

SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

PRESENT:

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

**Civil Review Petitions No.296 to 301, 308, 309 & 509 of 2020.
and C.M.A No.4533 of 2020.**

(Against the short order dated 19.06.2020 and the detailed judgment dated 23.10.2020 passed by this court in Const. Petition. 17/2019, etc)

Justice Qazi Faez Isa	(in CRP No.296/2020)
Sindh High Court Bar Association	(in CRP No.297/2020)
Mrs. Sarina Isa	(in CRP No.298/2020)
Supreme Court Bar Association	(in CRP No.299/2020)
Muhammad Asif Reki President Quetta Bar Association	(in CRP No.300/2020)
Shahnawaz Ismail, VC Punjab Bar Council	(in CRP No.301/2020)
Balochistan Bar Council	(in CRP No.308/2020)
Pakistan Federal Union of Journalists	(in CRP No.309/2020)
Abid Hassan Minto	(in CMA No.4533/2020)
Pakistan Bar Council thr. VC	(in CRP.509 of 2020)

...Petitioners

VERSUS

The President of Pakistan and others	(in CRP.296-301, 308, 309 & 509 of 2020)
The Supreme Judicial Council thr. its Secretary and others	(in CMA No.4533 of 2020)

...Respondents

For the petitioner(s) : Mr. Justice Qazi Faez Isa (in-person)
Assisted by Barrister Kabir Hashmi.
(in CRP.296/2020)

Mrs. Sarina Faez Isa (in-person)
(in CRP.298/2020)

Mr. Hamid Khan, Sr. ASC.
Syed Rifaqat Hussain Shah, AOR.
(in CRP.299, 300, 301 & 308/2020)

Mr. Rasheed A. Rizvi, Sr. ASC.
(through Video Link from Karachi).
(in CRP.297 & 309/2020)

Syed Rifaqat Hussain Shah, AOR.
(in CRP.509/2020)

Nemo. *(in CMA.4533 of 2020)*

For Federation of Pak. : Ch. Aamir Rehman, Addl. AGP.

For President, PM & AGP. : Mr. Sohail Mahmood, Addl. AGP.

Date of hearing : 26.04.2021.

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JUDGMENT

Magbool Baqar, Mazhar Alam Khan Miankhel, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ.-

Preface

This judgment must announce loud and clear that no one, including a Judge of the highest court in the land, is above the law. At the same time, no one, including a Judge of the highest court in the land, can be denied his right to be dealt with in accordance with law. Every citizen of Pakistan, notwithstanding his status or position, is entitled to due process of law in any action detrimental to his life, liberty, body, reputation or property under Article 4 of the Constitution and safeguarding of his fundamental rights guaranteed under Articles 9 to 28 of the Constitution. It matters little if the citizen happens to hold a high public office, he is equally subject to and entitled to the protection of law.

2. While judicial accountability is the cornerstone of judicial independence, it does not mean that accountability of a judge is bereft of due process of law and fair trial guaranteed under the Constitution. An open court-house is no less than a glass house, yet the judges boldly and courageously uphold the law even against the mightiest in the land, without fear and favour, in full public gaze. In doing so, they step on many a toes and rattle many a skeleton. This may at times, invite efforts to discredit them by creating doubts about their personal integrity. Since judges have no public platform to clarify, respond or defend themselves, such efforts go beyond the person of the judge and undermine public trust and public confidence in the judicial institution. Constitutional safeguard of due process to enjoy the protection of law and to be treated in accordance with law, therefore, assumes even greater significance in the case where integrity of a judge is in question.

Facts

3. The President of Pakistan, on advice of the Prime Minister of Pakistan, filed a Reference under Article 209 of the Islamic Republic of Pakistan 1973 ("**Constitution**") against Mr. Justice Qazi Faez Isa ("**Justice Isa**"), a Judge of the Supreme Court of Pakistan, in the Supreme Judicial Council of Pakistan ("**Council**") to conduct inquiry against him, alleging the commission of misconduct by Justice Isa mainly on the basis of his non-disclosure of three foreign properties of

his family members - spouse and children - in the declaration of his assets filed with the annual income tax returns under Section 116 of the Income Tax Ordinance, 2001 ("**ITO**"). The Council commenced inquiry-proceedings against Justice Isa, in the said Reference. Justice Isa and, among others, many Bar Councils and Bar Associations of the country, challenged the action of filing the Reference by the President and also the proceedings commenced on the basis thereof before the Council by invoking the original jurisdiction of this Court through constitution petitions filed under Article 184(3) of the Constitution. The constitution petitions were allowed by this Court *vide* order dated 19 June 2020, detailed reasons whereof were delivered on 23 October 2020. The Court quashed the Reference filed against the petitioner and held that the process adopted in preparing the Reference was fraught with illegalities of such scale and degree that amounted to *mala fide* in law¹ and declared that the proceedings initiated by the Council on the basis of that Reference, stood abated.² The Court left the matter of its alleged violation of Section 116(1)(b) of the ITO by Justice Isa to be determined in the first instance by the hierarchy of the concerned legal forums specified under the ITO. However, the Court, on its own, went on and directed the Commissioner of Inland Revenue, Islamabad ("**Tax Commissioner**") to initiate proceedings against the family members of Justice Isa [but not against Justice Isa], under the ITO and directed the Chairman, Federal Board of Revenue ("**FBR**"), to submit a report regarding the determination made in those proceedings by the Tax Commissioner to the Secretary, Council. The Secretary, Council was directed to place the said report before the Chairman, Council and the Chairman, Council to lay it before the Council, and the Council was asked to consider it in the matter of Justice Isa, in exercise of its *suo motu* powers, as it may deem appropriate. A strict time-frame was also given for immediate compliance of each step of the impugned directions. The impugned directions are reproduced here for ready reference:

Impugned directions

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

¹ See the judgment under review, para 136.

² See *ibid*, para 137.

having jurisdiction over the children. (The spouse and children are herein after referred to as "the respondents".) Any notices issued or proceedings taken (or proposed to be issued or taken) under the 2001 Ordinance in relation to any of the respondents in respect, or on account, of the properties aforesaid prior to the date of this Order stand terminated forthwith.

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

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

7. Upon receipt of the replies (and of such additional material/record as may be filed in response to such clarification or explanation, if any, as the Commissioner may, in writing, have sought), the Commissioner shall give an opportunity of hearing to the respondents in person or through an authorized representative/counsel and shall thereupon make an order in accordance with the 2001 Ordinance.

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

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

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

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

It is against these directions of the Court that Mrs. Isa (**"petitioner"**), the spouse of Justice Isa and other petitioners, namely, Justice Isa, the Bar Councils, Bar Associations and others, in whose constitution petitions these directions were made, have filed the present review petitions. It may be important to mention that we have treated Mrs. Isa as the main petitioner in the present review proceedings, because the contentions made, during arguments before us, mainly related to the contravention of her rights under the Constitution, law, and principles of natural justice, fair trial and due process.

Contentions of the parties

4. The petitioners, Mrs. Isa and Justice Isa, have appeared and argued in person, while the other petitioners have been represented through their learned counsel. They have mainly contended that: (i) the impugned directions have been made in contravention of the provisions of the ITO, particularly that of Section 122 thereof, thereby infringing rights vested in the petitioner after lapse of the prescribed time-period for making amendment in the tax assessment order; (ii) the Tax Commissioner, Islamabad has no jurisdiction to proceed in the tax matter of the petitioner; (iii) the impugned directions have conferred such power and jurisdiction on the Tax Commissioner which are not vested in him by law; (iii) the impugned directions have been made in violation of the right of the petitioner to be heard before taking any adverse action against her - a basic principle of natural justice; (iv) the impugned directions have been made in breach of her fundamental right to fair trial and due process guaranteed by Article 10A of the Constitution and of her constitutional right to be dealt in accordance with law guaranteed by Article 4 of the Constitution; (v) the impugned directions have referred the tax matter of the petitioner, an independent person, to the Council for action against her spouse, Justice Isa, without his having any

concern in her tax matters: Justice Isa cannot be held liable to account for alleged tax-evasion (if any) by her independent spouse, under any law of the land or under any clause in the Code of Conduct prescribed for Judges of the constitutional courts; (vi) this Court could not have issued any direction to the Council to exercise its *suo motu* jurisdiction; (vii) the impugned directions have been made against the Constitution, law and principles of natural justice, and are therefore liable to be recalled in exercise of review jurisdiction; and (vi) any proceedings taken and order passed by the Tax Commissioner and any action made by the Chairman FBR, of preparing and sending any report to the Council being a superstructure built on illegal and void impugned directions are also liable to be quashed.

5. Two learned Additional Attorneys-General have appeared before the Court on behalf of some of the respondents, namely, President of Pakistan, Federal Government, Prime Minister of Pakistan and Attorney-General for Pakistan ("**contesting respondents**") and opposed the review petitions, supporting the impugned directions. Rest of the respondents have not opted to appear and oppose the review petitions. Learned Additional Attorneys-General, to rebut the contentions of the petitioners, have submitted that: (i) the impugned directions do not comprise any adverse order against the petitioner, Mrs. Isa; therefore, there was no legal necessity to give her a hearing, as the Court has directed the Tax Commissioner to proceed against her in accordance with the law, i.e., the ITO; (ii) the Court has not, by the impugned directions, determined any civil right and obligation or any criminal charge against the petitioner; therefore, her fundamental right to fair trial and due process guaranteed by Article 10A of the Constitution has not been infringed by the impugned directions; (iii) the petitioner was provided with hearing on 18 June 2020 when the Court heard her on video link, before making the impugned directions on 19 June 2020; therefore, there has not been any violation of the principle of natural justice; (iv) the Court has directed the Tax Commissioner to proceed against the petitioner in accordance with law; therefore, constitutional right of the petitioner to be dealt in accordance with law guaranteed by Article 4 of the Constitution has not thereby been violated; (v) the public servants, including the Judges, are answerable to their disciplinary authorities for the unaccounted for assets of their spouses and children; therefore, the Court has legally and properly ordered for reporting the results of the

proceedings to be conducted by the Tax Commissioner regarding the foreign properties of the petitioner, to the Council; (vi) the Court has not directed the Council to proceed against Justice Isa necessarily, rather has left it to the discretion of the Council to take such action or proceedings as deemed appropriate by the Council; (vii) the impugned directions have lawfully been made by the Court in exercise of its powers under Article 187 of the Constitution for doing complete justice; (viii) there is no apparent error in the impugned directions; therefore, they cannot be recalled within the limited scope of the review jurisdiction; and (ix) the Tax Commissioner could have, on his own, taken all such proceedings against the petitioner which have been directed to be taken by the Court in the impugned directions; therefore, the proceedings conducted and order made by the Tax Commissioner under the ITO against the petitioner cannot be quashed even if the impugned directions are recalled.

