond their mandate and compel such person to divulge the nature of the activity that had become the source of acquiring the undeclared asset. Hence, insofar as the legitimacy of the activity from which the undeclared asset was created would still remain a mystery and the matter would come to an end but only for the purposes of income tax law. Hence, the legitimacy of the activity from which the undeclared asset was created would still remain unascertainable inspite of the fact that Sections 111 and 182 of the Income Tax Ordinance, 2001 were fully applied by the Income Tax authorities by taking the matter to its logical conclusion.

14. Apart from detecting tax evasions on undeclared incomes as discussed above, the declarations made under Section 116 of the Income Tax Ordinance, 2001 can also be used by a forum that is 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) become a 'relevant fact' in order to prove a 'fact in issue' which is possessing assets beyond means. So, the utility of the declaration made under Section 116 is not restricted to detect probable tax evasion only but it can 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 comes to examining the conduct of a public office holder.

15. In the present case, the jurisdiction of the Supreme Judicial Council was not invoked to recover income tax that may not have been paid on income from which the London properties were acquired as such

a function falls within the exclusive domain of Income Tax Ordinance, 2001 but it was invoked on account of non-disclosure of foreign assets located beyond the tax jurisdiction of this Country so as to determine as to whether such assets were acquired through legitimate means of income. It is the determination of legitimacy of source of acquisition of London properties which is being sought in the Presidential Reference, hence, the allegation of probable concealment was made. Therefore, taking recourse to Section 116 of the Income Tax Ordinance, 2001 could only be termed as a 'relevant fact' which is intended for proving the 'fact-in-issue' which is the probable concealment of the source from which the foreign assets were acquired.

16. Where a person holds a high public office and any asset standing in his name or in the name of any member of his or her household in the country or abroad and had not been declared to the tax authorities in terms of Section 116 (1) (b) of the Income Tax Ordinance and if someone, accidentally or deliberately, finds out about it and shares such information with the authority that is competent to seek source of acquisition of such undisclosed property, then the holder of public office cannot avoid making necessary disclosure. 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 stands. Unless it is so demonstrated, non-disclosure is likely to cast doubts on his or her integrity and honesty and can 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 Income Tax Ordinance, 2001 by itself is not a 'fact in issue' but only a 'relevant fact' which can be used to seek explanation with regard to source of acquisition of undeclared assets that stand 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 can justify withholding of financial disclosure that is relevant in such accountability process. Thus, the declaration of assets and liabilities made under Section 116 (1) (b) can be used as a 'relevant fact' before both the forums i.e. income tax authorities and the forum that is empowered to take disciplinary action against a holder of public office, as the object and purpose of both the forums is distinct.

17. The declaration required under Section 116 of the Income Tax Ordinance, 2001 is also regardless of ones' gender as the phrase used in the said section is 'person's spouse' and not wife. Thus, if a resident taxpayer is a husband then he is required to disclose the assets of his wife and if resident taxpayer is a wife then she is required to declare her husband's assets. Such a declaration has nothing to do with the spouse's financial dependency or otherwise on the resident taxpayer. Income tax law is not concerned with whether the spouse of a resident taxpayer is dependent or is a person of means. All that it intends is that no tax evasion takes place by hiding one's undeclared source of income in the names of taxpayer's loved ones. Husband and wife are both presumptive heirs of each other. Any property in the name of any of them is also inheritable by their children. Hence, wealth in the name of taxpayer's spouse, irrespective of his or her own means of income, has to be declared on account of mere existence of such relationship with the taxpayer. If dependency of spouse of a public office holder is 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 is financially well off and is living as a member of the taxpayer's household and a property in his or her name remains undeclared and when such a fact gets disclosed, the public office holder in order to avoid disciplinary proceedings takes the plea that his or her spouse being 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 Income Tax Ordinance, 2001. This, if accepted, would then mean that if first asset of substantial value raised from the income of taxpayer bought in the name of taxpayer's spouse is declared, then there is no need to declare all assets acquired subsequently by the taxpayer in his or her spouse's name as by then the spouse with the ownership of valuable asset that was acquired first in point of time has become a person of means. As stated earlier, the whole intent of the income tax law is to prevent tax evasion which would be frustrated if such an unintended meaning is attributed to the term 'spouse' appearing in Section 116. It is for this reason that when the law states 'spouse' it does not qualify it by stating that only such assets are to be declared which stand in the name of a dependent spouse. The word 'spouse' cannot be read to restrict or qualify its meaning which on its plain reading is not intended. Therefore, nothing is to be read into Section 116 so as to mean that the term 'spouse' is confined to only such spouses who are dependent on their taxpaying spouses.

18. In the book 'Statutory Interpretation by F. Bennion' (5th Edition page 751), it is stated that punctuations are to denote the stops that ought to be made in oral reading, and point out the sense. When the relevant portion of Section 116 (1) (b) of the Income Tax Ordinance, 2001 is examined it reads *'the total assets and liabilities of the person's spouse, minor children, and other dependents…'* we find that in the said provision there is a coma before the conjunction *'and'*. When in any sentence two independent clauses are joined together, each intended to stand on its own as a complete message then a coma is added before the conjunction *'and'* in order to denote that the words that appear after the coma and the conjunction are not to be read so as to modify what has preceded before in the same sentence. Joining of two clauses in one sentence does not mean that both are to be read as

ejusdem generis. This rule is to be applied with caution so as not to limit the meaning of the general word 'spouse' to a narrow category of 'dependent spouse'. What Section 116(1) (b) intend to mean is that the wealth in the names of the taxpayer's spouse or minor children has to be declared on account of mere existence of such relationship with the taxpayer. The dependency of such relations on the taxpayers is not a condition precedent. This being the legal position, a resident taxpayer even in an action taken under Income Tax Ordinance, 2001 cannot take the stand that unless his or her spouse is shown to be dependent on him or her, there is no legal obligation to declare the assets that stand in their names under Section 116 (1) (b) of the Income Tax Ordinance, 2001.

19. It may also be added here that as far as a person's wife is concerned, the legal position is that when a woman marries and moves to her husband's house then the husband has to bear the entire cost of her living in all circumstances even if she is a lady of means. Husband cannot force his wife to share household expenses even if wife is capable of maintaining herself from her own financial resources. The responsibility of a husband to financially support his wife is to such an extent that when he fails to do so she has a right to seek divorce. This obligation of a husband towards his wife as a member of his household exists under civil law, Muslim Personal Law as well as under Islamic law which creates a right of the wife over her husband to provide for her living which he can reasonably bear. Hence, based on her legal right, a husband is legally obligated to provide to her wife all necessities of life irrespective of her own means as long as the marriage subsists and even for some time thereafter. In Islamic jurisprudence, Al-Kamal-Ibn-al Humam a learned Islamic scholar of Fiqh, while dilating upon the obligation of husband towards his wife states that wife can even rent her own house to her

husband so that her husband will allocate that house for their dwelling (FathulQadir, 111, 321 – 339). When law recognizes that it is a right of a wife that her husband must maintain her as long as she remains part of his household, there is no concept where a husband can claim that he has no financial responsibilities towards his wife for the reason that she is a lady of means. When it is within husband's power and reach to comply with the mandate of the law which requires him to disclose assets in the name of his wife who is living with him as member of his household then he must honour the mandate of the law.

