

Study Guide



SCP

Supreme Court of Pakistan

SUPREME COURT OF PAKISTAN



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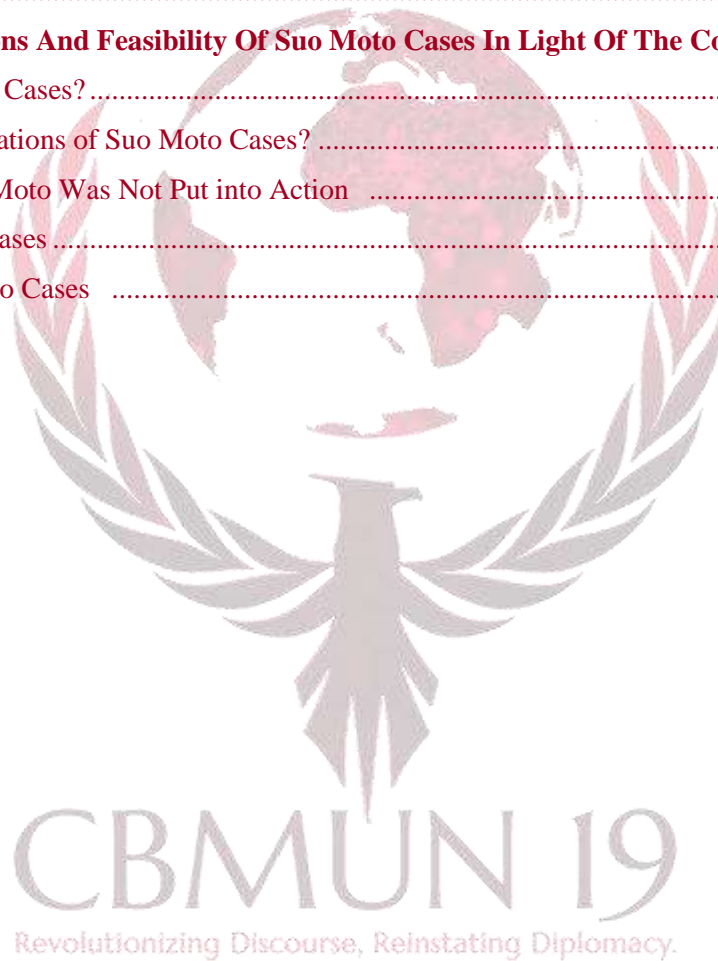


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Table of Contents

INTRODUCTION.....	4
CASE 1: Action To Be Taken Against Leader	5
Article 62	5
Article 63	6
Procedure Of Disqualification According To Article 62 And 63	8
Past Precedents	9
CASE 2: Limitations And Feasibility Of Sua Moto Cases In Light Of The Constitution.....	10
What are Sua Moto Cases?	10
What are the Limitations of Sua Moto Cases?	12
Cases Where Sua Moto Was Not Put into Action	13
Recent Sua Moto Cases	13
Feasibility Sua Moto Cases	15





INTRODUCTION

The Supreme Court of Pakistan is the highest appellate court of the country and court of last resort. It is the final arbiter of the law and the Constitution. Its orders/decisions are binding on all other courts in the country. All executive and judicial authorities are bound to act in aid of the Supreme Court. The Constitution contains elaborate provisions on the composition, jurisdiction, powers and functions of the Court. The qualifications for and mode of appointment of judges, the age of retirement, the grounds and procedure for removal and the terms and conditions of service of judges are elaborately prescribed. The Constitution provides for the independence of judiciary and its separation from the executive. The Constitution assigns the Supreme Court a unique responsibility of maintaining harmony and balances between the three pillars of the State, namely, the Legislature, the Executive and the Judiciary. As guardian of the Constitution, the Court is required to preserve, protect and defend this basic document.

The Supreme Court exercises original, appellate and review jurisdiction. It possesses exclusive original jurisdiction for the settlement of intergovernmental disputes between Federal and Provincial Government(s) or Provincial Governments inter se. Under this jurisdiction, the Court pronounces declaratory judgments. The Supreme Court can also exercise original jurisdiction, with respect to the enforcement of fundamental rights, if the case involves an issue of public importance. The Court also exercises advisory jurisdiction, where under the President may obtain its opinion on a question of law. Under its appellate jurisdiction, the Court entertains appeals against orders and decisions of High Courts and other special courts/tribunals.