6. We have considered the arguments of the parties, gone through the case law referred and perused the record of the case minutely.

Judicial power of dissenting Judges in review jurisdiction

7. As two of us (Maqbool Baqar and Syed Mansoor Ali Shah, JJ.) and our learned brother, Yahya Afridi, J., earlier delivered dissenting opinions to the extent of making the impugned directions, we consider it appropriate to briefly state, at the very outset, our understanding of the judicial power to be exercised by the dissenting Judges in review jurisdiction. Needless to mention that the dissenting Judges on the Bench that heard the case, subject to their availability, are necessary members of the Bench constituted to hear review petition filed against the majority judgment, i.e., judgment of the Court,³ in particular, when the Bench that first heard the case was a specially constituted Bench for hearing that case.

8. Review jurisdiction is conferred on this Court by Article 188 of the Constitution, which states that the "Supreme Court shall have power, subject to the provisions of any Act of *Majlis-e-Shoora* (Parliament) and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it." The phrase "any judgment

³ *Zulfikar Ali Bhutto v. State* PLD 1979 SC 741 (7-MB). Views of two of us (Manzoor Ahmad Malik and Syed Mansoor Ali Shah, JJ.), in this regard, expressed in *Justice Qazi Faez Isa v. President of Pakistan* PLD 2021 SC 639 and *Cherat Cement Co. v. Federation* PLD 2021 SC 327, are endorsed.

pronounced or any order made by it" used in the Article unambiguously means "judgment or order of the Court." In case of a split decision (where there is dissent by one or more members of the Bench), the majority judgment is the judgment of the Supreme Court in terms of Article 188. While the majority and minority views of the judgment become part of the jurisprudence, to be read, analyzed and applied in future, it is the majority view, at the time, that attains the status of the judgment of the Court.

9. The Judgment of the Court is characterized as the judgment of the entire Bench, rather than of the majority judges. The entire Bench means the full numeric strength of the Bench, including the dissenting judges. For instance, if a case is decided by a 4-3 majority of a 7 member Bench, the judgment of the majority of 4 members, which becomes the judgment of the Court, is considered to be the judgment of a 7 member Bench of the Court, and not of a 4 member Bench. Any principle of law enunciated in such majority judgment of 4 members cannot be overruled *in any other case* by a unanimous decision of a 5, 6, or even 7 member Bench; this can be done only by a Bench larger than a 7 member Bench. Conversely, any principle of law enunciated in the unanimous judgment of a 5 member Bench can be overruled by majority of only 4 members sitting in a 6 or 7 member Bench. The extent of the judicial power of the members of a Bench in this regard is thus dependent upon the total numeric strength of the Bench.⁴ In the present case, irrespective of the dissenting opinions of three members of the Bench, on the impugned directions, the majority judgment of the Court is to be considered to be a 10-member Bench judgment. For the purpose of exercising review jurisdiction under Article 188, the judgment of the Court (10-member Bench judgment) is under review, and the internal difference of opinion between members of the Bench in majority and minority is not relevant.

10. As the judgment of the Court is considered to be the judgment of all the members of that Bench, irrespective of its being majority judgment or unanimous judgment, there can be no difference in judicial powers of the members who earlier delivered the majority or minority judgment while hearing the review petition, under Article 188 of the Constitution, against the judgment of the Court, i.e., the majority judgment. This is because the judgment of the Court is under review and

⁴ Cherat Cement Co. v. Federation PLD 2021 SC 327; Shanti Fragrances v. Union of India (2018) 11 SCC 305.

not the view of the majority judges. There is nothing in the Constitution or the Supreme Court Rules 1980 that restricts the judicial power of dissenting Judges in review jurisdiction in comparison to that of the Judges who delivered the majority judgment. The dissenting Judges, subject to their availability, being necessary members of the review Bench possess the same judicial power as that of the other members of the Bench.⁵ The Judge whose opinion remained the minority view in the main case is as empowered to review the judgment of the Court, as can a Judge who delivered the majority opinion. This is because under the review jurisdiction the judges enjoy the flexibility to change their view, they might continue to hold or reverse their earlier view and thus subscribe to either the earlier majority or minority view. Adjudication is a deliberative process and the power of review, within its limited scope, allows the judge to reconsider his earlier opinion. Hence, there can be no fetters on the exercise of his judicial power as that would offend the fundamental constitutional value of independence of the judiciary.

11. We may, however, underline the distinction between the revisiting of a principle of law enunciated in a judgment delivered *in one case* by a larger Bench of this Court *in any other case* and the review of its own judgment by a Bench of this Court *in the same case*: in the latter situation, the review Bench with the same Judges, if available, and with the same numeric strength can review, within the scope of its review jurisdiction, any part of its judgment including any principle of law enunciated therein.

Grounds of review

12. Rule 1 of Order XXVI of the Supreme Court Rules, 1980 provides that subject to the law and the practice of the Court, the Court may review its judgment or order in a Civil proceeding on grounds similar to those mentioned in Order XLVII, Rule I of the Code of Civil Procedure, 1908 and in a criminal proceeding on the ground of an error apparent on the face of the record. Under Order XLVII, Rule I of the Code of Civil Procedure 1908, there are three grounds of review: (i) the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the applicant or could not be produced by him at the time when the judgment was

⁵ Views of two of us (Manzoor Ahmad Malik and Syed Mansoor Ali Shah, JJ.) in this regard, expressed in Justice Qazi Faez Isa v. President of Pakistan PLD 2021 SC 639 and Cherat Cement Co. v. Federation PLD 2021 SC 327, are endorsed.

pronounced or order made, (ii) some mistake or error apparent on the face of the record, and (iii) any other sufficient reason. These grounds of review are, in fact, limitations on the power of review of this Court.

13. With this understanding that all members of the Bench (10 members) enjoy equal judicial power in review jurisdiction, we approach the three core questions involved in the present review petitions, in the light of the respective contentions of the parties.

Questions for determination

14. The core questions that arise out of the contentions of the parties, for our determination are:

- i. Whether the directions contained in paragraphs 4 to 11 of the order dated 19 June 2020⁶ ("**impugned directions**"), supported by the detailed reasons of the majority judgment delivered on 23 October 2020,⁷ ("**judgment under review**") have been made by the Court without adhering to the principles of natural justice, fair trial and due process and by contravening the relevant provisions of the law and the Constitution;
- ii. If the impugned directions are found to have been so made, whether they can be recalled in exercise, and within the scope, of review jurisdiction; and
- iii. If the impugned directions are recalled, what will be the legal status and effect of any proceedings taken, orders passed or actions made in pursuance of those directions?

Question (i) as to constitutionality and legality of the impugned directions

15. This Court as back as in the year 1959 held in *Chief Commissioner v. Dina Sohrab*⁸ that "it cannot be disputed that it is a principle of natural justice that no one should be dealt with to his material disadvantage or deprived of liberty or property without having an opportunity of being heard and making his defence", and later observed in *Aman Ullah v. Federal Government*⁹ that "whenever a hearing has been provided it has to be meaningful." We are, therefore, to determine whether, in the present case, the impugned directions have the effect of causing any "material disadvantage" to the petitioner, Mrs.

⁶ Reported in PLD 2020 SC 346.

⁷ Reported in PLD 2021 SC 1.

⁸ PLD 1959 SC 45.

⁹ PLD 1990 SC 1092. See also *MFMY Industries v. Federation* 2015 SCMR 1550 and *Maqbool Ahmed v. District Officer* PLD 2010 Lah 332

Isa, and whether a fair and “meaningful hearing” was given to her before making the impugned directions.

(a) *Direction for tax proceedings against the petitioner and “material disadvantage” to her*

14. The petitioner has argued that the impugned directions affected her rights that had vested in her after lapse of the period prescribed under the ITO for issuing, or making amendment in, the tax assessment order; therefore, such directions could not have been issued without giving her an opportunity of fair hearing to put forth and explain her case against the issuance of such directions. She has submitted that under the ITO, the Tax Commissioner could not have issued any notice to her to explain her income, and make any assessment order for payment of tax against her, after lapse of a period of five years from the end of the tax year to which that income relates. The learned Additional Attorneys-General, opposing the contentions of the petitioners, submitted that the Court has, by the impugned directions, directed the Tax Commissioner to proceed against the petitioner in accordance with the law, i.e., the ITO, and has not made any adverse order against the petitioner; therefore, it was not necessary to provide an opportunity of hearing to the petitioner before making the impugned directions.

16. A plain reading of the relevant provisions of the ITO, i.e., Sections 114, 116, 120, 121 and 122, shows that Section 114 of the ITO requires certain specified persons to furnish a return of their income for a tax year, accompanied with, *inter alia*, evidence of payment of tax due as per return of income and a wealth statement as required under Section 116. It also authorizes the Tax Commissioner to require, by notice in writing, any person who, in his opinion, is required to file a return of income for a tax year but who has failed to do so, to furnish a return of income for that year, in respect of one or more of the last five completed tax years. The Tax Commissioner can, under Section 120, make any adjustment in the income tax return filed by a taxpayer within six months of filing of return, or issue notice to the taxpayer informing him of the deficiencies in the tax return and directing him to provide any information, particulars, statement or documents till the expiry of one hundred and eighty days from the end of the financial year (six months) in which return was furnished. If no such adjustment is made or no such notice is issued within the prescribed period (six months), the income tax return filed by the taxpayer is treated to be complete and the assessment

of due tax made by the taxpayer is deemed to be the assessment made by the Tax Commissioner. Under Section 121, the Tax Commissioner can by himself issue the tax assessment order for a tax year within a period of five years after the end of that tax year if the taxpayer has not filed the income tax return of that year. While under Section 122, he can amend a tax assessment order treated as such under Section 120 or a tax assessment order issued under Section 121 within a period of five years from the end of the financial year in which he has issued or treated to have issued the tax assessment order to the taxpayer.