Plea of *mala fide:*

20. As regards plea of *mala fide*, only on one occasion in the past this Court interfered with the proceedings of the Supreme Judicial Council. This happened in the case of *Iftikhar Muhammad Chaudhry Vs. President of Pakistan* (PLD 2010 Supreme Court 61). Even in that case the merits of allegations made in the Presidential Reference were not made basis for nullifying the proceedings but this 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. What happened on 09.03.2007 with the then Chief Justice of Pakistan could be said to be one of the darkest days in the history of Pakistan's judiciary. A day when independence of judiciary and the judicial institutions were trampled at the hands of the then President. On 09.03.2007, the then President called the Chief Justice for a meeting at his office in the morning hours, in which the Chief Justice refused to give any assurance that this Court will not be an impediment in granting judicial clearance of his candidature in the upcoming presidential elections. Upon his refusal, the Chief Justice was asked to either resign or face the Reference. The Chief Justice refused to resign, upon which he was not allowed to leave for more than five hours. During this time the Chief Justice was stripped of

all his powers and a Reference against him was filed under Article 209 (5) of the Constitution. The President appointed a senior judge as the Acting Chief Justice, who took oath the same day and held the meeting of the Supreme Judicial Council at 06:30 p.m. Two Chief Justices of the High Courts who were members of the Supreme Judicial Council were specially flown in for the meeting even before the Acting Chief Justice had taken oath of his office. During the hearing of *Iftikhar Muhammad Chaudhry's* case, this Court summoned the record of the proceedings of the Supreme Judicial Council and after examining the same, noticed that no order of convening the Supreme Judicial Council meeting on 09.03.2007 had ever been passed on that day. The Council nevertheless met in the evening and issued a notice to the deposed Chief Justice for his appearance before the Supreme Judicial Council on 13.03.2007 and also restrained him from performing his judicial functions. In the meanwhile, the Chief Justice was taken to his residence and put under house arrest.

21. From the contents of the judgment rendered in the case of *Iftikhar Muhammad Chaudhry*, it becomes evident that the Presidential Reference was not quashed by this Court on the basis of the allegations contained therein but because his removal from his office was on account of his refusal to give assurance to the then President that his candidature in uniform in the said elections would not be judicially invalidated. Hence, the unholy haste in first seeking resignation under coercion followed by mistreatment and forcible removal from office and then sudden convening of the meeting of the Supreme Judicial 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 Supreme Judicial Council. That was the background that led to the quashment of the Reference against the then Chief Justice by this Court. The petitioner

has not alleged *mala fide* against the President but has raised such a plea only against the informant and the persons who processed the information. The present case is thus not even remotely close to what treatment was meted out to the then Chief Justice of Pakistan.

Maintainability of the Presidential Reference on the touchstone of Article 48 of the Constitution:

22. The petitioner has also sought quashment of the Presidential Reference on the ground that it is not maintainable in law. In this regard, the petitioner formulated two legal questions in his petition. In the first question, it is stated that by acting on the advice of the Prime Minister, the President has contravened the provision of Article 209 (5) of the Constitution as he did not form his own independent opinion in respect of purported misconduct. In the second question, it is stated that without obtaining the approval of the Federal Cabinet, the Prime Minister could not have advised the President to file the Reference and reliance was placed on the case of *Mustafa Impex, Karachi Vs. The Government of Pakistan* (PLD 2016 SC 808) in this regard. Both the legal questions though contradict each other, one can say that these pleas may have been taken in the alternative without stating so. In order to examine the question whether the Reference suffered from any legal defect, the true import of Article 48 (1) & (2) of the Constitution needs to be examined in the light of Article 209 (5) of the Constitution.

23. Article 48(1) of the Constitution makes it obligatory upon the President to act in accordance with the advice of the Cabinet or the Prime Minister which means it comes into play when any matter relates to executive authority of the Federation as Article 99 (1) of the Constitution provides that the executive authority of the Federation shall be exercised by the Cabinet and the Prime Minister in the name of the President. This also indicates that the affairs of the government in the parliamentary form of government are exclusively in the hands of the

Prime Minister and the Cabinet as it is them who are collectively responsible to the Parliament in terms of Article 90(6) of the Constitution. Then there is a *non-obstante* clause contained in Article 48(2) of the Constitution, which creates an exception to the rule laid down in Article 48(1) as it allows the President to act in his own discretion in certain matters without taking advice from the Prime Minister or the Cabinet. There are few provisions in the Constitution in which the President can exercise his powers in his own discretion. These are proviso to Article 48 (1), Article 48(2), Article 56(2), Article 58(2), Article 75(1) (b), Article 91(7), Article 209(5), Article 232(1) and proviso to Article 232 (2).

24. From the contents of Article 209 (5) of the Constitution, it becomes clear that in forming his opinion the President is not dependent on the advice of the Prime Minister or the Cabinet. He can form opinion on any information that may have come to him from any other source. This is so as the Judiciary is separate and distinct from the Executive branch of the Government. It has to remain completely separate and uninfluenced by any decision of the Executive in the running of its affairs. No doubt the Executive to a certain extent have a role in the appointment of judges of the Superior Judiciary and it also controls their perks and privileges, however, once a judge of the Superior Judiciary is appointed and his tenure of service stands secured under the Constitution, the Executive being the biggest litigant in the country was not to be conferred with the power to decide against which judge an inquiry into his conduct or capacity should be conducted by the Supreme Judicial Council. When the Executives of the Provinces have not been entrusted with the power to initiate disciplinary proceedings with regard incapacity or misconduct of the judges of the district judiciary then to vest such a power in the Federal Government, when it comes to giving directions to the Supreme Judicial Council to initiate an

inquiry into the conduct of a judge of the Superior Judiciary was out of question. Nonetheless, such a power had to exist in some office in order to trigger inquiry against the conduct of the judges of the Superior Judiciary, therefore, the Constitution vested such power in the President who is the symbol of unity of the State and not part of the Executive branch of the government. So while examining the power of the President to call for inquiry under Clause 5 of Article 209 of the Constitution, it clearly indicates that the President has to act in his own discretion to which he is entitled to by virtue of Article 48(2) of the Constitution.

25. For the President to act under Article 48(1) the source is the advice of the Prime Minister and the Cabinet and for the President to act under Article 209(5) the source could be any, there is no limitation. All that the executive can do is to place information which it considers actionable before the President and then it is 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 cannot 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. In the present case, information with regard to London Properties after verification from the income tax records of the Federal Board of Revenue and the office of the Land Registry of London was submitted to the Law Minister vide ARU's letter dated 10.05.2019 and on such information the course that was adopted was of Article 48 (1) of the Constitution which is evident from the summary prepared for the Prime Minister. Paragraphs 17 & 18 of the summary for convenience sake are reproduced as follows:-

> *"17. Therefore, it is proposed that His Excellency the Prime Minister of Pakistan may kindly be pleased to advice His Excellency the President of Pakistan under Article 48 of the Constitution to form an opinion that Justice Qazi Faez Isa may be guilty of misconduct and hence direct the Supreme Judicial Council under Article 209(5) of the Constitution to enquire into the matter, according to the law and the Constitution, and submit a Report after such enquiry to his Excellency the President of Pakistan under Article 209(6) of the Constitution.*
>
> *18. This Summary is accompanied by a draft Reference (see Attachment A) proposed to be filed before the learned Supreme Judicial Council; which, if found appropriate, His Excellency the Prime Minister of Pakistan may advice His Excellency the President of Pakistan to sign and institute/file the Reference."*

26. From the contents of paragraphs 17 & 18 of the summary, it is clear 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 on 17.05.2019 and was then placed before the President. The President acted on such advice and signed the Reference on 20.05.2019, 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 becomes 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.