The Supreme Court was created under the Constitution of 1956. It succeeded the Federal Court, set up in 1948, which was successor to the Federal Court of India, established in 1937. Since its creation in 1956, the Supreme Court has retained its name and jurisdiction through the successive legal instruments including the Constitution of 1973.

SUPREME COURT OF PAKISTAN AT CBMUN'19

Two petitions will be before the court. All two must be discussed and assessed. Half of the delegates will be respondents, and the other half will be petitioners, for each. The awards will be decided on the basis of which advocate presents the most legitimate analysis on the petitions. Lobbying etc. will be kept at a minimum though un-moderated caucuses will exist. Both blocs have to present one document each on their arguments for each case.

The delegates are expected to explore the workings of law making as well so arguments such as societal implications of any legislation would not be relevant to the court. However, such arguments will be accepted as long as they are secondary to the legal imperative behind them.



CASE 1: ACTIONS TO BE TAKEN AGAINST THE LEADER (IN REFERENCE TO ARTICLE 62, 63).

ARTICLE 62

Article 62 of the constitution of the Islamic Republic of Pakistan states the basic fundamental conditions for the qualification of an individual for a seat in the parliament of Pakistan.

The parliament of Pakistan (Majlis-e-Shoora) comprises of the upper house (Senate) and the lower house (National Assembly).

The following are the required conditions for qualifications:

1. A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless:

- a) He is a citizen of Pakistan;
 - b) He is, in the case of the National Assembly, not less than twenty -five years of age and is enlisted as a voter in any electoral roll in-
 - i. Any part of Pakistan, for election to a general seat or a seat reserved for non-Muslims; and
 - ii. Any area in a Province from which she seeks membership for election to a seat reserved for women.
 - c) He is, in the case of Senate, not less than thirty years of age and is enrolled as a voter in any area in a Province or, as the case may be, the Federal Capital or the Federally Administered Tribal Areas, from where he seeks membership;
 - d) He is of good character and is not commonly known as one who violates Islamic Injunctions;
 - e) He has adequate knowledge of Islamic teachings and practices obligatory duties prescribed by Islam as well as abstains from major sins (consumption of alcohol, adultery, gambling, fornication)
 - f) **He is sagacious, righteous and non-profligate, Sadiq and Ameen(honest and trustworthy), there being no declaration to the contrary by a court of law.**
 - g) He has not, after the establishment of Pakistan, worked against the integrity of the country or opposed the ideology of Pakistan.
2. The disqualifications specified in paragraphs (d) and (e) shall not apply to a person who is a non-Muslim, but such a person shall have good moral reputation.



ARTICLE 63

Article 63 of the constitution of the Islamic Republic of Pakistan states the basic fundamental conditions for the disqualification of an individual for a seat in the parliament of Pakistan.

Any individual falling under the following conditions is considered disqualified.

1. A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if:
 - a) A person declared of unsound mind by a competent court.
 - b) He ceases to be a citizen of Pakistan, or acquires the citizenship of a foreign State; or
 - c) He holds an office of profit in the service of Pakistan other than prescribed.
 - d) He is in the service of any statutory body or anybody which is owned or controlled by the Government or in which the Government has a controlling share or interest; or
 - e) Being a citizen of Pakistan by virtue of section 14B of the Pakistan Citizenship Act, 1951 (II of 1951), he is for the time being disqualified under any law in force in Azad Jammu and Kashmir from being elected as a member of the Legislative Assembly of Azad Jammu and Kashmir; or
 - f) He has been convicted by a court of competent jurisdiction for propagating any opinion, or acting in any manner, against the ideology of Pakistan, or the sovereignty, integrity or security of Pakistan, or morality, or the maintenance of public order, or the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary or the Armed Forces of Pakistan, unless a period of five years has elapsed since his release; or
 - g) He has been, on conviction for any offence involving moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release; or
 - h) He has been dismissed from the service of Pakistan or service of a corporation or office set up or, controlled, by the Federal Government, Provincial Government or a Local Government on the grounds of misconduct, unless a period of five years has elapsed since his dismissal; or
 - i) He has been removed or compulsorily retired from the service of Pakistan or service of a corporation or office set up or controlled by the Federal Government, Provincial Government or a Local Government on the ground of misconduct, unless a period of three years has elapsed since his removal or compulsory retirement; or
 - j) He has been in the service of Pakistan, unless a period of two years has elapsed since he ceased to be in such service; or
 - k) He, whether by himself or by any person or body of persons in trust for him or for his benefit or on his account or as a member of a Hindu undivided family, has any



share or interest in a contract, not being a contract between a cooperative society and Government, for the supply of goods to, or for the execution of any contract or for the performance of any service undertaken by, Government:

Provided

That the disqualification under this paragraph shall not apply to a person-

- i. Where the share or interest in the contract devolves on him by inheritance or succession or as a legatee, executor or administrator, until the expiration of six months after it has so devolved on him;
- ii. Where the contract has been entered into by or on behalf of a public company as defined in the Companies Ordinance, 1984, of which he is a share-holder but is not a director holding an office of profit under the company; or
 - The office of Lumbardar(powerful land lord families), whether called by this or any other title;
 - Anyoffice holder, by virtue of such office, is liable to be called up for military training or military service under any law providing for the constitution or raising of a Force; or
 - he has obtained a loan for an amount of two million rupees or more, from any bank, financial institution, cooperative society or cooperative body in his own name or in the name of his spouse or any of his dependents, which remains unpaid for more than one year from the due date, or has got such loan written off; or
 - he or his spouse or any of his dependents has defaulted in payment of government dues and utility expenses, including telephone, electricity, gas and water charges in excess of ten thousand rupees, for over six months, at the time of filing his nomination papers; or
 - he is for the time being disqualified from being elected or chosen as a member of the Majlis-e-Shoora (Parliament) or of a Provincial Assembly under any law for the time being in force.

For the purposes of this paragraph “law” shall not include an Ordinance promulgated under Article 89 or Article 128.

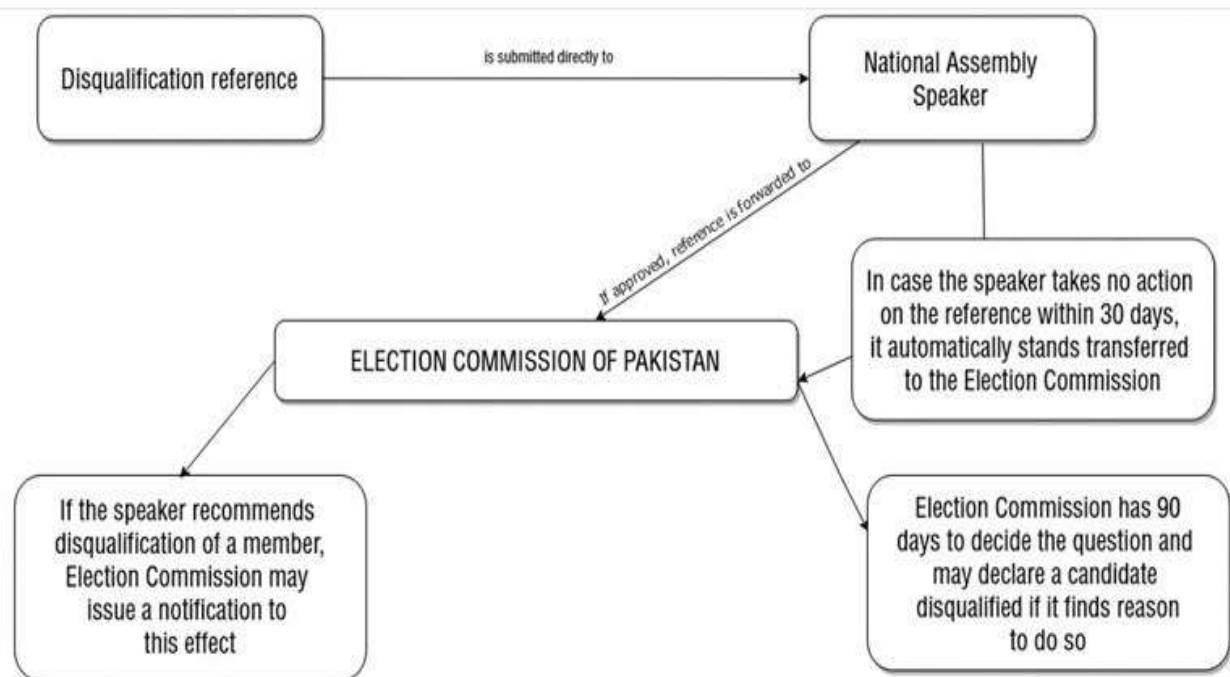
2. If any question arises whether a member of Majlis-e-Shoora (Parliament) has become disqualified from being a member, the Speaker or, as the case may be, the Chairman shall, unless he decides that no such question has arisen, refer the question to the Election Commission within thirty days and should he fail to do so within the aforesaid period it shall be deemed to have been referred to the Election Commission.