17. The foreign properties were purchased, in the present case, by the petitioner and her children in the years 2004 and 2013; their income and sources to purchase those properties obviously relate to those years or the years prior thereto. When this Court made the impugned directions to the Tax Commissioner on 19 June 2020, a period of more than five years had lapsed since the end of those tax years to which their income and sources of fund for purchase of those properties relate. Therefore, the impugned directions, *prima facie*, affected the vested right of the petitioner, as this Court has, in several cases,¹⁰ held that after the expiry of the statutory period a vested right accrues to the taxpayer that his assessment will not be reopened.

18. The bar of time-limit within which an assessment can be amended under Section 122 of the ITO, as held by this Court in *Commissioner of Income Tax v. Eli Lilly Ltd.*,¹¹ is a statutory recognition of the protection against arbitrary power of reopening or amending a tax assessment after the expiry of the prescribed period. This statutory bar vests a right in the taxpayer that after efflux of the prescribed period, his tax assessment will not be reopened or amended. The power conferred by Section 122 on the Tax Commissioner, having the potential of adding to the tax liability of the taxpayer, is more substantive than procedural; therefore, even any legislative amendment in the time-period prescribed in that Section cannot be applied retrospectively unless the Legislature gives that amendment retrospective effect by express words or necessary implication. Thus, there cannot be any cavil to the proposition that the Court cannot undo the statutory bar of time-limit provided in Section 122 of the ITO by its order or direction. The submission of the contesting

¹⁰ See *Taxation Officer v. Rupafil* 2018 SCMR 1131; *Commissioner v. Eli Lilly* 2009 SCMR 1279; *Assistant Collector v. Khyber Electric Lamps* 2001 SCMR 838; *Federation v. Ibrahim Textile Mills* 1992 SCMR 1898; *Commissioner v. Eastern Federal Union Insurance Co.* PLD 1982 SC 247; *Nagina Silk Mill v. Income-Tax Officer* PLD 1963 SC 322.

¹¹ 2009 SCMR 1279.

respondents that the impugned directions cannot be termed as an adverse order against the petitioner is, therefore, not valid.

19. 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*¹², 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, as held in *Yousaf Rerolling Mills v. Collector of Customs*,¹³ is not to be either stretched in favour of the State, or narrowed in favour of the taxpayer. 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*¹⁴ quoted by Hamoodur Rehman J. in *Nawabzada Amir Khan v. Collector of Estate Duty*¹⁵, "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."

20. The submission of the contesting respondents that the Court directed the Tax Commissioner to proceed against the petitioner in accordance with the provisions of the ITO, and not otherwise, also appears incorrect. Had the Court directed the Tax Commissioner to issue notice to the petitioner after ascertaining his authority to do so under the ITO with the expression that "the Tax Commissioner shall, subject to the provisions of the ITO, issue notice to the petitioner", the submission of the contesting respondents might have carried weight. But the impugned directions did not leave any option with the Tax Commissioner to consider his legal authority before initiating proceedings in the tax matter of the petitioner. Further, it was admittedly the Tax Commissioner, Karachi who had the jurisdiction, under Section 209 of the ITO, to proceed in respect of the income tax returns filed by the petitioner, but the impugned directions mandated the Tax Commissioner, Islamabad to proceed in the matter. And it was only after the impugned directions that the FBR transferred the cases of the petitioner and of her children to the Tax Commissioner, Islamabad vide

¹² PLD 1973 SC 49

¹³ PLD 1989 SC 232

¹⁴ [(1921) 1QB 64, 71]

¹⁵ PLD 1962 SC 335

its order dated 25-06-2020. The impugned directions have, thus, affected the vested right of the petitioner which have accrued to her after lapse of the period prescribed under Sections 121 and 122 of the ITO for issuing, or making amendment in, the tax assessment order and have the effect of causing “material disadvantage” to the petitioner. Therefore, it was necessary to provide her a fair and “meaningful hearing” before making the impugned directions. Whether she was provided with such a “hearing” is the question, which we address hereunder.

(b) *Hearing of the petitioner on video-link and the right of hearing*

21. The contesting respondents have submitted that the petitioner was provided with a hearing on 18 June 2020 when the Court heard her via video-link from her residence, before making the impugned directions on 19 June 2020, while the petitioner has argued that her voluntary statement made through video-link does not constitute a “meaningful hearing” that justifies the making of the impugned directions against her. To decide whether a fair and meaningful hearing was given to the petitioner before making the impugned directions, it is necessary to know: What does a fair hearing envisage? And what are the necessary requirements so that a hearing may be said to be fair and meaningful?

(c) *Essential constituents of a fair hearing*

22. The right of hearing is one of the basic principles of natural justice, expressed in the maxim *audi alteram partem*, i.e., no one is to be condemned unheard (right to be heard). The principles of natural justice aim to secure justice or to prevent miscarriage of justice. Lord Denning, speaking for the Privy Council in *Kanada v. Government of Malaya*,¹⁶ described the two necessary characteristics of the right of hearing thus: “If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence is given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them...It follows, of course, that the Judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other.” Lord Morris reiterated and re-emphasized these essential requirements of the right of

¹⁶ (1962) AC 322.

hearing in *Ridge v. Baldwin*.¹⁷ His lordship said: "It is well-established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet...here is something which is basic to our system: the importance of upholding it far transcend the significance of any particular case."

23. Justice Muhammad Afzal Zullah, speaking for this Court in *Pakistan v. Public at large*¹⁸ referred to various injunctions of Islam and instances contained in the Holy Quran and Sunnah of the Holy Prophet (PBUH) and observed: "Right to property and honour, in addition to life, were also declared sacred which means: not only that their violation is to be punished and/or compensated but also that it is to be prevented...All this cannot be possible without a notice and opportunity of hearing. The denial of these safeguards for doing justice would amount to *Zulm* [injustice] and *Ziaditi* [wrong doing] against oneself as also the victim...Command [of hearing the arguments of both parties] is specific to the effect that when a public authority is to be exercised for resolving a controversy regarding rights and liabilities, the decision would not be rendered without proceedings in which the person affected is also afforded an opportunity of hearing...It is common principle which governs the administration of justice in Islam that in case of liability with penal or quasi-penal consequences and/or deprivation of basic rights a notice as well as an opportunity of hearing, are of absolute necessity. This by itself has to be recognized as a basic right."¹⁹

24. Justice Sarkaria of the Indian Supreme Court also described these two facets of the rule as to right of hearing as "universally respected" in *Swadeshi Cotton Mills v. Union of India*.²⁰ He observed that the "maxim *audi alteram partem* has many facets. Two of them are: (a) notice of the case to be met; and (b) opportunity to explain. This rule is universally respected and duty to afford a fair hearing in Lord Loreburn's oft-quoted language, is 'a duty lying upon everyone who decides something', in the exercise of legal power. The rule cannot be sacrificed at the altar of administrative convenience or celerity; for, 'convenience

¹⁷ (1964) AC 40.

¹⁸ PLD 1987 SC 304.

¹⁹ Emphasis added.

²⁰ AIR 1981 SC 818.

and justice' -as Lord Atkin felicitously put it- 'are often not on speaking terms'."²¹

25. Thus, the general consensus of judicial opinions, as noted by this Court in *University of Dacca v. Zakir Ahmed*,²² seems to be that to ensure the principle of fairness embedded in the right of hearing, the person sought to be affected must at least: (i) be made aware of the allegations made against him, upon which basis the decision is to follow, (i.e., notice of the case to be met) and (ii) be given a fair opportunity to make any relevant statement putting forward his own case, and to correct or controvert any relevant statement brought forward to his prejudice (i.e., opportunity to explain). In other words, in order to act justly and to reach at just ends by just means, a deciding authority is to comply with and implement, in all circumstances, these elementary and essential requirements of principle of fairness and right of hearing. As Lawton, L.J. said in *Maxwell v. Department of Trade*²³ that "doing what is right may still result in unfairness if it is done in the wrong way".

(d) *Status of hearing petitioner on video-link before making impugned directions*

26. In the light of the elementary and essential requirements for the fulfillment of the right of hearing, namely, (i) notice of the case to be met and (ii) opportunity to explain, we proceed to examine whether, in the present case, these essential requirements of right of hearing were complied with by providing the petitioner an opportunity of hearing on video-link, before making the impugned directions.

27. The constitution petition No. 17/2019 wherein the impugned directions have been made was filed by Justice Isa on 7 August 2019 and decided by the Court on 19 June 2020. On 17 June 2020, when concluding arguments of the respondents were being heard, Justice Isa appeared in person, for the first time, in Court and verbally conveyed the request of his spouse desiring to make a statement in Court on video link. The said request was allowed by the Court on 18 June 2020, and on the same day at 4:00 p.m. she addressed the Court via video-link from her residence and made her statement. The recording of her said statement was made and the transcript thereof was also prepared only for perusal of the Members of the Bench under order of the Hon'ble

²¹ Internal double quotation mark converted into single.

²² *University of Dacca v. Zakir Ahmed* PLD 1965 SC 90 (5-MB) per Hamoodur Rahman, J.

²³ 1974 QB 523.

Senior Member of the Bench, the master and in-charge of the orderly conduct of court-proceedings. On the next day, i.e., 19 June 2020, the constitution petitions were decided and the impugned directions were made in the short order of the Court.