Judicial Accountability:

27. The framers of our Constitution believed that the process of accountability of Judges of the Superior Judiciary be better left in the hands of an independent body of Judges instead of the Parliament to prevent any political pressure on them. The institution of the Supreme Judicial Council was thus carved out under Article 209(5) of the Constitution for the superior judiciary from the judiciary. The mechanism provided for judicial accountability in essence is indirectly holding oneself accountable in the eyes of the public. It is compatible with the principle of judicial independence, both individual independence of the judges and independence as a whole of the institution and ensures public trust in the judiciary. By virtue of Article 209 (7) read with Article 211 of the Constitution the role of scrutinizing the merits of the allegations made against a Judge of the Superior Judiciary and render findings thereon is to be exclusively performed by the Supreme Judicial Council only. No Court can assume such a role. The Supreme Judicial Council is not to be treated as a forum that is dead in its duty to examine the merits of the allegations made against any judge of the superior judiciary. Only plea of *mala fide* was allowed to be taken by this Court in the case of *Iftikhar Muhammad Chaudhry Vs. President of Pakistan*(PLD 2010 Supreme Court 61) and that too *mala fide* was attributed to the former President who was then solely entitled to form the opinion as to whether Supreme Judicial Council be directed to conduct inquiry against a judge of a Superior Judiciary. No such plea was taken against the President.

28. Every judge of the Judiciary, without any distinction, deserves the honor, dignity and respect which go with his office. When the integrity of a judge of the Superior Judiciary is called in question under Article 209 (5) of the Constitution, then not only his credibility but of the entire judicial institution is put at stake. The very commencement of the inquiry proceedings against a judge causes psychological pain and anguish that continues until his name gets finally cleared. The agony may even continue for some time thereafter. Nonetheless, the sanctity of the mechanism provided for overseeing the conduct of judges of the Superior judiciary has to be respected as nothing makes the judges of the Superior Judiciary immune from the process of accountability. Allegations of misconduct had been made against notable justices of superior judiciary around the world. Some got impeached and the others were cleared. Every Judge of the Superior Judiciary has to demonstrate due deference to the Supreme Judicial Council that has been entrusted with the Constitutional responsibility to make inquiries into their conduct. This is to be done to assure that judges are performing their role as Guardians of the Constitution.

29. Where an asset located in the country or abroad, standing in the name of a judge of the superior judiciary or any member of his household which was acquired while he was in office and has not been declared to the income tax authorities and such fact becomes public then the satisfying sense of finality to the whole episode would always be missing unless the matter is brought to its closure. One can imagine the immeasurable damage both to the image of the judge for the remainder of his tenure in office and the faith of the people in the accountability process when the allegations made in the Reference having extensively gone into public domain are not taken to their logical conclusion. As the saying goes ‘the robe magnifies the conduct’. Leaving the matter without inquiry would in fact give rise to a great deal of skepticism about his

integrity in the public eye. Judges write many judgments, some of which go against the sitting government. This does not mean that Article 209(5) of the Constitution cannot be invoked against a Judge who has delivered such judgments. When it comes to accountability of judges, no distinction can be made amongst them. The jurisdiction of the Supreme Judicial Council also does not depend upon what motivated the informant to place the information on the desk of one of the two opinion makers who found it to be credible enough to call for an inquiry, nor the filing of a Reference becoming public would be enough to vitiate the proceedings before the Supreme Judicial Council. The function of the Supreme Judicial Council is to search for the credibility of the information rather than the credibility or motivation of the informant, therefore, primacy has to be given to the matter that goes to the heart of the controversy.

Conclusion:

30. The petitioner commands great respect in the legal fraternity. However, when questions have been raised on the petitioner's financial credibility then it becomes all the more necessary that he and his wife, who lives with him as a member of his household, should take this as an opportunity to scrub away the taint. Proving the allegation wrong by making a full disclosure with regard to source of acquisition of London Properties located beyond the tax jurisdiction of this country would be the only appropriate response to meet the allegations and clear the doubts that may have arisen in the minds of the public. For any reason, if Article 209 (5) of the Constitution is made ineffective through judicial interference, it will die in the hearts and minds of the people for whom it was framed. After holding that the Presidential Reference was not maintainable in law, wrapping up these proceedings without adopting the course provided in the short order dated 19.06.2020 would not have resulted in genuine exoneration for the petitioner. Keeping this

in mind when this Court in its short order directed the Commissioner Income Tax, FBR to probe into the reasons of non-declaration of foreign assets and place its report before the Supreme Judicial Council, it in effect left it to the Supreme Judicial Council to consider whether such report contains sufficient information so as to embark upon inquiry as envisaged under Article 209(5) of the Constitution.

JUDGE

YAHYA AFRIDI, J. – I have had the pleasure of going through the majority judgment authored by my worthy brother Umar Ata Bandial, J. and agree with him to the extent of declaring the Presidential Reference filed against Mr Justice Qazi Feaz Isa to be without lawful authority. However, on the grounds to declare the same and on certain crucial issues dilated upon by my respected brother Judge, I very respectfully differ. Hence, my separate note.

2. As for the facts leading up to the present petitions, and the valuable submissions of the learned counsel for the parties, the same have very aptly been recorded by my worthy brother Umar Ata Bandial J. Thus, I would not repeat the narration thereof and adopt the same to be read as a part of the present opinion.

CONSTITUTION PETITION NO. 17 OF 2019

3. In Constitution Petition No. 17 of 2019, Mr Justice Qazi Faez Isa, the Petitioner, has invoked the constitutional jurisdiction of the Supreme Court under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 (**"Constitution"**), seeking in essence, the quashing of the reference filed against him by the President of Islamic Republic of Pakistan (**"the President"**) under Article 209 of the Constitution **("the Reference")** before the Supreme Judicial Council **("Council"),** and all such steps and proceedings taken in pursuance thereof.

Scope of Original Jurisdiction under Article 184(3)

4. Before considering the merits of the challenge made to the Reference, I would first address the question regarding the maintainability of the present petition, and whether in the peculiar

circumstances of the present case, the Supreme Court of Pakistan (**"Supreme Court"**) ought to positively exercise its original constitutional jurisdiction vested under Article 184(3) of the Constitution. The said provision reads:

> **Article 184 of the Constitution**"(3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article."

5. The above provision determines the very contours of the original jurisdiction of the Supreme Court by premising the same on the fulfilment of the two condition precedents[1]: firstly, that the Supreme Court considers the matter being of public importance; and secondly, that the said matter involves any of the *enforcement* of the fundamental rights provided under Chapter I of Part II of the Constitution **("fundamental rights")**.

