**MAQBOOL BAQAR, J**.- The above petition brought into question the legality, propriety and justification of Presidential Reference No. 1/2019 (**"the purported Reference"**), sent to the Supreme Judicial Council (**"SJC"**), under Article 209(5) of the Constitution of the Islamic Republic of Pakistan (**"the Constitution"**), against the petitioner, who is the third senior most puisne Judge of this Court, and is legitimately expected to become the Chief Justice of Pakistan on 17.09.2023. It was contended that the Reference has been filed with *mala fide* intent and for collateral purposes, through colourable exercise of powers, and that it suffers from malice of law, as well as of facts, and from lack of jurisdiction.

2. The Reference, according to the petitioner, in addition to being derogatory to the Constitution in multiple ways, manifests utter misconception, and mis-construal of the relevant law, i.e. The Income Tax Ordinance, 2001 (**"ITO 2001"**), and particularly Section 116 thereof, the alleged/perceived violations/breach whereof, forms the very basis of the purported Reference.

3. Before going into the details and elaboration of the above, it may be noted that the purported Reference has alleged that the petitioner had failed to declare in his wealth statements, three different properties, jointly owned by his wife and children in London, as was required of him in terms of Section 116(1)(b) of the ITO 2001, and ancillary thereto, had claimed that the source of acquiring the said three properties has not been disclosed/accounted for. It was contended that it can therefore not be ruled out that the properties may have been acquired through money laundering. As per the documents annexed to the Reference, it was a complaint dated 10.04.2019, sent by one Abdul Waheed Dogar ("the complainant Dogar"), that triggered the Chairman, Asset Recovery Unit (**"ARU"**), the respondent No. 8, and the Law Minister, the respondent No. 4,

into action which culminated in the purported Reference. However, the basic theme of the petitioner's case was that the complaint was merely a ruse to camouflage the fact that the purported Reference was a product of the animus and ill-will harboured by the main ruling political parties, and some government agencies against the petitioner, and of their desire to remove the petitioner from his office, whom they perceived as an obstacle in their riding this country roughshod, and also to over owe the other Judges of the superior Courts of this country into subjugation.

4. The learned counsel submitted that as a judge of the Supreme Court, the petitioner was appointed as a one-man commission to investigate the Quetta carnage where 75 people (mostly lawyers) lost their lives due to a suicide bomb attack. His Report was unsparing of the role of the various intelligence agencies operating in Balochistan at the time and raised many hackles. The learned counsel then referred to the judgment authored by the petitioner in Suo Moto Case No.7 of 2017 (*Faizabad Dharna case*) and submitted that it was this *suo motu* that triggered a chain of events that eventually led to the filing of the purported Reference.

5. He highlighted certain portions of the judgment where the petitioner recorded certain facts and made some strong observations relating to PTI, MQM and ISI, inter alia, as follows:-

> "**Para 21**: General Musharraf was determined to stop CJP Iftikhar Chaudhry from visiting the SHC in Karachi on 12.5.2007. MQM was supporting him. Containers were placed on roads to stop the CJP and his supporters. When this did not stop them, gunmen fired upon them and more than 50 people were killed.

**Para 22**: PTI & PAT camped for several months on Islamabad's Constitution Avenue in 2014 causing great inconvenience to residents and others. They not only achieved the formation of a Commission to probe the election results but received months of free publicity.

**Para 24**: The TLP must have been emboldened in their decision to embark upon the *dharna* by the State's failure to bring the principal conspirators and perpetrators of 12th May 2007 to task as well as the absence of any consequences (rather conferment of political benefits) to PTI and PAT following their 2014 *dharna*.

**Paras 30 – 33**: ECP had failed to act upon TLP's breaches of the Election Act and Rules.

**Para 34 – 41**: Both electronic media and the print media had legitimate grievances about informal censorship and restrictions upon their distribution. The State and PEMRA appeared to have looked the other way.

**Para 42 & 43**: The mandate of the ISI must not be a secret. Not only is this contrary to international practice relating to intelligence agencies but it gives rise to the impression that it exceeds its domain – especially given previous SC observations in Air Marshal Asghar Khan's case where the ISI was found to be engaging in political activities. It was observed that the distribution of cash handouts by uniformed military officers to TLP protestors reinforced the impression that the

> military was interfering in politics. This was reinforced by the DG ISPR's comments about political matters such as his comment that the 2018 elections were the fairest in history. It was emphasized that the oath of military officers requires them to abstain from politics and the impression that they favoured any political party undermined the reputation of the Armed Forces.
>
> **Para 53(12)**: Intelligence agencies (including ISI, MI, IB) and ISPR must not interfere with the freedom of the media.
>
> **Para 53(15)**: Proceedings should be taken by the concerned Head of Department against any military officer who violated his oath of office by engaging in any political activity."

Mr. Malik submitted that while otherwise unexceptionable in law, the inconvenient truths mentioned in the judgment sparked the fury of not only the ruling political parties, but also the various State agencies and departments mentioned therein. According to the learned counsel an unprecedented number of review petitions were filed against the Faizabad *dharna* judgment, including by PTI, MQM, and the Ministry of Defence ("**MoD**") on behalf of the Armed Forces and the ISI and that it was, quite evidently, a coordinated exercise by various actors within the executive branch. The learned counsel further submitted that the MoD's review petition claimed that the judgment threatened the morale of the Armed Forces and ISI, tended to drive a wedge between soldiers and officers and could destroy their cohesion as a fighting force. In other words, the *Faizabad dharna* judgment had placed the national security and defence of Pakistan at risk. All "*explicit and implicit adverse observations*" in relation to the

Armed Forces and the ISI were sought to be removed. Mr. Malik submitted that he does not find it appropriate at that juncture to argue whether such plea was baseless hyperbole or not; nonetheless the very fact that such plea was raised shows the level of ire and passion against the judgment (and its author) aroused within the departments/agencies for whom the MoD was holding brief.

6. Referring to the PTI's initial review petition, the learned counsel submitted that through their petition, PTI claimed the judgment, as one-sided, biased, politicized, in violation of fundamental rights and natural justice, an abuse of judicial power and thoroughly improper. According to them, Mr. Malik submitted, merely by rendering such judgment the Petitioner violated his Oath of Office, and Articles 3 and 5 (as well as the Preamble) of the Code of Conduct for Judges, and was liable to be removed under Article 209. He then referred to the MQM's petition and submitted that the same also claims that merely by passing such judgment, the Petitioner committed misconduct rendering him liable to be removed under Article 209, and pointed out that MQM's review petition reiterates the allegations made in the PTI petition and that most of the grounds and questions of law in both petitions are in identical language. He contended that identical language used by PTI and MQM clearly establishes that the PTI and the MQM petitions calling for the removal of the Petitioner were a coordinated and collaborative exercise between the two parties of the ruling coalition. It was according to Mr. Malik not just the ranting of a single aggrieved litigant rather a joint deliberate decision was taken by these two ruling coalition parties, not only to seek review of the judgment itself, but to levy allegations of professional misconduct against the Petitioner and demand his removal. It is also important to note that both review petitions allege misconduct and violation of the Code of

Conduct. In the facts and circumstances of the case, as thoroughly examined by me, the submission of the learned counsel seems to be just, fair and correct.

7. Though nothing is known about the complainant Dogar, neither had he furnished his address or telephone number, nor had he disclosed as to for whom he works as a journalist, which he claims to be. The official respondents also have not claimed knowing the so called journalist/complainant in any way. There is absolutely nothing on the record to show that the complainant is a public spirited person, or has in any manner been involved in any public or national cause, and or has done any press/media reporting. All that is known about the complainant Dogar is that he once concocted a story published in daily "Jinnah", a local newspaper of Islamabad, regarding an incident in which famous journalist Mr. Ahmed Noorani, was in broad day light, attacked by six assailants with iron rods near Aabpara, Islamabad, which incident was reported by national and international media, including New York Times and BBC, as a likely retaliation of Mr. Noorani's reporting the activities of intelligence agencies. The complainant Dogar in his story has claimed that Mr. Noorani was in fact attacked by the brothers of a girl with whom he (Mr. Noorani) was involved. However, subsequently the complainant Dogar retracted his concoction and apologized for it. It may also be relevant to note here that the purported complainant has also not disclosed as to how, in the first place, he came to know about the alleged ownership of the properties, particularly when he did not even know the names of the petitioner's wife and children, the alleged owners of the properties, and more intriguingly, as to how he discovered that the properties were not disclosed by the petitioner in his wealth statements, which is a confidential information, protected under the income tax law, unauthorized disclosure whereof is a penal

offence. The complainant Dogar also did not explain as what made him so eager and keen to secure the information and to divulge it before the Chairman ARU who, as shall be discussed in detail in a while, has had absolutely no authority to obtain and entertain the same. However the purported complaint was found so credible, and was entertained with such a great zeal and fervour that the Chairman, somehow located the hitherto, complete stranger, with absolutely no information regarding his whereabouts, and no knowledge of his credentials and, (as disclosed by Chairman in his report dated 10.5.2019), held a meeting with him, and asked him (Dogar) about his motivation, and also sought from him the evidence that he may have in support of his allegations. Though nothing has been disclosed about the complainant's motivation as yet, however the report claimed that the complainant Dogar furnished to the Chairman ARU a copy of the register of title obtained from the website of the UK Land registry, of the property bearing No.40 Oakdale Road, London E11 4DL, registered in the name of Mst. Zarina Monserrat Khoso Carrera and Arslan Isa Khoso, which copy was though said to be annexed to the Chairman's above report, but was not placed either before the SJC or the Court, nor was it supplied to the petitioner, though the petitioner made an application seeking the same, and was furnished only through CMA No.3312 of 2020 dated 01.6.2020, As per the report, though the complainant claimed that those in whose name the said property is registered, are the wife, and son of the petitioner, he however evidently did not furnish any proof of the relationship, and also did not explain as to how he came to know about it.

8. On 15.4.2019, the Chairman ARU held a meeting regarding the purported complaint with Mr. Ashfaq Ahmed, Chief International Taxes, Federal Board of Revenue ("Mr. Ahmed"),

Mr.Muhammad Rizwan, Director FIA, Barrister Zia ul Mustafa Nasim, an expert on international criminal laws ("Barrister Zia"), and the Secretary ARU, and on the next date i.e. 16.4.2019, held a meeting with the Law Minister, the respondent No.4, along with the above officers, at the end of which meeting the Law Minister and the Chairman ARU, directed Barrister Zia to verify the details of the property mentioned in the complaint, and also to carry out an extensive search to identify any other properties that may belong to the persons named in the purported complaint. They also directed Mr. Rizwan of FIA to obtain copies of the identification documents of the said persons, including those of their CNICs, passports, visas and their family trees, as well as their travel history. The Chairman ARU, in pursuance of the above meeting, and on the advice of Mr. Ahmed, forwarded a copy of the purported complaint to the Chairman FBR, to check the veracity of the claim made therein. As is evident from the "record note" of the aforesaid meeting, not only the purported complaint and its ramification were discussed during the meeting, but the relevant copy of the extract of the UK Land Registry was also perused, whereafter the Law Minister requested the Chairman ARU and the officers present to call the complainant in person to assess the veracity of his allegations, and it was in this backdrop that the Chairman ARU's above mentioned meeting with the complainant Dogar took place, and thus the Chairman's claim in his report dated 10.5.2019, that it was the complainant Dogar who furnished to him the extract, does not seem to be correct, as evidently he possessed a copy of the extract before he met Dogar, which copy as noted above was placed before the Law Minister during the meeting dated 16.4.2019. In the light of the above, the fact that copy of the said extract was neither submitted by the complainant Dogar, the respondent No.10, along with the purported complaint or at any time

subsequently, nor was it filed by any other respondent, until the official respondents did so through CMA No.3312 of 2020, as shall be seen in the later part of this judgment, gains an added significance.

