Syed Mansoor Ali Shah, J.-

Introduction

While it appears that this case is about the independence and accountability of a judge, it is truly about the independence and accountability of our institutions. It raises the questions: Are we governed by the Constitution and the Rule of Law or can the Government of the day conveniently get off the constitutional rails to suit its ends and come prying into the private lives of its citizens in disregard of their constitutional rights? Can a Special Assistant[1] to the Prime Minister, acting as Chairman, ARU,[2] assume a role larger than the statutory institutions of the State and spearhead investigation and surveillance into the life and conduct of a judge of the highest constitutional court, sidestepping the prescribed constitutional process? Can the Special Assistant wield power over statutory institutions like FBR, NADRA and FIA without any sanction of law? Can a Law Minister, ignore the law, the Constitution and the statutory institutions of the State and permit ARU to entertain, investigate and collect evidence on a private complaint against a constitutional court judge? Is the Law Minister justified to place a Summary based upon the evidence so collected, before the Prime Minister for approval? Is there a level of responsibility expected of the Prime Minister, who is the Chief Executive of the Federation and Head of the Cabinet, in approving Summaries placed before him? In a matter no less serious than the removal of a judge of the highest court in the land, was the Prime Minister required to inquire how the "information" placed before him was collected and whether the information collected actually made out a case of "misconduct" against the Petitioner Judge or is the Prime Minister to impetuously approve Summaries without any application of mind? Can Government in a constitutional democracy be driven by personal bias, malice, intolerance and bigotry or should an institutional process run it with collegiality, transparency, fairness, openness, diversity and inclusiveness as its hallmarks? Are we to expand our frontiers of freedom as we mature into a democracy and strengthen our constitutional guarantees

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[1] The substantive legal post of Chairman, ARU, is that of a Special Assistant to the Prime Minister.

[2] Asset Recovery Unit (discussed in detail later)

with renewed confidence and enthusiasm or regress into darkness by permitting unconstitutional acts that allow muffling of a critical judicial voice in the name of judicial accountability? This case makes us think, whether we want our future generations to descend into a dystopia or grow up into a vibrant democracy with an understanding and conviction that "in a democracy, the State is neither with us nor against us. It is us."[3]

2. I concurred with the conclusion of the Majority recorded in the Short Order dated 19.6.2020, whereby the Reference filed against Justice Qazi Faez Isa was quashed and the subsequent proceedings before the Supreme Judicial Council stood abated. I have gone through the Majority Judgment and, with respect, hold a different view of the Constitution, the law and the facts of the case and have been unable to subscribe to the logic and reasoning of the Majority view. I have, therefore, penned my own reasons for quashing the Reference. I am also unable to agree with the directions[4] issued by the Majority in the Short Order and have given reasons for my dissent later in the judgment.

Judicial Independence and Judicial Accountability

3. "I have always thought…that the greatest scourge of angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt or a dependent judiciary," said John Marshall.[5] Judicial independence and judicial accountability are two sides of the same coin and one cannot co-exist without the other. Therefore, to compromise on judicial accountability is to compromise on our freedoms guaranteed under the Constitution; the Rule of Law; Independence of Judiciary; and Democracy itself. We all know that the court cannot buy support for its decisions by spending money or use force to coerce obedience of its decrees. The court's power lies in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the judiciary as fit to determine what the law means and to declare what it demands. The court's concern with legitimacy is not for the sake of the court but for the sake of the nation to which it is

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[3] Jonathan Sumption, Trials of the State: Law and the Decline of Politics (2019).
[4] Paragraphs 4-11 of the Short Order dated 19.06.2020.
[5] Fourth Chief Justice of the United States Supreme Court (1801-1835) - see Fazal Karim, Judicial Review of Public Actions, p.282, Vol-1 (2nd ed.).

responsible.[6] Foundations of judicial institution stand on public confidence and public trust that lend it legitimacy and public acceptance. Institutional legitimacy of the judiciary, in turn, is grounded in judicial integrity of the judges. According to John Marshall, ignorance, corruption and dependence of a judge are the evils that tarnish judicial integrity; Our Constitution also lays down the measure of judicial integrity of a judge. While taking oath a constitutional court judge makes a solemn promise before God that he will discharge his duties and perform his functions honestly and faithfully in accordance with the Constitution and the law; that he will not allow his personal interest to influence his official conduct or decisions; that he will abide by the code of conduct issued by the Supreme Judicial Council; and that he will always preserve, protect and defend the Constitution. This is the constitutional requirement of judicial integrity. A judge is to always tread the path of the Constitution and the law, must possess strength of character to never give in to external influence for personal benefit, and must be bold and courageous to always stand for the Constitution and to preserve, protect and defend it. Any compromise on this sacred promise with God, is to comprise judicial integrity.

4. While judicial accountability is critical for upholding the legitimacy of the judicial institution, equally important is the right of a Judge to enjoy the protection of law and to be treated in accordance with law. Judicial accountability, like any other accountability, must be according to the standards of due process guaranteed under Article 4 of the Constitution. We must remember that public confidence and public trust in the legitimacy of the judicial institution can only be attained when judges decide without fear or favour, in accordance with law, even while sitting in judgment over the affairs of their own colleague. While dealing with judicial accountability we are not to project a forced image of self-accountability to win accolades of the public or make extra effort to win over public confidence. We are to simply decide in accordance with the Constitution and the law – come what may.

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[6] see: Planned Parenthood v. Casey, 505 U.S. 833 (1992)

Brief Facts

5. Justice Qazi Faez Isa ("Petitioner Judge") being part of a two Member Bench of this Court authored judgment in Suo Motu Case No.7 of 2017, known as *Faizabad Dharna* case,[7] decided on **February 6, 2019**, and made certain observations therein as to the 2014 *Dharna* of the current main ruling political party (PTI), the role of the coalition ruling party (MQM) at the time of Karachi incident of 2007, and the interference by the Military Intelligence Agencies in politics and freedom of Media. It was also directed in the judgment that proceedings should be taken against military officers who had violated their oath of office by engaging in political activity. Several review petitions were filed against that judgment, including the petitions by the PTI, MQM, and Ministry of Defense, Government of Pakistan, in **March, 2019**. The Ministry's petition sought for expunction of the observations and directions made regarding the Military Intelligence Agencies and its officers. The PTI and MQM (the political parties currently in Government), in their review petitions, asserted that the Petitioner Judge by making the objectionable observations in the judgment had violated his Oath of Office and Code of Conduct for Judges and was liable to be removed from office under Article 209 of the Constitution. This assertion of removal was made only against the Petitioner Judge, and not against the other learned Member of the Bench.

6. Soon thereafter, one Abdul Waheed Dogar ("Complainant") made a complaint titled "Accountability of Judges" to the Asset Recovery Unit ("ARU"), housed in the Prime Minister's Office, on **April 10, 2019**, against the Petitioner Judge and two other judges of the constitutional courts. The complainant alleged that these judges owned offshore properties. A meeting of the ARU was held on **April 15, 2019** to discuss the complaint at the residence of the Chairman, ARU in the Minister's Colony, Islamabad, and it was decided in that meeting that since the matter pertained to the Judges of Superior Judiciary the opinion of the Law Minister should be sought. The Chairman and certain Members of the ARU met the Law Minister in his office on **April 16, 2019** who advised orally that before taking any further action, the ARU should check

[7] PLD 2019 SC 318.

the veracity of the allegations contained in the complaint. No formal correspondence took place between the ARU and the Law Ministry, in this regard. The Chairman, ARU, after that meeting, tasked Barrister Zia Naseem, Legal Expert of the ARU, to verify the property details attached with the complaint, and further conduct a wider property search in the names of persons mentioned in the complaint and of their family members. He also tasked Mr. Muhammad Rizwan, Member of the ARU from FIA, to obtain identification documents of persons mentioned in the complaint, copies of their CNICs and passports, all visas, if any, family tree and travel history. On the suggestion of Mr. Muhammad Ashfaq Ahmad, Member of the ARU from FBR, the Chairman decided to forward the complaint through a formal letter to the Chairman, FBR for assessment and analysis into declaration of assets of persons mentioned in the complaint. The Legal Expert of ARU submitted his report about UK properties in the name of the spouse and children of the Petitioner Judge, on **May 8, 2019**. The Member of ARU from FIA submitted his report on **May 10, 2019**. Assistant Commissioner (IR), Commissioner (IR), and DG, (International Taxes)/Member of ARU from FBR, all three, submitted their reports on **May 10, 2019**. The Chairman, ARU then made his final Report on **May 10, 2019** after examining all the reports and record submitted to him by the Legal Expert and Members of the ARU, and dispatched it to the Law Minister on the very same day, i.e., **May 10, 2019**. The Report also mentioned a meeting of the Chairman, ARU with the complainant held to inquire into the allegations made in the complaint.

7. The Chairman, ARU thus investigated the complaint; located properties in the UK, and obtained reports regarding record of the Petitioner Judge and his family from the FBR, NADRA and FIA. He found that there were three properties in the names of the spouse and children of the Petitioner Judge in UK having been purchased in the years 2004 and 2013 and that those properties had not been declared by the Petitioner Judge and his family in their tax returns. One property was initially reported to have been purchased in 2011, but later on after filing of the Reference it was reported to have been purchased in the year 2004. The Chairman, ARU did not consider it fit to inquire into the alleged properties of

one other judge mentioned in the complaint after noting in the minutes of meeting held on April 16, 2019 that the said judge had already resigned.

8. The Chairman, ARU, as mentioned earlier, submitted his report of the said investigation conducted on the complaint to the Law Minister on **May 10, 2019**. The Law Ministry, made a "Summary for the Prime Minister", on **May 17, 2019**, proposing to the Prime Minister to advise the President, under Article 48(1) of the Constitution, to form an opinion that the Petitioner Judge may be guilty of misconduct and direct the Council under Article 209(5) of the Constitution to inquire into the matter. The basis for the proposal was stated in the Summary as under:

> "A judge of the Superior Court who omits to intentionally declare three expensive London properties jointly owned by his spouse and children, violates Section 116 of the 2001 Ordinance. The tax records of the learned Judge and his spouse are absolutely silent about the sources through which the said properties had been acquired and how and from where the funds were made available to purchase the said properties, without violating the money laundering regime and the Foreign Exchange Regulation Act, 1947. The said mis-declaration seems glaring. Thus, the said Judge i.e. Justice Qazi Faez Isa appears to have committed gross misconduct and is liable to be removed upon the recommendations of the Supreme Judicial Council in terms of Article 209 of Constitution."

The draft Reference was also annexed with the Summary. On the same day, i.e., **May 17, 2019** the Prime Minister, accordingly, advised the President to form his opinion, direct the Council and sign the draft Reference. The President approved the Prime Minister's advice and signed the Reference on **May 20, 2019**. The Secretary, Ministry of Law and Justice forwarded the Reference to the Supreme Judicial Council ("Council") on **May 23, 2019**. The Secretary, Council placed the Reference before the Chairman, Council, on **May 29, 2019**, and the Chairman, Council made an order to convene the meeting of the Council for **June 14, 2019** to consider the matter. Even though the matter had not yet been taken up in the meeting of the Council for preliminary consideration, several newspapers published the filing of the Reference and the allegations made therein against the Petitioner Judge on May 28, 29, 30, 31, and June 1 and 3, 2019. Later during the proceedings before the Council the matter was

discussed in press conferences and TV talk shows by the Government Ministers and even by the President of Pakistan.

Issues

9. The constitutional and legal issues I would address are as follows:

i. Could the Asset Recovery Unit (ARU) entertain and investigate a complaint against the conduct of a constitutional court judge under the law and Constitution?

ii. Was the ARU established with lawful authority under the law and Constitution? And what was the legal status of its Chairman?

iii. Did the ARU collect evidence in support of the allegations made in the complaint against the Petitioner Judge in accordance with the law and Constitution?

iv. If the answer to the above question is in the negative, could the Law Minister and the Prime Minister rely and act upon such evidence?

v. Was the President to form his independent personal "opinion", or to form the "opinion" on and in accordance with the advice of the Prime Minister, under Article 209(5) of the Constitution, on the "information" placed before him?

vi. Could an opinion as to the commission of misconduct be reasonably made against the Petitioner Judge, on the "information" given in the "Summary" and material annexed therewith?

vii. Does publicizing the act of sending the Reference against the Petitioner Judge and of the contents thereof attract proceedings under Article 204 of the Constitution and Contempt of Court Ordinance, 2003?

viii. Were the acts of entertaining the complaint, inquiring into and collecting evidence on the allegations, and making and filing of the Reference against the Petitioner Judge, *malafide*?

I endeavour to deal with these issues as per my humble understanding of the law and Constitution.

Constitutional Process for Removal of a Constitutional Court Judge

10. Article 209 of the Constitution provides the process for the removal of a constitutional court judge. A special constitutional forum - Supreme Judicial Council - has been vested with the exclusive jurisdiction under the Constitution to inquire into the capacity and conduct of a constitutional court judge, and

recommend his removal. The Council is a collegium of judges headed by the Chief Justice of Pakistan and consisting of two next most senior judges of the Supreme Court and two most senior Chief Justices of High Courts. The process of the Council is set in motion when "information from any source" against a constitutional court judge reaches the President or the Council. Either of the two gatekeepers, as the case may be, principally verifies and assesses the gravity of the allegations and forms an "opinion" whether the matter calls for "inquiry" into the capacity or conduct of the judge by the Council.