6. What is crucial to note is that Article 184(3) of the Constitution vests a distinct and discretionary[2] jurisdiction with the Supreme Court, wherein it has vast authority to take action *suo motu* or on receiving petitions. This jurisdiction of the Supreme Court should not be viewed merely as a forum of redress of aggrieved individuals, but more as a repository of authority to address issues that fall within the ambit of Article 184(3) of the Constitution. Importantly, an order passed by the Supreme Court under this jurisdiction is final and not appealable. The only medium of challenge available to a person aggrieved of such an order is the limited jurisdiction of the Supreme Court under review.

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1 Justice Raja Jilal-Ud-Din and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Human Rights, Government of Pakistan, Islamabad and others (PLD 2016 Supreme Court 269); 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 etc.: In the matter of 2017 P L C (C.S.) 984.

2 Dr. Muhammad Tahir-ul-Qadri v. Federation of Pakistan (PLD 2013 SC 413); Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another (PLD 2010 SC 483)

7. Thus, to maintain judicial discipline and to uphold the rule of law, there is an inherent and dire need for judicial introspection; to structure the unfettered discretion of the worthy Chief Justice of the Supreme Court to constitute benches of the Supreme Court to hear and decide cases under Article 184(3), and in particular, *suo motu* actions, lest the exercise of such jurisdiction may be seen to have been abused. However, passing any definite findings on this crucial matter in the present petition would not only be swaying from the issue in hand but also, on many counts, will be premature, as the matter is already *sub-judice* before the Supreme Court.[3]

Matters of Public Importance

8. The scope and extent of the term "matters of public importance", as provided under Article 184(3) of the Constitution, has been an issue of perennial deliberation of this Court. The judicial consensus reached is for the same to encompass any issue affecting the legal rights or liabilities of the public or the community at large, and it is not restricted to an individual or a group of individuals, how so large the group might be.[4] It is also settled law that the *locus standi* of the Petitioner would not be a prime mover for determining this condition precedent of invoking Article 184(3) of the Constitution, except in exceptional circumstances.[5]

Independence of Judiciary

9. On careful consideration of the issues agitated by the Petitioner in the present petition, it is noted that the key issue, apart from his grievance, in essence, is the independence of the judiciary. To

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3 C.M.A. No. 7798 of 2018

4 Anwar Aziz v. Federation of Pakistan (PLD 2001 Supreme Court 49), Abdul Wahab v. HBL (2013 SCMR 1383) and Asad Ali v. Federation of Pakistan (PLD 1998 Supreme Court 161); Miss Benazir Bhutto v. Federation of Pakistan (PLD 1988 Supreme Court 416); 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 Supreme Court 642)

5 Dr. Muhammad Tahir-ul-Qadri v. Federation of Pakistan (PLD 2013 Supreme Court 413)

understand the jurisprudential purport and importance of this concept, one must first appreciate the very essentials of a safe, socially progressive, and economically prosperous society. A view I am inclined to endorse and posit is that, for such a society, a delicate balance must be maintained between the three essential foundational institutions: the State, the rule of law, and an accountable government[6]. Surely, the institution of the rule of law has evolved, however, its general gist has always remained the same and has been aptly described[7] in terms that:

> "In the West, in India, and in the Muslim world, there was a body of preexisting law, sanctified by religion and safeguarded by a hierarchy of priests and clerics, that was prior to and independent of the state. This law was seen as being older, higher, and more legitimate than the current ruler and therefore binding on him. That is the meaning of the rule of law: even the king or emperor is bound by the law and not free simply to do as he pleases."

10. In order to establish the rule of law in a society where constitutionalism prevails, the mode and manner of its constitutional instantiation have varied amongst the civilized nations. Our constitutional history bears witness to a meaningful effort of the legislative branch to bolster the rule of law. To this end, one of the marked features has been to establish an independent judiciary.

11. The independence of the judiciary, in effect, is the constitutional insulation of the judges, through the structural and procedural mechanisms, from undue influences of other organs of the State, in particular, the executive. To ensure such independence, the Constitution provides for separation of the three organs of the State, thereby aiming to maintain the balanced trichotomy of power in the country. In the zeal to insulate the judiciary, one must not forget to attend to its accountability. All this is to ensure that no organ of the

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6 Francis Fukuyama, The Origins of Political Order: From Prehuman Times to the French Revolution (1st edn, 2011) pp.15-16

7 Francis Fukuyama, The Origins of Political Order: From Prehuman Times to the French Revolution (1st edn, 2011) p 121

State, be it the judiciary, assumes unbounded authority. Both independence and accountability of the judiciary must be deliberately present, complementing each other in strengthening the intrinsic fibre of the judiciary, in achieving the ultimate goal of establishing the rule of law in the society. To propagate and seek independence of judiciary without its accountability would amount to imposing judicial autocracy.

12. In view of the above delibrations, independence of the judiciary with all its legal, social and political implications is surely a "matter of public importance".[8] Hence, the challenge made by the petitioner meets the first condition precedent for invoking the jurisdiction of the Supreme Court under Article 184(3) of the Constitution.

Fundamental Rights

13. Now, moving on to the other constitutional requirement for the positive exercise of the original jurisdiction of the Supreme Court, which is the *enforcement* of the fundamental rights. The petitioner claims to seek enforcement of his fundamental rights to a fair trial[9], free speech[10] and information[11], and that, too, for the larger interest of safeguarding the independence of the judiciary. On the face of it, to deny a person the enforcement of the said rights would surely appear to be unjust. However, in the peculiar circumstances of the present case, when the Petitioner is not just a citizen, but a Judge of the Supreme Court, I feel compelled to examine the question: whether a sitting Judge of a constitutional court can file a constitutional petition, which not only relates to the terms and conditions of his service but also affects the terms of the code of conduct that he has sworn to uphold.

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8 Asad Ali v. Federation of Pakistan (PLD 1998 Supreme Court 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).

9 Article 10-A of the Constitution

10 Article 19 of the Constitution

11 Article 19-A of the Constitution

Majesty of an Oath

14. The Petitioner is a Judge of the Supreme Court and has assumed the office by taking an oath under the Constitution[12]. The oath declares; *inter alia*, that "I will abide by the code of conduct issued by the Supreme Judicial Council" (**"code of conduct"**)[13].

15. The form and meaning of oaths vary across jurisdictions, yet it has over time, evolved into a recognized "natural and universal custom".[14] At its core is always the deterring force to ensure the truth of utterance or fulfilment and performance of the promise so made by the declarant. In our constitutional framework, neither the overriding sway of the fundamental rights can be diminished, nor can the importance of an oath be rendered insignificant. Each one has a constitutional *niche*. On the one hand, we have the fundamental rights that have been conferred with constitutional protection to be jealously guarded against any invasion of law or acts of the executive.[15] On the other hand, on taking an oath, a Judge accepts 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 commands him to avoid an act, the sitting Judge is 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 takes an oath under the Constitution, he by his conduct subjects 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 of conduct. Consequently, the fundamental rights of a sitting Judge shall

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12 Articles 178 and 194 read with Third Schedule of the Constitution.

13 Third Schedule of the Constitution read with Article 209(8) of the Constitution

14 Helen Silvino, 'The Oath' [1959] (68)7 Yale Law Review 1329

15 Article 8, 199, 184(3) of the Constitution

remain eclipsed, so far as their enforcement is not in consonance with the terms of his oath.