28. We have very carefully read the transcript of her statement as well as of the observations made by the Hon'ble Senior Member of the Bench. We do not find in it that his lordship or any other Hon'ble Member of the Bench asked her whether she had anything to say if the Court would direct the tax authorities to inquire into her sources of fund whereby she had purchased the foreign properties, and to conduct proceedings for determining her tax liability regarding those properties under the ITO. She was not informed of the action the Court was contemplating to take, nor was she given a chance to state her stance on that. Thus, she was not given "notice of the case to be met", nor was she provided with an "opportunity to explain" why the Court should not make such directions. Both the very essential requirements of right of hearing were not complied with before making the impugned directions. Hearing the petitioner on 18 June 2020 by the Court on video-link before making the impugned directions on 19 June 2020, therefore, cannot be said to be a fair and "meaningful hearing" in the context of making the impugned directions. While the independent, adult and married children of the petitioner (her son and daughter) were not heard at all, before making the impugned directions that related to and affected them also. The impugned directions must have come as a surprise to the petitioner and her children.

(e) *Effect of violation of right of hearing (principle of audi alteram partem)*

29. This Court has time and again reiterated²⁴ that even in absence of any express provision in the statute, the principle of *audi alteram partem* is to be read into the relevant provision and applies in proceedings where adverse action is being considered to be taken against a person or if the contemplated action is going to affect any of his vested rights. The violation of this principle vitiates the proceedings and makes

²⁴ Ali Muhammad v. State PLD 2010 SC 623; Asim Khan v. Zahir Shah 2007 SCMR 1451; PIA v. Nasir Jamal 2001 SCMR 934.

the action taken therein to be illegal, as the violation of this principle is considered as a violation of law.²⁵

(f) *Right of hearing and Article 10A of the Constitution*

30. It may be pertinent to highlight here that after the insertion of Article 10A in the Constitution, "right of hearing" being a necessary component of "fair trial" and "due process" has become a fundamental right and is now to be read into every statute enacted by the Legislature by force of the constitutional provision, which was earlier so read because of the judicial pronouncements. Article 10A is cited here for ready reference:

10A-Right to fair trial

For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

The expression "civil rights and obligations" used in Article 10A is of wide and expansive amplitude: it covers everything that has civil consequences. And "civil consequences", in the words of Lord Denning,²⁶ "cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence." The petitioner, in the present case, was deprived of her vested right by the impugned directions, without providing her an opportunity of fair and meaningful hearing, i.e., by giving her notice of the contemplated action (the impugned directions) and opportunity to explain why such action (the impugned directions) should not be made. The impugned directions are, therefore, vitiated on this ground.

(g) *Right of petitioner (spouse of a Judge) to be dealt with in accordance with law*

31. We feel constrained to observe that the petitioner cannot be penalized and deprived of her constitutional right to be dealt with in accordance with law merely because she is the spouse of a Judge and action against her would establish the impartiality of the Court. We believe that public confidence in the impartiality and fairness of the court-process can be achieved only when Judges decide the matters presented before them against all persons, whosoever they may be, in

²⁵ Hazara Improvement Trust v. Qaisra Elahi 2005 SCMR 678; Anisa Rehman v. P.I.A.C. 1994 SCMR 2232; Lilaram v. Ghulam Ali 1991 SCMR 932.

²⁶ Howard v. Borneman (1974) 3 WLR 660.

accordance with law without fear or favour. Judges are under oath to discharge their duties and perform their functions, honestly to the best of their ability and faithfully in accordance with the Constitution and the law, and to do in all circumstances, right to all manner of people according to law without fear or favor, affection or ill-will. They cannot deviate from their solemn oath even if any popular action taken otherwise than in accordance with law helps paint the image of the Court in better light. Judges are to decide in accordance with law and protect the fundamental rights rather than sacrifice these constitutional rights at the altar of expediency and image building of the Court.

(h) Scope of the powers under Article 187(1) of the Constitution

32. The learned Additional Attorneys-General have attempted to support the impugned directions by making reference to the provision of Article 187(1) of the Constitution also. They have submitted that this Court, under the said constitutional provision, can issue any direction for doing complete justice. The petitioners have opposed it with the contention that no reference to Article 187(1) of the Constitution was made by the Court for making the impugned directions, therefore, the same cannot be treated to have been issued under that provision of the Constitution. They have further submitted that even under the said Article, the Court could not have made the impugned directions in breach of the right of hearing of the petitioner, Mrs. Isa, and conferred such authority and jurisdiction on the Tax Commissioner which he did not have under the ITO.

33. So far as the contention of the petitioners that no reference to Article 187(1) of the Constitution was made by the Court for issuing the impugned directions, therefore, the same cannot be treated to have been issued under the said Article is concerned, we do not find it tenable. If this Court is found to have power to issue the impugned directions under Article 187(1) of the Constitution, the express mentioning of that Article while making the impugned directions was not necessary. We are, therefore, to see only whether this Court could have issued the impugned directions under Article 187(1) of the Constitution. We consider it proper to reproduce the provisions of Article 187(1) of the Constitution, for ease of reference, before appreciating the respective submissions of the parties on it:

Article 187(1):

Subject to clause (2) of Article 175, the Supreme Court shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document.

No doubt, this Court has been conferred, under Article 187(1) of the Constitution, very vast power to issue "such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it", but the Court ordinarily issues such directions, orders or decrees, under Article 187, which are consequential or incidental to the matter adjudicated upon by the Court or to the relief prayed for by the parties.

34. The question that needs consideration, in the present case, however is whether the Court can issue any direction, order or decree against a person, under this Article, in contravention of provisions of some law. After deep deliberation, we find that the Court cannot do so. The main reason for our reaching this conclusion is that as per Article 4 of the Constitution, to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every person, and no action detrimental to the life, liberty, body, reputation or property of any person can be taken except in accordance with law. The right to be dealt with in accordance with law assured by Article 4 of the Constitution stands at a high pedestal and even outshines fundamental rights guaranteed by Articles 9 to 28 of the Constitution, as this right cannot be suspended during the proclamation and imposition of Emergency under Article 233 of the Constitution.²⁷ Article 4 of the Constitution is the bedrock of the rule of law, and antithesis to the rule of men, in our country. It is a restraint on the executive and judicial organs of the State to abide by the rule of law.²⁸ No person, authority, tribunal or court exercising executive or judicial powers can take any action against any person in contravention of any law. There is no exception to this principle, which equally applies to this Court exercising its judicial powers, including the power under Article 187(1) of the Constitution. Under the said Article, the Court can pass any order to do complete justice between the parties; however, it cannot make an order inconsistent with the fundamental rights or in contravention of any constitutional provision or any relevant statutory law.²⁹

²⁷ Federation v. Manzoor Elahi PLD 1976 SC 430; Federation v. Shaukat Ali PLD 1999 SC 1026.

²⁸ Federation v. Nawaz Sharif PLD 2009 SC 644.

²⁹ Dossani Travels v. Travels Shop PLD 2014 SC 1; Prem Chand v. Excise Commissioner AIR 1963 SC 996.

35. The Tax Commissioner, Islamabad had no territorial jurisdiction under Section 209 of the ITO and no authority and power to issue a tax assessment order under Section 121 or to amend a tax assessment order under Section 122 for a tax year after lapse of a period of five years from the end of that tax year, against the petitioner. The impugned directions mandated him to do that which he could not have done under the law, i.e., the ITO. Needless to mention, that if an Authority has no jurisdiction in the matter under the law, the jurisdiction cannot be conferred on that Authority by an order of the Court;³⁰ but the impugned directions had the effect of doing so. The Tax Commissioner could not have proceeded after lapse of the statutory period, against any other person; the petitioner has, it appears, been discriminated and deprived of her fundamental right to equality before law and equal protection of law guaranteed under Article 25 of the Constitution, by the impugned directions, in addition to negation of her right of hearing enshrined in fundamental right to "fair trial" and "due process" guaranteed under Article 10A and constitutional right to be dealt with in accordance with law guaranteed by Article 4 of the Constitution. We, therefore, find that the impugned directions could not have been made by this Court in exercise of its power under Article 187(1) of the Constitution.

(i) *Constitutionality of referring the matter to the Supreme Judicial Council for exercise of its suo motu power*

36. As to referring the result of tax proceedings to be conducted against the petitioner, through report of the Chairman FBR, to the Council for considering *suo motu* action against Justice Isa, the petitioners have contended that the tax matter of the petitioner, an independent person, could not have been referred to the Council for action against her spouse, Justice Isa, without his having any concern in her tax matters; that Justice Isa cannot be held liable to account for alleged tax-evasion (if any) by her independent spouse, under any law of the land or under any clause in the Code of Conduct prescribed for Judges of superior Courts; and that this Court could not have issued any direction to the Council to exercise its *suo motu* jurisdiction. On the other hand, the contesting respondents have submitted that the public servants, including the Judges, are answerable to their disciplinary authorities for the unaccounted for assets of their spouses and children,

³⁰ *Badshah Begum v. Additional Commissioner* 2003 SCMR 629.

therefore, the Court has legally and properly ordered for reporting the results of the proceedings to be conducted by the Tax Commissioner regarding the foreign properties of the petitioner, to the Council; and that the Court has not directed the Council to proceed against Justice Isa necessarily, rather has left it to the discretion of the Council to take such action as deemed appropriate by it.

37. We have considered the respective contentions of the parties on this point carefully. We agree with the submission of the contesting respondents that this Court did not direct the Council to proceed against Justice Isa necessarily, rather left it to the discretion of the Council to take such action as deemed appropriate by the Council, but the question is whether any law or any clause in the Code of Conduct prescribed for Judges of superior Courts makes the Judges liable to account for the alleged tax-evasion (if any) by his or her independent spouse. No such law or clause in the Code of Conduct has been referred to us, during arguments. We, therefore, find the answer to the said question clearly in the negative.

38. The petitioner, Mrs. Isa, and her children being private citizens, their tax matters had no nexus with the essential pre-requisite for invoking and maintaining any proceedings in the original jurisdiction of the Court under Article 184(3) of the Constitution, and were thus not amenable to the jurisdiction that was invoked and exercised thereunder through the short order dated 19.06.2020. Further, the tax matter of the petitioner, Mrs. Isa, could not have been referred to the Council as the role and jurisdiction of the Council 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 impugned directions tend to stretch the scope of jurisdiction of the Council beyond the constitutional mandate and vest in the Council the jurisdiction and authority not granted to it by the Constitution.