11. The proceedings before the Council, its report to the President and the removal of the judge by the President under Article 209 cannot be called in question in any court of law under Article 211, unless the removal of the judge is without jurisdiction, *malafide* or *coram non judice*. A limited judicial review on these three grounds is not affected by Article 211, as no ouster clause can keep the actions taken without jurisdiction, *malafide* or *coram non judice*, beyond the scrutiny of the constitutional courts.[8] Article 211 gives immunity to proceedings before the Council till the removal of the judge by the President. However, proceedings and steps taken before the matter lands before the Council escape the immunity under Article 211. In the present case, there were several steps that preceded the proceedings before the Council: the filing of complaint ('information') by the complainant before the ARU; the entertainment of the complaint by the ARU; the mode and manner of dealing with the complaint by the ARU and Law Ministry; the investigation and collection of evidence to supplement and document the complaint by the ARU; the preparation of "Summary" for making the Reference by the Law Ministry; the advice of the Prime Minister on the Summary; and the approval of that advice by the President. All these acts preceded the proceedings before the Council and are not hit by the ouster clause of Article 211. They are, therefore, subject to standard judicial review like any other executive or administrative act, on the grounds of substantive illegality, procedural impropriety and

[8] see CJP Iftikhar Chaudhry v. President of Pakistan, PLD 2010 SC 61, per Khalil-ur-Rehman Ramday, J, paras 78, 80, 83 and 85.

decisional irrationality.[9] In a democracy governed by the rule of law, where arbitrariness in any form is eschewed, no Government or authority has the right to do whatever it pleases; where the rule of law prevails, there is nothing like unfettered discretion or unaccountable action.[10] It is, however, underlined that a Reference competently filed by the President against a constitutional court judge should not ordinarily be made subject to scrutiny in judicial review by any Constitutional Court including this Court, unless the extraordinary circumstances demand such intervention in the interest of justice and fair play.[11]

12. While a citizen (a private person) can always directly approach these forums by placing the information before them, it is important to understand how the Government (Federal, Provincial or Local) or its Ministries, Divisions, Departments and officials place such "information" or complaint against a judge of a constitutional court before the President. Can any Ministry, Division, Attached Department or Department of the Government on receiving any information against a constitutional court judge, entertain it and proceed with it, or start collecting evidence or verify the contents of the complaint? The answer to this is in the negative in the light of Article 209(7) of the Constitution, which mandates that the only constitutional forum available to inquire into the conduct or capacity of a constitutional court judge is the Council. So the Governments, its Ministries, Divisions, Departments or Attached Departments and their officers are not authorized to entertain any complaint against a constitutional court judge, let alone proceed and collect evidence to supplement the complaint. They can at best return the complaint to the complainant and guide him to approach the constitutional forums under Article 209 of the Constitution.

13. Let us take a situation where any Ministry, Division, Attached Department or Department of the Government, in the course of its normal business, discovers some adverse information against a constitutional court judge that may attract impeachable misconduct, in addition to the legal proceedings under the relevant

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[9] See Ibid, para 70.
[10] see State of W.B v. Debasish Mukherjee, (2011) 14 SCC 187.
[11] See CJP Iftikhar Chauhdry case (supra), Per Muhammad Nawaz Abbasi, J. p.215.

law. The concerned Department etc., in such situation, should at first proceed against the constitutional court judge on the basis of the adverse information in accordance with the law under which it functions. For example, if it is the FBR that discovers such an information, it can proceed against the judge under the tax laws and the judge will have a right to defend himself in accordance with law. Only when these proceedings come to a close after exhausting all the legal and judicial avenues and it is finally held that the judge has violated the law, the FBR may, in the interest of judicial accountability, send this information to the Federal Government through the Division with which it is attached under the Rules of Business, 1973 ("ROB") for information and necessary action. It will then finally rest with the Federal Government i.e., the Cabinet, to decide if the violation of law amounts to impeachable misconduct and whether the Federal Government should proceed against the constitutional court judge and place the "information" before the President. Such process finds its justification from the foundational constitutional principles like independence of judiciary, rule of law and parliamentary democracy.

Entertainment of Complaint by ARU

14. First and foremost, the complainant could only have approached the constitutional forums provided under Article 209(5) of the Constitution and could not have filed the complaint before any other office or authority. Therefore, the very act of approaching the ARU was *per se* unconstitutional and illegal. It is noted with concern and suspicion that how did the complainant, a citizen of this country, plan on filing the complaint against a constitutional court judge before the ARU, which had no public interface or the legal mandate to deal with such a matter and had earlier never conducted any inquiry for the accountability of a constitutional court judge. There is surprisingly nothing on the record to show how the complainant found out about ARU. The ARU was not a Ministry or Division of any Ministry of the Federal Government, or an Attached Department, neither was it a statutory authority nor had the notification of its establishment been published in the official gazette for public information. The ARU, therefore, for all practical purposes did not legally exist for the world outside the Prime Minister's Office. However, the

complainant instead of approaching the Council, which would have ordinarily come to the mind of a citizen, particularly in view of the publically known recent removal of a High Court Judge by the President on the recommendation of the Council,[12] approached the ARU for the accountability of judges. This looks more odd especially when the complainant claims to be a journalist. Such an unusual step by the complainant raises eyebrows about the credibility of the complaint and the *bonafide* of the complainant.

Legal Status of ARU

15. The ARU was established by the Cabinet vide Notification dated 06.11.2018. The Federation has defended the establishment of the ARU by the Cabinet, by referring to the provisions of Rules 4(5) and 16(1)(m) of the ROB. The submission made on behalf of the Federation was that Rule 4(5) empowers the Prime Minister to establish agencies and offices for conducting the business of the Federal Government, and under Rule (16)(1)(m) the Cabinet has power to decide any matter referred to it by the Prime Minister. The Prime Minister referred the matter of establishing the ARU to the Cabinet, and the Cabinet thus competently approved the establishment of the ARU. Rules 4(5) and 16(1)(m) of ROB are reproduced here for ready reference:

> **4. Organization of Divisions.**
> .....
> (5) The business of Government, other than the business done in the Federal Secretariat or the Attached Departments, shall be conducted through such agencies and offices as the Prime Minister may determine from time to time.
>
> **16. Cases to be brought before the Cabinet.**--(1) The following cases shall be brought before the Cabinet:-
> .....
> .....
> (m) any case desired by the Prime Minister to be referred to the Cabinet.

Bare reading of the provisions of Rule 4(5) makes it clear that the said Rule does not empower the Prime Minister to establish new agencies or offices; it simply authorizes him to refer the business of the Government to already established agencies and offices under the law. The word "determine" has been used in the Rule in the context of allocation or entrustment of the business of Government and not for the power to establish a new agency or office. In the

[12] Justice Shaukat Siddiqui's case, Report of the Council dated 11.10.2018.

absence of any power to establish a new agency or office, reference of the matter to the Cabinet under Rule 16(1)(m) by the Prime Minister is inconsequential, as the Cabinet also does not enjoy any such power. The scope of the ROB made under Article 99(3) of the Constitution cannot extend to creation of agencies or offices to perform functions in relation to any matter to which the executive authority of the Federation extends. Such agencies or offices can be established only by or under some law enacted by the Parliament on the subject over which it has the legislative power under the Constitution. The creation of the ARU by the Cabinet, cannot be sustained treating it as an Attached Department of the Cabinet Division also. The Departments that have been declared as Attached Departments to particular Divisions are created by or under the law, and not by the Federal Government.[13] The Federal Government, as per Rules 2(1)(ii) and 4(4) of ROB, can only declare them attached with a particular Division, but cannot create them. The Terms of Reference (TORs) of the ARU define its role and powers. The ARU does not pass as a coordinating agency or office under the TORs for the following reasons: first, as per its Notification it was established as an entity separate from the Departments whose officials have been made its Members and also addressed as such in its TORs; second, there is no mention of its coordinating role in the TORs; third, the powers and functions have been prescribed in the TORs as that of the ARU, and not of its Members; and fourth, but most importantly, the ARU was conferred such wide and extensive powers which even its Members did not enjoy under the laws of their parent institutions, e.g., it was empowered to request any intelligence agency under the Government of Pakistan for assistance in obtaining any information on any subject within and outside the country,[14] and authorized to seek assistance and information from Law Enforcement Agencies and other Government Departments, including the information relating to bank accounts, companies record, revenue record, travel record, NADRA record etc.[15] With such intrusive investigative powers, the ARU cannot be said to be an innocuous coordinating agency, office or unit. The

[13] See ROB, Schedule III.
[14] TOR No. 7.
[15] TOR No.8.

establishment of the ARU was, therefore, absolutely without lawful authority, and is hereby so declared. In the absence of any legal status of the ARU, its Chairman and Members also have no legal position or status.

Budgetary Status of ARU

16. It is important to see how the ARU was being funded. Were the funds allocated for the functioning of ARU duly reflected in the Annual Budget? Funds can be allocated for any Government activity only by the National Assembly in the Annual Budget Grants under Article 82(2) or supplementary and excess budget grants under Article 84 of the Constitution. The Annual Budget Statements for the financial years 2018-19 and 2019-20 do not mention the allocation of any budget for the expenditure of ARU. The power of the Federal Government, i.e., the Cabinet, under Article 82(3) is only recommendatory, and provisional under Article 84, both are subject to the assent by the National Assembly. The amounts as approved in the budget passed by the National Assembly can be utilized only for the purpose specified in the budget statement. Any re-appropriation of funds or their utilization for some other purpose is not justified under the Constitution; for this purpose, the supplementary budget statement has to be placed before the National Assembly following the procedure provided in Article 84 of the Constitution. Persons making the unauthorized expenditure from the Federal Consolidated Fund are personally responsible for that expenditure.[16] The ARU, therefore, had no budgetary support and therefore does not pass for an executive authority. In this background, role of the ARU becomes more suspicious and raises the questions: who funded the investigation and the transnational surveillance of the Petitioner Judge; who paid for the Law Expert of the ARU; who paid for collecting information from the UK HM Land Registry or *192.com,* which are not open source, as one has to pay and register to access information; who was funding the entire operation. These unanswered questions cast doubts on the *bonafides* of the

[16] See Case of Action against Distribution of Development Funds, PLD 2014 SC 131; Mustafa Impex v. Govt. of Pakistan, PLD 2016 SC 808 and Ram Jawaya v. State of Punjab, AIR 1955 SC 549.

Government and the Prime Minister, the Chief Executive of the Federation.

Legal Status of the Chairman, ARU

17. The appointment of the Chairman, ARU by the Cabinet is not backed by any law including any rule of the ROB. Even otherwise, the ROB made under Article 99(3) of the Constitution cannot provide for creation of posts in connection with the affairs of the Federation. Such power must be conferred by some law enacted under Article 240(a) of the Constitution. Article 99(3) empowers the Federal Government to make rules only on two subjects: firstly, for the allocation of the business of the Federal Government to its different components, i.e., the Ministries; and secondly, for the transaction of that business. The Rules made under this power can regulate the procedural modalities of allocation and transaction of the business, i.e., by which Ministry or Division of a Ministry and how a matter is to be taken up and dealt with; such Rules cannot grant substantive power to create posts in connection with the affairs of the Federation.[17] The expression "allocation and transaction" of the business does not by any stretch of imagination imply such power. Thus, the appointment of the Chairman, ARU by the Cabinet was without lawful authority, and is so declared.

18. The prior appointment of the Chairman, ARU as Special Assistant to the Prime Minister on Accountability with the status of Minister of State, under Rule 4(6) of the ROB also appears to be questionable. The Constitution has prescribed a limitation for the total number of the Federal Ministers and Ministers of State: second proviso to Article 93 mandates that the total strength of the Cabinet, including Ministers of State, shall not exceed eleven percent of the total membership of Majlis-e-Shoora (Parliament). This command of the Constitution cannot be circumvented and made redundant by doing a thing indirectly that cannot be done directly. The Constitution has envisaged the Federal Government consisting of the Prime Minister and the Federal Ministers to exercise the executive authority of the Federation,[18] and has allowed assistance in exercise of that authority by appointment of

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[17] See Mustafa Impex v. Govt. of Pakistan, PLD 2016 SC 808.
[18] The Constitution of the Islamic Republic of Pakistan, 1973, Article 90(1).

the Ministers of State[19] and the Advisers.[20] The Constitution does not provide for appointment of any Special Assistant to the Prime Minister. The scope of the Rules of Business made under Article 99(3), as above explained, is restricted only to the "allocation and transaction" of the business of the Government. The vires of Rule 4(6) of the ROB that empowers the Prime Minister to appoint Special Assistant, therefore, needs serious examination. This matter, however, is not directly in issue in the present case; therefore, it is left to be decided in an appropriate case some other time.

19. The ARU was, as aforesaid, neither supported by any law nor recognized by the ROB as a functional part of the Federal Government. It was at best an internal part of the Prime Minister's Office and possessed no legal status more than that of the status of its Chairman, i.e., the Special Assistant to the Prime Minster. Such an internal unit or wing or cell under the Cabinet Division and in the Prime Minister's Office had no power to deal with or pry into the affairs of a third party and more so of a citizen who at all times enjoys an inalienable right to the protection of law and the constitutional guarantee of fundamental rights. Without the backing of an enabling law, the ARU or the Chairman, ARU had no power or jurisdiction to deal or interact with any third party. There is no power inherent in the Executive; the Constitution and the law are the only source of its powers and duties.[21] No office or authority of the Executive can take any action detrimental to the life, liberty, body, reputation or property of any person except in accordance with law as mandated by Article 4 of the Constitution. Inspite of no legal standing, the ARU and its Chairman had arrogated to themselves the role of avatars of accountability, drawing their legal authority and power from the Terms of Reference (TORs) approved by the Cabinet. The TORs of the ARU, which set out various inquisitorial and investigative functions regarding the life, liberty, reputation and property of the citizens of Pakistan, have absolutely no legal value. The ARU, it is stated as a matter of example, was not even entitled to proceed against a peon at the Prime Minister's Office. However, audacity of the Chairman,

[19] Ibid., Article 92(1).
[20] Ibid., Article 93(1).
[21] See Muslim League v. Federation, PLD 2007 SC 642.

ARU had no bounds and he, on a vague complaint, without any authorization from any constitutional or legal source, started investigation into the affairs of a judge of the highest constitutional court of the land. A Special Assistant, a contractual employee, serving at the pleasure of the Prime Minister had no authority or power to embark upon this inquisition. It is not reasonable to accept that the Special Assistant to the Prime Minister or the Law Minister could have performed all these acts without any kind of tacit authorization from the Prime Minister. This misplaced overzealousness besides being illegal and without jurisdiction is also speaking, and speaks loudly, that there was more to it than meets the eye.

Investigation of the Complaint by the ARU

20. The Chairman, ARU on receiving the complaint from the complainant acted with surprising agility and unleashed his team to collect evidence of the alleged foreign properties. The ARU, which was to work under the Cabinet Division as per decision of the Cabinet, did not make any formal request to the Law and Justice Division through the Secretary, Cabinet Division for consultation on the matter in accordance with Rule 14 of the ROB, despite noting in minutes of its meeting held on April 15, 2019 that the matter was sensitive as it related to the Judges of the Superior Judiciary. The informal discussion and consultation made by the Chairman and Members of the ARU with the Law Minister on April 16, 2019, and the oral advice of the Law Minister in that discussion carries no value in the eyes of law. The Law Minister, who was a distinguished constitutional lawyer, also did not realize the importance of his advice, even oral, and gave a "go ahead" to the ARU for inquiring into the veracity of the allegations made in the complaint against judges of the constitutional courts. The Chairman, ARU who was also a Barrister-at-law, and not a layman, knew well that an oral advice of the Law Minister was nothing in the eyes of law and he should have ascertained his legal authority to inquire into the allegations made against Judges of Constitutional Courts, before initiating the inquiry into the allegations made in the complaint. But both of them paid no heed to the constitutional mandate of Article 209 of the Constitution, and initiated the process of inquiring into the allegations made in

the complaint in such a manner which even the Council could not have done if the complaint had been made to it. This cannot be taken to be an innocent mistake by persons of such a legal caliber and standing.