9. On 10.5.2019, Zia Ahmed Butt, Assistant Commissioner Income Tax, prepared and sent his report to the Commissioner (IR), AEOI Zone/International Taxes Zone, LTU, Islamabad, Zulfiqar Ahmed, who forwarded the same along with his covering letter to the Secretary, EOI, FBR, Sajida Kausar, the same day i.e. 10.5.2019. The said letter also was received at the FBR head office, the very day, and then reached the desk of Mr. Ahmed, the DG, International Taxes, again on 10.5.2019, who was able to review and summarise all of this information, received from his field officers, and to communicate it onward to the Chairman ARU through his letter dated 10.5.2019. This letter from DG also reaches the Chairman ARU, the same day, i.e. 10.5.2019. The Chairman also manages to review it immediately and to make his own comprehensive summary dated 10.5.2019, for the Law Minister, incorporating not only the information received from the FBR but also the report of 08.5.2019, prepared by Barrister Zia of ARU, and the identity and the travel history by FIA, submitted also on 10.5.2019. The Law Minister then forwarded this report, as a summary to the Prime Minister, who then advised the President to file a reference. Such a long drawn and extensive exercise involving so many officers cannot possibly be concluded within a single day, one can only guess as to whether these officers signed on the proverbial dotted lines or were the purported reports and summaries prepared much before the magical date of 10.5.2019. Certainly, as submitted by Mr.Malik, 10.5.2019 was the longest day for the petitioner.

10. The case against the petitioner, as set out in the purported reference, proceeded on the premise that in terms of the

provisions of section 116 of the ITO 2001, the petitioner was required to disclose the properties owned by his wife and children in his wealth statement, but he and so also his wife and children, failed to do so, and as a corollary thereof, it was claimed that it remained unexplained as to how were these properties acquired, and thus, it was contended that the possibility that these properties were acquired through money laundering cannot be ruled out, the above allegations and insinuations were, solely based on the purported report obtained by the Chairman ARU from the FBR. However, as rightly submitted by Mr.Muneer A. Malik, the purported reference did not allege any dishonesty or corruption in the acquisition of such properties and that it was also not alleged that the petitioner did not have sufficient tax paid/white money to acquire the said properties, if he wanted to. Absolutely nothing was placed on the record that there has been any money laundering on the basis whereof it could be said that the case against the petitioner is of money laundering. It was not even explained as to what is the basis for making such a serious allegation against a senior Judge of the Supreme Court. There is also no allegation that the petitioner failed to pay any tax due.

11. Now before proceeding to examine the merits and veracity of the allegations, it will be appropriate to peruse and analyse the provisions of section 116 of the ITO 2001, which reads as follows:-

> **"116. Wealth statement.-**
>
> (1) The Commissioner may, by notice in writing, require any person 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–
>
> (a) the person's total assets and liabilities as on the date or dates specified in such notice;

(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;

(c) any assets transferred by the person to any other person during the period or periods specified in such notice and the consideration for the transfer;

(d) the total expenditures incurred by the person, and the person's spouse, minor children, and other dependents during the period or periods specified in the notice and the details of such expenditures; and

(e) the reconciliation statement of wealth.

(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.

Provided that every member of an association of persons shall also furnish wealth statement and wealth reconciliation statement for the year along with return of income of the association.

(3) Where a person, who has furnished a wealth statement, discovers any omission or wrong statement therein, he may, without prejudice to any liability incurred by him under any provision of this Ordinance, furnish a revised wealth statement, along with the revised wealth reconciliation and the reasons for filing revised wealth statement, under intimation to the Commissioner in the prescribed form and manner, at any time before the receipt of notice under sub-section (9) of section 122, for the tax year to which it relates.

Provided that where the Commissioner is of the opinion that the revision under this sub-section is not for the purpose of correcting a

> *bona fide* omission or wrong statement, he may declare such revision as void through an order in writing after providing an opportunity of being heard.
>
> *Explanation* — For the removal of doubt it is clarified that wealth statement cannot be revised after the expiry of five years from the due date of filing of return of income Tax for that tax year."

12. In terms of clause (e) of sub-section 2 of Section 114 ITO 2001, a return of income has to essentially accompany a wealth statement as required under section 116. This mandatory requirement of filing of a wealth statement along with the return is, in terms of section 2A of section 118 ITO 2001, maintained, also where the return is required to be filed electronically. While sub-section (4) of section 118, envisages two different occasions for filing of wealth statements, one with reference to sub-section (2) of Section 116, which reiterates the requirement of section 114, that the wealth statement filed thereunder shall be filed by the date due for furnishing the return of income for that year, and the other where a person files a wealth statement in compliance of a notice under sub-section (1) of Section 116, and reaffirms the time prescribed by the said sub-section for compliance, being the date as specified in the notice.

13. Section 114(1) ITO 2001, provides for furnishing the return of income for the tax year, sub-section (2) thereof, as noted above, require that, the return of income, (a) shall be in the prescribed form and shall be accompanied by such annexures, statements, or documents as may be prescribed. The said provision itself prescribes certain essentials for the said return, one such essential requirement, has been specified through clause (e) of the said sub-section which reads, "*shall be accompanied with a wealth*

*statement as required under section 116*". Now section 116 is composed of two parts, one is contained in sub-section (2) thereof, which is merely a reiteration of what has been specified through the above quoted clause (e) of sub-section (2) of section 114 ITO 2001, whereas the other part, which is composed of sub-section (1), empowers the relevant Commissioner to require "*any person*" through a notice in writing, to furnish on the "*date specified in the notice*" the following information, through the prescribed wealth statement:-

> (a) the person's total assets and liabilities as on the date or dates specified in such notice;
>
> (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;
>
> (c) any assets transferred by the person to any other person during the period or periods specified in such notice and the consideration for the transfer;

14. Now the two statements, though both called wealth statement, are patently different and distinct from each other. They cater to two different requirements and are filed in/on two different situations/occasions, having different features, and containing distinct information and details, one of the two is an essential part of the income return under section 114 ITO 2001, required to be filed by "*every resident tax payer*", "*for the tax year*", "*by the due date for furnishing the income for that year*", whereas the other, undoubtedly is not a part of the income return, but is filed only when required by the concerned Commissioner in writing, which demand, in contrast to sub-section(2), which, as noted earlier makes its filing an obligation on a "*resident tax payer*", could be made from "*any person*", whereas the due date for filing the statement under section (1) is not the due date prescribed for filing the income return, but the

statement thereunder is to be furnished "*on the date specified in the notice*".

15. Pakistan is a federal republic, its governance structure is based on provincial autonomy and trichotomy of power. Our constitutional scheme secures and guarantees independence of judiciary in a meticulous, effective and robust manner. Amongst the main objectives espoused through the preamble to the Constitution, professes independence of judiciary, as one of the prime objectives, and thus states "….. the independence of judiciary shall be fully secured". Such has also been our resolve, expressed through the objective resolution, which by virtue of Article 2A forms substantive part of the constitution. One of the most significant safeguard, ensuring the professed and committed independence of judiciary, has been provided by way of protecting the tenure of office of the judges of the Supreme Court and the High Courts, through articles 179 and 195 of the Constitution, respectively. Article 179 thus reads:-

> "*A Judge of the Supreme Court shall hold office until he attains the age of sixty five years, unless he sooner resigns or is removed from office in accordance with the Constitution.*" (*emphasis supplied*)

16. Article 195 secures the tenure of a High Court Judge in similar terms. Whereas clause (7) of Article 209 of the Constitution provides that, "*a Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article*" (*emphasis supplied*). The possibility of removal of these Judges is envisaged by clause (6) of Article 209, in two successive eventualities, (a), being, a Judge, after the inquiry by the Supreme Judicial Council (SJC), (composition of which council has been prescribed by the said Article itself), is found incapable of performing duties of his office, or to be guilty of misconduct, and (b) in view of such incapability or misconduct, the SJC forms an opinion that the Judge be removed

from office, and its only then that the President may remove him from office. Clause 6 thus reads:-

> " ***(6)*** *If, after inquiry into the matter, the Council reports to the President that it is of the opinion-*
> *(a) that the Judge is incapable of performing the duties of his office, or has been guilty of misconduct, and*
> *(b) that he should be removed from office.*
> *the President may remove the Judge from office.*"

17. An inquiry against a Judge can only be initiated as envisaged and prescribed by sub-clause (5) of Article 209 of the constitution, which reads as follows:-

> " *(5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court-*
> *(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or*
> *(b) may have been guilty of misconduct,*
> *the President shall direct the Council to, or the Council may, on its own motion, inquiry into the matter.*"

18. However in the present case, the conduct of the President, who is the head of the State, was neither in consonance with the provisions of Article 209, nor was it in conformity with the requirements of Article 90 and 91 of the Constitution. Article 90 reads as follows:-

> "*90. (1) Subject to the Constitution, the executive authority of the Federation shall be exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the Federal Ministers, which shall act through the Prime Minister, who shall be the chief executive of the Federation.*
> *(2) In the performance of his functions under the Constitution, the Prime Minister may act either directly or through the Federal Minister.*"

19. The above provisions clearly mandates that the executive authority be exercised by the Federal Government, it also

unambiguously lays down that the Federal Government is composed of the Prime Minister, and the Federal Ministers, which composition, in terms of the Article 91(1), has been described as Cabinet. Article 91(1) reads as follows:-

> "*91. (1) There shall be a Cabinet of Ministers, with the Prime Minister as its head, to aid and advise the President in the exercise of his functions.*"

20. Sub-Article (6) of Article 91 provides that "*The Cabinet, together with the Ministers of State, shall be collectively responsible to the Senate and the National Assembly*".

21. In the first place, the President erred in ignoring, the flagrant violation of Article 90, inasmuch as the purported complaint/ information, was submitted to him by the Prime Minister, without the approval of the Cabinet, which approval was essentially required thereby (Article 90). This Court in the case of **M/s Mustafa Impex** v. **Govt. of Pakistan** (*PLD 2016 SC 808*), has examined and expounded the status and role of the Cabinet in view of the above article, as follows:-

> "*79. We begin with the postulate that the constitutional definition of Federal Government under Article 90 is absolutely clear in its scope and ambit- it means the Prime Minister and the Federal Minister, which, in turn, means the Cabinet. The Cabinet is a composite concept and its components are the Prime Minister and the Federal Ministers. Together they constitute the Cabinet. Article 91, as it stands at present, bears the heading "The Cabinet", and restate the same proposition from a slightly different perspective. Under Article 90 it was posited that the executive authority was to be exercised by the Federal Government i.e. the Cabinet. But, it was added that the Cabinet was to exercise the executive authority in the name of the President. In brief, the executive authority of the state was to be exercised by the Cabinet, as a collective entity, in the name of the President. ..... The central role in both theoretical formulations is played by the Cabinet which*

> *is, in fact, a re-description of the Federal Government. The Prime Minister is the head of the Cabinet but he can neither supplant it nor replace it. ..... He cannot exercise its powers by himself. ..... If we treat the office of the Prime Minister as being equivalent to that of the Cabinet, it would follow that the Prime Minister, by himself, as a single individual, becomes the Federal Government. This is simply inconceivable. It is the antithesis of a constitutional democracy and would amount to a reversion to a monarchical form of Government reminiscent of King Louis XIV's famous claim that "I am the State" (literally "L'etat, c'est moi"). It is most emphatically not the function of this Court to surrender the hard won liberties of the people of Pakistan to such a fanciful interpretations of the Constitution which would be destructive of all democratic principles. We have no doubt in rejecting it, in its entirety.*"

22. The foregoing has been reiterated through para 80 of the judgment in the following words:-

> "*.....The Prime Minister cannot take decisions by himself, or by supplanting or ignoring the Cabinet because the power to take decisions is vested with the Federal Government i.e. the Cabinet, and unilateral decisions taken by him would be a usurpation of power ..... The decisions of the Federal Government are the decisions of the Cabinet and not of the Prime Minister. Any decisions taken by the Prime Minister on his own initiative lack the authority of the law or the Constitution.*"

23. Holding as above, the Court declared Rule 16(2) of the Rules of Business, 1973, which enabled the Prime Minister to dispose of matters by bypassing the cabinet, as ultra vires to the Constitution.

24. The judgment in its earlier part at page 846, para 46, held that in view of clause 6 of Rule 20 of the Rules of Business, 1973, which provided that no case shall be discussed in the cabinet,

nor any issue raised, without a summary relating to it, first being circulated, mere formal consent of the Cabinet without following the detailed provisions in the Rules may render the decision open to question and that the Cabinet, being the supreme body of the Executive, with a high constitutional status, cannot, and ought not to be treated as a mere rubber stamp for decision making by the Prime Minister. It was observed that Article 90 envisages a parliamentary form of Government which is based on decision making by the Cabinet. To turn the Cabinet into such a rubber stamp in pursuit of decision making by the Prime Minister to the exclusion of his Cabinet would violate the letter and spirit of our Constitution. That would be to reduce a cabinet form of government into a prime ministerial one, which is a concept alien to the Constitution. So as per this judgment, and as prescribed by Rule 20, it is not just the approval of the Cabinet that is required, but such approval has to be made after due deliberation with full awareness of the matter approved/sanctioned.