16. The limitation on a person to invoke the original jurisdiction of the constitutional courts for the enforcement of his fundamental rights in our country is not *alien* to the Constitution. Some of the striking instances in this respect are: the members of "forces" cannot claim any fundamental right in the matters relating to their service16; those employed in "service of Pakistan" are debarred from invoking extra-ordinary Constitutional jurisdiction of superior courts concerning the terms and conditions of service[17]; and in some cases relating to terms and conditions of service of the civil servants, this Court has observed that even if the order of the competent authority is without jurisdiction, writ jurisdiction would still not be available to him.[18]

Code of Conduct

17. As fairly commented by an eminent jurist, the essential expectation from a Judge is "judicial virtue-*phronesis*: sobriety, wisdom, courage, modesty, and the capacity to resist the siren of notoriety for righting all wrongs regardless of one's formal jurisdiction to do so".[19] As for our jurisdiction, the *judicial virtues* of a constitutional Judge have been articulated in the code of conduct. A careful review thereof reveals that on the one hand, a Judge is bestowed with the sacred constitutional trust, and on the other hand, he is obligated "to present before the public an image of Justice of the Nation,.....Equally, it imposes patterns of behaviour, which are a hallmark of distinction of a Judge among his fellow-men".[20] And in doing so, demands from him, amongst other

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16 Article 8, 199 (5) of the Constitution

17 Article 212 and (other restrictions imposed by law)

18 Syed Arshad Ali and others Versus Pakistan Telecommunication Company Ltd. and others (2008 S C M R 314); I.A. Sharwani and others versus Government of Pakistan through Secretary, Finance Division, Islamabad and others (1991 S C M R 1041)

19 Lawrence B. Solum, "Virtue Jurisprudence: A virtue-centred Theory of Judging" (2004).

20 Preamble to the code of conduct

attributes: to be "cautious and forbearing"[21]; "to keep his conduct in all things, official and private, free from impropriety"[22]; to avoid publicity and "not engage in public controversy"[23]; 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".[24]

18. Admittedly, there is no absolute bar on a sitting Judge to resort to litigation. The command provided in the code of conduct is for the worthy Judges to "endeavour to avoid" litigation in person or a representative capacity. Thus all possible efforts are to be made by the worthy Judges to avoid litigation, and resorting to the same should only be made in dire need, and that too, as a last inevitable option. Caution should always govern the need. In case, a sitting Judge having no other possible alternative enters into litigation, he has to tread very carefully and remain "cautious and forbearing" to ensure that his actions do not infringe upon the respect and dignity attributable to the esteemed office of the Judge. The object is to avert any chance of him being placed in a position which leads to his conduct being seen as unbecoming of a Judge.

19. I appreciate the repeated assertions of the worthy counsel of the Petitioner that he is under the strict instructions of his client to vehemently assert that the petition was moved for safeguarding the independence of the judiciary and that he had accepted the brief for the same reason. However, from the Petitioner's point of view, the subject matter of the present litigation, in pith and substance, revolves around allegations of impropriety, no matter how baseless it may seem. This being so, seeking to enforce the fundamental rights to challenge the very charges against him to be *ultra vires,* and that too without withstanding

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21 Article II of code of conduct
22 Article III of code of conduct
23 Article V of code of conduct
24 Article VI of code of conduct

the prescribed enquiry would negate the very spirit of the oath taken by the petitioning Judge.

Conclusion

20. In view of the above deliberations, I am of the considered opinion that the present petition is not maintainable. It starkly lacks 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. More so, when the positive exercise of the said jurisdiction by this 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 instant petition being bereft of essential constitutional requirements is non-maintainable, and thus, must fail.

CONSTITUTION PETITIONS NO. 19 TO 30, 32 AND 34 OF 2019

21. The Petitioners in these petitions include eminent lawyers and the premier elected bodies representing the entire lawyers' community of our country. Most strikingly, though they all have independently moved this Court, yet they have in unison challenged the very legality of the Reference filed by the worthy President against Justice Qazi Faez Isa and the steps taken in pursuance thereof.

The Supremacy of the Supreme Judicial Council

22. I will first address the preliminary objection raised by the learned counsel of the Federation regarding the lack of jurisdiction of this Court to entertain the present petitions given the bar provided under Article 211 of the Constitution. The exclusive jurisdiction of the Council to proceed against a sitting constitutional Judge under Article 211 of the Constitution should stand supreme unless the same is effectively challenged on the grounds of *coram non judice*, *mala fide* and want of

jurisdiction.[25] To this end, I am not going to comment upon the merits of the charges levelled against Mr Justice Qazi Faez Isa in the Reference, as the same falls in the exclusive domain of the Council. Similarly, another contested issue, the scope and extent of the culpability of a sitting Judge *qua* the actions and inactions of his spouse and children, is a matter which ought to have been expressly dealt with in the code of conduct. In absence of a clear provision therein, this issue, in my opinion, has to be left open for determination by the Council; the authority competent under the Constitution[26] to determine and prescribe the terms of the conduct of a sitting judge.

23. Given the above, my present opinion would test the challenge to the Reference on its constitutional plane, as to its maintainability and validity, and not on the credence or merit of the alleged misconduct. In the circumstances, any directions of this Court setting steps for the Council to follow, and that too, without hearing the learned counsel for the parties on the challenge made on the jurisdiction and *bona fide* of the Council, would be premature and offend the principle of natural justice. Moreover, a direction of this Court pre-determining a course of action for the Council to follow, when the Constitution already provides a clear mandate for the same, would amount to usurping the exclusive constitutional jurisdiction vested in it under Article 211 of the Constitution.

Maintainability of the Petitions under Article 184(3) of the Constitution

24. In essence, these petitions seek the enforcement of the fundamental rights i.e. access to justice and a fair and independent judiciary. These issues, as stated earlier, have been treated by this Court

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25 Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others (PLD 2010 SC 61)

26 Under Article 209(8) of the Constitution

as "matters of public importance". Moreover, it has also by now been settled that for seeking matters of public importance relating to the enforcement of fundamental rights before the original constitutional jurisdiction of this Court, the general petitioner need not be an aggrieved person in the strict sense.[27] And more importantly, the present Petitioners, unlike a sitting Judge of the superior court, are not shackled by any legal restrain of a constitutional oath to invoke the original constitutional jurisdiction of this Court. Resultantly, the present Petitioners fulfil the two mandated condition precedents to invoke the constitutional court under Article 184(3). Given the above, the objection of the Federation to the maintainability of the petitions is devoid of merit, and thus the same is dispelled.

Constitutional Requirements for a Presidential Reference

25. Our written Constitution envisages a Federation with a parliamentary form of government, where the executive authority of the Federation vests with the Cabinet headed by the worthy Prime Minister, and all its acts are to be expressed in the name of the worthy President.[28] The worthy Prime Minister personifies the executive authority of the Federal Government, while the worthy President figures as the apolitical head of the State, unifying the federating units, and maintaining the balance of the trichotomy of power between the three organs of the State. The role of the worthy President in the executive affairs of the Government, under the Constitution, as a general rule[29], is bound by the "advice" of the Cabinet. However, the Constitution provides for exceptions to the above rule[30], where the worthy President has been mandated to exercise his discretion or form his independent opinion on

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27 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 P L C (C.S.) 984), Miss Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416) Pakistan Muslim League (N) through Khawaja Muhammad Asif v. Federation of Pakistan (PLD 2007 Supreme Court 642)

28 Article 91 of the Constitution

29 Article 48(1) of the Constitution

30 Article 48(2) of the Constitution

matters, and then act accordingly. Similarly, while performing some "other constitutional" functions, the Constitution also dictates for the worthy President not to be bound by the said "advice".