21. The Chairman ARU, after the discussion with the Law Minister, on his own initiated the inquiry against the alleged properties of the judges of the constitutional courts and their family members. He tasked his team to procure the family records of the Petitioner Judge from NADRA and also their travelling history and the tax record from FIA and FBR, respectively. This fact is evident from the minutes of the meeting held on April 16, 2019 by the Chairman and Members of ARU with the Law Minister; there is no mention of discussion among the Members of the ARU on how to proceed further in the matter, or making of the decision by consensus or majority view of the Members. The Chairman, ARU did not obtain the opinion of or consult with the other Members of ARU. However, the other Members of ARU supplied information on the Petitioner Judge and his family without the authorization of law. It is clear from the minutes of the meeting that ARU was being run by the Chairman, ARU, and the other Members of ARU, even though representing statutory authorities, acted illegally and with alarming servitude.

22. Astonishingly, the Chairman, ARU on the oral advice of the Law Minister, decided not to inquire into the alleged foreign properties of another judge[22] mentioned in the complaint on the ground that the said judge had already resigned. This selective treatment unveils the true objective of the proceedings conducted by the Chairman, ARU and the Law Minister: to conduct a judicial witch-hunt rather than to recover alleged unlawful foreign assets and properties. Had the Chairman, ARU been acting for recovery of the alleged illegally acquired foreign assets of the Judges as per the so-called mandate of the ARU, the fact that a judge had resigned could have made no difference for taking legal proceedings for the recovery of his alleged illegally acquired foreign properties.

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[22] Justice Farrukh Irfan Khan of the Lahore High Court.

Searching and Locating the Foreign Properties by the Legal Expert, ARU

23. This is the most sensitive, disturbing and scary part of the case for any law-abiding citizen and for a country governed by the rule of law. It is an admitted fact between the parties that ownership of an immovable property in UK can be traced through UK HM Land Registry's official website, only by giving its address (property number) and not by simply citing the name of the owner. This information was not supplied by the complainant and was not available on the record of FBR or any other office or authority in Pakistan. The critical question that requires explanation is, how did the complainant or the ARU find out the addresses of the UK properties, so that they could access UK HM Land Registry? Answer to this question will answer whether we have a Government of law or Government of men.

24. The Petitioner Judge asserted in his constitutional petition that the information forming the basis of the Reference was gathered through covert surveillance in stark violation of his and his family's fundamental rights of privacy and dignity. The response of the Federation in its concise statement was a simple denial to this assertion of the Petitioner Judge; no details were mentioned as to how the UK properties in the name of the spouse and children of the Petitioner Judge were located. The report dated May 8, 2019 of the Legal Expert, ARU annexed with the concise statement only stated that after an asset search the properties had been found registered in names of the persons mentioned in that report. This report was also silent as to how that property search was conducted. Who carried out the search? How was the search carried out? Who paid for it and when, especially when ARU has not sanctioned budget? What was discovered in the search? No evidence to this effect has been placed before us. These are questions that go unanswered and are deeply worrying in a State that is governed by the Rule of Law.

25. It was much after the counsel of the Petitioner Judge had completed his arguments that on June 1, 2020 the Chairman, ARU and the Legal Expert, ARU filed their concise statement, and in that statement they asserted that the details of those residing in

any immovable property in the UK can be accessed through open source websites such as *192.com* and *ukphonebook.com*; that once the address is located, the owner of that immovable property can be found through open source such as the UK HM Land Registry. They further stated that there had been no covert surveillance of the Petitioner Judge or his family. The Petitioner Judge filed a CMA in response to the said concise statement of the Chairman and Legal Expert, ARU. He stated therein that *192.com*, *ukphonebook.com*, and UK HM Land registry websites are not free or open source websites. He elaborated that to access the information from the website *192.com*, an account with username and password need to be created, payment is to be made by debit/credit card, the website acknowledges the payment of charges by email, and sends the requested information by email, and likewise is the procedure of accessing information from the UK HM Land Registry website. The Federation in defence did not produce any record of the searches made on those websites: What and how many addresses were found and under whose names? Who created the account? Who made the payment of charges? What were the payment or credit card details? Who received the acknowledgement of payment and the requested information and at whose email address? More importantly, there is no evidence of what information was received that was allegedly carried to UK HM Land Registry. The Federation has papered over the gaps by referring to *192.com*, which is not sufficient, unless details are furnished regarding the information retrieved from the said site. It is underlined that a paid source, which requires registration and payment before allowing access to information, is not an open source as claimed by the Federation. It shows that no such search was conducted for tracing the properties through those websites; rather the details of the properties were gathered through covert surveillance of the Petitioner Judge and his family. Covert surveillance and interception are offensively intrusive investigative tools only available to intelligence agencies in the country.[23]

26. Article 129(g) of the Qanun-e-Shahadat Order, 1984 allows the Court to presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who

[23] *See* Investigation For Fair Trial Act, 2013

withholds it. When a party withholds best evidence available with him without any sufficient cause, an adverse presumption is drawn against that party, irrespective of who bears the onus of proof,[24] that the evidence withheld must have been against his version.[25] Thus, the omission of the Federation and of the Chairman and Legal Expert, ARU to produce the said record as to procuring the address of the UK properties of the spouse and children of the Petitioner Judge through the *192.com* website gives rise to a presumption that the Legal Expert, ARU never searched the addresses of the properties through the *192.com* website. Even otherwise, the Chairman and Legal Expert, ARU in their concise statement made a general statement that an immovable property can be located through open source websites, but they did not make any specific and categorical statement therein that the UK properties of the family of the Petitioner Judge were located by that method. The ARU was not equipped to carry out surveillance or interception without the assistance of the intelligence agencies, for which it had been authorized in the TORs by the Cabinet without any lawful authority as discussed above. It is underlined that intelligence agencies were also aggrieved of the *Faizabad Dharna* judgment as it carried adverse observations regarding their role and activity. That is why the review petitions were filed by the Ministry of Defense on behalf of the intelligence agencies. Further, it is evident from the report dated June 26, 2019 of the Legal Expert, ARU that he hired a Tracing Agent firm to trace the residents of the properties over the years, and not to trace the addresses of the properties.

27. While regular inquiry and investigation is limited to reaching out to lawful and visible evidence existing at the time, covert surveillance and interception are modern intrusive investigative tools for discovering and creating evidence against a person by encroaching upon his privacy and personal liberty. While investigation is the collection of the available record and mostly after notice to the person under investigation, surveillance is far more secretive and clandestine operation which is designed to intrude into the private recesses of one's life, the confidential zone

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[24] *See* Murugesam Pillai v. Manickavasaka Desika, (1917) I.L.R. 40.
[25] Rameshwar Singh v. Rajit Lal, AIR 1929 PC 95; Hiralal v. Badkulal, AIR 1953 SC 225; and, Muhammad Zubair v. State, 2007 SCMR 437.

that stands protected under the constitutional guarantees of the right to privacy and personal liberty. It is for this reason that surveillance is permitted in the limited area of anti-state or terrorist activities and that too under judicial and executive oversight. Outside this limited area, surveillance is constitutionally prohibited. Intelligence agencies do not enjoy a free hand in conducting surveillance but are subject to strict rules of compliance and oversight by the court. In the absence of any other evidence furnished by ARU or the Law Minister, it is but obvious that in this case the information about the addresses of properties were obtained through no other means but through covert surveillance and interception of the intelligence agencies which gathered the information from the private zone of privacy enjoyed by the Petitioner Judge and his family, without any authorization of law and by brutally trampling over the constitutional guarantees of privacy, personal freedom and dignity. To trivialize the right to privacy by saying that the judge has nothing to hide is "no different than saying you don't care about free speech because you have nothing to say."[26] The mode and manner of procurement of information regarding the three UK properties cannot be lightly dismissed; in it lays the destiny of our people and the future course of our country.

28. The complainant is a party to these proceedings. He also appeared before us, but did not explain his source of information or cleared the allegations leveled against him. The complainant appears to be a proxy, who could not have discovered the addresses of the three foreign properties. This inference is further supported from the following facts. The complaint allegedly annexed the copy of title record of one foreign property of the spouse of the Petitioner Judge, with his complaint. That copy of the title record was tendered by the Federation in Court, with the concise statement of the Chairman and Legal Expert, ARU on June 1, 2020 belatedly as mentioned above. The notable aspect of this copy of the title record is that it bears the Spanish name of the spouse of the Petitioner Judge, which as per stance of the Federation came to surface when the Member of ARU from FIA obtained her NADRA record, passport record and travelling history

[26] Edward Snowden, Permanent Record.

record. It is alarming to imagine how the complainant had come to know of the Spanish name of the spouse of the Petitioner Judge and how on earth he got the access to the address of that property. When the complaint does not mention either. The Chairman, ARU stated in his report that he met the complainant but did not mention in that report how the complainant had known the Spanish name of the spouse of the Petitioner Judge and got the address of that property. To cover up these gaping omissions, the Federation took the stance during arguments that the complainant was a journalist and no journalist tells, or can be compelled to tell, the source of his information. The stance is misconceived; it has been taken without appreciating the fact that the complainant had not got published an investigative story in any newspaper, he had rather made a complaint for action against the judges of constitutional courts for their alleged misconduct. His status was that of a complainant, and not of a journalist, in making the complaint. It is no rocket science to put the facts together to discern that the complainant was fed the information to generate the complaint. Whoever fed him the information are the real actors of this saga. The credentials of the complainant give further credence to this story; he was an unknown journalist with rather dubious reputation. Report of the Chairman ARU dated May 10, 2019 compiled after thorough investigation of the allegations made in the complaint and submitted to the Law Minister goes silent as to why the complainant wanted to file the complaint, what was his source of information, what newspapers he worked for, and did his complaint qualify to hide behind the code of ethics of journalists.

29. This aspect of the case as to the unlawful procurement of the information through unlawful surveillance of the Petitioner Judge and his family is deeply worrying and shakes the foundations of a democratic society based on the rule of law. The issue of unlawful surveillance and invasion of privacy of the Petitioner Judge and his family is far more critical and grave than the information procured by the ARU. It is a naked threat to personal liberty, privacy and dignity guaranteed to the citizens under the Constitution. In order to appreciate the gravity of the constitutional violation committed by the ARU or its Chairman, it is important to understand the concept of privacy and personal freedom in a constitutional

democracy that protects our private lives, our friendships, our relationships, our thoughts and our very sense of being, which no State has the power to touch or encroach.

Concept of Privacy

30. The Greek philosopher Aristotle spoke of a division between the public sphere of political affairs (which he termed the *polis*) and the personal sphere of human life (termed *oikos*).[27] This dichotomy may provide an early recognition of "a confidential zone on behalf of the citizen."[28] Activities in the private realm are more appropriately reserved for "private reflection, familial relations and self-determination."[29] John Stuart Mill in his essay, 'On Liberty' (1859) gave expression to the private zone in one's life; "The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."[30] Sir Edward Coke, perhaps the most influential English jurist of all time, famously declared in *Semayne case*[31] "that the house of everyone is to him as his Castle and Fortress as well for his defence against injury and violence, as for his repose." Justice Stephen Breyer in his book writes that "by privacy, I mean a person's power to control what others can come to know about him or her."[32] In the most famous essay on privacy ever written, published in the *Harvard Law Review* in 1890, Louis Brandeis and Samuel D Warren referred to the principle of the right to an "inviolate personality," and said that it was a part of the more general "right to be let alone."[33] Later Justice Louis Brandeis expressed the right to privacy in his dissent in *Olmstead v. United States*[34] in the terms that a core of freedom and liberty from which the human being had to be free from intrusion. The right to be let alone is a reflection of the inviolable nature of the human personality. "Privacy

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[27] *Justice K.S. Puttaswamy (Retd) v. Union of India,* AIR 2017 SC 4161.
[28] Michael C. James, A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe, *Connecticut Journal of International Law, p.261, Vol.29, Issue 2,* (Spring 2014)
[29] Ibid, at page 262
[30] John Stuart Mill, *On Liberty*, Batoche Books, p.13, (1859).
[31] [5 Coke 91: 1 Sm LC (13th Edn.) 104 at p. 105]
[32] Justice Stephen Breyer (Associate Judge of the United States Supreme Court) in *Active Liberty* p.66
[33] Warren and Brandeis, The Right to Privacy, *Harvard Law Review, p.193,* (1890), Vol. 4, No. 5.
[34] 277 U.S.438, 478 (1928)

is…essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy."[35] Privacy therefore affirms the agency and autonomy of the individual and the right of every person to have the freedom and liberty to live a life of dignity. Privacy requires that all information about a person is fundamentally his own, only for him to communicate or retain for himself. The concept of private life includes the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world.[36] "The freedom of a country can only be measured by its respect for the rights of its citizens, and … these rights are in fact limitations of state power that define exactly where and when a government may not infringe into that domain of personal or individual freedoms that during the American Revolution was called "liberty" and during the Internet Revolution is called "privacy."[37]

31. Recognizing and protecting the zone of privacy is the freedom and liberty our Constitution holds dear. Privacy attaches to the person and not to the place where it is associated. Home under Article 14 of the Constitution is not only the physical house but the entire treasure of personal life of a human being.[38] The intrusion by the State into the sanctum of personal space, other than for a larger public purpose, is violative of the constitutional guarantees. Right to privacy is deeply intertwined with the right to life, right to personal liberty and right to dignity. "Arguing that you don't care about the right to privacy because you have nothing to hide is no different than saying you don't care about free speech because you have nothing to say."[39] This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny and protected against "unwanted gaze,"[40] unless they act in an unlawful manner.

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[35] Lawrence Lessig, Code and Other Laws of Cyberspace, p.153–55 (1999).
[36] Artavia Murillo ET AL. ("In Vitro Fertilization") v. Costa Rica (2012), Inter-Am. Ct. H.R. (Ser.C) No.257
[37] Edward Snowden, Permanent Record.
[38] see Benazir Bhutto v. President of Pakistan, PLD 1998 SC 388.
[39] Edward Snowden, Permanent Record.
[40] Jeffrey Rosen, The Unwanted Gaze: The Destruction of Privacy in America (2000).

Social Impact of Violation of Privacy.