25. The effective participation and contribution of the Cabinet in decision making becomes necessary also in view of the fact that in terms of sub-Article (6) of Article 91, the Cabinet has been made collectively responsible/liable for the decision made, and the policies formulated, by the executive.

26. However in the present case, the Prime Minister by-passed the Cabinet altogether and sent his purported advice to the President for forwarding the purported reference to the SJC, without the sanction of the Cabinet.

27. Mr. Bilal Minto, the learned counsel for the petitioner in CP No.20/2019, has drawn our attention to another fundamental constitutional flaw which too goes to the very root of the matter, that needs to be considered. He submitted that the President lacked

jurisdictional and constitutional authority to entertain the purported reference, also for its having been filed by a private person, instead of a government, and that a private complaint, seeking to invoke Article 209 of the Constitution, cannot be lawfully entertained, even by a government functionary, what to say about a non-entity like ARU. According to the learned counsel a private complaint can be received and entertained only by SJC. He submitted that under the original Article 209 (5) of the Constitution, information in respect to a possible misconduct of a superior court judge could only be presented to the President. Even the Supreme Judicial Council had to first submit information about a judge to the President who then had to form an "opinion" as to whether the information comprised "misconduct". If he formed the opinion that it did comprise misconduct, he would have to send the matter back to the SJC to inquire. The learned counsel referred to the original article 209(5), which read as follows:-

> *"209(5)... If, on information received from the Council or from any other source, the President is of the opinion that a Judge...etc"*

He submitted that the LFO (of 2002) amended the original sub article (5) as follows (inter alia):

> "*209(5)...If, on information from any source, the Council or the President is of the opinion that a Judge... etc*"

The learned counsel pointed out that the 18th Amendment, did not change this part of 209(5), as it stood amended by the LFO and therefore it continues to read today as above.

28. As amended, clause (5) enabled the SJC to receive information from any source and proceed with inquiry on its own. This meant that the SJC no longer needed a direction from the President. However, even though the SJC could now receive information from any source, the President was still retained in this

clause as one of the sources from which the SJC could receive information. According to Mr. Minto this is significant. If the SJC could now receive information from any source, why was the President retained as a specific, separate source in this amendment? Why was he not considered covered by the words "*any source*"?

29. The learned counsel submitted that unless it is held that this part of the clause is "*redundant*", it would be necessary to discover a reason behind the fact that the President has been retained here. In other words, it would be necessary to determine a specific role for which the President was retained.

30. Answering the query that he raised, the learned counsel submitted that the President has been retained in clause 5 to act as a "*buffer*" i.e. a neutral entity between the executive/political government(s) and the judiciary which, to my mind also, is the only plausible explanation. Mr. Minto rightly recalled that the need for there to be a neutralizing buffer between the executive/political government and the judiciary was also underscored by Mr. Raza Rabbani Sr. ASC, while arguing for the petitioner in CP No.26 of 2019, where he has pointed out that a tension between these two organs of the state is obvious in view of the fact that the government is a party before the judiciary in the vast majority of cases. The purported reference, the tone, language and contents of the pleadings filed by the Attorney General before the SJC, as well as the vast machinery employed by the government to "*build*" a reference, make it even clearer how such a tension exists between the government and the judiciary. He thus, submitted that it is in acknowledgment of the nature of relationship, between the government and the judiciary that the President has been retained as a "*buffer*". This ensures that all information coming from the government(s) in respect to perceived "*misconduct*" of a judge of superior court must pass through the

President. The President is expected to act neutrally and must form an "opinion" on information received from a government, before sending the matter to SJC.

31. The logical conclusion of the foregoing discussion is that unless it is held that the retention of the President in this constitutional provision is redundant, which certainly is an impossibility, the only plausible reason to retain the President that one can perceive is that he is meant to act as a buffer between the judiciary and the government, then it follows that information from the government about alleged misconduct of a judge must always pass through the President and cannot be submitted to the SJC directly. Conversely, if this is the role that the President is to play, then private persons, i.e. everyone except the government(s) must approach the SJC directly with their information and not through the President.

32. The learned counsel submitted that there is nothing odd in suggesting that two organs of the state can be hostile to each other, President Andrew Jackson of the USA is said to have expressed his displeasure at the Supreme Court's ruling in Worcester v Georgia by uttering the words

> "*John Marshall (CJ) has made his decision, Now let him enforce it*".

33. The present case (especially submissions regarding mala fides made on behalf of Justice Isa), itself sufficiently demonstrates how important it is for the President to play the role of a buffer and a neutralizer between the government and the judiciary.

34. However the President has not applied his independent mind while forwarding to the SJC the purported reference, which as noted earlier also, contains the allegation that the petitioner has failed to declare certain foreign properties, owned by his wife and

children, as was perceived to be required of him in terms of section 116 of the ITO 2001. As patently manifest from the plain reading of the provisions of section 116 ITO 2001, and the Performa of wealth statement prescribed thereunder, and reinforced through the notes contained therein, which shall be discussed in a while, the petitioner in the fact and circumstances of the case, was not at all obliged to make the disclosure as contended, and therefore no case can possibly be made out against the petitioner, for any non-compliance, or breach of the said provision. Had the President applied his mind independently, he would have readily and surely appreciated that reliance of the Chairman ARU, the Law Minister and the Prime Minister, on a purported report obtained by the Chairman ARU was wholly unconstitutional, unlawful, illegal, inappropriate, misconceived and *mala fide*. The same is patently deleterious to the constitutional mandate, and the relevant law i.e. ITO 2001, and is gravely misleading. It has been prepared in utter disregard of the entire scheme of the ITO 2001, and the detailed and elaborate procedure laid thereby. No notice was issued either to the petitioner or even to his wife and/or children, and no opportunity of hearing was provided to either of them before proceeding to prepare the purported report, certainly no adjudication was done with regard to the allegation by the competent hierarchy, or otherwise. Even in case there would have been a determination regarding the alleged non-compliance against the petitioner, through due process, as prescribed, and by a designated officer, such initial determination also would not have been sufficient to proceed against the petitioner under Article 209 (5) of the Constitution, as that also would have been pre-mature, and would have deprived the petitioner of his right of appeal(s), under the Statute, and from availing his remedy before the High Court and then before this Court. It may also be crucial to

note here that even the ultimate finding of non-compliance with the provisions of section 116 of the ITO 2001, shall not be sufficient to make the petitioner amenable before the SJC, unless it is held that that the same was deliberate and with ill intent, and the nature of the infraction found was such as to justify initiation of the proceeding under Article 209. In the absence/disregard of all the above, the purported reference cannot be said to be *bona fide*.

35. Even a cursory reading of the provisions of section 116(1) and (2) together makes it abundantly clear, which view, as noted earlier, is reinforced with the perusal of the wealth statement form filed along with the income return, that a filer is certainly not required to disclose the assets of his independent spouse and children through the wealth statement that he/she is required, to file along with his/her income return, otherwise there was no need for the provisions i.e. sub-section (1) of section 116, enabling the Commissioner to seek such information through a notice. The analysis of the provisions of clause (e) of sub-section (2) of Section 114, sub-section (2A) and (4) of section 118, and comparison of sub-section (1) and (2) of section 116 of the ITO 2001, leaves no manner of doubt that the wealth statement, filed along with the income return, is not the same as required to be filed in compliance with the notice under section 116(1). As also noted earlier, the above sub-section (1) of section 116 clearly enumerates, the information that the Commissioner may seek thereunder. However none of the provisions of the ITO 2001, specifies the information that is to be furnished through the wealth statement required in terms of clause (e) of sub-section (2) of section 114, so the statute by itself does not require the filer to disclose the properties owned by his or her spouse or children, along with the income return under section 114. We therefore have to peruse the Performa of the wealth statement filed

along with the income return, as specified in part (iv) of the second schedule to the Income Tax Rules 2002. Clause 12 of which Performa, though provides for “particulars/description of Assets, if any standing in the name of the spouse, minor children and other dependents”, but as is evident from note seven (7) of the notes incorporated in the performa, which particular note is in the context of the aforesaid column, and reads “Give details of assets of the spouse, minor children and other dependents, and state whether such assets were transferred directly or indirectly to the spouse or minor children, or other dependents, or was acquired by them with funds provided by you”, the plain and simple meaning of this note, which is instructive and explanatory in nature, is that, only such assets are to be mentioned in the relevant column which, though stand in the name of the spouse and minor children, and other dependents, but have either been transferred to them by the filer, whether directly or indirectly, or were acquired by them with the funds provided by the filer, otherwise the query would have been, as to whether the assets were acquired by them (spouse, minor children or other dependents) directly or indirectly, or were acquired by them with the funds provided by you. The query, as explained/elaborated through the said note, pertains to acquisition, either by way of transfer by the filer directly, or through a route of third party, or from the funds provided by the filer. The use of word “transfer” in the earlier part of the note, instead of the word “acquired”, as used in the later part is significant. It may be relevant to note here that the assets or the properties are obtained not only through transfer, but are often acquired by way of allotment, lease, grant and/or sanction etc. The reference to transfer in the note, is in fact to a transfer from a filer, either directly or through some intermediary. It may also be beneficial/instructive to note here that in order to make compliance

of the mandate as contained in the provisions of section 114 and 116 of ITO 2001 simple and straight and in order to remove the remotest possibility of any confusion, or ambiguity, in that regard, the relevant query as set out in Column-12 of the wealth statement, has been re-casted, in the performa introduced in the year 2014 and placed at S.No.13, to read, "Assets created benami in the name of spouse(s), children and other dependents", whereas the "instructions for filing the return "Part-11(E)", which seems to have replaced the "notes" on the reverse of the wealth statement, at S.No.8, instructs, that the "Assets created in the name of spouse(s), children and other dependents, at S.No.13, are to be declared only if acquired by them with funds provided by you". It is also crucial to note here that the changes in clause 12 of the performa, and the notes/instructions, have not been brought as a consequence of any change in the relevant provisions of the statute, as none has occurred, but for the purpose and objective as noted above, and to bring the performa in perfect conformity and harmony with the relevant provisions of the ITO 2001, particularly those of section 114, 116 and 118 thereof, the foregoing as shall be discussed further is the only rationale and logical conclusion one can draw.

36. Although as noted above, the performa, before it was changed in 2014, by itself, required disclosure of the assets which were acquired by the wife and children only from the filer or through him. However, the modified performa and instructions would also have been beneficial to the petitioner had the earlier performa been otherwise as it is now well laid down that beneficial notifications, executive orders and instructions have retrospective effect, **Messrs Army Welfare Sugar Mills Ltd and others v. Federation of Pakistan and others** (1992 SCMR 1652) and **Elahi Cotton Mills Ltd**

**and others** v. **Federation through Secretary, Ministry of Finance, Islamabad and others** (PLD 1997 SC 582).

37. As submitted by Mr. Babar Sattar, the learned ASC, who argued for the petitioner in relation to the relevant provisions of the ITO 2001, if the filing of wealth statement necessarily required, from "*every resident taxpayer*", in every instance, the submission of additional information that could only be sought by the Commissioner after issuing a notice in writing then section 116(1) would be redundant, at least with respect, to the resident taxpayer. According to the learned counsel the only natural reading of the two provisions is that the wealth statement as required in section 116(2) has to specify the wealth and assets of the taxpayer only. Under Section 116(1), however, the Commissioner is empowered to issue a notice and seek information regarding the assets of the dependents, after having specified the dates in the notice. Further, the Commissioner may require "*any person*" not just the "*resident taxpayer*" to provide this information. Section 116(1) creates an obligation, subject to notice by the Commissioner, for every person to whom such notice is issued, in contrast to section 116(2), which creates the obligation to file a wealth statement for 'tax payers'. Pursuant to 116(1), a non-resident Pakistani who has no income taxable in Pakistan can be required to file a wealth statement and reconciliation statement. The object, purpose and scope of sections 116(1) and 116(2) is manifestly distinguishable.