3. The Election Commission shall decide the question within ninety days from its receipt or deemed to have been received and if it is of the opinion that the member has become disqualified, he shall cease to be a member and his seat shall become vacant.

PROCEDURE OF DISQUALIFICATION ACCORDING TO ARTICLE 62 AND 63

After the conclusion of the court proceedings and issuance of the court verdict of disqualification, the following process is followed.





PAST PRECEDENTS

Former Prime Minister Yousuf Raza Gilani was disqualified on 19th June 2012 from holding a seat in parliament for committing contempt of the court on moral turpitude in terms of Article 63 of the Constitution which specifies disqualification for a period of five years.

Former Prime Minister Mian Nawaz Sharif was ousted from his office by the order of the Supreme court on 28th July 2017 under article 62 1(f) and 63 of the constitution of Islamic Republic of Pakistan. The reason being he was dishonest in disclosing his employment to the Dubai-Based Capital FZE company in his nomination papers filled in the election commission of Pakistan.

Similarly, former PTI (Pakistan Tehreek-e-Insaf) General Secretary Jehangir Khan Tareen was disqualified under article 62 1(f) on 15th December 2017 as he had not declared his property e.g. “Hyde House” in his nomination papers filled at the Election Commission of Pakistan.





CASE 2: LIMITATIONS AND FEASIBILITY OF SUO MOTO CASES IN LIGHT OF THE CONSTITUTION:

WHAT ARE SUO MOTO CASES?

Suo Moto is a term that is given to an action of authority which it takes on its own will without any pressure from external political factors. Suo moto is specifically defined as "on its own motion," and it is a Latin legal term with the similar definition as of term 'suasponte'. When a government agency acts according to its own apprehension and knowledge regarding a case, it's often said, "the Commission took Suo moto control over the matter. "The judicial governance takes an action once a party brings upon a case which it wants to be judged on legal basis. High Court and Supreme Court of Pakistan possess the power to instigate a hearing by themselves without the need of any one filling any appeal or writing a petition in order to get the case approved for its discussion. Only in the need of serious immediate intervention within the legal boundaries, Suo Moto gets in order. However, there are heated debates against the discussion of whether there should be application of Suo Moto within the state of Pakistan or not. There have been an unconditional number of cases that require attention from elected institutions but they are often ignored; hence, the asset of Sou Moto cases is used in this case. On the contrary, they also get overused which further puts the rule of law in a threatened position.

Law 184(3):

184. Original jurisdiction of Supreme Court.-(1) The Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in any dispute between any two or more Governments.

Explanation:-In this clause, "Governments" means the Federal Government and the Provincial Governments.

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



APPLICATIONS FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER ARTICLE 184(3) OF THE CONSTITUTION:

1. An application for a writ of habeas corpus shall be filed in the Registry and shall be accompanied by an affidavit by the person restrained, stating that the application is made at his instance and setting out the nature and circumstances of the restraint. The application shall also state whether the applicant has moved the High Court concerned for the same relief and, if so, with what result:

Provided that where the person restrained is unable owing to the restraint to make the affidavit, the application shall be accompanied by an affidavit to the like effect made by some other person, which shall state the reason why the person restrained is unable to make the affidavit himself.

2. The application shall be heard by a Bench consisting of not less than two Judges.
3. If the Court is of opinion that a prima facie case for granting the application is made out, a rule nisi shall be issued calling upon the person or persons against whom the order is sought, to appear on a day to be named therein to show cause why such order should not be made and at the same time to produce in Court the body of the person or persons alleged to be illegally or improperly detained then and there to be dealt with according to law.
4. On the return day of such rule or any day to which the hearing thereof may be adjourned, the Court shall, after hearing such parties as are present and wish to be heard, make such order as in the circumstances it considers to be just and proper.
5. In disposing of any such rule, the Court may, in its discretion, make such order for costs as it may consider just.
6. An application for the enforcement of any other fundamental right shall be filed in the Registry. It shall set out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and shall be accompanied by an affidavit verifying the facts relied on, and at least eight copies of the said application and affidavit shall be lodged in the Registry. It shall also state whether the applicant has moved the High Court concerned for the same relief and, if so, with what result. The application shall be made by notice of motion, but the Registrar may in appropriate cases put up the application before the Court for orders as to the issue of notice.
7. Such application shall be heard by a Bench consisting of not less than two Judges of the Court. Unless the Court otherwise directs, there shall be at least eight clear days between the service of the notice of motion and the day named therein for the hearing of the motion.
8. Copies of the said application and the affidavit in support thereof shall be served with the notice of motion and every party to the proceeding shall supply to any other party, on demand and on payment of the proper charges, copies of any affidavit filed by him.
9. The notice shall be served on all persons directly affected, and on such other persons as the Court may direct:

Provided that on the hearing of any such motion, any person who desires to be heard in opposition to the motion and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with the notice of motion and shall be liable to costs in the discretion of the Court.