32. Illegal and illegitimate surveillance, by both State and private actors, has the impact of intrusion into the private lives of citizens, not only violating their constitutional rights but also intruding on the very personhood, privacy and personal liberty of those surveilled. Surveillance has disparate impact, violating principles of non-discrimination and equality as enshrined in our Constitution. Writing for the Harvard Law Review in 2013, Neil Richards stated that surveillance has a chilling effect on the exercise of our civil liberties.[41] Furthermore, surveillance is often exercised as a power by the watcher over the watched, as a form of control. "This disparity creates the risk of a variety of harms, such as discrimination, coercion, and the threat of selective enforcement, where critics of the government can be prosecuted or blackmailed for wrongdoing unrelated to the purpose of the surveillance."[42] Surveillance and illegitimate intrusions into privacy impact the essential work that journalists, academics and activists do. Undue surveillance can lead to a chilling effect on those critical of State institutions and societal norms. Undue interference with individual's privacy can both directly and indirectly limit the free development and exchange of ideas.[43]

33. In fledgling democracies, where institutional development is still finding its feet and the concept of rule of law has not firmly taken ground, special care is required to ensure that law enforcement and intelligence agencies fully comply with the law dealing with surveillance and interception. Any laxity or concession given to these agencies to step outside the law and collect evidence, can be a serious threat to constitutional guarantees of the people, in particular, and to democracy, in general. International experience[44] tells us that unconstitutional and illegally procured private information amassed by the agencies can be used to manipulate and blackmail people for promoting political agendas.

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[41] Neil M. Richards, The Dangers of Surveillance, Harvard Law Review, p.1935, vol.126, (2013).
[42] Ibid
[43] *see* Digital Rights Foundation (DRF), Impact and Legality of Surveillance, A Policy Brief (2020). https://digitalrightsfoundation.pk/wp-content/uploads/2020/10/Impact-and-Legality-of-Surveillance-Final-Document-14.10.2020-1.pdf
[44] *See* Bolo Bhi, Surveillance, Interception and Evidence Gathering: Local Law and International Precedents, A Research Paper (2020). https://bolobhi.org/surveillance-interception-and-evidence-gathering-local-law-and-international-precedents/

This cripples human security and dismantles democracy, lowering it slowly into an abyss of totalitarianism. Any unconstitutional intrusion and unlawful collection of reels of unauthorized private data can make any law enforcement or intelligence agency become a Frankenstein – indestructible and uncontrollable. Infringing the foundational principle of separation of powers. In a parliamentary democracy with inbuilt checks and balances the question of who will guard the guards does not arise and should not arise.

34. Intercepted material through "surveillance" includes data, information or material in any documented form, whether written or recorded, through audio visual device, CCTV, still photography, observation or any other mode or technique. And, "interception" on communication medium includes: emails, SMS, IPDR (internet protocol detail record) or CDR (Call detail record) and any form of computer based or call phone based communication using wired or wireless or IP (internet protocol) based media or gadgetry.[45] The fact that the ARU did not possess the resources or the technical capacity to carry out surveillance of the Petitioner Judge and his family and the interception of their communications, gives credence to the stance of the Petitioner Judge that the surveillance was carried out in connivance and in collaboration with the intelligence agencies. The possibility of such happening, therefore, cannot be ruled out in the absence of any other evidence to the contrary, on the record.

Investigation for Fair Trial Act, 2013

35. The only law referred to us during arguments that allows surveillance of persons by the Law Enforcement and Intelligence Agencies is the Investigation for Fair Trial Act, 2013 ("IFTA"). The Legislature in the preamble provides that "being mindful that the existing laws neither comprehensively provide for nor specifically regulate, advance and modern, investigative techniques such as covert surveillance and human intelligence, property interference, wiretapping and communication interception that are used extensively in other jurisdictions to successfully prevent the offences and as an indispensable aid to the law enforcement and

[45] The Investigation for Fair Trial Act, 2013, section 3(g).

administration of justice."[46] It further provides that "in order to neutralize and prevent the threat or any attempt to carry out scheduled offences it is necessary that the law enforcement and other agencies be given certain authorizations to obtain evidence in time and only in accordance with law[47]." Regarding the evidence so collected the preamble provides that "it is also in order to declare the admissibility and use of the material obtained during lawful investigation under the present law, in the judicial proceedings and all other legal proceedings or process to ensure fair trial.[48]" The IFTA requires a notified officer to make an application under the Act, if there is reason to believe that a person may be associated with or is likely to act in a manner that constitutes a scheduled offence. However, the officer is required to obtain a warrant from court for surveillance or interception. Prior to obtaining a warrant, the officer is required to prepare a report with supporting material, present it to the Minister (Federal Minister for Interior) for permission and then move the application before a judge for issuance of the warrant. A warrant under the Act is to be issued by a judge of the High Court in chamber. Section 8 of IFTA lists the requirements the officer must meet when seeking permission for surveillance or interception, whereas Section 10 pertains to what is to be considered by the judge when issuing a warrant. The duration of the warrant under Section 14 of the IFTA is 60 days. It may be re-issued for another 60 days after a fresh application is made and reasons presented by the officer, for why the earlier time period was insufficient. If the request by the applicant is deemed arbitrary by the judge, under Section 15 of the law, departmental action can be recommended against the officer. Under Section 22 of the Act, the authorized officer is required to certify that the evidence collected is strictly in accordance with the warrant and has not been tampered with or altered, before turning it over to the investigating officer.

36. The IFTA, thus, provides that intelligence agencies can carry out surveillance and interception of a suspect to gather information regarding anti-state or terrorist activities and that too after obtaining a warrant from a Judge of the High Court

[46] Ibid, preamble.
[47] Ibid.
[48] ibid

concerned. Intelligence agencies therefore do not have a *carte blanche* to probe into the lives of ordinary men and women of this country. These agencies are regulated by law and are subject to law. In 2013, a coalition of civil society organizations developed *"International Principles on the Application of Human Rights to Communications Surveillance"* highlighting a human rights approach to surveillance. These principles, though not adopted by any State party, the principles highlight the ways in which international human rights law applies to surveillance practices. The principles are 1) legality: "any imitation to the right to privacy must be prescribed by law"; 2) legitimate aim: "laws should only permit communications surveillance by specified State authorities to achieve a legitimate aim that corresponds to a predominantly important legal interest that is necessary in a democratic society. Any measure must not be applied in a manner which discriminates on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;" 3) necessity: "strictly and demonstrably necessary to achieve a legitimate aim"; 4) adequacy: "must be appropriate to fulfill the specific legitimate aim identified;" 5) proportionality: "should be regarded as a highly intrusive act that interferes with the rights to privacy and freedom of opinion and expression, threatening the foundations of a democratic society"; 6) competent judicial authority: "determinations related to communications surveillance must be made by a competent judicial authority that is impartial and independent"; 7) due process: "that lawful procedures that govern any interference with human rights are properly enumerated in law, consistently practiced, and available to the general public"; 8) user notification: "individuals should be notified of a decision authorizing communications surveillance with enough time and information to enable them to appeal the decision"; 9) transparency: "about the use and scope of communications surveillance techniques and powers"; 10) public oversight: "establish independent oversight mechanisms to ensure transparency and accountability of communications surveillance"; 11) integrity of communications and systems: "States should not compel service providers or hardware or software vendors to build surveillance or monitoring capability into their systems, or to

collect or retain particular information purely for State surveillance purposes"; 12) safeguards for international cooperation: "States may not use mutual legal assistance processes and foreign requests for protected information to circumvent domestic legal restrictions on communications surveillance"; 13) safeguards against illegitimate access: "enact legislation criminalizing illegal communications surveillance by public or private actors."[49]

37. Any covert surveillance or interception of the citizens of Pakistan other than under IFTA is starkly offensive to their fundamental rights of privacy and personal liberty. There is no law in the country that authorizes any law enforcement or intelligence agency to pry into the privacy of home to dig out private family information through targeted surveillance, and to use it against them to achieve various ends. Any such surveillance into the inviolate private core of human life seriously threatens normal human existence as it clogs their freedoms and distorts the meaning of our constitutional democracy founded on the rule of law promised by our founding fathers. Such intrusion and encroachment into the private life of a citizen by the State actors totally demolishes the scheme of fundamental rights under the Constitution. Fundamental rights of privacy, personal liberty and dignity provide a bar against intrusion into the private life of a citizen through surveillance; which aims to continuously fish for something adverse against a citizen and then to use it against him when required. These are tricks of a totalitarian State and not the ways of an elected Government of a constitutional democracy which must rest its governance on the rule of law and supremacy of the Constitution.

Information Procured from NADRA, FBR & FIA by the ARU

38. The Member of the ARU from FIA, Assistant Commissioner (Inland Revenue), Commissioner (Inland Revenue), and DG (International Taxes)/Member of ARU from FBR, all four, submitted their reports on May 10, 2019. Rights to personal liberty

[49] Electronic Frontier Foundation, Necessary & Proportionate: International Principles on the Application of Human Rights Law to Communications Surveillance, (2014). Also see: Bolo Bhi, Surveillance, Interception and Evidence Gathering: Local Law and International Precedents, A Research Paper (2020)

and privacy under Articles 9 and 14 of the Constitution impose a constitutional obligation on State authorities to protect the privacy and personal freedom of the citizens unless the law expressly authorizes them to do otherwise in exceptional circumstances. In the absence of any law to the contrary, the rights to privacy and personal freedom become absolute and stand to protect the privacy and personal freedom of the citizen. No Government institution is to disclose the personal information of any citizen unless the law authorizes the institution to do so. In the absence of any specific law, the umbrella of constitutional guarantees will come to cover and protect the citizen. Employees of NADRA, who were legally enjoined under section 28 of the NADRA Ordinance, 2000 not to communicate to any person any information acquired by them in the course of their employment, committed violation of that command of the law by making compliance with the command of the Chairman, ARU in communicating to the Chairman and other Members of the ARU the NADRA record relating to the Petitioner Judge and his family. Likewise, Member of the ARU from FBR committed violation of section 216 of the ITO, 2000 by disclosing the tax records of the Petitioner Judge and his spouse to the Chairman and other Members of the ARU. While Member of the ARU from the FIA breached Rule 18 of the Government Servants (Conduct) Rules, 1964 by making unauthorized communication of the official documents and information as to the passport/visa record and travelling history of the Petitioner Judge and his family. It is astonishing that information which even the Prime Minister, any Federal Minister or the Cabinet could not solicit under the law was being made available to the Chairman, ARU by the officials of NADRA, FBR and FIA. At the cost of repetition, the Chairman, ARU examined all the reports and record submitted to him on May 10, 2019, made his final Report on May 10, 2019 and submitted it to the Law Minister on the very same day, i.e., May 10, 2019. All proceedings stand concluded in one day. This hurried exercise being against the normal course of business also points towards lack of *bonafide* in the whole process and proceedings.

39. The Chairman and Legal Expert, ARU procured the information regarding the UK Properties by offending the fundamental rights of personal liberty, privacy and dignity of the

Petitioner Judge and his family by procuring personal information regarding the UK Properties without the sanction of any law through covert surveillance and interception, and also by violating the confidentiality provisions of the NADRA Ordinance and the ITO. These actions of the Chairman and Legal Expert of ARU also attract criminal liability under section 35 of IFTA. The ARU thus did not collect the evidence in support of the allegations made in the complaint against the Petitioner Judge, in accordance with the law and Constitution. Additionally, when the very establishment of the ARU and appointment of its Chairman were without any lawful authority, all the acts done by the Chairman, Legal Expert and Members of the ARU as to the investigation and collection of evidence in support of the allegations made in the complaint were also without lawful authority and are so declared. For these illegal actions, the authorities concerned must initiate criminal and disciplinary proceedings against the Chairman, Legal Expert and Members of the ARU, as well as, the deafulting officials of FBR and NADRA under the IFTA, ITO and NADRA Ordinance, 2000.

Reliance on the Illegally Collected Evidence by the Law Minister and Prime Minister

40. The Law Minister, a distinguished lawyer, did not raise any objection to the investigation and surveillance conducted by the ARU for accountability of a constitutional court judge, on receiving the report of the Chairman, ARU. He rather relied upon the evidence illegally collected in that inquiry for making the "Summary for the Prime Minister", and proposing to the Prime Minister to advise the President to form an opinion that the Petitioner Judge may be guilty of misconduct and direct the Council to inquire into the matter under Article 209 of the Constitution. Likewise, the Prime Minister also without asking the Law Minister or the Chairman ARU as to under what authority of law the ARU conducted inquiry into and collected evidence on the allegations made in a complaint against a constitutional court judge, advised the President on the basis of that illegally collected evidence to form the opinion, direct the Council and sign the draft Reference. It is important to assess whether the evidence/material collected by the ARU, passed on to the Law Minster and further put up before the Prime Minister was legally admissible.

Exclusionary Rule- Admissibility of Illegally Collected Evidence

41. Under the classic common law, the test of admissibility of evidence was whether it is relevant to the matter in issue. If it is, it is admissible, and the Court is not concerned with how it was obtained.[50] The law of evidence, i.e., the Evidence Act, 1872 (now Qanun-e-Shahdat Order, 1984) did not deal with the possibility of procurement of evidence through illegal and unconstitutional surveillance offending the fundamental rights of privacy, personal liberty and dignity. It also did not envisage that the right to a fair trial would be guaranteed as a fundamental right under the Constitution. There has, however, been a great shift in application of the said rule in major common law jurisdictions, with recognition of the importance of civil rights and liberties of the citizens in a State governed by the Rule of Law.

42. In United Kingdom, the mother of common law, Lord Hoffman has observed in *A v. Secretary of State*[51] that "the courts will not shut their eyes to the way the accused was brought before the court or the evidence of the guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonor the administration of justice, if the proceedings were to be entertained or the evidence admitted. In such a case the proceedings may be stayed or the evidence rejected on the ground that there would otherwise be an abuse of process of the court".

43. In Australia, Barwick CJ speaking for the Court in *R v. Ireland,*[52] held that when evidence is procured by unlawful or unfair acts, the judge has a discretion to reject the evidence. In the exercise of that discretion, the learned Chief Justice said, "the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion". This statement of

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[50] See Kuruma v. Queen, 1955 AC 197; Pooran Mal v. Director of Inspection, AIR 1974 SC 348; and, Bisvil Spinners v Pakistan, PLD 1992 SC 96.
[51] [2006] 2 AC 221.
[52] [1970] HCA 21.

law was reaffirmed by the High Court of Australia in *Bunning v Cross.*[53]

44. In United States, the Fourth Amendment to the US Constitution guarantees the privacy rights by declaring that "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized". A right to be free from unreasonable searches and seizures is though declared by the Fourth Amendment, but how one is to translate the guarantee into concrete terms is not specified. Several possible methods of enforcement were considered by the US Courts over time; however, the US Supreme Court has settled the one as an effective means to make real the right, which is called the Exclusionary Rule. Under this Rule, the evidence seized in violation of the Fourth Amendment rights is excluded by the US Courts. Exclusion of evidence as a remedy for Fourth Amendment right violation was founded in *Boyd v. United States*,[54] and was developed in later cases. In *Mapp v Ohio*,[55] the US Supreme Court held that to admit evidence obtained in violation of the right would be, in effect, to "grant the right but in reality to withhold its privilege and enjoyment", and explained that the exclusionary rule is designed "to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it".