38. Mr. Sattar further submitted that the annual wealth statement filed electronically along with income tax return is filed under Section 116(2). To state that Petitioner has breached section 116(2) of the ITO, the President had to be convinced that as a matter of law and practice the content of Section 116(1) is to be read into Section 116(2) and every taxpayer filing a wealth statement is obliged

to disclose within such statement all assets of a spouse (whether dependent or not) and the assets of non-dependent adult-children and whether or not such assets are the products of the taxpayer's income i.e. including assets that are products of inheritance, gift, *etc.*, this, he submitted is neither the law nor the practice. The above submissions of Mr. Sattar are in consonance with the view as expressed hereinbefore, that neither was the petitioner obliged to make any declaration as suggested, nor has he committed any breach of the provision of Section 116 or for that matter any other provision of ITO 2001. In support of his contention, the learned counsel relied upon the of case titled **Miss Sabira B. Nanjiani, Karachi v. Deputy Commissioner of Income Tax, Salary Circle-03, Zone-D, Karachi** (2007 PTD 1810) the Sindh High Court while interpreting Sections 58(1) and (2) of Income Tax Act, 1979 (the predecessor provisions of Section 116(1) and (2) of the ITO) recognized that these two subsections created separate requirements, thus supporting the above interpretation of section 116(1) and (2) of the ITO.

39. If the interpretation in the Reference is accepted then every taxpayer (including each Judge, the Prime Minister and the President) is mandated to disclose each and every asset of his/her spouse and children in their wealth statements, whether or not created out of the tax payer's income and whether or not the spouse or children are dependents. This would throw almost every taxpayer in breach of Section 116(2), to the extent that the wife owns any property (including jewellery) that has not been created out of the husband's income or that the husband is unaware of. Conversely, it would also throw most married female tax filers to be in breach of section 116, as most wives do not have details of the assets of their husbands and don't report their husband's assets on their wealth

statements; section 116 uses the word 'spouse'. The interpretation accorded in the Reference makes no sense in view of the purpose of inclusion of requirement of wealth statement under the law. The only purpose a wealth statement serves is to act as a balance sheet for reconciliation of income to ensure no income escapes tax.

40. The Petitioner could not possibly have disclosed/ declared the assets of his non-dependent spouse and non-dependent adult-children under section 116(2) or even under section 116(1) for that matter unless the assets were a product of his income, as such declaration/inclusion would make it impossible to reconcile the wealth statement and provision of reconciliation statement which is a mandatory part of and rationale for filing of the wealth statement. And if he did disclose such assets he would be filing a false return. Moreover, the law cannot possibly require both spouses to declare identical assets on their wealth statements as in doing so their wealth statements would never reconcile their incomes. Section 116 of the ITO cannot be conceived to have proposed such an absurdity.

41. The purpose of law is to add certainty to the lives of citizens. The proposed interpretation of section 116 of the ITO is intentionally dishonest as it suffers from an impossibility. Legal liability cannot be affixed on the basis of fanciful misconstruction and uncertainty. It would be rare for one spouse to know with exactitude the details of all assets of the other spouse, and be virtually impossible where a husband has more than one wife. Hanging penal liability on such assumed knowledge and mandatory disclosure (and the impossibility of avoiding it, unless the other spouse voluntarily shares such information) defies rationality.

42. As rightly submitted by Mr. Babar Sattar, the only two circumstances in which a Section 116(1) notice in relation to the said properties could be issued to the Petitioner were, (i) if the

Commissioner believed at the relevant time that the Petitioner's income had escaped taxation and was not accounted for in his wealth statement under 116(2) or (ii) if the Commissioner issued a notice to the spouse of the Petitioner and she stated that she purchased the properties in question from money received from her husband, which he had not disclosed in his wealth statement.

43. According to Mr. Babar Sattar, the underlying object of the taxman in issuing section 116 notice is to detect any income that may have escaped taxation. Thus such income and the asset made from it would be converted back into income and then taxed. However, undisputedly the petitioner has a pristine record in declaring substantial income and paying tax on it, therefore, in view of the Petitioner's tax record and lack of motivation to acquire properties in the name of his spouse or children when he had legitimate tax-paid means to acquire such property, the Petitioner could never be served with a tax demand in lieu of such properties (especially in view of section 90). There is also no suggestion that the properties in question were purchased by the Petitioner or were purchased on his behalf.

44. In view of part IV and Recovery of Tax provisions in the ITO, especially, section 138, tax can only be recovered from the taxpayer, his estate or anyone holding property on behalf of the taxpayer, and no tax liability gets transferred to the spouse of a delinquent taxpayer. In the present case there is no allegation that the spouse/children of the Petitioner are holding property on his behalf, therefore, the provisions of section 90 are not attracted. Any tax liability of a spouse cannot be transferred to the other spouse nor adverse presumptions be drawn against them, as there is neither any concept of collective responsibility under the ITO nor one of joint tax filling (as in the US, which then also has the Innocent Spouse Rule,

where non-declaration of tax by one spouse is not known to or for the benefit of the other).

45. Any adverse presumption against the spouse of an allegedly delinquent taxpayer would undermine the doctrine of individual responsibility in Article 5 of our Constitution that provides the foundational basis for rights and responsibilities under our constitutional order.

46. A very serious constitutional abrasion in this case, is the President's sending the purported reference to the SJC on the advice of the Prime Minister, without applying himself, and without forming an independent opinion, as to whether, in the facts and circumstances of the case it was desireable to send the purported reference to the SJC. By following the advice of the Prime Minister, and not applying himself independently, the President has committed a gross violation of the constitution. There is absolutely no concept of any "advice" in the constitutional scheme of initiating and maintaining any proceedings against a Judge. Article 209(5) of the Constitution, recognises the role of only two offices/entities, the President, and the SJC. The Prime Minister has absolutely no role or participation in the entire process. The term "advice" is alien to the proceedings, under Article 209. Clause 5 of the said Article, which has been reproduced herein earlier, says, "the President is of the opinion", it does not say opinion to be formed on the advice of the Prime Minister, so it is the exclusive domain and prerogative of the President to form an opinion, either to send or not to send the matter to the SJC, for it to hold an inquiry. The language employed in clause 5 of Article 209 is plane, simple and unambiguous, it does not allow any room for an interpretation other than its literary meaning. Importing into the said provision any word, or phrase shall not only be violative of the elementary principle of interpretation, but shall

also hurt the very spirit of the said provision, and shall further be in conflict with the entire constitutional scheme, and the principle of trichotomy of power and independence of judiciary. As discussed herein before, it is with a certain purpose, that despite an amendment, whereby SJC has been empowered to receive information "from any source", the President has been retained in this clause, such is for him to act as a buffer, and insulate the judiciary from the executive's onslaught, by way of misconceived, untenable, malicious and mala fide, complaints/allegations. As observed earlier also, government happens to be party in a vast majority of cases and tension between these two organs of state is not unnatural.

"In a democracy governed by rule of law under written constitution, judiciary is sentinel on the qui vive to protect the fundamental rights and to poise even scales of justice between the citizens and the State or the State inter se. Rule of law and judicial review are basics of the constitution." ..... "under the Constitution it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective". ..... "The judiciary seeks to protect the citizen against violation of his constitutional or legal right or misuse or abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive. It is therefore absolutely essential that the judiciary must be free from executive pressure or influence which has been secured by making elaborate provisions in the constitution with details. Independent judiciary is therefore most essential when liberty of citizen is in danger. It then becomes the duty of the judiciary to poise the scale of justice unmoved by the powers (actual or perceived)

undistributed by the clamour of the multitude". ..... "The extra ordinary complexity of modern litigation requires him (a Judge) not merely to declare the rights of citizen but also to mould the relief warranted under given facts and circumstances and often command the executive and other agencies to enforce and give effect to the order, writ, or direction or prohibit them to do unconstitutional acts."[1]

47. It is the above role, functions and obligations of the judiciary, that cause friction and give rise to tension between the executive and the judiciary, and thus a unique role of neutral buffer, as described above, has been assigned by the constitution to the President. It is not a function that falls within the executive authority of the Federation. The president must personally and independently apply his mind as to whether a Judge has committed misconduct and, if so, whether it justifies the sending of reference against him. Sub-article (2) of Article 48 of the Constitution provides for the president to "act in his discretion in respect of any matter, in respect of which he is empowered by the constitution to do so", it is his exclusive domain and prerogative to form an opinion and decide as to whether it is desireable to send a matter under Article 209 of the Constitution to the SJC. In Al-Jehad-II case (PLD 1997 SC 84, at 205 and 206), the power of the President to ask the Prime Minister to place his decision before the Cabinet (Article 46(c), prior to 18th amendment), or the power to ask the parliament to reconsider a bill (Article 75), were held to be obvious examples of presidential power to be exercised independently, and without the advice of the Prime Minister, despite the absence of any reference to the word "discretion" in the said Article

[1] C.Ravichandran Iyer v. Justice A.M. Bhattacharjee & Ors 1995 SCC (5) 457, JT 1995(6) 339

48. Another serious issue involved in this case pertains to collection of material and covert surveillance, as justly submitted by Mr. Muneer A.Malik, it hardly needs to be emphasised that all, and every state power must rest in some law, some provision of the constitution, or the rule of business prescribed thereunder. Our constitution does not vest in the state, any prerogative power, and does not allow space for any inherent power, such being an underlying principle of the concept of the rule of law. The power and authority of all the various organs of the State are conferred by law and are regulated and structured thereby in a well-defined manner. These powers are to be exercised by the various functionaries of the State, in the manner and to the extent prescribed. A citizen is free to do anything not prohibited by law, but a State functionary can perform only those acts which are permissible for him to perform under some law. The case law relied upon by the learned counsel have very succinctly enunciated the above constitutional principle of governance. Thus in the case of ***PML-N v. FOP*** (*PLD 2007 SC 642*), has been held, that:

> *"It may not be out of place to mention here that there is no inherent power in the executive, except what has been vested in it by law, and that law is the source of power and duty. The structure of the machinery of government, and the regulation of the powers and duties which belong to the different parts of this structure are defined by the law, which also prescribes, to some extent the mode in which these powers are to be exercised or those duties performed. From the all pervading presence of law, as the sole source of governmental powers and duties, there follows the consequence that the existence or non-existence of a power or duty is, a matter of law and not of fact, and so must be determined by reference to same enactment or reported case. Consequently there are no powers or*

> *duties inseparably annexed to the executive Government. It cannot be argued that a vague, indefinite and wide power has been vested in the executive to invade upon the proprietary rights of citizens and that such invasion cannot be subjected to judicial scrutiny if it is claimed that it is a mere executive order…"* (p. 673 at para 26).

49. In the concurring note of Kaikaus J. in the case of *Jamal Shah* (PLD 1966 SC 1 at 52, 53) this proposition was expressed as follows:

> "*Before proceeding to examine it however let me state what I believe to be the object of Article 2. I have little doubt that its object was to negative any claim by the Government that it had inherent power to take action which was not subject to law or that it could deal with individuals in any manner which was not positively prohibited by law. Governments have frequently been making such claims. The King of England could do no wrong and what he did as a King was above the law and beyond the jurisdiction of Courts. Representative Governments too have been claiming that in some spheres they possess powers of action which are not subject to law…"*

It was further held that:-

> "*While it cannot be said that Article 2 makes a change in the existing law for even according to the previous decisions there could be no act of State in relation to citizens, its importance should not be under-estimated. It embodies an important charter. It prevents the Government from taking any action in this country for which there is no legal sanction, and it at the same time debars the Legislature from creating an authority whose actions are not subject to law.*"

50. The same view was expressed in *Province of Punjab v. Gulzar Hassan* (PLD 1978 Lahore 1298 at 1316, 1317) in the following words:-

> *"...in respect of citizens the Government has only such powers as are granted to it by the municipal law, that is, the law of the country*". And, "*no executive authority can take any executive action without the support of a valid law and any action taken in violation of the above rule can be struck down...*".

51. This formulation was subsequently approved and cited by the **Supreme Court in *FOP v. Shaukat Ali Mian*** (PLD 1999 SC 1026 at 1054). Please also see ***Ghulam Sabir's*** case (PLD 1967 Dacca 607 at 610, 611) and ***Iftikhar Chaudhry's*** case (above) (at p. 153-155, paras 120 to 122).