39. The impugned directions also create an anomalous situation as they provide that the proceedings before the Council, as contemplated thereby, shall not be effected by the filing or pendency of any appeal under the ITO against the order/report of the Tax Commissioner, or against any order made or decision taken at any appellate stage. If in the event the Council, on the basis of the report submitted by the Chairman

FBR in pursuance of the impugned directions, recommends removal of Justice Isa, but subsequently Mrs Isa, succeeds in her challenge to the order of the Tax Commissioner, and the said order is found not sustainable, the time for the retrieval may have passed as by then Justice Isa may have reached the age of superannuation. The injury inflicted upon Justice Isa and the damage suffered by this institution will thus be irretrievable. In a reverse scenario where the Council may not agree with the findings of the Tax Commissioner, but such findings are upheld by the forums, including this Court, before which the Tax Commissioner's findings are amenable to correction, an anomalous and embarrassing situation may occur.

(j) *Obligation of a Judge as to the knowledge of financial matters of his or her financially independent family members.*

40. So far as the submission of the contesting respondents is concerned, that the public servants, including the Judges, are answerable to their disciplinary authorities for the unaccounted for assets of their spouses and children. Nothing is there in any law or in the Judges' Code of Conduct which could possibly be stretched to hold a Judge liable for the conduct of his spouse and children, or for that matter of anybody else, without there being any evidence to connect him with, and hold him responsible for such conduct. Needless to remind the salutary principle of law that everybody is responsible for his own deeds or misdeeds, acts and omissions, and nobody incurs any liability on account of any wrong committed by any other person.³¹

(k) *Infringement of the Independence of the Supreme Judicial Council*

41. Another aspect of referring the matter to the Council by this Court for exercise of its *suo motu* power is that it infringes the independence of the Council. Provisions of Articles 209 and 211 of the Constitution ensure the independence of the Council: only the President of Pakistan, acting in accordance with the constitutional procedure prescribed under Article 209 read with Article 48(1), can direct the Council to inquire into the matter of alleged misconduct or incapacity of Judges of the constitutional courts, and the proceedings before the Council cannot be called in question in any court including this Court as provided in Article 211 of the Constitution except when the Council acts

³¹ M/s Avia International v. Assistant Collector of Customs 2004 PTD 997.

with *mala fide* (in fact or in law), without jurisdiction or *coram non judge*. No one before us had argued that the Council with *mala fide* (in fact or in law) was not performing its constitutional duty under Article 209 of the Constitution; therefore, there was no occasion for this Court to direct the Chairman, Council to place the report of the Chairman, FBR regarding decision of the Tax Commissioner in the tax matter of Mrs. Isa and ask the Council to even conduct “proceedings” to decide whether or not it will inquire into the matter of alleged misconduct against Justice Isa in exercise of its *suo motu* powers. To uphold the independence of judiciary and to protect the Judges of constitutional courts against unwarranted harassment and oppression, the Constitution has established and constituted the Council to proceed and inquire into the allegations of incapacity or misconduct against such Judges independent of any extraneous influence, on direction of the President or in exercise its *suo motu* powers. In *Ikram Chaudhry v. Federation*,³² Chief Justice Ajmal Mian, a distinguished Judge of this Court, speaking for a five member Bench of this Court held:

[Clause (5) of Article 209 of the Constitution] does not admit filing of a Constitutional petition for a direction to the Supreme Judicial Council or to the President to initiate proceedings of a judicial misconduct against a Judge of a superior Court...This Court or a High Court cannot take upon itself the exercise to record even a tentative finding that a particular Judge has committed misconduct warranting filing of a reference against him under Article 209 of the Constitution.

Therefore, asking the Council, by the impugned directions, to conduct “proceedings” to decide whether or not it will inquire into the matter of alleged misconduct by Justice Isa in exercise of its *suo motu* powers is also tantamount to interference into the independent functioning of the Council and, thus, against the spirit of the provisions of Articles 209 and 211 of the Constitution.

(I) *Government Servants cannot file complaints against judges directly*

42. Further, we note that the impugned direction to the Chairman, FBR to submit report to the Council and asking the Council to consider that report for deciding to take any action thereon against Justice Isa have the effect of directing the Chairman, FBR to file a complaint in the Council against Justice Isa, in the form of report. The impugned directions have thus authorized the Chairman, FBR to do that which he cannot do under the Constitution and the law. He being an

³² PLD 1998 SC 103 (5-MB).

officer subordinate to the Federal Government cannot make any complaint against a constitutional court Judge directly to the Council; only the Federal Government can do so and that too by the constitutional process of acting through the President. If the officers of the Federal or Provincial Governments or of the autonomous bodies or authorities under the control of such Governments are allowed or empowered to file complaints concerning or emanating from their official actions against Judges of the constitutional courts who, in exercise of their constitutional jurisdiction, make judicial review of official actions and inactions of such officers, there would be disastrous consequences for the independence of judiciary. This crucial aspect could not be noticed at the time of making the impugned directions, and it vitiates that direction of the Court being against the very fundamental right of the public for which enforcement this Court entertained the constitution petitions in the present matter, i.e., the independence of judiciary.

Conclusion on question (i)

43. The above discussion, thus, leads us to conclude and answer question (i) in affirmative: the impugned directions are found to have been made by this Court without adhering to the principle of natural justice, fair trial and due process, i.e., the petitioner's right of hearing, guaranteed under Article 10A of the Constitution and without adverting to, and in contravention of, the relevant provisions of the law, i.e., Sections 114-122 and 209 of the Income Tax Ordinance, 2001 and the scope of Article 187 in the context of Article 4 of the Constitution.

Question (ii) as to recalling impugned directions in review jurisdiction

44. It would not take long to answer this question as the extent and scope of the review jurisdiction of this Court, in the light of the relevant provisions of the Constitution and the Supreme Court Rules, is well-settled by various pronouncements of this Court. Briefly stating, the review jurisdiction is vested in this Court by Article 188 of the Constitution and is subject to the provisions of any Act of Parliament and of any rules made by this Court. The Parliament has not so far passed any Act on this subject; this Court has, however, made rules to regulate its power of review, which are contained in Order XXVI of the Supreme Court Rules, 1980. The relevant Rule, for present purposes, is Rule 1 of Order XXVI which states:

Subject to the law and the practice of the Court, the Court may review its judgment or order in a civil proceeding on grounds similar to those mentioned in Order XLVII, rule 1 of the Code [of Civil Procedure, 1908] and in a criminal proceeding on the ground of an error apparent on the face of the record.

This Rule has, subject to the law and the practice of the Court, limited the review jurisdiction of this Court in criminal proceedings to one ground only, *viz*, an error apparent on the face of the record, while has made reference for review in civil proceedings to the grounds mentioned in rule 1 of Order XLVII of the Code of Civil Procedure, 1908 which provides three grounds for review: (1) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of, or could not be produced by, the party seeking review at the time when the decree was passed or order made; (2) some mistake or error apparent on the face of the record; (3) or any other sufficient reason. The third ground has been interpreted by the courts to be read *ejusdem generis* in the context of two preceding grounds. It is notable that the ground, "error apparent on the face of the record", is common for review in both civil and criminal proceedings. In the present case, it is this ground which has been agitated for praying review of the order of the Court that contains the impugned directions. Therefore, the simple question before the Court is whether the errors identified above in making the impugned directions can be said to be the errors apparent on the face of the record.

45. The expression, "error apparent on the face of the record", as observed by Hamoodur Rehman, J. in *Anwar Husain v. Province of East Pakistan*³³, cannot be defined with precision or exhaustiveness, and there would always remain an element of indefiniteness inherent in its very nature. It is to be determined in each case on the basis of its own peculiar facts. Therefore, we would not attempt to define the said expression exhaustively either, and restrict ourselves to examine: whether any judgment pronounced or order made without providing a fair and meaningful hearing to the person affected thereby or without advertent to, and in contravention of, relevant provisions of law and the Constitution can be termed "an error apparent on the face of the record".

46. The Federal Court of British India held in *Raja Prithwi Chand v. Sukhraj Rai*³⁴ that the "indulgence by way of review is granted mainly owing to the natural desire to prevent irremediable injustice being done

³³ PLD 1961 Dacca 155.

³⁴ AIR 1941 FC 1.

by a Court of last resort as where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard." We find these observations of the Federal Court very relevant to the circumstances of the present case. In the present case, we acted on the assumption that we had heard the petitioner, Mrs. Isa, on video-link on 18 June 2020 before making the impugned directions, but it has been revealed to us during hearing of the present review petitions that the said hearing did not meet even the very elementary and essential requirements of the right of hearing. This Court has held in *Anisa Rehman v. P.I.A.C.*³⁵ that the violation of principles of natural justice is equated with the violation of a provision of law, as they are to be read into the relevant provision of every statute even if not expressly incorporated therein. We may add that after recognition of the right to fair trial and due process as a fundamental right by insertion of Article 10A in the Constitution, violation of the principles of natural justice, which are the necessary components of the right to fair trial and due process, is now to be taken as a violation of the fundamental right as well. In *Federation v. Nawaz Sharif*,³⁶ this Court held that "non-hearing of petitioners is an error on the face of record meriting interference in review jurisdiction."

47. So far as any judgment pronounced or order made without advertent to, and in contravention of, the relevant provisions of law or Constitution is concerned, there is plethora of judicial opinions³⁷ enunciated by this Court on treating it as an error apparent on the face of the record that warrants the review of that judgment or order. We do not want to burden this judgment with reproduction of extracts from all such opinions, however, would like to narrate briefly the principles of law on which they are based, *viz*, their *ratio decidendi*.