45. In Canada, the principle governing the exclusion of evidence obtained in violation of the charter rights and freedoms has been codified. Section 24(2) of the Canadian Charter of Rights and Freedoms declares that where a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

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[53] [1978] HCA 22.
[54] 116 U.S. 616 (1886).
[55] 367 US 643 (1961).

46. The Irish Supreme Court has in *DPP v. JC*[56] laid down the following principles with regard to the admission or exclusion of the evidence obtained in violation of the constitutional rights, in order to balance the legitimate competing public interests: (i) The onus is on the prosecution to establish the admissibility of all evidence; (ii) If a claim is raised that evidence was obtained in breach of constitutional rights, the onus is on the prosecution to establish either (a) that there was no unconstitutionality, or (b) that despite any interference with constitutional rights the evidence should still be admitted; (iii) Where evidence is obtained in deliberate and conscious violation of constitutional rights, it should be excluded except in exceptional circumstances; (iv) Where evidence was taken in breach of constitutional rights, there is a presumption in favour of exclusion, which can be rebutted by evidence that the breach of rights was either (a) inadvertent or (b) derived from subsequent legal developments; and (v) Whether or not a breach of constitutional rights was deliberate and conscious requires analysis of the conduct or state of mind of the individual who actually gathered the evidence, as well as, any senior official or officials within the investigating or enforcement authority concerned who was involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence-gathering of the type concerned.

47. The above-stated principle as to inadmissibility of the illegally collected evidence has developed mostly in the cases where there was a law that regulated a constitutional right, but that law was not followed or was violated in the process of collecting evidence. The courts have held such evidence to be generally inadmissible, with few exceptions, mainly with the reason that the admission of such evidence would compromise the integrity of the judicial process and bring the administration of justice into disrepute. I concur in the principle, and see no hindrance in adopting it in our jurisdiction. The admission and reliance on the material (evidence) illegally collected by the ARU without any enabling law empowering it to do so, in flagrant violation of the fundamental rights of privacy, liberty, dignity and freedom of movement of the Petitioner Judge and his family, would

[56] [2015] IESC 31.

compromise the integrity of the judicial process and bring the justice system into disrepute. Therefore, such material (evidence) was inadmissible even in view of the above-stated principle established in other common law jurisdictions and did not fall within the exceptions thereto, as the illegal acts done for collecting the material (evidence) were not inadvertent, rather were deliberate and conscious.

Surveillance, where there is no Law

48. The present case, however, poses different questions: What would be the effect of violation of a constitutionally guaranteed fundamental right, which is absolute as it is not regulated by any law? Would the prohibition on admissibility of evidence collected by infringing such right be absolute or be subject to exceptions? While the fundamental right to personal liberty and privacy guaranteed by Articles 9 and 14 of the Constitution are subject to law, there is no law in our country that authorizes any law enforcement or intelligence agency to pry into the privacy of any person through surveillance and interception, except the IFTA. The scope of the IFTA, as discussed above, is also restricted to the surveillance and interception of a person who is suspected to be involved in any terrorist or anti-state activity. Besides this limited scope under the IFTA, no other law regulates the fundamental right of privacy of citizens and allows probe into their lives through surveillance and interception. Thus, in the remaining sphere the right to privacy is absolute, until law is enacted to regulate it. The violation of this sphere of the absolute privacy right makes the inadmissibility of evidence collected in violation thereof also absolute. Absolute right entails absolute prohibition on its violation. The ARU collected evidence by violating the sphere of absolute privacy right of the Petitioner Judge and his family through surveillance, and without backing of any law for its authority to do so. Therefore, such evidence/material was liable to be excluded from consideration without any exception, and the Law Minister and Prime Minister could not have relied and acted upon it, for making the “Summary” and advising the President respectively.

49. The Law Minister opined in the Summary put up before the Prime Minister that the Petitioner Judge appeared to have committed "grave misconduct" by not declaring three London properties owned by his spouse and children and by not explaining the source of their purchase in his tax record, without appreciating, rather ignoring altogether, the fact that no office or authority in Pakistan, under the relevant law, had ever asked the spouse and children of the Petitioner Judge to explain their sources to purchase the said properties and their failure to declare the same in their tax record, if there was any obligation for such declaration under the law.

50. The Prime Minister being the Chief Executive of the Federation, failed to verify and examine the information placed in the Summary before him. Advising the President to proceed against a judge of the highest court of the land required the Prime Minister to exercise due diligence and careful consideration of the contents of the Summary placed before him. It was not just any business he was attending to, he was approving initiation of inquiry against a Supreme Court judge, but he took no pains to see that the ARU, besides being a non-entity had no authority under the law to investigate and collect evidence on a complaint that could not have been entertained by the ARU. He also failed to verify how the addresses of the three foreign properties were discovered and who authorized the ARU to carry out transnational investigation and surveillance and whether any office or authority had asked the spouse and children of the Petitioner Judge to explain the sources of purchase of those properties. Without attending to the above material objections against the information placed before him and without taking due care, he advised the President on the basis of the evidence illegally collected by the Chairman, ARU on the oral advice of the Law Minister, to direct the Council to hold an inquiry against the Petitioner Judge.

Opinion of the President under Article 209 (5) of the Constitution

51. The President also did not question under what authority of law the ARU conducted inquiry into the allegations made in a complaint against a constitutional court judge and whether any office or authority had asked the spouse and children of the

Petitioner Judge to explain the sources of purchase of those properties, and approved the Prime Minister's advice and signed the draft Reference annexed with the Summary without applying his independent mind, exercising his discretion and forming his own opinion. The constitutional question that arises for determination is: whether under Article 209(5) of the Constitution, the President is to form his personal "opinion" or to act on the "advice" of the Cabinet or the Prime Minister as envisaged under Article 48(1) of the Constitution. In order to answer this question, the unique nature of the role of the President under Article 209 (5) needs to be seen and purposively interpreted in the confluence of foundational constitutional principles: parliamentary democracy; separation of powers; independence of judiciary; the rule of law; and neutrality of the office of the President being Head of State and representing unity of the Republic.

52. In a parliamentary democracy, the President is largely a non-executive symbolic leader of the State who does not exercise executive or policymaking power. However, in the same parliamentary democracy a non-executive President may, nevertheless, possess and exercise powers of extraordinary political intervention as a constitutional arbiter or guarantor. This is premised on the principle that underscores that a non-executive President separates the representative embodiment of the permanent institutions of the State from the leader of the incumbent Government. The separation of offices between Head of Government and Head of State, a non-executive President, helps maintain a symbolic separation between the incumbent Government, which is party-political, and the permanent institutions of the State as such, which are supposed to be politically neutral and universal. The President symbolically ensures that the ruling party or the coalition is separate from a non-partisan embodiment of the whole.[57] President is a neutral and an impartial arbiter who while forming his "opinion" under Article 209(5) is to weigh both: the sanctity of a non-partisan judicial institution and the grievance of the political government against the judge in order to give true expression to judicial

[57] See Elliot Bulmer, Direct Democracy: International IDEA Constitution-Building Primer 3, International Institute for Democracy and Electoral Assistance, (2nd ed. 2017)

independence and judicial accountability. Only someone with the stature and position of a President can perform this challenging role.

53. The existence of judicial independence depends on the existence of legal arrangements that guarantee it. Judicial independence is composed of two foundations: independence of the individual judge and the independence of the judicial branch. The independence of the individual judge means that the judge is subject to no authority other than the law[58]. A judge will have "nothing to influence or control him but God and his conscience."[59] On matters of adjudication, the judge is alone. Second limb of judicial independence is the institutional environment in which the judge operates. It is a protective institutional wall around the individual judge that will guard him against the possibility of any inside or outside influence. A partisan Government or other specialized State institutions, at times, in order to achieve their political ends may try to influence or pressurize judges and invoke the removal process to penalize or intimidate judges. The real aim of proceedings may be to remove a judge whose judgments are considered troublesome by those in authority.[60] At this junction, the protective institutional design that guards the judge against external onslaughts becomes critical. The constitutional scheme of independence of judiciary is not to shut its eyes and ears to the complaints against the judge but to ensure that the judge gets to enjoy his constitutional protections till the last.

54. Separation of powers is the backbone of our democracy. The purpose of separation of powers is to strengthen freedom and prevent the concentration of power in the hands of one government actor in a manner likely to harm the freedom of the individual and other institutions. The principle requires that each branch of the State has a function that is its major function and the other branch should not impinge upon its nucleus. The institutions of the State have to walk the tightrope of checks and balances while

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[58] Aharon Barak, The Judge in a Democracy, Princeton University Press (2006).
[59] Evans v. Gore, 253 U.S. 245, 250 (1919) (quoting John Marshall, *cited at* Debates, Va. Conv. 1829-1831, 616, 619).
[60] See J. van Zyl Smit, The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law), 79-81.

operating in their designated spheres outlined clearly in the Constitution. One branch of the State should not be able to destabilize or weaken the other branch. Constitutional design protects this through the principle of separation of powers and President's role under Article 209(5) actualizes this balance. This is a constitutional principle. It may not be written in the Constitution but it is written within the lines. The courts in a democracy have to give expression to this principle when interpreting the Constitution.

55. One of the basic principles of democracy is the Rule of Law. From the standpoint of democracy, the most important of the meanings is the substantive rule of law. The substantive rule of law is the rule of proper law, which balances the needs of society and the individual and strikes a balance between society's need for political, economic and judicial independence, on the one hand, and the right to personal liberty, and human dignity on the other.[61]

56. Constitution is philosophy, politics, society, and law all rolled into one.[62] Judiciary is the guardian of the Constitution. In interpreting a Constitution, other than the express language of the Constitution, its implied language conveys a meaning between the lines, which is otherwise invisible in words - it is derived from the structure of the Constitution. Any interpretation of the Constitution must be grounded in these foundational principles. Role of the President when considered in the background of these fundamental principles, best assumes the role of an "arbiter" and a "buffer" between a partisan government and a permanent neutral branch of the State, the judiciary. The President is to examine the "information" placed before him under Article 209(5) as Head of State, acting as an arbiter between the two branches of the State, discharging his function as a person representing the unity of the Republic. This unique function of the President is co-equal with the role of the Council under the same clause of Article 209 of the Constitution. Both have to form an "opinion;" both have to perform a somewhat quasi-judicial function; both have to take a decision

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[61] Aharon Barak, The Judge in a Democracy, Princeton University Press (2006).
[62] ibid

on the basis of the information before them. Personal opinion of the President under Article 209(5) actualizes the non-partisan role of the President and provides a check on any partisan adventurism by the Government of the day against the judiciary. If the President is just a rubber stamp acting on the advice of the Cabinet, a hostile Government can, theoretically, file references against a number of judges of the constitutional courts, resulting in initiation of inquiries against all of them. Mere initiation of inquiry against the conduct of the constitutional court judges is enough to tarnish the image of judiciary, and weaken public confidence and public trust the nation reposes in the judicial institution.

57. At a textual level, "information" is placed before the President under Article 209(5). This information is then processed into a Reference only if the President forms an opinion that the information makes out a case for inquiry against the judge. If information is actually an "advice," the words "President is of the opinion" become redundant. Second, it is absurd to conclude that under the same provision, the Council is empowered to form its own "opinion" but the President is not. Under Article 48(2), where the Constitution vests the President with a more personalized task of exercising his "discretion," he performs the same himself and not on the advice of the Cabinet or the Prime Minister. Quite similar is the function of forming an "opinion" which can only be done by the President himself.

58. As a Head of the State, the President is the best person to review the "information" placed against a constitutional court judge by a constituent of the State, be it Federal, Provincial or Local Government. The executive function of the Government is till the placement of "information" before the President. Beyond that, the formation of "opinion" by the President falls outside the realm of the executive function and becomes a more quasi-judicial function in nature. Parallel needs to be drawn between the two streams: the President and the Council. While the Council actualizes this quasi-judicial function through the Supreme Judicial Council Procedure, 2005, the President does no different without such procedure. This leaves no margin for a mechanical act by the President on the advice of the Cabinet.

59. While the Constitution vests the President with the power to form an "opinion", it is difficult to imagine that this power is to be exercised by him in a mindless and mechanical manner, thus reducing him to just a rubber-stamp, who upon receiving information is to simply direct the Council to inquire into the conduct of a constitutional court judge. His role under Article 209(5) is not to execute an executive function, but act as an arbiter on a conflict between two State institutions. Failure of the President to form his "opinion" in this case has resulted in the President rubber stamping unconstitutional and illegal "information" into a Reference by directing the Council to inquire into the matter of the Petitioner Judge. This has compromised the neutrality of the office of the President and besmirched his exalted office. If expression is to be given to the constitutional scheme and foundational principles discussed above, the constitutional role of the President is best actualized as an independent arbiter under Article 209 when he is to form his personal opinion. To this conclusion, I also find support from the majority judgment of a 13-Member Full Court Bench of this Court in C*JP Iftikhar Chaudhry case.*[63] The allegations of *malafide* in that case were made against the President, and the Court accepting those allegations quashed the Reference impugned therein. If the President had to act, in the opinion of the Court, on and in accordance with the advice of the Prime Minister, the proof of *malafide* against the President would not have entailed the result of quashment of the Reference. Further, in summarizing the various steps in the process of making a Reference by the President, the Court mentioned, amongst other steps, receipt of information by the President, formation of opinion by the President and direction (Reference) by the President; no step regarding advice of the Prime Minister was mentioned.[64] Entry 35 in Schedule V-B to the ROB that provides that President is to act on advice of the Prime Minister for making Reference to the Council under Article 209(5) is, therefore, *ultra vires* the Constitution and is so declared.

60. In the present case, the President did not apply his mind and form his own opinion on the "information" received; he simply

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[63] See CJP Iftikhar Chaudhry case (supra) , per Khalil-ur-Rehman Ramday, J, paras 107, 196.
[64] See Ibid., paras 64, 65.

approved the advice of the Prime Minister and signed the draft Reference submitted with that advice. The formation of opinion and the direction to the Council to hold an inquiry was, therefore, not that of the President; both these acts are declared to have been made without jurisdiction and *coram non judice,* and thus unconstitutional and of no legal effect.