52. However, in the present case, as rightly pointed out by Mr. Malik in detail, not only the material was collected absolutely without any sanction or authority, in an illegal manner, and in breach of certain specific prohibitions placed by law, but was so done, also against the categorical mandate of the Constitution, and more disturbingly, was done by, and at the stance of a body, and a person, the ARU and its Chairman, who both are unknown to law, Constitution and the rules of business framed thereunder. ARU and its purported Chairmanship do not owe their existence to any law. Both are non-entities. All of their acts were wholly without jurisdiction. Faced with the above objection raised by Messrs Muneer A.Malik, and Raza Rabbani, Mr. Faroogh Nasim, the learned counsel appearing for the official respondents, in his endeavour to justify the creation and the existence of ARU, referred to and relied upon clause (5) of Rule 4 of the Rule of Business, 1973, however the said Rule, which is reproduced below, is of no avail to him in the present case:-

> ***"4*** *.....*
>
> *(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.*"

53. One can readily see that the above rule certainly does not provide for creating any new entity, it merely requires that the governmental business, which is not done in a federal secretariat or an attached department, be conducted through such agencies and officers as the Prime Minister may determine. The rule undoubtedly does not deal with the creation or the establishment of any new agency or office, but only enables the Prime Minister to assign/allocate such business which is not conducted in the Federal Secretariat or the attached departments to some government agency, or officer and nothing beyond. Mr. Farough Nasim, the learned ASC, however could not refer to any other rule, law and/or any provision of the Constitution, which may have been helpful in creating/establishing the ARU. Though the Chairman ARU, at the relevant time, was also a Special Assistant to the Prime Minister, but nothing was referred to or placed before us, justifying his conducting himself in the manner he did, however despite the fact that the Chairman and the ARU were bereft of any legal status and had absolutely no power or authority to collect the material that they did, but the Chairman misused his so-called office and did so at his whims.

54. Even the notification dated 06.11.2018, referred by Mr. Farough Nasim, the learned counsel for the official respondents, in terms wherof the ARU is purportedly created and empowered to perform certain functions, as enumerated therein by way of its "terms of reference", through its clause/term 5 provides "Where no evidence seems to suggest any criminality other than untaxed foreign assets of Pakistani abroad, the same may be referred to the FBR for

taxation purposes under the applicable provisions of law. ……."

55. Indeed nobody can have any cavil to the contention of Mr. Muneer Malik that the very process of investigation or collection of material about a citizen, inherently and invariably, involves a collision with his rights guaranteed under Articles 4 and 14. Certainly a State functionary can only embark upon the investigation or collection of material about a citizen under (i) the authority of an enabling law, (ii) by a functionary designated under the law; and (iii) then too, only for a justifiable cause or reason.

56. As is apparent from the discussion herein, there was absolutely no cause, reason or justification for initiating the process of investigating a Judge, much less to embark on a fishing expedition against him and his family. The State has no business to pry upon or collect personal information about its citizen, unless there is a just cause and legitimate purpose for doing so. No State functionary, much less a body or a person, which/who has absolutely no legal sanction to act on behalf of the State, can embark upon an investigation or collection of material without the sanction of an enabling law, and that even where such sanction and authority is available, the power and mandate thereunder is well regulated, neither can such power be exercised whimsically, nor can it travel beyond certain specified limits, and is always designed to be invoked/exercised under certain specified circumstances, and only where grounds and reasons justifying such exercise occurs or exist, and in a just, fair and a reasonable manner. Non-compliance of which prescription shall render the investigation, or collection of material, violative of Articles 4 and 14 of the Constitution. In this regard one may keep in sight the different provisions of law referred by Mr. Malik, like sections 156 and 157 of the Code of Criminal

Procedure, 1898 ("**Cr.P.C.**") whereby investigations are authorised and the officer(s) who will perform it are specified, along with the conditions on which an investigation will be launched: i.e. if there is reason/sufficient grounds to suspect commission of a cognizable offence (whether through registration of FIR or otherwise). So that all of the three requirements mentioned are met. Albeit, section 156 (2) also contains savings clause in case a police officer acts beyond his jurisdiction. Sections 254 to 259 of the Companies Act, 2017 empowers the Registrar or the Securities and Exchange Commission of Pakistan ("**SECP**") to conduct investigations and to seek and collect information about companies and their officers but this it can only do if certain conditions are met. Similarly, sections 175 and 176 of the ITO authorizes the investigation and allows the State to collect information about any particular assesse. It designates the person who will conduct the investigation (i.e. the Commissioner of relevant jurisdiction or his delegate). And, the Commissioner's exercise of this power has to be reasonable and for the purposes permitted by the ITO itself. Under section 16 of the Civil Servants Act, 1973 and Rules 2 (2) & (3) read with Rule 7 of the Civil Servants E&D Rules it is the parent statute which authorizes disciplinary action to be conducted in the manner specified by the Rules. The Rules designate an inquiry officer. The Rules confer upon such inquiry officer the power to inquire and also regulate the exercise of his power.

57. In fact even a law that may permit a State functionary to investigate and collect personal information about a citizen, whimsically, and without cause shall be violative of Article 4 of the Constitution which provides, that, *"(a) no action detrimental to the life, liberty, body or reputation or property of any person shall be taken except in accordance with law.*"

58. Any information about a citizen, received by the government functionaries in connection with their official duties, is so received by way of a trust, there is a general duty of confidentiality imposed on all government servants in relation to such information in terms of the Fundamental Rights, and as per Rule 18 of the Civil Servant Rules of Conduct, 1964, which provides:

> "*No government servant shall, except in accordance with any special or general order of the Government, communicate directly or indirectly any official document or information to a government servant unauthorized to receive it, or to a non-official person, or to the press.*"

59. They cannot handover such information to an unauthorized person (even if he be a government servant). This general rule is, of course, subject to the exception in cases of a request for information under the Right to Access of Information Act and, in such cases, the procedure under that Act would be followed. The present case, of course, does not fall under that Act. The common law also itself recognizes a duty of confidentiality on the part of public bodies and functionaries that receive information in the course of their public duties or in exercise of their legal powers – not to disclose it or use it for any other purposes.

60. Over and above this general duty in common law, and the Civil Servant Rules, some statutes including the ITO and the NADRA Ordinance impose a statutory duty of confidentiality and a specific statutory prohibition on sharing such information (except under certain exceptions that were not met here). Nevertheless, information about the Petitioner and his family from the FBR and NADRA were freely accessed, obtained and shared by/with the ARU and the media in violation of the respective statutory provisions.

61. The ITO confers a high degree of confidentiality to data collected by the FBR. Tax returns (including wealth statements) are afforded this high degree of confidentiality. One of the reasons, clearly, is to remove any inhibition for people to fully and freely disclose their financial information. It can only be shared for specified reasons. Reference may be made to certain sections regarding confidentiality under ITO:

> ***"Section 198****: Prosecution for unauthorised disclosure of information by a public:*
> "*A person who discloses any particulars in contravention of sub-section 1B of section 107 or section 216 shall commit an offence punishable on conviction with a fine of not less than five thousand rupees or imprisonment for a term not exceeding one year, or both.*"
>
> ***Section 216****: Disclosure of information by a public servant:*
> "*(1) All particulars contained in –*
> *(a) any statement made, return furnished, or accounts or documents produced under the provisions of this Ordinance;*
> *shall be confidential and no public servant save as provided in this Ordinance may disclose any such particulars.*"

62. Even the Prime Minister of Pakistan cannot ask an Income Tax Officer/Commissioner to provide a tax returns of any person unless the request falls within the four corners of one of the exceptions to section 216. Obviously, the Chairman ARU does not enjoy a better position. The only exception clause relevant in this case would be:

> "*(p) as may be required by any officer or department of the Federal Government or of a Provincial Government for the purpose of investigation into the conduct and affairs of any public servant, or to a*

*Court in connection with any prosecution of the public servant arising out of any such investigation."*

63. Similarly, sections 28 and 29 of the NADRA Ordinance 2000 make it a criminal offence to share NADRA data without lawful authorization.

64. As discussed in detail hereinbefore, a Judge of the superior Court can be removed from the office only in terms of Article 209 of the Constitution. Indeed as rightly submitted by Mr. Malik and the other learned counsel appearing for the petitioners in the above constitution petitions, Article 209 does not strip away the protection that a Judge enjoys as a citizen. Any inquiry against a Judge can only be initiated as envisaged by sub-clause (5) of Article 209. There is no other law that authorises investigation or collection of material in respect of the alleged misconduct.

65. Article 209 recognises only two state functionaries, the President and, the SJC and assigns certain roles to them, The ARU and its Chairman are non-entities, and complete strangers, and could not have received any complaints against Judges, let alone start collecting material about them. The plain language of Article 209 suggests that it is only the SJC which has the power to undertake an enquiry against a Judge for misconduct. Hence, only the SJC could have asked for the records that were unlawfully obtained by the ARU. But even if one takes a more relaxed view of the safeguards of Article 209 as adopted in *Justice Iftikhar Chaudhry*'s judgment and accepts that some collection of material about a Judge can take place even before the Reference, only the President can authorise that collection of material, as the President is the only other authority mentioned in Article 209. But he too cannot ask a stranger or a private person, or a non-entity like the ARU to verify, or collect material. The president can direct only the

designated/authorised agencies like the FBR, FIA, NADRA, police and SBP etc. to do so, and that again, within their sphere and domain, as the "designated functions can only be conferred on officer or authorities who are sub-ordinate to the federal government. They cannot for example, be conferred on private entities or companies, official power can be exercised through official channels "(Mustafa Impex's case (PLD 2016 SC 808)". However, evidently the President did not authorise the FBR or any authority under it, to share any tax information, or any other information, with the Chairman ARU. The Chairman ARU, its officers, the Law Minister, and officers of FBR who provided the said information violated the confidentiality provisions of ITO, i.e. sections 198 and 216 and are liable thereunder.

66. The learned counsel for the respondents has not been able to explain to us, under what legal authority, Barrister Zia of the ARU was asked to "*verify the property details attached with the Complaint*" and "*further to conduct wider property search in the names of persons mentioned in the Complaint along with their family members*".

67. As noted earlier, also alongside this scrutiny of UK property records, the Chairman ARU simultaneously ordered investigation by the FIA and directed them to dig out from the NADRA database and the integrated border management system, and share the personal and confidential data – not only of the Petitioner but his wife, his son and daughter including their CNIC details, passport details and travel history. The Chairman ARU, as noted earlier, had no legal authority to ask for such data and the FIA and NADRA *etc.* had no legal authority to share it with him. The chairman ARU and the officers of FIA and NADRA involved in the matter have

exposed themselves to be proceeded under section 28 and 29 of the NADRA Ordinance 2002.

68. Furthermore the Chairman ARU and his 'legal expert' Barrister Zia have claimed that they hired private investigators to track down the Petitioner's children, go through their credit history, find out their past and present residences and dig out the names and details of all the persons who had resided in the properties owned by them over the last 10 years, which again was a brazen violation of the fundamental rights of the petitioner, his wife and children.

69. Mr. Muneer A.Malik, learned counsel for the petitioner in support of his contentions that a case built on the basis of illegally collected evidence is liable to be quashed for such illegality alone, relied upon the following judgment:-

- ***Megatech* case** (2005 SCMR 1166) where though the sale tax officer, who searched and seized the records was competent to do so, but had failed to obtain a search warrant from the Magistrate as required in terms of section 40 of the Sales Tax Act, this Court, while upholding the Lahore High Court's judgment, declaring the search and seizure as without authorization and whimsical, and directing restoration of the seized record, dismissed the petition filed by the department.
- To the same effect is this Court's judgment in ***Food Consult's Case*** (2007 PTD 2356).
- In ***M.D. Tahir v. State Bank of Pakistan*** (2004 CLD 1680, 1699 to 1702), a single bench of the Lahore High Court observed that it can hardly be doubted that when one's private details are taken, it affects the life of the person, making him particularly vulnerable, and insecure. The degradation of life thus occurs. It was held that the SBP's direction to banks (at the behest of the CBR) to provide details of all the account-holders who received profit/interest in excess of Rs.10,000/-

annually, violated Article 14 and 9 of the Constitution and that "*taking of private information without any allegation of wrongdoing*" was an "*extraordinary invasion*" of the Fundamental Right to privacy. The Court further held that a citizen, in the absence of any wrongdoing, has a right to be protected from the "*prying eye of tax collection agencies*".