48. The obedience to the Constitution and law is, under Article 5(2) of the Constitution, the inviolable obligation of every citizen, including the persons holding posts in the legislative, judicial or executive organs of the State. This obligation of the Judges of the constitutional courts is further emphasized by the oath they take before assuming charge of their posts, to discharge their duties and perform their functions in accordance with the Constitution and law, and to

³⁵ 1994 SCMR 2232.

³⁶ PLD 2009 SC 644.

³⁷ See *Muhammad Amir v. Controller of Estate Duty* PLD 1962 SC 335; *Zulfikar Ali Bhutto v. State* PLD 1979 SC 741; *Suba v. Fatima Bibi* 1996 SCMR 158; *Abdul Ghaffar v. Asghar Ali* PLD 1998 SC 363.

preserve, protect and defend the Constitution. Moreover, the persons whose matters are presented before them for determination also have a constitutional right to be treated in accordance with the law, guaranteed to them by Article 4 of the Constitution. Therefore, whenever Judges of these courts are pointed out, in review jurisdiction conferred by the Constitution or law, something in their judgment or order to be in conflict with the Constitution or any law of the land, it becomes their duty to unhesitatingly correct that error. Duty of the Judges of the apex Court of the country is more thoughtful and profound in this regard, as there is no other court which can correct their error, and the principles of law enunciated in their judgments are, under Article 189 of the Constitution, binding on all other courts in the country. Therefore, whenever they find that their judgment or order of which review is sought was pronounced or made without adverting to, and in contravention of, any provision of law or the Constitution, they must correct the error considering it their inviolable constitutional obligation and duty, not a favour or concession to the party seeking review.

49. In the present case, although this Court made the impugned directions in good faith to ensure the accountability of a constitutional court Judge and to uphold the public trust in the impartiality of the Court, but as these directions were made by the Court, on its own, without putting to the parties on notice, without informing them what the Court was contemplating to do and without inviting and hearing their arguments on the matters dealt with therein, the above-noted legal and constitutional aspects of the impugned directions with their ramifications were not present in the mind of the Court while making the impugned directions. If the Court had heard the arguments on the matters dealt with in the impugned directions and the legal position relating thereto had been debated and appropriately placed before it, the Court would not have made the said directions as the Court never intends to act contrary to law.

50. The impugned directions were in no way a relief consequential or incidental to the matter adjudicated upon by the Court, i.e., the constitutionality and legality of the Reference filed against Justice Isa, or to the relief prayed for by the parties, i.e., the quashing of the Reference or dismissal of the constitution petitions. The impugned directions must have come as a surprise to the parties being unexpected, as they were beyond the scope of the case before the Court, on a matter that was not debated in the course of the hearing.

51. Likewise, directing for speedier proceedings in the tax matter of Mrs. Isa to be conducted by a Tax Commissioner who had no jurisdiction to proceed in her tax matters under the law was unwarranted. The impugned directions singled out Mrs. Isa and Justice Isa for special treatment by directing initiation of proceedings into their matters by the tax authorities and the Council in accordance with a procedure that was not provided by the law and the Constitution; their fundamental right to equality before the law and equal protection of law guaranteed by Article 25 of the Constitution was thus infringed by the impugned directions.

52. This Court, in its concern to enable the early resolution of the matter, made the impugned directions without noticing the relevant provisions of the ITO and without considering the consequences of ensuring accountability of a constitutional court Judge through a procedure that is not envisioned by Article 209 of the Constitution. "To seek to be wiser than the law is the very thing by good laws forbidden."³⁸ However, to err is human; Judges presiding courts including the apex one are no exception. Courts are, therefore, as much human institutions as any other and share all human susceptibilities to error. Owning his mistake on realization does not diminish one's prestige or ability; it perhaps enhances both. A Judge, therefore, should not hesitate to review his decision if it is established not to be right. Because it is better to return to what is right than to clinging onto what is wrong.³⁹

Conclusion on question (ii)

53. We, therefore, find no difficulty to conclude and answer question (ii) in affirmative: the impugned directions having been made without providing a fair and meaningful hearing to the petitioner, Mrs. Isa, thus violating the principle of natural justice, and without adverting to, and in contravention of, the relevant provisions of law and the Constitution, definitely fall within the scope of the well-established ground of review, namely, "error apparent on the face of the record"; thus they can be recalled by this Court in exercise of its review jurisdiction under Article 188 of the Constitution read with rule 1 of Order XXVI of the Supreme Court Rules, 1980. Exercising that jurisdiction, we recall the impugned directions.

Question (iii) as to legal status of actions made in pursuance of impugned directions, and conclusion on this question

³⁸ Greek Philosopher Aristotle said.

³⁹ Second Islamic Caliph Umar (r.a.) wrote it to Abu Musa al-Ash`ari.

54. The question is quite simple and has an easy answer. We are of the view that the answer to this question lies in the same principle on the basis of which this Court, in the judgment under review⁴⁰, declared the proceedings initiated by the Council to stand abated on quashing of the Reference filed by the President. This Court held that the show cause notice issued by the Council derived its substance from the quashed Reference and without the Reference the show cause notice was just a blank piece of paper which could not become the basis for any subsequent inquiry against the petitioner, Justice Isa. No one has disputed the said decision of this Court, in the present review proceedings. Actually, the moment the foundation is removed, the entire structure collapses. The principle, having been enunciated by this Court in many cases,⁴¹ is now well-settled that when the basic order is without lawful authority, then the entire superstructure built on it falls on to the ground automatically. Thus, any proceedings taken, orders passed or actions made in pursuance of the impugned directions being a superstructure built on those directions loses their legal status and effect, when their very foundation, viz, the impugned directions, is found to have been laid without lawful authority. They have, therefore, no legal status and effect.

55. These are the reasons for our short order dated 26 April 2021, which is reproduced below for completion of the record:

For the reasons to be recorded later, captioned Review Petitions are allowed and the directions contained in paras 4 to 11 of the impugned short order dated 19.06.2020 passed in Const. Petition No.17/2019 and other connected matters, alongwith supporting detailed reasons given in the majority judgment of the same date, are recalled and set-aside. All the subsequent proceedings, actions, orders, information and reports in pursuance of the directions contained in the short order dated 19.6.2020 and the detailed reasons thereof, are declared to be illegal and without any legal effect. Resultantly, any such proceedings, actions, orders or reports cannot be considered or acted upon and pursued any further by any forum or authority including the Supreme Judicial Council.

Our learned brother, Manzoor Ahmed Malik, J., (who has since retired) was a signatory to the above short order; therefore, following the precedents of *Al-Jehad Trust v. Federation* (PLD 1996 SC 324) and *CJP Iftikhar Muhammad Chaudhry v. President of Pakistan* (PLD 2010 SC 61), the office is directed to place these detailed reasons recorded in support of that order before his lordship, for his consideration whether he agrees with the detailed reasons.

⁴⁰ See para 137.

⁴¹ See *Yousaf Ali v. Muhammad Aslam* PLD 1958 SC 104; *Executive District Officer v. Muhammad Younas*, 2007 SCMR 1835; *Atta-ur-Rehman v. Umar Farooq* PLD 2008 SC 663; *Province of Punjab v. Border Area Committee* PLD 2011 SC 550.

Right of a Judge to be dealt with in accordance with law in the matter of his accountability

56. Before parting with the judgment, we consider it appropriate to re-emphasize that we strongly believe that judicial independence and judicial accountability are two sides of the same coin and one cannot exist without the other - to compromise on judicial accountability is to compromise on independence of judiciary - but our only concern in the present matter is that a constitutional court Judge in the matter of his accountability, or for that matter his spouse, must be dealt with in accordance with the law. As it is said that injustice anywhere is a threat to justice everywhere; whatever affects one directly, affects all indirectly,⁴² so would the accountability of one Judge in a manner not provided by the Constitution have adverse impact upon the independence of all Judges, and thus destroy the independence of the judiciary as an institution. The constitutional guarantee of the right to be dealt with in accordance with law, under Article 4 of our Constitution, is available not only to every citizen of the country but also to every other person for the time being within Pakistan. We are clear and firm in our view that this constitutional guarantee cannot be curtailed or limited in the case or matter of any person whosoever he may be and whatever the allegations against him may be. We think it would not be out of place to cite some observations which were recently made in *Naveed Asghar*⁴³ case by two of us (Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ) and our learned brother Manzoor Ahmed Malik, J.:

An accused person cannot be deprived of his constitutional right to be dealt with in accordance with law, merely because he is alleged to have committed a gruesome and heinous offence. The zeal to punish an offender even in derogation or violation of the law would blur the distinction between arbitrary decisions and lawful judgments. No doubt, duty of the courts is to administer justice; but this duty is to be performed in accordance with the law and not otherwise. The mandatory requirements of law cannot be ignored by labelling them as technicalities in pursuit of the subjective administration of justice. One guilty person should not be taken to task at the sacrifice of the very basis of a democratic and civilised society, i.e., the rule of law. Tolerating acquittal of some guilty whose guilt is not proved under the law is the price which the society is to pay for the protection of their invaluable constitutional right to be treated in accordance with the law. Otherwise, every person will have to bear peril of being dealt with under the personal whims of the persons sitting in executive or judicial offices, which they in their own wisdom and subjective assessment consider good for the society.

This was our approach towards the rule of law in case of persons who were alleged to have committed a gruesome and heinous offence; we cannot deal with the case of a Judge any differently, who because of his unblemished character and honest performance of his duties both at the Bar and on the Bench during a life-long period of about forty years,

⁴² Dr. Martin Luther King said.

⁴³ *Naveed Asghar v. State* PLD 2021 SC 600.

enjoys great respect in the legal fraternity. The members of almost all the Bar Associations across the country hold Justice Isa as an honest, independent and impartial judge, with impeccable integrity. It may also be noted here that the various petitioners who earlier challenged the filing of Reference against Justice Isa, and now the impugned directions, include the premier Bar bodies like Supreme Court Bar Association, Pakistan Bar Council, all the four provincial Bar Councils and High Court Bar Association Quetta, Quetta Bar Association, Sindh High Court Bar Association, Karachi Bar Association, Peshawar High Court Bar Association, and Senior Lawyers like Mr. Abid Hassan Minto. All the above are the main stake-holders in the judicial system and are best suited to form and express their opinion about the integrity and ability of a Judge. In addition to those named above, Pakistan Federal Union of Journalists is also a petitioner; they certainly are the people who have their fingers on the pulse of the people of this country.