"Information" does not constitute Misconduct

61. Without prejudice to the findings and declarations given above that the information (evidence) collected against the Petitioner Judge by the ARU with the blessing of the Law Minister was legally inadmissible, it is underlined that the said information even if considered, does not constitute misconduct. The allegations against the Petitioner Judge in the "information" put up as a "Summary for the Prime Minister" that ultimately took the form of the Reference relate to the alleged violation of the Income Tax Ordinance, 2001 ("ITO"), Anti-Money Laundering Act, 2010 ("AMLA") and the Foreign Exchange Regulation Act, 1947 ("FERA"). There is no charge of corruption or acquisition of the foreign properties by the Petitioner Judge in names of his spouse and children as ostensible owners (*benamidar*). The stance of the Petitioner Judge is that no violation of the said laws is made out against him and no misconduct on his part can be spelt out from the assertions and allegations made in the Reference.

Income Tax Ordinance, 2001

62. The alleged violation of Section 116(1)(b) of the ITO is the mainstay of the Reference filed against the Petitioner Judge. Provisions of the said Section are equivocal, and attract different constructions. There has not yet been any judicial interpretation of it. The parties have, therefore, proposed different interpretations on it. It would be advantageous to cite the provisions of Section 116(1)(b) of the ITO before embarking on discussion on the proposed interpretations, for ready reference:

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

> (b) the total assets and liabilities of the person's spouse, minor children, and other dependents as on the date or dates specified in such notice;
>
> (2) Every resident taxpayer being an individual filing a return of income for any tax year shall furnish a wealth statement and wealth reconciliation statement for that year along with such return.

At the outset, it is pointed out that Section 116(1), ITO simply provides for issuance of notice to a taxpayer for filing the wealth tax statement or wealth reconciliation statement alongwith the income tax return and provides for particulars to be included in such a statement. In case a taxpayer has already filed the above statements alongwith his return, Section 116(1) appears to have no relevance. It is not the case of the Federation that the Petitioner Judge failed to file the wealth tax statement or wealth reconciliation statement. In case the said statements are deficient or incorrect, the tax department can issue notice to the taxpayer under Section 120(3) and consider the case in the light of Section 111 of the ITO. No such notice or proceedings were initiated by the FBR against the Petitioner Judge. Directly leveling allegation of violation of Section 116(1)(b) against the Petitioner Judge in this background is misconceived besides being premature.

63. It was argued on behalf of the Petitioner Judge, by referring to the principle of *noscitur a sociis* (known by its associates), that the meaning of the word "spouse" should be determined by considering the words "minor children, and other dependents" with which the former word is associated in clause (b) of Section 116(1). Therefore, an individual resident taxpayer, as per his version, is to mention the assets of his or her spouse in the wealth statement only if the latter is his or her "dependent". The stance of the Federation, on the other hand, was that the word "spouse" should be given its literal meaning. The Legislature has not used the word "dependant" with the word "spouse". Every individual resident taxpayer, as per its stance, is to mention the assets of his or her spouse in the wealth statement irrespective of the fact that the latter is or is not his or her "dependent". The possible interpretations do not end here. Rather, two other interpretations were also put to these provisions by the FBR while prescribing the forms of wealth statement. In the form prescribed for the tax year

2013, a taxpayer was required to declare the assets of his or her spouse if he or she had not filed income-tax return and wealth statement independently; while, in the form prescribed for the tax year 2015, a taxpayer was required to declare only those assets of his or her spouse which had been acquired by funds provided by that taxpayer. There are, as such, at least four possible interpretations of the provisions of Section 116(1)(b) of the ITO.

64. The matter of alleged tax violation has not reached this Court in its usual legal course routing through the tax authorities, tax tribunal and the High Court. I would therefore not give any definite finding on the said, or any other, possible interpretations of Sections 116(1)(b) of the ITO. I would rather examine the reasonability of forming the opinion of commission of misconduct against the Petitioner Judge on the basis of alleged violation of the provisions of Section 116(1)(b), and in doing so would test the formation of opinion on all the said four canvassed interpretations.

65. One foreign property was purchased by the spouse of the Petitioner Judge in the year 2004, before his elevation to the Bench of the Balochistan High Court in 2009; this property was therefore completely irrelevant for forming opinion of misconduct and making the Reference against the Petitioner Judge. The other two foreign properties were acquired by the spouse and children of the Petitioner Judge in the year 2013, after his said elevation; they were, therefore, to be declared in the tax year 2013 by the Petitioner Judge if there was any legal obligation on him, at that time, to do so. The children of the Petitioner Judge were not minors in the year 2013; therefore, no question as to his obligation to declare their assets arises under Section 116(1)(b) of the ITO. The current dispute relates to his alleged obligation to declare the assets of his spouse only. Therefore, the question is whether the Petitioner Judge was under any legal obligation to declare the foreign assets of his spouse in his wealth statement along with his tax returns filed in the tax year 2013. The simple and straightforward answer as per its own interpretation of the FBR that was in vogue in 2013 is that he was not. As afore-mentioned the FBR, in the wealth statement form prescribed for the tax year 2013, required a taxpayer to declare the assets of his or her spouse

if he or she had not filed income-tax return and wealth statement independently. It is an admitted fact that the spouse of the Petitioner Judge had filed her income-tax return and wealth statement independently, in the year 2013. It, therefore, appears that there was no legal obligation on the Petitioner Judge to declare the assets of his spouse in his wealth statement as per the requirement of the FBR prevailing in the year 2013. The departmental second interpretation expressed in the form prescribed for the tax year 2015 is that a taxpayer is required to declare only those assets of his or her spouse which had been acquired by funds provided by that taxpayer. There was neither any allegation in, nor was any material annexed with, the "Summary" initiated for forming the opinion of misconduct against the Petitioner Judge that the funds for purchase of the foreign assets were provided by the Petitioner Judge to his spouse. No opinion of misconduct against the Petitioner Judge, thus, could have been made on the basis of these two departmental interpretations of the provisions of Section 116(1)(b), ITO. It may be pertinent to mention here that though the courts of law are not bound by departmental interpretations and constructions of the laws yet they give due weight and consideration to such interpretations and constructions, and do not disregard them without cogent reasons. Such constructions have their basis in the necessary practice of executive and administrative officers construing statutes to execute and apply them, in advance of the judicial construction. These officers are usually expert on the subject dealt with by the law, and their practical construction of the law provides a sound basis for judicial interpretation.[65]

66. The interpretation offered by the Petitioner Judge is that an individual resident taxpayer is to mention the assets of his or her spouse in the wealth statement if the latter is his or her "dependent". For examining this interpretation, it would be useful to refer that during the hearing, the spouse of the Petitioner Judge requested the Court for allowing her to appear before the Court through video-link and make a statement. Her request was allowed. She then made her statement and referred to certain documents, copies of which were subsequently submitted in

[65] NS Bindra's Interpretation of Statutes, p.859-861 (10th Ed. 2007).

separate sealed envelopes to all Judges sitting in this Full Court Bench the next day. The documents submitted were*:* (i) copies of income tax returns and wealth statements for Tax Years 2018 and 2019; (ii) title documents in respect of agricultural land owned by her; (iii) evidence of liquid investment with National Savings Centre together with income derived therefrom; and (iv) certificate from a scheduled bank confirming movement of funds in her private foreign currency account etc. The wealth statements submitted by her include the foreign properties owned by her, the non-disclosure whereof in his wealth statements by the Petitioner Judge is the main basis for filing of the Reference against him. The FBR, in response to her statement, also submitted her available tax record. These documents include her income tax returns and wealth statements for various tax years including the Tax Years 2018 and 2019, and statutory notices requiring filing of tax returns for certain years when these were not voluntarily filed. The said documents and record amplify the version of the Petitioner Judge that his spouse is a separate and independent taxpayer/assesse in the records of the FBR, who has been separately and independently filing tax declarations in relation to income derived by her from her own sources. The tax record furnished by the FBR does not rebut this assertion, rather supports the same. In the background of this admitted position, the spouse of the Petitioner Judge cannot be said to be his dependent. Thus, the FBR could not have asked the Petitioner Judge to declare her assets in his wealth statement filed with the tax return in the tax year 2013, and sought explanation from him regarding the sources of purchase of the assets by his spouse. In arriving the conclusion that the spouse of the Petitioner Judge was not his dependent in the year 2013, I am supported by the following observations made in the case of *Imran Khan v. Nawaz Sharif*:[66]

> 126. As far as the issue regarding respondent No.6 namely Mariam Safdar allegedly being a 'dependent' of her father namely Mian Muhammad Nawaz Sharif is concerned I have found that the material produced before us sufficiently established that respondent No.6 was a married lady having grown up children, she was a part of a joint family living in different houses situated in the same compound, she contributed towards some of the expenses incurred by the joint family, she submitted her independent tax returns, she owned sizeable and valuable property in her own name, she was capable of surviving on her

[66] PLD 2017 SC 265.

> own and, thus, she could not be termed or treated as a 'dependent' of her father merely because she periodically received gifts from her father and brothers. In this view of the matter nothing turned on respondent No.1 not mentioning respondent No.6 as his dependent in the nomination papers filed by him for election to NA-120 before the general elections held in the country in the year 2013. *(emphasis supplied)*

67. In terms of the scheme envisaged in the ITO, once an asset is claimed by a person to have been sourced by him or her and, more so, such asset is also declared in the statutory declaration/wealth statement by that person, then only that person could be questioned and required to explain the source of acquiring such asset by the tax authorities. In the event that person fails to properly explain the source, an addition could be made in his or her income and that added income is taxed accordingly. Under no circumstances, any other person could be made directly or indirectly part of such proceedings. Thus, no opinion of misconduct against the Petitioner Judge could have been formed on the basis of this interpretation of the provisions of Section 116(1)(b), ITO.

68. The interpretation suggested by the Federation is that every individual resident taxpayer is to mention the assets of his or her spouse in the wealth statement irrespective of the fact that the latter is or is not his or her "dependent". Section 114 of the ITO requires that the tax return for any tax year has to be accompanied by the wealth statement required under Section 116. In case a wealth statement is not filed or is deficient, the income tax return filed is not considered complete. In case of any deficiency, the Commissioner, FBR is empowered to issue a notice to the taxpayer under Section 120(3) of the ITO, informing the deficiency and providing him time to rectify it. If it is cured during the given time, the tax return is considered complete and accepted. Therefore, if the Commissioner, FBR had been of the view, as per the interpretation suggested by the Federation, that the Petitioner Judge was under legal obligation to declare the assets acquired by his spouse in the year 2013, in his wealth statement filed with tax return of 2013, he should have issued notice to the Petitioner Judge specifying the defect and providing him time to rectify it. The Petitioner Judge, in that case, could have defended that notice on all legal grounds available to him including the interpretation

proposed by him as well as the interpretations put to the provisions of Section 116(1)(b) by the FBR itself in the forms prescribed for wealth statement. No such notice, however, was issued to the Petitioner Judge. Further, if the Commissioner, FBR on the basis of some "definite information" had been satisfied that that the tax return and wealth statement filed by the Petitioner Judge in the year 2013 were not accurate and some income chargeable to tax had escaped taxation, he could have issued an amended assessment order under Section 122(5) of the ITO, after hearing the Petitioner Judge, within a period of five years prescribed in Section 122(2) of the ITO. No such legal exercise was done. Therefore, without any determination of, or even initiation of legal proceedings on, the alleged violation of Section 116(1)(b) by the Commissioner, FBR either under Section 120 or under Section 122 against the Petitioner Judge, no opinion of misconduct against the Petitioner Judge could have been formed on the basis of the interpretation suggested by the Federation also.

69. In the last on the current head of discussion, I consider it important to highlight that Section 116A which requires a resident individual taxpayer to furnish statement of foreign assets, was inserted in the ITO in the year 2018 by the Finance Act, 2018. This amendment made in the year 2018 *prima facie* shows that there was earlier no obligation on a resident individual taxpayer to furnish such statement of even his own foreign assets, much less the foreign assets of his spouse and children.

Anti-Money Laundering Act, 2010

70. The Federation argued that being a case of 'concealed income', the matter also falls under the AMLA by referring to following entries in the Schedule to the AMLA:

> **Section XIIA The Income Tax Ordinance, 2001**
>
> 192. Prosecution for false statement in verification-where tax sought to be evaded is ten million rupees or more
>
> 192A. Prosecution for concealment of Income-where tax sought to be evaded is ten million rupees or more
>
> 194. Prosecution for improper use of National Tax Number Certificate – where tax sought to be evaded is ten million rupees or more

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

The argument is hopelessly misconceived and misdirected. The aforesaid entries in the Schedule were inserted vide Notification No. SRO 425(I)/2016 dated May 14, 2016[67] through which offences under Sections 192, 192A, 194 and 199 of the ITO were listed as "predicate offences" for the purposes of invocation of the AMLA. In the present case, admittedly all three foreign properties were acquired prior to May 14, 2016; therefore, the AMLA is not applicable at all. Needless to mention, that the principle of prohibiting retrospective punishment is a guaranteed fundamental right under Article 12 of the Constitution. Even otherwise, it is manifestly clear that the Legislature has put a precondition that 'tax sought to be evaded is ten million rupees or more' in all the four entries mentioned above. Thus, for the invocation of the AMLA the law presupposes conclusion of proceedings under the relevant provisions of the ITO to determine the said threshold and that too in relation to tax liability for the period on or after May 14, 2016. No such determination has taken place; hence, there is no application of the AMLA to the present case.

Foreign Exchange Regulations Act, 1947

71. The FERA provides for regulation of payments and dealings in foreign exchange and securities, and the import and export of currency and bullion. Sections 4 and 5 of the FERA provide that no one can deal in foreign exchange[68] except through an authorized dealer and imposes restrictions on transfer of money outside Pakistan. There is no evidence on the record that establishes or even *prima facie* shows any violation of the FERA against the Petitioner Judge. The Federation pointed out no violation of the FERA, even during the arguments.

72. In view of the above analysis of the relevant provisions of the ITO, AMLA and FERA, no violation of any provision of those laws is made out against the Petitioner Judge on the basis of the assertions and allegations made in the "information" given in the "Summary for the Prime Minister" that ultimately took the form of

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[67] Published in Official Gazette on May 20, 2016.
[68] Defined in section 2(d) of FERA to mean foreign currency , etc.

the Reference; therefore, no opinion as to the *prima facie* commission of any misconduct by the Petitioner Judge could have reasonably been made on the basis of that "information."