26. As far as the decision of the worthy President to send the Reference against the Mr Justice Qazi Faez Isa under Article 209 of the Constitution is concerned, the learned counsel representing the Federation and defending the Reference, vehemently contended that the same was to be sent on the "advice" of the worthy Prime Minister and that it was binding upon the worthy President. On the other hand, the learned counsel for the Petitioners have vehemently argued to the contrary.

27. Before commenting on the above-narrated legal issue, it would be appropriate to first contextualize the facts leading to the sending of the Reference to the Council. Based on the complaint of Mr Dogar, a summary was prepared and then moved by the Ministry of Law, and finally placed before the worthy President, with the "advice" of the worthy Prime Minister, in terms that:

> "Subject: **REFERENCE UNDER ARTICLE 209(5) OF THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN**
>
> 21. In terms of Article 209(5), read with Article 48 of the Constitution of the Islamic Republic of Pakistan, 1973, the President is advised to form an opinion on the proposals contained in paras 17 and 18 of the summary, and direct the Supreme Judicial Council to inquire into the allegations of misconduct against Mr Justice Qazi Faez Isa, a Judge of the Supreme Court of Pakistan. Accordingly, draft reference (Attachment A) may pleased be signed.
>
> (-sd-)
> IMRAN KHAN
>
> PM's Office U.O. No. 1338/Secy(PM)/2019 dated 17-05-2019.

The worthy President signed and approved the summary with his handwritten note in terms that:

> 22. The Prime Minister's advice at Para 21 of the Summary is approved and the Reference signed. **(handwritten noting)**
>
> (-sd-) President

28. The above noting on the summary reflects the following: firstly, that the "advice" of the worthy Prime Minister was unconditionally

approved by the worthy President; secondly, the approval so made by the worthy President was without his independent application of mind on the "information" contained in the summary regarding the alleged misconduct against Mr Justice Qazi Faez Isa; and finally that, there was no formulation of an "opinion" by the worthy President regarding the sufficiency of the "information" to constitute misconduct against the sitting Judge of the Supreme Court to file a reference.

29. Given the above factual background, the constitutional mandate of the President to receive information regarding the alleged misconduct of a Judge of a constitutional court, and the ultimate decision to file a reference against him before the Council is governed by Clause (5) of Article 209 of the Constitution, and it reads:

> "(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 provided)

30. A careful reading of the above provision, *inter alia*, strikingly begs the following comments on a presidential reference: firstly, that the "information" regarding the alleged misconduct of a constitutional Judge, plays a very crucial and determining role in the entire decision making of sending a reference against the said Judge to the Council; secondly, the said "information" may emanate from "any" source; thirdly, on receipt of the said information, the worthy President has to form his opinion, or whether to proceed with the sending of the reference or otherwise; and finally, that a Reference sent by the worthy President has a special status, as compared to any other reference filed before the Council, as an inquiry thereon is mandatory.

31. To legally appreciate the issue under review, the focus should now be on the “advice” of the worthy Prime Minister to the worthy President to file a reference against an honourable Judge of the superior judiciary for his alleged misconduct.

32. In this regard, the contention of the learned counsel representing the Federation, defending the Reference was that; sending a Reference against a Judge of a constitutional court to the Council was an executive act, and it came within the purview of the general rule, envisaged under clause (1) of Article 48 read with clause (1) of Article 91 of the Constitution and clause 15A read with item 33 of the Schedule IV of the Rules of Business, 1973 **(“Rules of Business”)**; and thus the “advice” of the worthy Prime Minister was binding upon the worthy President. However, the learned counsel for the Petitioners vehemently argued to the contrary.

33. The legal purport of clause (5) of Article 209 of the Constitution portrays a picture contrary to the contention of the learned counsel for the Federation. The constitutional mandate of the worthy President, under the said provision, is to form an “opinion”: whether misconduct is made out against the Judge, and if so, then a reference is to be sent for an enquiry to the Council. This decision or for that matter, the "opinion" is to be based on the "information" received from "any source". The "advice" of the worthy Prime Minister when received by the worthy President, would only be an "information" received from a "source", and thus lose its efficacy as an "advice", within the contemplation of clause (1) of Article 48 of the Constitution. In such circumstances, the "advice" of the worthy 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 worthy President would have to apply his independent mind on the matter and then act accordingly.

34. The contention that the “advice” of the worthy Prime Minister to file a reference against Judge of a constitutional court was binding on the worthy President would have been reasonably plausible only if we omit to read the words, "If, on information from any source," prefacing Article 209 (5). It is only then that the "advice" of the Prime Minister would maintain its constitutional identity, and not be categorized as an "information" reaching the worthy President from a "source". This, I am sure, could not be the intent of the legislature, as every word of the Constitution has a purpose and meaning to it. No word is to be rendered redundant. More so, when the words so provided in the Constitution, given their ordinary meaning, convey no absurd purpose or meaning.[31] In such circumstances, the will of the legislature, as reflected in the letter of the law, has to be respected and abided. Thus, in the face of the command of the Constitution, any contrary provision contained in the Rules of Business, as relied upon by the learned counsel for the Federation, would have to yield and be declared *ultra vires* of the Constitution.

35. One cannot lose sight of the special constitutional status assigned to a Presidential Reference under Article 209(5) of the Constitution. Unlike other complaints received by the Council, which can be discarded without any formal enquiry, a Presidential Reference, however, commands a mandatory enquiry by the Council. This being so, the decision-making process leading to the worthy President sending a reference to the Council under Article 209(5) deserves careful and thorough deliberation by the worthy President. Given the facts relating to the opinion formed by the Worthy President in the present case, I have noted that it demonstrates grossly negligent attitude lacking any application of mind. Instead of applying his independent mind to the

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[31] Federation of Pakistan through Secretary Ministry of Petroleum and Natural Resources v. Durrani Ceramics (PLD 2015 Supreme Court 354); Baz Muhammad Kakar v. Federation of Pakistan through Ministry of Law and Justice (PLD 2012 Supreme Court 923); Shahid Nabi Malik v. Chief Election Commissioner (PLD 1997 Supreme Court 32)

seriously important matter placed before him, the worthy President blindly accepted and followed the "advice" of the worthy Prime Minister to send the Reference to the Council. The formation of the “opinion” by the worthy President was, it seems, muddied by the blatant and uncalled for obedience to the “advice” of the worthy Prime Minister.

36. Accordingly, for the reasons discussed above, I hold that the worthy President has 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 worthy President is 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 Reference against Mr Justice Qazi Faez Isa stand abated.

Legal validity of Information Obtained Unlawfully

37. One must be mindful of the fact that even the above-recorded findings declaring the Reference to be without lawful authority are not to be understood or construed to belittle or diminish the authority vested in the Council to proceed on the information of alleged misconduct of a sitting Judge.