57. We are fully conscious of the fact that it is the impeccable integrity and high standard of ethics and transparency that engenders the public's confidence in the judiciary. It is in order to achieve and maintain the public confidence, trust and perception about the independence, impartiality and integrity of the superior Court Judges, that our Constitution has provided an elaborate scheme, for the accountability of the Judges under Article 209, which needs to be adhered to strictly as rightly observed in the judgment under review,⁴⁴ that "infringements of Article 209 erode the independence of the judiciary." But unfortunately our chequered history has seen numerous attempts to trample upon judicial independence during both, civilian as well as military governments. Nonetheless, we must not become prisoner of our past and must now obviate any attempt to damage the judiciary.

58. History is witness to the fact that the fundamental rights, particularly of those who are the most vulnerable, becomes the first causality in societies where the judiciary comprises those who were compromised and thus susceptible to being influenced from those wielding power and influence. The edifice of the judicial independence rests on the assumption that every Judge besides being fair and impartial is fiercely independent and is free to uphold his judicial views. This judicial freedom is fundamental to the concept of the rule of law. Any attempt to muffle judicial independence or to stifle dissent shakes the foundation of a free and impartial judicial system, thus eroding public confidence on which the entire edifice of judicature stands. Public

⁴⁴ Para 16.

confidence is the most precious asset of this organ of the state, which controls neither the sword nor the purse. A judge whose decisions are dictated not by the fidelity to the letter and spirit of the law but based on what he deems to be palatable to the Government would cause irretrievable damage to the public confidence in the judiciary, and consequently jeopardize its credibility and moral authority. Judges should not be, in the words of Lord Denning, "diverted from their duty by any extraneous influence, nor by hope of reward nor by fear of penalties, nor by flattering praise, nor by indignant approach".

59. We believe that the rule of law and the independence of judiciary are conceptually interwoven: without an independent judiciary, expecting the rule of law is a sheer farce. And the rule of law and the independence of the judiciary are the only guarantee to the maintenance and preservation of a thriving democracy. We reiterate what two of us (Maqbool Baqar and Syed Mansoor Ali Shah, JJ.) and our learned brother, Yahya Afridi, J., said in their order of 19 June 2020 while disposing of the constitution petitions in the present matter:

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

We proclaim that no one is above the law, but at the same time declare that no one can be denied his right to be dealt with in accordance with the law. If Mrs. Isa, or a spouse of any other Judge, does not comply with the tax law, she must be dealt with in accordance with the law, and if Justice Isa, or any other Judge, breaches any clause of the Code of Conduct prescribed for Judges of the constitutional courts, he also must be proceeded against but only in accordance with law and not otherwise.

Sd/-
(Maqbool Baqar)
Judge

I agree.

Sd/-
(Manzoor Ahmad Malik)

Judge

Sd/-
(Mazhar Alam Khan Miankhel)
Judge

Sd/-
(Syed Mansoor Ali Shah)
Judge

Apart from Civil Review Petition No.296 of 2020, all other Civil Review Petitions are allowed and the reasons for the same are recorded in my separate note.

Sd/-
(Yahya Afridi)
Judge

Sd/-
(Amin-ud-Din Khan)
Judge

Islamabad,
Released on 29.01.2022.
Approved for reporting.

YAHYA AFRIDI, J.:- Every judgment pronounced by the Supreme Court of Pakistan is a considered, solemn and final pronouncement on all points raised and decided in the case.⁴⁵ However, under Article 188 of the Constitution of the Islamic Republic of Pakistan, 1973 (“**Constitution**”) read with Rule 1 of Order XXVI of the Supreme Court Rules, 1980 (“**Rules**”) this Court is vested with the jurisdiction to review its judgment, in certain circumstances. The judicial consensus of this Court is that a judgment passed on an erroneous assumption of material facts, or without advertent to a provision of law or Constitution, or without noticing an undisputed construction of law and Constitution amounts to an error apparent on the face of the record, and thus justifies positive exercise of the review jurisdiction.⁴⁶

2. After careful and cautious consideration of the directions of this Court to the officials of the Federal Board of Revenue (“**FBR**”), the Hon’ble Chairman and learned Secretary of the Supreme Judicial Council (“**Council**”), contained in paragraphs No. 4 to 11 of the short order dated 19.06.2020 (“**impugned directions**”), I find that the same have been made by us without appropriately considering the scope of the ouster clause of Article 211 of the Constitution and the relevant provisions of the Income Tax Ordinance, 2001 (“**Ordinance**”). These two crucial omissions on our part are the marked and distinct “errors apparent on the face of the record” and thus, warrant the positive exercise of the review jurisdiction of this Court.

3. To start with, we need to appreciate the exclusivity of the constitutional domain of the Council secured under Article 211 of the Constitution, which expressly commands all courts, including this Court,

⁴⁵ Abdul Ghaffar v. Asghar Ali (PLD 1998 SC 363) [5-MB]; Government of Punjab v. Aamir Zahoor-ul-Haq (PLD 2016 SC 421) [5-MB]

⁴⁶ Muhammad Boota v. Member (Revenue) BOR (2010 SCMR 1049)

not to interfere in the proceedings of the Council. The said ouster provision reads:

211. Bar of Jurisdiction.

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

No one can doubt the wide-ranging power vested in this Court under Article 184(3) or Article 187(1) of the Constitution, to issue appropriate directions, while disposing of a case. However, where the Constitution under Article 211 expressly forbids all courts, including this Court, not to interfere in the proceedings of the Council, then the authority of this Court under Article 184(3) or, for that matter, under any other Article of the Constitution, has to yield to such definite ouster.

4. The very essence of the ouster clause provided in Article 211 is to curtail the jurisdiction of the courts, including this Court, to protect and preserve the autonomy and supremacy of the "proceedings" of the Council against judicial interference. The term "proceedings" as used in Article 211, has been astutely elaborated in the case of **Iftikhar Muhammad Chaudhry v. President of Pakistan**⁴⁷, wherein it was observed that the word "proceedings" does not stand alone or is unqualified in the said provision but stands restricted and qualified by three other words, "before the council".⁴⁸ Accordingly, the ouster of this Court's jurisdiction applies to all proceedings that may take place before the Council. If the Council is to decide on whether or not it should exercise its *suo moto* powers, such a decision would be a "proceeding" before the Council and thus protected under Article 211 against any judicial intrusion. This constitutional protection exalts the position of the Council and establishes its legally lofted supremacy in matters relating to initiating and proceeding with inquiries against the Judges of the Superior Judiciary. And unless the

⁴⁷ PLD 2010 SC 61.

⁴⁸ *Ibid*, para 67.

very proceedings of the Council to proceed against a Judge of the Superior Judiciary is positively adjudged to be *coram non judice, mala fide* or without jurisdiction, Courts are to jealously maintain the constitutional independence of the Council.

5. In view of this constitutional mandate, any directions of this Court setting steps for the Council, and for that matter, for its Hon'ble Chairman and learned Secretary, to follow or to refrain from following and that too, without first adjudging its actions or inactions to be *coram non judice, mala fide* or without jurisdiction would amount to excessive exercise of jurisdiction by this Court under Article 184(3) and Article 187(1) of the Constitution. Such directions of the Court amount to usurping the exclusive constitutional jurisdiction vested in the Council under Article 209 and protected under Article 211 of the Constitution.

6. To sum up, it would be safe to state that this Court did not have the jurisdiction to issue the impugned directions to the Council to consider initiating, or otherwise, an inquiry against the Petitioner Judge based on the "information" received from the tax officials of the FBR. If the instructions of the Court to the Council to consider the report of the tax officials, as vehemently argued by the contesting respondents, are not strictly considered or taken as "directions" to the Council, even then the same has the effect of making this Court a "complainant", and not the "adjudicator" in the matter. Similarly, if this Court issues directions to the contrary, that is, refraining the Council from considering "information" obtained, this Court would then too be exceeding its mandated constitutional jurisdiction.

7. Another important aspect that escaped the notice of this Court, while issuing the impugned directions to the tax officials was that the impugned directions, in effect, created a parallel regime alien to the

scheme envisaged under the Ordinance. The Ordinance provides an intricate mechanism for the tax authorities to proceed in various matters relating to taxpayers, which range from procedural guidelines, specific timelines and jurisdiction available to the concerned authorities, while at the same time, it also provides protection to the person being assessed, adhering to the settled principles of 'due process' and 'natural justice'.

8. This Court has, in the judgment under review, passed binding directions to the tax officials to proceed in a set manner, overlooking the provisions of the Ordinance relating to taking cognisance of "definite information"; scrutiny of information and assessment of income tax returns; and territorial jurisdiction.⁴⁹ Moreover, in making the impugned directions, we also lost sight of the procedure provided in the Ordinance, as to how tax officials are: (i) to proceed against a tax filer that has undeclared income and assets or mis-declared the same and within what time period; (ii) to determine the source of funds for purchasing the undeclared assets, whether generated in Pakistan or in some foreign country; and (iii) above all, to which tax year the undeclared local assets or source of funds and the undeclared foreign assets and source of funds are to be added to and assessed.⁵⁰

9. With the force and guidance of the impugned directions of this Court, and that too, against persons not party in the constitution petitions, expecting the probe by the tax authorities to abide by the "due process" provided under the Ordinance, would be a far cry. In the circumstances of the case, the matter of probe against the spouse and children of the Petitioner Judge should, I think, best have been left to the concerned tax authorities to proceed under the Ordinance, without any

⁴⁹ Section 209 of the Ordinance.

⁵⁰ Section 111 of the Ordinance.

specific directions. By giving directions to the tax authorities to proceed with the matter on the basis of a procedure and timeline foreign to the Ordinance, this Court has ultimately subdued the procedure prescribed under the Ordinance by expanding its role, inadvertently, as 'legislator' rather than 'adjudicator'.