- In the case of ***Muhammad Sadiq Umrani v. Government of Sindh*** (PLD 1993 Kar. 735), an unnamed "law enforcement agency" detained the petitioners and carried out investigation against them, and then handed over their custody and the evidence collected, to the police, who then registered an FIR. It was held by a division Bench of the High Court of Sindh, that the investigation could only take place after the registration of an FIR and, in any event, the "agency" had no power to investigate, and that the material collected by the "agency" could not be utilized by the police as it would amount to post-facto validation of an unlawful act. The proceedings were quashed.

70. On the other hand, Mr. Farough Naseem, the learned counsel for the official respondents submitted that as a matter of fact, no illegality and/or mala fide is involved in obtaining any information or material in this case. He contended that even in case the same would have been obtained illegally, then also, the respondents' reliance thereon, could not be objected to, as it is the relevance and the truth of the evidence that is material for its admission, and not the means whereby it was obtained. Mr. Naseem further submitted that since neither the authenticity or the genuineness of the documents in question, nor the factum of ownership manifested therefrom have been challenged/denied, and thus there is no fact in issue, and therefore the nature of evidence and the manner in which it was obtained is, in any view of the

matter, of no significance. According to the learned counsel the respondents' case in the circumstances, is on a far better footing than the cases, which support his view that the material consideration for the admissibility of evidence, is its truthfulness and relevance, and not the manner in which it is obtained, such as:-

- ***Noor ul Islam v. The State*** (1986 SCMR 1836)
  Where the petitioner's conviction for offence under The Prohibition (Enforcement of Hadd), Order 1979 was challenged, inter alia, on the ground that the Police Officer who investigated the case was not, amongst the officers designated to proceed in the matter. This Court held that an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court, and dismissed the petition.
- (**PLD 1992 SC 96) Bisvil Spinners v. Pakistan**
  Where, in a case pertaining to levy of excise duty, this Court held that where a person was in the wrong and had made wrongful gain, he would not be entitled to retain the wrong gain, because of failure on the part of the State machinery to perform a procedural act, and that evidence in the form of documents, which are otherwise relevant and pertinent for the decision of an issue, recovered or obtained from a party could be examined or relied upon irrespective of the fact that certain formalities were not observed in taking them into possession.
- ***Magraj Patodia v. R.K. Birla and others*** (AIR 1971 SC 1295)
  Where it was held that the fact that a document was procured by improper or even illegal means will not be a bar on its admissibility, if its relevance and genuineness is proved.

  Similar view was expressed in the cases of ***R.M.Malkani v. The State Maharashtra*** AIR

1973 SC 157, **Umesh Kumar v. *State UP*** (AIR 2014 SC1106) and **R.V. Sang (1979) 2 All ER**

71. From the perusal of the case law cited by M/s. Muneer A.Malik and Farough Nasim, in support of their respective contentions, one can see that the principle followed by this Court in the cases of Noorul Islam and Bisvil Spinners (supra), where, in the first of these two, this Court refused to interfere in the matter for the reason that the police officer who investigated the case was not an officer designated to do so, and in the other the petitioner was found to have made wrongful gain through the offence alleged, could not subsequently sustain, as manifest from the cases of Megatech and Food Consults (supra), which are later in time and where search and seizure of record and the proceeding initiated on the basis thereof were declared illegal, for lack of compliance of the procedural requirement, and similarly in the case of Muhammad Sadiq Umrani (supra), the proceedings were quashed by the Division Bench of a High Court on the ground that investigation in that case was done by an agency which was not empowered to investigate, and also that the investigation was initiated before the registration of the FIR, whereas the Indian Judgment cited by Mr. Farough Nasim, in the face of Megatech and Food Consults (supra), are of no effect. In any view of the matter, the cases cited by Mr. Farough Nasim are not applicable to the present case because material collection in the present case does not suffer from mere irregularities, but the collection made in the present case was wholly illegal, unathorised, contrary to the mandate of the Constitution and by those whose purported status, position is not recognized by law.

72. Mr. Munner A.Malik, also argued at length in respect of the petitioner's allegation that the petitioner and his family have also been subjected to covert surveillance, since after the Faizabad

Dharna case judgment. In this regard it may be recalled that as per the purported reference, it was the complainant Dogar who through his complaint dated 10.04.2019, informed the Chairman ARU that the petitioner's wife and children own some properties in London, which have not been disclosed by the petitioner to the income tax authorities. However, till date, there is absolutely no clue as to how the complainant Dogar came to know about the subject ownership, and discovered about the alleged non-disclosure. Although in his complaint, Dogar has mentioned that "documentary evidence is enclosed" but neither any such document was annexed to the reference, nor was it placed before this Court, despite an application seeking the same by the petitioner. However an online copy of a UK land registry entry in respect of the Oakdale Road Property registered in the name of Zarina Montserrat Khoso Carrera and Arsalan Isa Khoso, said to have been furnished by the complainant Dogar, was belated filed through a CMA. The fact that no document was furnished by the complainant Dogar along with the purported complaint, and also that an online copy of the UK registry was already with the Chairman ARU, as discussed in para 8 herein before, is also evident from the Chairman's report dated 10.5.2019. It may be noted here that neither the above document nor any information regarding the title/ownership was publicly available or accessible, these were rather confidential, and the complainant Dogar had no concern with, or means to obtain the same.

73. The absence of any specifics and any proof or documentary record along with the Dogar's complaint and the Government's failure to produce the same, as noted above, is significant, and confirms, the Petitioner's allegation, that Dogar was merely a proxy who was set up by the Government itself. The

complainant Dogar did not and indeed could not, have had any information about the Petitioner and his family by himself.

74. It was also in pursuance of meeting dated 16th of April 2019, that ARU's, Barrister Zia was instructed to carry out a wider search for the properties of the Petitioner's family members. By the 23rd of April 2019, he had not only traced down the other two properties but had also applied for, and obtained the official certified extracts from the property register for all three properties. It may also be noted that by 23rd April 2019, Barrister Zia had not been informed by the FIA/NADRA of the names of the Petitioner's wife and children. How did he therefore know under whose name to even start looking?

75. Nevertheless, Barrister Zia was able to promptly and expeditiously furnish a report on 8.5.2019 identifying three properties in UK owned by the Petitioner's family members and annexing official certified copies of relevant entries in the UK Land Registry duly notarized on 25.4.2019 i.e. less than 9 days after he was asked to verify, with respect to all the three properties situated in London.

76. Barrister Zia does not explain in his report how he knew the names of all of the Petitioner's family members, even before the FIA had identified them through its report of 10.5.2009. Nor does he explain how he arrived at, and knew to ask specifically for, the Land Register entries of the remaining two properties, namely 90 Adelaide Road and 50 Coniston Court.

77. As explained by Mr. Muneer Malik the UK Land Registry allows for two ways of getting information regarding the title of a property. The first is through an online register search. The second is through a search of an online map. In both cases, one needs to enter/provide the Land Registry with either the exact address of a property or its precise location on a map. It is not ordinarily possible to do a search of the title of UK properties merely with reference to

the name of the owner. To do so, one needs the permission of the Registrar, which is only granted to either the owner himself or an authorized person on his behalf such as a trustee in bankruptcy proceedings or the holder of a probate or letters of administration. Clearly, therefore, neither the complainant Dogar nor Barrister Nasim could have done a name search of the Petitioner and his family members, even if they knew the names of the Petitioner's family members, to arrive at the said properties.

78. The respondents however neither denied the above said essential requirement of feeding the exact address, and the precise location for getting the information regarding title of a property and the fact that one cannot find out as to whether someone owns any property in UK just by resorting to name search, nor have they claimed to have adopted the procedure as explained above. The respondents also did not claim to have used any of the so called open source/website, like "192.com" for making the discovery, however through CMA No.3312/2020 dated 01.6.2020, they filed a photo copy of the screen shot of the home page of the said website i.e. "192.com" and of "ukphonebook.com" which display a search bar wherein one can feed the name of the person, whose properties are being sought to be discovered and as can been seen from annexures "A" to "I" filed by Mr. Muneer Malik through CMA No.3505/2020, the website then displays, only the partial address of the person named. Neither does it reveal the full address, nor does it, at any stage reveals the title of the property, situated at the said address, and it is only upon payment of certain amount that the source discloses the full address of the person named, and as noted earlier, then too it does not reveal the title. Furthermore for retrieving information regarding title one has to make certain payment to the HM Land Registry also, however not a single document, either by way of any email or the requisite

receipts have been filed, which documents are essential to show that the above procedure was in fact adopted and the requisite payments were made and if by whom. In fact such was also not been claimed.

79. As such, it is clear that the Government already had the specifics of the properties and the names of the Petitioner's family members prior to the purported complaint and the purported ARU "*investigation*". As rightly submitted by Mr.Muneer A.Malik, it is indeed clear that this whole rigmarole of "*complaint*" followed by an "*investigation*" was to cover up the fact that this information was, in fact, obtained by government agencies through covert surveillance.

80. The Federation has itself filed documents showing the utter lack of respect they have for the privacy of a Judge and his family and their cavalier attitude towards covert surveillance of a Judge. The Federation's Reply itself shows that the ARU hired a private investigation agency in the UK to find out every place that the Petitioner's children had resided in the last 10-years (p. 272 to 282 of CMA No.8921 of 2019, Part II), Mr. Malik submitted that if the Federation is willing to pay a private investigation agency to surveil the Petitioner – is it farfetched to imagine that they also used State intelligence agencies for such purpose.

81. Mr. Muneer A.Malik, referred to the case of Mohtarma Benazir Bhutto (PLD 1998 SC 388), where a seven members Bench of this Court held that covert surveillance of Judges by intelligence agencies was in and by itself a sufficient ground for the dissolution of a government. The learned Judges discussed in detail how covert surveillance violates the constitutional principle of judicial independence, as well as the right of dignity and privacy guaranteed under Article 14, and held it to be "*a direct interference in the independent functioning of Judiciary and is a grave violation of the principle of trichotomy of power*". It was further observed that

surveillance is also contrary to the Islamic injunctions; in particular verse 12 of *surah Al-Hujurat* which reads, "*O ye who believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin: and spy not on each other*", and that "*[I]f a person intrudes into the privacy of any man, pries on private life, it injures the dignity of man, it violates the privacy of home, it disturbs the tranquility of the family and above all it puts such person to serious danger of blackmail*" and that the same is "*wholly destructive of the independence of judiciary*". The learned Judges proceeded to hold that the privacy of home mentioned in Article 14, could not be restrictively defined to apply to the home alone but signified the citizen's right to privacy wherever he lived or worked and even in public places. It was ordered that until such time as a proper law was framed in this regard, no tapping or eavesdropping of any person should take place without permission of this Court or a commission formed by it. It was further held that "*If the executive interferes with the judiciary in any manner... [i]f the privacy of the Judges and their communications is not ensured, then it is not possible for them to discharge their duties in the manner envisaged and mandated by the Constitution*".

82. Twenty-two years have passed since this judgment but it continued to be disregarded. Such disregard is at the nation's peril, destructive of the Judiciary's independence and in negation of the Constitution.

83. In a civilized democratic dispensation, where dignity of man, and his privacy, has been secured by a written constitution inviolably, covert surveillance is an anathema, and is extremely reprehensible. However because of the strong wave of terrorism that engulfed this Country as a consequence of the so called Afghan war, posing threat to our very existence, and in order to curb and control the same, it was felt necessary to allow covert surveillance, but

keeping in view the intrusive and abrasive nature of such act, and in order to lay down a complete mechanism so that it be exercised very sparingly and in a well-regulated manner, leaving no room for excessive, arbitrary or whimsical exercise of such power, a law was enacted by the name of Fair Trial Act, 2013 (the Act). The preamble to the Act recognizes the need to prevent our law enforcement and intelligence agencies, from using such power arbitrarily. In terms of the Act, the covert surveillance can only be carried under a warrant issued by a High Court. In order to obtain such warrant, the officer concerned, in terms of section 5 of the Act, is required to prepare a report in that regard supported by relevant material, and on the basis thereof to seek approval of the Federal Minister for Interior, before making an application to the Judge of the High Court for issuance of surveillance warrant, whereas in terms of section 8 of the Act, the application submitted to the High Court Judge, is required to be supported by an affidavit of the authorized officer, to the effect that the contents of the report and the application are true and correct and that the warrant sought shall be used only and exclusively for preventing or lawfully investigating the schedule offence or to collect evidence in support thereof, and further that the same shall neither be misused in any manner, nor shall the approval of the warrant be abused to interfere or intervene in the privacy of any person. Sub-clause (2) of Section 10 of the Act, inter alia, provides that the Judge while passing the order for issuance of warrant shall ensure that (a) the authorized officer is properly authorized to represent the applicant agency; and (b) the issuance of warrant shall not unduly interfere in the privacy of any person or property. Whereas section 15 of the Act prescribes that where a Judge is of the view that any request for the issuance of warrant is based on insufficient or irrelevant considerations and has resulted in undue and

inappropriate interference in the privacy of any person, or that the material and information collected, or received under the warrant, show that the officer concerned did not apply himself fully while making an application for the warrant, then he may recommend departmental action against the officer concerned. In terms of section 27 of the Act, a review committee comprising Ministers of Defence, Interior and Law, are, on a six monthly basis, required to call for reports from all the applicants about the warrants obtained by them and assess as to whether the evidence collected pursuant to the warrant of surveillance, or interception, has been helpful in prevention of offences and of aid to prosecution or has been able to achieve the object and purposes of the Act.