38. It is also pertinent to note that any “information” capable of being translated into evidence could be measured on the principles of the law of evidence; relevance and admissibility, and not the source of such information or evidence, unless it is hit by an exclusionary rule. It is by now a well-recognized principle in Common Law jurisdictions, in particular in the United Kingdom[32], Canada[33], and India[34] that, when

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[32] The point was put starkly by Crompton J. in England in the 19th century: “It matters not how you get it; if you steal it even it would be admissible in evidence..” R. v. Leatham (1861), 8 Cox C.C. 498, at 501, [1861-73] All E.R. Rep. Ext. 1646; R v Sang, [1979] 2 All ER 1222; Kuruma v. The Queen (PLD 1957 Privy Council 32); Jones v the University of

such information is relevant, the admissibility thereof would follow. However, there is a divergence of opinion witnessed in the judicial pronouncements germinating from the United States of America[35], which I, with great respect, do not subscribe to. The judicial stance taken across the Atlantic to disregard taintedly obtained evidence would only be legally palatable if viewed in their territorial context, and that too with the constitutional prohibition to search and seize properties under the Fourth Amendment.

39. Now reverting to Clause (5) of Article 209 of the Constitution, the information, though obtained and disclosed unlawfully, if admitted would fall within the mischief of "information from any source". And thus, it would remain the discretion of the Council to decide; whether based on the said admitted information, it would *suo motu* proceed against a sitting Judge or otherwise. Any finding by this Court on the probative value of the information or any direction to the Council to act in a particular manner, and that too at this stage, would not only be premature but also amount to usurping the constitutional domain of the Council.

Information in Mr Dogar's Complaint

40. Much has been stated about Mr Dogar and his complaint of 10-4-2019 **("Complaint")**. His lack of standing, as a journalist; his *mala fide* in filing the complaint against the wife of Mr Justice Qazi Faez Isa owning foreign property in the United Kingdom; he being a proxy of disgruntled elements in the ruling establishment; and most strikingly that, the information regarding the foreign property of Mrs Sarina Isa

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Warwick, [2003] 3 All ER 760[2003] 3 All ER 760; Imerman v Tchenguiz and others; Imerman v Imerman, [2011] 1 All ER 555 [2011] 1 All ER 555.

33 Propp v. Propp, 2014 SICCA 5, [2014] S.J. No. 12, at para. 41 (Sask. C.A.)

34 Magraj Patodia vs R. K. Birla and Ors (1971 AIR 1295, 1971 SCR (2) 118); RM Malkani vs. the State of Maharashtra (AIR 1973 SC 157); Umesh Kumar v. State of Andhra Pradesh (AIR 2014 SC 1106)

35 Boyd v. the United States (116 U.S. 616(1886); Weeks v. United States (232 U.S. 383(1914); U.S. v. Leon (468 U.S. 897, 104 S.Ct. 3405 (1984); Mass. v. Sheppard (468 U.S. 981 (1984); Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232 (1976); Terry v. Ohio, 382 U.S. 1 (1968); Adams v. Williams, 407 U.S. 143 (1972).

stated in his complaint was obtained by surveillance by the intelligence agencies on the directions of the Federal Government.

41. The foreign property highlighted in the Complaint has been admitted by Mr Justice Qazi Feaz Isa to be owned by his wife, Mrs Sarina Isa. In view thereof, any negative aspersions against Mr Dogar, at least to the extent of the adjudication of the present petitions, are legally insignificant, if not entirely irrelevant.

Unlawful Surveillance

42. It is universally recognized that unlawful surveillance of any person, much less a sitting Judge of a constitutional court is to be seriously deprecated. Our Constitution exalts the right to privacy[36] and guarantees that every citizen is to be dealt with in accordance with the law.[37] Thus, any action by the executive, without the backing of the law, violating or undermining the independence of the judiciary would constitute the offence of subversion of the Constitution, entailing severe penal consequences for both the actors and abettors.

43. The Petitioners were able to place on record, sufficient material to demonstrate strong reservations of the ruling party in Government and its political allies against the judicial pronouncement authored by Mr Justice Qazi Faez Isa.[38] In such circumstances, had the information regarding the foreign property owned by the family members of Mr Justice Qazi Faez Isa not been freely and legally accessible, then it would have sufficed to establish the allegation of obtaining the said information through surveillance. To this end, the learned counsel for the Petitioners was initially able to successfully set up their stance. However, the learned counsel for the Federation, in rebuttal, was able to demonstrate that the information regarding any property in the United Kingdom, including the one owned by the family member of Mr Justice

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36 Article 14 of the Constitution
37 Article 4 of the Constitution
38 In SUO MOTU CASE NO.7 OF 2017 (PLD 2019 Supreme Court 318)

Qazi Faez Isa could be retrieved or accessed through internet searches. And further, placing on record, a copy of the title of the said foreign property, pre-dating the Complaint, and that too, from the relevant and competent authority under the laws of the United Kingdom (**"Certificate"**)[39] confirmed that the requisite search under the laws of the 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.

Asset Recovery Unit's Legal Status

44. The legal sanction for establishing the Asset Recovery Unit **("ARU")** has also been a matter of contest between the parties. The question that arises is whether this controversy is so integral to the impugned Reference that it must be decided. I am in such a situation reminded of Justice Frankfurter's dictum: "[t]hese are perplexing questions. Their difficulty admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case."[40] In the present case, the controversy in hand can be resolved based on the legality of the actions taken by the Chairman of ARU, passing a definite finding on the legal status of ARU would be unnecessary, if not legally incorrect.

Verification of Mr Dogar's Complaint from Income Tax Officials

45. The steps taken for the verification of the information contained in the Complaint from the Income Tax authorities in Pakistan can be summarised in terms that the Law Minister[41], on being informed about the allegations contained in the Complaint, directed the Chairman ARU, to seek verification of the ownership of the said foreign property

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39 Certificate dated 26.04.2019 (CMA No.3321/2020)

40 Whitehouse v. Illinois Central R. Co., 349 U.S. 366, 372-73; On the same line Justice Robert said, "if it is not necessary to decide more, it is necessary not to decide more." PDK Labs. Inc. v. United States DEA, 360 U.S. App. D.C. 344, 362 F.3d 786 (2004)

41 Direction/advice of the Law Minister to Chairman, ARU in meeting dated 16.04.2019 recorded in letter No. 1-11/20-19-ARU dated 10.05.2019

from the income tax returns of Mr Justice Qazi Faez Isa or his wife, Mrs Sarina Isa. In pursuance of the directions of the Law Minister, Chairman ARU[42] sought confidential information from the then Chairman Federal Board of Revenue, who, without any protest, complied blindly thereto[43]; and particulars of their income tax returns filed and maintained under Income Tax Ordinance, 2001**("Ordinance")** were disclosed to Chairman ARU by Chairman Federal Board of Revenue[44]; 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 Reference.[45]

Confidentiality of Income Tax Returns and the Penal Consequence for its breach

46. The above-stated conduct of the Law Minister, the Chairman ARU, the then Chairman Federal Board of Revenue and the complying Income Tax Officials, when viewed in terms of the provisions of the Ordinance, raises serious legal concerns regarding their said actions. To start with, the Ordinance expressly provides for confidentiality of information recorded in the income tax returns of an assessee.[46] The income tax officials, who are the custodian of the said information, are commanded under the law to jealously guard the same, and in case of any breach thereof, the offender is to face penal consequences under the Ordinance.[47] However, this confidentiality of information would in no way prevent the competent income tax officials to seek from the assessee, the source of funds[48] for the acquisition of any assets. In case, the competent income tax official is not satisfied with the explanation for the source of funds, he can departmentally proceed against the assessee for non-declaration and misdeclaration of assets under the enabling provisions of the Ordinance.