10. Much was argued from both sides about whether Mrs. Sarina Faez Isa, who was not a party to the proceedings, was provided with a fair "hearing" befitting the bare threshold to suffice the principles of natural justice, before her case was referred to the tax authorities. One should not expect a consensus of a ten-member Bench on this factual controversy, as to whether Mrs. Sarina Faez Isa was provided with a fair "hearing", and that too, based solely on her informal statement made while addressing the Court *via* video link on 18.06.2020. Therefore, in these review proceedings, it would be appropriate to remain focused on the core issues involved in the constitution petitions, and not be distracted by the factual controversy, as to whether Mrs. Sarina Faez Isa was provided with a fair and adequate opportunity to be heard before directing the tax officials to scrutinise her foreign assets. For, when a Court sits to review its own judgment or order, it does not hear a new case but only reconsiders its decision on the issues involved in the case already heard and decided, within the limits of its review jurisdiction.

11. Another error that crept in while making the impugned directions is the distraction from the fundamental issue of alleged misconduct of the Petitioner Judge *qua* the non-disclosure of foreign assets of his spouse, in his wealth statement, filed with the income tax returns under Section 116 of the Ordinance. Though this was the main controversy, the impugned directions directed the tax officials to proceed against the spouse and children of the Petitioner Judge regarding the subject foreign properties, instead of directing the tax officials to proceed against the

Petitioner Judge to determine his liability, if any, in accordance with the Ordinance. Under the Ordinance,⁵¹ when a tax filer fails to furnish adequate justification for an asset, the same is then deemed as the tax filer's asset procured through unexplained income chargeable to tax, and the tax is charged accordingly by adding that income under the head "Income from other Sources". Thus, in case the spouse and children of the Petitioner Judge fail to adequately justify the sources of fund for purchasing the foreign assets, the same would be deemed even then, under the Ordinance, to be owned by them, and not by the Petitioner Judge. Our concern, in the constitution petitions, wherein the impugned directions have been given, was with respect to the independence of the judiciary and the accountability of the judges in the context of alleged misconduct of the Petitioner Judge, which has, in my opinion, been detracted from, by making the impugned directions against his family members.

12. In view of the above deliberations, I find that the impugned directions affecting the rights of Mrs. Sarina Faez Isa, her son and daughter, have been passed by this Court in excess of jurisdiction, and are, therefore, recalled. Consequently, the "superstructure" of subsequent proceedings, actions, orders and reports built on the legally faulty "foundation" of the impugned directions would fall and have no legal effect on the rights and obligations of Mrs. Sarina Faez Isa, her son and daughter.

13. As for the effect of the above declaration *qua* the allegation of misconduct against the Petitioner Judge, suffice it to state that it does not diminish or dilute the constitutional authority of the Council to consider, on its own motion, an "information" received from "any source", whatever it may be, including the "information" contained in the report

⁵¹ Section 111 of the Ordinance.

received from the tax official, for deciding to initiate an inquiry, or otherwise, into the conduct of the Petitioner Judge. In this regard, we should not lose sight of clause 5 of Article 209 of the Constitution, which clearly provides that "information from any source" can form the basis of an inquiry by the Council against a Judge of the Superior Judiciary. The legal significance and practical implication of the insertion of the word "any" prefixing the word "source" in clause 5 of Article 209 of the Constitution has, in fact, expanded the pool from which the Council may obtain "information" to initiate an inquiry into the conduct or capacity of a Judge of the Superior Judiciary. To interpret the word "any" used in clause 5 of Article 209 of the Constitution in a manner that would dilute the authority of the Council and restrict the information it can or cannot consider would amount to defeating the very command of the Constitution. Therefore, the Council, "on information" emanating from "any source" can proceed, on its own motion, with an inquiry into the capacity or conduct of any Judge of the Superior Judiciary. The decision on the question, whether to commence the inquiry or otherwise, is a matter that is within the exclusive domain of the Council. This Court, or for that matter any other Court, lacks the jurisdiction to restrict this vast authority vested in the Council by the Constitution - the supreme law of the land.

14. Before concluding, I think it is proper to make clear that the present order, by no means, seeks to curtail the lawful authority of the President, the Council and the tax officials to proceed against any Judge of the Superior Judiciary, including the Petitioner Judge, in accordance with law as mandated by Article 4 of the Constitution. We cannot champion the rule of law if we breed complacency in judicial accountability, a feature that seeks to uphold and bolster the rule of law. Thus, it is important to ensure that there are no artificial impediments to

ensuring accountability of judges, provided accountability is pursued in accordance with law. This exposition of authority, in particular, of the tax officials, however, should in no way detract them from their statutory duty to remain steadfast in ensuring the confidentiality of the information of a tax filer as mandated under section 216 of the Ordinance which, as noted in the judgment under review, was blatantly breached in the case of Mrs. Sarina Faez Isa: the tax officials on the unlawful directions issued by the Chairman ARU, Barrister Shahzad Akbar with the concurrence of the Federal Law Minister, Dr. Farogh Naseem, breached the statutory confidentiality of Mrs Sarina Faez Isa's tax returns. I feel constrained to observe that allowing the said delinquents to continue in such important positions of authority by the worthy Prime Minister, and that too after this Court has unanimously declared their actions to be in violation of the Constitution and law, particularly the provisions of section 216 of the Ordinance entailing penal consequences,⁵² belies the most elementary principles of "good governance", and expose the worthy Prime Minister's complicity in the commission of the said violations.

15. As far as Civil Review Petition No.296 of 2020 is concerned, that is, in my view,⁵³ not maintainable, as the *locus standi* of the Petitioner Judge to invoke the original jurisdiction of this Court under Article 184(3), as well the review jurisdiction therein, stands eclipsed till he holds the office of a Judge of the Supreme Court of Pakistan; for he owes an obligation under clause 8 of Article 209 of the Constitution to observe the Code of Conduct issued by the Council for Judges of the Superior Judiciary, that, *inter alia*, requires him to avoid being involved in litigation, for himself or even on behalf of others, which includes public

⁵² See Judgment of Umar Ata Bandial J, paras 85 and 136(x); Judgment of Maqbool Baqar J, para 65; Judgment of Syed Mansoor Ali Shah J, paras 38 and 81(ii); Judgment of Yahya Afridi, J., paras 47 and 52.

⁵³ See my view recorded in detail in my minority judgment delivered on 23 October 2020 in Constitution Petition No. 17/2019 of the Petitioner Judge.

interest litigation under Article 184(3) of the Constitution. The object is to avert any chance of a Judge of the Superior Judiciary being placed in a position, where his conduct may be seen as unbecoming of a Judge, glimpses of which were seen during the proceedings of the present review petitions.

16. In summation of the above discourse, my considered opinion on the essential issues raised in the present review petitions are that:

- i. This Court cannot pass any direction that would, in essence, prompt or pre-empt the Council to proceed in a certain manner or refrain it to proceed in any manner as it would, in fact, amount to judicial intervention in the "proceedings before the Council", and thereby offend the express mandate of Article 211 of the Constitution, unless the very "proceedings" are determined to be *coram non judice*, *mala fide* or without jurisdiction, which has not been established in the case in hand;
- ii. The impugned directions of this Court to the Council to consider the Report of the tax officials amounts to judicial interference in the "proceedings before the Council", and thus violates the autonomy and supremacy of the "proceedings" of the Council against judicial interference envisaged under Article 211 of the Constitution;
- iii. The Council is, however, on its own motion, competent to consider or refuse to consider "information" received from "any" source, be it the Report of the tax officials, to determine whether to inquire or not inquire into the conduct of the Petitioner Judge or otherwise;
- iv. The impugned directions to the tax officials to inquire into the affairs of the spouse and children of the Petitioner Judge, setting out the manner and the timeframe in which they are to proceed, violate and are alien to, the provisions of the Income Tax Ordinance, 2001, and have subverted the procedure prescribed thereunder;
- v. The President and the Council have the authority, and are free to proceed against any Judge of the Superior Judiciary, including the Petitioner Judge for alleged misconduct, in accordance with Article 209 of the Constitution;
- vi. The tax officials are competent to proceed against the Petitioner Judge or any other Judge of the Superior Judiciary, serving or retired, his spouse or/and children, without fear or favour, in

relation to his or her tax affairs only in accordance with the provisions of the Income Tax Ordinance, 2001 and not otherwise on the basis of unlawful directions;

- vii. Section 216 of the Income Tax Ordinance, 2001, commands confidentiality of the information of a tax filer, and breach thereof exposes the delinquent to penal consequences under sections 198 and 199 of the Ordinance. Such consequences are attracted in the present case to those giving the unlawful directions, namely, Chairman ARU, Barrister Mirza Shahzad Akbar with the concurrence of the Federal Law Minister, Dr. Farogh Naseem; the tax officials executing the unlawful directions in breach of section 216 of the Ordinance; and finally, the worthy Prime Minister, who despite clear and unanimous finding of misdoings of the named delinquents by this Court, retained them in positions of authority, thereby blatantly exposed himself to complicity in the commission of the said violation.
- viii. The Petitioner Judge or any other serving Judge of the Superior Judiciary lacks the *locus standi* to invoke the original jurisdiction of this Court under Article 184(3), as well as the review jurisdiction therein, as their right to invoke the same stands eclipsed, till they hold the office of a Judge of the Superior Judiciary, essentially to avert a position where their conduct may be seen as unbecoming of a Judge, as ordained in Code of Conduct issued by the Council for Judges of the Superior Judiciary.

17. These are the detailed reasons for my short order dated 26.04.2021, which read:

For the reasons to be recorded later, all review petitions except C.R.P. No. 296 of 2020, are allowed and the directions contained in paragraphs No. 4 to 11 of the order dated 19.06.2020 and detail judgment dated 23.10.2020 passed in Constitution Petition No. 17 of 2019 and other connected petitions are recalled. Consequently, all the subsequent proceedings, actions, orders and reports made in pursuance of the said directions are declared to be of no legal effect and/or consequences.

Sd/-
Judge