Code of Conduct and Vicarious Responsibility of a Judge

73. A constitutional court judge can be removed from office if he or she commits "misconduct" as provided under Article 209 of the Constitution. "Misconduct" is a constitutional term and must draw its spirit and meaning from the Constitution. It is important that the meaning of constitutional "misconduct," the scheme of the Code of Conduct and the scope of the impeachable misconduct of a constitutional court judge must flow from the standard of judicial integrity set out by the Constitution. The constitutional standard of judicial integrity lies in the oath of a constitutional court judge, as discussed earlier; falling short of it would amount to impeachable misconduct. Under Article 209(8) of the Constitution, the Council issues a Code of Conduct, which is to be observed by the judges of the constitutional courts. This Code of Conduct for the Judges of the Supreme Court and High Courts[69] ("Code") carries additional standards and etiquettes for Judges to follow in order to uphold the prestige and honour of the judicial institution. The Code formulated by the Supreme Judicial Council cannot control the constitutional meaning of the term "misconduct" but provides a helpful guideline. The Code is a basket of judicial obligations, etiquettes, and courtesies of varying degrees and effect, covering both judicial character and judicial behavior of a Judge.[70] While some Articles of the Code directly impinge on judicial integrity, others simply pass as mere guidelines of good behavior, civility and mannerism in conducting the court. It cannot be said that every deviation of the Code, how insignificant it may be, would constitute impeachable misconduct. For example, a judge's failure to decline to act in a case involving his own interest[71] may constitute an impeachable misconduct, while in case a judge who gets a speeding ticket for driving fast and offends the requirement of being law-abiding may not be liable for an impeachable

[69] Framed under the Constitution of 1962 and amended from time to time. Final version to date is till the last amendment made in the year 2009.
[70] See the preamble to the Code.
[71] Article III of the Code.

misconduct. Similarly, a judge who is not punctilious enough in sitting and rising in court, cannot be removed on this pretext, unless ofcourse, these violations are so frequent and regular that they weigh heavily on the public confidence and legitimacy of the judicial institution. So each case has to be seen in its own peculiar facts after examining the nature of the violation. It is underlined that the Code largely lays down judicial obligations and etiquettes for the Judge in his official capacity. Only Article II of the Code provides generalized yet more personal standards like "a Judge must be God-fearing, law-abiding, abstemious, truthful of tongue, wise in opinion, cautious and forbearing, blameless and untouched by greed." These saintly qualities are personal to the Judge. We must also remember that judges are humans at the end of the day, no matter how glorified and hallowed their office and the Code may make them appear. Chief Justice McLachlin[72] said: "Judges are not living Oracles. They are human beings, trained in the law, who struggle to understand the situations before them and to resolve them in accordance with the law and their conscience."[73] Impeachable misconduct is when there is a violation of law or violation of the Code that is so grave that it ruptures judicial integrity, tarnishes public confidence and pulls down legitimacy of the judicial institution. Short of this, it might be misconduct but not impeachable misconduct. Like under the service laws, gravity of misconduct determines the penalty, which ranges from mere censure all the way to dismissal from service. It is commonsensical that not every infraction leads to removal of a constitutional court judge or constitutes impeachable misconduct. The best test is to see if the judicial integrity of a judge has been undermined resulting in lowering the public confidence and trust in the judiciary, thus impairing impartiality and legitimacy of the judicial institution.

74. Judicial integrity and the Code are judge specific, largely covering judicial conduct and partly his personal behavior. The standards under the Code extend to the judge and judge alone. The Code has no jurisdiction over the family, relatives and friends of the judge. It is certainly ideal but it would be unfair to expect

[72] Chief Justice of Canada (2000-2017).
[73] Judging in a Democratic State: Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada.

that the spouse and children of the Judge must be equally "God-fearing, law-abiding, abstemious, truthful of tongue, wise in opinion, cautious and forbearing, blameless and untouched by greed." The Code has no concern with the family or friends of the judge. Infact, it is totally impractical to think otherwise. Let us assume that the spouse or the family of a judge were remiss in managing their financial and tax affairs. In the absence of any charge or evidence of corruption against the judge, if the judge had time and again asked his spouse and family to be more careful and responsible in their tax matters, but they for some reason did not do so, what is the judge supposed to do in such a situation? Should the judge abandon his spouse and the family? Does the Code provide an answer? Does the Code expect and require that families of the judges must be exemplary and ideal members of the society? And if they do not come up to the expectation or if there is even the slightest of infraction on their part, the judge is liable for their misconduct? Is this responsibility part and parcel of the terms and conditions of service of a constitutional court judge? I think not. The Code is judge specific document and does not extend to family members and in no event, holds a judge vicariously responsible for the conduct of his family - his spouse and children - who are independent, natural and legal persons in their own right and can do whatever they want. "Conduct" and "misconduct" are personal to a judge under the Code. Like any other citizen, a judge cannot be held accountable for the conduct of someone else, there is no such thing as vicarious responsibility of a judge, unless the law requires it or there is evidence that the wrongdoings of the judge have been concealed behind the family façade. In the case of Chief Justice of Gibraltar,[74] Lord Hope (with whom Lord Rodger and Lady Hale agreed) while answering the question that to what extent, and in what circumstances, is a judge to be held accountable for the actions of his or her spouse or other close relatives, observed: "The days are long gone when a husband and wife were treated as one person in law and the husband was that person. It is not unknown for senior figures in public life to have spouses or partners who pursue their own careers and interests, in the course of which they may say or do

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

things that, are controversial and embarrassing. Any difficulties that this may give rise to should be resolved between themselves, if they can be resolved at all, in private. Judges are not to be taken as supporting or endorsing their spouse's or partner's conduct if they do not publicly dissociate themselves from it. The law should recognize that they are independent actors and that the deeds of the one are not to be visited on the other." I fully subscribe to his views. Unless the personal or official conduct of the judge threatens public confidence in the judicial institution or the legitimacy of the judicial institution, the question of impeachable misconduct does not begin to arise.

Publicizing the Reference

75. The matter of leaking and publicizing the filing of the Reference against the Petitioner Judge and of the allegations made therein is also of great concern and requires serious consideration. The Council has structured its discretion to process any "information" received in the form of a complaint, to make the preliminary assessment thereof and to conduct the "inquiry" by its Procedure of Inquiry, 2005. Paragraph 13 of the Procedure of Inquiry, 2005 provides for the proceedings of the Council to be conducted *in camera* and also bans reporting the proceedings of the Council. Validity of the Procedure of Inquiry, 2005 particularly of its Paragraph 13 was challenged in *Justice Siddiqui Case*,[75] but was upheld by this Court. Purpose of Paragraph 13 was stated to protect both the Judge whose conduct and capacity is to be inquired into and the institution of the judiciary. The Court held that the necessity of *in camera* proceedings prevails over the right to information provided by Article 19A of the Constitution, and observed that due to an open trial the name of a Judge facing inquiry could be maligned even though the allegations may eventually be rejected by the Council. The Court directed in clear terms that "the process of determination whether any *prima facie* case has been made for proceedings under Article 209 of the Constitution in any event should be held *in camera*". The Court thus put an absolute restriction of confidentiality on the process of preliminary assessment of the allegations made against a

[75] Shaukat Aziz Siddiqui v. Federation of Pakistan, PLD 2018 SC 538.

constitutional court judge. This restriction, therefore, equally applies to publicizing the Reference filed by the President and the allegations made therein. In the context of publicizing, proceedings of preliminary assessment of "information" conducted by the President is similar and equal to proceedings by the Council. Therefore, if the proceedings are to be conducted by the Council *in camera*, then so should be the proceedings by the President.

76. Under Article 204(2)(b) of the Constitution, the constitutional courts have power to punish any person who scandalizes the Court or otherwise does anything which tends to bring the Court or a Judge of the Court into hatred, ridicule or contempt. Publicizing a complaint or Reference and the allegations made therein, of which veracity is yet to be determined after inquiry by the Council, definitely tends to bring the Judge into hatred, ridicule and contempt, and thus attracts the provisions of Article 204 of the Constitution and the Contempt of Court Ordinance, 2003. Needless to say that hostile publicity of a matter through modern media can orchestrate an unprecedented level of hostility towards a particular individual, and even an institution.[76] The restriction of confidentiality is to achieve a certain objective, i.e., preserving the integrity and honour of the judicial institution by maintaining public confidence. Publicizing a complaint or Reference undermines public confidence in the judiciary and lowers the esteem of the individual judge. The prestige and integrity of the judiciary is thus undermined without any concrete findings of misconduct against a Judge. The restriction is also to preserve, protect and safeguard the authority and dignity of the Judge who continues performing his functions on the Bench during the inquiry against him, as there is no provision in the Constitution to suspend his judicial powers during the inquiry proceedings.[77]

77. In the present case, it is a matter of record that the Reference was publicized even when it had not yet been placed before the Council for preliminary consideration, as the filing of the Reference and the allegations made therein against the Petitioner Judge was

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[76] See David Corker and David Young, Abuse of Process and Fairness in Criminal Proceedings, Butterworths Law (2000).

[77] See Hlophe v. Constitutional Court of South Africa, (2008) ZAGPHC 289; and, Justice Paul Uuter Dery v. Tiger Eye P.I., 2016 SC (J1/29/2015), Ghana Supreme Court.

published in several newspapers on May 28, 29, 30 and 31, and June 1 and 3, 2019 and later during the proceedings before the Council the matter was discussed in press conferences and TV talk shows by the Government Ministers and even by the President of Pakistan. The act of publicizing the filing of the Reference against the Petitioner Judge and of the allegations made therein, is clearly unconstitutional and falls within the scope of the provisions of Article 204 of the Constitution and the Contempt of Court Ordinance, 2003. The fact as to who leaked and publicised this matter is disputed and cannot be resolved in the present proceedings, but the matter cannot be left unnoticed and allowed to go unchecked. Such omission would encourage repetition of the mischief in future. Thus, I would leave the matter to the discretion of the Hon'ble Chief Justice of Pakistan who is *pater familias* of the judiciary and is to protect its prestige, honour, reputation and integrity, to initiate appropriate proceedings for a thorough inquiry of the matter so that the right to fair trial of the persons involved in publicizing the Reference and the allegations made therein, may not be infringed.

Is the Reference Malafide?

78. An administrative authority must act in a *bonafide* manner and should never act for an improper motive or ulterior purpose or contrary to the requirement of the statute or improperly exercise discretion to achieve some ulterior purpose. The determination of the plea of *malafide* involves two questions, namely – (i) whether the administrative action is contrary to the object and requirements of law, and (ii) whether there is a personal bias or an oblique motive. *Malafide* of law is constituted when a person inflicts an injury upon another person in flagrant contravention of the law; he is not allowed to say that he did so with an innocent mind. He is taken to know the law and act within the law. He may, therefore, be guilty of *malafide* of law, although so far as the state of mind is concerned, he acts ignorantly and in that sense innocently. Thus, action of an authority is tainted with *malafide* of law when it takes the action which is so unreasonable, improbable or blatantly illegal that it ceases to be an action contemplated by the law under which it is purportedly taken, or takes the action by

violating the mandatory procedural requirements or without satisfying the jurisdictional requirements, or takes the action which no reasonable person could have taken on the basis of the available material.[78] On the other hand, an unlawful action done designedly, willfully or wantonly and not accidently, thoughtlessly or negligently falls within the domain of *malafide* of fact. In such case, the action is taken in bad faith either to hurt the person against whom the action is taken or to benefit oneself or another, or in colourable exercise of powers for collateral or ulterior purposes not authorized by the law under which the action is purportedly taken.[79] If the act suffers from *malafide* of law, the mischief is corrected by nullifying the act; *malafide* of fact, however, further entails the consequences of making the actor accountable also.

79. It is true that *malafide* is difficult to prove against a public functionary because there is a presumption of regularity with regard to all official acts under Article 129(e) of the Qanun-e-Shahdat Order, 1984.[80] However, this presumption of regularity is available only to official acts done by a person or authority competent to do that. The presumption of regularity cannot be attached to the acts done by the persons and authorities who have no legal authority to do those acts, rather a reverse presumption for lack of *bonafide* arises. In such a case, the onus to prove *malafide* does not remain as high. *Malafide* is inferential by construct. It can be drawn from direct or circumstantial evidence.[81] The Court carefully takes into consideration the surrounding circumstances of the action; the conduct of the persons involved; the object and purpose to be achieved; and the nature of the illegality. The court, in a way, reconstructs the whole act and its backdrop, and then evaluates the *fides* of the action and its actors. If *malafide* on the part of the actors is apparent on the face of record, then the court of law seized with the matter is

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[78] See West Pakistan v. Begum Shorish Kashmiri, PLD 1969 SC 14, 32 (5-MB), per Hamoodur Rahman, J; Sarwar v. Punjab, 1990 SCMR 999, 1001, per Shafiur Rahman, J.; and, Said Zaman v. Federation, 2017 SCMR 1249, 1279-80 (5-MB), per Sh. Azmat Saeed, J.

[79] See Abdul Rauf v. Abdul Hamid, PLD 1965 SC 671, 675 (5-MB), per B. Z. Kaikaus, J.; Federation v. Saeed Ahmad, PLD 1974 SC 151, 170 (4-MB), per Hamoodur Rahman, C. J.,; Said Zaman v. Federation, 2017 SCMR 1249, 1279-80 (5-MB), per Sh. Azmat Saeed, J.

[80] Federation v. Saeed Ahmad, PLD 1974 SC 151.

[81] See CJP Iftikhar Chauhdry case (supra) p.215, Per Muhammad Nawaz Abbasi, J.

not supposed to shut its eyes from taking notice thereof.[82] While full faith is given to public acts and record of the Government, this assumption is overturned if *malafide* is borne out from the record.

80. If we start reading the events after the *Faizabad Dharna* judgment, one is compelled to conclude that the Petitioner Judge was deliberately targeted for his observations and directions made in that judgment, which perhaps were considered hostile and troublesome by those in power. This fact is floating on the record of the review petitions. The vengeance and resentment against the Petitioner Judge is more than visible from the strange and unprecedented assertions made for his removal on the ground of misconduct in the review petitions; soon it took shape of a vague complaint filed before an incompetent authority (ARU) housed in the office of the Prime Minister. The vengeance and resentment continued with the entertainment of the bogus complaint, unauthorized investigation and collection of evidence through the surveillance of the Petitioner Judge and his family, illegally seeking information from statutory institutions and using the illegally collected evidence for making advice to the President to send the Reference against the Petitioner Judge. These extraordinary facts and circumstances in the process of conducting the so-called accountability of the Petitioner Judge may be summarized in sequence, as under:

i. The current ruling parties (PTI and MQM) aggrieved of some observations made by the Petitioner Judge in the *Faizabad Dharna* judgement make an unprecedented and astonishing assertion in their review petitions filed against that judgment that the Petitioner Judge has violated his Oath of Office and Code of Conduct for Judges, and is liable to be removed from office under Article 209 of the Constitution.

ii. The complainant makes the complaint for "Accountability of Judges" to the ARU, housed in the Prime Minister's Office, and not to the Council, in the very next month of filing of those review petitions.