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42 Letter No. 1-11/2019-ARU dated 22.04.2019
43 F.No.2(99)Int. Taxes/EOI/2019 dated 10.05.2019
44 FBR disclosed information to ARU vide letter No. F. No. 2(99)Int. Taxes/EOI/2019 dated 10.05.2019
45 ARU further pass on the information to Law Minister vide letter No. 1-11/2019-ARU dated 20.05.2019
46 Section 216 of Ordinance
47 Sections198 and 199 of Ordinance
48 Sections 111 and 216 Ordinance

47. In the present case, once the Income Tax Officials had information regarding the alleged undeclared assets of Mrs Sarina Isa, they despite having ample authority to legally proceed against her under the 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, have exposed themselves to penal prosecution for commission of offences under Section 189 read with Section 199 and section 216 (1) of the Ordinance.

Immunity from Penal Consequences for Breach of Confidentiality

48. The worthy counsel representing the Federation contended that the information so directed to be obtained, disclosed and received was immune from penal consequences, as it was in furtherance of an enquiry against a "public servant", which was legally protected from prosecution under Section 216(p) of the Ordinance. For clarity, let us review the penal as well as the asserted saving provisions under the Ordinance, which read:

> **198. Prosecution for unauthorized disclosure of information by a public servant.**--A person who discloses any particulars in contravention of [1][sub-section IB of section 107 or] section 216 shall commit an offence punishable on conviction with a fine [2][of not less than five hundred thousand rupees] or imprisonment for a term not exceeding [3][one year], or both.
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> **199. Prosecution for abetment.** – Where a person [4][knowingly and willfully] aids, abets, assists, incites or induces another person to commit an offence under this Ordinance, the first-mentioned person shall commit an offence punishable on conviction with a fine or imprisonment for a term not exceeding three years, or both.
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> **216. Disclosure of information by a public servant.**--(1) All particulars contained in:
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> (2) Any statement made, return furnished, or accounts or documents produced under the provision of this Ordinance; .....

> shall be confidential and no public servant save as provided in this Ordinance may disclose any such particulars.
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> (2) Notwithstanding anything contained in the Qanun-e-[1][Shahadat], 1984 (P.O. Order No. 10 of 1984, or any other law for the time being in force, no court or other authority shall be, save as provided in this Ordinance, entitled to require any public servant to produce before it any return, accounts, or documents contained in, or forming a part of this records relating to any proceedings under this Ordinance, or any records of the Income Tax Department generally, or any part thereof, or to give evidence before it in respect thereof.
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> (3) Nothing contained in sub-section (1) shall preclude the disclosure of any such particulars--
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> .....
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> (p) as may be required by any officer or department of the Federal Government or a Provincial Government for an 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;

49. A careful reading of the above provisions, brings forth the intent of the legislature to seriously protect the confidentiality of information recorded in the income tax returns of an assessee. This intent is evident from the said information being expressly excluded from judicial scrutiny and more importantly declaring such breach of confidentiality to be an offence following penal consequences.

50. Apart from the strict statutory protection of the said information, one must appreciate that the 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 rests solely with the Council, and none other. Even otherwise, the information relating to income tax returns of Mrs Sarina Isa would not fall within the scope of the purported enquiry of a "public servant" envisaged under Section 216(3)(p) of the Ordinance. The particulars of Mrs Sarina Isa's income tax returns would remain immune from such permissible disclosures and thus retain its confidentiality. Surely, the legal position would have been otherwise, had Mrs Sarina Isa consented to allow such disclosure, which she did not or had the competent tax authorities initiated proceedings against her under the Ordinance, which they never

did. This being so, passing any directions by this Court to the tax authorities with specific time spans and setting the procedure for the Income Tax officials to proceed against Mrs Sarina Isa, would amount to parallel legislation, when the Ordinance provides a framework for all such matters. More so, when such directions have been made against a person who was not a party to the present petitions. In the circumstances, any such directions of this Court would amount to prosecute her, and that too without providing her with an effective opportunity of hearing.

51. It was further vehemently asserted that the Law Minister was immune from criminal prosecution under Article 248 of the Constitution. It is by now judicially settled that there is no protection extended to holders of constitutional office from prosecution for their illegal acts.[49] Hence, no constitutional immunity from prosecution would be available to the Law Minister or any other Federal Minister for issuing directions to obtain legally confidential information, and that too in the face of the said direction to an officer of the Government to commit an offence under the Ordinance.

Administrative and Penal Consequences for Passing on Confidential Information

52. The direction of the Law Minister and the Chairman ARU to solicit, obtain and receive, confidential information regarding the income tax returns of Mr Justice Qazi Faez Isa and Mrs Sarina Isa, *prima facia,* exposes them to criminal prosecution for having committed an offence under the section 199 read with sections 198 and 216(1) of the Ordinance. Similarly, the fact that the then Chairman Federal Board of Revenue and the Income Tax Officials having not refused the illegal directions of the Law Minister and Chairman ARU, and passing on

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49 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); Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others (PLD 2010 Supreme Court 61)

confidential information to them, *prima facia*, exposes them not only to departmental action but also to penal consequences under section 198 read with section 216(1) of the Ordinance.

53. Accordingly, for the reasons stated above, the present Chairman, Federal Board of Revenue is directed to ensure that the entire record of the present case is placed before the Federal Board of Revenue to proceed under the law, against the Law Minister, the Chairman ARU, the then Chairman, Federal Board of Revenue 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 Mr Justice Faez Isa and Mrs Sarina Isa.

54. Keeping in view the sensitive nature of the proceedings, the present Chairman, Federal Board of Revenue is to further appraise the Federal Board of Revenue to strictly follow the law in letter and spirit, without fear or favour, and most importantly, to independently apply its mind to the facts of the matter, lest the fundamental right to a fair trial under Article 10-A of the Constitution of the Law Minister, the Chairman ARU, the then Chairman, Federal Board of Revenue and the delinquent Income Tax Officials is violated. A compliance report of the above action of the Federal Board of Revenue is to be submitted by present Chairman, Federal Board of Revenue under his signature to the Registrar of the Supreme Court not later than fifteen days from receipt of this Judgment. The Registrar of this Court is directed to transmit a copy of this Judgment to the Chairman, Federal Board of Revenue for compliance.

Conclusion

55. The present constitutional challenge made by the Petitioners representing the entire lawyers' community of the country, have been able to successfully establish that the worthy President grossly failed to exercise his discretion as mandated under the Constitution and, thus, the entire process built thereon leading to the

filing of the Reference was in violation of the law and the Constitution. At the same time, it is intrinsically important to note that, the independence of our judiciary is not so fragile as to be effectively threatened or undermined by complaints. Accountability of Judges is and shall remain, the essential lifeblood for a democratically vibrant society. Indeed, indiscriminate, lawful and transparent accountability of Judges would further bolster the independence of the judiciary, boast public trust, and thus, promote the rule of law in our country. And to consider otherwise would be to accede to judicial autocracy.

Judge