84. The above review and analysis clearly shows that even in cases of terrorism, covert surveillance, cannot be exercised without the permission of an authority as high as a High Court Judge, and that for obtaining such permission the officer concerned has to make out a strong case, justifying the same. The application and report prior to its submission before the High Court has to be approved by the Minister of Interior, and all care and caution is to be exercised to ensure and demonstrate that not only the surveillance is inevitable but also that the same shall not be misused. Very rigorous and stringent conditions are attached to the permission/warrant for surveillance so that the same may not be executed whimsically, and may not be exploited for any unrelated purposes. The above also shows that our lawmakers are highly conscious of the fact of how damaging intrusive and abrasive covert surveillance may prove and therefore the relevant law itself discourages and makes it very difficult to obtain a permission for the same through the various provisions/requirement noted above. However, the Respondents have violated all of the above and carried covert surveillance of the

Petitioner and his family without any rhyme or reason, wholly illegally, unauthorizedly and in violation of law and fundamental rights of the Petitioner and his family, secured by our Constitution.

85. As contended by Mr. Malik, normally, it is next to impossible to prove that an official act was actually motivated by a personal animosity, or by a desire to exact vengeance, or by some improper consideration. State of mind and *mala fides* in fact are a hard thing to prove. But this is one of the extraordinary cases where the respondents have themselves given proof of their state of mind and the actual consideration behind their acts, just one month before the so-called complaint was received and a simultaneous investigation launched into the affairs of the Petitioners, his wife and his adult children.

86. It was just two months before the purported Reference, both parties of the ruling coalition (PTI and MQM), stated on record that the Petitioner does not deserve to be a judge because the Petitioner 'authored' the *Faizabad dharna* judgment. The dates are important here. PTI and MQM filed their review petitions on 7.3.2019. By 10.4.2019, the Government's proxy, the complainant Dogar, had submitted his complaint against the Petitioner. By 16.4.2019, the formal collection of material and investigation against the Petitioner by **ARU**, **FBR**, and **FIA,** was already in full swing. By 20.5.2019, this culminates in the purported Reference. Naturally, if the Petitioner is not a judge of this Court, he cannot hear the reviews either. Through their petitions, the Respondents have themselves furnished the ulterior motive and collateral purpose behind the Reference. Indeed it was never a question about the properties.

87. The review petitions filed by the PTI and MQM clearly and expressly show their hostility and ill-will towards the Petitioner. They have themselves articulated in so many words the reason why

they don't want to see Petitioner as a Judge – they consider him to be biased against their parties and they think that the *Faizabad dharna* judgment is sufficient ground to remove him as a Judge. They do not want the Petitioner to hear the review.

88. Indeed direct proof of a collateral purpose, an ulterior or improper motive is exceedingly rare, however, this is one of those rare cases where the relevant actors have actually submitted their collateral purpose and motive to the Court in writing. The emergence of this complaint and the filing of this Reference, regarding purchases made back in 2004 and 2013, barely a month after these review petitions is not a mere coincidence.

89. It is also relevant to note here that in order to obtain a report, which they obtained, the respondents through a Notification dated 7th May 2019, arbitrarily changed the petitioner tax officer without even informing him. The said Notification also discloses that the Petitioner's wife's tax officer too was changed from Karachi to Islamabad.

90. Also significant to note, with regard to the mala fide conduct of the official respondents is that though the purported reference was signed by the President on 20.5.2019 and through letter dated 23.5.2019, forwarded by the Law Secretary to the Secretary of SJC under the seal and strict confidence. It was then put up before the Chairman, SJC on 29.5.2019, who ordered that it be fixed before the SJC on 14.6.2019, and notice be issued to the Attorney General for Pakistan, however, by the afternoon of 28.5.2019 (i.e. a day earlier), the Reference against the Petitioner and its contents had already been leaked to the media. At the time, the only persons in possession of a copy of the President's Reference were the President, Prime Minister, Law Minister, Attorney-General, Law Secretary and the Secretary SJC. It is thus so obvious that the leak

was by the executive, which shows their malice. Even the precise addresses of the properties and their purchase prices had reached the public domain, by discriminating the contents of the Reference, and two days thereafter on 30.5.2019, the Special Assistant to PM for Information, Ms. Firdous Ashiq Awan, held a press conference in which she states that the Reference was the "*ehtisaab ka shakinja*" against the Petitioner as he had "*played a shot by stepping out of the crease*". The ARU and Law Ministry also issued separate press releases on 1.6.2019 in relation to this secret and confidential Reference, announcing that they had filed the Reference after due verification and obtaining evidence from the UK. Both the Law Minister and the Chairman ARU are barristers and thus supposed to know the law and their Ministerial responsibilities. The Petitioner's image was systematically damaged through these selected leaks and press conferences by members of the Cabinet. By the time the contents of the Reference were published by the media i.e. on 28th May 2019, there were only five people who knew of the Reference, the President, the Prime Minister, the Law Minister, the Attorney-General and the Chairman ARU. There were also the then Chief Justice and the SJC Secretary, but even the Federation has not alleged that the leak came from them. One or more of these five State functionaries at the highest level leaked this information or sanctioned its leak. This was clearly an act of malice.

91. Mr. Muneer Malik submitted that after the horse had already bolted and the Petitioner and his family had been exposed to public vilification and disgrace, PEMRA made an ostensible attempt to close the stable door by issuing an advice dated 30.5.2019 to all channels to stop programmes about the Reference. According to him it is clear that this advice was merely a ruse to stop coverage of voices criticizing the Reference and the Government's action. Bar

Associations and Bar Councils across the country held multiple press conferences and general bodies and meetings criticizing the Reference but they were not given media coverage. On the other hand, a handful of unelected lawyers under the name of 'Lawyers Action Committee' in Lahore and Karachi were, despite the PEMRA advice, given live coverage by multiple channels for their press conferences in support of the Reference. The *mala fide* nature of the executive's campaign to destroy the Petitioner's credibility prior to the SJC hearings is thus patently clear. In true Goebellion fashion the Government team defamed and vilified the Petitioner and then suppressed the truth and the counter-narrative through a controlled media. To this day, no government inquiry or investigation into the source of this leak has taken place.

92. The above narrated facts leaves absolutely no room for any doubt that the purported Reference springs from actual malice and ill-will harboured against the Petitioner by the concerned State functionaries on account of the *Faizabad dharna* judgment and a common desire to ensure his absence from the review thereof. It is submitted that this was a collusive exercise involving at the very least President Arif Alvi, Prime Minister Imran Khan, Law Minister Farogh Naseem, Chairman ARU Mirza Shahzad Akbar and AG Anwar Mansoor Khan and they have been personally impleaded in the instant petition. As rightly submitted by Mr. Malik, malice can be inferred from their deeds and actions and the surrounding context. This Court in case of *Muhammad Yousuf v. Abdul Qayyum* (PLD 2016 SC 478, 483) in the context of malicious prosecution held that the absence of reasonable cause for one's actions can be used as evidence to establish malice. It was also observed that "*[m]alice is a state of mind and can be inferred from the circumstantial evidence*" as well as the contextual background. In *State v. Ataullah Mengal* (PLD

1967 SC 78, 91) this Court held, "*Intention, as has often been observed, is a state of mind and it can only be gathered from the evidence of his overt acts and expressions. The Court cannot look into the minds of the persons…*". Similarly, in the case of *Shahbaz Khan* (PLD 2016 SC 1, 9), this Court observed that "*a state of mind cannot be proven by positive evidence or by direct proof*" but it can only be inferred. In the case of *Aftab Ahmed Memon v. Chairman NAB* (2019 YLR 1865, 1870) regarding the *mala fides* of NAB referring to an unreported judgment of this Court in the case of *Khalil Ahmed Soomro v. State,* it was held "*It is often difficult to prove mala fides and thus it may be inferred from the facts and circumstances surrounding a particular case.*" The cases of *Khawaja Ahmed Hassan* (2005 SCMR 186) and *Jan e Alam v. State* (PLD 1965 SC 640), are also beneficial in this regard.

93. We have already held that the Law Minister and the Chairman ARU are liable under the relevant provisions of ITO, 2001, and the NADRA Ordinance. In addition to the said two respondents, the Prime Minister himself is liable under the above law as it was ordered by him and by his team that all the illegalities noted in the present judgment were committed. He is also liable for sending the purported advice to the President, which in the facts and circumstances of the case was infected with malice. Whereas, Mrs. Firdous Ashiq Awan, the former Special Assistant to the Prime Minister is liable for committing contempt of Court for the uncalled for and disrespectful comments she made in her press conference as noted above.

94. Mr. Farough Naseem, the learned counsel for the official respondents, being an expert on Income Tax law, and perhaps knowing fully well that Section 114, read with Section 116 of the ITO does not at all require a filer to declare the assets of his non-

dependent wife, and children, nor is there any other provision in the ITO, 2001 creating any such obligation on a filer, i.e. requiring him to disclose the assets of his non-dependent wife and children along with his/her income returns, has in his attempt to justify the claim of the Federation, that the petitioner was instead so required, which claim forms the very basis of the purported Reference, and in his endeavor to save the Reference from being quashed, has referred to three different Asset Declaration Acts, being, Asset Declaration Act 2019, Voluntary Declaration of Domestic Assets Act, 2018, and Foreign Assets (Declaration and Repatriation) Act, 2018, under which Acts, amnesty was offered in respect of undisclosed assets to all, except "holders of public office", which phrase, in the context of the said three Acts, according to the learned counsel, included the Judges of the superior Courts, their spouses and dependents, without any distinction between a dependent and a non-dependent spouse. He submitted that the above description of the term "Holder of Public Office", may be used as a guideline to treat a Judge of a superior Court along with his/her spouse (whether dependent or not), and the dependent children, as holder of public office, as one single distinct class, in the context of those other dispensation, dealing with similar situation, and where the relevant terms have not been defined, and may well be employed to treat the spouse of a Judge of a superior Court, whether dependent or not, as of the same class and category, as a Judge himself. Mr. Farough Nasim in his endevour to draw a similar analogy went on to refer to Regulation 31 of the Money Laundering and combating of financial terrorism regulation for banks and DFIs, issued by the State Bank of Pakistan, where according to the learned counsel, the term politically exposed person (PEPs) have been defined to include senior judicial officials, and their close associates and family members also, irrespective of the spouse being

dependent or non-dependent. Mr. Farough Nasim also referred to Security and Exchange Commission of Pakistan (Anti Money Laundering and countering financing of terrorism) Regulation 2018, where also PEPs as defined through its regulation 2(t)(ii), includes senior judicial officials, and the formalities and requirements thereunder in terms of its regulation 10(4), extends to the family members and close associates of PEPs, and in the same vein referred to Martial Law Regulation 59, dated 02.12.1969. The learned counsel submitted that the foregoing shows that in ordinary and popular sense the Judges of the superior Courts and their spouses, whether dependent or not, are clubbed, to fall into one class or category. So the learned counsel was suggesting to us to read the word "Judge", as employed in Article 209 of the Constitution, as meaning not only the judge himself, but also his/her spouse and children and on the analogy of the provisions of the regulations referred by him, expand/stretch the meaning of the word, so as to include even the "close associates" and family members" of the Judge, which defies even the common sense, and to say the least is absolutely preposterous. It shows the hollowness of the case made up against the petitioner. Through his above submission, the learned counsel is, in fact, seeking certain purported descriptions in some statutes enacted for a very limited purpose, scope and application and for a very short life span, to be enforced as guidelines for stretching the meaning of a straight forward simple word, with an unnatural result, and also to control the meaning , scope, application, and interpretation of one of the most significant provision of the Constitution, based on a sacred principles of our jurisprudence and polity, being the independence of judiciary. The learned counsel has perhaps lost sight of a well settled proposition of law that interpretation of a word or a phrase cannot be transported from one

statute to another and that it is unsafe to compare the language of one statute with that employed in another, even though the subjects covered by the two may involve similarities-Ghulam Mustafa Jatoi v. Additional & Sessions Judge (1994 SCMR 1299), Federation of Pakistan through Secretary, Ministry of Finance v. Haji Mohammad Sadiq & others (2007 PTD 67).