10. The Court may in such proceedings impose such terms as to costs and as to the giving of security as it deems fit.
11. The provisions of Order XVII relating to petitions shall, so far as may be applicable, apply to applications under this Order.



WHAT ARE THE LIMITATIONS OF SUO MOTO CASES?

The PBC has proposed that the “SC should suitably amend the Supreme Court Rules, 1980, to regulate and structure the parameters of the exercise of suo moto powers, and a Special Bench of the Court should be constituted for the hearing of suo moto cases.” To strengthen the constitutional balance-of-powers in Pakistan, the PBC believes that the top court should exercise its powers under Article 184 (3) of the Constitution more sparingly, in order” to maintain the principle of tracheotomy of powers”. There are concerns that, owing to its increasingly active use of suo moto powers, this balance have begun to tilt too far in the direction of the judiciary. What some see as a proudly “independent” judiciary, others see as an increasingly “unaccountable” court.

Concerns:

- 1) Doubts about allocation of cases to different branches of Supreme Court emerge.
- 2) Need for better transparency methods increase.
- 3) The system through which judiciary functions gets negatively affected and confidence of public in these institutions gets undermined.
- 4) An accused right to a fair trial and right to appeal are often undermined and denied. There is a high potential for trespassing into the constitutional powers and roles of other institutions and branches of the State.
- 4) The Court’s exercise of its ‘fundamental rights jurisdiction’ is visualized to not be in accordance with the safeguard and promotion of human rights, and based more on political calculations comparatively rather than a bona fide and appropriate legal interpretation and explanation of ‘public importance’ or the identification or clarification of ‘fundamental rights’.

If we look upon the recent “disqualification” judgments, we conclude over the following findings:

Article 62(1)(f) of Pakistan’s constitution states that there shall be no person getting elected from parliament unless they are “sagacious, righteous and non-profligate, honest and Ameen (trustworthy), there being no declaration to the contrary by a court of law.”

The Supreme Court interpreted its 184(3) jurisdiction to include making “declarations” about the “honesty” of a member of parliament under Article 62(1)(f), making them responsible for their membership’s disqualification as well as being prohibited from contesting elections for a lifetime. Through this process, politicians like Prime Minister Nawaz Sharif and a senior leader of the Pakistan Tehreek-e-Insaaf, Jahangir Khan Tareen, were both disqualified.

Not defying the fact that the vague, indefinite and subjective formulation of Article 62(1)(f) fails to accomplish the implementation of its doctrine symbolizing legality. Courts should not be making such moralistic and subjective determinations in the first place, it is important to note that in all these cases, the Supreme Court made a declaration of “dishonesty” against members of parliament without a trial and in the absence of conviction for any crime.



CASES WHERE SUO MOTO WAS NOT PUT INTO ACTION:

1) Raymond Allen Davis Incident:

Raymond Allen Davis is a former United States Army soldier, private security firm employee, and contractor with the Central Intelligence Agency (CIA).

Series of events which occurred:

1. On January 27, 2011, Davis killed two armed men in Lahore.
2. After a lot of contending and defending shown by US government which continued emphasizing that Davis was protected by diplomatic immunity as he was employed with the US consulate in Lahore, Davis was therefore still jailed with crime charges in Pakistan with double murder and illegal possession of firearm.
3. A car which was coming to aid Davis had a hit and run accident where it killed a third Pakistani man, Ibadur Rahman.
4. On March 16 2011, Davis was released after the families of two killed men were paid \$2.4 million in 'diyya'-blood money.
5. He was acquitted from all the charges and was immediately departed from Pakistan.
6. In June 2017, Davis launched his book titled 'The Contractor: How I Landed in a Pakistani Prison and Ignited a Diplomatic Crisis', in which he narrated of the incident and the events which occurred during his imprisonment in Pakistan. Pakistan's former interior minister Rehman Malik termed the book a "pack of lies" maligning Pakistan's government and military, denying allegations regarding the extent of Pasha's role, and accused Davis of ulterior motives.
7. Pakistan Tehreek-e-Insaf (PTI) leader Shah Mehmood Qureshi claimed that he was trying to be in the limelight after the disclosures made by the CIA agent Raymond Davis in his book.
8. Pakistan People Party (PPP) took exception from this statement.