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[82] Hazara Improvement Trust v. Qaisra Elahi, 2005 SCMR 678, p.698.

iii. The Chairman, ARU (substantive post - Special Assistant to the Prime Minister) discusses the matter with the Law Minister informally, without making any formal consultation through the Cabinet Division (under whom the ARU was to function as per decision of the Cabinet) with the Law and Justice Division in accordance with Rule 14 of the ROB.

iv. The Law Minister gives a "go ahead" to the ARU in an informal discussion, without realizing the importance of his advice, even oral, for inquiring into the veracity of the allegations made in the complaint against Judges of the Constitutional Courts.

v. The Chairman, ARU who is a Barrister-at-law, and not a layman, knowing well that an oral advice of the Law Minister has no value in the eye of law and without looking for his own legal authority to inquire into the allegations made against Judges of Constitutional Courts, initiates the inquiry into the allegations made in the complaint.

vi. The Chairman, ARU makes the decision alone to initiate the process of inquiring into the allegations made in the complaint, and does not obtain the opinion of or consults with the Members of the ARU as to whether the institutions they represent can inquire into the allegations made in a complaint against a constitutional court judge.

vii. The Chairman, ARU decides to proceed for accountability of the judges of constitutional courts, and not for recovery of their alleged foreign assets as per the so-called mandate of the ARU, for he decides not to inquire about the alleged properties of another judge named in the same complaint, while noting that the said judge has already resigned.

viii. The Members of the ARU make compliance of the directions of the Chairman, ARU and share with him the confidential information available in the record of their Departments, by violating the provisions of the law under which those Departments function.

ix. The Legal Expert, ARU, who is also a Barrister-at-law, in compliance with the directions of the Chairman, ARU causes surveillance of the Petitioner Judge and his family for locating the properties in London, in violation of their fundamental rights of liberty, privacy, dignity and freedom of movement, and in derogation of the provisions of IFTA.

x. The Member of the ARU from FIA, Assistant Commissioner (Inland Revenue), Commissioner (Inland Revenue), and DG (International Taxes), all four, submit their reports on May 10, 2019. The Chairman, ARU then examines all the reports and record submitted to him on May 10, 2019, makes his final report on May 10, 2019 and submit it to the Law Minister on the very same day, i.e., May 10, 2019. All proceedings stand concluded in one day, with admirable alacrity.

xi. The Law Minister (a distinguished lawyer) does not raise any objection to the inquiry conducted by the ARU for accountability of a constitutional court judge, on receiving the report of the Chairman, ARU. He rather, relying upon the illegally collected evidence in that inquiry, makes a "Summary for the Prime Minister" proposing to the Prime Minister to advise the President to form an opinion that the Petitioner Judge may be guilty of misconduct and direct the Council to inquire into the matter under Article 209 of the Constitution.

xii. The Law Minister opines that the Petitioner Judge appears to have committed "grave misconduct" by not declaring three London properties owned by his spouse and children and by not explaining the source of their purchase in his tax record, without appreciating, rather ignoring, the fact that no office or authority in Pakistan, under the relevant law, has ever asked the spouse and children of the Petitioner Judge to explain their sources to purchase the said properties and their failure to declare the same in their tax record, if there was any obligation to declare the foreign assets under the ITO.

xiii. The Prime Minister remains unaware of the actions of his Special Assistant, the Chairman, ARU working right under his nose at the Prime Minister's Office. Further, the Prime Minister without asking the Law Minister or the Chairman, ARU about their unconstitutional and illegal investigation and evidence collection against a constitutional court judge and without inquiring whether any office or authority had asked the spouse and children of the Petitioner Judge to explain the sources of purchase of those properties and whether the properties owned by the spouse and children of the Petitioner Judge attract any liability of the Petitioner Judge, goes ahead, without any application of mind, to advise the President to form the opinion and direct the Council, and to sign the draft Reference.

xiv. The President also does not ask the said questions and approves the Prime Minister's advice and signs the draft

> Reference annexed with the Summary without applying his independent mind, exercising his discretion and forming his own opinion.

Such blatant violations of the law and Constitution by the Chairman, and Legal Expert of the ARU, the officers of FBR, FIA and NADRA, the Law Minister and the Prime Minister; undue haste in processing the matter; dubious credentials and ring of anonymity around Mr. Dogar (the complainant); oddity of approaching ARU instead of the Council; failure on the part of ARU to convincingly show how they located the addresses of the three UK properties of the family of the Petitioner Judge; afterthought of referring to *192.com* and again failing to show how *192.com* helped; failure of the ARU to show who searched through *192.com* and the UK HM Land Registry, who registered with them and who paid for it; keeping names of those persons in secret; resultant necessary inference of having done the covetous transnational surveillance of the Petitioner Judge and his family to dig out the addresses of the three properties with support of the intelligence agencies; and rushed and mechanical approval of the Summary by the Prime Minister, all these facts and circumstances when read in the background of the assertions made by the current ruling political parties (PTI and MQM) in their review petitions filed against the *Faizabad Dharna* judgment, lead to a clear and a convincing finding that the whole process initiated under the garb of accountability of the Petitioner Judge suffers from more than mere *malafide* of law and jumps up into the realm of *malafide* of fact also. In the present case, other than the legal and constitutional violations, extraneous considerations, as mentioned above, have come to surface, which reflect vindictiveness and ulterior motive. Knowing well that there was no determination of tax violation of the Petitioner Judge and no explanation of the spouse and children of the Petitioner Judge was ever sought, the matter was still pushed ahead with the collateral purpose of defiling the honour of the Petitioner Judge and with the design to pressurize him into resignation or lead to his removal. These facts go beyond *malafide* of law and fall within the ambit of *malafide* of fact as they show bad faith and colourable exercise of powers for collateral or ulterior purposes not authorized by the law under which the actions were purportedly taken. Therefore, the actions of entertainment of the complaint, the investigation and surveillance for the collection of

evidence, the putting up of Summary before the Prime Minister by the Law Minister and finally the approval of the Summary by the Prime Minister and placing the "information" before the President under Article 209(5) of the Constitution for removal of the Petitioner Judge from office are found to be tainted with both *malafide* of law and *malafide* of fact. All the Government actors mentioned above are held responsible. As the buck stops with the Prime Minister in a constitutional parliamentary democracy, the major burden of these malicious actions fall on his shoulders who also happens to be the leader of a political party that had filed the review petition with an astonishingly unique prayer seeking ouster of the Petitioner Judge for expressing an independent view.

Held

81. In view of the above findings, all the acts and steps from the entertainment of the complaint till the sanction of the "Summary" for placement of the "information" before the President by the Prime Minister are declared illegal, without jurisdiction, *malafide* of law and fact, and thus unconstitutional and of no legal effect. While, the acts of the President approving the advice of the Prime Minister, and signing and sending the Reference against the Petitioner Judge are declared without jurisdiction and *coram non judice,* and thus unconstitutional and of no legal effect. The outcome of the said declarations is that:

(i) the Reference against the Petitioner Judge is quashed, and as a result the proceedings, including the Show Cause Notice, before the Council stand abated;

(ii) the authorities concerned are directed to initiate criminal and disciplinary proceedings against the Chairman, Legal Expert and Members of the ARU, as well as, against the other defaulting officials of FBR and NADRA for their illegal acts, under the IFTA, ITO and NADRA Ordinance, 2000; and,

(iii) the Registrar of this Court is directed to place the matter before the Hon'ble Chief Justice of Pakistan for considering to initiate appropriate proceedings for a thorough inquiry of the matter of leaking and publicizing the Reference and the allegations made therein, and for taking legal action against the persons found involved therein.

I allow all the constitutional petitions in these terms.

Reasons for my Disagreement with the Short Order[83]

82. Justice Ruth Bader Ginsburg[84] once commented, "Judges disagree without being disagreeable." While this is largely true for us judges, history is not as forgiving. Through Short Order dated 19.06.2020 the Reference against the Petitioner Judge was quashed by unanimous opinion of all the members of this Full Court Bench. However, the Majority added certain directions to the FBR and the Council whereby the Commissioner, FBR was directed to issue notices under ITO to the spouse and children of the Petitioner Judge regarding the acquisition of the three foreign properties. He was also directed to decide the notices and the Chairman FBR was directed to submit a report of the decision to the Council. While the Council was asked to consider the matter by invoking its *suo moto* powers with or without there being a report filed by the Chairman, FBR. All these directions were to be actualized within a specified time-line provided in the Short Order. With respect, I could not persuade myself to concur with these directions. Here under are my reasons for the disagreement.

83. The spouse and children of the Petitioner Judge like all other citizens of Pakistan are independent persons and enjoy an inalienable right to the protection of law. As they were not party to the instant proceedings and were never summoned or made a party to the proceedings by the Court, any adverse order against them, will deprive them of their inalienable right to due process under the Constitution and the law, and will contravene the well-entrenched and deep rooted principle of *audi alteram partem*. The Court cannot go against the grain, values and scheme of our Constitution and the established principles of law. After the Reference against the Petitioner Judge was unanimously quashed by this Full Court Bench, the case set out against the Petitioner Judge came to an end. In the absence of any allegations of corruption against the Petitioner Judge or of his holding foreign properties in the names of his wife and children as a trustee or a *benamidar*, this Court, and for that matter the Council, have no

[83] Paragraphs 4-11, thereof.
[84] Former Associate Justice of the Supreme Court of the United States (1933-2020)

concern with the assets and properties of the spouse and the children of the Petitioner Judge.

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

85. The principle is more than settled that if an Authority has no jurisdiction in the matter under the law, the jurisdiction cannot be conferred on that Authority by an order of the Court.[85] Under Section 122 of ITO an assessment order cannot be reopened after a lapse of five years by the FBR. Also, regulating the Tax Commissioner to function and perform his duties within a prescribed time-line, which is not so provided under the ITO amounts to entering the realm of judicial legislation.

86. With respect, direction to the Chairman, FBR to send the Report to the Council would make the Chairman, FBR a complainant and the Report a new complaint. The FBR is an organ and instrumentality of the Federal Government and is not empowered to directly approach the President under Article 209 of the Constitution unless the Federal Government i.e., the Cabinet, approves to place such information before the Council through the President. The Federal Government of any of its Departments cannot make a complaint or report in relation to the conduct of a judge directly to the Council, and it has to place such a complaint or report in the form of "information" before the President to form his "opinion" and make direction (Reference) in accordance with the provisions of Article 209 (5) of the Constitution. Clear letter of the Constitution cannot be bypassed. A thing required by law to be

[85] See Badshah Begum v. Additional Commissioner, 2003 SCMR 629.

done in a certain manner must be done in the manner as prescribed by law or not to be done at all.[86]

87. This Court cannot, it is submitted with respect, direct someone to file a complaint against a constitutional court judge before the Council and then make the Council consider the said complaint. This would have a far reaching effect as it would dismantle the independence and neutrality of the Council and the constitutional scheme under Article 209 that safeguards a constitutional court judge. It also flouts the right to fair trial under Article 10A of the Constitution. The Council is a constitutional body which enjoys *suo moto* powers to inquire into the conduct and capacity of a judge. Acting on its own motion (*suo moto*) and being asked to act on its own motion (*suo moto*) are two inconsistent and irreconcilable concepts. The Council is structured under the Constitution to exercise its *suo motu* powers independent of any extraneous influence. I am fortified by the observations of Ajmal Mian, C.J. made in *Ikram* case.[87] The learned Chief Justice while declining the prayer, in that case, for issuing direction to the President to make Reference against some constitutional court judges under Article 209(5) of the Constitution observed that Article 209(5) "does not admit filing of a Constitutional petition for a direction to the Supreme Judicial Council or to the President to initiate proceedings of a judicial misconduct against a Judge of a superior Court. ... This Court or a High Court cannot take upon itself the exercise to record even a tentative finding that a particular Judge has committed misconduct warranting filing of a reference against him under Article 209 of the Constitution."

88. In my view, the observation that the right to appeal under the ITO would be available to the spouse and children of the Petitioner Judge while simultaneously, the Council may also commence proceedings - can lead to conflicting results and thereby, may render the appeal under the ITO otiose and futile. Besides, the Council does not enjoy any power to issue directions to any judicial or a quasi-judicial forum to speed up pending matters against a constitutional court judge.

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[86] See Assistant Collector v. Khyber Electric, 2001 SCMR 838; S.M.C. No. 18 of 2010, PLD 2011 SC 927; and, Zia Ur Rehman v. Ahmed Hussain, 2014 SCMR 1015.
[87] Ikram Chaudhry v. Federation, PLD 1998 SC 103, para 11.

89. The proceedings initiated through the short order after the quashment of the Reference against the Petitioner Judge would mean that the Council must now consider if a judge can be made vicariously liable for misconduct for his family's affairs, a concept that is alien to the Code of Conduct and has nothing to do with judicial integrity as discussed above.

In the end

90. In our constitutional democracy, it is essential that everyone enjoys his or her domain of freedom, free from Governmental intrusion - lest it aims to check an unlawful activity. Privacy, liberty, autonomy and agency are integral parts of dignity and life and are cherished constitutional values that determine the frontiers of a living constitutional democracy. There can be no compromise on either judicial independence or judicial accountability. These are essential pillars, which together uphold public confidence and legitimacy of the judicial institution. The real and enduring strength of the judiciary, however, is anchored in ruling according to the Constitution and the law without fear or favour, irrespective of public perception and irrespective of who is before the court, an ordinary litigant or a judge of the highest constitutional court of the land. An American poet once said:

The perfect judge fears nothing
- he could go front to front before God;
Before the perfect judge all shall stand back
- life and death shall stand back
- heaven and hell shall stand back.[88]

(Syed Mansoor Ali Shah)[89]
Judge

Islamabad,
the 04th November, 2020.
Approved for Reporting.
Sadaqat

[88] Walt Whitman, "Great are the Myths" in Leaves of Grass.
[89] Before parting I wish to appreciate and acknowledge the valuable assistance rendered by Mr. Zafar Iqbal Khokhar, Research Officer cum Civil Judge, Supreme Court Research Centre. (SCRC)