95. Mr. Naseem also referred to certain provisions of some presidential orders and rules and submitted that the said provisions which prescribe pension and various allowances for the widows of the Judges also do not discriminate between the dependent and non-dependent widows which again does not make any sense in the present context and is wholly irrelevant.

96. Mr. Farough Naseem further contended that his above submissions establish a sense of proximity between spouses. According to him, Islam also recognizes such proximity. He referred to *Surah Al-baqarah* (II:187) with regard to the relationship of husband and wife. It is said that “they are clothing for you and you are clothing for them”. He submitted that the Holy Quran describes universal principles which are applicable across the board and that the above verses establish that spouses are inseparably and inextricably linked together. He also referred to “Tadabbur-e-Quran”, Volume-I by Amin Ahsan Islahi in this regard. However, the above verse is in a different specific context and cannot mean to say that a person would be liable for misconduct of his spouse in the present context. Responding to the above, Mr. Hamid Khan, the learned counsel for the petitioners in Constitution Petitions No. 19, 23, 25 & 32/2019, submitted that the doctrine of proximity as canvassed before the Court is totally repugnant to the Islamic Law particularly the Muslim law of Inheritance which strongly emphasizes and stresses upon the individuality of the spouses particularly in relation

to the holding of the properties by the two separately. Separation of entities of the spouses regarding the holding of separate properties by them individually is clearly ordained in the following verses of the Holy Quran:

- Verse 7 of *Surah An Nisa* directs as under:
  > "unto the men (of a family) belongeth a share of that which parents and near kindred leave, and unto the women a share of that which parents and near kindred leave, whether it be little or much-a legal determine share"

- Verses 11 and 12 of *Surah An Nisa* ordain:

  > "Allah chargeth you concerning (the provision for) your children: to the male the equivalent of two females, and if there be women more than two, then there is two-third of the inheritance, and if there be one (only) then the half. And to his parents a sixth share of the inheritance to each if he have a son; and if he have no son and his parents are his heirs, then to his mother appertaineth the third; and he have brethren, then to his mother appertaineth the sixth, after any legacy he may have bequeathed, or debt (hath been paid). Your parents or your children; Ye know not which of them is nearer unto you in usefulness. It is an injunction from Allah . Lo! Allah is knower; Wise".

  > "And unto you belongeth a half of that which your wives leave, if they have no child; but if they have a child then unto you the fourth of that which they leave, after any legacy they may bequeathed, or debt (they may have contracted, hath been paid). And unto them belongeth the fourth of that which ye leave if ye have no child. But if ye have a child then the eighth of that which ye leave, after any legacy ye may have bequeathed, or debt (ye may have contracted, hath been paid). And if a man or woman have a distant heir (having neither parent nor child), and he (or she have a brother or a sister (only on the mother's side) then to each them twain (the brother and the sister) the sixth, and if they be more than two, then they shall be sharers in the third, after any legacy that may have been bequeathed or debt (contracted) not injuring (the heirs by willing away more than a third of the heritage) hath been paid. A commandment from Allah. Allah is knower, Indulgent".

- Verse 32 of *Surah An Nisa* directs:
  > "Unto men a fortune from that which they have earned, and unto women a fortune from that which they have earned".

- Verse 176 of *Surah An Nisa* directs:
  > "They ask thee for a pronouncement Say; Allah hath pronounced for you concerning distant kindred. If a man die childless and he have sister, hers is half the heritage,

> and he would have inherited from her had she died childless. And if there be two sisters, then theirs are two-thirds of the heritage; and if they be brethren, men and women, unto the male is the equivalent of the share of two females".

97. It is thus evident that Islam stipulates separate identities of the spouses particularly in relation to their entitlement for holding of their properties separately from one another. There is no application of the so called doctrine of proximity to the properties of spouses as pleaded by the learned counsel for the respondents.

98. The foregoing contains my reasons for the order, as contained in paras 13 and 14 of the short order dated 19.6.2020, in terms whereof, I, along with my learned brothers Mansoor Ali Shah and Yahya Afridi, JJ, joined the other learned brothers of the Bench in quashing the purported Reference against the petitioner (Qazi Faez Isa, J.), and declared that the proceedings and the show cause notice in relation thereto, stand abated.

99. We, (myself, Mansoor Ali Shah and Yahya Afridi, JJ.) have however not been able to persuade ourselves to agree with the part of the short order, as contained in paras 3 to 11 thereof, whereby directions have been issued to the FBR, to issue notices, and initiate proceedings, against the wife and children of the petitioner, and for submitting the report of the said proceedings to the SJC, for the later to proceed in the matter as contemplated in the aforesaid paragraphs, and with various other directions contained therein, for the following reasons.

100. In the first place the Court having unanimously quashed the reference, and as a result declared that the proceedings and the Show Cause Notice issued in respect thereof, stood abated, there was, I may very respectfully observe, absolutely no justification for the above directions, and guidelines. The said directions were/are

clearly beyond the scope of the petition allowed/disposed of through the short order.

101. The questions involved in the above petition filed before us under Article 184(3) of the Constitution, were, as to whether the petitioner in terms of section 116 of the ITO 2001, was obliged to disclose to the tax authorities, the properties, held by his wife and children in London, and as to whether the petitioner resorted to money laundering in the acquisition of the said properties, so was alleged in the purported reference sent by the President of Pakistan against the petitioner under Article 209(5) of the Constitution. The petitioner challenged the reference on multiple grounds, his response to the above allegations was that neither was he liable to make the disclosure as contended, nor has he committed any breach of any obligation under the ITO 2001, or under any other law. It was claimed that the reference has been filed with *mala fide* intent, and collateral purposes, through colourable exercise of power, and was a product of animosity, of the main coalition parties of the ruling alliance, and certain government functionaries towards the petitioner. The petitioner further claimed that the purported reference streamed from malice of law, as well as of facts, and ill-will harbored by the aforesaid persons against the petitioner. The Reference, according to the petitioner, had been filed in derogation of the mandate of the constitution, and the same also suffers from jurisdictional error and is liable to be quashed.

102. After examining and analyzing the various allegations, claims, and contentions of the parties, and the facts and circumstances of the case, as evident from the record, and in the light of the relevant statute, and the case law placed before us, by both the sides, I found that the allegations against the petitioner were wholly unfounded, baseless, frivolous, misconceived and *mala fide*,

and that the petitioner was right in claiming the purported Reference to be a product of animosity, malice of law as well as of facts and that it streams from the ill-will harbored by some functionaries of the executive against the petitioner. It was found that despite commissioning the entire government machinery, to somehow ferret some excuse to proceed to dislodge the petitioner, and misusing the government departments, and resources, in unconstitutional and unlawful manner, in that pursuit, including covertly surveilling the petitioner, and his family, the official respondents have neither been able to show any illegality or misconduct on the part of the petitioner, nor that the wife and children of the petitioner are his dependents. As discussed in detail earlier, neither any provision of the ITO 2001, nor of any other law, requires the petitioner to make the disclosure as was contended. There is no concept of any vicarious liability under the income tax law as was suggested by the respondents.

103. Upon quashment of the purported reference and abatement of the proceedings in relation thereto, and in view of the clear finding as recorded herein before, that the petitioner has not misconducted himself and has no concern, either with the properties held by his spouse and children in London, or their tax affairs, if any, no question of public importance with reference to the fundamental right, amenable before this Court under Article 184(3) of the Constitution, remained to be decided, or dealt with by this Court. The matter dealt with through para 4 to 11 of the short order, I may humbly observe, are extraneous to the proceedings disposed of through the short order.

104. The properties having been acquired by the wife and children of the petitioner in the tax years 2004 and 2013, and five years period of limitation prescribed by law for opening of the tax assessment with regard thereto having expired several years before,

they cannot be lawfully required to furnish the source of funds for acquiring the said properties, or any income information for the said years. The assessments that have attained finality with the afflux of time cannot be ordered to be re-opened. The FBR's reopening the same shall be in violation of the legal prohibition and disability. Such would also violate the vested rights of the wife & children. The order requires the wife and children of the petitioner to do what the law does not oblige them to do, and instead prohibits the FBR from seeking information, the wife and children have been obligated to furnish. It may be observed here that obligations can only be rooted in law – **National Commission on the status of Women v. Government of Pakistan** (PLD 2019 SC 218).

105. The order has been passed against the person who were neither before the Court nor were they put to notice, as to why FBR be not directed, as directed in terms of the order. No opportunity was provided to them to submit as to why the FBR be not so directed.

106. The wife and children being private citizen, their tax matters have no nexus with the essential pre-requisite for invoking and maintaining any proceedings under Article 184(3) of the Constitution, and were thus not amenable to the proceedings that were invoked thereunder, and disposed of through the short order dated 19.6.2020. As the role and jurisdiction of the SJC is limited to the matters relating to the conduct and capability of the superior Court Judges. It is not mandated to delve into the affairs of someone who is not a judge of a superior Court. The order tends to stretch the scope of SJC beyond its mandated jurisdiction, it rather vests in the SJC the jurisdiction and authority not granted to it by the constitution.

107. ITO 2001 certainly prohibits reopening of the tax assessment matters after expiry of a period of five years. Through the

short order, the wife and children of the petitioner have been obligated to furnish to the FBR information regarding the assessment which have attained finality much earlier than the prescribed period. Our governance structure is based on the principle of trichotomy of power. The role of the three organs of the state, the Executive, the Legislature and the Judiciary, are well defined by the Constitution. Judiciary being the guardian of the Constitution has to ensure this principle is maintained by all the three. The onus of maintaining the prescribed balance is heaviest on the judiciary. Judiciary therefore has to be most conscious and sensitive in this regard, and to proceed in the matters, very carefully, so that it may not step out of its role and jurisdiction as prescribed by the constitution, and avoid entering the realm of legislation. This Court has persistently reiterated the well-established principle that the courts cannot and should not create any right, liability or obligation that is not founded in law. One may refer to the case of the State v. Ziaur Rehman (**PLD 1973 SC 49**), in this regard. This principle is applied in the realm of taxation with even greater force, and thus while "construing taxing statutes the language used is not be either stretched in favour of the state, or narrowed in favour of the tax payer" (*Yousaf Rerolling Mills v. Collector of Customs PLD 1989 SC 232*), and that while interpreting tax laws "Courts must look to the words of the statute and interpret it in light of what is clearly expressed" and in the words of Rowlett J., in **Brady Syndicate v. Land Revenue Commissioner** [(1921) 1QB 64, 71], quoted by Hamoodur Rehman, J., in **Nawabzada Amir Khan v. Collector of Estate Duty** (PLD 1962 SC 335), "in a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

108. The order tends to create an anomalous situation, for it provides that the proceedings before the SJC as contemplated thereby, shall not be effected by the filing or pendency of any appeal under ITO 2001 against the order/report of the Commissioner, or against any order made or decision taken at any appellate stage, as in the event the SJC, on the basis of the report submitted by the Commissioner in pursuance of the short order, recommends removal of the petitioner, but subsequently the petitioner succeeds in his challenge to the order of the commissioner, and the said report is found not sustainable, the time for the retrieval may have passed, as by then the petitioner may have reached the age of superannuation. Even otherwise the damage inflicted upon the petitioner, and suffered by this institution, shall be irretrievable. In a reverse scenario where the SJC may not agree with the findings of the Commissioner, but such findings are upheld by forums before which the Commissioner, finding may be amenable to correction, an anomalous and embarrassing situation.

(Justice Maqbool Baqar)

*"APPROVED FOR REPORTING"*