Criticism:

"There was never a question of giving Raymond Davis diplomatic immunity," said PPP Senator Saeed Ghani while reacting to the statement. He said Shah Mehmood Qureshi was claiming fake events and there was not an iota of truth in his claim. In the cabinet reshuffle of the time, Senator Saeed Ghani said it was a huge shock to Shah Mehmood Qureshi when he was not made foreign minister. His views indicated confusion that when the relevant institutions and the government were all on the same page regarding Raymond Davis Case, then why Suo-Moto case not taken.

RECENT SUO MOTO CASES:

1) TLP's Dharna:

Article 184 (3) of the Constitution and Supreme Court's Jurisdiction 6:

This Court had invoked jurisdiction under Article 184 (3) of the Constitution of the Islamic Republic of Pakistan ("the Constitution"), which provision is reproduced hereunder:



Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, have the power to make an order of the nature mentioned in the said Article.5 Section 508 of the Pakistan Penal Code, 1860 makes it a punishable offence to induce a person to believe that he will be rendered an object of Divine Displeasure, and illustration (a) thereunder is with regard to a person who “sits dhurna”.Chapter 1 of Part II referred to in Article 184 (3) of the Constitution is titled “Fundamental Rights” and Articles 9 through to 28 of the Constitution set out specific fundamental rights. These fundamental rights are categorized as human rights in many countries and in international treaties.

The jurisdiction invoked by this Court was neither questioned nor challenged. However, as the original jurisdiction of this Court was invoked we should ensure that it was done in accordance with the Constitution. Part VII of the Constitution is titled “The Judiciary” and is divided into different chapters: Chapter 1 – The Court, Chapter 2 – The Supreme Court of Pakistan, Chapter 3 – The High Courts and Chapter 3A – Federal Shariat Courts. The Constitution stipulates that, “No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law”. The Constitution confers a number of different jurisdictions on the Supreme Court. The most commonly used one is this Court’s appellate jurisdiction where under appeals and petitions for leave to appeal are heard; these arise from cases already decided by a High Court or tribunal. Under its transfer jurisdiction this Court may, “transfer any case, appeal or other proceedings pending before any High Court to any other High Court”.The advisory jurisdiction of this Court may be availed of by the President to seek the opinion of this Court, “on any question of law which he considers of public importance”. The Supreme Court is also empowered to decide, “Any dispute between any two or more Governments” In the exercise of its review jurisdiction this Court has the power to review its own judgments and orders. The Supreme Court also has an ancillary power, “for doing complete justice in any case or matter pending before it”.

Jurisdiction under Article 184 (3) may be invoked by the Supreme Court if two preconditions are met. Firstly, the matter must be one of public importance and, secondly, it must pertain to the enforcement of any of the Fundamental Rights. The term public importance however is not defined in the Constitution. We may therefore, in accordance with settled principles of interpretation, consider whether the same phrase – public importance – is used elsewhere in the Constitution, and if so, by reference thereto the scope of these words can be better determined. Every citizen has the fundamental right to access “information in all matters of public importance”. The President may “obtain the opinion of the Supreme Court on any question of law which he considers of public importance”. Appeals from a judgment, decree, order or sentence of an Administrative Court or Tribunal lies to the Supreme Court if it, “involves a substantial question of law of public importance”. These provisions like Article 184 (3) of the Constitution use the word “public” in conjunction with the word “importance” meaning thereby that the mere importance added, matter isn’t, in itself, sufficient to invoke jurisdiction. The matter must be one of public importance, that is, it must involve the rights of public too.



2) Rao Anwar Case:

The Supreme Court of Pakistan took Suo Moto notice of the alleged extrajudicial murder of Naqeebullah Mehsud in Karachi. Chief Justice of Pakistan (CJP) Mian Saqib Nisar asked the Sindh IGP to submit a report within seven days. 27 years old Naqeebullah hailing from South Waziristan was alleged to be among four suspects who got killed in an encounter with a police team led by Senior Superintendent of Police (SSP) Rao Anwar in the Usman Khaskheli Goth on the outskirts of the metropolis. However, no evidence has been approved declaring any crime being committed- not withstanding police allegations, specifically those made by SSP Anwar.

FEASIBILITY OF SUO MOTO CASES:

