PLD 2001 Supreme Court 607

Present: Irshad Hasan Khan, CJ.

Muhammad Bashir Jehangiri,

Ch. Muhammad Arif and Qazi Muhammad Farooq, JJ

KHAN ASFANDYAR WALI and others---Petitioners

versus????????????

FEDERATION OF PAKISTAN through Cabinet Division, Islamabad and others---Respondents

Constitutional Petitions Nos. 13, 10, 27, 15, 16, 17, 28, 24, 26, O1, 14,19, 20, 32 and 33 of 2000 decided on 24th April, 2001.

(a) Constitution of Pakistan (1973)---

----Art.184(3)---National Accountability Bureau Ordinance (XVIII of 1999), Preamble---Constitutional petition under. Art.184(3) of the Constitution before Supreme Court---Maintainability ---Vires of National Accountability Bureau Ordinance, 1999--- Constitutional petitions were admitted for hearing as questions raised therein ,(detailed below) were matters of first impression and of great public importance involving Fundamental Rights, as ordained by Art.184(3 , of the Constitution and there was another circumstance that Supreme Court had commented upon in the case of S Yed Zafar Ali Shah and others v General Pervez Mussharaf, Chief Executive of Pakistan and others reported as PLB 2000 SC 869 that "the validity of National Accountability Bureau Ordinance, 1999 will be examined separately in appropriate proceedings at appropriate stage."

Following are the common points emerging from the Constitutional petitions for consideration of the Court:

"(i) Whether the impugned Ordinance creates a parallel judicial system in disregard of the provisions of Articles 175, 202 and 203 of the Constitution and is violative of the law laid down by this Court in the case of

Mehram Ali and others v. Federation and others (PLD 1998 SC 1445)?

(ii) Whether section 2 of the impugned Ordinance whereby it deems to have come into force with effect from 1-1-1985 being retrospective contravenes the Fundamental .Right enshrined in _ Article 12 of the Constitution insofar as it creates a new offence of 'wilful default' with retrospective effect?

(iii) Whether section 5(r) of the impugned Ordinance which defines `wilful default' negates the. freedom of trade, business or profession as contemplated by Article .18 of the Constitution, which guarantees that subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business?

(iv) Whether the power vesting in the Chairman, National Accountability Bureau or the Court trying a person for any offence under the impugned Ordinance vide clause (a) of section 12 .and by providing in clause (c)(iv) thereof that any such order shall remain in force for a period of up to thirty days. is an unreasonable restraint and violative of Articles 4, 9, 23 and 24 of the Constitution?

(v) Whether clause (d) of section 14 of the impugned Ordinance whereby the burden of proof in respect of an offence under section 9(a)(vi) .and (vii) has been-placed on the accused and his conviction has been conferred validity, is violative of Articles 4 and 25 of the Constitution?

(vi) Whether section 16(d) of the impugned Ordinance which authorises the Chairman, National Accountability Bureau to select the venue of the trial by filing a reference before any Accountability Court established anywhere in Pakistan, suffers from excessive delegation?

(vii) Whether section 17 (c) the impugned Ordinance which enables the Accountability Court to dispense with any provision of the Code of Criminal Procedure, 1898, and follow such procedure as it may deem fit in the circumstances of the case, is violative of Articles 4 and 25 of the Constitution?

(viii) Whether section 18 of the impugned Ordinance which prohibits the Accountability Court to take cognizance of any offence under the impugned Ordinance except on a reference made

by Chairman, National Accountability Bureau or an officer of the National Accountability Bureau duly authorised by him, amounts to excessive delegation?

(ix) Whether section 24(d) of the impugned Ordinance which empowers the Chairman, . National Accountability Bureau to detain in his custody an accused person up to a period of ninety days after having produced him once before the Accountability Court, such power vesting in executive authority is contrary to the right of equal protection and also opposed to the spirit of Fundamental Rights contained in clause (2) of Article 10 of the Constitution?

(x) Whether section 23 of the Ordinance insofar as it prohibits transfer of any right, title, interest or creation of charge on property after the Chairman, National Accountability Bureau has initiated investigation into the offences under the impugned Ordinance, alleged to have been committee by an accused person, is violative of Articles,23 and 24 of the Constitution"

(xi) Whether section 24(a) of the impugned Ordinance empowering the Chairman, National Accountability Bureau at any stage of the investigation under the impugned Ordinance to direct that the accused, if not' already arrested, shall be arrested, tantamounts to conferment of unbridled and unfettered powers of determining if an accused is to be arrested or not, is violative of Article 25 of the Constitution??????????

(xii) Whether insofar as section 24(c) of the impugned Ordinance enjoins that the provision of clause (a) thereof shall also apply to cases which have already been referred to the .Accountability Court, offends against the provisions of Articles 4 and 25 of the Constitution on the ground of retrospectivity in its operation?

(xiii) Whether the case of voluntary return (plea of bargaining) under section 25 of the impugned Ordinance is derogatory to the concept of independence of judiciary insofar as where the trial has commenced the Court cannot release the accused without consent' of the Chairman, National Accountability Bureau?

(xiv) Whether section 25A (e) and (g) giving unfettered discretion to the Chairman, National Accountability Bureau to reject the recommendations of a duly appointed committee and to refuse to recognise a settlement arrived at. between a creditor and a debtor, amounts to excessive delegation and restraint on the freedom of contract on the touchstone of Articles'4, 18 and 25 of the Constitution?

(xv) Whether section 32(d) of the impugned Ordinance purports to oust the jurisdiction of the superior Courts from exercising their jurisdiction under Article 184(3) and Article 199 of the Constitution?

(xvi) Whether various provisions of the impugned Ordinance grant arbitrary and unfettered discretion to the Chairman, National Accountability Bureau e.g.---

(i) under section 9(c) of the impugned Ordinance to set whatever conditions he feels with respect to. the release of an accused from custody,

(ii) under section 18(g) to refer or not to refer a case to an Accountability Court, JMM
(iii) under section 25A(g) to refuse to recognise a settlement arrived at between a creditor and debtor

(xvii) Whether to exclude the officers and staff of the National Accountability Bureau who have not been deputed or posted to National Accountability Bureau from the Federation or a Province, from the category of civil servants within the purview of section 2(b) of the Civil. Servants Act, 1973, is violative of Article 25 of the Constitution?

(xviii) Whether the alleged violation of principles of Universal Declaration of Human Rights of 1948 and the Cairo Declaration on Human Rights in Islam are? justiciable in these proceedings?

(xix) Whether the impugned ordinance is liable to be struck down in the ground that earlier Ehtesab Act1997 was competently? and validly made and its vires were upheld by this court and therefore there was no necessity for enacting the same?

(xx) Whether the vires of the impugned Ordinance can be examined on the touchstone of Article 2A of the Constitution having regard to the law laid down by the Supreme Court in the case of Hakim Khan and 3 others v Government of Pakistan through Secretary Interior and others (PLD 1992 SC 595)?

(xxi) Whether the provisions for appointment of Chairman and other officials in the National Accountability Bureau are discriminatory inasmuch as they do not lay down any qualifications in that regard or methodology for their appointment? '

(xxii) Whether the provisions relating to transfer of cases qua the Provincial Courts within the territories of a Province and from one Province to another, suffer from excessive delegation?

(xxiii) Whether in the absence of any provision in the impugned Ordinance regarding special treatment to be meted out to .women-accused is not violative of the mandate under Article 25(3) of the Constitution and section 167 of the Criminal Procedure Code??

(b) National Accountability Bureau Ordinance (XVIII of 1999)-

----[As amended], Preamble---Summary of National Accountability Bureau Ordinance, 1999.

The Ordinance intends to provide for the setting up of National Accountability Bureau so as to eradicate corruption and corrupt practices and hold accountable all persons accused of such practices and matters ancillary thereto as spelt out from the Preamble.

Section 1 of the Ordinance describes the title of the Ordinance. By virtue of section 2 it came into force on 16-11-1999 and has been, trade retrospectively applicable with effect from the 1st day of January, 1985. Section 3 provides that the Ordinance shall .have effect notwithstanding anything contained in any other law for the time being in force. Section 4 covers its application and provides that it extends to whole of Pakistan and shall apply to all persons in Pakistan and. persons who are or have been in the service of Pakistan wherever they may be including areas which are part of Federally and Provincially Administered Tribal Areas.

Section 5 defines the expressions, 'accused', 'appropriate Government', 'assets', 'associates', 'Chairman National Accountability Bureau'. 'Code', 'Conciliation Committee', 'Court', 'Judge', 'Deputy Chairman', 'National Accountability Bureau', 'freezing', 'holder of public office', 'offence' 'person', 'property', 'Government property' and 'wilful default'. Section 6 deals with the constitution of National Accountability Bureau and appointments of its Chairman and Acting Chairman. Sections 7 and 8 deal with the appointments of Deputy Chairman and the Prosecutor? General Accountability respectively Sections e 9 and 10 respectively deal with corruption and corrupt practices and punishments therefore. The matters relating to imposition of fine, freezing of property and claim or objection against the freezing are respectively dealt with in sections 11, 12 and 13.

Section 14 deals with the presumption against accused accepting illegal gratification. Section 15 provides for incurring of disqualification to contest elections or to hold public office by convicted persons. Sections 16, 16A and 16B respectively deal with the subjects of trial of offences, transfer of cases and contempt of Court. Section 17 relates to application of the Code of Criminal Procedure as also power of the Accountability Court to dispense with any of the provisions of the said Code. Cognizance of offences by the Accountability Court, power of Chairman. National Accountability Bureau or any officer authorised by him to call for information and reporting of suspicious financial transactions by the banks and financial institutions for taking prompt action are dealt with under sections 18, 19 and 20. Section 21 deals-with international cooperation and requests for mutual legal assistance. Jurisdiction of Chairman, National Accountability Bureau to investigate suspected offences is provided under section 22 while section 23 deals with the circumstances under which the transfer of property by an accused or his relatives etc., shall be void. Section 24 deals with the arrest of the accused and other ancillary matters leading to the trial before an Accountability Court. Matters in relation to voluntary return/plea bargaining, payment of loans and tender of pardon to accomplice/plea bargaining are the subject-matters of sections 25, 25A and 26. Section 27 deals with power of Chairman, National Accountability Bureau or an officer authorised by him to seek asststance from any department of the Federal Government etc. and section 28 pertains to appointment of members of the staff and officers of National Accountability Bureau. Section 29 deals with the competence of the accused to be a witness and sections 30, 31 and 31A encompass the subjects of false evidence, etc., prohibition to hamper investigation and abscondence of accused to avoid service of warrants. Section 31B lays down the procedure for withdrawal from prosecution Section 31C'provides that the Accountability Court shall not take cognizance of an offence against an officer or any employee of a bank or financial institution without prior approval of the State Bank o: Pakistan. Section 31D deals with inquiry, investigation or proceedings in 'respect of imprudent bank loans etc. The matters in relation to appeal after conviction are dealt with under section 32 and the subject of transfer of pending proceedings has been dealt with under section 33.

Section 34 lays down procedure for framing rules for carrying out the purposes of the Ordinance, which shall form part Of the Ordinance itself. The subjects of repeal and indemnity are dealt with under sections 35 and 36 whereas section 37 provides power to President to add, omit or modify any provision .for the enforcement of the Ordinance. The Schedule of Offences provides for various terms of imprisonment in relation to the offences under the Ordinance.?

(c) National Accountability Bureau Ordinance (XVl(II of 1999)---

----[As amended], Preamble---Constitution of Pakistan. (1973), Art. 184(3)--?Constitutional petition under Art. 184(3), Constitution of Pakistan before Supreme Court ---Maintainability---Vires of National Accountability Bureau Ordinance, 1999---Question of great public importance---Not safe to decide case on concession simpliciter, shown by State counsel, in matters involving question of great public importance---Duty of Supreme Court was to exercise powers and functions within the domain of its jurisdiction in respect of any law or provision of law which comes for examination to ensure that the majesty of the law prevails and erosions therein are prevented so that all persons live securely under the rule of law; to promote within the limits of judicial functions, the observance and attainment of Human and Fundamental Rights and to administer justice impartially among. persons and between persons and the State which is sine qua non for the maintenance of judiciary and encouragement of public confidence in the judicial system.?

(d) National Accountability Bureau Ordinance (XVII1 of 1999)---

----[As amended], Preamble---Constitution of Pakistan (1973), Art. 184(3)--?Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Grounds on which the Ordinance was sought to be struck down and defended summarized.

The National Accountability Bureau Ordinance, 1999 is sought to be struck down insofar as it:--

- creates a parallel and non-federal judicial system;
- denies the trial and Appellate Courts the power to grant bail and to suspend

  sentences and vests the . power to grant bail in the executive (Chairman, National Accountability Bureau);
- allows the prosecution to detain a person for 90 days without so much as an initial duly formulated and precise F.I. R. ;
- provides for unfair procedure in derogation of due process;
- creates new offences;
- is in vague, imprecise and sweeping language;

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- reverses, for these offences, the burden of proof; and
- applies them retrospectively;
- delegates unfettered and unguided discretion to the executive, particularly as to the venue of the trial (question of federalism), plea bargaining and settlements;
- denies altogether the right of appeal in certain circumstances;

That some of the provisions of the National Accountability Bureau Ordinance are in conflict with some of the Fundamental Rights as also other provisions of the Constitution;

- It has been promulgated by the Federal Government without any legislative competence;
- It does not merely create a parallel judicial system, but a parallel system enabling the executive to exercise judicial powers, which is beyond the authority of the present dispensation, in that, conferment of judicial powers on the executive cannot be countenanced in law;
- It provides criminal penalty for civil debt/contractual obligations, default whereof was not punishable at the time of the execution of agreements in question, and even in the case of continuing. breach, the same cannot be converted into an offence being hire by Article 12 (2) of the Constitution;
- It is unfair, unjust, inequitable and against the accepted norms of jurisprudence as held by this Court in the cases of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445) and Sh. Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504);
- It violates the provisions of sections 154, 200, 156, 157, 202, 161(4), (5), (6) and (7); ,169, 172, 173, 177, 179, 180, 185, 512, 494, 417 of the Code of Criminal Procedure, section 201 P.P.C: and Article 203 of the Constitution;

- The power of transfer/withdrawal. of cases from the ,Courts of ordinary jurisdiction for trial in the Accountability Courts without. the approval of the Court, vested in Chairman, National Accountability Bureau, being uncontrolled, militates against - the concept of independence of judiciary;

- Fundamental Rights cannot be Suspended in view of the judgment Syed Zafar Ali Shah v. General Pervez Musharraf (PLD . 2000 SC 869) and this Court, in the exercise of its jurisdiction under Article 184(3) of the Constitution, can strike. down the National Accountability Bureau Ordinance, being violative of Articles 8, 10 and 12 of the Constitution;

- Some. provisions of the National Accountability Bureau Ordinance are intra vires and others are ultra vires, but the doctrine of severability is not attracted in these cases, in that, the good parts cannot be separated from the bad ones and therefore the entire National Accountability Bureau Ordinance should be struck down in view of the fact that the field is totally and adequately occupied by the existing laws on the subject;

- It is an ex post facto law, the very thought whereof is abhorrent to the administration of justice;

- It is not a mere procedural law, but a substantive law and therefore the rules of evidence to reduce the rigour of standard of proof are unsustainable;

The case of the Federation/respondents is that the National Accountability Bureau Ordinance does not suffer from any legal infirmity inasmuch as:

- It is a valid piece of legislation made and promulgated by the competent authority under the Chief Executive's Order No. 9 of 1999 dated 15-1-1-1999, as amended from time to time;

- The legislation has been duly acted upon and is being administered throughout the country inasmuch as numerous Accountability Courts have been established and Judges have been appointed to such Courts in consultation with the Chief Justice of Pakistan. This ensures the independence of the Courts and the judiciary in 'general. All these Courts are presided over by serving and retired District and Sessions Judges, who are under the direct supervisory control of the Chief Justices of the respective High Courts of the four Provinces: '

- The National Accountability Bureau Ordinance is a special law falling in the-series seeking to combat the evil of high level corruption. . For the first time; through the National Accountability Bureau Ordinance, members of hitherto an untouchable class of influential and powerful persons; not merely restricted to holders of public offices, but. also including bankers, businessmen, industrialists, bureaucrats and other persons, who are involved in corruption and corrupt practices as defined in the National Accountability Bureau Ordinance, fall within the purview of accountability in an effective and coherent manner;

- The National Accountability Bureau Ordinance seeks to:--

(i) re-define certain offences and re-prescribe their punishments;

(ii) provide for Special Courts and procedure for trial of specified offences;
?
(iii) provide for special agency for pre-trial investigation / inquiry namely, the National Accountability Bureau;

One of the objective of the National Accountability Bureau Ordinance is the retrieval of? the looted public money. It also provides for ?plea bargaining? which appears for the first time in such a law in Pakistan and in consequence 1064.600 million rupees have been recovered during a short span;

- Up to 2-4-2001, 759 authorized investigations have been undertaken by the National Accountability Bureau out of which 143 have been completed while 586 are in progress and 30 have been closed or suspended. Similarly out of 261 filed in the Accountability Courts, 120 have been decided with 73 convictions and 16 acquittals. 46 `plea bargaining' cases were concluded while 13 were rejected. Only 36 accused are in National Accountability Bureau custody for interrogation, 156 are in the judicial lock? ups, 56 have been released and 69 are at large; ,

- The National Accountability Bureau Ordinance was framed keeping in mind Articles 175, 202 and 203 of the Constitution and the principles laid down in Mehram Ali's case

PLD 1998 SC 1445;

- It does not create a new offence with retrospective effect, but an offence, which is in the nature of continuation of wilful default' after coming into force of the National Accountability Bureau Ordinance;

- Section 5(r) does not negate the freedom of trade, business and profession as contemplated in Article 18 of the Constitution. It merely seeks to penalize deliberate evaders of due payments to financial institutions. Prosecution of genuine cases where there are no deliberate and wilful evasions is abandoned within the contemplation of the National Accountability Bureau Ordinance; .

- Section 5 (r), no doubt, is a Constitutional deviation in view of the provisions of Article 12 (2) of the Constitution, but on the ground of State survival and having regard to the objectives of the Chief Executive coupled with the law declared in the case of Syed Zafar Ali Shah PLD 2000 SC 869,. no objection can be taken to section 5. (r), particularly when adequate safeguards have been provided by making appropriate amendments in the Ordinance;

- Conciliation Committee has been established and no, proceedings against the loan defaulters can be initiated by the National Accountability Bureau without the recommendation of the Governor, State Bank of Pakistan. However, .section 25-A requires to be further suitably amended so as to empower the Court of competent jurisdiction to decide as to whether or not accept the agreement/conciliation reached between the parties;

- The National Accountability Bureau Ordinance does not contravene the. provisions of Articles 23/24 of the Constitution, in that, freezing of property of the accused persons? (ill-gotten properties). is merely an interlocutory measure;

- The vires of the National Accountability Bureau Ordinance cannot be tested on the touchstone of 'the Fundamental Rights, which stood suspended by the Proclamation of Emergency of 28th May, 1998; which has been upheld by this Court in Syed Zafar Ali Shah's case PLD 2000 SC 869;

- The burden of proof on accused is not .an alien concept in jurisprudence. There are number of existing laws, which place the burden of proof on the accused and/or require an accused to rebut a statutory presumption. Such a course is not violative of the equality clause(s) of the Constitution;

- The choice of Court to which a reference is sent for trial is a matter of procedure and no body has a vested right to demand that his case be tried by a particular Court/Bench;

- The power conferred on Chairman National Accountability Bureau is not uncontrolled and his discretion is to be exercised judiciously having regard to the provisions of section 24A of the General Clauses Act, 1897, which require reasons to be recorded in writing for a deviation while passing any discretionary order;

- The provisions of the Ordinance are in conformity with the established principles of procedure for criminal proceedings;

- The nature of investigation and inquiry under the National Accountability Bureau Ordinance is of special kind, which entails inquiry and investigation into such offences, and in most cases requires tedious ,efforts including careful perusal of voluminous records of companies/banks, which cannot be completed overnight and therefore the period of 90 days for custody has been prescribed;

- A The period of remand of 90 days is not violative of Article 10(2) of the Constitution, in that, section 24 (d) requires production of the accused before an Accountability Court within 24 hours of the arrest;

- Section 23 of the Ordinance, insofar as it prohibits transfer of any right, title, interest or creation of charge on property after Chairman, National Accountability Bureau has initiated investigation into the offences under the National Accountability Bureau Ordinance, is an interlocutory measure, in that, it is not desirable that persons accused of such offences should frustrate the objects of law by creating third party rights in respect of illegally acquired property thereby creating hurdle in the objects of law;

- Power vesting in Chairman, National Accountability Bureau under section 24 (a) of the National Accountability Bureau Ordinance to order arrest of the, accused if not already arrested at any stage of the investigation, is neither discriminatory nor violative of

Article 25 of the Constitution, in that,. similar powers are conferred upon police officers under section 54., Cr.P.C.;

- As to the case of voluntary return, i.e. `plea bargaining' under section 25, the provision stands amended by virtue of Amendment Ordinance No. XXIV of 2000 and now, by virtue of section 25 (a) (ii), after cognizance of the offence has been taken by the Court or the trial hay commenced, Chairman, National Accountability Bureau may release the accused only with the approval of the Court;

- There is no restraint on freedom of contract, in that, the Powers earlier vesting in Chairman, National Accountability Bureau tinder section 25(e) and (g) have now been vested in the Governor, State Bank of Pakistan by virtue of the Amendment Ordinance No. XXIV of 2000, thus clause (g) of section 25 does not suffer from excessive delegation;

- Section 32 (d) of the National Accountability Bureau Ordinance is subject to the Constitution and does not purport to oust the Constitutional jurisdiction of the Courts;

- The Civil Servants Act, 1973 continues to apply to civil .servants, who are deputed to or posted in the National Accountability Bureau. Those, who are appointed directly, are distinct and separate category and class of persons and therefore no violation of Article 25 of the Constitution is caused;

- The mere fact that the Ehtesab Act, 1997 was competently and validly made and its vires were upheld by this Court does not curt, the power of the Legislature to make a new law on the same subject; .

- The National Accountability Bureau Ordinance is neither discriminatory nor un-Islamic and in. any case, its vires cannot be examined on the touchstone of Article 2A of the Constitution;

- The method of appointment in respect of Chairman, National Accountability Bureau is contained in section 6(b)(i) and for other officers in section 28 of the Ordinance. Provisions relating to transfer of cases qua the Provincial Courts within the territories .of a 'Province and from one Province to another Province, do not suffer from excessive delegation;

- As regards special treatment to be meted out to women-accused, the provisions of section 167, Cr.P:C. are applicable and the same have not been ousted.?

(e) National Accountability Bureau Ordinance (XVIII of 1999)---

----[As amended], Preamble---Constitution of Pakistan (1973), Arts. 184(3) & 199---Constitutional jurisdiction of Supreme Court under Art.184(3) of the Constitution ---Scope---Vires of legislation---Principles---Any legislhtive instrument which undermines independence of judiciary or abrogates or abridges any Fundamental Right may be regarded as repugnant to the spirit . of the Constitution---Supreme Court has the power to declare such legislative instrument as unenforceable, partly or wholly, as the case may be, depending upon the nature of legislation and facts and circumstances of each case---When the existence and safety of the country is endangered because of the economic disaster, Supreme Court is the sole Judge, both of proportions of the danger and when and how the same is to be prevented and avoided.??

(f) National Accountability Bureau Ordinance (XVIU of 1999)---

----[As amended], Preamble---Constitution of Pakistan (1973), Art. 184(3)--?Constitutional jurisdiction of Supreme Court under Art. 184(3) of the Constitution ---Scope---Vires of National Accountability Bureau Ordinance, 1999---Supreme Court has to protect the Fundamental Rights guaranteed under the Constitution and the independence of judiciary---Supreme Court being the ultimate guardian of the rights of the people, it was the duty of the Court to authoritatively interpret not only the validity of the National Accountability Bureau Ordinance, 1999 but also its scope.

Bench should be independent of the Executive and. arbiter of the. Constitution to decide all disputed questions. This is so because the superior Courts, in the exercise of their judicial powers, have to check the arbitrary exercise of power by any other organ or authority of the State. It rests with the Courts alone to define and limit the exercise of power by the Executive in terms of a legislative instrument. It is the duty of Supreme Court to protect the Fundamental Rights guaranteed under the. Constitution and the independence of the judiciary. Supreme Court is the ultimate guardian of the rights of the people. It is, therefore, the duty of Supreme Court to authoritatively interpret not only the validity 4 the National Accountability Bureau Ordinance, 1999 but also its scope.?

(g) National Accountability Bureau Ordinance (XVIII of 1999)---

----[As amended], Preamble---Constitution of Pakistan (1973), Art. 184(3)--?Constitutional petition under' Art.184(3) of the Constitution before Supreme Court ---Maintainability---.Requirements---Vires of National Accountability Bureau Ordinance, 1999---Only requirement for maintainability of Constitutional petition under Art. 184(3) was that petition, should raise a question of public importance with . regard to the enforcement of Fundamental Rights---National Accountability Bureau Ordinance, 1999 affecting the public at large, question of its validity was a question of public importance.?

Syed Zafar Ali Shah and others v. General Pervez. Musharaf, Chief Executive of Pakistan and others 2000 SCMR 1137 ref.

(h) National Accountability Bureau Ordinance (XVIII of 1999)---

----[As amended], Preamble---Constitution of Pakistan (1973), Arts. 184(3), 12; 175, 202 & 203-;_-Constitutional petition under Art. 184(3) of the Constitution before , Supreme Court---Maintainability---Constitutional petitions, were admitted to regular hearing, inter alia, to examine whether the promulgation of National Accountability Bureau Ordinance, 1999, whereby it was deemed to have come into force with effect from 1-1-1985 being retrospective, contravened the Fundamental Rights enshrined in Art.12 of the Constitution insofar as it created a new offence of "wilful default' as also the question whether the said Ordinance created a parallel judicial system in disregard of the provisions of Arts.175, 202 & 203 of the Constitution and was violative of the law laid down by the Supreme Court in the case of Mehram Ali reported as PL,D 1998 SC 1445---Held, it was the duty of the Supreme Court to examine the points raised in the petitions and pronounce authoritative judgment thereon.?

(i) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.5(g)---Criminal Procedure Code (V of 1898), S.6---Federal Government is competent to make a law providing for Special Courts and procedure under which the Courts will function and dispense justice.

Section 6, Cr.P.C. describes the criminal Courts and 'any other Court established by or under any other law'. Thus, -the Federal Government is competent to make a law providing for Special Courts and the procedure under which the Courts will function and dispense justice.?

(j) Legislation

----Principle---Legislature, which has made any law, is competent to change, annul, reframe or add to that law.?

(k) Constitution of Pakistan (1973)---

----Arts.175, 202, 203 & 225---Establishment and jurisdiction of Courts and Tribunals---Rules of Procedure---High Court to superintend subordinate Courts---Expression "Such other Courts as may be established by law" in Art. 175 of the Constitution are relatable to the subordinate Courts referred to in Art.203 of the Constitution---Functioning of any Court or Tribunal, beyond the control and supervision of the High Court concerned in terms of Art.203 of the Constitution, does not fulfil the mandatory requirement of the Constitution, in that, under Art.203 of the Constitution read with Art. 175 of the Constitution, the supervision and control of the subordinate judiciary exclusively vests in the High Courts.?

Mehram Ali and others v, Federation of Pakistan and others PLD 1998 SC 1445 ref.

(l) Constitution of Pakistan (1973)---

----Art.175---Criminal Procedure Code (V of 1898), S.6---Establishment of Criminal Courts---Constitution does confer power on the Federal Legislature to establish Criminal Courts or Tribunals and not necessarily those Criminal Courts, which fall within the purview of S.6, Cr.P.C.?

Abdul Hafeez v. The State PLD 1981 SC 352 and Mirza Gulzar Beg v. Station House Officer, Railway Police Station, Lahore and 3 others PLD 1977 Lah, 435 ref.

(m) National Accountability Bureau Ordinance (XVIII of 1999)---

----[As amended], Preamble---Constitution of Pakistan (1973), Art. 184(3)--?Constitutional petition under Art. 184(3) before the Supreme Court--?National Accountability Bureau Ordinance, 1999 [as amended] having been competently promulgated was neither ultra vires the Constitution nor did it invade the Provincial autonomy in any manner---Principles.

All laws relating to the jurisdiction of Courts and for filing causes before the Courts, whether civil or criminal, do not take their queue on the principle of federation. In civil law, it is the cause. of action that determines, in most cases, where the suit has to be filed--where the defendant---where the debtor resides. So, there are variety of considerations but none relatable to federal territorial character. In criminal cases, the general principles are contained to sections 177 to 182, Cr.P.C. i.e. where the crime takes place, the Courts in that area have jurisdiction and it matters little whether the person belongs to one or the other Province. It is the crime, its nature and the place of crime that determine the place where the trial has to take place Section 178, Cr.P.C. authorizes the Provincial Governments to determine the venue of trial of offences It is a law of procedure, the scheme of which is not concerned with the question of provincial autonomy. Where a crime has taken place in various parts of the country or is spread over various places, any of the Courts of those areas is competent to take cognizance of the matter. In determining where the matter has to be tried, no consideration is given to the provincial nature of the society, autonomous nature of the Provinces or to the tact that the -accused belongs to one or the other Province. All these matters have no concern with the concept of provincial autonomy except the High Courts, which have been created under the Constitution for each Province. The scheme of the creation of the Supreme Court is not of that character. It is not a Federal Court. It is the apex Court. It is a Court for the whole of Pakistan and it does not go by the principle of federation in that fashion in which. the allocations are made and distributions take place. In its own wisdom, the Supreme Court may decide how, to manage its composition. That is different thing, but the Constitution does not do that, it looks into it as an apex Court.

The National Accountability Bureau Ordinance has been competently promulgated and is neither ultra vires the Constitution nor-does it invade the provincial autonomy in any manner.?

(n) Constitution of Pakistan (1973)--- . .

----Art.176---Su?preme Court---Composition of---Constitution looks into Supreme Court as an apex Court---Supreme Court is not a Federal Court, it is the apex Court and is a Court for the whole of Pakistan and does not go by the principle of Federation in that fashion in which the allocations are made and distributions take place---Supreme Court, in its wisdom, may decide how to manage its composition.?

(o) National Accountability Bureau Ordinance (XVIII of 1999)---

----Ss.5(g), 9(c), 16(c), 16-A(b), 24(d) & 32---Constitution of Pakistan (1973), Arts.175, 202, 203 & 184(3)---Establishment of Accountability Courts; trial of offences; transfer of cases; release of accused from custody: arrest and appeal under the Ordinance---Validity---Questions for consideration were as to whether provisions of the National Accountability Bureau Ordinance, 1999 were violative of the principles of trichotomy of powers as envisaged under the Constitution and whether the Ordinance created a parallel judicial system in disregard of the provisions of Arts. 175. 202 & 203 of the Constitution in the light of law laid down in Mehram Ali's case PLD 1998 SC 1445---Held, Judges of Accountability Courts had to be serving District and Sessions Judges qualified to be appointed as Judges of the High Court and such Judges were to be appointed for a period of three years in consultation with the Chief Justice of the concerned High Court and not with the Chief Justice of Pakistan as contemplated in S.5(g) of the National Accountability Bureau Ordinance, 1999---Employment of a retired Judge of a High Court or a retired District & Sessions Judge as Judge of the Accountability Court impinged upon the independence of judiciary---National Accountability Bureau Ordinance, 1999 had vested various judicial powers such as grant of bail and release of accused pending trial or appeal, exclusively in an executive Authority i.e. the Chairman, National Accountability Bureau, in violation of the principle of separation of powers-?-Powers to set conditions for the release of an accused from custody or detention was a judicial power which ought not to be exercised except by a Court which was established under Art. 175 of the Constitution and was subject to the supervisory jurisdiction of the High Court in term of Arts.202 & 203 of the Constitution---Instructive guidance for smooth and effective functioning of the Accountability Courts and terms of office of the Judges of such Courts including that of present incumbents were provided by the supreme Court with a direction that relevant provisions in the National Accountability Bureau Ordinance, 1999 be suitably amended.

Section 5(g) of the National Accountability Bureau Ordinance, 1999 provides drat a judge of an Accountability Court will be appointed by the President after consultation with the Chief Justice of Pakistan and he can only be removed from office earlier than the statutory period by the President, after consultation with the Chief Justice of Pakistan. Section 16(c) of the said Ordinance provides that where more than one Accountability Courts have been established for an area, the Chief Justice of the High Court of the Province concerned shall designate an administrative judge from amongst the Accountability Courts/Judges in that area.

Section 16A(b) provides that where the Chairman, National Accountability Bureau seeks transfer of a case from one Accountability Court to another within a Province, an application seeking such transfer shall be made to the Chief Justice of the High Court for that Province and

where the transfer is sought from an Accountability Court in one Province to an Accountability Court in another Province, an application seeking such transfer shall be made to the Chief Justice of Pakistan. Section 32 provides that appeal from final judgment and order, of an Accountability Court shall lie to the High Court of the concerned Province. Section 34 provides that rules shall be framed by the President for carrying out the purposes of the impugned Ordinance in consultation with the Chief Justice of Pakistan.

In the present case the questions which require consideration are (i) whether the above provisions of the impugned Ordinance are violative of the principle of trichotomy of powers as envisaged under the Constitution and (ii) whether the Ordinance has created a parallel judicial system in disregard of the provisions of Articles 175, 202 and 203 of the Constitution in the light of the law laid down in Mehram Ali's case PLD 1998 SC 1445.

It is true that under section. 5(g) of the National Accountability Bureau Ordinance, 1999 a Judge of an Accountability Court is appointed by the President of Pakistan in consultation with the Chief Justice of Pakistan and he cannot be removed earlier than the statutory period of two years after consultation with the Chief Justice of Pakistan. It is also true that as a matter of fact except few, all the Judges of the Accountability Courts are from the subordinate judiciary who were appointed through a consultative process. Though the Chief Justice of Pakistan is the sole consultee for appointment of a Judge of Accountability Court, nevertheless, he had obtained written recommendations from the Chief Justices of the concerned High Courts and only those persons were appointed who were recommended by the concerned Chief Justice.

The provision. of section 5(h) which permits the employment of a retired Judge of a High Court or a retired District and Sessions Judge does impinge upon the Independence of Judiciary. The statutory appointment of persons other than serving Judges is two years while a Sessions Judge serving on deputation as Judge Accountability Court, `can be reverted to the subordinate judiciary at any stage as no statutory terms of deputation have been prescribed. Additionally, having regard to the. principles of separation of powers and in consonance with the. concept of Independence of Judiciary, judicial powers cannot be exercised by executive functionaries. The National Accountability Bureau Ordinance vests various judicial powers such as grant of bail and release pending trial or appeal, exclusively in an executive authority, i.e. the Chairman, National Accountability Bureau, in violation of the principle of separation of powers.

Section 9(c) read with section 24(d) of the Ordinance vests the power to release any person accused of an offence under the Ordinance in the Chairman, National Accountability Bureau and that too on the basis of any conditions as he may think fit are unwarranted. Such vesting of power is unwarranted. The power to set conditions for the release of an accused from custody or detention is a judicial power which ought not to be exercised except by a Court which is established under Article 175 of the Constitution and is subject to the supervisory jurisdiction of the High Court in terms of Articles 202 and 203.

For smooth and effective functioning of the Accountability Courts all the Judges should be serving District and Sessions Judges qualified to be appointed as Judges of the High Court. They should be appointed for a period of three years in consultation with the Chief Justice of the-concerned High Court and not with the Chief Justice of Pakistan as contemplated in section 5(g) of the National Accountability Bureau Ordinance. During their term of appointment as such they shall not be transferred to any other place nor removed from service except on ground of misconduct, or physical or mental infirmity by the competent authority i.e. the High Court concerned, after following the procedure prescribed in the relevant rules in that regard. They shall be entitled to same remuneration, privileges, facilities and allowances as are admissible to their counterparts who are performing functions in respect of Courts and Tribunals established by the Federal Government. They shall not be paid the salaries and privileges as are admissible to Judges of the High Court except security arrangements if and when required having regard to the nature of their work. Remuneration already drawn for the period they performed their functions as Judges of the Accountability Courts shall not be recovered being hit by the doctrine of past and closed transaction. Further, appointment and posting as Judge of Accountability Court shall not debar such Judge from being elevated as Judge - of a High Court if so appointed in terms of Article 193 of the Constitution.

The present incumbents/Judges .of the Accountability Courts who are not serving District and Sessions Judges shall be given an option to serve as 'such on the last pay/salary drawn at the time of their retirement as District and Sessions Judges for the remainder part of their term of three years otherwise their services shall be dispensed with by giving them three months' salary.?

There is a positive direction by Supreme Court in the case of Zafar Ali Shah's case PLD 2000 SC 869 that the Government shall accelerate the process of accountability in a transparent and coherent way. The Accountability Courts have since been established by the President in consultation with the Chief Justice of Pakistan who in turn had supported the recommendations of the concerned Chief Justices of the High Courts in their entirety without suggesting additional names for any of the intending appointees, it would, therefore, be in the interest of

quick disposal of accountability cases and in the fitness of things that the. Present incumbents/Judges of the Accountability Courts are not disturbed from performing their functions at the respective places of their posting. They shall be deemed to have been appointed for a period of three years from the day they entered upon their respective offices. However, the Judges of the Accountability Courts shall perform their functions under the supervision and disciplinary control of the respective High Courts'.

Budgetary allocations already sanctioned/earmarked for establishment of Accountability Courts, their presiding officers, staff and for other allied matters, shall remain operative notwithstanding the fact that Judges of the Accountability Courts shall be under the disciplinary control of the concerned High Courts and not the Federal Government. The relevant provisions in the National Accountability Bureau Ordinance, therefore be suitably amended.?

(p) National Accountability Bureau Ordinance (XVIII of 1999)---

----Preamble---Constitution of Pakistan (1973), Arts. 175, 202, 203 & 184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---National ,Accountability Bureau Ordinance, 1999 vests various judicial powers such as grant of bail and release of the accused pending trial or appeal exclusively in an executive Authority, i.e. the Chairman, National Accountability Bureau, which is in violation of the principles of separation of powers.?

(q) National Accountability Bureau Ordinance (XVIII of 1999)---

----Ss.9(c) & 24(d)---Constitution of Pakistan (1973), Arts. 175, 202, 203 & 184(3)---Vires of National Accountability Bureau Ordinance, 1999--?Provisions of S.9(c) read with S.24(d) of the Ordinance vest the power to release any person accused of, an offence under the Ordinance in the Chairman of the Bureau and that too on the basis of any conditions as he may think tit, are unwarranted-- -Powers to set conditions for the release of an accused from custody or detention is a judicial power which ought to be exercised by a Court which is established under Art.175 of the Constitution and is subject to the supervisory jurisdiction of the High Court in terms of Arts.202 & 203 of the Constitution.?

(r) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.9(b)---Constitution of Pakistan (1973), Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Provision of S.9(b) of the Ordinance purports to deny to all Courts, including the High Courts, the jurisdiction under Ss:426, 491, 497, 498 & 561-A, Cr.P.C. or any other law for the time being in force, to grant bail to any person accused of an offence under the Ordinance---Validity---Superior Courts have the power to grant bail under Art. 199 of the Constitution, independent of any statutory source of jurisdiction such as S.497, Cr.P.C.---Section 9(b), National Accountability Bureau Ordinance, 1999, to that extent is ultra vires the Constitution and the same is to be suitably amended accordingly.

The superior Courts under Article 199 of the Constitution "remain available to their full extent ....notwithstanding anything contained in any legislative\instrument enacted by the Chief Executive": Whereas, section 9(b) of the National Accountability Bureau Ordinance, 1999 purports to deny to all Courts, including the High Courts, the jurisdiction under sections 426, 491, 497, 498 arid 561A or any other provision of the Code of Criminal Procedure or any other law for the time being in force, to grant bail to any person accused of an offence under the National Accountability Bureau Ordinance. The superior Courts have the power to grant bail under Article 199 of the Constitution, independent of any statutory source of jurisdiction such as section 497 of the Criminal Procedure Code. Section 9(b) of the Ordinance to that extent is ultra vires the Constitution. Accordingly, the same be amended suitably.?

(s) National Accountability Bureau Ordinance (XVIII of 1999)---

----Ss.5(r) & 2---Constitution of Pakistan (1973), Arts. 12, 18 & 184(3)--?Constitutional petition under Art.184(3) of the Constitution before the Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---"Wilful default" ---Contention was that creation of a new offence of "wilful default" with retrospective effect was violative of Art.12 of the Constitution and definition of "wilful default" as given in S.5(r) of the Ordinance negated the freedom of trade, business or profession as contemplated by Art.18 of the Constitution---Validity---Non-payment of loan/dues in terms of the agreement within the contemplation of S.5(r) of the Ordinance is a continuing breach of duty or obligation, which itself is continuing. if duty to repay the loan/dues continues from day to day and the non-performance of that duty/obligation from that point of view is continuing default in the repayment of loan and if it is continuing, there is a fresh starting point of. limitation every day as the wrong continues---No limitation and no question of retrospectivity is involved as long as the duty remains un-discharged--Offence contemplated under S.5(r) of the Ordinance is the one which is committed over a span of time, therefore the last act of the offender controls the innocence or otherwise of

the party---Nature of default contemplated is not the default which is committed once and for all, it is a continuous default and on every occasion the default occurs and recurs, it constitutes an act or omission which continues and therefore a fresh act---Offence contemplated under S.5(r) of the Ordinance is not retrospective but prospective in nature---Viewed in the perspective stated the transformation of the alleged civil action flowing out of the contractual obligations, into an "offence" under the Ordinance did not suffer from any flaw whatsoever---Punishments and creation of offences by the Ordinance are protected by Art.12 of the Constitution, in that, under Art.12 of the Constitution ex post facto legislation can neither create new offences nor provide for more punishment for - an offence than the one which was available for it when committed, this is the limited impact of Art.12 of the Constitution---Only prohibition as to retrospectivity of the offence, contemplated under Cl.(1), (a)(b) of Art. 12 of the Constitution, therefore, is not attracted in circumstances---Supreme Court, however, in order to ensure across-the-board accountability issued directions under Art.37 read with Art. 187 of the Constitution for the application of S.5(r) of the Ordinance which shall be suitably incorporated in the Rules to be framed under S.34 of the Ordinance, which shall on promulgation become part of the Ordinance--?Adoption of the directions shall not affect the initiation of investigation and its continuation to its logical end or the proceedings pending before any Authority/Court under the National Accountability Bureau Ordinance, 1999.

For the last several years there has been tremendous increase in allegations of massive corruption against divergent strata of the society. The necessity for creating the offence of `wilful default' arose because in the past the prosecution agency and other government agencies had not properly carried out their public duty to investigate the offences disclosed due to the alleged involvement of several persons holding high offices in the executive, public offices, etc. Indifferent/casual attitude of the concerned agencies to conduct and proceed with the investigation is understandable. This is, indeed, a grave situation. Supreme Court can take judicial notice of the fact that great loss of public revenue owing to enormous corruption and failure to recover the looted money through huge bank loan defaults pose a serious threat to economic life, financial stability, credit and security of Pakistan including the unity and integrity of the nation. These are the circumstances in which the vires of the Ordinance are to be judged, which was promulgated for an expeditious and thorough probe into corruption and corrupt practices and holding accountable those' accused of such practices, which had already been delayed for several decades. The validity of the impugned Ordinance is also to be judged keeping in view the extraordinary circumstances prevailing in the country and the adverse impact of lacking probity in the public life leading to highest degree of corruption. Such a situation has also adversely affected the foreign investment and funding from the International Monetary Fund as well as the World Bank who have warned that future aid to Pakistan shall be subject to the requisite steps being taken to eradicate corruption. If the pervading corruption in the society is permitted to continue unchecked it would lead to economic disaster.

It was on 12th October, 1999, that the situation prevailing in the country in the sphere of economic debacle was recognised. The factors leading to the above situation on the ground, included the acts and omissions of persons who were the Members of the National and Provincial Assemblies, the Senate, the Civil Services, in business and/or working for gain in other disciplines in the country.

In Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others (PLD 2000 SC 869) Supreme Court took notice of the pleadings of the parties, and after considering the adverse effects of the inaction etc. of all concerned to collect the looted wealth of the country from those who were responsible therefore, it was observed that the action taken on 12-10-1999 was justifiable and that the speeches of the Chief' Executive dated 13-10-1999 and 17-10-1999 correctly spelt out the plan/scheme to be adhered to by him for the purposes of making recovery thereof: It was held that Chief Executive of the Islamic Republic of Pakistan is entitled, inter alia, to perform all such acts and promulgate all legislative measures as would establish or lead to the establishment of the declared objectives of the Chief Executive as spelt out in his speeches referred above. The Chief Executive in his speech dated 17-10-1999 clearly stated:

"Revival of economy is critical. Our economy is in deep trouble and revolutionary steps are needed to put it back on track. The Pakistani people were subjected to betrayal of their. trust. Their hard-earned money was frozen or taxed in violation of State commitment. We need to restore this trust. " '

"The process of accountability is being directed especially towards those guilty of plundering and looting the national wealth and tax evaders. It is also directed towards loan defaulters and those who have had their loans rescheduled or-condoned. The process of accountability will be transparent for the public to see.. My advice to the guilty is to return voluntarily national wealth, bank loans and pay their taxes before the hand of law forces them to do so with penalty. As a last chance I urge all defaulters to come forth and settle their debts within a period of four weeks, after which their names will be published and the law will take its due course. They owe this to Pakistan and I expect their spirit of patriotism to guide them. "

It was in the above backdrop that the Ordinance was promulgated and amendments made therein, subsequently. . The plea that a person entering into contractual obligations before the promulgation of the impugned Ordinance cannot be made to suffer for his alleged failure to clear his said indebtedness under the impugned Ordinance and that too as an offence, loses all significance in the light of the above circumstances. It is not the case of any one that they have been willing to account for the ill-gotten wealth and that it was not their inaction which has placed them in the predicament in which they find themselves today. The sources of amassing wealth by the specific individuals and juristic persons being what they are, they should not expect any lenient view in the cases, against them provided the action taken against them is not contrary to a valid piece of law. More so, when the efforts on behalf of Bureau in putting them under notice of 30-days in terms of section 5(r) of the impugned Ordinance also fell on deaf ears. Viewed in this perspective, the transformation of the alleged civil action flowing out of the contractual obligations, into an "offence" under the impugned Ordinance, does not suffer from any flaw whatsoever.?

The validation and legitimacy accorded to the present Government is conditional, inter-linked and intertwined with the holding of general elections to the National . Assembly, the Provincial Assemblies and the Senate of Pakistan within the time frame laid down by this Court leading to restoration of the democratic institutions, that is to say, the elections must be held and Assemblies restored by 12-10-2002.?

.It is true that .unless a proper investigation is made and it is followed by equally proper prosecution, the efforts to recover the looted money would be an exercise in futility. The need for a strong and competent prosecution machinery is a sine qua non for a fair and competent investigation. Investigation and prosecution are inter-linked. If the conduct of those who are guilty of not discharging their contractual obligations in the re-payment of loans then in order to revive the economy in the light of the declared objectives of the Chief Executive particularly his speech dated 17-10-1999 and the law laid down in Zafar Ali Shah's case (PLD 2000 SC 869), there does not appear to be any bar.to promulgate the legislation to make such conduct amounting to an "offence" and the same must be duly investigated and the offender against whom a prima facie case is made out should be expeditiously prosecuted through a fair trial. .It is well known that the international agencies like the International Monetary Fund and the World Bank have warned Pakistan time and again that future aid to the country may, be subject to appropriate steps being taken to eradicate corruption.

In the Commonwealth Finance Ministers Meeting held on 21-23rd September, 1999 noticed in the case of Zafar Ali Shah's case (PLD 2000 SC 869) it was .inter alia observed that; "Corruption, which undermines development, is generally an outcome and a symptom of poor governance. It has reached global proportions and needs to be attacked directly and explicitly". In this context and in the interest of State survival any appropriate strategy/legislation for ameliorating the situation and reviving the economy has to be judged in the light of the test laid down in Zafar Ali Shah's case (PLD 2000 SC 869). It may be re-emphasised that in the judgment in Zafar Ali Shah's case (PLD 2000 SC 869), which was upheld in review, it was stated in unambiguous terms that the Chief Executive is entitled to perform all acts and promulgate all legislative measures as are highlighted in paragraph 6 of the Short Order, clause (v) whereof reads as under

"(v) That these acts, or any of them, may be performed or carried out by means of Orders issued by the Chief Executive or through Ordinances on his advice."

The de facto and de jure status of the present regime was recognised for a transitional period to prevent any further destabilisation and with a view to create corruption-free atmosphere at national level through transparent accountability; revive the economy before restoration of democratic institutions under the Constitution, in that, the Constitution offered no solution to the crisis. In these circumstances, the Court took judicial notice of the fact that the people of Pakistan generally welcomed the army takeover due to avowed intention of the Chief Executive to initiate the? process of across-the-board and transparent accountability against persons from every walk of life against whom corruption and abuse of national wealth have been alleged, and take appropriate measures for stabilising the economy and restoring the democratic institutions within the shortest possible time after achieving his declared objectives. This will be another factor which shall be kept in mind while examining the validity of the impugned Ordinance.

Yet another factor, which is to be taken into consideration while judging the validity of the impugned Ordinance would be that one of the grounds on which validation and legitimacy was accorded to the present regime as stated in the case of Zafar Ali Shah PLD 2000 SC 869 was that the representatives of the people, who were responsible for running the affairs of the State were themselves accused of massive corruption and corrupt practices in the public as well as private spheres and were benefiting therefrom. They were resisting the establishment of good governance. There was a -general perception that corruption was being practised by diversified, strata including politicians, parliamentarians, public officials and ordinary citizens and there was no. political and economic stability in the country. The bank loan defaults were rampant, in that, as per report of the Governor, State Bank of Pakistan, Rs.356 billion were payable by the

bank defaulters up to 12-10-1999. There being no accountability and transparency, economic stability in the country was highly precarious and there was an overall economic slowdown as GDP growth during the past three years had hardly kept pace with the growth of population and that Pakistan has a debt burden which equals the country's entire national income.?

If the conduct of a holder of public office amounts to an offence, it must be investigated forthwith and if a prima facie case is made out against the offender there is no reason why he should not be prosecuted for the majesty and maintenance of rule of, law. A duty is cast on the judiciary to ensure the rule of law and guard against erosion therein. In the past the Government agencies had failed to perform their statutory duties to investigate matters and to prosecute all persons who were found to have. committed offences of corruption, corrupt practices and recovery of Government dues with a view to protect the persons involved, who were very influential and powerful.

In view of persistence of corruption and genuine emergent need for the recovery of outstanding amounts from those persons .who have committed default in the repayment of amounts to banks, financial institutions, Government and other agencies and all measures having failed to recover the same' through ordinary Courts of law, it became necessary to promulgate the extraordinary legislation in the extraordinary circumstances prevalent in the country. Had the Government agencies and the Revenue authorities performed their duties and legal obligations justly, fairly and in accordance with law and had there been proper investigation into alleged offences committed by important politicians, bureaucrats .and the persons who were recipients of money from any unlawful sources given for unlawful considerations, there would have been no need to promulgate the Ordinance. But when the matter discloses a clear nexus between crime/corruption and powerful persons holding public offices which poses a serious threat to the economy as well as the very existence of the country, then to prevent erosion of the rule of law and to take steps for restoration of democracy in the country within the time frame laid down by Supreme Court, it will have to be examined whether the mechanism involved for recovery of amounts from the wilful defaulters for reviving the economy is in conformity with the declared objectives of the Chief Executive. Applying the above principles, there was a need for creation of an offence of `wilful default' and mechanism for recovery of the same as is purported to have been done under section 5(r) of the Ordinance.?

The matter may be looked at from another angle as well. The mere fact that at the time of entering into an 'agreement no punishment was prescribed for default in payment of loam or bank dues, as the case may be, cannot possibly mean that the duty of the defaulter to re-pay the loan/dues also expired. The duty still remains. It continues till the loan/dues are re?paid as required under the agreement. Therefore, non-payment of loan/dues in terms of the agreement within the contemplation of section 5(r) is a continuing breach of duty or obligation, which itself is continuing if duty to re-pay the loan/dues as aforesaid continues from day to day and the non?performance of that duty/obligation from that point of view must be held to be a continuing default in the repayment of loan. Therefore, if it is continuing, there is a fresh starting point of limitation every day as the wrong continues. Viewed from this angle, there is no limitation and no question of retrospectivity, involved as long as the duty remains un-discharged.?

It is also instructive- to refer to section 23 of Limitation Act, 1908 which prescribes that in the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues. It is within the competence of the Legislature to treat a continuing wrong as an offence independent of the contract so that the offence so created is applicable to a case where there is a continuing breach of contract which has been converted into an offence, with a view to helping the general public at large

in that sphere. It could, therefore, be rightly urged that there will practically be no limitation of prosecution under section 5(r) of the Ordinance as long as the duty to re-pay the loan/debt/bank dues continues under an agreement or contract and the same remains undischarged. The offence contemplated under section 5(r) is the one which is committed over a span of time, therefore, the last act of the offender controls the innocence or otherwise of the party. The nature of default contemplated here is not the default which is committed once and for all. It is a continuous default. Thus on every occasion the default occurs and recurs, it constitutes an act or omission which continues and is therefore a fresh act. Looked at from this angle the offence contemplated under section 5(r) is not retrospective but prospective in nature.?

Article 12 of the Constitution does not deprive the Legislature of its power to give retrospective effect to an enactment, which the Legislature is competent to enact. It merely provides that no law shall authorise the punishment of a person for an act or omission that was not punishable by law at the time of the act or omission; or for an offence by a penalty greater than, or of a kind different from,- the penalty prescribed by law for that offence at the time the offence was committed. Seen in this perspective, the act of `wilful default', is not an act or omission which was punishable by law at the time the same was committed but an act or omission committed 30 days ,after the promulgation of the Ordinance whereby the offence of `wilful default' under

section 5(r) was created. As stated above, it was in the nature of a continuous wrong, which was converted into an offence prospectively i.e. in a case where such wrong/wilful default continued even after the expiry of 30 days of the promulgation of the impugned Ordinance and not retrospectively. In other words, it is a case where the punishment is prescribed in relation to the breach of a continuing duty which is not performed -even within 30 days after the coming into force of the Ordinance. By no stretch of imagination it could be termed retrospective in operation, particularly in view of the statement made by counsel of the Federation that no prosecution was launched in respect. of `wilful default' where re-payment of loan etc. was made good within 30 days of the promulgation of the Ordinance.

So far as the punishments and creation of offences by the Ordinance are concerned, they are protected by Article 12 of the Constitution, in that, under Article 12 of the Constitution ex post facto, legislation can neither create new offences nor provide for more punishment for an offence than the one which was available for it when committed. This is the limited impact of Article 12 of the Constitution. Therefore, the only prohibition as to retrospectivity of the offence, contemplated under clause (1) (a) (b) of Article 12 of the Constitution, is not attracted here. However, in order to ensure across-the-board accountability, Supreme Court ordered the following directions for the application of section 5 (r) of the Ordinance. The same shall be suitably incorporated in the Rules to be framed under section 34 of the Ordinance, which shall, on promulgation, become part of the Ordinance:

(i) No prosecution for `wilful default' shall be launched before the expiry of 30 days' statutory notice and an additional 7 days' notice shall also be served on the alleged defaulter to satisfy Governor, State. Bank of Pakistan that he has not committed 'any `wilful default'. The report of Governor, State Bank of Pakistan as to the prima facie guilt or innocence will be subject to the final decision of the Accountability Court. The same procedure will be followed with regard to recovery of other public dues falling within the contemplation of section 5(r) of the Ordinance. The Governor, State Bank of Pakistan, shall record his recommendations within 7 days with reasons therein.

(ii) Any settlement arrived at with the defaulters by the Chairman, National Accountability Bureau or compounding of any offence shall be subject to the decision of the Accountability Court.

(iii) In respect of any person who is being investigated under the Ordinance, if the final report after full investigation, is that no prima facie case is made out to proceed further and the case must be closed against him; that report must be promptly submitted to the Accountability Court concerned for its satisfaction that the concerned authorities have not failed to perform their legal obligations and have reasonably come to such conclusion. The final decision in the matter would be by the concerned Accountability Court. The Accountability Court shall conclude the trial expeditiously after giving fair opportunity to the accused.

(iv) Everyone against whom there is reasonable suspicion of commission of a crime under the National Accountability Bureau Ordinance is to be treated equally and if need be, proceedings may be held in camera to the extent necessary in public interest and to avoid prejudice to the accused.

(v) The concerned prosecuting agencies shall ' conduct their responsibilities and functions without being influenced by extraneous considerations.

(vi) The Chairman, National Accountability Bureau shall ensure reasonable and expeditious time-frame for the completion of investigation -and launching of prosecution.

(vii) The Chairman, National Accountability Bureau should take time? bound steps to establish a grievance redressal mechanism to promptly deal with the complaints received from the public against the Bureau.

(viii) While attending to nature of duty. and functions of the officer engaged in the investigation of an offence, the following observations made in Union of India and others v. Sushil Kumar Modi and others (1997) 4 SCC 770), be kept in view:

"4. At the outset, we would indicate that the nature of proceedings before the High Court is somewhat similar to those pending in this Court. in Vineet Narain v. Union of India ((1996) 2 SCC 199) and Anukul Chandra Pradhan v. Union of India ((1996) 6 SCC 354) and, therefore, the High Court is required to proceed with the matter in a similar manner. It has to be borne in mind that the purpose of these .proceedings is essentially to ensure performance of the statutory duty by the CBI and the other Government agencies in accordance with law for the proper implementation of the rule of law. To achieve this object a fair, honest and expeditious investigation into every reasonable accusation against each. and every person reasonably suspected of involvement in the alleged offences. has to be made strictly in accordance with law. The duty of the Court in such proceedings is, therefore, to ensure that the CBI and other Government agencies do their duty and do so strictly in conformity with law. In these

proceedings, the Court is not required to go into the merits of the accusation or even to express any opinion thereon, which is -a matter for consideration by the competent Court in which the charge-sheet .is filed and the accused have to face trial. It is, therefore, necessary that- not even an observation relating to the merits of the accusation is made by the Court in these proceedings lest it prejudices the accused at the trial. The nature of these proceedings may be described as that of `continuing mandamus' to require performance of its duty, by the CBI and the other Government agencies concerned. The agencies concerned must bear in mind and, if needed, be reminded of the caution administered by Lord Denning in this behalf in R. v. Metropolitan Police Commr. (1968) 1 All ER 763/(1968) 2 QB 118). Indicating the duty of the Commissioner of Police, Lord Denning stated thus : (All ER p.769)

`I have no hesitation, however, in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State,...I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law. of the land. He must take steps so to post his men that crimes may be detected; arid that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be; bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not prosecute - this man or that one. Nor can any police authority tell him, so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.'

The nature of such a proceeding in a Court of law was also indicated by Lord Denning, as under

`A question may be raised as to the machinery by which he could be compelled to do his duty. On principle, it seems to me that once a duty exists, there should be a means of enforcing it. This duty can be enforced. I think, either by action at the suit of the Attorney-General; or -by the prerogative order of mandamus.."

(ix) Unless a competent prosecution, follows a fair and competent investigation, the ultimate analysis would be violative of the principle of fair trial. A panel of competent lawyers 'of experience and impeccable reputation should be prepared with the advice of Ministry of Law, Justice and Human Rights. Their services should be utilised as prosecuting lawyers in cases of significance on reasonable remuneration. For terms and conditions of their services, guidance may be sought from the Central Law Officers Ordinance, 1970, prescribing method for the appointment of Standing Counsel and Deputy Attorney-Generals.

Adoption of the above course shall not affect the initiation of investigation and ' its continuation. to its logical end or the proceedings pending before any authority/Court under National Accountability Bureau Ordinance. These instructions are being issued under Article 37 read with Article 187 of the Constitution, which empowers Supreme Court to issue any appropriate directions, orders or decrees, as may be necessary for doing complete justice in any case or matter pending before it which are enforceable throughout Pakistan.?

(t) Public life---

----Principles enumerated.

Following are the seven principles of public life:

(i) Selflessness: Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves:

(ii) Integrity: Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that influence them in the performance of their official duties. '

(iii) Objectivity: In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

(iv) Accountability: Holders of public office are , accountable for their decisions and actions to -the public and must submit themselves to whatever scrutiny is appropriate to their office.

(v) Openness: Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

(vi) Honesty: Holders of public office have a duty to declare. any. private interests relating to their public duties and to take steps to resolve any conflicts arising in a way- that protects the public interest.

(vii) Leadership: Holders of public office should promote and support these principles by leadership and example.?

Lord Nolan's Report (1995), Vol. I, titled: "Standards in Public
Life" quoted.'

(u) National Accountability Bureau Ordinance (XVHI of 1999)---

----S.37---Constitution of Pakistan (1973), Art.184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court--Vires of National Accountability Bureau Ordinance, 1999---Removal of difficulties---Supreme Court directed that suitable amendments shall be made in S.37, of the Ordinance to provide for consultation by the. President of Pakistan with the Chief Justice of Pakistan for modifications; additions or omissions.?

(v) National Accountability Bureau Ordinance (XVIII of .1999)---

----S.12---Constitution of Pakistan (1973), Art.184(3)---Constitutional petition under Art. 184(3) of Constitution of Pakistan (1973), before. Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Freezing the property of accused by Chairman of the Bureau---Validity---Provision of S.12, National Accountability Bureau Ordinance, 1999 so far as it vests the power in Chairman of the Bureau. to pass an order of seizure, freezing, attachment or prohibitory order by taking possession, or by appointment of receiver, or prohibiting the payment of rent or delivery of property to the accused or to any other person on his behalf which shall remain in force for a period not exceeding thirty days, suffers from excessive delegation, ends of justice would be fully met if the period contemplated under the first proviso to cl.(c) of S.12 is curtailed to fifteen days---Provisions contained in S.12(f) that the order of freezing mentioned in S. 12(a) to (e) shall, as the case may be, remain operative until final disposal by the Accountability Court or the Appellate forum impinge upon the independency of judiciary and suffers from excessive delegation in that it is for the Accountability Court alone to determine the period of duration during which the freezing shall remain operative till final disposal of the reference by the Accountability Court---Provision of S.12(t) of the, Ordinance makes operative the freezing order notwithstanding filing, or pendency of appeal under, the Ordinance which is against the concept bf independence of judiciary -- Ends of justice will be fully met if cl.(f) of S.12 of the Ordinance providing for continuation of freezing of property after the accused has been' acquitted is suitably amended to provide for continuation of such freezing for a period not exceeding ten days to be reckoned from the date of receipt of the certified copy of the order to enable the Bureau for filing an appeal against the acquittal order and thereafter it would be for the appellate forum to pass appropriate orders.

Section 12 of the National Accountability Bureau Ordinance, 1999 confers upon the Chairman, National Accountability Bureau, the unchallengeable power to freeze the property of an accused. The power to deprive an individual of the legitimate use of. his property is .no minor concern but is one which goes to the root of the case., .It is the duty of the superior Courts to protect citizens from being deprived of their liberty and property, except in accordance with the Constitution and the laws, subject to reasonable restrictions. Section 12, insofar as it vests the power in the Chairman to pass any order of seizure, freezing, attachment or prohibitory order by taking possession, or by appointment of receiver, or prohibiting the payment of rent or delivery of property to the accused or to any other person on his behalf, which shall remain in force for a period of not exceeding thirty days, suffers from excessive delegation. The ends of justice would be fully met if the period contemplated under the first proviso to clause (c) of section 12 is curtailed to fifteen days. Likewise, the provisions contained in clause (1) thereof that the order of freezing mentioned in section 12(a) to (e) shall, , as the case may be, remain operative until final disposal by the Accountability Court or the Appellate Forum impinge _ upon the Independence of Judiciary and suffers from excessive delegation in that it is for the Accountability Court alone to determine the period of duration during which the freezing shall remain operative till final disposal of the reference by the Accountability Court. Similarly, clause (t) also makes operative the freezing order notwithstanding filing or pendency of appeal under the Ordinance. This provision is against the concept of Independence of Judiciary. It is true that section 12 (a)(c)(iv) of the Ordinance provides for interlocutory measure to ensure that property relating to the accused is not dealt with by him or on his behalf pending investigation. Similar provisions exist in other laws, in respect of civil as well as criminal liability. Rules 1 and 2, Order XXXIX of the Code of Civil Procedure provide for passing of such orders. Section 37(2) of the Control of Narcotic Substances Act, 1997 and the Criminal Law Amendment Act, ~ 1964 also contemplate powers to freeze property. Nevertheless, it is for the Appellate Court alone to decide having regard to the merits of each case justly. fairly and in accordance with law whether or not the order of freezing shall remain operative upon filing of or during the pendency of an appeal under the Ordinance. However, the ends of justice will be fully met if

clause (f) of section 12 of the Ordinance providing for continuation of freezing of property after the accused has been acquitted is suitably amended to provide for continuation of such freezing for a period not exceeding ten days to be reckoned from the date of receipt of the certified copy of the order to enable the National Accountability Bureau for tiling an appeal against the acquittal order. Thereafter it would be for the appellate forum to pass appropriate
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(w) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.13(c)---Constitution of Pakistan (1973), Arts.2A & 184(3)--?Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Appeal against order of freezing etc. ---Provision of S. 13(c) which relates to claim or objection against freezing denies the right of appeal against an order made under S.12 of the Ordinance---Validity---Purported denial of the right of appeal is violative not only of Art.2A of the Constitution but also power of the superior Courts to correct such orders through exercise of that Constitutional jurisdiction, clearly the denial of right of appeal is contrary to the norms of justice as -also violative of principles of natural justice--?Provision of S. 13(c) of the Ordinance which denies the right ,of appeal is violative of principles of Islamic Injuctions and the same needs to be suitably amended so as to allow right of appeal to the accused as well as to the non-?accused/third party whose claim or objection against freezing of property is dismissed by the Accountability Court.

The purported denial of the right of appeal is violative not only of Article 2A of the Constitution but also power of the superior Courts to correct such orders through exercise of their Constitutional. jurisdiction. Clearly, the denial of right of appeal is contrary to. the norms of justice as also violative of principles of natural justice. Thus, ..section 13(c) which denies the right of appeal is violative of the principles of the Islamic Injunctions and the same needs to be suitably amended so as to allow right of appeal to the accused as well as to, the non-accused/third party whose claim or objection against freezing of property is dismissed by the Accountability Court.

(x) National Accountability 'Bureau Ordinance (XVM of 1999)---

----S.14(d)---Constitution of Pakistan (1973), Art. 184(3)---Constitutional petition under Art. 184(3) before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999:---Burden of proof placed on the person accused of an offence under S.9(a)(vi) of the Ordinance ---Validity--?Supreme Court, for safer administration of justice and in the interest of good governance, efficiency in the administrative and organizational set up issued the directions for effective operation of S. 14(d) of the Ordinance to the effect that the prosecution shall first make out a reasonable case against the accused charged under S.9(a)(vi) & .(vii) of the Ordinance and in case the prosecution succeeds in making out a reasonable case to the satisfaction of the Accountability Court, the prosecution would be deemed to have discharged the prima facie burden of proof and then the burden of proof shall shift to the accused to rebut the presumption of guilt.

Under section 14(d) of the National Accountability Bureau Ordinance, 1999 the `burden of proof has been placed on the person accused of an offence under. section 9 (a) (vi) and (vii) of the Ordinance. Placing of `burden of proof on an accused is not an unfamiliar concept in legal parlance. There is a large number of Statutes wherein the burden of proof' has been placed on the accused.?

Where `burden of proof' s placed. or presumptions are raised by a law on a class of persons that it creates, then as long as such presumptions are raised or `burden of proof is placed uniformly in respect of persons to whom such a law applies, there is no violation of the equality clause/s of the ,Constitution. Laws raising presumptions against and placing onus of proof upon an accused have repeatedly been challenged in various jurisdictions and it has consistently been the view of Courts that subject to their uniform application and there being a rational connection between the facts presumed and the facts proved, such laws are valid.?

Article 121 of the Qanun-e-Shahadat, 1984, also places burden of proof on the accused.?

A bare perusal of Article 121, Qanun-e-Shahadat, 1984 would show that the onus to prove innocence may be shifted on to the accused, where existence of certain circumstances bringing his case within the ambit of general or special exceptions contained in the Pakistan Penal Code, is necessary ' to be proved for getting an acquittal, absence of which' shall be presumed by the Court. Supreme Court therefore declined to hold that where a person is accused of aR offence and the burden of proving innocence is shifted on to him having regard to the peculiar circumstances mentioned in any provision of law, the same can be derogatory to ordinary dispensation of criminal justice or violative of Articles 4 and 25. of the Constitution.

Matters relating to remedy, mode of trial, the manner of taking evidence and forms of actions are all matters relating to procedure- Only a matter of procedure would be retrospective. However, if in this process any existing rights are affected on the basis of a statute the same

would not operate. retrospectively unless the Legislature' had either by express enactment or necessary intendment given the legislation retrospective effect. Viewed from whatever angle the placing of burden of proof on the accused, in the facts and circumstances of the case in juxtaposition with section 14(d) of the Ordinance falls within the realm of procedural law. Thus visualized, the plea that the ratio of Nabi Ahmed's case PLD 1969 SC 599 is applicable to all situations in the realm of substantive law, cannot .stand a detailed scrutiny thereof. Even the assertion that Nabi Ahmed's case PLD 1969 SC 599 was followed in Bhai Khan's case PLD 1992 SC 14 by a learned Single Judge of the Lahore . High Court, Lahore and therefore, it should be considered as applicable to the facts and circumstances of the present lis 'as well, also falls in the same category. Clearly, the cases of Nabi Ahmed PLD 1969 SC 599 and Bhai Khan PLD 1992 SC 14 are distinguishable and confined to the facts and circumstances of those cases.

The Accountability Courts have been established to deal exclusively with corruption and corrupt practices and hold accountable those accused of such practices and matters ancillary thereto so that cases can be decided speedily as also to guard against delays in investigation and to forestall the acts of the suspects who have been able to abuse the process of law by stalling investigations at initial stages through litigation of sorts. As to the validity of section 14(d), that if a holder of public office or any other person has issued any directive, policy or SRO (Statutory Regulatory Order) or any other order which grants or enables any undue concession or benefit in any taxation matter or law or otherwise so as to benefit himself or any relative or associate or a benamidar or any other person is concerned, suffice it to say that there may be cases where the accusation cannot be supported by direct evidence and is a matter of inference of corrupt motive for the decision with nothing to prove directly any illegal gain to the decision maker. To protect decision making level officers and the officers conducting inquiry/investigation from any threats, appropriate measures must be taken to relieve them of the anxiety from the likelihood of harassment for taking honest decisions.

Viewed torn t~ he above context although shifting of burden of Proof on an accused in terms of section 9(a)(vi)(vii) read with section 14(d) may not be bad in law in its present form, but would certainly be counter?productive in relation to the principle of good governance. If decision making level officials responsible for issuing orders, SROs etc. are not protected for performing their official acts in good faith, the public servants and all such officers at the level of decision making would be reluctant to take decisions and/or avoid or prolong the same on one. pretext or another which would ultimately lead to paralysis of State-machinery. Such a course cannot be countenanced by Supreme Court.

Be that as it may, the prosecution has to establish the preliminary facts whereafter the onus shifts and the defence is called upon to disprove the presumption. This interpretation appears to be reasonable in the context of the background of the Ordinance and the rationale of promulgating the same notwithstanding the phraseology used therein. The above provisions do not, constitute ' a bill of attainder, which actually means that by legislative action an accused is held guilty and punishable. For safer dispensation of justice and to the interest of good governance, efficiency in the administrative and organizational set up, it is necessary to issue the following directions for effective operation of section 14(d):

(1) The prosecution shall first make out a reasonable case against the accused charged under section 9 (a)(vi))) and (vii) of the National Accountability Bureau Ordinance, 1999.

(2) In case the prosecution succeeds in making out a reasonable case to the satisfaction of the Accountability Court, the prosecution would be deemed to have discharged the prima facie burden of proof and then the burden of proof shall shift to the accused to rebut the presumption of guilt.?

State of Madras v. A. Vaidyaitatha iyer PLD 1958 SC'(Ind.) 264; Muhammad Siddiq v. The State 1997 SCMR 503; Ghulam Ali v. The State PLD 1963 (W.P.) Kar. 582; Mir Ahmed v. The State PLD 1962 SC 489; Ghulam Muhammad v. The State 1980 PCr.LJ 1039; Badshah Hussain v. The State 1991 PCr._LJ 2299; Abdul Razak Rathore v. The State PLD 1992 Kan 39; Shabbir Ahmed v. The State PLD 1996 Kar.537; The State of West Bengal v. The. Attorney-General for India, Intervener AIR 1963 SC 255; LIMA Declaration made at the conclusion of 8th International Anti-Corruption Conference in LIMA (Peru) in September, 1997; and Liaqat Parvez Khan v. Government of the Punjab through Home Secretary PLD 1992 Lah. 517 ref.

Nabi Ahmed's case PLD 1969 SC 599 and Bhai Khan's case PLD 1992 SC 14 distinguished. .

(y) Interpretation of statutes--?----

Retrospectivity---Only a matter of procedure would be retrospective, however, if in the process any existing rights are affected on the basis of a statute the same would not operate retrospectively unless the Legislature had either by express enactment or necessary intendment given the legislation retrospective effect.?

(z) Criminal trial---

Matters relating to remedy, mode of trial, the manner of taking evidence and forms of actions are all matters relating to procedure.?

(aa) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.15(a)---Constitution of, Pakistan (1973), Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Disqualification to contest emotions or to hold public office---Validity---Provision of S. 15(a) of the Ordinance providing disqualification from being elected, chosen, appointed or nominated as a member or representative of any public office or any statutory or local authority of the Government of Pakistan for a period of 21 years is too excessive and the same be suitably amended so as to, provide disqualification for a period of 10 years to be reckoned from the date the convict is released after serving his sentence---Proviso to cl. (a) of S.15 of the Ordinance providing disqualification for 21 years shall also be suitably amended to provide disqualification for 10 years to be reckoned from the date the convict is discharged of his liabilities relating to matter on transaction in issue.

The provision of clause (a) of section 15 of the National Accountability Bureau Ordinance, 1999 providing disqualification from being elected, chosen, appointed or nominated as a member or representative of any public office, or any statutory or local authority of the Government of Pakistan for a period of 21 years is too excessive and the dame be suitably amended so as to provide disqualification for a period of 10 years to be reckoned from the date the convict is released after serving his sentence.

The proviso to clause (a) of section 15 providing disqualification for 21 years shall also be suitably amended to provide disqualification for 10 years to be reckoned from the date the convict is discharged of his liabilities relating to matter on transaction in issue.?

(bb) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.16(d)---Constitution of Pakistan (1973), Art. 184(3)---Constitutional petition under Art. 184(3) before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Trial of offences---Venue of trial---Determination of venue of trial under the Ordinance in term of S. 16(d) does not contravene the concepts of 'federalism' and/or Provincial autonomy---Principles.

The relevant. question reads: "Whether section 16(d) of the impugned Ordinance which authorises the Chairman, National Accountability Bureau to select the venue of the trial by filing a reference before any Accountability Court established anywhere in Pakistan suffers from excessive delegation?

It is true that ordinarily, the jurisdiction to try a person for an offence does not depend upon the 'place where the offender is found, but the place where crime is committed. Generally speaking, all crime is local.. These principles are also enshrined in the general law relating to proceedings in criminal prosecution and jurisdiction of the criminal Courts as also trials. Section 177, Cr.P.C. also provides that every offence ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it is committed. However, notwithstanding the above provision, the Provincial Government under section 178, Cr.P.C. may direct that any cases or class of cases in any district sent for trial to a Court of Session, may be tried in any Sessions Division provided such direction is not repugnant to any .direction previously issued by the High Court under section 526, Cr.P.C. or any other law for the time being in force. Thus, the determination of venue of trial under the Ordinance in terms of section 16(d) does not contravene the concepts of 'federalism' and/or Provincial autonomy.?

(cc) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.16A(b)(i) & (ii)---Constitution of Pakistan (1973), Arts.4 & 184(3)--?Constitutional petition under Art.184(3) of the Constitution before Supreme Court---Vires of National Accountability Bureau Ordinance, 1999---Transfer of cases---Validity---Provision of S.16(a)(b) (i) & (ii), insofar as it denies access to an accused person for the redress of his grievance in the matter of transfer of a case from one Court to another, is ultra vires the Art.4 of the Constitution, which envisages the right of access to justice to all, which is equally founded in the doctrine of 'due process of law'---Transfer of cases from one Court to another, either within a Province or from one Province to another, as contemplated under S. 16A of the Ordinance, the prosecutor and the accused must be placed on equal footing and to this extent, S. 16A is ultra vires the Constitution and needs to be suitably amended---Principles.

Article 175 of the Constitution provides for the establishment and jurisdiction of the Supreme Court of Pakistan, a High Court for each Province and such other Courts as may be established by law. Apart from establishment of the Courts as aforesaid, the Constitution or the law may provide for the subjects in respect of which that power may be exercised and the manner of

exercise of such power. It may demarcate/identify the territories/place or places in which a particular Court shall function. It may specify the persons in respect of whom the judicial power to hear and determine will be exercisable. Put differently, it may provide for the subject-matter over which the judicial power is to be exercised, the manner of exercise of jurisdiction, the right to adjudicate upon a particular subject ?matter and the authority to exercise in a particular manner.

Article 175 (3) provides that the Judiciary shall be separated progressively from the 'Executive within 14 years from the commencing day. After expiry of the stipulated period, the cut-off date of 23rd March, 1994, had been given by the Supreme Court to enable the Provincial Governments to finalise separation of Judiciary from the Executive. Guidelines for achieving this objective as well as financial independence of the Judiciary were also laid down by Supreme Court in the case of Government of Sindh v. Sharaf Faridi (PLD 1994 SC 105).

Article 203 of the Constitution provides that the supervision and control over the subordinate Judiciary exclusively vests in the High Court concerned. It comprehends all supervisory powers both judicial as well as administrative as to the working of the subordinate Courts including .the disciplinary matters. Any provision in any law, direction or order empowering any executive functionary to have administrative supervision and control over the subordinate Judiciary either directly or indirectly, would militate against the concept of separation of powers and independence of Judiciary as envisaged under Article 175 and the Objectives Resolution. It would thus be seen that even under the general law, the power to order cases to be tried at different places falls within the domain of executive authority, which could not be termed as violative of judicial independence. Article 203 of the Constitution is applicable to the Courts under the National Accountability Bureau Ordinance, 1999 and such Courts are subordinate to the High Courts and therefore the power of superintendence vested in the High Court prevails over these Courts within the hierarchy of the Courts of the country and for the purposes of the Constitution. The High Court, in appropriate proceedings whenever it is made to appear to it that a fair trial cannot be held before any Accountability Court at a particular place and it is expedient for the ends of justice that any offence under the Accountability Court other than the Court seized of the matter, may transfer the case accordingly.

Section 16A (b) (i) and (ii) of the National Accountability Bureau Ordinance, 1999 purports to achieve the above objective by empowering Chairman, National Accountability Bureau to direct the Prosecutor-General Accountability to apply for transfer of a case from any such Court in one Province to a Court in another Province or from one Court to a Court in another Province or from one Court in a Province to another Court in the same Province. The above section, however, does not meet the ends of justice, in that, the Chairman, National Accountability Bureau has beer. given the choice to make a move before the appropriate Chief Justice through the Prosecutor-General, but Such right is not available to the accused.

The above provision, insofar as it denies access to an accused person for the redress of his grievance in the matter of transfer of a case from one Court to another, is ultra vires the Article 4 of the Constitution, which envisages the right of access to justice to all, which is equally founded in the doctrine of `due process of law'. The right of access to justice includes the right to be treated in accordance with law, the right to have a fair and proper trial and the right to have' an impartial Court or Tribunal. Without having an independent Judiciary, the Fundamental Rights enshrined in the Constitution will be meaningless. Equality pf citizens gives rise to two basic questions: first, to what extent the Legislature can delegate legislative functions to other bodies; and secondly, what control the Judiciary can exercise over departmental Tribunals? As to the first, the rule is that while the Legislature cannot confer on any other body power to make whatever laws it likes, it can, by its Acts, define the outline of the legislative power within the limited field to carry out the purposes of the legislation. The Legislature cannot frame such law as may bar right of-access to Courts of law and justice. Any law, which denies the right of access to Courts and justice, is violative of Article 25 of the Constitution. It is true that the expression, `equal protection of law', does not place any limitation on the power of the State to make reasonable classification of citizens in that regard, but if such classification is without any reasonable basis, it would tantamount to denying that right to a category of persons and the same being discriminatory is liable to be struck down.

The rule regarding holding an open trial is not rigid and inflexible nor could it be pressed to its breaking point in defeating very ends of justice. The Presiding Officer or the Magistrate concerned is empowered to forbid access of the public generally or any particular person remaining in Court at any stage of inquiry or trial for sufficient reasons in interests of administration of justice.?

Resultantly, in the matter of, transfer of cases from one Court to another, either within a Province or . from one Province to another, as contemplated under section 16A, the prosecutor and the accused must be placed on equal footing. To this extent, section 16A is declared ultra vires the Constitution and needs to be suitably amended.?

Government of Sindh v. Sharaf Faridi PLD 1994 SC 105; AI-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324; Jibendranath Kishore Acharya Chaudhry v. Province of East Pakistan PLO 1957 SC (Pak.) 9; Government of Balochistan v. Azizullah Memon PLD 1993 SC 341 and Zulfiqar Ali Bhutto v. The State PLD 1979 SC 53 ref.

(dd) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.17(c)---Constitution Pakistan (1973), Arts.4, 25 & 184(3)--?Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Power of the Accountability Court to dispense with any provision of Code of Criminal Procedure---Validity---Provision of S. 17(c) of the Ordinance is not violative of Arts.4 & 25. of the Constitution---Principles---Accountability Court under S.17(c) of the Ordinance, however shall not exercise its discretion arbitrarily but on sound judicial principles by assigning reasons

The Court's power to dispense with a provision of Criminal Procedure Code is not uncontrolled and will be governed by the principles enshrined in section 24A, General Clauses Act, 1897. If the Accountability Court deems lit to make departure from the provisions of the Criminal Procedure Code reasons will have to be recorded in writing under the section. In appropriate cases such reasons are justiciable in the exercise of Constitutional jurisdiction of the superior Courts at the instance of an aggrieved party. Section 164 of the Qanun-e-Shahadat provides that: "In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques".

In terms of the provision of section 17(c) of the National Accountability Bureau Ordinance, 1999 an Accountability Court shall not exercise its discretion arbitrarily but on sound judicial principles by assigning valid reasons. Section 17(c) is not violative of Articles 4 and 25 of the Constitution.?

(ee) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.18---Constitution of Pakistan (1973), Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court---Vires of National Accountability Bureau Ordinance, 1999---Cognizance of offences by the Accountability Court---Validity---No excessive delegation of power having been found in S.18 of the Ordinance, the same was a valid piece of legislation.

The offences under the National Accountability Bureau Ordinance, 1999 are special in nature and their investigation and inquiry extends to complicated transactions; bank accounts and books of account for which aid of experts may be required by investigating authority to unearth and detect such offences. It is, therefore quite reasonable as well as practical that the investigating agency should first thoroughly inquire into suspected offences and then decide whether or not to refer the same to an Accountability Court. There is, therefore, no excessive delegation of power in the above section. It tray be observed that the Ehtesab Act, 1997 also contained a similar provision, which was declared to be a valid piece of legislation by Supreme Court in Federation of Pakistan v. M. Nawaz Khokhar PLD 2000 SC 26.?

Federation of Pakistan v. M. Nawaz Khokhar PLD 2000 SC 26 ref.

(ff) National Accountability Bureau Ordinance (XVIII of 1999)'---

----S.24(d)---Constitution of Pakistan (1973), Art. 184(3)---Constitutional petition Under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Arrest, detention and remand of the accused---Validity---Provision of S.24(d) of the Ordinance is ultra vires to the extent that same denies the right of the accused to consult and be defended by a legal practitioner of his choice, to this extent cl.(d) of S.24 of the Ordinance requires to be suitably amended, outer limit of 90 days fixed in cl. (d) of S.24 of the Ordinance appears to be excessive, prolonged -detention of an accused without sufficient cause for such detention, makes an inroad on the personal liberty of citizens as guaranteed under the Constitution which cannot be countenanced---Supreme Court directed that S.24(d) of the Ordinance be further amended to the extent that Accountability Court shall not remand an accused person to custody under S.24(d) for a term exceeding fifteen days at a time; if sufficient and reasonable. cause appears for further remand, after the expiry of the first fifteen days, the accused shall be brought before the Court for appropriate orders and that in no case, each remand shall be for a period more than fifteen days at a time and the Court passing order of remand shall forward a copy of such order with reasons for making it to the High Court concerned---Proviso to cl. (d) of S.24 of the Ordinance insofar as it contains the provision that "no accused arrested under the Ordinance shall be released without the written order of the Chairman, National Accountability Bureau is ultra vires being repugnant to the concept of Independence of Judiciary, suitable amendment be made so as to delete the words "without the written order of the Chairman, NAB or".

Article 10 of Part II of the Constitution provides safeguards as to arrest and methodology for the production of an accused before a Magistrate, communication of grounds, rights of the accused to be defended by counsel, arrest under detention law, constitution of Review Board, proceedings before Review Board and maximum period of detention. In the present case Court is not dealing with a law regarding preventive detention and, therefore, the provisions relating thereto in Article 10 of the Constitution are not relevant for the purpose of the controversy raised herein. The provisions of clause (d) of section 24 of the Ordinance are in substantial compliance of the provisions of clauses (1) and (2) of Article 10 of the Constitution. However, the above clause is ultra vires to the extent that it denies the right of the accused to consult and be defended by a legal practitioner of his choice. To this extent clause (d) of section 24 of National Accountability Bureau Ordinance, 1999 requires to be suitably amended.

It is true that in terms of sections 167 and 344, Cr.P.C. when an accused is arrested he is bound to be produced before a Magistrate within a period of twenty-four hours and beyond such period police cannot detain him without seeking permission from a Magistrate and that no Magistrate can remand an accused to custody for a term exceeding fifteen days at a time, respectively. It is also well established that remand is not to be granted in routine and the liberty of citizens must be protected subject to the law and the Constitution. It is provided in National Accountability Bureau Ordinance, 1999 that Cr.P.C. applies subject to any inconsistency with the Ordinance. The provisions contained in clause (d) of section 24 of the Ordinance, insofar as they relate to the remand of an accused, are inconsistent with the provisions of the Cr.P.C. inasmuch as under sub?section (1) of section 344 of the Cr.P.C. the maximum period of remand is fifteen days. Several provisions of the Ordinance are inconsistent with what has been laid down in Cr.P.C. But, as pointed out above, the Cr.P.C. is applicable subject to any inconsistency with the Ordinance. Therefore, the mere fact that subsection (1) of section 344, Cr.P.C. provides maximum remand for a period not exceeding fifteen days at a time, does not, ipso facto, confer a right on a person accused of an offence under National Accountability Bureau Ordinance, 1999 to be detained for a period of not more than fifteen days at a time. Explanation added to subsection (2) of section 344, Cr.P.C. can be referred which provides that if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained in that behalf, this is a reasonable cause for a remand.

Under section 24(d), a maximum period of 90 days is provided for detention in connection with investigation etc., which is not automatic or the accused is to be detained for 90 days straightaway. Generally, the accused is produced before the Court after every 10/ 15 days, in some cases even with an interval of 3-4 days, and the Court, keeping in view the facts and circumstances of the case, determines the period of further custody. It is reasonable if the accused is directed to be produced before the Court after every 15 days or earlier keeping in view the facts and circumstances of each case, for appropriate orders.

Be that as. it may, it is the duty of Supreme Court to jealously safe guard the liberty of the citizens and to strike down a law, or suggest amendment thereto for protecting the same or avoiding undue harassment to them.

Outer limit of ninety days fixed in clause (d) of section 24 of National Accountability Bureau Ordinance, 1999 appears to be excessive. Prolonged detention of an accused without sufficient cause for such detention, makes an inroad on the personal liberty of citizens as guaranteed under the Constitution, which cannot be countenanced by Supreme Court.

Clause (d) of section 24 of the Ordinance be also amended to the extent that the Accountability Court shall not remand an accused person to custody under clause (d) of section 24 of the Ordinance for a term exceeding fifteen days at a time. If sufficient and reasonable cause appears for farther remand, after the expiry of the first fifteen days, the accused shall be brought before the Court for appropriate orders and that in no case, each. remand shall be for a period more than fifteen days at a time. The Court passing order of remand as referred to above, shall forward a copy of such order with reasons for making it to the High Court concerned. Suitable amendments be made accordingly.

The Chairman, National Accountability Bureau cannot, under any principle of jurisprudence, simultaneously assume the role of prosecutor and Judge. The power of judicial review and the matters relating to the administration of justice solely vest with the judiciary and such powers cannot be entrusted to the National Accountability Bureau being violative of the very concept of Independence of Judiciary: '

The proviso to clause (d) of. section 24 insofar as it contains the provision that: ??.no accused arrested .under this Ordinance shall be released without the written order of the Chairman, National Accountability Bureau?.is ultra vires being repugnant to the concept of Independence of Judiciary. Suitable amendment be made so as to delete the words ?without the written order of the Chairman, NAB or".?

(gg) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.24(a)---Constitution of. Pakistan (1973), Art. 184(3)-7-Constitutional petition under Art. 184(3) of the Constitution before. Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Inquiries and investigation of the accused---.Validity---Powers conferred by S.24(a) of the Ordinance are part of normal powers relating to inquiries and investigation, however, while exercising powers under.S.24(a) of the Ordinance the Chairman, National Accountability Bureau shall consider the facts and circumstances of each case justly, fairly, equitably, in accordance with law and in conformity with the provisions of S.24A of the General Clauses Act, 1897 and not in a discriminatory manner---Any such order passed by the Chairman is subject to correction in appropriate cases by the superior Courts in the exercise of their Constitutional jurisdiction---Provision of S.24(a) is ex facie not ultra vires the Art.25 of the Constitution.

The powers conferred by the provision of section 24(a) of the Ordinance ate part of normal powers relating to inquiries and investigation. Similar powers are conferred upon Police Officers by the Criminal Procedure Code under section 54 thereof. However, there is no doubt that while exercising powers under section 24(a) of the Ordinance the Chairman National Accountability Bureau shall consider the facts and circumstances of each case justly, fairly, equitably, in accordance with law and in conformity with the provisions of section 24A of the General Clauses Act, 1897 and not in a discriminatory manner. Any such order passed by him is subject to correction in appropriate cases by the superior Courts in the exercise of their Constitutional jurisdiction. It is, therefore, difficult to hold that section 24(a) is ex facie ultra vires the Article 25 of the Constitution.?

(hh) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.24(c)---Constitution of Pakistan (197.3), Art.184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court---Vires of National Accountability Bureau Ordinance, 1999---No element of retrospectivity in cl.(c) of S.24 of the Ordinance having been found, same was not ultra vires the Constitution.?

(ii) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.23---Constitution of Pakistan (1973), Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Prohibition on transfer of property ---V,4lidity---Provision of S.23 is not in conflict with Arts.2A, 4, 23; 24 & 25 of the Constitution of Pakistan, in that, reasonable restrictions in the public interest may be imposed by a law on the right to hold, acquire or dispose of property and National Accountability Bureau Ordinance by its very nature is a law relating to acquisition and retention of ill-gotten property and to recover the same---Supreme Court, however, directed that S.23 be suitably amended to reflect that transfer of property by an accused person or any relative or associate of such person or any other person on his .behalf or creation of a charge on any movable or immovable property owned by him or in his possession, while-the inquiry, investigation or proceedings are pending before the National Accountability Bureau or the Accountability Court, shall not be void if made with prior approval in writing of the Judge, ;Accountability Court, subject to such terms and conditions as the Judge may deem fit in consonance with the well established principles of law for passing interlocutory orders in consonance with the objects of the It was contended that insofar as section 23 prohibits transfer of property merely because an investigation has been initiated at the discretion of the Chairman, National Accountability Bureau it is violative of Articles 23 and 24 of the Constitution which guarantee rights to property. Insofar as the above section makes any such transfer void even though both the transferor and the transferee be genuinely unaware of such investigation, the section offends Articles 2A, 4, 23, 24 and 25 of the Constitution. The above provision is not in conflict with the aforementioned Articles of the Constitution, in that, reasonable restrictions in the public interest may be imposed by a law on the right to hold, acquire or dispose of property. The National Accountability Bureau Ordinance, 1999, by its very nature, is a law relating to acquisition and retention, of ill-gotten property and to recover the same.

Furthermore, section 23 is an interlocutory measure to prevent persons accused of such offences to frustrate the objects of law by creating, thud party interest in respect of illegally acquired property, thereby creating hurdles in the object of law i.e. to eradicate corruption and corrupt practices and hold accountable all those persons accused of such practices and matters ancillary thereto. The purpose of this- power is more to preserve the property acquired by the accused through corruption and corrupt practices so that ultimately if the guilt is proved the same can be taken back from him in accordance with law. Section 23 of the National Accountability Bureau Ordinance, 1999 is also preventive in nature and prescribes penalties for the accused person who attempts to alienate or transfer by any means property after the Chairman, National Accountability Bureau has initiated investigation, inquiry or proceedings have commenced against him in an Accountability Court. Put differently, it is in the nature of a restraint order. The protective measures are not by way of punishment but with a view to ensure that the final decision is not rendered redundant.

Additionally, somewhat similar provisions are contained in section 7 of the Offences in Respect of Banks (Special Courts) Ordinance, 1984 which provides that: ".After a Special Court has taken cognizance of a_ scheduled offence alleged to have been committed by an accused person, such person or any relative of such person or other person on his behalf shall not, without the previous permission in writing of the Special Court, transfer, or create a charge on, any movable or immovable property owned by him or in his possession, while proceedings are pending before the Special Court; and any transfer of, or creation of a charge on such property without such permission shall be void". Viewed in this perspective, transfer. of property by the accused or his relatives etc. seems permissible with the approval of the Court. Supreme Court, therefore, directed that section 23 be suitably amended to reflect that transfer of property by an accused person or any relative or associate of such person or any other person on his behalf or creation of a charge on any movable or immovable property owned by him E
or in his possession, while the inquiry, investigation or proceedings are pending before the National Accountability Bureau or the Accountability Court, shall not be void if made with prior approval in writing of the Judge, Accountability Court, subject to such terms and conditions as the Judge may deem fit in consonance with the well-established principles of law for passing - interlocutory orders in consonance with the objects of the Ordinance.?

(jj) National Accountability Bureau Ordinance (XVIII of 1999)---

----[As amended], Preamble---Ordinance by its very nature is a law relating to acquisition and retention of ill-gotten property and to recover the same.?

(kk) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.25---Constitution of Pakistan (1973), Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court---Vires of National Accountability Bureau Ordinance, 1999---Plea bargaining--?Validity---Plea bargaining envisaged under S.25 of the Ordinance is to be encouraged but it is not desirable in cases opposed to the principles of public policy---Chairman, National Accountability Bureau/Governor, State Bank of Pakistap, while involved in plea bargaining negotiations, should avoid using their position and-authority for exerting influence and undue pressure on parties to arrive at settlement ---Any type of alternate resolution like the `plea. bargaining' envisaged under S.25 of the Ordinance is to be encouraged in the interest of revival of economy and recovery of outstanding dues--?Accused can be persuaded without pressure or threat to agree on a settlement figure subject to the provisions of the Ordinance---Establishing such procedure at the investigation/inquiry stage greatly reduces determination of such disputes by the Court---Plea bargaining/compromise being in the nature of compounding the offences, the same should be subject to approval of the Accountability Court---Supreme Court directed that S.25 of the Ordinance be suitably amended.

A perusal .of the Preamble of the National Accountability Bureau Ordinance, 1999 shows that it is a composite and an extensive law and its interpretation has to be done in a manner different, from the normal interpretation placed on purely criminal statutes. This law deals with, among others, setting up of the National Accountability Bureau, which is an executive as well as administrative authority and an investigating agency; which deals with several aspects of `corruption', etc. The National Accountability Bureau does not merely deal with crimes of corruption, it also deals with their investigation and settlement out of Court. Bargain out of Court is now an established method by which things are settled in several developed societies. It was necessary in- cases where the criminal is a potential investor and is inter-linked with the economy of the society, he should be given an opportunity to play his role in, the society after he has cleared his liability. There appears to be nothing amiss insofar as it does not oust the jurisdiction of the Accountability Courts to exercise their judicial power in appropriate proceedings. Rather this is in the nature of a facility provided to the accused. There is nothing wrong with the National Accountability Bureau . Ordinance, 1999 providing for a procedure of bargaining.

Moreover, the scheme for exploring the possibility of settlement during investigation/inquiry stage by the Chairman, National Accountability Bureau cannot be ignored straightaway. At the outset, most of the lawyers tend to consider the question of settlement out of Court. There is need to focus attention on this significant facet of the matter. The rationale behind the Ordinance is not only to punish those who were found guilty of the charges levelled under the Ordinance but also to facilitate early recovery of the ill-gotten wealth through settlement where practicable. The traditional compromise, settlement, compoundability of offence during the course of proceedings by the Courts after protracted litigation is wasteful. Viewed in this' perspective, a power has been vested in the Chairman,' National Accountability Bureau to facilitate early settlement for recovery of dues through `plea bargaining' where practicable. Lawyers are often interested in settling the disputes of their clients on just, fair and equitable basis. There are different approaches to settlement. Plea bargaining is not desirable in cases opposed to the principles of public policy. Chairman, National Accountability Bureau/Governor, State Bank of Pakistan, while involved in plea bargaining negotiations, should avoid using their position and authority for exerting influence and undue pressure on parties to arrive at settlement. However, in the interest of revival of economy and recovery of

outstanding dues, any type .of alternate resolution.' like the `plea bargaining' envisaged under section 25 of the Ordinance should be encouraged. An accused can be persuaded without pressure or threat to agree on a settlement figure subject to the . provisions of the Ordinance. Establishing this procedure at the investigation/inquiry stage greatly reduces determination of such disputes by the Court. However, as the plea bargaining/compromise is in the nature of compounding the offences, the same should be subject to approval of the Accountability Court. Accordingly, section 25 of the impugned Ordinance be suitably amended.?

(ll) National Accountability Bureau Ordinance (XVIII of 1999)---

----Preamble---Object and scope---Principles of interpretation of National Accountability Bureau Ordinance, 1999.

A perusal of the Preamble of the National Accountability Bureau Ordinance shows that it is a composite and an extensive law and its interpretation has to be done in a manner different from the normal interpretation placed on purely criminal statutes. This law deals with, among others, setting up of the. National Accountability Bureau, which is an executive as well as administrative authority and an investigating agency; which deals with several aspects of corruption, etc. The National Accountability Bureau does not merely deal with crimes of corruption, it also deals with their investigation and settlement out of Court.?

(mm) Interpretation of statutes---

---- Composite and extensive law---Principles of interpretation.?

(nn) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.25-A(e) & (g)---Constitution of Pakistan (1973), Art.184(3)--?Constitutional petition under Art.184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999--?Payments out of Court---Payment of loan---Discretion of Chairman, National Accountability Bureau to reject. Recommendations of Committee' and Governor State Bank of Pakistan---Validity---Provisions of S.25A(e) & (g) in their present form suffer from excessive delegation of power,, in that, these provisions confer .unfettered discretion on the Chairman; National Accountability Bureau to reject the recommendations of a duly appointed Committee and. to refuse to recognize a settlement arrived at between a creditor _ and debtor---Supreme Court directed that the recommendations made by .the Governor State Bank of Pakistan shall be binding on the Chairman, National Accountability Bureau except for valid reasons to be assigned in writing subject to approval of the Accountability Court to be accorded within a period not exceeding 7 days and that suitable amendment be made in S.25A(e) & (g) of the Ordinance.

Provisions of section 25A (e) and (g) of the Ordinance in their present form suffer from excessive delegation of power, . in that, these provisions confer unfettered discretion on the Chairman, National Accountability Bureau to reject the recommendations of a duly appointed committee and to refuse to recognize a settlement arrived at between a creditor and a debtor. Supreme Court directed that the recommendations made by the Governor, State Bank of Pakistan shall be binding on the Chairman, National Accountability Bureau except for valid reasons to be assigned in writing subject to approval of the Accountability Court, to be accorded within a period not exceeding 7 days. Suitable amendment be made in section 25A (e) and (g).?

The Chairman; National Accountability Bureau is not competent to reject- a settlement arrived at between a creditor and debtor through the intervention of Governor State Bank of Pakistan without the approval of the Accountability Court.?

(oo) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.32---Constitution of Pakistan . (1973), Art. 184(3)---Constitutional petition under Art.184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Appeal---Purported ouster of jurisdiction of the superior Courts from exercising their jurisdiction under Art. 184(3) and Art. 199 of the Constitution---Validity---Provision of S.32 of the Ordinance so far as it purports to oust the jurisdiction of the superior Courts from exercising the jurisdiction whether under Art. 184(3) or Art. 199 of the Constitution is ultra vires---Supreme Court directed that by way of abundant caution, S.32 of the Ordinance be suitably amended so as to clarify in unambiguous terms that ouster of jurisdiction does not embrace the superior Courts in the exercise of their Constitutional jurisdiction---High Courts, however, shall exercise the power under 'Art. 199 sparingly in rare and exceptional circumstances for valid reasons to be red in writing.

Section 32 of the Ordinance provides appeal before the High Court at the instance of any person convicted or. the Prosecutor-General Accountability. However, it prohibits appeal against an interlocutory order of the Court during the proceedings pending before -it under this

Ordinance and provides an appeal only against the final judgment of the Accountability Court. T11e main attack is directed against clause (d) thereof which provides that no stay of proceedings before Accountability Court shall be granted by any Court on any ground whatsoever, nor proceedings thereof be suspended or stayed by any Court on any ground whatsoever.

Constitutional jurisdiction vesting in the High Courts tinder Article 199 of the Constitution cannot be taken away or abridged, or curtailed by subordinate legislation. The above provision insofar as it purports to oust the jurisdiction of the superior Courts from exercising the jurisdiction whether under Article 184(3) or 199 of the Constitution is ultra vires.?

However, by way of abundant caution, section 32 be suitably amended so as to clarify in unambiguous terms that ouster, of jurisdiction does not-embrace the superior Courts in the exercise of their constitutional jurisdiction. Needless to observe that High Courts shall exercise this power sparingly in' rare and exceptional circumstances for valid reasons to be recorded in writing.?

Inayat Ullah and others v M.A.Khan and others PLD 1964 SC126; Nagina Silk,Mills, Lyalipur v. Income-tax Officer PLD 1963 SC 322; Abdul Rashid v. Pakistan PLD 1962 SC 42; Muhammad Anwar v. Government of West Pakistan PLD 1963 Lah. 109;, Abdul Rahim v. Chancellor of West Pakistan University of Engineering and Technology PLD 1964 Lah. 376; Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan as Supreme Commander of the Armed Forces, Islamabad and -others PLD 1996 SC 632 ref.

(pp) National Accountability Bureau Ordinance (XVIII of 1999)--

----S.18(g)---Constitution of Pakistan :(1973), Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance; 1999---Cognizance of offence---Reference to Accountability Court ---Procedure---Validity--?Provisions corresponding to S.170, Cr.P.C. are contained in S.18(g) of the Ordinance to which no exception can be taken subject to compliance with the procedure laid down in 5.170, Cr.P.C. so far as it is applicable, Supreme Court directed that S. 18(g) of the Ordinance be suitably amended.

The powers vesting in the Chairman, National Accountability Bureau to release an accused from custody having regard to the gravity of the charge against him, favour the accused. However, while doing so, he is to record valid reasons in writing. As regards the vesting of powers with the Chairman, National Accountability Bureau under section 18(g) to refer or not a case to the Accountability Court after perusal of the material and evidence collected during inquiry and investigation, suffice it to say that this power corresponds to the normal powers vested in all Police Officers or Officers of investigating agencies. Reference may be made to section 170, Cr.P.C.?

Clearly, the existence of sufficient evidence is a condition precedent for the police acting under section 170, Cr.P.C. and for making a request to the Magistrate to take cognizance of the offence. It is for the officer in charge of.a police station to decide whether there is sufficient evidence to justify the forwarding of the accused to the competent Magistrate. A corresponding provision is contained in section 18(g) to which no exception can be taken subject to compliance with the procedure laid down in section 170, Cr.P.C. so far as it is applicable. To this extent section 18(g) be suitably amended.?

(qq) National Accountability Bureau Ordinance (XXIII of 1999)---

----S.28(d)---Constitution of Pakistan (1973), Art.184(3)---Constitutional petition under Art.184(3) of the Constitution before Supreme Court---Vires of National Accountability Bureau . Ordinance, 1999---Appointment of officers and staff of National Accountability Bureau---Validity---Provision of S.28(d) of the Ordinance creates two categories of persons serving in National Accountability Bureau; the first one is of persons directly appointed to whom Civil Servants Act, 1973 does not apply while the second category is comprised of persons who are civil servants deputed to or posted in National Accountability Bureau, but Civil Servants, Act, 1973 continues to apply to such persons---Officers and staff of the Bureau being of two different categories and classes of employees, no violation of Art.25 of the Constitution is involved.?

(rr) National Accountability Bureau Ordinance (XVIII of 1999)---

----[As amended], Preamble---Constitution of Pakistan (1973), Art. 184(3)--?Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Question to the effect whether the alleged violation of principles of universal declaration of Human Rights, 1948 and Cairo Declaration on Human Rights in Islam are justiciable in the proceedings before Supreme Court under Art. 184(3) of the Constitution was left by the Supreme Court to be considered in some other appropriate case, in

that, the order proposed to be passed in the present proceedings did not contravene the said declaration.?

(ss) National Accountability Bureau Ordinance (XVHI of 1999)---

----[As amended], Preamble---Constitution of Pakistan (1973), Art. 184(3)--?Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Mere fact that Ehtesab Act, 1997 was competently and validly made and its vires were upheld by the Supreme Court did not in any way prescribe any limitation on the competent Legislature to make a new law on the subject for new laws are not made only when previous laws have been declared invalid.?

(tt) National Accountability Bureau Ordinance (XV1II of 1999)---

----Preamble---Constitution of Pakistan (1973),- Arts.2A & 184(3)--?Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999 on the touchstone of Art.2A of the Constitution having regard to. the law laid down by Supreme Court in the case of Hakim Khan and 3 others v. Government of Pakistan reported as PLD 1992 SC 595---No provisions of the Ordinance having been pointed out to be repugnant to the Injunctions of Islam, Supreme Court declined to deal with the question of vires.?

(uu) National Accountability Bureau Ordinance (XV1II of 1999)---

----S.6(b)(i)---Constitution of Pakistan (1973), Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Appointment of Chairman of National Accountability Bureau---Validity---Supreme Court directed that S.6; was required to be suitably amended in the terms to the effect that (a) The Chairman, National Accountability Bureau ,shall be appointed by the President in consultation with the Chief Justice of Pakistan; (b) the Chairman, National Accountability Bureau shall hold office for a period of three years; (e) the Chairman, National Accountability Bureau shall not be removed from office except on the grounds of removal of a Judge of the Supreme Court of Pakistan; (d) the Chairman, National Accountability Bureau shall be entitled to such salary, allowances and privileges and other terms and conditions of service, as the President determines and these terms shall not be varied during the term of his office; (e) the Chairman, National Accountability Bureau may, by writing under his hand, addressed to the President, resign his office and that 'the present incumbent of the office of Chairman, National Accountability Bureau shall be deemed to have been appointed for a term of three years from the day he entered upon his office.

Insofar as the provisions relating to methodology for appointment of Chairman, National Accountability Bureau and Deputy Chairman, National Accountability Bureau without prescribing any qualifications in that regard are concerned, it may be observed that there are numerous other instances where no specific qualifications have been prescribed for certain appointments. Such examples include appointment of Governor of a Province, Director-General, FIA under Federal Investigation Agency Act, 1974, Managing Director of PIA under the Pakistan International Airlines Act, 1956 and Federal Tax Ombudsman under Establishment of Office of Federal Tax Ombudsman Ordinance, 2000. However, in view of the importance of the National Accountability Bureau, its objectives of eradication of corruption and corrupt practices and to ensure the process of accountability to be conducted in a coherent and transparent manner, it is essential that its independence is maintained. With a view to achieving the above objective, Supreme Court found that clause (b)(i) of section 6 to the effect that the Chairman, National Accountability Bureau, "shall hold office during the pleasure of the President" is ultra vires being repugnant to the concept of independence of an institution.

Section 6, therefore, requires to be suitably amended in the following terms:

(a) The Chairman, National Accountability Bureau shall be appointed by the President in consultation with the Chief Justice of Pakistan.

(b) The Chairman, National Accountability Bureau shall hold office for a period of three years.

(c) The Chairman, National Accountability Bureau shall not be removed from office except on the grounds of removal of a Judge of the Supreme Court of Pakistan.

(d) The Chairman, National Accountability Bureau shall be entitled to such salary, allowances and privileges and other terms and conditions of service, as the President determines and these terms shall not be varied during the term of his office.

(e) The Chairman, National Accountability Bureau may, by writing under his hand, addressed to the President, resign his office.'

In order to ensure continuity of the accountability process and in the light of the decision in Zafar Ali Shah's case PLD 2000 SC 869 that the process of accountability be accelerated, Supreme Court directed that the present incumbent of the office of Chairman, National Accountability Bureau shall be deemed to have been appointed for a term of three years from the day he entered upon his office.?

(vv) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.7---Constitution of Pakistan (1973), Art. 184(3)---Constitutional petition under Art. 184(3) before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Appointment of Deputy Chairman of the National Accountability Bureau---Validity---Supreme Court directed that provision of S.7(b) be suitably amended to the effect that "the Deputy Chairman shall hold office for a minimum period of two years and shall not be removed except on ground of misconduct as defined under S.2(4) of the Government Servants (Efficiency and Discipline) Rules, 1973.?

(ww) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.8----Constitution of Pakistan (1973), Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Appointment of Prosecutor-General Accountability---Validity---Held, in view of the legal nature of duties of the Prosecutor-General Accountability, he must be a person qualified to be appointed as a Judge of the Supreme Court of Pakistan in that his duty is to give advice to the Chairman, National Accountability Bureau upon such legal matters and to perform such other duties of a legal character as may be referred or assigned to him by the Chairman, National Accountability Bureau and, in the performance of his duties, he has a right of audience in all Courts including the High Courts and the Supreme Court---Section 8(a) of 'the Ordinance, therefore, be amended so as to provide that (a) The Prosecutor-General Accountability shall hold an independent office on whole time basis and shall not hold any other office concurrently; (b) he shall be appointed by the President in consultation with the Chief Justice of Pakistan and Chairman, National Accountability Bureau on such terms and conditions as may be determined by the President; (c) his remuneration and fringe benefits shall in no case exceed those of the Attorney-General for Pakistan, who is the Principal Law Officer of the country and holder of a Constitutional office; (d) he shall hold a tenure post of not less than two years; (e) his services shall not be dispensed with except on the grounds prescribed for removal of a Judge of the Supreme Court; (f) he shall not be permitted to conduct private cases and in lieu thereof he may be allowed a special allowance; (g) he may, by writing under his hand addressed to the President of Pakistan, resign his office---Present incumbent of the post of Prosecutor-General, in the interest of continuity of accountability process, shall continue in office on the existing terms and conditions of his service till his successor is appointed or he is found suitable to be retained in service as such subject to recommendations of the consultees.?

(xx) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.8---Constitution of Pakistan (1973), Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Independent Prosecution Agency, establishment of---Supreme Court directed that a panel of competent lawyers of experience and impeccable reputation shall be prepared in consultation with the Law and Justice Division and their services shall be utilized as Prosecuting Counsel in cases of significance at reasonable fee on case-to-case basis; even during the course of investigation of an offence, the advice of a lawyer chosen from the panel should be taken by the National Accountability Bureau---Every prosecution which results in the discharge or acquittal of the accused must be reviewed by a lawyer on the panel and, on the basis of the opinion given, responsibility should be fixed for dereliction of duty, if any. of the concerned officer and in such cases, strict action should be taken against the officer found guilty of dereliction of duty in accordance with law---Steps shall be taken for the constitution of an able and impartial agency comprising persons of unimpeachable integrity to perform functions of investigation and inquiry, etc by the National Accountability Bureau---Till the constitution of such body, Special Counsel shall be appointed for the conduct of important trials in consultation with the Law and Justice Division.?

(yy) National Accountability Bureau Ordinance (XVIII of 1999)---

----[As amended], Preamble---Constitution of Pakistan (1973), Arts.25 R 184(3)---Constitutional petition under Art.18?44(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance. 1999---Absence of provision in the Ordinance regarding special treatment to be meted out to the women-accused---Validity---No direction is found in Article 25 to make sj6ecial provisions for women which merely permits that provisions with regard to women may be made---Provisions of the Criminal Procedure Code, 1898 being applicable where such provisions are not specially overridden or ousted in the National Accountability Bureau Ordinance, 1999, therefore, provisions relating to women-accused under Cr.P.C. shall apply to the Ordinance as well.?

(zz) National Accountability Bureau Ordinance (XVIII of 1999)---

----S.31-B---Constitution of Pakistan (1973), Art.184(3)---Constitutional petition under Art.184(3) of the Constitution before Supreme Court---Vires of National Accountability Bureau Ordinance, 1999---Withdrawal from prosecution---Procedure---Validity---Withdrawal of cases can neither be controlled by the Chairman, National Accountability Bureau nor the Prosecutor-General or Deputy Prosecutor-General, such course can be resorted to, only if the Accountability. Court so permits---Supreme Court directed that suitable amendment be made in S.31-B of the Ordinance.?

(aaa) National Accountability Bureau Ordinance (XVIII of 1999)---

----[As amended], Preamble=--Constitution of Pakistan (1973), Art. 184(3)--?Constitutional petition under Art. 184(3), of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999--?Operational instruction appear to be laudable provided they are implemented in letter and spirit---Supreme Court observed that apart from any internal instructions issued by the National Accountability Bureau for carrying out the objectives of the National Accountability Bureau Ordinance. 1999, it would be appropriate tha; rules as envisaged under the National Accountability Bureau Ordinance, 1999 are framed as expeditiously as possible to make the process of accountability transparent in a coherent manner and in the light of the observations made in this judgment.

Operational Instruction No. l (Marked Confidential) issued by National Accountability Bureau, salient features whereof read as under:

"The genesis of corruption in Pakistan is rooted in our historical, social and political history. The inherited system of governance has led to concentration of powers and privileges, thus glamorizing corruption in the society. Corruption is not a cause but a symptom of breakdown of systems and ethics. Fortunately, the tide is turning against the corruption, which lends a big support to National Accountability Bureau. At the same time, failing to deliver would have adverse consequences and therefore, cannot be ignored. The present Government has taken the challenge up-front and National Accountability Bureau has to deliver with a spirit of "Jihad" in the shortest possible time."

Para. 2 of the Instruction lays down the aims and objectives of National Accountability Bureau within the parameters of the National Accountability Bureau Ordinance, 1999 and seven-point agenda of the present Government. These are:

(a) Identification, investigation and prosecution of cases of corruption ensuring speedy disposal.

(b) Urgent recovery of the State money and other assets misappropriated, through corruption, corrupt practices and misuse of authority.

(c) Induce a deterrence against corruption in the society in general and amongst corrupt institution/persons in particular. '

(d) Develop a culture/mechanism of institutionalized accountability by every public/private organization.

(e) Structure National Accountability Bureau's organization on long term basis which is task oriented by highly professional.

The Instructions, amongst others, contain caution to be exercised against the individual acts of misconduct or misuse of authority, focus on operation, the capacity factor prioritization-parameters, and process, review of ongoing cases, limiting factors, i.e. the society's balance is not disturbed, the economic activity is not damaged and the campaign is conducted without harassment, principles of operational functions, functional matters, investigation functions, overseas investigations, teamwork, actions following formal investigations, plea bargaining within the parameters of the law, prosecution functions, functional spectrum and organization, pre-trial function, organizational aspect, etc. The directions contained in the Operational Instruction No.1 appear to be laudable provided they are implemented in letter and spirit. However, apart from any internal instructions issued by the National Accountability Bureau for carrying out the objectives of the National Accountability Bureau Ordinance, 1999 it would be appropriate that rules as envisaged under the National Accountability Bureau Ordinance, 1999 are framed as expeditiously as possible to make the process of accountability transparent in a coherent manner and in the light of the observations made, in this judgment. ?

(bbb) National Accountability Bureau Ordinance (XVIH of 1999)---

----S.5(m)---Constitution of Pakistan (1973), Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court---Vires of National Accountability Bureau Ordinance, 1999---Accountability of Armed Forces---Contention was that S.5(m) of the Ordinance, which defines 'holders of public office', excludes a person who is a member of any of the Armed Forces of Pakistan or for the time being is subject to any law relating to any of the said Forces, it is discriminatory insofar as the accountability of the Armed Forces is concerned---Validity---Held, it was wrong to contend that members of the Armed Forces were immune from accountability as they were subject to accountability in accordance with the methodology laid down in the Pakistan Army Act, 1952 and the Pakistan Army Act Rules, 1954.

It was contended, in the present case, that section 5 (m) of the impugned Ordinance, which defines 'holders of public office', excludes a person who is a member of any of the Armed Forces of Pakistan, or for the time being, is subject to any law relating to any of the said Forces, therefore, it is discriminatory insofar, as the accountability of the Armed Forces is concerned.

The petitioners have overlooked the Constitutional safeguard$ provided to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law for his actio" being challenged under Constitutional jurisdiction of the High Court by virtue of Article 199(2)(3) of the Constitution as well as Article 8, which lays down that the laws inconsistent with or in derogation of Fundamental Rights shall be void.

Article 63(1) of the Constitution provides for disqualifications for membership of Majilis-e-Shoora (Parliament), in sub-clausea (g) thereof, which is the rationale for not including the members of the Armed Forces within the purview of the National Accountability Bureau Ordinance. This, however, does not mean that they are immune from accountability. The Pakistan Army Act (XXXIX of 1952) as well as the Pakistan Army Act Rules, 1954 are self-contained Codes, which provide for prosecution and punishment in cases involving corruption, corrupt practices, illegal gratification and for matters connected therewith and incidental thereto. Officers and persons enrolled in army service are subject to section 2 of the Act. Offences of corruption and corrupt practices etc. corresponding to and ejusdem generis with the offences contained in section 9 of the National Accountability Bureau Ordinance, 1999 are provided for in sections 27, 40, 42, 47 and 55 of the Act. Section 27 of the Act prescribes 'offences against property or persons of inhabitant of country where serving' which is punishable with rigorous imprisonment for a term which may extend to fourteen years; section 40 of the Act deals with 'fraudulent offence' in respect of property which is punishable with rigorous imprisonment for a term which may extend to five years; 'illegal gratification' falls under section 42 of -the Act, which is punishable with rigorous imprisonment for a term which may extend to five years; section 47 relates to "false documents" which is punishable with rigorous imprisonment for a term which may extend to seven years; and section 55 of the Act provides for "violation of good order and discipline" and prescribes punishment for its breach, which may extend to five years.

Section 176 of the Act prescribes power of the Federal Government to make rules for the purposes thereof. Rule 13 read with Rule 157 of the Rules deal with investigation of charges, remand for trial, Court of inquiry and summary of evidence. Sections 80 to 142, contained in Chapters IX to XI of the Act provide for constitution, jurisdiction and powers of Court Martial.

Viewed in the above perspective, it is wrong to contend that members of the Armed Forces are immune from accountability. Admittedly, they are subject to accountability in accordance .with the methodology laid down in the Act and the Rules.?

(ccc) National Accountability Bureau Ordinance (XVIII of 1999)---

----[As amended], Preamble ---Constitution of Pakistan (1973), Art. 184(3)--?Constitutional petition under Art.184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999--?Accountability of National Accountability Bureau---Procedure---Supreme Court directed that the accounts of the National Accountability Bureau shall be kept in such form and in accordance with such principles and methods as the Auditor-General of Pakistan may prescribe---Accounts shall be audited by the Auditor-General, Pakistan annually and his report shall be submitted to the President of Pakistan---Chairman, National Accountability Bureau shall submit his Annual Report to the President of Pakistan as to affairs and performance of the National Accountability Bureau by 15th January of each succeeding year---Mechanism shall be evolved by the Chairman; National Accountability Bureau for redressal of the grievances against the functionaries of the National Accountability Bureau.?

(ddd) National Accountability Bureau Ordinance (XXIII of 1999)---

----[As amended], Preamble---Constitution of Pakistan (1973), Arts.209 & 184(3)---Constitutional petition under Art.184(3) of the Constitution before Supreme Court---Vires of National Accountability Bureau Ordinance; 1999---Accountability of superior

judiciary---Procedure---Judges of the superior Court's are not immune from accountability and it is for the President to make a reference under Art.209 of the Constitution if in a case such a course is desirable at his end.

Under Article 209 of the Constitution of the Islamic Republic of Pakistan, 1973, the Supreme Judicial Council of Pakistan consists of -

"(a) the Chief Justice of Pakistan;

(b) the two next most senior Judges of the Supreme Court; and

(c) the two most senior Chief Justices of High Courts."

Clause (5) of the above Article reads as under:

"(5) If, on information received from the Council or from any other source, the President is of the opinion that a Judge of the Supreme Court or of a High Court---

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct, .

the President shall direct the Council to inquire into the matter."

A perusal of the above clause indicates that the right to move the Supreme Judicial Council (SJC) against a Judge of the superior Court under .Article 209 of the Constitution is not available to any individual. Secondly, the President alone on the advice of Prime Minister or the Cabinet as the case may be, can refer a case of the Judge of the superior Court to Supreme Judicial Council for holding an enquiry against him.. Thirdly, the jurisdiction of Supreme Judicial Council to hold an enquiry against the Judge of a superior Court arises only when a reference is made to it by the President in this behalf. Fourthly, the enquiry by the Supreme Judicial Council against the Judge of a superior Court under Article 209 of Constitution of Pakistan (1973), is limited only to two points, namely (i) the incapacity of the Judge to perform the duties of his office properly arising from any physical or mental incapacity, and (ii) misconduct of the Judge concerned. Lastly, the findings of the Supreme Judicial Council in such an enquiry are recommendatory in nature and the action, if any, is to be taken by the President on the advice of the Prime Minister or the Cabinet. However, in order to make the Supreme Judicial Council more effective and functional and to ensure that the Judges of the superior Courts observe the Code of Conduct in letter and spirit, the Chief Justice of Pakistan/Chairman, Supreme Judicial Council convened meetings of the Council on 29-3-2000, 13-4-2000 and 30-4-2000 respectively wherein decisions, inter alia, were taken to make it obligatory on every Judge to take all steps necessary to expedite cases, and effectively control the processing thereof with a view to deciding the same expeditiously and to strictly adhere to the Code of Conduct, pursuant to the provisions contained in Articles II, IX and X of the Code of Conduct. Article X provides for quick disposal of cases. The Judges of the superior Courts have to work and conduct themselves under the Code of Conduct already prescribed for them. They are oath-bound to preserve the Code and act in accordance with its dictates. The Code of Conduct is a fairly comprehensive document and covers both the public and private conduct of Judges. It lays down essential norms of behaviour to be observed in the interest of maintaining decorum and judicial propriety. The Supreme Judicial Council is a unique institution, which comprises the senior most Judges in judicial hierarchy and entrusted with the onerous responsibility of deciding complaints that are referred to it through references by the President alone. It is an essential prerequisite of the independence of judiciary that there is put in place a system of accountability. It should, therefore, be the endeavour of the Judges of the superior Courts to make the Code fully applicable and ensure that it is strictly adhered to. The Judges of the superior Courts are not immune from accountability. They are accountable only in the manner laid down under Article 209 of the Constitution. The Judges of the superior Courts are not immune from accountability and that it is for the President to make a reference if in a case such a course is desirable at his end.?

Malik Asad Ali v. Federation of Pakistan PLD 1998 SC 161 and Zafar Ali Shah's case PLD 2000 SC 869 ref.

(eee) National Accountability Bureau Ordinance (XVIII of 1999)---

----[As amended], Preamble---Constitution of Pakistan (1973), Art. 184(3)--?Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Past and closed transactions---Supreme Court directed that judgment in the present Constitutional petition shall not affect the trials conducted and convictions recorded or any order passed or proceedings taken thereunder and the pending trials/proceedings may continue subject to the judgment--?Principles.?

Yousaf Ali v. Muhammad Aslam Zia and 2 others PLD 1958 SC (Pak.) 104 and Zafar Ali Shah's case PLD 2000 SC 869 ref.

(fff) National Accountability Bureau Ordinance (XVIIII of 1999)---

----[As amended]; Preamble---Constitution of Pakistan (1973), Art. 184(3)--?Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Judicial process, credibility of---Accountability Judge has to bear . in mind that expeditious trial and its early conclusion are necessary for-the ends of justice and credibility of the judicial process-Any dilatory tactics of the accused shall not prevent the Court from concluding the trials most expeditiously, within the time frame laid down in the National Accountability Bureau Ordinance---Any observation made by Supreme Court in this Order shall have no bearing on the merits of the cases pending before the Accountability Courts, which shall be decided in accordance with law---Care must be taken by the Accountability Courts to. ensure that the credibility of the judicial process is not undermined in any, manner whatsoever. ?

(ggg) Administration of justice---

---- Limiting the amount of time allowed by the Court to each side for arguments---Such limits can be helpful to the Court and the parties but should be imposed with care and caution and only after consultation with counsel to ensure a fair hearing.

(hhh) National Accountability Bureau Ordinance (XVIII of 1999)---

----[As amended], Preamble---Constitution of Pakistan (1973), Art.184(3)--?Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Supreme Court by' allowing the Constitutional petitions observed that the Order in the cases and directions contained therein shall come into force with immediate effect---Federal Government has been directed by the Supreme Court to formally promulgate appropriate legislative instruments, as soon as possible, but preferably, within a period of two months from the date of the Order of the Supreme Court in the cases, in order to make necessary amendments, modifications, alterations; or substitutions, as the case may be, to give effect to the directions of the Supreme Court.?

Aitzaz Ahsan, Senior Advocate Supreme Court and Ejaz M. Khan, Advocate-on-Record for Petitioner (in C.Ps. Nos. 13 and 27 of 2000).

M.Akram Sheikh, Senior Advocate Supreme Court assisted by Dr.Amjad Hussain Bokhari, Khurram Hashim, Farrukh Hussain Lodhi, Barrister Akhtar Khan, Sherjeel Adnan, Advocates Supreme Court and M. A. Zaidi, Advocate-on-Record for Petitioner (in C.Ps. Nos. ls to 17 of 2000.

K.M.A. Samdam, Advocate Supreme Court assisted by M. Bilal, Senior Advocate Supreme Court, Shahbaz Bokhari, Advocate, M. S, Khattack, Advocate-on-Record for Petitioner (in C.Ps. Nos.10 and 28 of 2000).

Ch. Mushtaq Ahmed Khan, Advocate Supreme Court and.S. A. Asim Jafri, Advocate-on-Record (absent) for Petitioner (in C.P. No. 24 of 2000). .

A.Hafeez Peerzada, Senior Advocate, Supreme Court assisted by M. Sardar Khan, Senior Advocate Supreme Court and, M. S. Khattack, Advocate-on-Record for Petitioner.(in C.l'., No. 26 of 2000).

Aitzaz Ahsan, Senior Advocate Supreme Court with S.Zafar .Ali Shah, Advocate, Supreme Court and Ejaz M. Khan, Advocate-on-Record for Petitioner (in C.P No. 1 of 2000).

M.Ikram Chaudhry, Advocate, Supreme Court and M. A. Zaidi, Advocate-on-Record for Petitioner (in C. P. No. 14 of 2000).

Dr. A.- -Basit, Advocate, Supreme Court and Ejaz M. Khan, Advocate-on-Record for Petitioner (in C. P. No. 19 of 2000).

Dr. Z. Babar Awan, Advocate, Supreme Court and Ejaz M. Khan, Advocate-on-Record for Petitioner (in C.P. No. 20 of 2000).

A.Haleem Pirzada; Advocate, Supreme Court and Imtiaz M. Khan, Advocate-on-Record for Petitioner (in C.P. No-. 32 of 2000).

Petitioner in person (in C.P. No. 33 of 2000).

Abid Hasan Minto, Senior Advocate Supreme Court, assisted by Ahmer Bilal Sufi, Advocate Supreme Court and Mehr Khan Malik, Advocate-on-Record for the Federation of Pakistan.

Maqbool Ilahi Malik, Senior Advocate Supreme Court assisted by Raja M. Bashir, Tariq Khokhar, Raja Saeed Akram, Azmat Saeed, Advocates Supreme Court and Mehr Khan Malik, Advocate-on-Record for the NAB.

Aziz A.Munshi, Attorney-General for Pakistan assisted by Tanvir Bashir Ansari, Deputy Attorney-General, Sher Zaman Khan, Deputy Attorney-General, Saeeduz Zafar, Deputy Attorney-General, Ch. Akhtar Ali and Raja Abdul Ghafoor, Advocates-on-Record (on Court's Notice) (in C.P. No. 16 of 2000).

Lt.-Col. Iqbal Hashmi, AJAG (on Court's- Notice).

Dates of hearing: 9th, 10th, 11th, 12th, 13th and 16th April, 2001. '

JUDGMENT

IRSHAD HASAN KHAN, C.J.---This judgment shall dispose of Constitutional Petitions Nos. .13, 10, 27, 15, 16, 17, 28, 24, 26, 01, 14, 19, 20, 32 and 33 of 2000, which have been filed by the petitioners, under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution), challenging the vires of the National Accountability Bureau Ordinance, 1999 (XVIII of 1999) (hereinafter called the NAB Ordinance) (as amended by Ordinance XIX of 1999 and Ordinances IV and XXIV of 2000) on the grounds that the said Ordinance is ultra vires the Constitution, principles of separation of powers and independence of judiciary`, in violation of Fundamental Rights of freedom of trade, business or profession, security of person, safeguard from illegal arrest and; detention, protection against retrospective punishment, inviolable dignity of man, freedom of movement, equality of citizens and other rights guaranteed by the Constitution and that it purports to set up an arbitrary executive body to negate the rule of law.

2. Vide order dated 12th September, 2000, a Bench of this Court, . admitted the above petitions to regular hearing, to consider the common points emerging from these petitions; which are in the following terms:

"(i) Whether the impugned Ordinance creates a parallel judicial system in disregard of the provisions of Articles 175, 202 and 203 of the Constitution and is violative of the law laid down by this Court in the case of Mehra Ali and others v. Federation and others (PLD 1998 SC 1445)?

(ii) Whether section 2 of the impugned Ordinance whereby it deems to have come into force with effect from 1-1-1985 being retrospective contravenes the Fundamental Right enshrined in Article 12 of the Constitution in so far as it creates a new offence of `wilful default' with retrospective effect?

(iii) Whether section 5(r) of the impugned Ordinance which defines `wilful default' negates the freedom of trade, business or profession as contemplated by Article 18 of the Constitution, which guarantees that subject to such qualifications, if any, as may be: prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation and to conduct any lawful trade 'or business?

(iv) Whether the power vesting in the Chairman NAB or the Court trying a person for any offence under the impugned Ordinance vide clause (a) of section 12 and by providing in clause (c)~ (iv) thereof that any such order shall remain in force for a period of up to thirty days is an unreasonable restraint and violative of Articles 4, 9, 23 and 24 of the Constitution? '
?
(v) Whether clause (d) of section 14 of the impugned Ordinance whereby the burden of proof in respect of an offence under section 9(a)(vi) and (vii) has been placed on the accused and his conviction has been conferred validity, is violative of Articles 4 and 25 of the Constitution?

(vi) Whether section 16(d) of the impugned Ordinance which authorises the Chairman NAB to select the venue of the trial by filing a reference before any Accountability Court established anywhere in Pakistan suffers from excessive delegation?

(vii) Whether section 17(c) of the impugned Ordinance which enables the Accountability Court to dispense with any provision of the Code of Criminal Procedure, 1898; and follow such procedure as it may deem fit in the circumstances of the case is violative of Articles 4 and 25 of the Constitution? ??????????

(viii),Whether section 18 of the impugned Ordinance which prohibits the Accountability Court to take cognizance of any offence under the impugned Ordinance except on a reference made

by Chairman NAB or an officer of the NAB duly authorised by him amounts to excessive delegation:'

(ix) Whether section 24(d) of the impugned Ordinance which empowers the Chairman NAB to detain in his custody an accused person up to a period of ninety days after having produced him once before the Accountability Court, such power vesting in executive authority is contrary to the right of equal protection and also opposed to the spirit of Fundamental Rights contained in Clause (2) of Article 10 of the Constitution?

(x) Whether section 23 of the Ordinance in so far as it prohibits transfer of any right, title, interest or creation of charge on property after the Chairman NAB has initiated investigation into the offences under the impugned Ordinance, alleged to have been committed by an accused person, is violative of Articles 23 and 24 of the Constitution?

(xi) Whether section 24(a) of the impugned Ordinance empowering the Chairman NAB at any stage of the investigation under the impugned Ordinance, to direct that the accused, if not already arrested, shall be arrested, 'tantamounts to conferment of unbridled and unfettered powers of determining if an accused is to be arrested or not, is violative of Article 25 of the Constitution?

(xii) Whether in so far as section 24(c) of the impugned Ordinance which enjoins that the provision of clause (a) thereof shall also apply to cases which have already been referred , to the Accountability Court, offends the provisions of Articles 4 and 25 of the Constitution on the .ground of retrospectivity in its operation?

(xiii) Whether. the case of voluntary return (plea of bargaining) under section 25 of the impugned Ordinance is derogatory to the concept of independence of judiciary in so far as where the trial has commenced the Court cannot release the accused without `consent' of the Chairman NAB?

(xiv) Whether. section 25A (e) and (g) give unfettered discretion to the Chairman NAB to reject the recommendations of a duly appointed committee and to refuse to recognise a settlement arrived at between a creditor and a debtor amounts to excessive delegation and restraint on the freedom of contract on the touchstone .of Ariicles 4, 1.8 and 25 of the Constitution?

(xv) Whether section 32(d) of the impugned Ordinance purports to oust the jurisdiction of the superior Courts from exercising their jurisdiction under Article 184(3) and Article 199 of the Constitution?

(xvi) Whether various provisions of the impugned Ordinance grant arbitrary and unfettered discretion to the Chairman NAB e.g. ?????

(i) under section 9(c) of the impugned Ordinance to set whatever conditions he feels with respect to the release of an accused from custody,

(ii) under. section 18(g) to refer or not to refer a case to an Accountability Court,

(iii) under section 25A(g) to .refuse to recognise a settlement arrived at' between a creditor and debtor.

(xvii) Whether to exclude the officers and staff of the NAB who have not been deputed to or posted to NAB from the Federation or a Province from the category of civil servants within the purview of section 2(b) of the Civil Servants Act, 1973, is violative of Article 25 of the Constitution?

(xviii) Whether the alleged violation of principles of Universal Declaration of Human Rights of 1948 and the Cairo Declaration on Human Rights in Islam are justiciable in these. proceedings?

(xix) Whether the impugned Ordinance is liable to be struck down on the ground that earlier Ehtesab Act, 1997 was competently and validly made and its vires were upheld by this Court and therefore there is no necessity for enacting the same?

(xx) Whether the vires of the impugned Ordinance can be examined on the touchstone of Article 2A of the Constitution having regard to the law laid down by this Court in the case of Hakim Khan and 3 others versus Government of Pakistan through Secretary Interior and others (PLD 1992 SC 595)?

(xxi) Whether the provisions for appointment of Chairman and other officials in the NAB are discriminatory inasmuch as they do not lay down any qualifications in that regard or methodology for their appointment

(xxii) Whether the provisions relating to transfer of cases qua. the Provincial Courts within the territories of a Province and from one Province to another, suffer from excessive delegation?

(xxiii) Whether in the absence of any provision in the impugned Ordinance regarding special treatment to be meted out to women? accused is not violative of the mandate under Article 25(3) of the Constitution and section 167 of the Criminal Procedure Code?"

"4. The above questions are matters of first impression and of great public importance involving Fundamental Rights as ordained by Article 184(3) of the- Constitution and as commented upon by this Court in the case of Syqd Zafar Ali Shah and others versus General Pervez Mussharaf, Chief Executive -of Pakistan and others (2000 SCMR 1137) wherein it was observed that: "The validity of National Accountability Ordinance, 1999 will be examined separately is appropriate proceedings at appropriate stage." This is.l another circumstance for admitting these petitions to .,regular . hearing."

"5. As observed at the outset of the hearing today that in these petitions the question of validity of the impugned Ordinance alone shall be examined and not individual grievances of the petitioners raised in some of the petitions either directly or indirectly. However, the petitioners shall not be debarred from raising their respective pleas available under the law through appropriate proceedings before appropriate fora in accordance with law. It is also clarified that admission of these petitions shall not operate as stay of proceedings before NAB, Accountability Courts or any other Court in relation to the matters arising out of the impugned Ordinance. Of course, such proceedings shall be decided on their. own merit and in accordance with law. It is further clarified that the petitioners herein or any accused whose cases are pending in Accountability Courts shall be at liberty, if so advised, to approach the appropriate forum under the Ordinance for redress of their grievances in . accordance with law."

3. Before we proceed further in the matter, it seems proper to refer to, the history of laws governing accountability process in. the country, detailed account of which has been given in the case of Federation of Pakistan v. M. Nawaz Khokhar (PLD 2000 SC 26) as. under:

"After the establishment of the State of Pakistan, Public and Representative Offices (Disqualification) Act, 1949 ZPRODA) was passed by the Legislature which became effective from 15th August, 1947. This Act provided for debarring from public life persons judicially found guilty of misconduct in any public office for a suitable period. It remained enforced until 21st September, 1954 when it was repealed by Public and Representative Offices (Disqualification) (Repeal) Act, 1954. After its repeal, there was no special law on the statute book dealing with the accountability of holders of public offices between the period from 21st September, 1954 to 6th August, 1959. On 7th August, 1958 while the country was under Martial Law, Elective Bodies (Disqualification) Order, 1959 (President's Order No. 13 of 1959), commonly known as ' EBDO' was promulgated which remained in force only until 31st December, 1960. The `EBDO' provided for disqualification of certain categories of persons from being a member or a candidate for the membership of airy elective body until 31st December, 1966. It was amended by P.O. No. 7 of 1960 dated 10-2-1960; P.O. 9 of 1960 dated 5-3-1960; P.O. 27 of 1960 dated 28-11-1960 and P.O. 29 of 1960 dated 27-11-1960. On 7th January, 1963, Elective Bodies Disqualification (Removal and- Remission) Ordinance, 1963 was promulgated which authorised the President to reduce the period of disqualification of a person disqualified under 'EBDO'. Once again, after expiry of `EBDO' on 31st December, 1960, no special law existed on the subject of accountability of holders of public offices until 8th of January, 1977. On 9th January, 1977, Holders of Representative Offices (Prevention of Misconduct) Act, 1976 (Act No. IV of 1977) and Parliament and Provincial Assemblies (Disqualification from Membership) Act, 1976 (Act No. V of 1977) were passed which provided for trial of offences of misconduct of holders of public offices before a Bench of the High Court consisting of not less than two Judges. On 13th November, 1977 Holders of Representative Offices (Punishment for Misconduct) Order (President's Post Proclamation) Order No. 16 of 1977 `(PPPO-16) and Parliament and Provincial Assemblies (Disqualification for Membership) Order (President's Post Proclamation Order 17 of 1977 (PPPO-17) Were promulgated. PPPOs-16 and 17 of 1977, however, did not repeal Holders of Representative Offices (Prevention of Misconduct) Act, 1976 and Parliament and Provincial Assemblies (Disqualification for Membership) Act, 1976 with the result that from 13-11-1977 onwards we had on the Statute Books Act No.IV of. 1977, Act No. V of 1977, PPPO-16 of 1977 and PPPO-17 of 1977, all dealing with punishment for misconduct and disqualification of the, holders of public offices. The above Acts No. IV and V of 1977, PPPO-16 of 1977 were finally repealed by Parliament and Provincial Assemblies (Disqualification for. Membership) (Amendment) Act, 1991 (Act No. VII of 1991) with effect from 6-8-1990, which was assented to by the President on 28-4-1991. PPPO-16 of 1977 was amended through PPPO-5 of 1978 dated 17-1-1978 and President's Order 1 of 1981. Similarly, PPPO-17 was also amended by Ordinance IX of 1990 dated 15-10-1990 and Act VII of 1991 dated 28-4-1991.

"On 18th November, 1996, Ehtesab Ordinance CXI of 1996 was promulgated which repealed PPPO-16 and PPPO-17 of 1977. Ordinance No. CXI of 1996 was amended by Ordinance No. CXXIII of 1996, Ordinance VII of 1997 and Ordinance XI of 1997. Amended Ordinance No.

CXI of 1996 was repealed and replaced by Ordinance No. XX of 1997, which was repealed by Act No. IX of 1997. Act No. IX of 1991 was amended through Ordinance No. II of 1998 on 4-2-1998 but this Ordinance lapsed on 3-6-1998 as it was not passed by the Parliament."

On 16th November, 1999, after the Military Takeover on 12th October, 1999, National Accountability Bureau Ordinance, 1999 (Ordinance No.XVIII of 1999) was promulgated, which has been thrice amended by Ordinance No. XIX of 1999 and Ordinances No. IV and XXIV of 2000. This Ordinance repealed the Ehtesab Act, 1997 (Act No. IX of 1997).

4. Here, it would be advantageous to refer to an observation made in M. Nawaz Khokhar (supra), which is to the following effect:

????it may be staffed that transparent, even-handed and across the board accountability of holders of all public offices, is the essence of Islamic polity and a democratic set-up. Presence of accountability process in a system of governance not only deters those who hold sway over the populace from misusing and abusing the power and.' authority entrusted to 'them but it also ensures principles of good governance."

5. We have heard the learned counsel for the parties at quite some length and perused the case-law on the subject cited at the Bar as also the other material placed on record.

6. Mr. Aitzaz Ahsan, learned Sr. A.S.C.; appearing in support of Constitutional Petitions Nos. 13 and 27 of 2000 filed on behalf of Asfandyar Wali and Mian Nawaz Sharif. submitted that the NAB Ordinance provides for a system and strt,cture for the accountability of holders of .public offices.

The learned counsel challenged the NAB Ordinance under four primary/main heads:

1. Physical. treatment to the accused and his property, which mainly relate to pre-trial proceedings:

(i) Section 9(b) and (c) deny the Courts the power to grant bail;

(ii) Section 24 (b) invests the power in the executive or the Chairman NAB to detain a person for 90 days in executive custody without registration of F.I.R.;

(iii)?????? Sections 12 and 23 authorize freezing of property;,

(iv) Section 12(t) denies the right of appeal against freezing of property;

(v) Remand of women and denial to them of statutory rights under section 167(5) Cr.P.C.

2. Nature of` the offences created by the NAB Ordinance:

(i) Sections 2, 5(r), 9(a) (vi), (vii) and (viii) relating to wilful default, misuse of powers, issuance of SROs, etc. provide retrospective application of offences and punishments;

(ii) Sections 5(r) and 9(a)(vi) fix strict liability of offences, which is ultra vires the Constitution because the requirement of mens rea is absent;

iii) Section 14 (c) provides reversal of burden of proof and ouster of presumption of innocence, which is gone of. the most fundamental con opts of criminal law;

iv) Sections .5(r) and 9 (a)(viii) provide criminal penalty for Civil debt/contractual obligations.

3. Excessive power given to the Chairman NAB or the Government:

?i) Clauses (a), (b) and (d) of section l~ 16 provide for initial determination of venue of trial, inter-provincial transfers of trials and holding of trials in places like Attock Fort;

ii) Sections 25(a) .and 25(c) give uncontrolled/unguided power to the Chairman NAB to `accept settlement - amounts/plea bargaining';

iii) Section 25(a)(i) gives unguided power to. NAB to determine plea bargaining' before trial;

iv) Sections 12 (a) and 12 (t) read with section 2 deny the right of appeal to a non-accused whose property has been frozen.

v) Section 9 (b) denies the appellate Court the power to suspend sentences, which is a major hurdle in the process of administration of justice.

According to Mr. Aitzaz Ahsan, the NAB Ordinance does not merely create a 'parallel judicial system' but a `parallel system' enabling the executive to exercise judicial powers, which is beyond the authority of the present dispensation. His precise plea was that conferment of judicial powers on the executive cannot be countenanced in law and even a `parallel judicial system' was reduced enormously by this Court in Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445) and struck down in Sh. Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504).

7. He submitted that under . the present dispensation the NAB Ordinance requires to be examined in the context of the decision in Syed Zafar All; Shah v. Gen. Petvez Musharraf (PLD 2000 S.C.. 869), particularly in view of the following passage of the report: -

"Indeed, the latter course would have been the most detestable thing to happen. Independence of Judiciary means that the contentious matters, of whatever magnitude they may be, should be decided/resolved by the Judges of the Superior Courts according to their conscience. This Court, while performing its role as "the beneficial expression of a laudable political realism", had three options open to it in relation to the situation arising out of the military take-over on Twelfth day of October, 1999: firstly, it could tender resignation en bloc, Which most certainly could be equated with sanctifying (a) chaos/anarchy and (b) denial of access to justice to every citizen of Pakistan wherever he may be; secondly, a complete surrender to the present regime by dismissing these petitions for lack of jurisdiction in view of the purported ouster of its jurisdiction under PCO No. L of 1999 and thirdly, acceptance of the situation as it is, in an attempt to save what `institutional values remained to be saved'. "

8. It was further submitted that the NAB Ordinance requires to be examined in two other contexts, first: saving the institutional values that remain to be saved, particularly in this period of deviation (because otherwise the Constitution saves the institutional values); and secondly, everything including the legislation in this period has to have a nexus with the purposes of the Emergency. He referred to the observations of one of us (Irshad Hasan Khan, J. as he then was) (now CJ) in Sardar Farooq Ahmed Khan Leghari and others v. Federation of Pakistan and others (PLD 1999 SC 57) at page 378, which read thus:.

"Fundamental Rights provide Constitutional safeguards to civil liberties. These rights guaranteed by the Constitution are essential human rights which inherently belong to every citizen of a country governed in a civilized mode. Not one of these safeguards can, the President of Pakistan, the Parliament, the Executive or the Judiciary, disturb under the scheme of the Constitution, except those having reasonable nexus with the object of the Proclamation of Emergency during its continuance. This is essential to ensure so that the Government may not derogate from Fundamental Rights as conceded to the Government, during the period of Emergency, and without having any reasonable nexus with the object of proclamation, the dangers to human liberties are frightful to contemplate. Such a concession to the Government is likely to lead to despotism and anarchy, which cannot be countenanced by the Courts. I respectfully do not subscribe to the view taken by the Indian Supreme Court in the case of Muhammad Yaqub (supra) that it is open to the President to suspend the enforcement of any of the Fundamental Rights conferred under the Constitution during the continuance of emergency and wherever such suspension is made it is in the interest of the country and no further proof of it is necessary. In my humble view only such Fundamental Rights can be suspended which have nexus with the reason which led to the Proclamation of Emergency. A satisfactory solution can, therefore, be had only if the power available to the President under the Constitution to proclaim emergency is exercised with the last encroachment upon the rights and liberties of the citizens."

9. It was also submitted that main stay of the respondents in the written statement is that the NAB Ordinance was legislated bona fide to combat the menace of rampant corruption. According to him, the validity of the legislation is to be judged on the touchstone of the Constitutional provisions and not the bona fides of the lawmaker. In support of his contention, reliance was placed on the following observation by one of us (Irshad Hasan Khan J, as he then was) [now CJ] in Sh. Liaquat Hussain (supra):

"I am fully inclined to agree with the learned Attorney-General that the impugned Ordinance was promulgated bona fide with a view to restore peace and normalcy in the country and, particularly, in Sindh, but however bona fide an action may be in itself, it cannot be a touchstone for judging the constitutionality of the impugned Ordinance. Its validity is to be judged only on the touchstone of the Constitutional provisions. Reading Articles 175, 203 and 245 together and in the light of the judgment recorded by this Court in the case of Mehram Ali (supra), it indubitably leads to the conclusion that the Military Courts envisaged under the Constitution tantamount to establishment of parallel Courts for which there was no warrant. The bare reading of Article 245 would show that it does not contemplate declaration of Martial Law or Mini-Martial Law in any form whatsoever. It is not the case of the learned Attorney-General that the Courts are not functioning. He, however, argued that the Courts were not deciding the cases expeditiously on account of fear of the terrorists. If that is so, the proper course was to take appropriate measures by improving methods of investigation, expeditious submission of challan to the trial Courts, security of witnesses/litigants as well as the Presiding

Officers of the Courts and to take long/short term measures including appropriate increase in the strength of Judges in the light of the various reports of the Law Commission."

10. He also argued that the NAB Ordinance requires to be examined in the context of the doctrine of .proportionality as propounded in Farooq Ahmed Khan Leghari's case (supra). He submitted that the Ordinance is disproportionate to the mischief it seeks to remedy. He referred to page 191 of the report, which reads thus:

"It may also be pointed out that the above views run counter to the Fundamental Rights guaranteed by the Constitution and the aforesaid International Covenants of Civil and Political Rights, European Convention on Human Rights and American Convention on Human Rights. In my view, a distinction is to be made between an emergency which is imposed when a country is engaged in an actual war or is subjected to actual external aggression and when the same is imposed on account of imminent danger thereof for the purpose of suspension of fundamental rights and continuation of the emergency. In the former case, the above Latin maxim inter arma silent leges (i.e. when there is an armed conflict, the law remains silent) or that the national success in the war is to be ensured in order to escape from national plunder or enslavement even if the personal liberty and other rights of the citizen are sacrificed as observed by Lord Atkinson 9 in the case of King v. Halliday (supra) would be applic4ble. But in the latter case the rule of proportionality is to be followed as propounded by some of the eminent authors and adopted under above Article 4 of the international Covenants of Civil and Political Rights. Article 15 of the European Convention of Human Rights, 1967 i.e. a public emergency permits a State to take derogatory measures in derogation of the covenants Subject to the condition that the rule of proportionality is observed meaning thereby, that the derogatory steps/actions should be to the extent required by the exigencies of the situation provided such measures are not inconsistent with their other obligations under the international law. The 'above view is reinforced by the report of International Law. Association, 1986 referred to hereinabove in para 36 (xix) that while imposing emergency following factors should be considered: .

(i) severity of cause defined generally as threatening the life of the nation;

(ii)? ????? good faith on the part of the imposing Government
(ii) proportionality (relating to geographic scope, duration, and choice of measures strictly required by the exigencies of the situation);
(iii) proclamation or notification
(iv) non-derogability of certain rights;
(v) respect for other international obligations
(vi) non-discrimination.

The rule of proportionality? is also in consonance with the view obtaining in U.S.A and Australia etc. namely, that a distinction has been drawn between the power of judicial review during actual war and after the cessation of hostilities already referred to hereinabove. Reference may again be made to the observation of Latham, C.J. in the case of Australia Communist Party (supra) that ?the Court in its decisions applied a rule that there must be a real and substantial connection between the legislation and the defence situation so created in order that the legislation could be valid?.

He submitted that the principle of proportionality has more pertinently been applied in the case of Syed Zafar Ali Shah (supra) wherein at page 119 (para 263) the following observation occurs:
?We are also in agreement with the submission of Syed Sharifuddin Pirzada that in international system of emergencies the Governments take steps to ensure that the Fundamental Rights of citizens are not affected and that the derogation must be proportionate to the emergency, while adopting constitutional as well as extra-constitutional means.?

He submitted that the NAB Ordinance finally requires to be examined in the context of those rights, which have Islamic source.? Reliance was placed on the observations of one of us (Muhammad Bashir Jehangiri, J) in the case of *Farooq Ahmed Khan Leghari (supra)* at page 386 of the report (para 16), which read thus: -

?It would, therefore, be noteworthy that the rights which have been conferred on human being under the Islamic Injunctions besides forming part of the Constitutional mandate, are not only beyond the legislative restriction and enforceable through the Courts of land are without any exception, of fundamental nature. These rights which have the element of Islamic mandate are not amendable to any change or subject to any usurpation by way of suspension for days much less than for years together.

??????????????????????

11.????????????????? Another submission of the learned counsel was that the NAB Ordinance also requires to be examined in the context of the observations of this Court in *Wukala Mahaz Barai Tahafaz Dastoor* v. *Federation of Pakistan* (PLD 1998 S.C. 1263) at 1308 regarding the basic structure theory.? In this regard, he also referred to para 6 (iii) of the Short Order in Syed Zafar Ali Shah?s case, which reads thus:

?That no amendment shall be made in the salient features of the Constitution i.e. independence of Judiciary, federalism, parliamentary form of government blended with Islamic provisions.?

12. Mr. Aitzaz Ahsan further submitted that the determination of the question of grant or refusal of bail is a judicial function.? The NAB Ordinance does not provide any judicial qualification for the Chairman NAB or the person acting on his behalf.? He referred to Halsbury?s Laws of England Volume 11, pages 112-113 (para 167) which reads as under: -
?In deciding questions relating to granting of bail, Justices act judicially and not ministerially.?

In this context, he next placed reliance on the Corpus Juris Secundum, Volume 8, section 39, which reads thus: -

?Admitting to bail or allowing bail is an entirely different act from the taking, accepting or approving bail after its allowance.? The former discussed section 41 infra and is generally considered to be a judicial act to be performed by a Court or a judicial officer while the latter may be a ministerial function to be performed by an authorized officer.?

The learned counsel also relied on *Anwar Saifullah Khan* v. *The State* (PLD 2000 Lahore 564 at 579) wherein it was held that the fixing of bail and the conditions for release are matters which require to be determined by a judicial officer.? He referred to para 14 of the report, which is to the following effect: -

?Coming to Issue No.2 we find it necessary to say a few words about the concept of bail. Conceptually, ?bail? means to procure release of one charged with an offence by ensuring t his future appearance in Court and compelling him to remain within the hands of the Court through sureties. The person, who is released on bail is known ?principal? while the person who gives security is known as ?surety?. The security, to be furnished may be in the form of bond or cash. The criminal administration of justice has inherited this concept from times immemorial. During the era of the Normans Rule in England, the whole community gave security for the appearance of an accused before the Court of trial. The community was treated as a property and served as a surety. This concept vanished with the march of time and in its place security of a third person was substituted. The concept of pre-trial release of the accused was developed on three presumptions: firstly, the accused was presumed to be innocent till he was found guilty; secondly, the accused should have a right to prepare his defence and prove his innocence before the Court of trial; and thirdly, the accused should not be punished before the finding of his conviction was rendered by the Court. These rules were developed by the contribution of Jurists and Courts. There was /is a judicial consensus that a Court has no authority under section 497 and 498 read with section 513 and 514 of the Code of Criminal Procedure? to ask the accused to furnish cash security. However, various approaches to this issue were adopted in different countries in consonance with the ground realities faced by them. A Division Bench of this Court had an occasion to examine this issue in the context of the Ehtesab Act, 1997 (IX of 1997). While dealing with this aspect, the Division Bench held in the case of the State v. Muhammad Hasham Babar PLD 1997 Lah 605 as under:-

?6. Foregoing rule, in the context of new dispensation, does not conclude the issue. We are accordingly tempted to examine the various forms of security in bail system of other countries. We are attracted to examine specially the Illinois? Laws of bail. Article 110 of the Code of 1963 is pertinent. It shows that the accused can secure his pretrial release in following manner:-

1.???????? Under 110-2 he may be released on his personal recognizance.

2.???????? Under 110-7 he may execute a bail bond and deposited with the clerk, cash equal to only 10% of the bail or $25, which ever is the greater. When bail is made in this way and the conditions of the bond have been performed. The clerk returns to the accused 90% of the sum deposited. The remaining 10% (1% of the bail) is retained by the clerk ?as bail bond costs.?

3.???????? Under 110-8 he may execute a bail bond and secure it by a deposit with the clerk of the full amount of the bail in cash, or in stocks and bonds authorised for trust funds in Illinois, or by unencumbered non-exempt Illinois real worth double the amount of the bail. When bail is made in this way and the conditions of the bond have been performed, the clerk returns the deposit of cash or stocks or bonds, or release the real estate, as the case may be, without charge of retention of any amount?.

In each case bail is fixed by a judicial officer. Article 110-5 prescribes factors to be considered in fixing the amount of bail. Under 110-6 either the State or the defendant may apply to the Court for an increase or for a reduction in the amount of bail or for alteration of the bond?s conditions. The choice between 110-7 and 110-8 is reserved to the accused?. The aforesaid methodology of cash security was challenged by one Schilb on Constitution grounds, in case Schilb v. Kuebel (Supreme Court of the United States (1971) 404 U.S. 357, 92 S, Ct. 479, 30 L. Ed. 2d. 502). In this case ?Jhon Schilb, the petitioner, was arrested and charged with (a) leaving the scene of an automobile accident, and (b) obstructing traffic. Bail was fixed at $500 of the first charge and at $250 on the second charge. In accordance with the Illinois bail statutes of 1963, petitioner deposited $75 in cash with the clerk of the Court. This amount was 10 per cent. Of aggregate bail. At his trial, Schilb was acquitted of the first charge and convicted of the second. When he paid his fine, the amount petitioner deposited was returned to him less $7.50 retained as ?bail bond costs? pursuant to the bail statute. The amount returned was 1 percent of the total bail and 10 percent? of the amount actually deposited. In a subsequent class action, Schilb challenged the Illinois bail system on Fourteenth Amendment due process and equal protection grounds. The circuit Court of St. Clair Country upheld the statute and dismissed the complaint. The Supreme Court of Illinois affirmed, with two justices dissenting. Schilb appealed to the United States Supreme Court"

13.?????? Mr. Aitzaz Ahsan also questioned the power of bail vested in the Chairman NAB or any person authorized by him on the touchstone of Article 10 of the Constitution, which reads thus: -

?10. ???? (1) No persons who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2). Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
?????????.?
14.?????? According to him, although the Accountability Courts have been invested with the power to release an accused under section 24(d) by a written order, yet such power has never been exercised by any of these Courts at any point of time in view of the overriding effect of section 9(b) of the NAB Ordinance despite the fact that accused are arrested on suspicion, without registration of any case and are detained in custody for 90 days without any remand order from the competent Court.? He relied on *Nazir Ahmed* v. *The State* (PLD 1987 Lahore 236) to contend that the power of discharging an accused from a case is inherent in section 167 Cr.P.C. The relevant portion in the report reads at page 241 as below: -

?When an Investigating Officer requires authority to detain an accused person in custody beyond the limits prescribed in section 61 of the Code of Criminal Procedure, he has to make an application therefor in accordance with the provision of section 167 of the said Code. If there are genuine grounds for continuing his detention, section 167 enables the Magistrate to pass an order extending the detention for a term not exceeding fifteen days in the whole. The Magistrate has a discretion to grant the remand. If the Magistrate finds that no case at all is made out against the accused he is justified in not granting the remand and discharging the accused from the case. The power of discharging an accused from a case is, therefore, inherent in section 167. If the Investigating Officer finds that the said accused in innocent or that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the said accused to a Magistrate for trial, there is nothing to prevent him from applying under section 167 of the Code, read with section 63 thereof, for his discharge from the case. Section 63 clearly states that no person who has been arrested by the Police Officer can be discharged except on his own personal bond or on bail, or under the special order of a Magistrate. Since the power of discharging an accused from a case during investigation is inherent in section 167 of the Code, an order under the said section can be passed on the report of a Police Officer praying for his discharge. Such an order would be the ?special order of a Magistrate? as contemplated in section 63. The scheme of sections 167 to 173 of the Code, read with the Police Rules, gives the impression that all investigations must be under taken and finalised within fifteen days, whereafter a challan or charge sheet should be filed, so that if later also the police want a remand of the accused, they may be able to secure the same under section 344 of the Code. If this be the view, any delay in the investigation over the fifteen days provided, should itself provide a ground for the discharge of an accused from the case, if the police neither produce the accused nor applying for his fresh remand, but release him (See *Dr. Niranjan* v. *Manipur Administration* (PLD 1986 Lah. 256), or apply for his discharge from the case on the ground that there are no reasonable grounds to connect him with the commission of the offence?.

On the Court?s power to discharge an accused, the learned counsel also relied on *J.C. Shah* v. *Ramswami* (AIR 1969 S.C. 1014) wherein it was emphatically stated: -

?The point of appearing before the Magistrate is that an independent authority exercising judicial power may, without delay, apply its mind to the case.?

Mr. Aitzaz Ahsan further relied on *Ghulam Sarwar* v. *The State* (1984 P.Crl.L.J. 2588) wherein a learned Single Judge of the Lahore High Court laid down the following 18 guidelines for the Magistrates in granting or refusing remand: -

> ?1.??????? During first 15 days, the Magistrate may authorise the detention of the accused in judicial custody liberally but shall not authorise the detention in the custody of the police except on strong and exceptional grounds and that too. For the shortest possible period;
>
> 2.???????? The Magistrate shall record reasons for the grant of remand.
>
> 3.???????? The Magistrate shall forward a copy of his order passed under section 167, Cr. P.C. ??? to the Sessions Judge concerned.
>
> 4.???????? After the expiry of 15 days, the Magistrate shall require the police to submit complete or incomplete challan and in case, the challan is not submitted, he shall refuse further detention of the accused and shall release him on bail with or without surety.
>
> 5.???????? After the expiry of 15 days, no remand shall be granted unless the application is moved by the police for the grant of remand/adjournment.
>
> 6.???????? The application moved by the prosecution/police after the expiry of 15 days of the arrest of the accused, be treated as an application for adjournment? under section 344 Cr. P.C.
>
> 7. Before granting remand, the Magistrate shall assure that evidence sufficient to raise suspicion that the accused has committed the offence has been collected by the police and that after further evidence will be obtained after the remand is granted.
>
> 8.???????? The Magistrate shall not grant remand/adjournment in the absence of the accused.
>
> 9.???????? The Magistrate should avoid giving remand/adjournment at his residence.
>
> 10.?????? The Magistrate shall give opportunity to the accused to raise objection, if any, to the grant of adjournment/remand.
>
> 11.?????? The Magistrate shall record objection which may be raised by an accused person and shall give reasons for the rejection of the same.
>
> 12.The Magistrate shall examine police file before deciding the question of remand.
>
> 13.?????? If no investigation was conducted after having obtained remand, the Magistrate shall refuse to grant further remand/adjournment.
>
> 14.?????? The Magistrate shall not allow remand/adjournment after 2 months (which is a reasonable time) of the arrest of the accused unless it is unavoidable.
>
> 15.?????? In case, complete challan is not submitted, the Magistrate shall commence trial on the strength of incomplete challan and examine the witnesses given in the list of witnesses.
>
> 16.?????? If the challan is not submitted within 2 months, the Magistrate shall report the matter to the Sessions Judge of the district and also bring the default of the police to the notice of Superintendent of Police of the district.
>
> 17.?????? The Magistrate shall not grant remand mechanically for the sake of co-operation with the prosecution/police.
>
> 18. ????? The Magistrate shall always give reasons for the grant of remand and adjournment.?

15.????????????????? On the issue of freezing of property under sections 12 and determination of claims under section 13 of the NAB Ordinance, Mr. Aitzaz Ahsan contended that the provisions are anomalous inasmuch as the freezing continues until the decision of the appeal and the Court is deprived of the power to make any order at that stage.? He elaborated his point by submitting that even in cases where the accused stands acquitted by the trial Court,

the freezing of the property under section 12 of the NAB Ordinance continues till the decision of the appeal filed by the State against the acquittal order.? Similarly, the learned counsel vehemently questioned the power of the NAB to freeze property in the possession of any relative, associate or person on behalf of the accused without giving him the opportunity to show his title.? He also contended that the absence of right of appeal against the freezing order, as envisaged in section 13 (c), is also against the principles of natural justice.? The learned counsel submitted that the above provisions of the NAB Ordinance are violative of Article 23 of the Constitution, which reads as under: -

?23.????? Every citizen shall have the right to acquire, hold and dispose of property in any apart of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest?.

16.????????????????? Mr. Aitzaz Ahsan referred to section 23 of the NAB Ordinance and contended that the rights of even third parties have been taken away and they have not been provided any right of appeal against the orders affecting their proprietary rights. He referred to *M/S Chenab Cement Product (Pvt.) Ltd & others* v. *Banking Tribunal, Lahore* (PLD 1996 Lahore 672) and *Pakistan through Secretary, Ministry of Defence* v. *The General Public* (PLD 1989 S.C. 6) to contend that at least one right of appeal must be provided to an affected person.

??????????

17.????????????????? The learned counsel next submitted that under the NAB Ordinance, the Chairman has unlimited powers of investigation of cases.? According to him, in that regard even the person against whom the investigation is being conducted, may not be aware of the same. In support of his plea that such treatment to an accused is contrary to the ?due process of law? he referred to following excerpt in *U.S.* v. *James Danial Good Real Property* (510 U.S. 43) and (126 Lawyers Edition II, p. 490):

?The practice of *ex parte* seizure creates an unacceptable risk of error since the proceeding affords little or no protection to an innocent owner.?

On the concept of ?due process of law?, the learned counsel also referred to Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 S.C. 14) wherein at page 31 the following passage appears:

?In my opinion the learned Advocate-General of East Pakistan is perhaps nearer the mark than the others.? In my view the words ?in an unlawful manner? in sub-clause *(b)* of Article 98(2) have been used deliberately to given meaning and content to the solemn declaration under Article 2 of the Constitution itself that it is the inalienable right of every citizen to be treated in accordance with law and only in accordance with law.? To my mind, therefore in determining as to how and in what circumstances a detention would be detention in an unlawful manner one would inevitably have first to see whether the action is in accordance with law, if not, then it is action in an unlawful manner.? Law is here not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time to time by the Superior Courts.? It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid down by law.? It may well be, as has been suggested in some quarters, that in this sense it is as comprehensive as the American ?due process? clause in a new garb.? It is in this sense that an action which is *mala fide* or colourable is not regarded as action in accordance with law.? Similarly, action taken upon extraneous or irrelevant considerations is also not action in accordance with law.? Action taken upon no ground at all or without proper application of the said of the detaining authority would also not qualify as action in accordance with law and would, therefore, have to be struck down as being action taken in an unlawful manner.?

He also referred to the following passage from a judgment of this Court reported as *New Jubilee Insurance Co. Ltd. v. National Bank of Pakistan* (PLD 1999 S.C. 1126) :-

?It may be observed that there are certain basic norms of justice.? One of the cardinal principles of above basic norms is that one cannot be a judge in his own cause.? The breach of the above cardinal principle of jurisprudence will in fact be violative of the right of ?access to justice to all? which is a well-recognised inviolable right enshrined in Article 4 of the Constitution.? This right is equally founded in the doctrine of ?due process of law?.? The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and the right to have an impartial Court or Tribunal.? The term ?due process of law? can be summarised as follows as held by this Court in the case of Aftab Shahban Mirani v. President of Pakistan (1998 SCMR 1863):-

(1) A person shall have notice of proceedings which after his rights.

(2) He shall be given reasonable opportunity to defend.

(3) That the Tribunal or court before which his rights are adjudicated is so constituted as to give reasonable assurance of his honesty and impartiality, and

(4) That it is a Court of competent jurisdiction.? Above are the basic requirements of the doctrine ?due process of law? which is enshrined, inter alia, in Article 4 of the Constitution.? It is intrinsically linked with the right to have access to justice which is Fundamental right.? This right, inter alia, includes the right to have a fair and proper trial and a right to have an impartial Court or Tribunal.? A person cannot be said to have been given a fair and proper trial unless he is provided a reasonable opportunity to defend the allegation made against him.?

18.????????????????? Mr.Aitzaz Ahsan referred to clause (d) of Section 24, which reads thus :

> ?24.????? (d)??????? Notwithstanding anything contained in the Code where the holder of a public office or any other person accused of an offence is arrested by NAB under this ordinance NAB shall as soon as may be inform him of the grounds and substance on the basis of which he has been arrested and produce him before the Court established under this Ordinance within a period of 24 hours of arrest excluding the necessary for the journey from the place of arrest to the Court and such persons shall having regard to the facts and circumstances of the case be liable to be detained in the custody of the Nab for the purposes of enquiry and investigation for a period not exceeding 90 days provided that no accused arrested under this Ordinance shall be released without the written order of the Chairman NAB or the order of the Court.?

According to him, this provision does not make an exception in case of women as compared to Sub-section (5) of Section 167 of the Cr.P.C. in the light of the intention and spirit of Article 25(3) of the Constitution.
???????????
19.????????????????? The learned counsel referred to Clause (r) of Section 5 of the NAB Ordinance whereby the offence of ?wilful default? has been defined as follows:

> ?5.(r)? ?Wilful default?? a person is said to commit an offence of wilful default under this Ordinance if he does not pay, or continues not to pay, or return or repay the amount to any bank, financial institution, cooperative society, or a Government department or a statutory body or an authority established or controlled by a Government on the date that it became due as per agreement containing the obligation to pay, return or repay or according to the laws, rules, regulations, instructions, issued or notified by the State Bank of Pakistan, or the bank, financial institution, cooperatives society, Government Department, statutory body or an authority established or controlled by a Government, as the case may be, and a period of thirty days has expired thereafter:
>
> Provided that it is not wilful default under this Ordinance if the accused was unable to pay, return or repay the amount as aforesaid on account of any wilful breach of agreement or obligation or failure to perform statutory duty on the part of any bank, financial institution, cooperative society or a Government department or a statutory body or an authority established or controlled by Government.?

and argued that the word ?wilful default? used in the title is not in the clause itself and that it is likely that a person who has not paid a small amount of his utility bills due to some reason may be covered by the above provision; the above provision contains a wide span and is vague in nature. He also referred to *Mrs.Shahida Faisal v. Federation of Pakistan and 3 others* (PLD 2000 Lahore 508) wherein the scope of the provision was dilated upon.? Mr. Aitzaz further argued that with regard to Clause (r) of Section 5 ibid the intention appears to have been primarily to deal with cases of bank default, loan default and money taken but not repaid but it has been extended to default in payment of utility bills of domestic consumers and there were prosecutions going on although no element of mens rea? has been provided in the above law, which is an essential ingredient of criminal jurisprudence.

20.????????????????? The learned counsel next referred to Section 9 of? the NAB Ordinance, which reads as under :

(a)??????? A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices-

(i)???????? if he accepts or obtains from any person or offers any gratification directly or indirectly, other than legal remuneration, as a motive or reward such as is specified in section 161 of the Pakistan Penal Code (Act XLV of 1860) for doing or for-bearing to do any official act, or for showing or for-bearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person; or

(ii)??????? if he accepts or obtains or offers any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or likely to be, concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with his official functions or from any person whom he knows to be interested in or related to the person so concerned; or

(iii)? if he dishonestly or fraudulently misappropriates or otherwise converts for his own use, or for the use of any other person, any property entrusted to him, or under his control, or willfully allows any other person so to do; or

(iv)?????? if he by corrupt, dishonest, or illegal means, obtains or seeks to obtain for himself, or for his spouse and/or dependants or any other person, any property, valuable thing, or pecuniary advantage; or

(v) ?????? if he or any of his dependants or benamidars owns, possesses, or has acquired right or title in any movable or immovable property or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for; or

(vi) ????? misuses his authority so as to gain any benefit or favour for himself or any other person, or to render or attempt to do so or wilfully fails to exercise his authority to prevent the grant, or rendition of any undue benefit or favour which he could have prevented by exercising his authority; or

(vii) ???? if he has issued any directive, policy, or any SRO (Statutory Regulatory Order) or any other order which grants or enables any concession or benefit in any taxation matter or law or otherwise so as to benefit himself or any relative or? associate or a benamidar or any other person; or

(viii)????? if he commits an offence of wilful default.

(b)??????? All offences under this Ordinance shall be non-bailable and, notwithstanding anything contained in sections 426, 491, 497, 498 and 561 A or any other provision of the Code, or any other law for the time being in force no Court including the High Court shall have jurisdiction to grant bail to any person accused of any offence under this Ordinance.

(c)??????? Where the Chairman NAB decides to release from custody or detention a holder of a public office or any other person accused of an offence under, this Ordinance, he shall do so after considering the gravity of the charge against such person and the accruing quantum of loss involved in the offence alleged to have been committed and may impose any reasonable conditions for such release.

(d)? The amount deposited by the accused with the NAB shall be transferred to the Federal Government or, as the case may be, a Provincial Government or the concerned bank or financial institution, etc., within one month from the date of such deposit.?

He particularly referred to Clause (a)(vi) above and to Section 14(d) to contend that what is happening in practice is that all the evidence is in the possession of the prosecution, but the ? burden of proof? is on the accused. He also referred to Section 9 (a)(vii) above and relying on the general principle of law enshrined in Article 122 of the Qanun-e-Shahadat Order, 1984 that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him and argued that Article 122 ibid is an exception to Article 117 of the Qanun-e-Shahadat Order. The latter lays down a general rule that in a criminal case the burden of proof is on the prosecution. The precise submission was that in respect of issuance of SROs etc. the burden of proving that the accused issued the same *bona fide* without intending to cause any loss to the public exchequer could not be proved in that such SROs, orders, directives etc. as the case may be, spring from office noting, decisions etc.? The relevant files are in the exclusive custody of the department concerned and without providing the accused an opportunity to have access to the said material, he cannot be condemned for failing to discharge the alleged burden.? To reinforce his arguments Mr.Aitzaz referred to the following passage from the case of?? *Sh.Liaquat Hussain and others v. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others* (PLD 1999 SC 504 at 793)
??Clearly, an accused charged of offences/an unconvicted person is presumed to be innocent and has a vested right to a fair trial before a Court or Tribunal validly established under Article 175(1) of the Constitution??

Mr. Aitzaz also referred to the following observation in *Jamat-i-Islami through Syed Munawar Hassan, Secretary-General v. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs* (PLD 2000 SC 111 at 161) :
??Viewed from that angle section 7-A of the impugned Act to the extent indicated above is unconstitutional, in that, it infringes the presumption of innocence and does not meet the condition of reasonableness due to vagueness?.?

21.????????????????? Mr.Aitzaz argued that in the NAB Ordinance criminal punishment has been provided for civil debt.? In this respect he referred to Article 11 of the International Covenant on Civil and Political Rights, which reads as under:
?????? ?ARTICLE 11

?No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.?

He also referred to Article 1 of the European Convention on Human Rights which provides no imprisonment for civil debt.? He next referred to Article 1 of the 4th Protocol of the European Convention on Human Rights which provides that no one shall be deprived of his liberty merely on the ground of inability to pay his debt.? He argued that a civil debt can be incurred for various reasons and therefore there should be no provision for imprisonment in that regard.
????????????????????? The learned counsel referred to *Jolly George Varghese and another v. The Bank of Cochin* (AIR 1980 SC 470 at 475) wherein in paragraph-11 it was observed :
?11.????? The words which hurt are ?or has had since the date of the decree, the means to pay the amount of the decree.?? This implies, superficially read, that if at any time after the passing of an old decree the judgment-debtor had come by some resources and had not discharged the decree, he could be detained in prison even though at that? later point of time he was found to be penniless.? This is not a sound position apart from being inhuman going by the standards of Art.11 (of the Covenant) and Art.21 (of the Constitution).? The simple default to discharge is not enough.? There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it.? The provision emphasises the need to establish not mere omission to pay but an attitude of? refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor?s other pressing needs and straitened circumstances will play prominently.? We would have, by his construction, sauced law with justice, harmonised S.51 with the Covenant and the Constitution.?
?????????????????????

Mr.Aitzaz referred to Section 16(d) of the NAB Ordinance which reads thus :

?16.(d)?? Notwithstanding anything contained in this section, if in respect of any case relating to an offence triable under this Ordinance, the Chairman Nab, having regard to the facts and circumstances of the case may file a reference before any Accountability Court established anywhere in Pakistan, and such Court shall have the jurisdiction to try the same.?

22.????????????????? He argued that in a case under the NAB Ordinance the former Mayor of Karachi having allegedly committed an offence in Karachi was tried in Attock Fort.? He was not in a position to ask for change of venue of trial in that no such provision has been made in the NAB Ordinance.? Here only the Chairman NAB can apply for transfer as provided in Section 16 of the NAB Ordinance, which reads as below:

?16.(a) Notwithstanding anything contained in any other law for the time being in force, all persons accused, of a scheduled offence, shall be prosecuted for such offence by Court established pursuant to this Ordinance exclusively as constituted under section 5 (g) and the case shall be heard from day to day and disposed of within 30 days.

(b)? ?The Court shall sit at such place or places as the Government may, by order, specify in this behalf.

(c)?? Where more Courts than one have been established for an area, the Chief justice of the High Court of the Province concerned shall, keeping in view the seniority and status of the Judges of various Court, designate a Judge of any such Court to be an Administrative Judge.

(d)?? Notwithstanding anything contained in this section, if in respect of any case relating to an offence triable under this Ordinance, the Chairman Nab, having regard to the facts and circumstances of the case may file a reference before any Accountability Court established anywhere in Pakistan, and such Court shall have the jurisdiction to try the same.?

He contended that in the past particularly during the last five years starting from Al-Jehad Trust Case in March 1996, the concept of separation of the Judiciary from the? Executive makes it imperative that this should be within the purview of the Judiciary and not the Executive to fix the venue of trial.? In this regard reference was also made to the following observation in *Akhlaq Ahmad v. Government of Punjab and 2 others* (1991 MLD 739 at 742) :

??Neither section 352 of the Criminal Procedure Code nor the rules on the subject empower the Government, the Home Secretary, or the District Magistrate to pass any order of their own directing the holding of trial at a place other than the Court-house.? It is not difficult to understand the rationale as to why such a power has not been conferred upon the executive authorities.? To allow them to determine the venue for holding Court would undermine the independence of the Judiciary.?

He also referred to *Mairaj Muhammad Khan v. The State* (PLD 1978 Karachi 308) and *Moslemuddin Sikdar v. The Chief Secretary, Government of East Pakistan and others* (PLD 1957 Dacca 101), wherein it was observed :

??If the trial had taken place in an ordinary Court, which are well known to the members of the public and which are haunts of lawyers and where all the members of the public have, in fact, free access, the case might have been different.?

23.????????????????? The learned counsel then referred to Section 25A(g) of the NAB Ordinance which confers judicial powers on Chairman NAB which cannot be countenanced under the law.? Section 25A(g) reads thus:

?25A(g)? Notwithstanding anything contained in this Ordinance or any other law for the time being in force, if the Chairman NAB is satisfied that any agreement entered into between a bank or a financial institution, a cooperative society and a lender is vitiated by the provisions of section 23 or any other provision of the Contract Act, 1872 (IX of 1872), or any other law or the same is collusive or is against public interest, he may refuse to take such agreement into consideration for the purposes of conciliation Committee or the conclusion drawn by them.?

24.????????????????? He referred to various passages from *The Hub Power Company Limited (HUBCO) through Chief Executive and another v. Pakistan WAPDA through Chairman and others* (PLD 2000 SC 841 at 865) to contend that if an agreement prima facie had been obtained through fraud or bribe it would be sufficient to take it out of the pale of the arbitrariness as distinguished from a commercial dispute raised under a valid agreement and that according to the public policy it requires a finding about its alleged criminality and such document was not referable to arbitration, meaning thereby that it can only be determined by a Court.? He argued that, therefore,? the Chairman NAB alone should not be given the power to determine the validity of such agreements :
??????????????????????
25.????????????????? Mr.Aitzaz next referred to Section 24(d) of the NAB Ordinance which reads thus :
?(d)????? Notwithstanding anything contained in the Code where the holder of a public office or any other person accused of an offence is arrested by NAB under this ordinance NAB shall as soon as may be inform him of the grounds and substance on the basis of which he has been arrested and produce him before the Court established under this Ordinance within a period of 24 hours of arrest excluding the necessary for the journey from the place of arrest to the Court and such persons shall having regard to the facts and circumstances of the case be liable to be detained in the custody of the Nab for the purposes of enquiry and investigation for a period not exceeding 90 days provided that no accused arrested under this Ordinance shall be released without the written order of the Chairman NAB or the order of the Court.

He contended that the above provision is being used as a weapon and virtually people are being arrested for ninety days with no FIR against them and plea bargaining is going on through misuse of this unguided discretion. The persons who are thus detained are under tremendous pressure.? The Full Bench of the Lahore High Court had twice termed this law as draconian law. He referred to *Anwar Saifullah Khan v. The State and 4 others* (PLD 2000 Lahore 564 at 578), wherein it was held that ??The supreme purpose of this legislation is to effect recovery of defaulted amounts of lending institutions, money or gains, obtained through corrupt practices, misuse or abuse of powers, kickbacks, commissions and other like amounts.? In Mrs. Shahida Faisal v. Federation of Pakistan etc (W.P.No.739 of 2000=PLD 2000 Lahore 508) the Full Bench of this Court has held *??That the powers conferred upon the Chairman, National Accountability Bureau are draconian in nature, nevertheless these are not incommensurate with the ground realities obtaining in our cherished State?.?*and *Mrs.Shahida Faisal v. Federation of Pakistan and 3 others* (PLD 2000 Lahore 508 at 540) wherein it was observed that *??The Chairman NAB is given extraordinary power to ignore any agreement entered into between the borrower and the lending institution subject to a condition that he comes to the conclusion that the agreement is violative of section 23 of the Contract Act or any of its provision or is opposed to public policy.? Undoubtedly, this power appears to be highly exceptionable and at the first blush, seems to be draconian in nature.?*
??????????????????????

26.????????????????? Mr.Atizaz further argued that the NAB Ordinance denies the supervisory and appellate powers to the High Court. The High Court cannot set the course of the prosecution or the proceedings before the Court right from the beginning and at the intermediary stage as is apparent from the contents of Section 32 of the NAB Ordinance,? which reads thus :

?32.(a) Any person convicted or the Prosecutor General, Accountability, if so directed by NAB, aggrieved by the final judgment and order of the Court under this Ordinance may, within ten days of the final Judgement and order of the Accountability Court prefer an appeal to the High Court of the Province where the Court is situated.

(b)??????? All Appeals against the final Judgement filed before the High Court will be heard by a Bench ?of not less than two judges constituted by the Chief Justice of the High Court and shall be finally disposed of within thirty days of the filing of the appeal.

(c)??????? Notwithstanding any other law for the time being in force or this Ordinance, no appeal against any interlocutory order of the Court during the proceedings pending before it under this Ordinance, shall lie and an appeal shall lie only against the Final Judgement of the Court.

(d)??????? No stay of proceedings before the Court shall be granted by any Court on any ground whatsoever, nor proceedings thereof be suspended or stayed by any Court on any ground whatsoever.?

27. Concluding his arguments, Mr.Aitzaz Ahsan submitted that the NAB Ordinance provides the authorities with a draconian means of dealing with an accused and his property, contrary to the due process of law and it creates a parallel judicial system in the country thereby empowering the Executive to perform the judicial functions.? The NAB Ordinance vests excessive and unguided authority in the Chairman NAB and the Government, and purports to deny supervisory and appellate powers to the Superior Courts.? He argued that it was a law that must be struck down, particularly some of its features i.e.,? in so far as it divests Courts from the powers to grant bail; allows inordinate detention period for an accused without an FIR; enables seizure of property;? purports to apply the offences of wilful default, misuse of authority and issuance of SROs with retrospective effect,? places the burden of proof on the accused? and provides for a criminal punishment for civil debt.? He emphasized that? empowering trial in places inaccessible to the general public and away from the normal seat of ordinary Courts, the NAB Ordinance impedes the exercise of Fundamental Rights of an accused by giving unbridled discretion to the Government in this and such other matters as rejecting settlements and plea bargaining.? In these respects the NAB Ordinance violates the institutional values as enshrined in a long history of the judicial system in Pakistan and its provisions are disproportionate to the mischief that they seek to eliminate.

28.????????????????? **Mr. Muhammad Akram Sheikh,** learned Senior ASC appearing on behalf of the petitioners in Constitution Petitions No. 15, 16 and 17 of 2000 vehemently argued that the National Accountability Bureau Ordinance, 1999 and all the amending Ordinances have been promulgated by the Federal Government without any legislative competence.? He submitted that Article 175 of the Constitution speaks of establishment of Courts as well as their jurisdiction in the following words:
?175.(1) There shall be a Supreme Court of Pakistan, a High Court for each Province and such other courts as may be established by law.?

(2)??????? No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.?

He contended that while conferment of the jurisdiction is a subject regarding which Federal Legislature makes laws except to curtail the jurisdiction of the Supreme Court according to Item No. 55 of the Federal Legislative List, yet there is no mandate of the Constitution to the Federal Government to set up Courts in the territories of the Provinces.? In support of his contention, he referred to Items No. 1 and 2 of the Provincial Legislative List-II of the Government of India Act, 1935, which read thus:
?1. Public order (but not including the use of His Majesty?s naval, military or air forces in aid of the civil power); the administration of justice; constitution and organization of all courts, except the Federal Court, and fees taken therein; preventive detention for reasons connected with the maintenance of public order; persons subjected to such detention.?

?2.??????? Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this list; procedure in Rent and Revenue Courts.?

He also referred to Items No. 1 and 2 of the Provincial List of the 1956-Constitution which makes the following reading:

?1.??????? Public order (but not including the use of naval, military or air forces, or any other armed forces of the Federation in aid of the civil power).?

?2.??????? Administration of justice; constitution and organization of all courts, except the Supreme Court; procedure in Rent and Revenue courts; fees taken in all courts, except the Supreme Court.?

He next referred to Articles 141 and 142 of the Constitution, which read as under:

?**141.**??? Subject to the Constitution, (Majlis-e-Shoora (Parliament) may make laws (including laws having extra-territorial operation) for whole or any part of Pakistan, and a Provincial Assembly may make laws for the Province or any part thereof.?

?**142.**??? Subject to the Constitution ?

(a)? ????? (Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to any matter in the Federal Legislative List;

(b)? (Majlis-e-Shoora (Parliament), and a Provincial Assembly also, shall have power to make laws with respect to any matter in the Concurrent Legislative List;

(c)??????? a Provincial Assembly shall, and (Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in either the Federal Legislative List or the Concurrent Legislative List; and

(d)??????? ?????.

He contended that all residual subjects have gone to the Provincial Legislature. The Constitution is a document which is a source of power distribution amongst all organs of the State as well as its federating units and this Court is not only the custodian of the Constitution but also of the ?Provincial Autonomy?, inasmuch as, it has the exclusive power to resolve disputes between the Provincial and the Federal Governments.? He submitted that the present Government is not answerable to any elected Parliament and is only operating by virtue of the mandate given to it by this Court in *Zafar Ali Shah v. Chief Executive, General Pervez Musharraf* (PLD 2000 SC 869), therefore, two things have to be in existence: (i) that every executive action or legislative instrument has to strictly adhere to the framework of the Constitution and (ii) it has to have a nexus with the Proclamation of Emergency of 14th October, 1999.? He further submitted that a legislative instrument cannot be promulgated merely because such facilities are available and the existing laws cannot be altered unless they have a nexus with the objects for which the Proclamation of Emergency has been reckoned. He contended that in India, until 42nd Constitutional Amendment, which took place on 3rd January, 1977, the position obtaining was very similar to that of Pakistan because the administration of justice and establishment of courts was a State subject and was not a Union or Concurrent subject and unlike Pakistan India have all their residual subjects to the Centre.? Thus, in the Constitutional dispensation we have greater part of autonomy for the Provincial Legislatures and the Provincial Governments for, we have all residual subjects to our Provinces.? He submitted that the position obtaining is that by virtue of 42nd Constitutional Amendment this subject was deleted from the State List so as to be made a residual subject and it was thereafter that certain Federal Courts were set up by the Federal Government.? He contended that in Pakistan there are two other Federal Courts operating within the framework of the Constitution: (i) under Article 212 of the Constitution and (ii) Federal Shariat Court under Article 203A.? In 1991, when the Government of Pakistan wanted to set up speedy Courts the proposition was examined by the consultants and the present Attorney General who was the Attorney General in those days and, according to Mr. Akram Sheikh,? it was the view of all concerned that the only way to set up a Court under the Federation is to amend the Constitution and therefore, a time-bound amendment was incorporated in Article 212 of the Constitution.

29.????????????????? He next contended that the Federal Government may be competent to set up Courts in the Federal territory but not in the territories of the Provinces and that it is possible for the Federal Government to make laws conferring jurisdiction on already existing Courts under the control and superintendence of the High Courts.? He contended that unlike the impugned Ordinance, Ehtesab Act, 1997 did not create its own Courts but it conferred jurisdiction on the High Courts and the Chief Justices of High Courts were to constitute Ehtesab Benches and relied upon *Mohtarma Benazir Bhutto v. Federation of Pakitan* (1999 SCMR 759)to contend that such Benches were held by this Court to be like any other Benches of High Court constituted to hear? a particular category of cases.? He contended that on the one hand the law has been promulgated without any legislative competence and on the other it has no nexus with the objectives on the basis of which the Emergency of 14th October, 1999 was proclaimed.
??????????

30.????????????????? Mr. Akram Sheikh submitted that a Judge of a Special Court is subordinate to and under the superintending control of the High Court and that this Court has disapproved the situations where the above element is absent. He submitted that an Accountability Judge acts in complete derogation of the High Court, in that, the jurisdiction is being exercised not in subordination to the High Court but in replacement thereof.? The learned counsel contended that Judges of the Accountability Courts have been given perks and privileges, which are equivalent to the ones given to the Judges of the High Courts and that such a course would create bias, which would paralyse the judicial faculties of the Judges, who will not be able to act impartially in the administration of justice.
??????????
31.????????????????? Mr. Muhammad Akram Sheikh next contended that there is no security of tenure available to the Judges of the Accountability Courts. They only work during good behaviour, in that no guidelines whatsoever have been provided for removal of such Judges and the court-houses are not regulated/controlled by the Judges instead they are controlled by the Armed Forces.
??????????
32.????????????????? Mr. Akram Sheikh, argued that the Accountability Courts are not under the control? and supervision of the High Courts in terms of Article 203 of the Constitution, therefore, their establishment is violative of the concept of independence of judiciary as envisaged under the scheme of the Constitution. He then placed on record copies of International Covenants and also relied on the following decisions/material relating to ? **Independence of Judiciary**?.

1.???????? **Written Constitutions A computerized**
Comparative Study of 142 Constitutions by Henc van Maarseveen.
??
1????????????????????????????????????
Out of 142 countries 105 constitutions explicitly declare independence of central judicial organ. The Pakistan?s constitution proclaims that, independent of judiciary shall be fully secured.?
??
(At page 2 of the Book.)?

The independence and coordination of these powers is the basis of the government.? The functions of the public power, legislative, executive, and judicial, cannot be united is a single organ.
Does the constitution contain an explicit declaration regarding the independence of the central executive organ(s)?

Yes, it is explicitly declared to be an independent organ
Yes, it is explicitly declared not to be an independent organ
No.
?
Does the constitution contain an explicit declaration on the independence of the central Judicial Organ?

Yes, it is explicitly declared to be an independent organ
Yes, it is explicitly declared not to be an independent organ
No.

The question was also answered affirmatively in cases where the judicial branch, the courts or the judges in general are declared to be independent:
?Wherein the independence of the judiciary shall be fully secured?? (Preamble Pakistan).

2?????????? **Liaquat Hussain V. Federation of Pakistan? (PLD 1999 SC 504)**??
?The Courts/Tribunals which are manned and run by the Executive Authorities, without being under the control and Supervision of the High Court in terms of Article 203 of the Constitution could hardly meet the mandatory requirement of the Constitution and that in order to ensure independence of the judiciary any court or Tribunal, which is not subject to judicial review and administrative control of the High Court and/or the Supreme Court does not fit within the judicial framework of the Constitution. (p.844)????????????????????????????????????
?
?The maximum period for the submission of challan is 14 days, which should be strictly adhered to.? In appropriate cases, contempt proceedings may be initiated against the investigating officer who deliberately or negligently causes delay in submitting challan or deliberately distorts investigation with a view to favour or disfavour someone.? Again, in appropriate cases, with a view to prevent delay in trial, challan may be submitted even if the report of medico-legal forensic or ballistic expert is awaited.? Such reports may be submitted later in point of time.? In cases tribal by the Court of Sessions, the challan rather than being submitted to the Magistrate/s. 190(3) of the Code should be sent directly to the Court of Session.

3????????? **Mehram Ali V. Federation of Pakistan (PLD 1998 SC 1445)** 20 48
The right of ?access to justice to all? is a Fundamental Right, which right cannot be exercised in the absence of an independent judiciary providing impartial, fair and just adjudicatory framework i.e. judicial hierarchy.? The Courts/Tribunals which are manned and run by executive authorities without being under the control ad supervision of the High Court in terms of Article 203 of the Constitution, can hardly meet the mandatory requirement of the Constitution.
?
Article 2-A, Independence of Judiciary, Separation of Judiciary from Executive, Hallmark of Constitution is that same envisages separation of the Judiciary from the Executive, Independence of judiciary is inextricably linked and connected with the process of appointment of Judges and the security of their tenure and other terms and conditions.
?
The right of ?access to justice to all? is a Fundamental Right, which right cannot be exercised in the absence of an independent judiciary providing impartial, fair and just adjudicatory framework i.e. judicial hierarchy.

That the independence of judiciary is inextricably linked and connected with the process of appointment of Judges and security of their tenure and other terms and conditions.
?

(i)?? that equal protection of law does not envisages that every citizen is treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;?

(ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;?

(iii) that different laws con validly be enacted or different sexes, persons of different age groups, persons having different financial standard and persons accused of heinous crimes.

(iv) ????? that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable classification in a particular set of circumstances, may be unreasonable in the other set of circumstances;

(v)? ??? that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;

??? (vi)?? ?? that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;

??? (vii)? ? that in order to make a classification reasonable, it should be based?

(a)??????? on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;

(b)??????? that the differentia must have rational nexus to the object sought to be achieved by such classification.
4????????? Government of Sindh V. Sharaf Faridi (PLD 1994 SC 105)?????
???????????????????????? (At page 54 of the Book)

In our opinion, financial independence of the judiciary can be secured if the funds allocated to the Supreme Court and High Court s (by the Parliament and the Provincial Assemblies in their respective annual budgets) are allowed to be disbursed within the limits of the budget by the respective Chief Justices of these Courts without any interference by the Executive.

5????????? **Mahmood Khan Achakzai V. Pakistan (PLD 1997 SC 426)**??????????
?????????? **(At page 56 of the Book)**

Kesavananda Bharati V. State of Kerala (AIR 1973 1461)
?????????? **(At page 58 of the Book)**

In all the Constitutions, the Objectives Resolution has been the pervading spirit.? It spells out board principles for the governance of the country. The common factors throughout have been Federal democratic form of Government guaranteeing all the freedoms, equality, tolerance and social justice, as enunciated by Islam and fully securing the independence of Judiciary.
?????????? **(At page 59 of the Book)**

No enactment can be made in respect of the provisions the Constitution relating to Judiciary by which its independence, and separation from Executive is undermined or compromised, for

such are the in-?? limitations in the Constitution completely independent from political, ???.. morality and force of public opinion. **?**
????????????????????????? (At page 63 of the Book)

Significantly by employing the words ?any law? the intention of the Constitution seems to be that Article 8 will apply laws made by the Majlis-e-Shoora (Parliament) be it general or any law to amend the Constitution. Likewise no enactments can be made in respect of the provisions of the Constitution relating to judiciary by which is independence and separation from executive is undermined or compromised.? These are in built limitations in the Constitution completely independent from political morality and force of public opinion.

6????????? **Govt. of Balochistan V. Azizullah Memon (PLD 1993 SC 341)**?????
????????????????????????? **(At page 69 of the Book)**
Constitution is based on the principle of trichotomy of power in which executive, legislature and judiciary have their own functions independent from each other.? None of these three organs are dependent upon the other nor one can claim superiority over the other.? In this context and background impose executive officers to carry out the judicial work by ignoring the Courts established in that area by itself creates discrimination and negates the very concept of justice and violates Fundamental Rights. **?**
????????????????????????? (At page 81 of the Book)

???the separation of the judiciary as contemplated in Article 175? of the Constitution and independence of the judiciary as envisaged in the Objectives Resolution cannot be achieved without having independent annual budge for the judiciary.? In other words, the judiciary should generate its own annual income accordance to its annual requirements. In my view, this may not be practicable.? I am inclined to hold ??.requirements of above Article 175 will be met if the judiciary ??.effective say in formulation of its annual demands.? To ?..differently, the executive should place annual funds ??.requirements at the disposal of the judiciary for operating it ?..being interfered with by any agency of the Executive.?
???????????
7????????? **The Superior Courts of Pakistan by M.A. Mannan** 85??????? ? 88
???????????? **(At page 86 of the Book)**

The Judges could only be removed for misbehaviour or infirmity of mind or body, reported by the Judicial Committee of the Privy Council on a reference by His Majesty.? The Government of India Act, 1935, Ss.200 and 201.

???????????? **(At page 87 of the Book)**
The Constitution of Pakistan, however, departed from the principle of parliamentary supremacy, which exists in England, and accepted the principle of judicial review found in the federal systems of Australia, Canada and the United States.

Independence of the judiciary was sought by incorporating similar provisions as were found in the Act of 1935.

(At page 88 of the Book)
Independence of the judiciary was preserved to a great extent, by the incorporation in the Constitution of the usual provisions understood to produce such results.

The jurisdiction and powers of the Supreme Court were mentioned in detail by the Constitution, but in the case of the High Courts, less comprehensive provisions were made.? Articles 170, 171, 176, 224 and 227 read together, as interpreted and applied by the courts perhaps, gave more powers and wider.

8????????? **Constitutional Law and Judicial Activism by B.R. Sharma**
???????????? **(At page 91 of the Book)**
Today the judiciary is not attracting the best legal talent because of discriminatory service conditions vis-?-vis the role of politics in the appointive process.? Delay in Courts has become a common feature.
The judicial verdict in Minerva Mills case, however, affirms that the Court is not prepared to give a free hand to the Parliament in the implementation of all the directives except those contained in Article 39(b) and (c).

(At page 93 of the Book)
Constitutional Rights of Prisoners and Judicial Activism.

The International Covenant on Civil and Political Rights emphasized that ?all persons deprived of their liberty shall be treated with human dignity and with respect for the inherent dignity of human person.?

(At page 94 of the Book)?

?the prison laws do not swallow up the fundamental rights of the legally unfree ? the courts will guard the freedom behind the bars.?

Prisoners? Rights and the Role of Judiciary.

(At page 95 of the Book)
Where the Court held that conditions of detentions cannot be extended to deprivation of other fundamental rights consistent with the fact detention.

(At page 96 of the Book)
Till that time he was not a person under the sentence of death.? The Court held that if solitary confinement was inflicted on a prisoner, it was a substantive in addition to the punishment awarded by the Court and that would violate Article 20(2).

?Where the rights of prisoners, either under the Constitution or under the law, are violated the writ power of the court can and should run to his rescue. ? The Court has Constitutional responsibility to ensure that the Constitutional purpose of the deprivation is not defeated by the prison administration.

It was implicit in Article 21, as interpreted in Maneka Gandhi?s case, namely, that no person should be deprived of his life or personal liberty except by a procedure which was ?reasonable, fair and just.?? Bhagwati J. for himself and Koshal J. held that right to an ?expeditious trial? was an integral part of the fundamental rights.

(At page 98 of the Book)
A review of the foregoing discussion makes it clear that the judiciary has played a significant role in the development of prison jurisprudence in India.? It has not only safeguarded prisoner? s rights but has also pleaded for amelioration of prison conditions.

(At page 99 of the Book)
This judicial function can only be performed by an authoritative, independent and impartial judiciary.? Hence, an independent judiciary is an indispensable requisite of a free society under the rule of law.? Independence here means freedom from executive or legislative interference in judicial functions.? This also means that the Judges must discharge their function without fear or favour.

(At page 100 of the Book)
The Committee expressed the view that ?the appointment of judges should not be left to the unfettered discretion of the executive?.

(At page 101 of the Book)
The Judges have been given a special security of their tenure.

They cannot be removed from their office except on ground of proved misbehaviour and incapacity.? This means that their tenure is not dependent upon the mere pleasure of the Government.

(At page 106 of the Book)
The Constitution guarantees them Independence by stating that judges are irremovable.? This has been interpreted to mean that they cannot even by transferred without their consent to a higher position than the one they are holding.

(At page 109 of the Book)
The independence of the judiciary is a cardinal and basic feature of our Constitution.

It is in this context that the independence of the Judiciary becomes vital and of paramount importance.? This independence of the judiciary must be protected if we want to maintain the essentials of a decent society governed by the rule of law.

(At page 120 of the Book)
He realized that a strong hold and independent judiciary was a sine qua non for upholding the rule of law in a parliamentary democracy.

9????????? **Law and Judiciary in Pakistan by Mr. Justice A.R.Cornelius** ?????? 127?????
136
??????????? **(At page 130 of the Book)**
Judicial Control of Executive and Legislative Action.
???????????
Cornelius maintained that the power of the judiciary to control administrative and legislative action derives its force from the Law and the Constitution.

The provision of Fundamental Rights not only guaranteed basic human freedoms but also placed check on administrative lawlessness.? Added to this was the power given to the Courts to pronounce upon the Constitutionality of all laws.? Where a law was made in direct violation of a Fundamental Right or of any other positive provision in the Constitution, it was liable to be invalidated by the superior Courts.

By Article 6 of the Constitution, it is provided that any law or any custom or usage having the force of law, which is inconsistent with any of the Fundamental Rights referred to above, shall to the extent of such inconsistency be void, and the State is debarred from making any law which taken away or abridges the Fundamental Rights, it being declared that to the extent of such contravention a law so made shall be void.

10??????? **Basic Principles on the Independence of the Judiciary ??????????????????**
Adopted by the 7th UN Congress on prevention of crimes through resolution 40/32 on November 29, 1985. ?????????????? ???????????
(At page 138 of the Book)

Independence of the judiciary

1.???????? The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence.

2.???????? The judiciary shall decide matter before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3.???????? The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4.???????? There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.? This principles is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5.???????? Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures.? Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6.???????? The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7.???????? It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

??????????? **(At page 139 of the Book)**?
Conditions of service and tenure

11.?????? The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12.?????? Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

18.?????? Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

(At page 141 of the Book)
In the performances of their duties, prosecutors shall:
(a)??????? Carry out their functions impartially and avoid and political, social, religious, racial, cultural, sexual or any other kind of discrimination.

On the strength of the above material, he submitted that the objective of judicial independence is not achievable without neutralizing the role of prosecutor and that even in Kosovo and? Yogoslavia, the countries which are torn by internal strife, the criteria of ?independent prosecutors? is adhered to.?? He contended that the prosecution, the Attorney General and the

Prosecutor General have to be different from the Chairman of the National Accountability Bureau and the Investigating Agency.? Their role should be to independently assess as to whether a case worth presentation is made out or not.

33.????????????????? The learned counsel submitted that the impugned Ordinance, which has replaced the Ehtesab Act, 1997, totally destroyed the values which were protected under the Ehtesab Act whereunder? a former Judge of the Supreme Court was the Prosecutor General/the Chief Ehtesab Commissioner.

34.????????????????? On the status of Accountability Ordinance vis-a-vis the Universal Declaration of Human Rights, the Cairo Declaration and Chapter on Fundamental Rights in the Constitution of Pakistan, he argued that Pakistan is a signatory to the above Declaration and that Universal Declaration of Human Rights was adhered to by this Court in the case of *Al-Jehad Trust v. Federation of Pakistan* (1999 SCMR 1379).? He laid great emphasis on the following excerpts from the Report:
?Even under the Universal Declarations of Human Rights, to which Pakistan is signatory, human beings have some basic fundamental rights irrespective of their origin or status.? In this behalf reference may be made to Articles, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 15 and 21 of the Universal Declaration of Human Rights.?

?The Fundamental Rights enshrined in the Constitution in fact reflect what has been provided in some of the Articles of Universal Declaration of Human Rights. Supreme Court, while construing the former, refer to the latter if there is no inconsistency between the two with the object to place liberal construction as to extend maximum benefits to the people and to have uniformity with the comity of nations.?

Reliance was also placed on HUMAN RIGHTS CASES (1993 SCMR 2001) wherein? at page? 2006 Placitums-C and D, it was held as under:
?Another very important question of the contemporaneous support of law for passing any of the appropriate orders in any of these cases was also discussed with some of its deeper implications.? It was pointed out that the ?enforcement? of the fundamental right concerned being the object of the law as enacted in the Constitution, will itself, furnish the contemporaneous support for the appropriate orders.? No further legal support might be necessary.? It was also emphasized that although the scope is left very wide for the Supreme Court to pass ?any? or ?all? ?appropriate orders? for the ?enforcement? of fundamental rights; yet following the usual Rules of judicial restraint an effort would always be made in procedural matters to find and discover other statutory dispensation as well.? Though, as already emphasized, strictly speaking it may not be needed at all.?

???.It was pointed out; firstly, that the fundamental rights conferred in Chapter 1 of Part II are by and large very comprehensive and no internationally recognized Human Right would ordinarily remain out of them.?? While trying to discover the connection of a Human Right which is not, prima facie, conferred by Chapter 1 of Part II of the Constitution, the necessary next exercise would be done under another mandate of the Constitution; namely that contained in Article 2-A thereof.? It makes the principles and provisions of the Objectives Resolution as a substantive part of the constitution and the Courts are obliged to give effect to it accordingly.? there are such Human Rights in Islam which when properly analyzed and understood, definitely stand at a higher pedestal as compared to the internationally recognized Human Rights.? For example, the right to obtain justice and the right to dignity of man are more pronounced in Islam that they are in any other system.? When interpreting the fundamental rights and their scope as conferred by Chapter 1 in Part II, corresponding or extended rights in the Islamic Jurisprudence and philosophy as well as Islamic Law would obviously be kept in view.? ???

Reference was then made to *Mst. Kaneez Fatima v. Wali Muhammad* (PLD 1993 SC 901) wherein at page 910 it was observed:

?5??The self-executing provision not only confers a right but it provides for its protection and a further duty is cast to enforce it without the aid of legislative enactment.? There may be supporting legislative enactments which may flow from such self-executing provisions of the Constitution, but they will not change the character of the self-executing provisions of the Constitution nor will they be dependent upon such supporting legislation.? but where merely a ?policy has been laid down or some guidelines have been provided?, they are dependent upon supporting legislations and enactments as in our Constitution, procedure is provided for enforcing or making such non-self-executing provisions operative.? Therefore, in such circumstances, the non self-executing provisions of the Constitution serve as a beacon light for the enactment of laws by the legislature and also for making rules and regulations which have the force of law.?
?6.??????? Article 2A makes the Objective Resolution a substantive part of the constitution.? The Objectives Resolution inter alia provides that the sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of

Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust.? The Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur?an and the Sunnah.? It goes on to provide for making adequate provisions for guaranteeing fundamental rights, safeguarding the interests of minorities and backward and depressed classes, and ensures the independence of judiciary. ?..?

?? **WILFUL DEFAULT**

35.????????????????? As to ?default? and ?wilful default?, Mr. Akram Sheikh, argued that default would not embrace every failure by the defendant to perform his part of the contract unless prevented by superior force and if a ?default? is committed intentionally or deliberately it is ?wilful default?.? He submitted that ?wilful default? means conscious failure to obey an order but a defaulter cannot be committed to prison in breach of a constitutional obligation, which would tantamount to breach of Fundamental Rights to a fair trial. He referred to the definition of ?default? and ?wilful default? as given in the following :

1????????? Words and Phrases (Permanent Addition)

West Publishing Co. 1658 to date ??

Definition of default; Definition of willful default ???????????

(At page 3 of the Book)

?Default? is judicial admission of plaintiff?s right to recover but, in an unliquidated damage case, not of the amount of recovery.

(At page 5 of the Book)

?Default? is the nonpayment of an obligation by the party bound to pay, without the consent of the parties having the right to waive the payment.? Therefore, when the party entitled to demand payment waives the same by extending the time for payment, either for a definite or indefinite period of time, the person bound by the obligation can not be said to be in ?default.?? Arnot v. Union Salt Co., 79 N.E. 719, 721, 186 N.Y. 501, citing De Groot v. McCotter, 19 N.J. Eq.531; Thomson v. Poor, 42 N.E. 13, 147 N.Y. 402; Toplitz v. Bauer, 55 N.E.1059, 161 N.Y. 325, 333.

2????????? Stroud?s Judicial Dictionary of Word and Phrases Fifth Edition by John S. James London Sweet & Maxwell Limited (1986)
???????????
Definition of default; Definition of willful default??????????????????????????

(At page 22 of the Book)

? ?Default? would seem to embrace every failure by the defendant to perform his contract unless prevented by superior force over which he had no control, such as stress of weather?.

?Default, is a purely relative term, just like negligence.? It means nothing more, nothing less, than not doing what is reasonable under the circumstances; not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction?.

(At page 27 of the Book)?
WILLFUL DEFAULT. ??Willful default of the person in charge? of a ship (s.299), Merchant Shipping Act 1854 (c.104), and s.419(3), Merchant Shipping Act 1894 (c.60)), means ?by the default? of such person, whether intentional or negligent, and especially so in view of s.29, Act of 1862 (c.630).
???????????
Willful default by a trustee is the willfully not doing something which he ought to do, as distinguished from doing something which he ought not to do;

3????????? Excellent Legal Word and Phrases Vol. III 1996 by Mian Muhibullah Kakakhel.

Definition of default; Definition of willful default??????????????????????????

(At page 30-31 of the Book)

Wilful Default.--If the default is committed intentionally or deliberately it is wilful default regardless of the reason why the default was intended.? The word ?wilful? must be given full significance? ?It is to be made clear that in order to be wilful, a default need not be habitual or

continuous.? A single default in the facts and circumstances of a particular case may be wilful.? AIR 1968 Orissa 113.

Willful default.?To made out ?wilful default? three elements must concur, viz., (1) the doer or abstainer of the act or omission must be a free agent; (2) he must be conscious of what he is doing or not doing and the probable result which might arise from his act or omission, and (3) this default may range from a state of mind all the way from supine indifference to conscious violation as a result of deliberation.? (1954 2 MLJ 763).

Wilful default is indicative of some misconduct in the transaction of business or in the discharge of duty of omitting to do something either deliberately or by reckless disregard of the fact whether the act or omission or was not a breach of duty.? AIR 1954 Madras 514).

(At page 33 of the Book)

Default means conscious failure to obey an order.? If an order of restoration has been made behind the back of a tenant and without his knowledge, he cannot be said to have defaulted in obeying it, for he was not aware of his obligation to obey it and could not be penalized for it.

(At page 40 of the Book)

As per Ackermann J.? The ?fair trial? guarantee required that a person should be detained only after a hearing presided over or conducted by a judicial officer drawn from the judicial structure established by the Constitution.? Persons drawn from the executive branch of the state could not discharge the function in the same way as a presiding officer who enjoyed the judicial independence which was foundational to, and indispensable for, discharge of the judicial function in a constitutional democracy based on the rule of law and which was expressly proclaimed, protected and promoted by s165 of the 1996 Constitution.? The singular importance of the judiciary as the protector of constitutional guarantees was a manifestation of the separation of powers doctrine.? The power to commit a recalcitrant witness to prison was a power which had to be seated in the judiciary and could not be exercised by non-judicial officers.

(At page 41 of the Book)

As per Sachs J.? There was a simple, profound and well-understood principle that only judicial officers should have the power to send people to prison. When such appointees were not judicial officers, they should not be able to exercise what was a crucial power of the authority reserved in democratic states to the judiciary, namely the power to punish misconduct or penalize recalcitrance by means of incarceration in a state jail.? The doctrine of the separation of powers prevented Parliament from entrusting such authority to persons who were not judicial officers performing court functions as contemplated by section 165(1) of the Constitution.?

4????????? **Chinamora V Angwa Furnishers (Pvt)**

(1997 Law Reports of Commonwealth p.149-169).

Judgement of Supreme Court of Zimbabwe ????????????????????????????????????

(At page 116 of the Book)

Constitutional Law?Fundamental Rights?Protection from degrading treatment?Willfully defaulting debtor?Civil imprisonment?Whether degrading treatment?Whether violative of right to protection of law?Constitution of Zimbabwe 1980.? ???????????? ???????????? ??????????????????????????
(At page 125 of the Book)

(South Africa)

The gravamen of the decision was that the existing law did not adequately distinguish between the fundamentally different categories of judgement debtors: those unwilling to pay even though having the means to do so, and those who simply cannot pay but who failed to prove their inability to pay.

(England)
The intention and effect of the change to the law was that a fraudulent debtor should be punished, but that an honest debtor should not: see Marris v Ingram (1879) 13 Ch D 338 at 343 and 2 Halsbury?s Laws (3rd edn) para 1267.

(At page 127 of the Book)

(India)

To be poor, in this land ? is no crime and to ?recover? debts by the procedure of putting one in prison is too flagrantly violative of Article 21 [of the Constitution which provides: ?No person shall be deprived of his life and liberty except according to procedure established by law?] unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness ? There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it.? The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree.?

(At page 131 of the Book)

Under 13(2)(c) two basic requirements must be met in order to justify the deprivation of personal liberty.? First, the deprivation may only be sanctioned ?in execution of the order of a court?.? It follows that an Act of Parliament must provide for it.? A term in an agreement of loan which makes civil imprisonment consequential upon non-payment by the debtor is, of course, of no validity whatsoever.? Section 27 of the Act authorities and empowers magistrates to issue a decree of civil imprisonment against a judgement debtor.? It is not the creditor but the court that makes the order.? In execution thereof the judgement debtor is arrested and detained in prison.? Second, the decree can only be made to secure the fulfillment of ?an obligation imposed on him by law.

5.???????? Abdul Latif V. Govt. of West Pakistan (PLD 1962 SC 384)??????????? 138????? 144

(At page 138 of the Book)

Public Accountant?Treasury contractor?Defaulter?Proceeded against to recover as ?arrear of land revenue? amounts, representing ?deficiencies? and ?Shortages?, in terms of Ss.66 & 69, Punjab Land Revenue Act (XVII of 1887) by warrant of arrest?Show cause Notice necessary, in spite of ?conclusive? nature of the ?certificate? under S.66 that amount is due?Supreme Court ? prohibited? further proceedings where such notice was not given?Indifference from general policy of Act?Revenue Recovery Act (I of 1890), S.4?Constitution of Pakistan (1956), Article 170?Writ of Prohibition.

7. International Covenant on Civil and Political Rights 1976

(At page 150 of the Book)

Article 11.? No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Discriminatory treatment amongst persons similarly placed to be avoided

36.??????????????????? He contended that this Court has never allowed discriminatory treatment amongst two alike and similarly placed persons.? He submitted that instead of leaving a person at the caprice, arbitrariness or fancy of an individual to pick and choose whomsoever he wishes to, as a wilful defaulter, a criteria should be laid down, a ceiling should be fixed or a class of persons from amongst the defaulters be identified by way of intelligible differentia for being dealt with differently.? He contended that a ?default? is an adjudicated liability, therefore, unless the competing claims of the parties ripen into ?an amount due? as a consequence of a judicial determination, a person does not become a defaulter. He referred to *Abdul Latif v. Government of West Pakistan* (PLD 1962 SC 382), to contend that before the process of recovery is initiated, the determination has to take place and the competing contentions cannot be taken as conclusive in making it a ?determined liability?.

37.??????????????????? Mr. Akram Sheikh submitted that breach of a civil liability cannot lead to imprisonment and in this respect referred to Order XXXVIII of the CPC, which, according to him, is complete answer to the contrary result. He submitted that there are 11 statutes in the field on the subject of accountability in Pakistan.? He submitted that it is not because there is a dearth of legislative instruments on accountability due to which corruption is uncontrollable? but because of lack of will and selective approach of the administrators.

38.??????????????????? Mr. Akram Sheikh then took up the question relating to ?Burden of Proof?? and contended that a minimum threshold has to be crossed by the prosecution before a presumption could be reversed and/or before the burden of proof could be shifted onto the accused. In this behalf he referred to some documents from Vol. 4 in support of his contention.
?? **ON BAIL**
39.??????????????????? He submitted that bail is a right of the accused but the NAB Ordinance has put a clog on the power of the court to grant bail. A Tribunal or Court is not free to determine tentatively or conclusively the facts which are placed before it. If there is any fetter

on the power of the Court to tentatively assess the material before it then it does not qualify to be called a free Court. In support of his contention he relied on the following case law, from Pakistan and foreign jurisdiction, to highlight the principles of grant or refusal of bail that: a detainee must be informed of reasons for his detention; the Courts of law alone are entrusted with deciding the rights and duties of all the persons who are in the protection of Courts; it is right and proper that the Courts should exercise the power and the principle that there is a presumption of innocence in favour of the accused is the undoubted law, axiomatic and elementary and its enforcement lies at the very foundation of the administration of criminal law.

1????????? **State V. Dlamini?**
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(2000 Law Reports of the Commonwealth p 239-293)??????????????????????

Judgement of the Constitutional Court of South Africa by Chaskalson P?? ????????????????????????
(At page 2 of the Book)
Constitutional Law?Separation of powers?Judicial Power ?Bail proceedings?Statutory provisions?Accused entitled to release on bail unless court finding detention to be in ?the interests of justice? ?Statute enumerating grounds whereby refusal of bail would be in ?the interests of justice? ? Whether such provisions an encroachment by legislature upon judicial functions?Whether in breach of doctrine of separation of powers ?Whether unconstitutional ? Criminal Procedure Act 1977, ss 60(4)-(9)?Constitution of the Republic of South Africa 1996

Constitutional Law?Fundamental Rights?Right to release from detention if ?the interests of justice? permit?Limitation?Bail proceedings?Statutory provisions?Accused entitled to release on bail unless court finding detention to be in ?the interests of justice??Statute enumerating grounds whereby refusal of bail would be in ?the interests of justice??Grounds including risk that accused would endanger public and that release of accused would cause public outrage-Whether statutory provisions in breach of fundamental rights?Whether unconstitutional? Whether saved as reasonable and justifiable limitation?Criminal Procedure Act 1977, ss 60(4)(e), (8A), (11)?Constitution of the Republic of South Africa 1996, ss 35(1)(f), 36.

(At page 4 of the Book)
Subsections (4)-(9) of s 60 of the CPA were introduced by a 1995 amendment and amplified by the 1997 amendment (to accord with the corresponding provisions of the interim Constitution and the Constitution).? Patently the interim of the legislature was not only to provide in meticulous detail how bail proceedings were to be conducted but also to provide judicial officers with clearly demarcated guidelines to be observed in the exercise of their adjudicative functions in relation to bail.

(At page 15 of the Book)
Everyone who is arrested for allegedly committing an offence has the right?(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(At page 20 of the Book)
In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail.

(At page 54-55 of the Book)
Summary

1. None of the provisions of the CPA impugned in the four cases before the court infringes the Constitution on any of the grounds advanced here.

2. None of the provisions of the Constitution presents any major obstacle to the application of those impugned provisions.

3. Bail as an institution is well known; so are its objectives and broad criteria.? The advent of the Constitution and the adoption of the 1995 and 1997 amendments to s 60 of the CPA properly construed, have provided a norm and guided the evaluation process.

4. Section 35(1)(f) of the Constitution acknowledges that persons may be arrested and detained for allegedly having committed offences but such arrestees are entitled to be released on reasonable conditions if the interests of justice permit.

5. Deciding whether the interests of justice permit such release, and determining appropriate conditions, is an exercise to be performed judicially in accordance with the procedure laid down in s 60 of the CPA.

6. Although a bail application is a formal court proceedings, it is relatively informal, inherently urgent and serves a uniquely interlocutory purpose distinct from that of the trial; the issue is not guilt but where the interests of justice lie in relation to bail.

7. In determining where the interests of justice lie, the essential exercise is to ascertain the relevant circumstances by using as a guide the checklist of relevant factors against the grant of bail provided in sub-s (4), as particularised in sub-ss (5) to (8A), and of those for the grant of bail provided in sub-s(9).

8. With regard to the factors both for and against the grant of bail, the checklist is not exhaustive, and the court has to consider any other relevant factor.

9. In seeking to establish the presence of such factors the court is to act as pro-actively and inquisitorially as may be necessary.

10. Having established all relevant factors, the court must weigh up the pros and cons of bail judicially, keeping in mind the possibilities of using appropriate conditions to minimize possible risks.

11. Where the public peace is a factor, i.e. where sub-ss(4)(e) and (8A) are invoked, the court should proceed with great caution and establish that the requisite exceptional circumstances are indeed present.

12. Likewise, where sub-s (11)(a) is involved, the court should be astute to ensure that the right to bail under section 35(1)(f) of the Constitution is not rendered illusory by the effect of sub-section (14), the incidence of the onus and the need to adduce evidence.? The accused is entitled to a reasonable opportunity to establish exceptional circumstances.? The latter term holds no hidden meaning and is to be applied judicially.

13. Although the accused?s guilt may be relevant in a bail application, evidence thereon should be confined to the central issue whether the interests of justice permit the release of that accused on bail.? Abuse by the prosecution of the right to cross-examine on the issue may result in the evidence being excluded at trial.?

14. The record of bail proceedings is neither automatically excluded from nor included in the evidentiary material at trial.? Whether or not it is to be excluded is governed by the principles of a fair trial.

15. Bail serves not only the liberty interests of the accused, but the public interest by reducing the high number of awaiting trial prisoners clogging our already overcrowded correctional system, and by reducing the number of families deprived of a breadwinner.

2????????? **DPP V Pete**

(1991 Law Reports of the Commonwealth p 553-589)??????????????????

Judgement of the Tanzania?s Court of Appeal

by **Nyalali CJ**??

(At page 58 of the Book)

Constitutional Law?Fundamental Rights?Personal Liberty?Bail-Statutory provision precluding grant of bail for certain offences?Defendant denied bail of district court pursuant to provision? Defendant applying to High Court for bail?Whether application raising constitutional issues? Whether court having jurisdiction?Constitution of United Republic of Tanzania, art 30(3), (4)? Criminal Procedure Act 1985 (Act No 9 0f 1985) (as amended by Act No 12 of 1987 and Act No 10 of 1989), s 148 (4), (5)(e).

Constitutional Law?Fundamental Rights?Personal liberty ?Bail?Statutory provision precluding grant of bail for certain offences?Whether deprivation or denial of liberty under? ?certain circumstances? and ? subject to a procedure? both ?prescribed by law??Whether provision Constitutional ? Constitution of United Republic of Tanzania, Article 15(2)? ?Criminal Procedure Act 1985 (Act No 9 of 1985)? (as amended by Act No.12 of 1987), s 148(5)(e)

Constitutional Law?Fundamental Rights?Personal Liberty?Bail?Statutory provision precluding grant of bail for certain offences?Whether provision amounting to denial of constitutional right to fair hearing?Whether amounting to treatment of person like convict before his guilt proved?

Whether discriminatory?Constitution of United Republic of Tanzania, art 13(4), (5), (6)? Criminal Procedure Act 1985 (Act No 9 of 1985), s 148(5)(e).??

(At page 59 of the Book)
In order to interpret the Constitution and the laws of the land correctly, there was a need to bear in mind certain basic concepts, principles and characteristics concerning the bill of rights and duties enshrined in the Constitution.? First, the Constitution recognized and guaranteed not only basic Human Rights duties.? This was symbolic and significant, expressing a Constitutionality recognized co-existence of the individual human being and society, as well as the co-existence of rights and duties of the individual and society. This view was supported by the principles underlying the African Charter on Human and Peoples? Rights, adopted by the Organization of Africa Unity in 1981, which Tanzania signed in 1982 and ratified in 1984, and account of which should therefore be taken in interpreting the bill of Rights and Duties introduced into the Constitution of Tanzania in 1985.? Second, the reality of the co-existence of the individual and society and the reality of the co-existence of rights and duties in the individual on one hand and the collective or communitarian rights and duties of society, and vice versa.

(At page 61 of the Book)
The Constitution of the United republic of Tanzania provides by Article 13:? ?(6) For the purposes of ensuring equality before the law the state shall make provisions: (a) that every person, when his rights and obligations are being determined, be entitled to a fair hearing by the court of law or other body concerned ? (b) every person charged with a criminal offence shall be presumed to be innocent until he is proved guilty.?

By Article 15: ?(1) Man?s freedom is inviolable and every person is entitled to his personal freedom.

(2) For the purposes of protecting the right to personal freedom, no person shall be subject to arrest, restriction, detention, exile or deprivation of his liberty in any other manner save in the following cases: (a) in certain circumstances, and subject to a procedure, prescribed by law; ?

(At page 76 of the Book)
The question that arises is whether section 148(5)(e) fits into the provisions of articles 30 or 31.? The learned judge dealt with this aspect of the case and stated:

?Therefore if the Republic wants bail to be denied under the provisions of article 30 of the constitution on the ground that the provisions of section 148(4) and (5) of the CPA are in the public interests the said provisions of section 148(4) and (5) of the CPA must pass the proportionality test on a balance of probabilities. Similarly when the Republic wants the court to refuse bail to the accused person under the provisions of art 31 of the Constitution on the ground that the provisions of s 148(4) and (5) were enacted on national security grounds the Republic has to prove and establish that these provisions of section 148(4) and (5) of the CPA are necessary and reasonably justifiable.? If the Republic overcomes both these two hurdles then only then may the courts refuse bail, but after affording the accused person opportunity to challenge the Republic?s statements and remarks.

3????????? **Minister of Home Affairs & Anor V Austin & Anor**

(1987 Law Reports of the Commonwealth p 567-585)??????????????????

Judgement of the Zimbabwe?s Supreme Court by Dumbutshena??
(At page 96 of the Book)
Constitutional Law?Fundamental Rights ?Reason for detention?Whether detainees had been ? informed? of reasons?Whether sufficient factual or evidentiary foundation given ?Emergency Powers (Maintenance of Law and Order) Regulations 1983, Section 17(2).

Administrative law-Judicial review-Detention-whether judicial review excluded-Meaning of ?if it appears to the minister?-Whether unreasonable exercise of discretion-Emergency Powers (Maintenance of Law and Order) Regulations 1983, section 17 (1).??
(At page 113 of the Book)
It is necessary to say that cases of detention involve the liberty of the individual, no matter who that individual is.? I would like to repeat and thus endorse what Leon, A.D.J.P., said in Hurely?s case supra at p. 715C-J:
???????????
?This case raises matters of great constitutional importance affecting the liberty of the subject, the security of the State and the jurisdiction of the Courts.? In dealing with this kind of legislation, Kotze, J. A., said the following in Union Government v Fakir 1923 AD 466 at 471:
???????????

?I should like, without attempting to dictate to the Legislature, to point out the great danger involved in departing from a well-known rule of constitutional law in all civilized countries? namely, that the courts of law alone are entrusted with deciding on the rights and duties of all persons who are within the protection of the courts,.

4????????? **Bull V Minister of Home Affairs**

(1987 Law Reports of the Commonwealth p 547-566)??????????????????

Judgement of the Zimbabwe?s High Court? by Sansole J.??
(At page 116 of the Book)
Constitutional Law?Fundamental Rights ?Personal Liberty? ? Bail ? Ministerial certificate prohibiting bail ? Whether statutory power ultra vires the Constitution Appropriate Constitutional provision governing issue ? Criminal Procedure and evidence Act, Chap. 59, Section 106(2).

Constitutional Law-Fundamental Rights-Fair hearing-Judicial process-Bail-Pre-trial custody-whether constitutional right to Bail-Constitution of Zimbabwe, Section 13(1), (2)(e) and (4) and 18(2) and (3).

Criminal procedure-Accused on remand-Reasonable suspicion of commission of offence-Whether court entitled to consider grounds of suspicion-Constitution of Zimbabwe of Zimbabwe, section 13(I) (e).

Section 13 of the constitution contemplated unqualified detention in the pre-trial period, subject to the limitation that that period was reasonable.

(At page 119 of the book)
?It is right and proper that the Courts should exercise this power.? It is only through the Courts exercising their powers, fearlessly and impartially, that a proper balance can be achieved between the interest of the State in bringing alleged wrongdoers to justice.? And the Courts in this country do so exercise these powers entirely free from any direct or indirect pressure or influence from the State, the Legislature or the executive branch of Government.? So basic is all this that the Courts will, insofar as they are legally able to do so, resist any attempts to lessen or minimize their powers and role in this regard.?

(At page 124-125 of the Book)
The relevant portions of section 13 of the Constitution of Zimbabwe are in the following terms:

(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of these specified in subsection (2).
(2) The case referred to in subsection (1) are where a person is deprived of his personal liberty as may be authorized by law--
(a) ?;
(b) ?;
(c) ?;
(d) for the purpose of bringing him before a court in execution of the order of court or an officer of a court or before the Senate or the House of Assembly in execution of the order of the Senate or that House;
(e) upon reasonable suspicion of his having committed or being about to commit a criminal offence;
(f) ?;
(g) ?;
(h) ?;
(i) ?;

(3) ?
(4) Any person who is arrested or detained.
(a) for the purpose of bringing him before a court in execution of the order of a court or an officer of a court; or
(b) upon reasonable suspicion of his having committed, or being about the commit, a criminal offence;

and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained upon a reasonable suspicion of his having committed, or being about to commit a criminal offence is not tired within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(At page 129 of the Book)
In Smith v Attorney-General, Bophuthatswana 1984 (1) SA 196 (BS) at 200F, it was said:

?The universal method of safeguarding individual liberty is to entrust it to an independent judiciary operating in public and compelled to give reasons.? Every man is entitled to ?due process of law?.? This principle is so ancient that it can be traced back to the Magna Carta (1215).?

(At page 131 of the Book)
Pertinent and strong persuasive authority in support of this view is provided by the decision of the Privy Council in Attorney-General of the of The Gambia V. Momodou Jobe [1984] AC 689 (PC).? It was contended in that case that a law of The Gambia that forbade the granting of bail, in the absence of certain defined special circumstances, to a person charged with an offence of dishonesty which affected public funds or public property, was invalid as being in conflict with section 15 of the Constitution of The Gambia At p.697A-F Lord Diplock said:

?The relevant provisions of the Constitution relating to remand in custody and release on bail are to be found in section 15 of the Constitution and they are:

?(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say:

??(e)? upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia?

(3) Any person who is arrested or detained:
??(b)??????????? upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia;
and who is not released, shall be brought without undue delay before a court.

(4)? Where any person is brought before a court in execution of the order of court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings save upon an order of a court.
(5) If any person arrested or detained as mentioned in subsection (3)(b) of this section is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears a later date are reasonable necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.?

There is thus nothing in the Constitution? which invalidates a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence, provided that he is brought to trial within a criminal offence, provided that he is brought to trial within a reasonable time after he has been arrested and detained.? Section 7(1) of the Act which prohibits release on bail, not totally, but subject to an exception if the magistrate is satisfied that there are special circumstances warranting the granting of bail, cannot in their Lordships? view be said to be in conflict with any provision of the Constitution.?

(At page 134 of the Book)
Section 72(5) of the Constitution of Kenya ?????? Provides:
?If a person arrested or detained as mentioned in subsection (3)(b) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions. ????

(At page 135 of the Book)
?Whereas section 72(5) of the Constitution makes release on bail mandatory only in certain prescribed circumstances, it is applicable to all offences. The amendments to section 123(3) have the effect of prohibiting the High Court from granting bail in cases of murder, treason, robbery with violence and attempted robbery with violence in any circumstances.? Thus, where, for example, a person is accused of robbery with violence bail may not be granted even if he is not tried within a reasonable time.?

5????????? **Ruto V. Attorney General & Anor**

(1996 (1) Commonwealth Human Rights Law Digest p 124-125)??????????????

Judgement of the Nairobi?s High Court by O? Kubasu

(At page 137 of the Book)

Extension of non-bailable offences inconsistent with judicial powers??????????????????

The applicant was charged with unlawful possession of psychotropic substance and denied bail on the ground that, by virtue of a recent amendment to the Criminal Code, all drug related offences had been made non-bailable.? The applicant sought a declaration that the amending legislation was inconsistent with the Constitution in so for as it purported to limit the unlimited jurisdiction of the High Court in criminal matters and, in particular, the jurisdiction to grant bail for drug related offences and infringed his right to personal liberty under section 72(5).

As Section 72(5) of the Constitution provided that all offences other than those punishable by death were liable, the amendment purporting to include drug related offences alongside capital offences was inconsistent and void.

6????????? **Imtiaz Ahmed V. State (PLD 1997 SC 545)**????????????????????????

(At page 139 of the Book)
S. 497?Constitution of Pakistan (1973), Article 9?Bail, grant or refusal of the principles? Approach of the Courts in view of the scenario prevailing in the country has to be reformation-oriented with the desire to suppress the mischieves?Courts, to achieve the said objective has to apply strictly the law which are designed and intended to eradicate the national evils but at the same time, they are duty bound to ensure that the approach should not be result in miscarriage of justice and provisions of Article 9 of the Constitution of Pakistan is not to be overlooked.

The courts should be oblivious of the fact that the present country is confronted with many serious problems/difficulties of national and international magnitude, which cannot be resolved unless the whole nation as a united entity makes efforts.? The desire to amass wealth by illegal means has penetrated in all walks of life.? The people commit offences detrimental to the society and the country for money.? Some of the holders of the public office commit or facilitate commission of offences for monetary consideration.? In the above scenario the Courts? approach should be reformation-oriented with the desire to suppress the above mischieves. To achieve the above objective, it is imperative that the Courts should apply strictly the laws which are designed and intended to eradicate the above national evils but at the same time, they are duty bound to ensure that the above approach should not result in miscarriage of justice.? It should not be overlooked that Article 9 of our Constitution , which relates to a Fundamental Right, guarantees life and liberty of every person.? Life, inter alia, includes the right to have access to a fair and independent judicial forum for redress.? A balance is to be stuck between national and individual interest/right. [p.22]F.

(At page 140 of the Book)
Bail, grant or refusal of?Principles.
A person accused of a bailable offence, is entitled as of right to be released on bail and grant of bail in such cases by the Court is not an act of grace or concession.? Even in cases where a person is accused of non-bailable offence and the case does not fall within the prohibitory clause, meaning thereby that the punishment prescribed for the offence is neither death nor imprisonment for life nor 10 years, the grant of bail in such cases is a rule and refusal an exception. [p.557]L.

Refusal of bail to a person in a case where he is entitled to its grant as of right, can only be justified on some statutory provision or on grounds strictly relatable to be holding of a just and fair trial.? Such refusal cannot be justified on any high principles of ethics or morality.? Both under the Anglo-Saxon concept of criminal jurisprudence as well as Islamic dispensation of criminal justice, the initial presumption of innocence of an accused charged with a criminal offence is not dislodged until he is proved guilty. Article 9 of the Constitution of Islamic Republic of Pakistan also provides that a person will not be deprived of his life and liberty except in accordance with the law.? Therefore, bail cannot be refused in a case by way of punishment. [p.558]M.?

7????????? **Government of Sindh V. Raees Farooq**

(1994 SCMR 1283)??

(At page 146 of the Book)
Leave to appeal was granted to consider whether High Court was justified in allowing the Constitutional Petition in terms of order granting bail to the detenus after having been informed that the detenus were allegedly involved in the criminal cases under the F.I.Rs. In the police stations; whether High Court was justified in dismissing the criminal miscellaneous application for cancellation of bail summarily without recording any finding; whether the allegation of prosecution that the detenus jumped the bail was correct or not.

(At page 147 of the Book)
Arts 199, 4, 9, 10 & 14?Provisions of Arts. 4, 9, 10 & 14 of the Constitution which confer fundamental rights on a citizen whenever violated and complaint is made to a High Court about

that violation, High Court must step into investigate such facts under the discriminatory jurisdiction conferred on it under Article 199 of the constitution and pass such order as may be found just, legal and equitable taking into consideration the facts and circumstances of each case.

Under Article 4 of the constitution of Pakistan, 1973 citizen has an inalienable right to be treated in accordance with law and to enjoy the protection of law.? Furthermore, under Article 9 of the Constitution no person shall be deprived of life or liberty save in accordance with law.? Article 10 of the Constitution provides safeguards against arrest and detention.? It provides that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest and every person who is arrested and detained in custody, shall be produced before a Magistrate within 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the Court of nearest Magistrate and no such person shall be detained in the custody beyond the said period without the authority of a Magistrate.? These Provisions do not apply to preventive detention, but this is not the case here.? Article 14 provides that the dignity of man and subject to law the privacy of home shall be inviolable.? It in clear terms prohibits that no person shall be subject to torture for the purpose of extracting evidence.? These provisions which confer Fundamental Rights on a citizen whenever violated and complaint is made to a High Court about their violation, the Court must step into investigate such facts under the discretionary jurisdiction conferred on it under Article 199 and pass such order as may be found just, legal and equitable taking into consideration the facts and circumstances of each case. [p.1291]C.?

Article 199?Arrest and detention?Constitutional jurisdiction of High Court?High Court has the jurisdiction to examine the facts and information laid before it to determine prima facie that it does not lack bona fides, is not a looked up or manipulated affair, the detenue has not been illegally detained without a proper and legal remand order where it is required and there appear reasonable grounds for believing that the detenue is involved in the crime charge with? Prosecution in such a situation is duty bound to disclose the material upon which it has acted and High Court is to satisfy itself that such action is lawful and not in violation of law and Fundamental Rights.

(At page 148 of the Book)
Where the liberty of a citizen is involved, the action initiated by the Police/prosecution is found to be mala fide and intended to extract evidence or information form the detenue the superior Courts should not be reluctant to step in and grant relief to the citizens.

8????????? **Mehram Ali V. Federation of Pakistan**

(PLD 1998 SC 1445)??

9????????? **Leading Constitutional Cases on Criminal ??????????????????????????? Justice** ???????????????????????
??????????????????????? United States Vs. Salerno

(At page 166 of the Book)
The Bail Reform Act of 1984 allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions ?will reasonably assure ? the safety of any other person and the community.?? The United States Court of Appeals for the Second Circuit struck down this provision of the Act as facially unconstitutional, because, in that court?s words, this type of pretrial detention violates ?substantive due process.?

(At page 169 of the Book)
The Due Process Clause of the Fifth Amendment provides that ?No person shall ? be deprived of life, liberty, or property, without due process of law ?? This Court has held that the Due Process Clause protects individuals against two types of government action.? So-called ? substantive due process? prevents the government from engaging in conduct that ?shocks the conscience,? Rochin v. California, 342 U.S. 165, 172 (1952), or interferes with rights ?implicit in the concept of ordered liberty,? Palko V. Connecti-cut, 302 U.S. 319, 325-326 (1937).? When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner ?. This requirement has traditionally been referred to as ?procedural? due process.

(At page 177 of the Book)
?The Principle that there is a presumption of innocence in favour of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.?? Coffin V. United States, 156 U.S. 432, 453 (1895).? Our society?s belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable

doubt, is ?implicit in the concept of ordered liberty,? Palko V. Connecticut,? 302 U.S. 319, 325(1937), and is established beyond legislative contravention in the Due Process Clause. ?

The statue now before us declares that persons who have been indicted may be detained if a judicial officer finds clear and convincing evidence that they pose a danger to individuals or to the community.? The statute does not authorize the Government to imprison anyone it has evidence is dangerous; indictment is necessary.? But let us suppose that a defendant is indicted and the Government shows by clear and convincing evidence that he is dangerous and should be detained pending a trial, at which trial the defendant is acquitted.? May the Government continue to hold the defendant in detention based upon its showing that he is dangerous?? The answer cannot be yes, for what would allow the Government to imprison someone for uncommitted crimes based upon ?proof? not beyond a reasonable doubt.? The result must therefore be that once the indictment has failed, detention cannot continue.? But our fundamental principles of justice declare that the defendant is an innocent on the day before his trial as he is on the morning after his acquittal.? Under this statute an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional.? The conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he will soon be guilty of something else.? ? ?If it suffices to accuse, what will become of the innocent??? Coffin v. United States, supra, at 455 (quoting Ammianus Marcellinus, rerum gestarum Libri Qui Supersunt, L. XVIII, C. 1, A.D. 359).

(At page 179 of the Book)
As Chief Justice Vinson wrote for the Court in Stack V. Boyle, supra:? ?Unless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.?.

40.????????????????? He also referred to three statutes quoted by Mr. Abid Hsasan Minto in his written statement, namely, (i) Criminal Justice Act of 1988 of Great Britain; (ii) The Prevention of Corruption Act? of Singapore and (iii) The Racketeer Influence and Corrupt Organization Statute (RICO) of USA to contend that in the first statute the power to grant bail is available even during remand; in the second statute the power to grant bail and compensation for wrongful detention is provided and the third one, according to him, though seems irrelevant but the right to grant bail is also available in that statute.? He submitted that there is no concept of complete code without power to grant bail and that this Court would not countenance a half-cooked concept of ?Court System?.

41.????????????????? Mr. Akram Sheikh also referred to some material on ?Rights of Accused and Definition?.? He made particular reference to Article 21 of the ?International Human Rights in Context? by Henry J. Steiner, relating to right of accused, which reads thus:
1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an International Tribunal;
(g) Not to be compelled to satisfy against himself or to confess guilt.

He also referred to book titled: ?**The Right of the Individual to Personal Security in Islam**? by Osman Abd-el-Malek al-Saleh to highlight the right of individual security in Islamic Criminal Law; Personal Security in Islamic Theories of incrimination and penology; the principle of individual criminal responsibility and Quranic injunctions in regard thereto in the following verses:
1) And the man hath only that for which the maketh effort.
2) Whoso doth right, it is for his soul and whoso doth wrong, it is against it.

3) Each soul earneth on its own account.?
4) No burden squl can bear another?s burden.
5) He who doth wrong will have the recompense thereof.

42.????????????????? His precise plea was that from its very inception, Islamic Law has recognized the presumption of innocence as a right inherent to all people.? Reference was also made to the case of *Shahida Zahir Abbasi v. President of Pakistan* (PLD 1996 SC 632), wherein at page 708, it was observed:
?27.????? A bare reading of the facts in the background of the case of Brig. Rtd. Imtiaz Ahmad supra would show that it would be fallacious to think that decisions of the executive including the Armed Forces to investigate serious charges against the accused officers are in the nature of ?acts of omission and commission? amenable to the judicial review of this Court under Article 183(3) of the Constitution when test of the law laid down in the cases of Zia-ur-Rehman, Khalil-uz-Zaman and Malik Hayat supra cited in paras. 20 and 21 ante is applied, namely, that acts done being *coram non judice* or without jurisdiction or *mala fide* in the instant case.

43.????????????????? Mr. Akram Sheikh also referred to the following case-law on ?remand? to contend that remand to police custody cannot be granted under the Code of Criminal Procedure for a longer period than 15 days.?
1????????? **Azmat Ali Shah V. The State (PLD 1999 Peshawar 39)**????????????????? 1????????? 5

(At page 1 of the Book)
Grant of adjournment and remand, is never to be taken in routine and it must be granted or refused by positive application of mind to the facts and circumstances of each case since that involved the liberty of a citizen whose each and every day of detention must be accounted for.

(At page 3 of the Book)
Obviously, when an accused person is arrested, he is bound to be produced before the Magistrate within a period of 24 hours with reference to section 61 of the Cr.P.C.?? Beyond such period police cannot detained a person on its own authority and hence has to seek permission from a Magistrate under section 167, Cr.P.C.? Such remand under section 167, Cr.P.C. cannot be obtained for a period of more than 15 days.? If after 15 days the investigation is not complete, the material is bound to be produced before the trial Court under section 344, Cr.P.C. to enable the Court to commence the enquiry.

(At page 4 of the Book)
In the state of affairs that prevails in our country, we observe quite frequently that laws are ignored and flouted in general and all the more flouted in certain specific cases. The liberties of citizens are now given secondary importance and at times the least importance. In such circumstances, it is necessary that the accused be physically produced before the Magistrate so that he is in a position every time to appreciate the plight of a detenu.

2????????? **Hafeezur Rehman V. The State (PLD 1993 Peshawar 252)**??????????? 6????????? 9

(At page 6 of the Book)
Under Section 167, Cr.P.C. a Magistrate can authorize the detention of an accused in custody for a term not exceeding 15 days in the whole while under section 344, Cr.P.C. an accused being in custody can be remanded for a term not exceeding 15 days at a time in case of absence of witnesses or any other reasonable cause necessary or advisable for the postponement or adjournment of an inquiry or trial.

(At page 7 of the Book)
Accused?s detention for want of competent remand order would, no doubt, amount to illegal confinement and the same can be a valid ground to release him on bail.

3????????? **Muhammad Siddiq V. Province of Sindh**
(PLD 1992 Karachi 358)??? 10??????? 20 ???????????
(At page 10 of the Book)
Detenus were arrested by the Police in investigation of one crime, kept in their custody under order of remand granted under S.167, Criminal Procedure Code by Magistrates and on expiry of maximum period of remand re-arrest in other cases and thus continuously kept in custody of police without any limit of time by resorting to provision S.167, Criminal Procedure Code --- Such practice clearly amounted to an abuse of power by the police invested in them under the law.???

A Magistrate is expected to act stringently in matters of grant of remand and it will always be in the interest of justice that remand of an accused person either to the police or judicial custody

during the investigation is granted for the minimum possible time required for completing the investigating of a case expeditiously.

(At page 19 of Book)
It must be remembered that police and magistracy play a vital part at initial stages? of administration of justice. In case these agencies fail to perform their duties in strict compliance of law people may lose faith in them. This will not only create a serious setback in the process of administration of justice but will also adversely affect the establishment of rule of law in the country.

4????????? **Muhammad Sadiq Umrani V. Government of Sindh (PLD 1993 Karachi 735)**?? ???????????????????????? 21??????? 31

(At page 21 of the Book)
Criminal Procedure Code (V of 1898), Ss.61, 167 & 154.? Wrongful confinement without any remand order and without registration of any case by Law Enforcing Agency.? Registration of cases by Police after such wrongful confinement on the basis of material supplied by the Agency.? Constitutional Petition seeking quashing of proceedings.? Petitioners were taken in custody by the Law Enforcing Agency as distinct from being arrested in any fresh for pending case or cases against them?While the said persons remained in custody of the Agency, they were neither produced before any Magistrate nor any remand orders were obtained?Such detention of petitioners clearly amounted to illegal detention---Custody of the Petitioners after quite some time as subsequently handed over to Police by the Agency.

(At page 22 of the Book)
It is an admitted position that while the said persons remained in the custody of the Agency, they were neither produced before any Magistrate nor any remand orders were obtained as none has been produced.? There is no law authorizing either the Agency or the Police to detain any person in their custody for an indefinite period as there are restrictions and conditions imposed by the Code of Criminal Procedure.? In the normal course also if an accused is arrested by the Police, even then the Police cannot retain his custody beyond a period of twenty-four hours as provided by section 61 Cr.P.C. and thereafter the police has to physically produce the accused before a Magistrate for remand either in police custody or judicial custody along with a proper remand report which indicates the number of FIR, the nature of offence committed, the date of arrest and the reasons for grant of remand.? Only then the Magistrate concerned passes the necessary order under section 167, Cr.P.C. and this is done for regulating the custody.

Moreover, when the custody of the said persons was handed over to the Police by the Agency, the Police Officer taking the custody were obviously well aware of the fact, that the said persons were in wrongful confinement of the Agency, as they only received their bare custody without any remand papers and neither any case was shown to have been registered against them nor they were required in any pending case.??

Specially so, when the various reports lodged against the said persons by the concerned Police officers, appear to be a managed affair under a pre-planned scheme.? In the circumstances, the said persons were kept in wrongful confinement without any remand order and without registration of any case.?

(At page 27 of the Book)
There is no law authorizing either the Agency or the Police to detain any person in their custody for an indefinite period as there are restrictions and conditions imposed by the Code of Criminal Procedure.? In the normal course also if an accused is arrested by the Police, even then the Police cannot retain his custody beyond a period of twenty-four hours as provided by section 61 Cr.P.C. and thereafter the police has to physically produce the accused before a Magistrate for remand either in police custody or judicial custody along with a proper remand report which indicates the number of FIR, the nature of offence committed, the date of arrest and the reasons for grant of remand.? Only then the Magistrate concerned passes the necessary order under section 167, Cr.P.C. and this is done for regulating the custody.

Moreover, when the custody of the said persons was handed over to the Police by the Agency, the Police Officer taking the custody were obviously well aware of the fact, that the said persons were in wrongful confinement of the Agency, as they only received their bare custody without any remand papers and neither any case was shown to have been registered against them nor they were required in any pending case.?? As such the subsequent taken by the police in arresting the said persons afresh and thereafter lodging fresh report against them on hearsay evidence, is nothing but a colourful exercise of power, as in doing so, they have not only obliged the Agency by retaining their custody, but it also amounts to continuation of their wrongful confinement under a legal cover. Specially so, when the various reports lodged against the said persons by the concerned Police officers, appear to be a managed affair under a pre-planned scheme.? In the circumstances, the said persons were kept in wrongful confinement without any remand order and without registration of any case is well founded.??

5????????? **Ghulam Sarwar V State (1984 P Cr. L J ?? 2588)**
??????????
6????????? **The State V. Samiullah Khan (PLD 1959 (W.P.) Karachi 157** ?????? 35??????? 38

(At page 35 of the Book)
Held, that in order to obtain remand under section 344, Cr.P.C. the following conditions require to be fulfilled.
(1) Some evidence should be adduced before the Court which should be sufficient to raise a suspicion of accused?s guilt, and the Court should be assured that further evidence to strengthen suspicion into belief is expected to be collected.
(2) A police report in writing of facts constituting the offence must also be produced to enable the Court to take cognizance of the offence;
(3) If the nature of the case is such that no cognizance can be taken of the offence without previous sanction then such sanction should be produced to enable the Court to take cognizance of the offence. [p.161]A.

7????????? **Bal Krishna V. Emperor (A.I.R. 1931 Lahore 99)**?? 39??????? 41

(At page 39 of the Book)
Criminal P. C. (1898), S. 167?Magistrate should state in writing the reasons for remand, and should satisfy himself as to its necessity.

Section 107 requires a Magistrate remanding an accused person to police custody to state his reasons in writing.? A remand to police custody ought not to be granted by a magistrate without satisfying himself as to it necessity, and the period of remand ought also be restricted to the necessities of the case.

Criminal P.C. (1898), S. 167?In absence of special reasons Magistrate in charge of Ilaqa should be approached by police for purpose of remand.

The Practice of obtaining remand from any Magistrate at the choice of the police is objectionable.? In absence of special reasons such as distance or other similar difficulties, the Magistrate in charge of the ilaqa should be approached by purposes of remand.?

(At page 40 of the Book)
S. 167, Criminal Procedure Code, requires a Magistrate remanding an accused person to police custody to state his reasons in writing. This provision has not been complied with the present instance. If the Magistrate had cared to study in diaries, as it was their duty to do before granting a remand, they would not have, I think, failed to discover that there was no legal justification for remanding the accused to police custody after the expiry of the first remand.? I would also take the opportunity to invite attention to the rules on the subject in Chap.6, Vol.II of the Rules and Orders of the High Court in which the subject has been dealt with at great length and stress had been laid on the great care necessary in remanding accused persons to police custody.? It will a appear from these instructions that a remand to police custody ought not to be granted by a Magistrate without satisfying himself as to its necessity and the period of remand ought also to be restricted to the necessities of the case.

I may incidentally remark that the practice of obtaining remands from any Magistrate at the choice of the police, which appears to prevail at present, is objectionable.

The total period of remand to police custody for investigation of an offence permissible under S.167, Criminal Procedure Code., having expired, there was no legal justification for the second and third remands to police custody granted in the present instance.

8????????? **Remand (Session Trails?Procedure and Practice p. 250-254)**?????

(At page 42 of the Book)
Remand.? Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours and there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station of the police officer making the investigation, if he is not below the rank of Sub-Inspector.

(At page 42 of the Book)
Remand to police custody?High Court Instructions.?Chapter 11-B of the Rules and Orders of the High Court of Judicature at Lahore, Vol. III deals with remands to police custody.? It runs as follows:

(1) The following instructions on the subject of remands to Police custody have been issued by the High Court.

(2) Magistrate should observe the great distinction between a remand to Police custody and an ordinary remand to the Magistrate?s lock-up under Section 344 on the adjournment of an inquiry or trial owing to the absence of a witness or from any other reasonable cause.
(3) The non-completion of the inquiry or trial justifies the latter, but the former requires something more, as it is expressly provided by section 167 that the non-completion of the investigation shall not, in the absence of a special order of a Magistrate, be deemed to be a sufficient case for the detention of an accused person by the Police.
(4) Ordinarily, when an investigation in complete, the proper course is for the accused person to be sent up promptly with such evidence as has been obtained, and for the trial to be commenced at once by the Magistrate and proceeded with, as for as possible, and then adjourned for further evidence.? In the detention of the High Court, a remand to police custody ought only to be granted in cases of real necessity and when it is shown in the application that there is good reason to believe that the accused can point out property or otherwise assist the Police in elucidating the case.
(5) The Police are too often desirous of retaining the accused in their custody for the longer period than twenty-four hours merely in the hope of extracting some admission of guilt from him.? This is contrary to section 163 and the following section of the code generally; and Magistrates must be careful not to facilitate this object by too great a readiness in granting remands.

(6) It should be further remembered that remands to Police custody cannot be granted under the Code of Criminal Procedure for a longer period than 15 days altogether, and cannot be granted at all by a Magistrate of the third class, or by a Magistrate of the second class not specially empowered by the Provincial Government.

(At page 54 of the Book)
I interrogated Ch. Sher Ali twice during his custody in NAB for ninety days.? It is correct that this visit took place in Attock Fort.? I did not sent Ch. Sher Ali to Attock fort.? I do not remember on what dates I conducted the investigation in Attock Fort.?
??????????
????????????????????? ??????? **RETROSPECTIVE OPERATION**

44.????????????????? Mr. Akram Sheikh then proceeded to dilate upon ?retrospectivity of statutes? and in that context referred to a book titled: ?**The Right of the Individual to Personal Security in Islam**? authored by *Osman Abd-el-Malek al-Saleh,* wherein under sub-heading ?The Principle of Non-Retroactivity of Penal Laws?, the writer observed as under:
?1.??????? **The Principle of Non-Retroactivity in Islamic Law and Its Importance to Individual Security.**
?Individuals can never be sufficiently secure to enjoy their rights and liberties if they can be accused of crimes for acts which were allowed when they were committed.? Thus, Islamic law has long recognized the principle of non-retroactivity of criminal laws as part of the foundation of its criminal justice system.? This principle means in essence that criminal laws have only prospective and not retroactive effect.? The significance of this principle is that it protects individual security and prevents abuse of power.?
?In view of the significance Islamic law attaches to the non-retroactivity principle, it is embodied in the constitutions of several Muslim states, and it is deemed a constitutional principle applicable to all the authorities of the state.? This universal recognition of the principle of non-retroactivity in Islamic law is in large measure due to the emphasis placed on the principle of legality, which by its very nature precludes the retroactive application of the criminal law.?
2.???????? **The precedence of the Non-Retroactivity Principle in Islamic Law.**
?While the principle of non-retroactivity had its origin in positive legal systems with Article 8 of the French Declaration of the Rights of Man in 1789, it has been an integral part of Islamic law for fourteen centuries.? The only exception to this principle in Islamic jurisprudence is that the criminal law has retroactive effect if it favors the accused.?
?The Quran cites many instances in which this principle was applied. For example, God prohibited the practice of usury, but he did not punish those who engaged in such acts prior to his decree.? God also forbids the marriage of one man to two sisters at the same time, but he did not punish such marriages which took place before the coming of Islam.?? He also prohibits a man from marrying his father?s wives, and condemns such practice as obscene, but he did not condemn such acts prior to Islam:

?And ?? marry not those women whom your fathers married, except that hath already happened in the past (of that nature). Lo! It was ever lewdness and abomination, and an evil way.?

?Similarly, the prohibition of adultery, theft, drinking alcoholic beverages and other crimes did not apply in pre-Islamic times.?
?The underlying purpose of the non-retroactivity principle is to give reasonable notice to individuals of God?s displeasure and to allow them time to put aside the old ways and conduct themselves according to God?s command.?

45.????????????????? **Mr. K.M.A. Samdani**, learned ASC for the petitioners in Constitution Petitions No. 10 and 28 of 2000 submitted that his clients, although politically apart but, so far as accountability is concerned, they are one.? He stated that his clients and he himself are all in favour of accountability, but this exercise must be undertaken under valid laws, not only in the interest of justice but also in the interest of the credibility of the Government.? He submitted that if there are doubts about the validity of a law under which certain persons are being or have been proceeded against, it does not serve the purpose.? He submitted that a law can be struck down by the Superior Judiciary only on three grounds:? (i) If the law is in conflict with any of the Fundamental Rights guaranteed under the Constitution; (ii) If the law runs counter to any other provisions of the Constitution; (iii) If the law is unfair, unjust, inequitable or against the accepted norms of jurisprudence as held in *Mehram Ali?s case* and other similar cases.

46.????????????????? The learned counsel submitted that *Mehram Ali?s case* goes a long way in supporting his contentions with regard to the provisions of the NAB Ordinance.? He, however, questioned that portion of the precedent case wherein it was observed that it would not apply to the convictions already recorded.? He contended that if a law is invalid or is? declared invalid, it is invalid since its inception.? He prayed that if the provisions of the NAB Ordinance are going to be declared invalid, they may be so declared from their inception and the judgment should apply to the convictions? already recorded and to the pending as well as future proceedings.

47.????????????????? **Mr. Muhammad Ikram Ch.** formulated his points as under:
i.????????? Whether the NAB Ordinance falls within the definition of law and has it achieved the objects of its promulgation;
ii.????????? Whether the earlier laws were not adequate against the corruption and bribery etc. and whether the impugned Ordinance can be struck down on the touchstone of Article 2A of the Constitution;
iii.???????? Whether the Fundamental Rights to be enforced under Article 184(3) have been attended to under the law and Constitution through judgments of this Court.

He referred to the following Statutes :
i.????????? Prevention of Corruption Act, 1947 (Act II of 1947);
ii. ???????? Prevention of Corruption Act (West Pakistan Extension) Ordinance 1958;
iii.???????? Pakistan Criminal Law Amendment Rules 1962;
iv.???????? Public and Representative Offices (Disqualification) Act, 1949;
v.???????? Elective Bodies (Disqualification) Order, 1959.

to contend that these laws were promulgated to cope with the menace of bribery/corruption committed by different public functionaries and political persons in Pakistan. He submitted **?** that adequate legislation in the shape of above laws against corruption/bribery and other mal-practices being already in the field, there was no need for promulgating the NAB Ordinance.? He submitted that the impugned law is tainted with *mala fide* as it has been promulgated with a view to roping in persons who might be opposed to the present regime. He argued that the NAB Ordinance is inconsistent with the established principles of law relating to administration of justice in criminal cases as laid down by this Court from time to time, therefore, the same is arbitrary in nature.?

??????????????????????? The learned counsel referred to the following excerpt from the treatise ?THE WARREN COURT AND ITS CRITICS? by Clifford M. Lytle :

?In delivering the majority opinion for the Court, Justice Clark concluded that the arguments which had been used to support limiting the exclusionary rule to the federal government in the *Wolf* case were no longer meaningful.? Clark reasoned that nothing can destroy a government more quickly than its failure ?to observe its own laws, or worse, its disregard of the charter of its own existence.??

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48.????????????????? **Dr. Z. Baber Awan**, learned ASC appearing for the petitioner in C.P. No. 20/2000, submitted that, in its present form, the NAB Ordinance offends against the Constitution as also the rights of the citizens guaranteed under the regular laws as well as the Constitution.? He next submitted that:

i) As per the definition of ?holder of public office? given in section 5(m)(ii), the Chief Executive, who is sitting in the chair of the Prime Minister and exercising all the powers and performing the functions of that office, is not included in this definition.? He prayed that clause (ii) *ibid* should be amended to include the Chief Executive of the country;

ii) Section 5(m)(v) includes the Chairman/Vice Chairman of a Zila Council, a Municipal Committee, a Municipal Corporation or a Metropolitan Corporation, but omits the Presiding Officer of the Cantonment Board, invariably an officer of the Armed Forces, who should be included in the above definition in that he also performs similar functions as are performed by the Mayor of a Municipal Corporation or the Chairman of a District Council;

iii) Section 5(r) read with section 31 (c) of the NAB Ordinance, which defines the offence of ?wilful default?, keeps out of its purview the person who writes off or waives a loan despite the fact that he is privy to and abettor of the offence and as such merits to be included in the list of persons who are said to commit the offence of ?wilful default?;

49.????????????????? The second submission of Dr. Baber Awan relates to the parallel judicial system created under the NAB Ordinance and according to him the following provisions of the Code of Criminal Procedure stand violated by various provisions of the NAB Ordinance:

i) Section 154 Cr.P.C. authorizes every person to lodge information about the commission of a cognizable offence whereas under section 18(a), the power exclusively vests with the Chairman NAB;

ii) Under section 200 Cr.P.C. a complaint can be lodged with the Court whereas under section 18 (b) (i) (ii) (iii) of the NAB Ordinance, nobody except the Chairman NAB can file a complaint. Refer *Syed Jalal Haider* v. *The State* (1972 SCMR 517);

iii) Sections 156 and 157 Cr. P. C. authorize investigation, inquiry, re-investigation, transfer of the investigation to multiple agencies and different persons/agencies like CIA, FIA, Crimes Branch, etc. can hold investigations, but under section 18(d) of the NAB Ordinance, the complainant, i.e. the Chairman NAB and nobody else can make investigation;

iv) Under section 202 Cr.P.C., in a case of direct complaint to the Court, the Court may get the case investigated from a person other than a police officer, but under the NAB Ordinance, there is no provision of re-investigation and transfer of investigation;

v) In section 167(4) Cr.P.C., it is provided that whenever physical remand is given, a copy of the paper of remand with the reasoning has to be sent by the Court granting the remand to the concerned Sessions Judge, who is in charge of the relevant Sessions Division, but under section 24(d) of the NAB Ordinance, the accused is liable to be detained for 90 days and no discretion is left with the Court;

vi) Under Article 203 of the Constitution, the Accountability Court should be under the supervisory jurisdiction of the High Court in regard to grant of physical remand and the copy of the remand order should be sent to the relevant Bench of the High Court to see that the Court has not acted mechanically.? Refer *Ghulam Sarwar* v. *The State* (NLR 1984 [Criminal Cases] 1);

vii) Under section 167 (5) (6) & (7) Cr.P.C., keeping in view the honour and modesty of women, other than in the cases of murder and dacoity, no woman can be kept in a police station, but under the NAB Ordinance, separate police stations have been created where women accused are detained;

viii) According to section 169 Cr.P.C., the investigating officer has the prerogative of applying his own mind and conscience and can discharge an accused if evidence is deficient, but under section 24(d) of the NAB Ordinance, this power has been taken away from the investigating officer and has been vested with the Chairman NAB, who does not investigate the cases himself;

ix) Section 173 (b), proviso I, Cr.P.C. provides that where investigation cannot be completed within 14 days from the date of registration of FIR, the officer in charge of the police shall within three of the expiration of such period, forward to the Magistrate an interim report (incomplete challan)? but under section 18 (f) of the NAB Ordinance, no such period has been fixed.? In all other special laws enacted so far, the period of remand for completion of investigation is 14 days;

x) Section 172, Cr.P.C., the investigating officer is bound to write down the Case Diaries, but the NAB Ordinance is silent about this valuable right of the accused person;

xi) Sections 177, 179 and 180 Cr.P.C. deal with the place of inquiry and trial and under section 185 Cr.P.C., if there is a doubt as to where exactly the offence is committed, reference has to be made to the relevant High Court, which will decide the question,

whereas under section 16 (b) of the NAB Ordinance, the government has to chose the place of inquiry and trial;

xii) Section 31 (a) of the NAB Ordinance has taken the place of three sections of Code of Criminal Procedure, namely, 87, 88 and 512.? Under the first two sections, proclamation can be issued and property attached and under section 512, the Court may record evidence, which can be used when the accused is arrested, but under section 31 (a), simply for the reason that the accused is not coming to the Court, he will be convicted without right of defence, opportunity? of hearing and recording of evidence, summarily for 3 years.? Against the punishment under section 31 (a), no appeal is provided whatsoever and three/four convictions have been recorded;

xiii) Section 494 Cr.P.C. gives power to the prosecutor to withdraw a case, who is in charge of the prosecution of a particular case, of course with the consent of the Court, but this right has been taken away by section 31 (b) of the NAB Ordinance where withdrawal of a case is in the total discretion of Chairman NAB;

xiv) Under section 417 (2) Cr.P.C. any person aggrieved of an order of acquittal, can go in appeal, but this right has been forfeited by section 32 of the NAB Ordinance;

xv) Under section 201 of Pakistan Penal Code, the trial Court is empowered to take cognizance of false prosecution, but section 36 of the NAB Ordinance takes away this right because all people concerned with the NAB are indemnified from prosecution;

xvi) Under section 497 Cr.P.C. if a person is detained without warrant, is arrested, appears or is brought before the Court, the accused can be released on bail if ?

- the accused is a woman;
- the accused is infirm or has a sickness, which is hazardous to his life as held in *Mian Manzoor Wattoo* v. *The State* (2000 SCMR 107);

the case is of further inquiry, but section 9 (b) of the NAB Ordinance takes away all these rights:

50.????????????????? Dr. Baber Awan next submitted that the process of accountability ought to continue in the interest of the country and proposed that as in the case of Wafaqi Mohtasib, the Chairman NAB should be a sitting Judge of the Supreme Court and the Regional Accountability Bureau should be headed by a sitting Judge of the High Court concerned.? He further submitted that:

- Under section 190 (3) Cr.P.C., all the challans of murder cases, even the cases of high treason, be submitted to the concerned judicial magistrates who are directly subordinate to the High Court.? Under section 63 Cr.P.C. such magistrates are authorized to discharge the accused if there appear no reason to proceed further;
- The accountability cases should be assigned to the concerned Sessions Judges instead of the present Accountability Courts which are manned by the retired Sessions Judges as well;
- Under section 25 (a) and (b), the power of ?plea bargain? is with the Chairman NAB.? Ordinarily, the prosecutor and the defence lawyer go to the chamber of the Judge for ?plea bargain?.? This power may be given to the trial Court with the consent of the prosecutor concerned;
- Appropriate enactment should be introduced empowering the Accountability Courts to put a question to the accused at the time of framing of the charge as to whether he is ready for ?plea bargain? or not?
- Under sections 204 Cr.P.C., even in the murder cases, including high treason, the trial Court is empowered to issue summons or warrants against the accused person for procuring his attendance in the Court whereas under section 91 Cr.P.C., when a person summoned in the Court appears, the Court directs him to furnish the bail bonds.? This facility should be expressly provided in the relevant law of accountability;

51.????????????????? Dr. Babar Awan concluded his arguments by referring to the following excerpts from the book titled ?Long Walk to Freedom? by Nelson Mandela:

?On 1 May 1963, the government enacted legislation designed ?to break the back? of Umkhonto, as Voster put it. The General Law Amendment Act, better known as the Ninety-Day Detention Law, waived the right of habeas corpus and empowered any police officer to detain any person without a warrant on grounds of ?suspicion of a political crime. Those arrested could be detained without trial, charge, access to a lawyer, or protection against self-incrimination for up to ninety days. The ninety-day detention could be extended, as Vorster ominously explained, until this side of eternity?. The law helped to transform the country into a police state; no dictator could covert more power than the Ninety-Day Detention Law gave to the authorities.?

52.????????????????? **Mr. Abdul Haleem Pirzada**, learned Sr.ASC, appearing for the petitioner in C.P. No. 32/2000, stated that in view of the admitting order, the onus has shifted to the respondents and sought permission to make submissions in rebuttal after the conclusion of the arguments on their behalf.

53.????????????????? **Ch. Mushtaq Ahmed Khan**, learned Sr. ASC, appearing for Nawabzada Nasrullah Khan, petitioner in C.P. No.24/2000, submitted that the grievance of his client against the NAB Ordinance and the process of accountability being carried out thereunder is that the accountability has to be even-handed, above board and for all times to come, to be controlled by a Commission headed by a judicial authority.? He contended that the operation of NAB Ordinance is discriminatory in nature and violates the principle of equality as enshrined in Articles 4 and 25 of the Constitution.? He submitted that by virtue of section 5 (m) (iv), the persons who belong to the Armed Forces? and the civil servants in the attached departments have been excluded from the definition of ?holder of public office?.? He clarified that unless a person comes within the purview of ?holder of public office?, he cannot be tried by an Accountability Court.

54.????????????????? Ch. Mushtaq Ahmed Khan read out section 16 (a) of the NAB Ordinance to contend that the power of transfer/withdrawal of cases from the ordinary Courts for trial in the Accountability Courts given to the Chairman NAB, offends against the concept of Independence of Judiciary inasmuch as it confers judicial power on the executive authorities.? He submitted that such power should be vested in the High Court concerned.

55.????????????????? The learned counsel next contended that section 25 of the NAB Ordinance is violative of Article 25 of the Constitution and should be taken out of the statute book inasmuch as if a person is found guilty of an offence, he should be brought to book and should not be allowed to go scot free.? The learned counsel also submitted that the power of Chairman NAB under section 31 (b) of the NAB Ordinance to withdraw the prosecution of a case and to release the accused person without the approval of the Court being uncontrolled, militates against the concept of Independence of Judiciary.? He submitted that the NAB Ordinance requires to be struck down or in the alternative a road map be given as done in *Mehram Ali?s case.*

56.**????????????????? Mr. Iqbal Haider,** petitioner in C.P. No. 33/2000, challenged sections 6, 7, 8, 9, 15 and 31 of the NAB Ordinance.? He submitted that sections 6 to 8 deal with the appointments of the Chairman NAB and the Prosecutor General Accountability, but no qualifications whatsoever have been laid down with the result that even a layman can be appointed to these posts.? He contended that the Chairman NAB cannot assume the powers of a Court.? He further submitted that a period of 3 years has been given to the present regime and the continuity in office of Chairman NAB is uncertain.

57.????????????????? Mr. Iqbal Haider referred to section 15 of the NAB Ordinance to contend that the same is violative of Article 63 of the Constitution inasmuch as under the

former provision, the disqualification is for a period of 21 years whereas under the latter, it is only 5 years.

58.????????????????? **Mr. Abdul Hafeez Pirzada**, learned Sr. ASC, appearing for the petitioner in C.P. No. 26/2000, submitted that:

- ❖ The NAB Ordinance has hit the constitutional conscience of Pakistan, a phrase expressed in Article 2 of the 1962 Constitution, equivalent of Article 4 of the 1973 Constitution, by no less a jurist than Chief Justice Cornelius in the judgment reported as *Jhamandas* v. *Chief Land Commissioner* ?(PLD 1966 S.C. 229);
- ❖ The Constitution is an organic instrument whereby a society regulates its life and if the conscience of the society is hit, it is intolerable;
- ❖ Jurisdiction of the Supreme Court under Article 184(3) of the Constitution is not subject to the limitations and trappings of Article 199 i.e., (i) the requirement of ?aggrieved party? and (ii) without there being an alternate remedy.? The only limitation applicable is the enforcement of Fundamental Rights of great public importance, which in this case is not disputed and while exercising jurisdiction under Article 184(3), the conscience of the Constitution, i.e. Article 4, will be kept in mind.? Refer *Syed Wasi Zafar* v. *Government of Pakistan* (PLD 1994 S.C. 621);
- ❖ If a law is held to be void, then, in the light of *Yousaf Ali* v. *Muhammad Aslam Zia* (PLD 1958 S.C. [Pak.] 104), the superstructure built thereon ceases to exist.? This principle was not followed in *Mehram Ali?s case*.? Had it been followed, the heaven would not have fallen.? Heavens have fallen in the civilized world, but those societies have not disappeared.? This Court must strike down this law if it is found to be invalid, as held by this Court in Yousaf Ali (supra);
- ❖ Article 8 (1) of the Constitution deals with *ex post facto* situation inasmuch as any law, custom or usage having the force of law to the extent of their inconsistency with the Fundamental Rights have been rendered void.
- ❖ Article 8(2) is prospective in nature and prohibits the State from making any law, which takes away or abridges the Fundamental Rights.? The mandate of Article 8 (2) affects the competence of lawmaking of the President without going into the thorny issue of what the PCO authorizes him to do or not to do.? In Article 8 (2), the word used is ?state? and not the legislature.? Therefore, the mandate is against the State as an entity including the President,? the Parliament, the Provincial Assemblies, or anyone who has authority to make law.? The NAB Ordinance, being violative of the Fundamental Rights, which cannot be suspended in view of the judgment in *Syed Zafar Ali Shah?s* case, is hit by Article 8 (2) of the Constitution and is liable to be struck down;
- ❖ Petitioner, Anwar Saifullah was arrested in November, 1999 and released recently by this Court.? He has been convicted for misuse of authority for one year, which sentence he has served out.? He has, therefore, approached the Court for enforcement of his Fundamental Rights;
- ❖ Under the NAB Ordinance, absolute, arbitrary, capricious, fanciful and discriminatory powers of detaining any person for 90 days with no obligation to give reasons for such detention, have been vested in the Chairman NAB, whose minimum qualifications have also not been laid down.? Thus, the rights guaranteed in Article 9 read with Article 8 (2) and Article 10, cannot be protected;
- ❖ The NAB Ordinance has dichotomized the society inasmuch as various categories of public functionaries have not been included in the definition of ?holder of public office?;
- ❖ Two successive Chairmen NAB are serving Lieutenant Generals in the Pakistan Army and a huge force of nearly 1000 has been employed in the Organization with unguided power.? The entire cross sections of the society, representing at one stage or the other the will of the people, can be prosecuted under the NAB Ordinance for misuse of authority whether of master or of servant and for a favour, whether material or not.? This type of process of accountability touches across the national integration process but one of the prime institutions of the country which is enjoined under the Constitution to protect the country from external aggression and internal disorder, has been excluded from the process of accountability.? The people are looked down upon as if they are the enemy.? The conscience of the Constitution of Pakistan is that thousand guilty persons may be acquitted than one innocent be sent to the gallows.

59.????????????????? Learned counsel referred to the case of *CALDER v. BULL* [3 U.S. 386 (Dall.)(1798)] and argued that the NAB Ordinance is liable to be struck down in its entirety on the following grounds in that it is within the restricted jurisdiction of this Court under Article 184(3) to do so:

i)????????? Wilful and deliberate failure of the President to obey the injunctive mandate of the Constitution and its conscience spelt out from Articles 4 and 8(2) of the Constitution.

ii)???????? Many provisions of this Ordinance are violative of the Fundamental Rights in that the good part cannot be separated from the bad and therefore the doctrine of severability is not

attracted in this case. This submission is buttressed by the argument that if such an exercise is at all undertaken, the remainder will be a legal instrument which will be inchoate, incomplete, vague, absurd and meaningless and, therefore, unworkable.

iii)???????? The field is totally and adequately occupied and therefore in accordance with the law declared by this Court there was no room for promulgating the NAB Ordinance.

iv)??????? The very idea of *ex post facto* legislation is abhorrent to the administration of justice.

v)???????? The moral authority behind the NAB Ordinance stands eroded.? The Ordinance is not covered by the doctrine of State Necessity. On the contrary, it is explicitly excluded from the applicability of the doctrine of State Necessity by this Court in *Zafar Ali Shah* (supra). Its constitutionality will be judged on the touchstone of the Constitution itself as re-emphasised and reiterated by this Court in Zafar Ali Shah?s case. For all intents and purposes, there is no difference between this case and any other ordinary case of promulgation of an ordinance.? This Court may consider and uphold or strike down the NAB Ordinance in the ordinary course of the exercise of its jurisdiction under Article 184(3), which this Court had re-asserted and upheld in the case of *Zafar Ali Shah* (supra).

vi)??????? The learned counsel for the petitioners had very elaborately drawn the attention of this Court at the time of admission of the petitions and have also done so during the submissions now, as to what parts of the NAB Ordinance are violative of which Fundamental Right. Suffice it to say that out of all the Fundamental Rights which this Court had held to be unsuspendable including liberty, life, dignity of man, inviolability of home etc., two are enough for the purposes of striking down the impugned Ordinance. These are guarantees against *ex post facto* laws in criminal matters and protection against discrimination. Discrimination means discrimination by the law itself or by an individual or organization or institution of the State pursuant to the powers conferred on him or it by the law.

60.????????????????? Mr.Pirzada referred to Article 12 of the Constitution which reads thus :
?12.????? (1)? No law shall authorise the punishment of a person ?
(a)??????? for an act or omission that was not punishable by law at the time of the act or omission; or
(b)??????? for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.
(2)??????? Nothing in clause (1) or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence.?

and elaborated that three principles have been enunciated by Article 12 of the Constitution.? First, an act or omission that was not punishable by law at the time of the act or omission,? under no principle of law that can be made punishable.? The only exception is in the case of abrogation of Constitution which is not the case here.?? Secondly, the rules of evidence cannot be changed *ex post facto* and prescribe or require or relax a mode or standard less stringent than the one that was in force at the time when the act was undertaken or omission occurred. Thirdly, no law can prescribe a penalty greater than or different from the penalty prescribed by law for the offence at the time of its commission.

61.????????????????? Mr. Pirzada argued that the NAB Ordinance is not procedural but substantive law in that changing the rules of evidence to reduce the rigours of standard of proof has been held by this Court to be substantive and not procedural law.

62.????????????????? He further argued that in order to promote and consolidate a civilized society with an organized and recognized legal system, the Court cannot permit *ex post facto* laws.? A citizen organizes his life and discharges his obligations to the society according to the laws in force at the relevant time.

63.????????????????? The learned counsel referred to Section 9(a)(vi) and (vii) of the NAB Ordinance to contend that these provisions are to be read with Section 14(d) *ibid*.? If the law says that one is presumed to be guilty the moment he is charged by the Accountability Court then it takes away the right of the accused under Section 342 Cr.P.C. Section 9 (a) (vi) *ibid* has created two distinct offences i.e. (i) misuse of authority by an accused so as to gain any benefit or favour for himself or any other person and (ii) wilful failure to exercise authority to prevent the grant or rendition of any undue benefit or favour which he could have prevented by exercising his authority.? He was of the view that the first offence was a monstrous one under which 50% references have been filed by the NAB.? Referring to Section 14(d) he argued with vehemence that it was a ?Bill of Attainder? and a legislative judgment, in that, the burden of proof has been placed on the accused and the prosecution is only required to frame a charge.? He submitted that an accused has no access to documents which can be pressed into service to discharge the burden of proof.? The moment the NAB authorities touch a case, the accused is incarcerated, burdening him with the responsibility to prove his innocence by producing positive evidence, which amounts to adding injury to insult. He went on to argue that the ? presumption? envisaged by Section 14(d) would come into play in the absence of positive proof with the result that an accused will be convicted by the Accountability Court which has no discretion to ignore or deviate from any provision of the Ordinance.

64.????????????????? He referred to the word ?misuse? which, according to him, has been used for the first time and the previous word was ?abuse?.? He contended that the word ? misuse? is a wider term and it includes every ?abuse? but not *vice versa.* The important thing is the context in which a word is used and that to say that new offence has been created means that there is a departure from the norm.? The word, which has been used in the Statutes for more than fifty years consistently, has been dropped and the word ?misuse? has come.? In support of his contention, he referred to Section 5 of the Prevention of Corruption Act, 1947 (Act No. II of 1947), relevant portion whereof reads thus:

?**5. Criminal misconduct**: (1) A public servant is said to commit the offence of criminal misconduct:
(d) if he, by corrupt or illegal means, or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; ?..?.

Reference was also made to *Sheikh Mujibur Rahman and another v. The State* (PLD 1964 Dacca 330), wherein at page 357 of the report, it was observed:

?**60**???.In matters like this the Legislature can be said to have dispensed with the ingredient of *mens rea* indirectly.? In the present case, however, it appears that the language indicates that one has to obtain some pecuniary advantage b y abusing his position as public servant either for himself or for any other person.? The word ?obtain? implies and presupposes some amount of effort on the part of the person who means to obtain a thing; and an effort is never possible without a conscious state of mind.? If any person wants to obtain or obtains anything for himself or for others he must be presumed to have made some efforts so that in normal routine course without such effort the thing sought to be obtained might not be available.? The word ? abuse? in this connection also pre-supposes that the position held by the public servant is used in a perverse manner and not in a normal way.?

He next contended that while it was difficult to accept the action of 12th October, 1999 it was also difficult to deny its moral authority.? Since the morality of the action was accepted by the

people of Pakistan but that moral authority has seriously eroded and one of the causes of that erosion is the unfair law and procedure for accountability, of which this Court should take judicial notice.? To substantiate his point of view, the learned counsel referred to pages 1, 6 and 14 of the written reply by Mr. Maqbool Elahi Malik, ASC appearing on behalf of NAB, which respectively read as under:-

RECOVERIES SINCE ESTABLISHMENT OF NAB

DIRECT RECOVERIES

?	Recovery of Bank default as on 31 Jan 2001	37.341 billion
?	Total corruption Money through Plea Bargain	01.064 billion
?	Recovery through Courts	01.056 Billion
?	Total	39.461 Billion

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INDIRECT RECOVERIES

?	PTCL	???? 05.597 Billion
?	CDA	???? 02.484 Billion
?	Under Process Recovery to Banks From:-	
	? Avaris	???? 1.4 Billion
	? Lakhanis	???? 1.5 billion
?	Custom duty evasion ? Wine trader Karachi	???? 0.1 Billion
?	**Total**	**??? 11.081 Billion**
TOTAL RECOVERIES ALL INCLUSIVE		**Rs.50.542 billion**
Total Amount Remitted to AGPR		**????? 0.768 Billion**

He contended that this ground of erosion of moral authority of the present regime also necessitates that the whole impugned Ordinance be struck down.? He further contended that unless enforcement of laws and the administration of justice is not improved, people cannot be frightened by making draconian laws.? He referred to *Nabi Ahmed v. Home secretary, Government of West Pakistan, Lahore* (PLD 1969 SC 599), wherein it has been held.

?21. ??In England, the basic sentiment of revulsion against injustice is strengthened by the jealousy of courts to preserve their jurisdiction uncontaminated by extra-judicial considerations. They regard all considerations, whether political, administrative or even legislative, if they are not embodied in the law itself, as subordinate, if not entirely extraneous, to the judicial outlook.? In the United states of America, emphasis on the constitutional separation of power is added.? In the words of the American jurisprudence, 16thvolume, page 771, Art.429 :
?The position has been taken, however, in some jurisdicti0ons that when an action is once commenced, jurisdiction is purely a judicial question, and it is unconstitutional, under the doctrine of the separation of the powers of Government, for the Legislature to attempt to usurp the judicial function by interfering legislation to oust the jurisdiction of the Court.?
?The leading authority in America is *Calder* v. B*ull* (1) in which the meaning of ex post facto legislation has been explained as follows:

?(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.
(2) Every law that aggravates a crime, or makes it greater than it was when committed.
(3) Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.
(4) Every law that alters the legal rules of evidence, and receives less or different testimony that the law required at the time of the commission of the offence, in order to convict, the offender.?
?**22.**????? One more consideration which appeals to me is that law abiding members of society regulate their lives according to the law as it exists at the time of their actions, and they expect the law to be steadfast and reliable?See *Hughes and others* v. *Lumley and others* (I).? They

assess and weigh the consequences according to the demands of existing law, including the requirements implicit in the existing system of law, and are entitled to feel cheated if the law later lets them down by taking away or reducing their rights, or increasing their burdens.? As pointed out by Willes, J. in *Phillips* v. *Eyre* (2) at p.876 :
?Retrospective laws are no doubt *prima facie* ?of questionable policy, and contrary to the general principle that a legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.?

Further :

?Blackstone, J., 1 com. 46, describes laws *ex post facto* of this objectionable class as those by which ?after an action indifferent in itself is committed, the Legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it.? Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had, therefore, no cause to abstain from it, and all punishment for not abstaining must of consequence be cruel and unjust?.?

23.?????? ??????.

?24.????? People do not mind changes in law, if only the pr5ocedure is altered without altering the substance of the law.? True, it is not easy to drawn a line between substantive and procedural law, but the task is not impossible if the essential difference is kept in the task is not impossible if the essential difference is kept in mind.? According to Salmonds Jurisprudence, 12th edition of 1966 at page 128?

?The law of procedure may be defined as that branch of the law which governs the process of litigation ?. All the residue is substantive law, and relates, not to the process of litigation, but to its purposes and subject-matter.?

Thus:

? ?a right of appeal, a right to give evidence on one?s own behalf, a right to interrogate the other party,? ?rules defining the remedy ?. As those which define the right itself,? that part of criminal law which deals, no with crimes alone, but with punishments also, as the measure of liability and many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of substantive laws,?

and, as such must be treated as falling within the classification of substantive law.? In this category has been included by this court the change of forum?

?If in the process any existing rights are affected or the giving of retroactive operation causes inconvenience or injustice.?
?See *Adnan Afzal v. Sher Afzal* (PLD 1969 SC 187).??????????????????????????????

Reliance was also placed on *Bhai Khan and others v. The State* (PLD 1992 SC 14), wherein at

page 23 of the report, it was observed:

?**7.**??????? ???These Articles prohibit convictions and sentences being recorded in the criminal jurisdiction under ex post facto laws.?? Previously ex post facto laws imposed liability and punished acts which earlier were lawful when done.? Such laws retrospectively created offences for acts or omissions that were not punishable at the time they were done or retrospectively punished persons for offences by penalties greater than or of different kinds from those prescribed for such offences at the time the same were committed.? The broad range and nature of ex post facto laws is ably set out by Qadiruddin Ahmad, J. in para. 20 of his judgment in Nabi Ahmad v. Home Secretary, West Pakistan (PLD 1969 SC 599 at 610-11).? Being against equity and all notions of fairplay and justice, these ex post facto laws over a period of time came to be abhorred.? Slowly but surely such ex post facto laws were avoided by resorting to beneficial construction or rendered invalid by legislation and the above Articles in both the Pakistan and Indian constitutions clearly render invalid such ex post facto laws and cover acts and omissions which may even have their commencement in the pre-constitution period.? See Keshavan M. Memon v. state? of Bombay AIR 1951 SC 128.? Where ex post facto laws only mollify or lessen the rigours of criminal law, but do not otherwise aggravate them, doubt has been expressed as to whether such laws fall within the prohibition of such articles.? The Indian Supreme court in Rattan Lal v. The State of Punjab (AIR 1965 SC 444) has treated such a law as not falling within the prohibition.?

Reference was also made to *Soni Devrajbhai Babubhai v. State of Gujarat* (AIR 1991 SC 2173) wherein at page 2176 of the report, it has been observed:

?**10.** In our opinion, the protection given by Art. 20(1) is a complete answer to the appellant?s contention.? The contention of learned counsel for the appellant that Section 304-B inserted in the Indian Penal Code does not create a new offence and contains merely a rule of evidence is untenable.? The rule of evidence to prove the offence of dowry death is contained in S. 113-B of the Evidence Act providing for presumption as to dowry death which was a simultaneous amendment made in the Indian Evidence Act was so amended simultaneously with the insertion of S. 304-B in the Penal Code by the same Amendment Act is another pointer in this direction. This contention is, therefore, rejected.?

65.????????????????? Mr. Hafeez Pirzada again referred to **?Commentary by Jon Roland on Calder v. Bull**?, 3 U.S. 386 (1798), wherein the author, in the beginning of the commentary, restated the points made in the opinion rendered in the above judgment, of which point No. 7 reads thus:

?**7.**??????? The prohibitions against ex post facto laws, and by implication, bills of attainder, while intended mainly for criminal penalties, such as disablements of life, limb, or liberty, but also include disablements of property, when such disablements are of a vested right in property.?

It was further observed:

?The linking of ex post facto laws and bills of attainder to criminal actions fails to consider that the purpose of these provisions is protection of the rights of defendants, and it matters little, except perhaps to the reputation of the defendant, whether the action is called ?civil? or ? criminal? if the right sought to be disabled is the same.? A competency hearing that seeks to confine the defendant to a mental institution is a petition to disable the liberty of the defendant, and as such must be accorded the same due process protections that a ?criminal? action would have that sought to imprison the defendant. For the defendant there is little difference between confinement in a mental institution and confinement in a penal institution.?

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66.????????????????? **Dr. A. Basit,** learned ASC appearing on behalf of the petitioners in Constitution Petition No. 19 of 2000, at the outset, formulated his points as under:

1.???????? The NAB Courts, as they are functioning under the existing Ordinance, have destroyed the Federal structure, inasmuch as, the territorial limits specified in the Notifications establishing the same have been disregarded by the Chairman, NAB.
2.???????? The main object of the NAB Ordinance, i.e., to recover foreign assets has been defeated in the manner in which NAB Courts have been set up, located and permitted to function.? Unless recognition of these Courts is available in the States where assets have been secreted, any judgment rendered by the NAB Court is likely to be disregarded.
3.???????? The hierarchy under the NAB system has destroyed the respect for normal Courts, inasmuch as, the judgement rendered by this Court in Dr. Farooq Sattar?s case has been disregarded by filing a Reference against him notwithstanding a prohibitory order to the contrary and the NAB is continuing with his trial.

Learned counsel stated that the alleged illegality raised in point No. 3 above, could not be urged in the Constitution Petition filed by the petitioner before this Court as the same had arisen out of the dismissal of the petitioner?s Constitution Petition in the High Court.

????????????????????????? The above contention is repelled as the only question involved herein relates to the *vires* of the impugned Ordinance.? The petitioner has already moved a petition for leave to appeal for redress of his grievance reflected in point No.3-above, which will be attended to on its own merits in due course. Any observation in these proceedings as to Dr. Farooq Sattar?s case may be prejudicial to either party.? Furthermore, we have categorically stated in the ?admitting order? that individual grievances whether directly or indirectly would not be adjudicated upon in these proceedings.

67.????????????????? Elaborating his other points, Dr. A. Basit submitted that two features are necessary to be noted: (i) this is a period of deviation from Constitution and the judicial review has to be adapted to this situation; and (ii) massive corruption still exists for which drastic laws are required and if these laws are drastic but not effective to achieve the object, even then they are counter-productive.?? He submitted that unless qualified and competent Judges are appointed and the trials are conducted in open Courts, the States to which assets have been secreted out, will not honour the judgments, therefore, the judicial review should be geared up

to make directions in terms of Section 37 of the impugned Ordinance.? He further submitted that Constitution remains under suspension and the Courts having validated such suspension, the criteria for judicial review cannot be directly derived from the text of the Constitution of 1973.? Drastic laws are required for checking corruption and particularly for recovering misappropriated assets in foreign banks.? Foreign Courts and States will release the assets only if the NAB Ordinance is so interpreted by this Court as to enable Pakistan to seek recovery of misappropriated amounts as National assets.? He submitted that MQM does not subscribe to the hue and cry raised by those politicians who have been in power and about whom information is available to the local Intelligence Agencies regarding their secret abodes. He referred to Section 5 (m) (vi) of the impugned Ordinance and contended that serving army officers have been excluded from the accountability process, which needs to be examined.

68.?????????????????? Dr. A. Basit further contended that in the presence of an Accountability Court established under the impugned Ordinance for a particular Province, change of venue of trial of an accused person who resides in that Province to an Accountability Court of another Province through an administrative order of the Chairman NAB, is destructive of the Federal structure of Pakistan.? In support of his contention, the learned counsel referred to a judgment passed by Lahore High Court in Writ Petition No. 6734/2000 on 5.7.2000, wherein it was observed:
?The other argument of the learned counsel that the Accountability Court of Attock presided over by Mr. Farrukh Latif has no jurisdiction in view of Notification dated 5.1.2000 where under his jurisdiction is only extended to the Province of Punjab and the Islamabad territory has got no force.? It must be appreciated that the Accountability courts are established by President of Pakistan after consultation with the Chief Justice of Pakistan which prima facie establishes that the courts are set up on countrywide basis and by no stretch of imagination their territorial jurisdiction can be limited.? Even Section 5(g) of the NAB Ordinance under which these Courts are established does not talk about the territorial limits.? If the notification issued under Section 5(g) has stated otherwise limiting the jurisdiction to a specific territory, said notification cannot over ride the provision of law.? Apart from this Section 16(d) of the NAB Ordinance empowers the Chairman or in his absence, the Deputy Chairman qua the selection of the forum.?

69.?????????????????? Dr. A. Basit concluded his arguments by submitting that the present Government had adopted the policy of circulating the draft-Ordinances to elicit public reaction from the concerned quarters and, in that regard, two legislations viz. ?The Regulation of Medical Education and Training in Pakistan Ordinance, 2000? and ?Freedom of Information Ordinance, 2000? were circulated but this practice was not followed in the case of the impugned Ordinance, therefore, a direction be issued to the President of Pakistan under Section 37 of the Ordinance to circulate the Ordinance to elicit public opinion and in the meanwhile to keep the impugned provisions under suspension.

70.?????????????????? **Mr. Abid Hasan Minto,** learned Sr. ASC appearing on behalf of the Federation vehemently argued that this is a case which does not purely involve a question of constitutional validity of a certain Ordinance.? The arguments addressed at the Bar may indirectly have some bearing on the Constitution itself and the state of affairs which prevails in the society at present but these arguments are not, strictly speaking, the arguments within the framework of Article 184(3) of the Constitution.? He submitted that ?admitting order? dated 12th September, 2000 contains 23 formulations, out of which many do not necessarily relate to Fundamental Rights.

71.?????????????????? He submitted, on instructions, that the Ordinance in question is the product of an extra-ordinary situation and special dispensation and that he would refrain from raising any technical objections with regard to the competence of these petitions before this Court or as to what questions this Court would like to take up for determination.? He submitted that ordinarily an Ordinance goes to the Parliament for the purposes of consideration where it is considered thread-bare and proper evaluation of the proposed law is made but presently we are dealing with a method of dispensation in special circumstances in which we are living today, therefore, the Federation is willing to take note of any objection of real/substantive nature in the Ordinance itself, which affects the constitutional rights of the citizens and take appropriate measures in regard thereto.?? Mr. Minto referred to Zafar Ali Shah?s case (supra) wherein this Court held that the Proclamation of Emergency has not completely suppressed or destroyed the old legal order but was a case of constitutional deviation for a transitional period so as to enable the Chief Executive to achieve his declared objectives as clearly spelt out in paragraph 13 of the Short Order and granted a short period of time within which the deviation and its purposes ought to have been completed.? He contended that the State of Pakistan is passing through a difficult time, which should be kept in mind while considering the vires of the Ordinance.? He submitted that although ordinarily whatever this Court observes through its judgments prevails as law of the land for all times to come until the law is changed by the Court itself through a subsequent pronouncement yet keeping in view the extra-ordinary character of the situation, the judgment rendered in such circumstances should also be treated to be a special rendering by the Court.? He added that in a case of this character, during the period of army takeover, where special circumstances are available and where the Federation has submitted to the jurisdiction

of this Court in *ex tenso* and not limited itself to Article 184(3) of the Constitution, a word of caution must enter the judgment, in that, several of these issues may not be germane to the jurisdiction of this Court under Article 184(3) of the Constitution.? He, however, contended that the impugned Ordinance is intended to be a permanent law and that objections are invited for the purposes of making it a law which will remain permanently on the Statute book as a law which will be applied to the citizens of Pakistan.? As to why this Ordinance, like other legislations, had not been circulated by the Government, Mr. Minto submitted that the Government has been circulating all its measures and Ordinances and the public debates are now being held with regard to the question even of the future quantum of autonomy but the impugned Ordinance was a law which required a quick measure and could not have been circulated in that fashion because were it circulated then, the persons who could have been brought to book thereunder, would have vanished altogether.? He however, added that the Federation has submitted the impugned Ordinance to the jurisdiction of this Court for the purpose of scrutinizing the same.

72.????????????????? He criticized the statement of Mr. Aitzaz Ahsan that the impugned Ordinance is a canon to kill the flies and agreed with Dr. A. Basit that the question is not whether a law is draconian or harsh but whether it hits the nail or not and that is it constitutional or not?? He also criticized the plea of Mr. Abdul Hafeez Pirzada to the effect that: ?destroy whole of this law? and contended that this law has served for a year and a half and good results have been achieved therefrom.

73.????????????????? He referred to the following statement at page 14 of the Paper Book containing additional documents, submitted by Mr. Maqbool Elahi Malik on behalf of the Federation, showing ?direct? and ?indirect? recoveries since the establishment of National Accountability Bureau:

RECOVERIES SINCE ESTABLISHMENT OF NAB

DIRECT RECOVERIES

?	Recovery of Bank default as on 31 Jan 2001	37.341 billion
?	Total corruption Money through Plea Bargain	01.064 billion
?	Recovery through Courts	01.056 Billion
?	Total	39.461 Billion

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INDIRECT RECOVERIES

?	PTCL	???? 05.597 Billion
?	CDA	???? 02.484 Billion
?	Under Process Recovery to Banks From:-	
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	? Lakhanis	???? 1.5 billion
?	Custom duty evasion ? Wine trader Karachi	???? 0.1 Billion
?	**Total**	**??? 11.081 Billion**
TOTAL RECOVERIES ALL INCLUSIVE		**Rs.50.542 billion**
Total Amount Remitted to AGPR		**????? 0.768 Billion**

The above statement was also relied upon by Mr. Abdul Hafeez Pirzada, Sr. ASC to show that total recovery through ?Plea Bargaining? was Rs. 01.064 billion and through Accountability Courts Rs. 01.056 billion.? Rest of the money amounting to Rs. 37.341 billion was recovered by other institutions through their own processes.? In order to rebut the above argument of Mr. Abdul Hafeez Pirzada, Mr. Abid Hasan Minto submitted a Chart indicating the rate of recovery by the banks and other institutions during the last ten years preceding the promulgation of the impugned Ordinance and contended that in view of the position shown therein, it would be inferred that after the promulgation of NAB Ordinance and because of its terms, the said recoveries have been made.? He further contended that there is a provision which says that if after coming into force of this law somebody pays off his debt/loan, his liability may be washed away and as the defaulters were conscious of the rigours of the law and were keen to avoid the same, therefore, they paid off their loans.? He submitted that this fact shows the actual impact and effect of this law.? Answering the question that the impugned Ordinance is likely to scare away the potential investors, Mr. Minto submitted that the dilemma of this society is that he who is the investor is also the culprit.? He, however, added that new provisions have been incorporated from time to time through amendments for the purposes of safeguarding the investment-climate and preserving the development of the society, which is another feature of the impugned Ordinance that it is not a static law but amenable to changes in view of

experience and public criticism.? He contended that the reason for promulgating this law was that all those laws which preceded it, had failed to deliver; corruption remained rampant and the things were manipulated in such a way that those laws became ineffective.? He further contended that it is a society of influences rather than democratic leanings.? He submitted that even the ?best? democracies of the world resort to employment of massive resources and funds for one candidate or a political party as against the other and that those who are able to manage those funds, do manage them, but not through their own resources but through variety of sources.? He argued that it is common knowledge how public influences are used to bring about those funds and even the office of President is used to manipulate the same whether it be United States, Germany or any other country.? In the third world countries, it was contended, the situation is the worst.? The champion of democratic institutions in the third world is our neighbour and it would be seen that there are financial and credibility crisis, which are created by the corrupt society itself. He then referred to an Article titled: ?White Collar Crime? from Encarta Encyclopedia by Sutherland, which reads thus:

?White-Collar Crime

White-Collar Crime, illegal acts committed by middle- or upper-class persons in conjunction with their ordinary occupational pursuits.? The term, which has no legal significance, was first popularized by the American criminologist Edwin H. Sutherland in his classic paper ?White-Collar Criminality? (1940).? Sutherland argued that important sociological differences exist between conventional crimes such s burglary and murder, which are defined without reference to the social status or occupation of the perpetrator, and white-collar crimes such as fraud, embezzlement, price-fixing, antitrust violations, income-tax evasion, misuse of public funds, and abuse of political and legal powers.? In general, the latter are committed by persons of relatively high social status, are intimately connected with the socially approved occupation of the perpetrator, and are treated by the authorities more leniently and inconsistently than are conventional crimes.

Historically, the chief sanctions against white-collar criminals have been loss of position and public trust, loss of a professional license, and the levying of fines. Rarely were jail sentences imposed and served.? This leniency in prosecution stemmed partly from the perception that a high-status individual implicated in criminal activity was sufficiently punished by the presumed loss of social esteem or occupational prospects, or both; and partly from the fact that most white-collar crimes are so-called victimless offences.? Only recently has this attitude begun to change.

White-collar crime has become an increasing problem in the latter part of the 210th century.? Authorities in the U.S., in particular, are dealing more severely with such crimes because of a growing feeling that an effort must be made to establish equality before the law for all citizens? without regard to money, power, or social status.? In part, this is a result of the greater awareness of the fallibility of public officials in the aftermath of the Watergate scandal.?

He also referred to Russ Long?s Lecture Notes on ?Whitle Collar Crime? dated July 12, 2000, wherein it has been observed:

?II. The Cost of White-Collar Crime?

?The dollar loss attributed to white-collar crimes, according to Sutherland, is probably greater than the dollar loss from all other types of crimes.? For example, the American business community lost $50 billion in 1980 to white-collar crime.? This was nearly 10 times more than the monetary value of all forms of street crimes (from Eitzen, 1986:426).??

?III. The Goals of White-Collar Crime: Profit And Political Power?

?Money is not the only motive for engaging in white-collar crime. Often political power is the goal.? In the 1950s and 1960s, when the FBI illegally broke into offices of left-wing political organizations, enhancing power was the objective, not money (see Coleman and Cressey, 1984:416).? The entire Watergate affair was oriented toward enhancing power.?

?V. Penalties For White-Collar Crime?

?The difference in how we respond to white-collar crime and ?regular? crime is dramatic.? If an individual shot and killed another individual with a hand gun, the death penalty would be considered. What happens when people are killed because a contractor uses substandard building material?? Remember the Hyatt House disaster in Kansas City??

?As a result of differences in perceptions between white-collar crime and regular crime, the accident in Kansas City was seen as a misfortune while an individual who shoots another individual is seen as a murderer.? White-collar criminals almost never go to jail. Former Vice President Spiro Agnew was never sentenced for bribery and tax evasion.? President Nixon received a full pardon for his part in the planning of the Watergate burglary, as well as its cover up.? Oliver North became a hero while acknowledging that he lied to Congress.? Reagan vetoed the Ethics in Government Bill in November 1988. His spokesperson said ?it was bad politics, but good government.?? Let?s also not forget the 25 deaths that resulted at Hamlet,

North Carolina?s Emmett Roe chicken plant. The owners had locked all the exits. The owner, who ordered the doors locked, was sentenced to 19 years and will be paroled in 2 to 6 years.?

?Incarceration rates dramatize the differential perceptions of white-collar crime compared to other types of crime.? According to the American Bar Association (ABA), 91 percent of those convicted of bank robberies go to jail while only 17 percent of those convicted of embezzlement of bank funds go to jail.? Only five percent of people suspected of committing white-collar crimes were convicted and only a small percent of these actually went to jail.? Such statistics are indeed peculiar given that the average dollar loss that results from street crime is much less than the dollar loss experienced from white-collar crime. In Florida, for example, street crime amounted to $ 35 per crime while the average loss to white-collar criminal activities was $ 621,000 (data is from Eitzen, 1986: 427).?

?VI. Why Don?t White-Collar Criminals Go To Jail??

?Clearly a double standard exists between white-collar crimes and street crimes. The following are some reasons that explain why white-collar criminals are not more rigorously pursued.

1. White-collar criminals hve money and can therefore afford the best legal advice.

2. Laws are generally written in favor of the white-collar criminal. People who commit white-collar crimes are sometimes the same people who are in a position to see to it that their crimes are not defined too negatively.

3. Whereas the impact of white-collar criminals on the nation is great, the cost to each individual is small. White-collar crimes do not impact individuals with the same intensity as when one individual is victimized by a petty criminal.

Virtually no police effort goes into fighting white-collar crime. Enforcement is many times put in the hands of government agencies (like the Environmental Protection Agency ? EPA). Often these agencies can act only as watchdogs and point the finger when an abuse is discovered.

Assigning blame in white-collar crime cases can be difficult. For example, pollution may be the result of corporate neglect, but corporation cannot sent to jail. Corporations could be heavily fined (a viable option), but the social impact of severely punishing an institution that may provide jobs to hundreds of people, as well as supply social necessities, may be more detrimental than the initial violation of the law.?

74.?????????????????? Mr. Abid Hassan Minto further contended that high corruption, serious fraud and white-collar crime is not a common place crime.? It is not a mere infraction of law, or rules, or solemn contract. It does not affect only one or a few individuals. Its victim ultimately becomes the entire society.? It involves the elite of the society who wield immense social, economic and political influence. These crimes destabilise the economic and social foundations of the society and when corruption enters the body politic of a nation, it destroys the very system as conceived by a democratic polity. It is destructive of democracy.

75.?????????????????? Mr. Minto stated that Pakistan?s conditions have been taken notice of by this Court itself in *Federation of Pakistan and others v. Haji Muhammad Saifullah Khan* (PLD 1989 SC 166),? *Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan and another* (PLD 1992 SC 646), *Mian Muhammad Nawaz Sharif v. President of Pakistan and others* (PLD 1993 SC 473), *Mohtarma Benazir Bhutto and another v. President of Pakistan and others* (PLD 1998 SC 388) and *Syed Zafar Ali Shah and others v. General Pervez Musharraf and others* (PLD 2000 SC 869). The learned counsel placed on record a comparative chart on the issue of corruption as dealt with by this Court in the above judgments, which is to the following effect :

PLD 2000 SC 869 ?Syed Zafar Ali Shah and others Vs General Pervez Musharraf and others	PLD 1998 SC 388 Mohtarma Benazir Bhutto and another Vs ?President of Pakistan and others	PLD 1993 SC 473 Mian Muhammad Nawaz Sharif ?Vs ?President of Pakistan and others	PLD 1992 SC 646 Khawaja Ahmad Tariq Rahim Vs ?The Federation of Pakistan and another	PLD 1989 SC 166 Federation of Pakistan and others Vs ?Haji Muhammad Saifullah Khan
Page 1129: 223. It has been alleged that the former Prime Minister and his chosen few in the Parliament plundered the national wealth and amassed personal wealth by engineering bank defaults of Rs. 356 billion and thereby indulged in acts of corruption and corrupt practices, which destroyed the national economy. On account of such massive corruption and corrupt practices in the administration of the affairs of the Government and its various bodies, authorities and corporations, the orderly functioning of the Government	**Page 565:** There is sufficient material available in the record produced by the respondents in support of the following ground mentioned in the order of dissolution:- 1?.. 2?.. 3?.. 4?.. 5?.. 6.Corruption in the Government Departments and Corporations, and making of appointments in violation of rules and regulations.	**Page 717:** 45. I may to ground ?d? of the impugned order, which reads as follows: - ?(d)????? Mal administration, corruption and nepotism have reached such proportions in the Federal Government, its various bodies, authorities and other corporations including banks supervised and controlled by the Federal Government the lack of transparency in the process of privatisation and in the disposal of public/Government properties, that they violate the requirement of the Oath(s)	**Page 694:** 24. This then brings into focus certain connected circumstances which are stated to have caused the breakdown, as is referred to by the President, namely, horse-trading to win over members of the Assemblies and corruption, inducement, nepotism and measures taken to prevent defection and/or to win over members from the other side, in contravention of Constitution and law, which had assumed prominence.? The?? learned	**Page 220:** There is another reason too for exercising the discre-tion or the choice in this manner. On the sub-continent, as elsewhere in the Parliamentary Demo-cracies, in order to avoid? or? in any case to reduce corrupt and illegal? practices at an election, control has been exercised through the maxi-mum?? limit?? of election expenses.

	PLD 1998 SC 388	PLD 1993 SC 473	PLD 1992 SC 646	PLD 1989 SC 166

PLD 2000 SC 869 ?Syed Zafar Ali Shah and others Vs General Pervez Musharraf and others	Mohtarma Benazir Bhutto and another Vs ?President of Pakistan and others	Mian Muhammad Nawaz Sharif Vs President of Pakistan and others	Khawaja Ahmad Tariq Rahim Vs ?The Federation of Pakistan and another	Federation of Pakistan and others Vs ?Haji Muhammad Saifullah Khan
in accordance with the provisions of the Constitution and the law had lost its meaning. It is alleged that public faith in the integrity and honesty of the government had disappeared, in that, the members of the government were either directly or indirectly involved in such corruption and corrupt practices. It is alleged that Mian Nawaz Sharif?s constitutional????? and????? moral authority stood completely eroded and that the situation was somewhat similar to the situation that was prevalent in July, 1977.		of the public representatives together with the Prime Minister, the Ministers and Ministers of State prescribed in the Constitution and prevent the Government from functioning in accordance with the provisions of the Constitution.? It may be observed that ground ? d? is more or less identical to ground ?c? and ground? ?f?? (iii)? and? ?f?(v) to that of ground ?e?(ii) and ?e?(iii) of the grounds in the case of Ahmed Tariq Rahim (supra), wherein it has been held? that? the?? above grounds	Judges of the High Court found from the material on the record that these malpractices were perpetrated to win over the members of the Assemblies by inducement, that those that defected were ostensibly rewarded, that this exercise gave rise to corruption, horse-trading and misuse of public funds running into crores of rupees? and? this? posed? a serious threat to the public interest and to the Coalition Government?? and??? that?? the???? national	Such a limit always existed in the recent past in out country and did so when members of these Assemblies contested the elections and got elected. But soon thereafter when came the time to file the return of the expenses incurred at the election ?all? were absolved of this responsibility by making an amend-ment in the law.

PLD 2000 SC 869 ?Syed Zafar Ali Shah and others Vs General Pervez Musharraf and others	PLD 1998 SC 388 Mohtarma Benazir Bhutto and another Vs ?President of Pakistan and others	PLD 1993 SC 473 Mian Muhammad Nawaz Sharif Vs President of Pakistan and others	PLD 1992 SC 646 Khawaja Ahmad Tariq Rahim Vs ?The Federation of Pakistan and another	PLD 1989 SC 166 Federation of Pakistan and others Vs ?Haji Muhammad Saifullah Khan
224. Regarding petitioners? plea that the politicians/ parliamentarians have been condemned as a class for indulging in corruption and corrupt practices it has been averred in the written statement that the charges are neither vague nor general nor undefined. It is pleaded that the systematic manner in which the entire governmental process was undermined and subverted and the way self-serving policies were followed by the previous government, do provide sufficient proof of the above allegations. ? ? ? ?On behalf of the? Federation,		themselves are not sufficient independently to warrant taking of action under Article 58(2)(b) of the Constitution but they can however be invoked, referred to and made use of alongwith grounds more relevant like grounds ?a? and ?b? which corresponded to grounds ?s? and ?c? in the present case (reference may be made to para marked M at page 666 PLD 1992 SC in the above case).	institutions began to crumble.	??. .?? ??. In this manner even this formal public accountability was dispensed with for the members of these Assemblies.

PLD 2000 SC 869 ?Syed Zafar Ali Shah and others Vs General Pervez Musharraf and others	PLD 1998 SC 388 Mohtarma Benazir Bhutto and another Vs ?President of Pakistan and others	PLD 1993 SC 473 Mian Muhammad Nawaz Sharif Vs President of Pakistan and others	PLD 1992 SC 646 Khawaja Ahmad Tariq Rahim Vs ?The Federation of Pakistan and another	PLD 1989 SC 166 Federation of Pakistan and others Vs ?Haji Muhammad Saifullah Khan
voluminous record spreading over dozens of paper books have been filed in support of the allegations of corruption and corrupt practices by the former Prime Minister as well as other members of his government.				
Pages 1145 to 1147: 232.???? Now we come to the question whether corruption can be made a ground for justifying intervention by the Armed Forces. We would be examining this question in a slightly different perspective, inasmuch as, the world community is committed to the	**Page 503:** 100. The next ground in the order of dissolution is corruption, nepotism and violation of rules in the administration of the affairs of the Government and its various bodies, authorities and corporations, which was done in such a matter that orderly functioning of Government in accordance with the provisions of the Constitution and law became impossible and in some cases? national security was challenged. In this context	**Page 778-779:** 44.?? Next ground in the order of dissolution is (d) which relates to mal-administration, corruption and nepotism by the Federal Government showing lack of transparency in the process of privatization. It is asserted by the respondents that? process? of	**Page 648:** (f) Article 58(2)(b) - Dissolution of National Assembly by the President ? Utility and efficacy of the National Assembly as a representative Institution elected by the people under the Constitution, and??? its??? mandate,?? was	

PLD 2000 SC 869 ?Syed Zafar Ali Shah and others Vs General Pervez Musharraf and others	PLD 1998 SC 388 Mohtarma Benazir Bhutto and another Vs ?President of Pakistan and others	PLD 1993 SC 473 Mian Muhammad Nawaz Sharif Vs President of Pakistan and others	PLD 1992 SC 646 Khawaja Ahmad Tariq Rahim Vs ?The Federation of Pakistan and another	PLD 1989 SC 166 Federation of Pakistan and others Vs ?Haji Muhammad Saifullah Khan
policy of showing ?zero tolerance? to all types of corruption. It is a sad state of affair is that no conceivable steps were initiated to curb the systematic corruption because of lack of transparent accountability during the tenure of the previous Government. The material placed before us indicates that the former government had shown little interest in eradicating corruption from the society. 233.???? `Corruption? is generally defined as the abuse of public office for private gain.? In? view? of? the fact that	the petitioner has taken the stand, as is reflected in the petition, that allegations of corruption, nepotism and violation of rules, even though reprehensible, did not constitute a ground that was sufficient in itself to justify and order under Article 58(2)(b) of the Constitution. In any case the ground is too vague and too general in nature and could not be sustained. Such matter could easily have been taken to the Courts and remedy of dissolving the entire National Assembly was no solution and nor was it sanctioned by the Constitution. Stand is taken by the respondents in the written statement that reliance placed by the petitioner on the case of Nawaz Sharif (suprs) is not helpful to her for the reason that in that case there were isolated instances of corruption for which enough supportive material was not available and as against that in the instant case violation of? rules and? regulations? in? respect? of	privatization lacked transparency and was vitiated by various illegalities and irregularities. Units were transferred to favorites without following proper procedure and methodology for fixation of net worth of units were not consistent. Recovery of sale price was not made in specified time-frame and manner which resulted in wastage of public assets at the cost of national exchequer. The mode of sale/transfer enabled the transferees to manipulate prices of products of sold units and made fortunes???? overnight?? to? the	defeated by internal dissentions and frictions, persistent and scandalous horse-trading for political gain and furtherance of personal interests, corrupt practices and inducement in contravention of the Constitution and the law, and by failure to discharge substantive legislative functions other than the adoption of the Finance Bill, and further the National Assembly had lost the confidence of the people; Council of Common Interests under Art.??? 153,??? which???? is	

PLD 2000 SC 869 ?Syed Zafar Ali Shah and others Vs General Pervez Musharraf and others	PLD 1998 SC 388 Mohtarma Benazir Bhutto and another Vs ?President of Pakistan and others	PLD 1993 SC 473 Mian Muhammad Nawaz Sharif Vs President of Pakistan and others	PLD 1992 SC 646 Khawaja Ahmad Tariq Rahim Vs ?The Federation of Pakistan and another	PLD 1989 SC 166 Federation of Pakistan and others Vs ?Haji Muhammad Saifullah Khan
scope of corruption has widened, this definition would include the abuse of all offices of trust. It has diverse meanings and far-reaching effects on society, government and the people. Of late, the culture of corruption and bribe has embedded in our society to the extent that even routine works which should be done without any approach or influence are commonly knows to be done on some such consideration. This bribe culture has plagued the society to the extent that it has become a way of life. In Anatulay VIII	corruption and nepotism had been carried out on such a widespread, pervasive and systematic basis that such charges can validly form basis for action under Article 58(20(b). In other words in the present case there was colossal difference in magnitude in both scale and nature of the corruption , nepotism and corrupt practices in question and the whole system of governance had been subverted and channels of administration polluted by a sustained abuse of power. It is, therefore, submitted that in the instant case there is overwhelming evidence to establish that person holding highest posts in the Government are guilty of corrupt practices and gross abuse of power which is a valid ground for concluding that Government cannot be carried on in accordance with the provisions of the Constitution. In there joinder? petitioner? has? once? again? denied??? the	detriment of the consumer. Eight Cement factories were sold to one group of Industrialists and the manner in which the Muslim Commercial Bank was sold to the favorites of the petitioner namely Mansha Group is well-known. Sale of properties owned by the Federal Government including Corporations was unconstitutional and in doing so Articles 153, 154 and 156 read with Article 161 were violated by the petitioner and his Government.	responsible only to Parliament, had not been allowed to discharge its Constitutional functions and exercise its powers despite persistent demands of the Provinces and Parliament had also not been allowed to function in that regard as required by Arts. 153 and 154 of the Constitution and in relation to Arts. 155 and 161 of the Constitution of Pakistan; National Finance Commission under Art. 160 of the Constitution had? never? been? called? to	

PLD 2000 SC 869 **?Syed Zafar Ali Shah and others Vs General Pervez Musharraf and others**	**PLD 1998 SC 388** **Mohtarma Benazir Bhutto and another Vs ?President of Pakistan and others**	**PLD 1993 SC 473** **Mian Muhammad Nawaz Sharif Vs President of Pakistan and others**	**PLD 1992 SC 646** **Khawaja Ahmad Tariq Rahim Vs ?The Federation of Pakistan and another**	**PLD 1989 SC 166** **Federation of Pakistan and others Vs ?Haji Muhammad Saifullah Khan**
(1988) 2 SCC 602 where Adbul Rahman Anatulay, Chief Minister of Maharashtra was prosecuted for corruption Sabyasachi Mukharji, J. Iamented as follows: ?Values in public life and perspective of values in public life, have undergone serious changes and erosion during the last few decades. What was unheard??? before Is commonplace today. A new value orientation is being undergone in our life and culture.	allegation and demanded that the respondents be made to prove the allegation strictly. **<u>Page 510</u>:** 109. On the ground of corruption, nepotism and violation of rules in the administration, it the written statement, large scale corruption is alleged in the finance sector of the Federal Government in which the petitioner as Prime Minister also retained for herself the portfolio of finance and did not appoint any person as Finance Minister. She appointed one Minister of State for Finance and a retired bureaucrat as advisor on finance. In that set-up petitioner herself assumed the responsibility and maintained complete control over the financial sector of the Federal Government. She took all the key decisions herself without involving anyone else.	45.?? In relation of Pakistan Telecommunication Corporation, the petitioner and his Government went to the extent of hiring services of foreign consultants and got legislation prepared abroad in advance for privatization in such a manner that only foreign investors could buy it. In this connection Ministry of Law and Justice was not consulted. The foreign investor was to purchase only 26% of the share holding in the proposed Corporation while Government of Pakistan through holding 74% were not given? any? right of vote. Tax-	meet and allowed to function, thus blocking mandatory Constitutional process in the matter of allocation of shares of revenues to the Provinces despite their persistent demands; Constitutional powers and functions of the Provinces had been deliberately frustrated and extension of executive authority of the Federation tot he Provinces in violation?? of??? Art. 97 and by the general manner of implementation of???? the Peoples? Programme and??? Senate??? which??? is	

PLD 2000 SC 869 **?Syed Zafar Ali Shah and others Vs General Pervez Musharraf and others**	**PLD 1998 SC 388** **Mohtarma Benazir Bhutto and another Vs ?President of Pakistan and others**	**PLD 1993 SC 473** **Mian Muhammad Nawaz Sharif Vs President of Pakistan and others**	**PLD 1992 SC 646** **Khawaja Ahmad Tariq Rahim Vs ?The Federation of Pakistan and another**	**PLD 1989 SC 166** **Federation of Pakistan and others Vs ?Haji Muhammad Saifullah Khan**
We are at the threshold of the cross-roads of values. It is for the sovereign people of this country to settle theses conflicts yet the Courts have a vital role to play in these matters.? 234.???? Although we are dealing with a case of intervention by the Armed Forces, yet it would be advantageous to allude to the ground of corruption, which came up for consideration in the cases of Kh. Ahmad Tariq Rahim(PLD 1992 SC 646), Mian Muhammad Nawaz Sharif (PLD 1993 SC 473) and	**Page 509:** 108. Another case of misappropriation cited is that? Ms. Naheed Khan, Political Secretary tot he Petitioner, and one Rehmatullah, the consultant to the petitioner, while the petitioner was the Prime Minister, forwarded lists of person and had cheques issued for them for total amount of Rs. 34,90,000. In gross violation of rules sums totaling to Rs. 6.1717 million and 27.05 million were sanctioned on the directions received from Ms. Naheed Khan and Mr. Rehmatullah respectively. In the rejoinder allegation is denied on the ground that the signatures of Ms. Naheed Khan were forged. In any case a case has been filed against her under sections 409, 420, 109 P.P.C. and section 5(2) of Prevention of Corruption Act, 1947 in which bail has been granted to her. These incidents can be considered	Holiday was proposed to be given to foreign purchaser. Buyer was to be a Government within a Government. There was reason to believe that petitioner and his Government had similarly decided to sell WAPDA, the Railways, PNSC, the Ports to foreign investors thus allowing foreign intervention in vital sectors of Pakistan to the control of foreign companies. The Government of Federation was not authorised under the Constitution or law to sell in the aforesaid manner.	representative of the Federating Units under Art. 59 and is an integral part of the Parliament, had been ridiculed and its Constitutional role had been eroded ? Such ground by themselves were sufficient to justify the President to dissolve the National Assembly under Art. 58(2)(b) of the Constitution of Pakistan. **Page 649:** (g) Article 58(2)(b) - Dissolution of National Assembly by the President	

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Benazir Bhutto (PLD 1998 SC 388) (*supra*). In the first case, it was observed by Shafiur Rehman, J. that corruption may not have been independently sufficient to warrant such an action, but it can be invoked, referred to and made use of alongwith other more relevant grounds, which are by themselves sufficient to justify the action taken. In Mian Muhammad Nawaz Sharif?s case (supra), it was observed that ?if the corruption, nepotism and favoritism are of such a large scale that they have resulted in the breakdown of the constitutional? machinery	in the light of the fact that during the tenure of the petitioner as Prime Minister how rules of the procedure were being violated with impunity and how public money was being dealt with by person who were very close to the petitioner. These incidents certainly show an element of lack of responsibility in the administration of the petitioner and could go a long way in satisfying the mind of the President that the Government of the Federation was not being run in accordance with the provisions of the Constitution. **<u>Page 511</u>:** In respect of financial irregularities mentioned in detail in the written statement and supported by documents which are contained in a separate file annexed with the written statement, the petitioner in the rejoinder has said nothing? at? all? excepting	46.?? It is claimed by the respondents that important decisions were taken by the petitioner and his nominees bypassing and in total disregard of Constitutional requirements and rules of business. Proposed privatisation of WAPDA, PTC, portion of Pakistan Railways or other Corporations owned by the Federal Government, PIA and nationalised banks whether sold and/or under consideration of being sold were never brought by the petitioner before CCI and NEC.? What? is? stated?? above	under Art. 58(2)(b) of the Constitution of Pakistan.-- Corruption and nepotism in the Federal Government, its functionaries and authorities and agencies statutory and other corporations, including banks working under its supervision and control and the holders of representative offices had reached such proportions that the orderly functioning of the Government in accordance with the? provision of?? the	

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completely, it may have nexus with the above provision?. In the third case of Benazir Bhutto, this Court took notice of enormous corruption and treated it as an independent ground on the basis of which an Assembly could be dissolved (Underlining is by way of emphasis). Once corruption pervades in the body politic and official circles, then the entire Government/ administration becomes completely crippled and paralyzed. Recounting the instances of alleged corruption the Federation has pointed out Sharifs? ownership of Cayman Island, and offshore company	three lines in respect of Mr. Aziz Memon which are responded as under:- ?It is well known that even though Aziz Memon was a Government party M.N.A., he was arrested during the petitioner?s tenure and the case is sub judice. No special treatment was meted out to him, therefore, the allegation has no force.? Such a short reply in the rejoinder clearly shows that other allegations are not denied specifically and categorically. Nothing more is needed to be said in respect of this allegation leveled by the respondents and the documents which have been produced in respect? thereof? except? that?? there is? overwhelming?? evidence?? produced?? by??? the	clearly shows that in respect of policy of privatisation, Constitutional requirements of provisions regarding CCI and NEC were not followed and Provinces were not given opportunity to participate in the formulation of such policies. It also appears that on the ground of mal-administration, corruption and nepotism of the Federal Government there was sufficient material before the President which has been produced in the Court as Annexures ?A? to ?A-12? and ?B? to ?R? which were considered in support of the ground of dissolution.	Constitution including the requirements of the oaths prescribed therein; and the law, did no longer carry public faith and credibility and despite being subject to wide public condemnation the Government had failed to take appropriate action in that behalf; authority, resources and agencies of the Government of the Federation including statutory corporations, authorities and banks had been misused for political ends and purposes and for personal gains and civil services? of? Pakistan? had	

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through Al-Towfeek Co. and the case of huge quantity sugar export to India ? receiving heavy amount is rebate. When corruption permeates in social, political and financial transactions to such an extent that even proper and honest orders and transactions are suspected to the pint of belief being a result of corruption, one is compelled to infer all is not well and corruption has gone deep in the roots. No doubt, this is an age of ?corruption eruption?, but during the last few years there have been large scale prosecutions? of? former? world	respondent on the ground of financial irregularities committed by the petitioner or by others within her knowledge and she did not do anything to remedy the situation to save the nation and its economic ruination and disaster **<u>Page 532</u>:** IN any case in the written statement instances in respect of certain projects and in support thereof a large number of documents have also been field which show corruption, nepotism and undue favour in official dealing of such projects which speak for themselves and the petitioner does not say that the documents produced by the respondents are false and fabricated but instead reliance has been placed on newspaper cuttings of the statements in which the Caretaker Prime Minister or the Interior Minister? had? stated? that		been undermined by disregarding the provisions of Arts. 240 and 242 of the Constitution of Pakistan ? Such grounds though were not independently sufficient to warrant the action of dissolution of National Assembly by the President but could be invoked, referred to and made use of alongwith ground more relevant.	

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leaders in various countries on the charges of corruption and corrupt practices, in some cases leading to convictions, which phenomenon must not be taken lightly and the issue must be addressed adequately and effectively through transparent institutionalized processes. 235. The observations made herein and in the Short Order are not intended to condemn *en bloc* the politicians and parliamentarians as a class. Undoubtedly, there are good, honest and upright as well as corrupt people in every group of persons. These? observations	initially they did not find material connecting the petitioner with the acts of corruption. in the final analysis after perusal of the documents produced by the respondents along with the written statement and the reply of the petitioner in the rejoinder and the documents filed by her in support of her stance, it can be said that the charge framed by the Respondents is adequately substantiated. **<u>Page 534</u>:** That being so Mr. Khalid Anwar was unable to show that there was no mistake in the name and the person named in the schedule is related to Mr. Asif Zardari. If this is accepted as correct, even then it is apparent that persons named in the schedule have been favored out of way after violation of rules. No?? mention? is? made? in? the		**<u>Page 653</u>:** The formal order of the President of Pakistan under Article 58(2)(b) which was gazetted is reproduced hereunder in extenso:- a. ?.. b. ?.. c. ?.. The Federal Government has failed in its duty under Article 148(3) of the Constitution to protect? the Province of Sindh against internal? disturbances and to ensure that the Government????? of???? that	

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are confined only to the situation, which is being attended to in these cases. Any proceedings commenced against any person including the parliamentarians of politicians or members from the general public under the laws of the country will, no doubt, be decided on their own merits in accordance with law and on the basis of the legally admissible material brought before the concerned for a in those proceedings without being influenced by any observation made in this judgment. Put differently, it will??? be????? only??? after??? the	rejoinder with regard to the allotment of land to the parliamentarians. Therefore, that charge stands established.		Province is carried on in accordance with the provisions of Constitution, despite the heavy loss of life and property, the rule of terror in urban and rural areas, riots, arson, dacoities, kidnapping for ransom, politics of violence among citizens and widely condemned failure of the Provincial Government and its law enforcing agencies, and also, in this behalf, failed to act under appropriate provisions of the Constitution.	

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finalization of the proceedings as above that the country will be geared up for resort to democratic principles and corruption free society which are prerequisite for good governance. This situation has also been recognized by the Commonwealth Finance Ministers Meeting held n 21-23rd September, 1999 at Grand Cayman, Cayman Islands. 236. The Federation has also alleged that most of the politicians/parliamentarians have misdeclared their assets both before the Wealth Tax Authorities?? as?? well?? as?? the				

PLD 2000 SC 869 **?Syed Zafar Ali Shah and others Vs General Pervez Musharraf and others**	**PLD 1998 SC 388** **Mohtarma Benazir Bhutto and another Vs ?President of Pakistan and others**	**PLD 1993 SC 473** **Mian Muhammad Nawaz Sharif Vs President of Pakistan and others**	**PLD 1992 SC 646** **Khawaja Ahmad Tariq Rahim Vs ?The Federation of Pakistan and another**	**PLD 1989 SC 166** **Federation of Pakistan and others Vs ?Haji Muhammad Saifullah Khan**

Election Commission including, the former Prime Minister who admittedly despite owning a helicopter, did not declare the same in his declaration of assets. It has been pleaded on behalf of the Federation that although misdeclaration of assets was a matter of record, yet the Constitutional authorities failed to file references against them before the concerned for a. thus, all such politicians/ parliamen-tarians through their acts of commission and omission have rendered themselves ineligible for being members of the representative bodies. In order to substantiate				

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the above allegations the learned Attorney-General has filed voluminous record wherein specific instances of misdeclaration of assets have been given. We have examined the relevant record only for the purposes of the present controversy and find that sufficient material exists showing, *prima facie,* that a large number of politicians indulged in misdeclaration of assets, which factor has a bearing on the issue in had. We may clarity that misdeclaration of assets or any discrepancy as to declaration of assets before the Wealth Tax Authorities qua the Election Commission may				

PLD 2000 SC 869 **?Syed Zafar Ali Shah and others Vs General Pervez Musharraf and others**	**PLD 1998 SC 388** **Mohtarma Benazir Bhutto and another Vs ?President of Pakistan and others**	**PLD 1993 SC 473** **Mian Muhammad Nawaz Sharif Vs President of Pakistan and others**	**PLD 1992 SC 646** **Khawaja Ahmad Tariq Rahim Vs ?The Federation of Pakistan and another**	**PLD 1989 SC 166** **Federation of Pakistan and others Vs ?Haji Muhammad Saifullah Khan**
not by itself be a ground for intervention of the Armed Forces on 12th October, 1999 but this aspect of the matter when viewed in the overall context and with particular reference to the alleged massive corruption and corrupt practices becomes a relevant factor. **<u>Page 1140</u>:** 228. Syed Sharifuddin Pirzada, learned Senior ASC ws right in contending that there were serious allegations of corruption, nepotism, lack of transparency and no accountability and that	- - - - - - - - - - - - **<u>Page 625</u>:** 34. The sixth ground relates to corruption, nepotism and violation of rules in the administration of affairs of the Government and its various bodies, authorities and corporations, which were so extensive and widespread that the orderly functioning of the	**<u>Page 837-838</u>:** 24.?? The word ?corruption? has not been defined by any law, but is has diverse meaning and far-reaching effects on society, Government and the people.It	**<u>Page 705</u>:** 43. Before concluding, a few matters call for consideration, which I would like to touch: *First:* ??.	

where there is corruption, there is no	Government in accordance with the provisions of the Constitution and the law had become impossible. Public?? faith	covers a wide field and can apply??? to??? any?? colour??? of	*Second:* Without accountability at all levels, no? headway can? be made	

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good Government, which fact has been recognised by this court by observing that corruption by itself is a ground for imposition of Martial Law or Proclamation of Emergencies. **<u>Page 1147</u>:** 237. We now take up another rallied issue relating to economic condition of the county. It was alleged on behalf to the Federation that the former Prime Minister and his business associates exported sugar produced in their sugar mills to India by rail and earned millions of rupees as	in the integrity and honesty of the Government had disappeared. **<u>Page 633</u>:** 43. The question whether corruption can be made a ground for dissolving the National Assembly has assumed great importance particularly at a time when it has plagued every walk of life in the governance of the country and administration. The question was considered in Khalid Malik v. Federation of Pakistan PLD 1991 Kar. 1 where I had observed as follows:- ?The word `corruption? has nowhere been defined but it has diverse meanings and far reaching effects on society, Government and people. It is always used in a sense which is completely? opposite? to? honesty,? orderly???? and	influence, to any office, any any institution, any forum or public. A person working corruptly act inconsistent with the official duty, the rights of others and the law governing it with intention to obtain an improbable advantage for himself or someone else. Dealing with corruption in Khalid Malk?s case I had observed as follows: - ?This bribe culture has plagued the society to this extent that it has? become? a? way? of? life. In Anatulay VIII (1988) 2? SCC? 602 where Abdul Rehman Antulay, Chief Minister?? of? Maharashtra? was	and any system of Government would meet failure. Till we have sorted this out, no success can be achieved with a Parliamentary system of Government. The setting up of a Parliamentary Ombudsman or Ethics Committee to Ensure Parliamentary Accounta-bility, to watch and control the personal actions of and exercise of official and Constitutional functions by the elected representatives and take action against them, where necessary, by secret	

			ballot, would set the pace for clean politics and	

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profit. It was pointed out that several, SROs were promulgated by the ten Government to claim export rebate on sugar and thereby the former Prime Minister and his predecessor committed breach of faith with Pakistani banks/overseas and resident Pakistanis by removing 11 billion dollars lying in their accounts in the banks in Pakistan without their consent and utilized the same for unauthorized purposes, which remain unexplained till today. It was further stated that the former government froze the FEBC accounts and	actions performed according to law. It covers a wide field and can apply to any colour of influence, to any office, any institution, any forum or public. A person working corruptly acts inconsistent with the official duty, the rights of others and the law governing it with? intention to obtain an improbable advantage for self or some else. There are various forms of corruption. One where a person discharges his duty according to law but on certain consideration. His act may be proper and legal but its performance is influenced by extraneous consideration be it monetary, affection or love. The culture of corruption and bribe,? of late, has embedded in out society to this extent that even routine works which should be done without any approach or consideration are commonly known to be done only on consideration. This bribe culture has plagued the society to this	prosecuted for corruption Sabyasachi Mukharju, J. laments as follows: - ?Values in public life and perspective of values in public life, have undergone serious changes and erosion during the last few decades. What was unheard before is common place today. A new value orientation is being undergone in our life and culture. We are at threshold of the cross-roads of values.	orderly parliamentary working. Selective accountability is a negation of democracy, as it can only lead to further political polarization and revenge and impair the democrtic process.	

	extent that it has become a way of life. In Anatulay? VIII(1988)? 2? SCC? 602? where			

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misappropriated the foreign exchange belonging to resident and non-resident Pakistanis, which not only brought bad name to the Pakistani banks but also to Pakistan as a country and the responsibility of this huge fraud lies heavily on the former Prime Minister.	Abdul Rahman Anatulay Chief Minister of Maharashtra was prosecuted for corruption Sabyaschi Mukhariji, J. laments as follows: ?Values in public life and perspective of values in public life, have undergone serious changes and erosion during the last few decades. What was unheard before is common place today. A new value orientation is being undergone in our life and culture. We are at threshold of the cross-roads of values. It is, for the sovereign people of this country to settle these conflicts yet the Courts have a vital role to play in these matter?.?	It is, for the sovereign people of this country to settle these conflicts yet the Courts have a vital role to play in these matter?.? The degeneration in all walks of life emanates, from corruption of power and corruption of liberty. Corruption breeds corruption. ? Corruption of liberty? leads to ? liberty of corruption?.? Corruption and bribery adversely affect the social,		

	The degeneration in all walks of life emanates, from corruption of power and corruption of liberty. Corruption breeds corruption. ?Corruption of liberty? leads to ?liberty of corruption?.?			

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	Corruption and bribery adversely affect the social, moral and political life of the nation. In society rampant with corruption peoples lose faith in the integrity of public administration. In India in 1964 Committee on the Prevention of Corruption known as Sanathanam Committee observed as follows: - ?It was represented to us corruption has increased to such an extent that people have started losing faith in the integrity of public administration. We had heard from all sides that corruption, in recent years, spread even to those levels of administration from which it was conspicuously absent in the past. We wish we could confidently and without reservation assert that at the political level Ministers, legislators, party officials were free from the malady. The general	moral and political life of the nation. In society rampant with corruption peoples lose faith in the integrity of public administration. In India in 1964 Committee on the Prevention of Corruption known as Sanathanam Committee observed as follows: - ?It was represented to us corruption has increased to such an extent that people have started losing faith in the integrity of public administration. We had		

	impressions are unfair and exaggerated. But the very fact that such impressions are there	heard from all sides that corruption, in recent		

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	causes damage to social fabric.? The committee also observed that there is a popular belief of corruption among all classes and strata which ?testifies not merely to the fact of corruption but its spread?. Such belief has a social impact causing ?damage to social fabric?. The anti-corruption and penal laws have remained ineffective due to their inherent defect in adequately meeting the fast multitudinous growth of corruption and bribery. Corruption in high places has remained unearthed leading to a popular belief that immunity is attached to them. To combat corruption the whole process and procedure will have to be made effective and institutionalized.?	years, spread even to those levels of administration from which it was conspicuously absent in the past. We wish we could confidently and without reservation assert that at the political level Ministers, legislators, party officials were free from the malady. The general impressions are unfair and exaggerated. But the very fact that such impressions are there causes damage to social fabric.?		

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	The spread of corruption and bribe culture is so wide that even rumours and concocted stories assume the proportion of general belief. Corruption cripples the Government and Administration. It paralyses the course of justice and throws honest persons of integrity in oblivion as redundant and misfit. No Government with record of corruption, nepotism and favouritism can claim to be run according to Constitution and Law. where corruption is of enormous nature affecting major spheres of life and it said motivating force in taking major decisions and public dealings by the Government and administration, it will surely have nexus with the order of Dissolution.? This ground also came up for consideration in Kh. Ahmed Tariq Rahim?s case PLD 1992 SC 646. At	The committee also observed that there is a popular belief of corruption among all classes and strata which ?testifies not merely to the fact of corruption but its spread?. Such belief has a social impact causing ?damage to social fabric?. The anti-corruption and penal laws have remained ineffective due to their inherent defect in adequately meeting the fast multitudinous growth of corruption and bribery. Corruption in high places has? remained? unearthed		

	page 666, Shafiur Rehman, J. observed that ?It is true that some? of? the? grounds like (c)			

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	(corruption), (e)(ii) and (e)(iii) may not have been independently sufficient to warrant such an action. They can, however, be invoked, referred to and made use of along with grounds more relevant like (a) and (b) which are by themselves sufficient to justify the action taken?. In Mian Muhammad Nawaz Sharif?s case, Ajmal Mian, J. observed that ?if the corruption, nepotism and favouritism are of such a large scale that they have resulted in the breakdown of the Constitutional machinery completely, it may have nexus with the above prevision.? I had reiterated may views quoted above, but further observed that the observations in Ahmed Tariq Rahim are binding. Now is the time to reconsider this aspect of the case thoroughly as in my view in Mian Muhammad Nawaz Sharif?s case or that of Kh. Ahmed Tariq Rahim this aspect had cursorily been dealt with. In Kh. Ahmed Tariq Rahim only one sentence quoted	leading to a popular belief that immunity is attached to them. To combat corruption the whole process and procedure will have to be made effective and institution-alized.? However, the Supreme Court in Ahmad Tariq Rahim?s case at page 666 observed that the grounds like corruption, nepotism, misuse of banks and violation of Articles 240 and 242 relating to the services may not be independently insufficient to warrant such an action (order of dissolution).		

	above was mentioned with regard to corruption. There? was? no full? fledged			

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	discussion on the question whether corruption could be made a ground for dissolution of the National Assembly. There seems to be no settled view and there appears to be divergence of opinion as according to Ajmal Mian, J. if the corruption is so enormous that the Government cannot be carried on in accordance with the Constitution, it can be made a ground for dissolution of the Assembly. Whether on the ground of corruption an Assembly can be dissolved depends upon the nature of corruption and its enormity. Time has come to make assessment of the situation and also to consider whether corruption can be made a ground for dissolution of the Assembly. Corruption which pervades in the administration, social and moral life which is rampant in political levels of Ministers, legislator, officials and it has gone so deep into the roots that a	They can, however, be invoked, referred to and made use of with grounds more relevant like ground (a) (failure of legislative functions of the National Assembly) and (b) ---wilful undermining and impairing the working of the Constitutional arrangements and usurping the authority of the Province and such institutions resulting in discord, confrontation and deadlock adversely affecting the integrity, solidarity and well-being of Pakistan. This view is binding on me. In the present		

	general impression has been created that no administrative,? Government	case the learned Attorney-General has pointed		

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	or even Governments corporation work normally done in the discharge of duty can be performed without resorting to corruption. Once corruption pervades in the body politic and official circles, then the entire Government and Administration is completely crippled and paralyzed. Honesty and integrity is sidetracked. There becomes a general impression that all official acts are motivated by corruption, favouritism and nepotism. This follows that any Government or Administration about which such impression has been created and have become common which may not be true in totality, it destroys the authenticity, legality and validity of the actions. Such actions purported to be done under the provisions of law or the Constitution, but motivated by private impulses, benefits and corruption cannot be termed as performed under the Constitution. When this becomes order of the day, it becomes difficult to say that the Government?? is?? run??? in	out about the corruption, nepotism and lack of transparency in the process of privatization of Muslim Commercial Bank and sale of cement factories, but on examination of those documents and the explanation offered by the petitioner the same cannot form an independent ground for dissolution. They, however, may be taken into consideration provided some substantial, effective and well-recognised grounds as set out in the judgement of this Court are proved and made out against the petitioner.		

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	accordance with the provisions of the Constitution. From the enormous record produced in this case to show corruption, nepotism, bribery and favouritism, one can safely assume that corruption at such massive scale had destroyed the social, moral, legal and political fabric of the nation. Where corruption is of such a nature, it can be made a ground for dissolution because the Government cannot be allowed to be run on the whims and caprices, corruption and bribery, favouritism and nepotism. I will distinguish Kh. Ahmed Tariq Rahim?s case as there on the ground of corruption the material produced was not of such enormous nature nor this aspect was considered factually and legally by Shafiur Rehman, J. in detail. Recounting the instances of corruption one may point out to Surrey Estate title documents of which are not available on record and is stated to be in the name of a company allegedly a dummy company in the			

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	nature of a benami title holder. However, circumstantial evidence discussed above connects the link between Surrey Estate and the petitioner, her husband and Bilawal House. Although the petitioner had denied any connection with Surrey Estate, the shipment through PIA of alleged household effects, telephone calls, permission obtained for constructing stable and security arrangements lead to the inference that the petitioner and her husband have interest in the said property. In cases of corruption sometimes it is difficult to obtain definite evidence, but it is not uncommon that in cases where disciplinary action as opposed to penal and criminal action is taken in the absence of direct evidence, from indirect material which directly and clearly points out to corruption, inference can be drawn. There may not be direct evidence against a Government official to prove specifically alleged			

	corruption, but if he lives beyond his means, it may be a			

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	relevant fact against him. Besides this, massive appointments made on the recommendation of M.N.As., M.P.As., Ministers or Prime Minister?s Secretariat in violation of the rules in the Government offices and public corporate sector is a corruption of serious nature as it excludes the meritorious persons, destroys the structure of service and shakes the confidence of the people. It also breeds in efficiency and encourages indiscipline. What makes it more serious that such appoints and the nominees of the party in power give in obedient command performance in violation of Rules and Regulations. The instance of Bait-ul-Mal referred above makes a horrifying reading. The Amin, who is a trustee in violation of the rules had dished out two cheques of Rs. 10 million each in the name of Maj.			

	Gen. (Retd.) Nasirullah Babar which on material available has not been distributed?? amongst?? the?? needy? and? poor?? as			

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	required by law. A political milage has been sought at the cost of Bait-ul-Mal. Even Ms. Naheed Khan was also recipient of money from Bait-ul-Mal in disregard of the rules and regulations. The financial scams, irresponsible and reckless policies motivated by personal or individual benefits, rise in written off loans, advances by banks and financial institutions, transactions made by Pakistan Steel Mills and similar other transactions and permissions referred to above give a general impression to all and sundry that every order passed, agreement and transaction made suffered from corruption. When corruption pervades in the social, political and financial transactions to such an extent that even proper and hones orders and transactions are suspected to the			

	point of belief begin a result of corruption one is compelled to infer all is not well and corruption has gained deep in the roots. No doubt this is an age of ? corruption eruption?, but			

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	during the last two years one third of Indian Cabinet and the Secretary General, NATO were charged of corruption and have fallen while Italy?s postwar prominent Prime Ministers, two former Presidents of South Korea were indicted for corruption and the later were even sentenced. There have been parliamentary investigations into financial abuses at high level in Japan, Turkey, Colombia and Mexico. Pakistan is not far behind. It has fallen in line. Although the President in his address warned against corruption, it continued unabated. In my opinion,			

	there ws sufficient material and the corruption was so enormous and widespread that an order of dissolution could be passed individually on this basis or collectively together with other substantive grounds discussed above.			

76.????????????????? Mr. Minto referred to the following portions of the? preamble to the NAB Ordinance:
?NAB ORDINANCE
ORDINANCE NO. XVIII OF 1999
An Ordinance to provide for the setting up of a National Accountability Bureau so as to eradicate corruption and corrupt practices and hold accountable all those persons accused of such practices and matters ancillary thereto;

??????????? WHEREAS it is expedient and necessary to provide for effective measures for the detection, investigation, prosecution and speedy disposal of cases involving corruption, corrupt practices, misuse/abuse of power, misappropriation of property, kickbacks, commissions and for matters connected and ancillary or incidental thereto;

??????????? AND WHEREAS there is an emergent need for the recovery of outstanding amounts from those persons who have committed default in the repayment of amounts to Banks, Financial Institutions, government and other agencies;

AND WHEREAS there is a grave and urgent need for the recovery of state money and other assets from those persons who have misappropriated or removed such assets through corruption, corrupt practices and misuse of power and/or authority;
??????????????????..?????????????????

He submitted that it is composite law and does not merely create Courts. The objects mentioned in the preamble are very singular to this kind of legislation and such statements are not available in the preambles of other enactments.? It is squarely related to the objective reality.? He emphasized that the interpretation of various provisions has to be made in conformity with the objects of the legislation unless this Court finds that these objects are *ultra vires* the Constitution or they are outside the scope of the legislative competence of the Federation. If they are within the legislative competence of the Federation then they will be taken note of and carefully considered while interpreting the various provisions thereof. He stated that burden of the arguments addressed on behalf of the petitioners is on the ground that there are several provisions of this law which indicate that a lot of power has been given to the National Accountability Bureau and Courts are not involved in that matter.? He prefaced his arguments with the submission that the preamble itself clarifies that it is a law which involves detection, which otherwise will be the subject matter of a separate law.? It involves investigation, which ordinarily is the subject matter of totally different laws.? Prosecution and speedy disposal are also the matters with which the Courts are concerned.? So, in regard to the question of ?parallel judiciary? and? ?judicial independence?, it is to be kept in mind that this Court is interpreting a law which does not merely create a Court but also requires disposal of cases by taking notice of several other areas? which are not a part of Court-activities.? A law which merely creates a Court and its jurisdiction, is of distinct character as compared to a law in which several other issues have been dealt with.? According to him, one matter which is not provided for in Section 25 is a parallel or alternate method of resolving a dispute.? After the amendment of this section through Ordinance 24 of 2000, if the Court has taken cognizance of the offence or trial commenced, the Chairman NAB? may release the accused only with the approval of the Court vide Section 25(a)(ii) ibid.? Similarly, in Section 25A relating to payment of loan etc.? a method has been evolved vide Ordinance 4 of 2000, whereby an elaborate machinery has been created with regard to detection and investigation of persons accused of wilful default, non-payment of dues to a bank or financial institution etc.? The Ordinance when read as a whole demonstrates that it is a statute which creates Courts and lays down principles and methodology for the disposal of cases before them.? By virtue of an amendment in Section 25, the words Chairman NAB in clause (e) have been substituted by the words ?Governor, State Bank of Pakistan?.? Resultantly, the matter is now within the discretionary exercise of power of the professionals to decide whether or not to accept the recommendation of the reconciliation committee or pass other appropriate orders for reasons to be recorded therein. The statute as amended does not encroach upon the powers of the Court in that regard.? Section 25A also evolves a machinery for the purposes of alternate resolution of the disputes which is a well-known modern concept for reducing the backlog in Courts.

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77.????????????????? The learned counsel also pointed out that from the date the NAB Ordinance was promulgated, more than one amendments were made therein.? Some of the amendments are formal and some substantial in character and were actually the result of public comments as also observations by the Courts.

78.????????????????? The learned counsel next referred to the Prevention of Corruption Act, 1947 (Act II of 1947) and contended that even the then political dispensation under the colonial rule, took note of a post World War-II circumstance that a lot of things were happening in the society which were breeding corruption and therefore the necessity for the enactment of Act II of? 1947.? The Prevention of

Corruption Act, 1947 only took care of the post war situation yet, it became a permanent law and remains so on the statute book, even today. This aspect will be quite instructive in appreciating the rationale for enacting the impugned Ordinance.

79.??????????????????? Mr. Minto also referred to an Indian statute ?The Prevention of Corruption Act, 1988? and stated that this is later in point of time i.e.,? several decades subsequent to its forerunner and is a new law altogether. This (1988 Law) keeps alive several provisions of the original law and introduces several others, most of which are relevant for purposes of controversy involved herein because they raise many more presumptions as compared to those which find mention in Section 5 of 1947 Act.? He argued that in 1984, India made laws which related to terrorism affected areas. They made elaborate and new dispensation for taking cognizance of matters of that magnitude. There are new provisions in the latter enactment relating to remand of the accused. Now, in India by a general statute, they have created presumptions in several areas in the Evidence Act as well.? The Indian Evidence Act has now a new section 111-A, in which a totally new category of presumptions has been catered for.?? He further submitted that as far as the presumptions are concerned,? both in the realm of anti corruption and anti terrorism acts in India, they are retrospective in operation and this matter has gone to several High Courts as also the Supreme Court of India and upheld, ruling that they fall in the category of procedural laws.

80.??????????????????? Mr. Minto argued that so far as the punishments and creation of offences by the impugned Ordinance are concerned, they are protected by Article 12 of the Constitution.?? He argued that under Article 12 of the Constitution *ex post facto* legislation can neither create new offences nor provide harsher punishment than the one which was available for it already.? This is the limited impact of Article 12 of the Constitution.

81.??????????????????? He argued that in the matter of substantive law and substantive rights, the general presumption regarding such statutes is that they are not retrospective. But, in the realm of procedure, the general presumption is to the contrary, unless the provision itself says that it is prospective.? It can be shown from the statute itself that presumption to the contrary has been displaced.?

82.??????????????????? Mr. Minto stated that the corruption in the society was noticed at the highest judicial level in the cases referred above and in many others.? He contended that the above cases are of great importance because each one of them is a case in which a legally established government was dismissed.? In Zafar Ali Shah?s case (supra) it was said that corruption is a valid ground for upsetting a legally established system.

83.??????????????????? The learned counsel next contended that this Court may also take judicial notice of several things which are happening in the society and in one form or the other they have been brought to the notice of this Court.? These are the failure and closure of the Banks as also scandals having overtaken, among others, Mehran Bank. In the field of their financial activity, Banks advance loans without obtaining proper securities in that regard.? Unable to take back the money, they are driven to writing off the loan.? These are very serious matters and this Court may see that when the banks get destabilized the economy of the country is not far behind to follow suit.? When the banks gets destabilized, the common citizen who is the depositor in the banks, suffers the most.? The ratio of the money which a common citizen deposits in the bank is much more than the deposits by the elite because the latter keep their money elsewhere.? Therefore, it is common man?s money which is actually spent on different exercises.? Six thousand people of a certain bank were laid off and their services were terminated.? They approached the Service Tribunal as also this Court. Ultimately they remained out of service.? The amount of money which that bank had squandered away, including written off loans, was the cause of the destabilization of the Bank. The amount of money that those six thousand employees were earning as their salaries from the bank, was only a fraction of that amount.? Then, there were scams of Co-operative Societies and Finance Companies.? Taj Company is now in a situation where the High Court is managing its affairs.? Co-operative Societies? matter ultimately came before this Court.? It is well known that in the Punjab they created a special law ?Undesirable Co-operative Societies (Dissolution) Act, 1993 which again came before a Full Bench of 5-Judges of the High Court and it was unanimously held that that law was a ?Bill of Attainder? and as there was no show cause notice, therefore, it was declared *ultra vires*.? This judgment was upheld by this Court.

84.??????????????????? Mr. Minto accepted the general arguments of Mr. Baber Awan to the effect that several provisions of the impugned Ordinance are not consistent with what has been provided in Cr.P.C. However, it was argued that Cr.P.C. will apply ?subject to any inconsistency with this law? and that there are provisions inconsistent with Cr.P.C.? He submitted that Cr.P.C. is not a code of fundamental rights

but a procedural law which can be altered and new procedure/s introduced, instead.? Petitioners have failed to make out a case that the NAB Ordinance is violative of the Fundamental Rights.?

85.??????????????????? Mr. Minto next contended that he is not opposed to examining the question of improvement of NAB Ordinance in these proceedings under Article 184 (3), in that this Court is exercising its jurisdiction in special circumstances.? According to him, the arguments addressed at the Bar on behalf of the petitioners that this is a special kind of crime internationally recognised, complicated and difficult, helps him in these proceedings.

86.??????????????????? He argued that the question of innocence of an accused person was a matter which gained prominence in the 14th and 15th centuries and became ultimately an *ipsi dixit*, a fundamental principle of criminal jurisprudence but then departures have been made therefrom.? In fact, a foreign jurisdiction in the modern world in the Continent itself has not accepted that principle.? For example, in France they have never accepted the principle of innocence of an accused person because they had confidence in their own system of administration of justice.

87.??????????????????? Mr. Minto referred to the contention of Mr.Baber Awan and stated that the law itself provides in Section 17 that Cr.P.C. applies subject to its inconsistency with the NAB Ordinance and that this is not an unusual statement to be made in a law. He made a statement at the Bar that no woman has ever been arrested, detained, or taken to the Police Stations in pursuance of this law by the NAB. He stated that although the impugned Ordinance is a harsh law but the manner in which people?s money has been squandered does require such a law.?

88.??????????????????? The learned counsel referred to volume IV of the reply filed by Mr. Maqbool Elahi Malik, Advocate General, Punjab, which contains a large number of extracts from various Acts from foreign jurisdiction, in particular, Criminal Justice Acts of 1987 & 1988 from England, the Encyclopaedia of Democracy, Encyclopaedia of Crimes, Human Rights, press clippings, etc., as ready material for reference.

89.??????????????????? Mr. Minto next referred to *Gokak Patel Volkart Ltd*. v. *Dundayya Gurushiddaiah Hiremath* ([1991] 71 Company Cases 403); *Subash Chander* v. *State of Punjab and others* (AIR 1979 Punjab & Haryana 238); *Bashiruddin Ashraf* v. *The Bihar Subai Sunni Majlis-Awaqf and another* (AIR 1965 S.C. 1206); *?*Sajjan Singh *v.* State of Punjab (AIR 1964 S.C. 464); and *State* v. Hyder Ali (AIR 1955 Hyderabad 128); on the question of retrospectivity in the context of Article 20 of the Indian Constitution (equivalent to Article 12 of the Constitution of the Islamic Republic of Pakistan) and the presumptions raised in a variety of statutes and retrospectivity attached to the presumptions therein.

90.??????????????????? Rebutting the arguments of Mr. Muhammad Akram Sheikh regarding competence of the Federal Legislature to deal with jurisdiction of the Courts as also the NAB Ordinance being an invasion on the provincial autonomy, Mr. Minto referred to Entry 55 of the Federal Legislative List which reads as under:-
?Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List and, to such extent as is expressly authorised by or under the Constitution, the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers.?

He also referred to Article 175 of the Constitution, which reads:-
(1) There shall be a Supreme Court of Pakistan, a High Court for each province and such other courts as may be establish by law.

(2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

(3) ???..

He submitted that there cannot be any court established under the law, which will have any jurisdiction that the law has not conferred on it. However, the superior judiciary has inherent power of judicial review, which is a special attribute of the superior judiciary and is not the subject matter of clause (2) of Article 175 of the Constitution. An example of the power of judicial review is contained in Article 187 of the Constitution. It is no where provided in the Constitution? that the Supreme Court shall have power to decide the question of its own jurisdiction. It is only in the exercise of its inherent jurisdiction that the Supreme Court decides this question, which it does even where a statute has specifically ousted its jurisdiction. Even the Constitutional provisions inhibiting the jurisdiction of the Court by some method

or other, or which seek to cut down the power of the Court, can be considered and a proper interpretation can be placed on them, keeping in view the inherent power of the Court.? The power of judicial review is not the subject matter of Article 175 (2) of the Constitution, which deals only with the jurisdiction of the Court to be conferred by law. The learned counsel made the above submission as a statement of law.

91.????????????????? The learned? counsel submitted that he has no cavil with the proposition that the Federal Legislative List does not contain any entry which confers any power on the Federal Government to establish any Court.? However, he referred to Item 1 of the Concurrent Legislative List relating to criminal law, including all matters included in the Pakistan Penal Code, but excluding offences against laws with respect to any of the matters specified in the Federal Legislative List and also to Items 2, 3 and 4 of the Concurrent Legislative List where the Federal Government is empowered to legislate on matters relating to criminal/civil procedures as well as evidence/oath, etc.? He submitted that section 6 Cr.P.C. describes the criminal courts and ?any other court established by or under any other law?.? Thus, the Federal Government is competent to make a law providing for special courts and the procedure under which the courts will function and dispense justice.? Mr. Minto submitted that complete answer to the plea raised by Mr. Akram Sheikh regarding competence of the Federal Government to promulgate the NAB Ordinance is provided in Items 1, 2 and 46 read with Item 47 of the Concurrent Legislative List.? He submitted that the objection of the petitioners that it is a case of ?occupied field?, is not well-founded, inasmuch as such a situation arises where a legislation by the superior legislature is already in the field.? He next submitted that a Legislature, which has made any law, is competent to change, annul, re-frame or add to that law.? He submitted that it is not even so much as controverted by the petitioners that the Provincial Governments/Legislatures have not made any legislation on the subject in question.

92.????????????????? Referring to the plea of by Mr. Aitzaz Ahsan regarding invasion of the provincial autonomy, Mr. Minto submitted that the law relating to crimes is not a law which goes on the basis of territorial considerations.? Indeed, all laws relating to the jurisdiction of courts and for filing causes before the courts, whether civil or criminal, do not take their queue on the principle of federation.? In civil law, it is the cause of action that determines in most cases where the suit has to be filed ? where the defendant resides, where the debtor resides ? so there are variety of considerations, not considerations of territorial character relatable to federal character.? In criminal cases, the general principles are contained in sections 177 to 182 Cr.P.C. i.e. where the crime takes place, the courts in that area have jurisdiction and it matters little whether the person belongs to one or the other Province.? It is the crime, its nature and the place where it is committed that determine the place where the trial has to take place.? Section 178 Cr.P.C. authorizes the provincial governments to determine the venue for trial of offences.? It is a law of procedure, the scheme of which is not concerned with the question of provincial autonomy.? When a crime is committed in various parts of the country over various places, any court of those areas is competent to take cognizance of the matter.? The learned counsel emphasized that in determining where the matter has to be tried, no consideration is given to the provincial nature of the society or the autonomous nature of the Provinces or that the accused belongs to one or the other Province ? all these matters have no relationship with the provincial autonomy except for the High Courts which have been created under the Constitution for each Province and there is no other perception of the Court concerning the provincial division, but in that regard also, the scheme at one time was that two Provinces had one High Court.? The scheme of the creation of the Supreme Court is not of that character, it is not a Federal Court. It is the apex Court. It is a Court for the whole of Pakistan and ***it does not go by the principle of federation*** in that fashion in which the allocations are made and distributions take place.? In its own wisdom, the Supreme Court may decide how to manage its own composition, that is a different thing, but the Constitution does not do that, it looks into it as an apex Court.? There have been demands that, as in the United States, there should be a Federal Court.? The judiciary is a totally distinct entity devoid of the questions, which arise as a matter of politics in the context of Federation. He submitted that the place of sitting of the Court is to be determined by the Government because it is the duty of the Government to provide the courthouses.
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93.????????????????? The learned counsel referred to the Preamble of the NAB Ordinance and submitted that it is a composite and extensive law and its interpretation has to be done in a manner different from the normal interpretation placed on purely criminal statutes.? This law deals with, among other things, setting up of the National Accountability Bureau, which is an executive authority, an administrative authority, an investigating agency and which deals with several aspects of ?corruption?, etc.? The learned counsel submitted that NAB does not merely deal with crimes of corruption, it also deals with their investigation and settlement out of Court. Settlement out of court is now an established method by which things are resolved in several developed societies.? It is necessary in these cases where the accused is a potential investor and his such form is inter-linked with the economy of the society. He should be given an opportunity to play his role in the society after he has cleared his liability.? Rather, it is in the nature of a facility provided to the accused and, in some cases, even the punishment of disqualification does not ensue. There is nothing wrong in the NAB Ordinance providing for a procedure of bargaining.? The settlement so reached cannot be described as illegal, in any sense of the term.?

94.????????????????? Under the normal criminal law, except in cases which are compoundable, all other cases are resolved through the process of adjudication on the basis of evidence.? There is no

alternate resolution of crimes and this is the general law.? Until the Islamic law intervened, the general law was that even the offence of murder was not a compoundable offence.? The mere fact that an alternate resolve procedure was not there, does not upset the procedure itself.? It does not have any effect on the *vires* of the NAB Ordinance.? The fact that this law provides for an additional method in the sphere of criminal law, does not impinge upon its validity.?

95.??????????????????? With reference to the objections raised by Mr. Babar Awan, Mr. Minto submitted that the *vires* and reasonableness of the NAB Ordinance cannot be tested on the touchstone of the provisions of the Code of Criminal Procedure.? It is within the competence of the Legislature to change the Criminal Procedure Code subject to the Constitution until and unless a Fundamental Right is affected and even the whole law of procedure can be changed and no person has any vested right in procedure.

96.??????????????????? Mr. Minto further submitted that this law is not a usual criminal law, inasmuch as it does not provide this kind of alternate dispute resolution.? It may be called a draconian law, which may be harsh according to the estimation of the other side, because in the circumstances in which the country finds itself today, a plunderer must be harshly dealt with. He submitted that retrieval of the looted money is the object of the impugned Ordinance.

97.??????????????????? He respectfully submitted that if there is a provision in the NAB Ordinance which is *ex facie ultra vires* the Constitution, this Court can strike it down. None of its provisions offends against the Fundamental Rights, neither on the question of bail, transfer of the proceeding, freezing of property, creation of offences and their application in a particular fashion, which are not retrospective in operation, nor even the presumptions raised therein.?? He argued that while exercising its jurisdiction under Article 184 (3) of the Constitution, this Court should confine itself to the examination of the vires of the NAB Ordinance on the touchstone of the Fundamental Rights and should abstain from determining the individual grievances, inasmuch as this would amount to pre-judging and pre-determining the matters, which can be effectively gone into when the concrete cases reach this Court in appropriate proceedings.?

98.??????????????????? At one stage, Mr. Minto made another statement of law in the following terms:
As far as jurisdiction of the Accountability Court is concerned, it will be determined with reference to the terms of the NAB Ordinance read with Article 175 (2) of the Constitution.

The learned counsel submitted that in order to determine whether a law has been competently made or not, the law itself and Article 175 of the Constitution, i.e. the source of law, will be looked into. The Legislature is competent to limit it or alter it subject to the Constitution. Principles and maxims in the domain of ?inherent jurisdiction? are special attributes of the Superior Courts alone.

99.??????????????????? Mr. Minto made yet another statement of law to the following effect:
?The burden of proof and the presumptions, all are in the realm of evidence.? The law of evidence is a law of procedure notwithstanding the observations in *Nabi Ahmed (supra)*, unless some provision has completely vested a substantive right in some citizen, which cannot be retrospectively affected, but ordinarily it is a law of procedure. However, the nature of offence or the nature of punishment cannot be changed, which are guaranteed under the Constitution.?

He elaborated the proposition thus: a prosecutor cannot be debarred from tendering in evidence a mechanical device in proof of a certain offence, which was not in existence at the time the offence was committed and objection to that effect by the accused would be of no consequence.

100.??????????????????? Mr. Minto next referred to the definitions of ?court? and ?judge? given in Section 5 (i) (g) & (h) respectively (to be read together) and submitted that they throw light on the character of the Court under the NAB Ordinance.? He next referred to? section 9 (b), which describes the jurisdiction of the court - the most objectionable provision according to the petitioners? side, inasmuch as it debars the Accountability Court as well as the High Court from releasing the accused on bail and the applicability of sections 426 to 561-A,? Cr. P. C. has been excluded and contended that the above special dispensation does not qualify for being set at naught in these proceedings.

101.??????????????????? The learned counsel submitted that Section 12 of NAB Ordinance relates to the freezing of property whereas objections against the freezing order can be filed under Section 13 of the NAB Ordinance before the Accountability Court and then NAB has nothing to do with it.? As to the objection regarding absence of right of appeal against the freezing of property, the learned counsel submitted that there are a variety of laws in which no appeal is provided against the interim orders.? As to the rights of third parties, he submitted that it would be very difficult to retrieve the property in case the decision is subsequently reversed.

102.??????????????????? The learned counsel submitted that section 16 of the NAB Ordinance deals with the creation of the post of Administrative Judge by the High Court who will be empowered to regulate the activities of other Judges and the filing of reference/s at the instance of Chairman NAB before any Court.?

103.??????????????? Mr. Minto submitted that the remedy provided under Article 199 of the Constitution, in certain conditions, would be available to all persons who have been taken into custody under the NAB Ordinance.? Then there is the remedy under Article 184 (3), apart from usual right of appeal under Article 185(3).? This is common law of the land which is available to every accused.? There is nothing in the NAB Ordinance which overtakes the provisions of the Constitution.

104.??????????????? Mr. Minto argued that Article 203 of the Constitution is applicable to the Courts under the NAB Ordinance and the Accountability Courts are subordinate to the High Court, and therefore the power of superintendence vested in the High Court prevails over these Courts within the hierarchy of the courts of the country and for the purposes of the Constitution.

105.??????????????? Mr. Minto submitted that, as stated earlier, this is an extensive and composite law, which applies to a variety of circumstances, because when NAB is dealing with outside agencies, it has nothing to do with Accountability Courts.? The NAB? has exclusive and independent jurisdiction to deal with the cases of corruption.

106.??????????????? Mr. Minto submitted that while examining the vires of this law, the following provisions may be given deeper consideration:

- Section 5 (a)? wherein ?accused? has? been extensively defined;
- Section 5 (m) defines ?holder of public office?, which has been gathered from all the previous statutes on the subject and thus the scope and purview of the process of accountability has been enlarged;
- Clause (iv) of section 5 (m) has brought all persons in the service of Pakistan within the purview of accountability, inasmuch as even the serving officers of the Armed Forces, who are employed in organizations other than the Armed Forces, have been included;
- Likewise in clause (vi) *ibid*, all those persons have been included who have served in, resigned, retired, discharged or dismissed from the Armed Forces and thus only a limited class of persons employed in the Armed Forces, who are within the discipline of the Force concerned, have been excluded with a view to maintaining integrity in the institution inasmuch as public trial in such cases would not be in the interest of the Institution.? Even otherwise, such persons are amenable to the discipline of the Force concerned;
- The word ?person? used in various provisions of this law is wide enough to cover any person and thus no body is being spared and across the board accountability is being conducted throughout the length and breadth of the country with no discrimination whatsoever, inasmuch as there is no political bias, no provincial bias.?
- The impugned law is applicable to the politicians, bureaucrats and other persons, it is vast in its application and the exceptions are very exceptional and very limited;
- *Article 8 (3) and Article 199 (3) of the Constitution, which grant immunity to the members of the Armed Forces from the judicial scrutiny of their actions in the exercise of extraordinary jurisdiction of the High Court;*
- Even the Universal Declaration of Human Rights also creates an exception in the above fashion;
- Section 14 (d) makes only that default punishable which is ?wilful?, which is contumacious, persistent and the defaulter does not intend to pay the dues.? If the default is beyond control, it is not wilful default and it will be ignored.? This provision is not an abstract one, inasmuch as there are persons who have eaten away the public money, got it waived, written it off.? Thus due attention has to be paid to the word ?wilful?;
- There are features favourable to the accused.? Under the NAB Ordinance, a period of 30 days is provided from the commencement of the law for repaying the defaulted amount. Thus, the offence of ? wilful default? under the NAB Ordinance is not retrospective offence to be hit by Article 12 of the Constitution.? Even prior to the enforcement of the NAB Ordinance, a warning was given by the Chief Executive and in consequence large amounts were paid back by a large number of persons voluntarily;
- Under this law, for the first time a civil transaction has been converted into an offence, which has no precedent in criminal law;
- Facts antecedent to the law can be borrowed and considered for the purposes of establishing an offence, although the offence becomes applicable from the day it comes into existence.? The mere fact that facts, which constitute the offence, are taken from a day before? or many days before the law came into force, does not make it retrospective;
- Entry into the Indian territory, initially with a valid permit, was declared illegal *ab initio* on cancellation of the permit by the Indian Supreme Court in the case of a person from Pakistan;
- In Halsbury?s Laws of England, 4th edition, Volume 45, para 1389, it is said:

?If a person enters on the land of another under an authority given him by law, and, while there, abuses the authority by an act which amounts to a trespass, he becomes a trespasser ab initio, and may be sued as if his original entry were unlawful.?

- A person may have certain rights under a contract, but certainly no one has any right in breach of a contract, particularly where the breach is wilful, or the person keeps on defaulting and above all what right a wilful defaulter is entitled to claim;

❖ It is well known that in the realm of contractual obligations, there may be an actionable wrong, inasmuch as it may be a tortuous act for which damages may be claimed, or it may be a breach of contract for which specific performance/damages can be claimed, or it may also entail criminal liability;
❖ *In the case of Bashiruddin (supra)*, where a statutory trust was created and a Mutawalli was appointed, who had to act under the direction and supervision of the trustees called Majlis.? The Mutwalli disobeyed certain orders of the Majlis, which disobedience was later declared an offence with retrospective effect.? The Indian Supreme Court held that Article 20 [equivalent of Article 12 of the 1973 Constitution] was not attracted;
❖ Section 16 (a) empowering Chairman NAB to move the Court for transfer/withdrawal of a case cannot be termed arbitrary or discriminatory, inasmuch as the rights of the accused have been taken care of in section 17 *ibid*, which provides that the provisions of the Code of Criminal Procedure would be applicable insofar as they are not inconsistent with the provisions of the NAB Ordinance;
❖ As to the continuance of freezing of property after the accused has been acquitted, the provision may be amended to provide continuation of such freezing during the period provided for filing an appeal against the acquittal order whereafter it would be for the Court to make appropriate orders;
❖ Bail is not a constitutional right, but it is the creation of a statute and is available under certain circumstances and subject to the limitations provided therein and the Legislature is competent to take away this right subject, of course, to the Constitution.? Innocence of the accused has not been the basis for provisions relating to the grant of bail, it is the circumstances of the case, the kind of offence with which he is charged, the nature of punishment to be awarded to him, the status and position of the person, who is involved (in the present case very powerful persons are involved), the kind of crime (in the present case financial/economic crimes are involved, which are very difficult to be detected). Besides, the extraordinary remedy provided under the Constitution is available to every accused person.
❖ Under section 24 (d), a maximum period of 90 days is provided for detention in connection with investigation etc., which is not automatic or that the accused is to be detained for 90 days straight away.? Generally, the accused is produced before the Court after every 10/15 days, in some cases even with an interval of 3-4 days, and the Court, keeping in view the facts and circumstances of the case, determines the period of further custody.? It is reasonable if the accused is directed to be produced before the Court after every 15 days or earlier keeping in view the facts and circumstances of each case, for appropriate orders;
❖ There is no usurpation of powers of the Court by virtue of the provisions of section 25 (a) or section 25A, inasmuch as these are alternate mechanisms, which take place between the parties;
❖ The procedure/method for appointment of Chairman NAB is provided in the NAB Ordinance, which is prescribed keeping in view the law itself and the purposes of the law.? It may be pointed out that no qualifications are laid down for the posts like Chairman WAPDA, Chairman PIA, etc.

107.???????????????? **Mr. Aziz A. Munshi**, Attorney General for Pakistan submitted that he has appeared in response to the notice issued by this Court vide order dated 12.9.2000 whereby the petitions challenging the NAB Ordinance were admitted to regular hearing.? He reiterated the submissions made by Mr. Abid Hasan Minto regarding Sections 9, 10, 13, 16, 24 and 32 of the NAB Ordinance.? He added that one of the declared objectives of the Chief Executive is to complete the accountability process leading to recovery of the amounts that were taken away by acts of corruption.? He further added that the members of the Armed Forces are subject to accountability under the Army Act, 1952 and the arguments addressed at the Bar to the contrary are devoid of any substance.

108.???????????????? **Mr.Aziz A. Munshi** further submitted that the learned counsel for the petitioners had stated that the executive authority of the Federation does not extend to a Province as the Proviso to Article 97 provides? ??. *that the said authority shall not, save as expressly provided in the Constitution or in any law made by Majlis-e-Shoora (Parliament), extend in any Province to a matter with respect to which the Provincial Assembly has also power to make laws.?*? They failed to notice that clarification made in Article 149 (2) of the Constitution to the effect that ?*The executive authority of the Federation shall also extend to the giving of directions to a Province as to the carrying into execution therein of any Federal law which relates to a matter specified in the Concurrent Legislative List and authorises the giving of such direction.?*
???????????

109.???????????????? The learned Attorney General also contended that in the case of *Mrs.Benazir Bhutto v. The Federation of Pakistan and others* (1991 MLD 2622) Parliament and Provincial Assemblies (Disqualification for Membership) Order (17 of 1977) has been declared to be legal.
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110.???????????????? Mr.Aziz A.Munshi further stated that his pleadings regarding Section 14(d) of the impugned Ordinance have been misconstrued by the learned counsel for the petitioners and that he had not given any concession in regard thereto.

111.???????????????? **Mr.Maqbool Ilahi Malik**, learned Senior ASC appearing on behalf of the NAB? stated that for the first time, in the history of this country many good things have happened on account of the NAB Ordinance which have been extolled by the international community as well. He emphasised, that those things should not be allowed which are not allowed by the Constitution but, if the rigours of the NAB Ordinance are lessened, the very useful work being done by the authorities functioning under it will be adversely affected. He stated that as an organisation the NAB has an Herculean task to perform.? He enumerated the principles of operational functions of the NAB as below :
a)???????? Highest respect to the judiciary and judicial process;

b)???????? Decentralised execution at RABs, effective monitoring by NAB;

c)???????? Exercise powers with due diligence and restraint;

d)???????? Effective liaison? and co-ordination with affiliated? investigation agencies and other government department.

e)???????? Appropriate legal cum diplomatic effort in co-ordination with Foreign Office & Interior Division and Law Division for overseas cases;

f)????????? Maximum reliance on experts of relevant fields for each stage of the operational cycle.

112.???????????????? The learned counsel referred to the NAB Ordinance and argued that it is a law which deals not only with corruption and bribery but also new offences like kickbacks, commissions and misuse of authority etc. The people who have been targeted under this law are very powerful and influential.? The procedure has been made stringent and there is utmost desire and demand that all the requisite steps should be completed in the shortest possible time.

113.???????????????? The learned counsel stated that the Chairman NAB had given the following directions/parameters for prioritization :

??????????? (1)??????? Quality of available evidence;
??????????? (2)??????? Amount involved;
??????????? (3)??????? Impact on national economy;
(4)??????? Impact on the common man based on their perception of the person(s) involved.

114.???????????????? The learned counsel stated that the following instructions had been given by the Chairman National Accountability Bureau :
a)???????? Plea bargaining may not be recommended where it is desired to create an impact by convicting the accused due to his corrupt act and reputation of corruption and status;
b)???????? No assurances of any kind be given to the accused prior to final decision by Chairman;
c)???????? One plea bargaining agreement must not give blanket cover to an accused in other cases, the agreement should be worded accordingly.
d)???????? The agreement must clearly state that the proposal of Plea Bargaining is accepted under section 25 read with section 15.
e)???????? The amount of Plea Bargaining should commensurate with default and increase with the stage at which the case is being processed i.e. inquiry, investigation, adv. investigation or prosecution;
f)????????? Beneficiaries of illegal land allotment cases may be persuaded to pay up the complete amount;
g)???????? The process of accepting voluntarily returns from PTCL, Employees and, in turn dropping of corruption cases against them should be stopped forth with till the team is asked to frame the rules and puts up its recommendations.

With reference to ?plea bargaining? the learned counsel stated that it is meant to settle the amount? which is due from a person, out of the Court.? This exercise does not involve? any judicial process.? Explaining different ways in which matters are being settled between the two parties, he said, one is consultation and the other is negotiation and these are without the interference of judicial process and judicial proceedings. ?????????? He stated that these processes are not entirely criminal and some matters partake of civil proceedings as well.? The learned counsel argued that the proceedings primarily become criminal when after the take-over by the new dispensation thirty days have passed but the liability has not been cleared and the person becomes an accused person.

115.??????????????? Refuting the contentions of the learned counsel for the petitioners that the impugned Ordinance tantamounts to creating a parallel judicial system in the country, Mr.Maqbool Ilahi Malik, made a statement at the Bar that Sections 5(g), 16(c), 16(a),? 17,? 32(a),? 32(b) and 34? when read together do point to the fact that there is no parallel judicial system. He further stated that all those flaws which were pointed by this Court in *Mehram Ali and others v. Federation and others* (PLD 1998 SC 1445) have been taken care of while drafting the Ordinance and by amending the same.

116.??????????????? With regard to ?wilful default? the learned counsel submitted that it has two parts. If the default is committed today there is no question of retrospectivity.? But if the default was there before the new dispensation came into operation and thirty days had passed thereafter, then it had become a default.? He referred to Punjab Shops and Establishment (Security) Act, 1999, to contend that as per the said enactment any shopkeeper who does not employ a Chowkidar or does not do certain other things provided therein commits offence.? The provisions with regard to wilful default fall in the same category inasmuch as there was a continuous obligation to be discharged but the same was not fulfilled.? In the same strain he referred to Section 403 PPC and submitted that after the passage of time fixed for discharging the liability the individual concerned commits criminal breach of trust within the contemplation of Section 403 PPC.

117.??????????????? Referring to the provision of freezing of property he submitted that identical provisions are contained in the FIA Act, 1974 which have been upheld in *Fazal Mahmood v. Sardar Khan and 3 others* (PLD 1996 Karachi 475 at 480)? and *Syed Hyder Ali v. Assistant Director, F.I.A. Commercial Circle Quetta and 4 others* (1999 MLD 1527 at 1530).

118.??????????????? Regarding filing of References, Mr.Maqbool Ilahi Malik referred to Section 16 of the Ordinance and submitted that? selection of venue of trial is the exclusive choice of the NAB which is not unconstitutional in any sense of the term.? Moreover, such course also has the support of Section 9 read with Section 178 and 197 (2) of Cr.P.C. In this behalf he placed reliance on? *In re:? Reference made by Sessions Judge, Larkana for transfer of cases* (1990 P.Cr.L.J. 1687),? *M/s. V.C.K. Bus Service (P) Ltd., Coimbatore and another v. H.B.Sethna and others* (AIR 1965 Madras 149) and *Riffat Askari v. The State* (PLD 1997 Lahore 285).

119.??????????????? As to detention of a person for a period of up to ninety days under Section 24(d), the learned counsel argued that this period of remand has nexus with the nature of crime and the offences with which the accused are charged. Even after the expiry of remand of fifteen days under the Cr.P.C. the accused goes back to the judicial lock up and remains with the police.? He referred to the case of Haji Kabir Khan and stated that it took 60 days to detect and investigate his assets and in the case of Mir Faiq Jamali it took 108 days to detect the misuse of government funds and contended that 90-days period is required to collect the incriminating material.

120.??????????????? Lastly, he contended that the question of shifting of? burden of proof is not being raised for the first time. There are so many laws in which the burden of proof has been placed on the accused.? *Nabi Ahmed* (supra) is distinguishable in that the observation there has a direct nexus with a Convention.? He concluded his arguments with the submission that burden of proof falls in the domain of procedural law and, therefore, is retrospective in operation.

ARGUMENTS IN REBUTTAL

121.??????????????? **Mr. Muhammad Akram Sheikh** speaking in rebuttal argued that reference was filed against Faisal Saleh Hayat under Parliament and Provincial Assemblies (Disqualification for Membership) Order (17 of 1977), which was pending before an Hon?ble Judge of this Court and the learned Attorney General did not find time for more than eleven months to appear and assist the Court.? He contended that the law did not deliver effectively because of the poor assistance by the prosecutors.

122.??????????????? The learned counsel referred to the judgment of this Court in *Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others* (PLD 2000 SC 869) wherein it was held that the Federal Government may make laws, can even amend the Constitution but cannot touch the principles of Federalism, independence of judiciary and Parliamentary form of Government blended with Islamic provisions.

123.??????????????? He referred to the Third Schedule of 1962 Constitution and stated that there was only one Central Legislative List. There was no Concurrent List. Since an argument has been raised that Cr.P.C.? and the Criminal Law entries in the Concurrent List will enable the Federal Government to make a law and so do Entry 46 in the Concurrent List in the 1973 Constitution: *?Offences against laws with respect to any of the matters in this List; jurisdiction and powers of all courts except the Supreme Court, with respect to any of the matters in this List.?* and Entry 4 regarding:? *?Evidence and oath, recognition of laws, public acts and records and judicial proceedings,?* still, it is asserted by him, no

amount of legislative power to make laws and create offences will enable the Government to establish Courts.

124.???????????????? He stated that Entries 1 and 2 of the Government of India Act, 1935 and that of the 1956 Constitution are similar in nature. Therefore, it shall have to be interpreted that when the law specifically? provided for organization and constitution of the Court it understood the subject of organization and setting of the Court as a distinct subject.? Otherwise, everything should have come under the Criminal Procedure Code.? He submitted that the framers of the Constitution right from 1935? are conscious of the fact that law relating to evidence as also Criminal and Civil Procedure is not a law where the Federal Government can competently establish Courts.?

125.???????????????? The learned counsel argued that no answer either in the written form or in the arguments has been submitted to show nexus between the present legislation and the promulgation of emergency.? Otherwise, if this Court concedes the legislative power to the Government then they can substitute all existing laws made by the Parliament by churning out legislative instruments.? This Court in Judges? case has held that (i) the law and the Constitution made by the Parliament and (ii) the Constitution amended by Eighth Amendment by one person, stand on different parameters. So, the provisions of Eighth Amendment shall give way to the provisions of the original Constitution.? Dealing with the matters of transfer of Judges from the High Courts to Federal Shariat Court, it was ruled that such transfer/appointment under the proviso to clause (4) of Article 203B of Chapter 3A of the Constitution will give way to Article 209 because Chapter 3A had been promulgated by General Zia-ul-Haq through the Constitution (Amendment) Order, 1980 (P.O. No.1 of 1980).?
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126.???????????????? He argued that prosecutors in one case act as counsel in other cases for plea bargaining before the Chairman NAB. Were it was before an open Court it would have been clogged because inherent conflict of interest is involved in that behalf.? There should not be shying of and bypassing of the Courts.? He stated that all offences under this law have been made compoundable.? It is not the wilful default alone which can be settled through plea bargaining.? A most heinous offence of kickbacks of huge amounts is also compoundable.? He argued that the money which is being retrieved is public money and the ultimate custodian of public money is, in order, this Court, the High Courts and the other Courts. The working of the law on the ground tantamounts to legalizing extortion or ransom from the citizens of the country without reference to the Court.? If the Accountability Court is only a Court sharing powers within the hierarchy of the Courts, then how come it is overreaching the powers of the Company Judges trying the defaulters.

127.???????????????? The learned counsel referred to Section 31D of the Ordinance which reads
?S.31D. Inquiry, investigation or proceedings in respect of imprudent bank loans, etc.-

Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from Governor, State Bank of Pakistan:

??????????? Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000, shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan.?

He stated that the above amendment is procedural and the same is retrospective.? It was mandatory on them to have the pending cases at least looked at by the Governor, State Bank of Pakistan, which they have not done.
128.???????????????? He argued that his efforts to know how many defaulters are there and how many of them are being prosecuted by NAB, have not yielded the desired result.? The list provided indicates that they are prosecuting 64 defaulters.? This number of defaulters is too meagre to admit of being the result of any criteria whatsoever, he argued. He contended that it seems to be the discretion of the Chairman NAB to prosecute a person who has defaulted for one million rupees and to let get off defaulters of hundred billion rupees each.? He prayed that if the Court is not persuaded to scrap the whole law then a criteria be laid down that the NAB must provide a system whether black crows are to be tried or white.? He argued that the quantum of embezzlement must be the criteria and in today?s world it may be hundred million or fifty million.?

129.???????????????? With reference to section 25 of the Ordinance the learned counsel argued that the NAB has various criteria for structuring agreements with different people which is discriminatory. Whatever they do they should submit it before the Court. They cannot afford to be arbitrary.?

130.???????????????? He submitted that this Court has provided them with an exit strategy which they have not devised for themselves and it is the gracious indulgence of this Court in the great national interest. The people are recognizing the government because of the Review Judgement and because of the main judgment.? The attitude of the world has changed and that is why it is necessary that the

mandate given to them needs to be regulated and structured so that discretion is not allowed to remain with them.

131.??????????????? The petitioners are claiming the right to choose the venue for reference and they have the right to move for transfer. A person belonging to Sindh has a right to be tried in Sindh, because people are there to provide him diet and look after him in their own territory.? Why they have established different Courts under different notifications with attached areas. This Court should not allow them to file references without nexus with the commission of the crime.

133.??????????????? Lastly, he contended that they say that no? law is justiciable under Universal Declaration of Human Rights (UDHR) and Cairo Declaration. Except for three Articles each in Cairo Declaration and UDHR, others are part of our Fundamental Rights and every law is liable to be tested on the touchstone of our Fundamental Rights.?

134.??????????????? **Mr. Abdul Hafeez Pirzada** speaking in rebuttal stated that some constitutional instruments prior to 1973 invested the provincial legislatures and governments with the power to establish Courts. In 1973 departure was made and all residual powers were vested in the provinces. This was one of the agreements on which consensus was achieved that the residual powers will vest in the provinces and this is how the issue of provincial autonomy was resolved at that time.? That is why there is no entry in the relevant List of the Constitution in that regard. He maintained that any subject on which there is no categorical provision in the Federal List or the Concurrent List, is provincial. Establishment of Courts falls within the residual power of the Provinces.

135.??????????????? Mr. Pirzada referred to *Messrs Gadoon Textile Mills and 814 others v. WAPDA and others* (1997 SCMR 641) to contend that just because a law is subject matter of the Concurrent List does not *ipso facto* confer executive authority on the Centre. All that the Concurrent List says is that both the Federal Parliament and the Provincial Legislature shall be competent to legislate in respect of the subjects provided in the Concurrent List.? As far as the Executive authority is concerned, the same does not vest in the Federation.? In this context he referred to Articles 97 and 137 of the Constitution as well.? If the Federal Law impinges on the Provincial Authority and enacts on concurrent subjects, it has to expressly oust the executive authority of the province, otherwise even under the Federal Law the executive authority shall vest in the Province. He reiterated that this Court has deprecated resort to legislation by Ordinances if the field is occupied.? ?Occupied field? means that comprehensive legislation exists and there is no need to promulgate any law on the same subject. The Constitution provides that in the event of a Federal Law and a Provincial Law coming into conflict with each other, the Federal Law shall prevail and, to the extent of inconsistency, the Provincial Law shall remain subservient to the Federal Law.? He referred to *The Collector of Customs, Karachi and others v. Messrs New Electronics (Pvt) Limited and 59 others* (PLD 1994 SC 363) in support of his plea.

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136.??????????????? He referred to *Nabi Ahmed* (supra) and contended that it is an over simplification and naivety? of the submission of the learned counsel for the Federation that? the above judgment flows from Human Rights Convention. In fact it is based on Human Rights Convention only for a country which does not have a written Constitution. In the countries which have written Constitution, vires of legislation are tested on the touchstone of Constitution and not any Convention. That is why our Courts have referred, with approval, the precedents from the American jurisdiction. He also pointed out that Nabi Ahmed (supra) was reaffirmed by this Court and the learned counsel for the respondents had not been able to produce any judgment to the contrary.? Unless this Court revisits and over rules Nabi Ahmed (supra), the same is binding and as such Section 14(d) has to be struck down.? Mr. Pirzada referred to **?A TREATISE ON THE CONSTITUTIONAL LIMITATIONS**?? by? Thomas M.Cooley, to contend that violation of a contract made in the past cannot be made ?punishable *ex post facto*.? He ? emphasised that it is the biggest error to say that NAB Ordinance is not *ex post facto*.

137.??????????????? Referring to clause (2) of Article 12 of the Constitution, he submitted that law cannot authorize punishment of a person with penalty greater than or of a kind different from the penalty prescribed by law for that offence at the time it was committed. There is no dearth of authority for the proposition that approach should be beneficial and reducing the rigours of law in the light of the Principle recognized by the Constitution in the shape of power to grant immunities and pardons by the President. However, in the ordinance in question, the term of imprisonment stands enhanced from 7-years to 14-years. In this respect he cited the example of Azam Khan Hoti, a politician and former Federal Minister from NWFP who has been awarded 14-years imprisonment, confiscation of property and disqualification for 21-years for an offence which, at the relevant time, carried maximum punishment of 7-years and submitted that NAB Ordinance cannot be held valid on the ground of State Necessity either.

138.??????????????? He next contended that the learned counsel for the respondents have tried to justify the promulgation of NAB Ordinance on the ground of corruption. Such argument is untenable because while determining constitutional validity of an enactment, special approach is not permissible. More so, the NAB Ordinance is not claimed to be a temporary law.

139.??????????????? Mr. Pirzada further contended that Article 12 of the Constitution deals with the menace of corruption partly in that in the event of prospective application of the NAB Ordinance, Article 25 of the Constitution will come into play. Referring to Inam-ur-Rehman Vs. Federation of Pakistan and others (1992 SCMR 563 at 590) it was contended that the NAB Ordinance is liable to be struck down as it has the potentialities of being discriminatory. He went on to submit that there would be no objection if a Commission is set up to institutionalize the office of Chairman, NAB like the Officer of Wafaqi Ombudsman and Chief Election Commissioner. Even in the Ehtesab Act, the office of Chief Election Commissioner was institutionalized by providing that he should be a retired Judge of Supreme Court.
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140.??????????????? Mr.Abdul Haleem Pirzada argued that it has been said that moral authority has been eroded by the NAB Ordinance. It stands totally demolished by just one act of the present government i.e. when they took Mr. Nawab Sharif off the hook and sent him abroad by giving him VIP exit while cases were pending against him before the NAB Courts.? He said that according to the Chief Executive he had looted the money and wanted to kill him when he was in the plane. However, the Establishment could not mete out the same treatment to the late Prime Minister of Pakistan from Sindh.

141.??????????????? He further argued that something more than the conscience of the Constitution has been violated by the promulgation of the impugned Ordinance.? He lamented that all the Military rulers had never shown any respect for the Constitution.? The Chief Executive says that this Constitution is a limb of the body, which could be chopped off any time for the welfare of the body.? But the Constitution is not the limb of the body, it is the soul of the body and one cannot live without soul.

142.??????????????? He further stated that the statement made by the Chief Executive to the effect that the Government has respect and regard for the Courts is not correct in that according to his statement published in Daily-Jang dated 20.2.2001, he has deplored the tendency of granting bail to ?undesirable? persons.

143.??????????????? He argued that as NAB cases are mostly based on documents therefore, fifteen days time for remand is more than reasonable.

144.??????????????? As to freezing of the properties of third parties, he said that assuming such properties are not frozen by the Accountability Court during the trial and orders are passed while disposing of the case finally, the result would be that third parties would be condemned unheard. The rule of natural justice demands third parties may be given the right of appeal. He prayed that when the properties are mentioned in a reference, the names of those persons should be given in whose names the same stand ostensibly. The precise submission was that at the stage of trial those persons in whose names the properties actually stand should be put on notice to enable them to show that they had acquired those properties with their own resources and be given chance to lead evidence, if so desired.

145.??????????????? He differed with Mr. Minto that ?default? is distinguishable from wilful default and that under the Ordinance an accused is not liable for punishment for default simpliciter.? He further submitted that the question for consideration is at what stage the accused will prove that the default is not wilful. He asserted that under the prevalent practice, a reference is filed against the suspects irrespective of the fact whether default has been committed wilfully or otherwise. He prayed that the provision of ?wilful default?? be struck down.

146.??????????????? He argued that the claim of the other side that in the matter of burden of proof, there are some exceptions cannot stand legal scrutiny in that it has to be shown whether those exceptions were available in terms of the relevant provisions of the Ordinance or not.

147.??????????????? With regard to venue of trial, he argued that it is the right of the accused that he be tried at the place where the offence occurred.? However, under the impugned Ordinance it is the right of the Government to file the reference anywhere in Pakistan.? He argued that it is unfair to try a person from Sindh in Punjab. In all fairness the place of trial ought to be the place where the offence occurred.

148.??????????????? Mr. K.M.A.Samdani while exercising his right of reply submitted that his clients are not against the process of accountability but they have prayed for total annulment of the impugned law from its very inception.

149.??????????????? Mr.Mushtaq Ahmad Khan speaking in rebuttal adopted the arguments of Mr.Abdul Hafeez Pirzada. However, he stated that during the course of his arguments he had referred to various sections of the impugned Ordinance to show that it is discriminatory in nature particularly section 5(m)(iv). The learned counsel stated that, in fact, it was not his argument that the exemption of Armed Forces from the process of accountability will create some discrimination because they have their own system of accountability and there is a provision in that regard under Article 199(3) of the Constitution.? He submitted that Mr. Minto did go through that portion of his argument but missed the main portion of the above section.? He stated that in fact his argument was with regard to the next part of that section which reads : ??other than a person who is a member of any of the armed forces of Pakistan, or for the time being is subject to any law relating to any of the said forces, except a person who is, or

has been a member of the said forces and is holding, or has held, a post or office in any public corporation, bank, financial institution, undertaking or other organisation established, controlled or administered by or under the Federal Government or a Provincial Government?.? He contended that in fact this portion of the above section will take out of the ambit of the accountability so many other categories of civil servants who although do not fall within the definition of ?members of the armed forces?? but they are civil servants and only because they are working with the armed forces therefore they have been exempted.

150.???????????????? The learned counsel further argued that the question of transfer of cases under section 16A of the impugned Ordinance has been dealt with, but his emphasis was also on section 16(a), which is regarding trial of offences, because in that the Court does not come at all.? In other cases it is the High Court which is to be moved. The Chairman has to write a letter to the Court of the Anti-Corruption Judge to send any case to the Accountability Court and the case shall stand transferred. This part of the? argument has not been replied to by the other side and that makes the entire section ultra vires.?

151.???????????????? Mr. Muhammad Ikram Ch., referred to section 2 of the impugned Ordinance and contended that the intention of the law makers was to rope in maximum number of those people who are politicians although certain other categories have also been mentioned therein.? He stated that no arguments were addressed on this issue by the learned counsel representing the Federation and/or the NAB.

152.???????????????? He further contended that earlier he had referred to Section 2 of the Prevention of Corruption Act, 1947 wherein thirteen categories of different public servants have been enumerated and regarding which he had made a very precise submission that after legislating on the subject over the past 53 years, after all, why this Ordinance was ultimately thought to be promulgated. He contended that appropriate legislations against corruption, bribery and mal-practices were already in the field and they were adequate therefore there was no need for the impugned Ordinance. He contended that under Section 5? of the impugned Ordinance certain new clauses have been added with a view to wielding more power by the legislature and that his arguments in that behalf were not replied to by the learned counsel for the respondents.

153.???????????????? The NAB Ordinance has been promulgated to provide for the setting up of a National Accountability Bureau so as to eradicate corruption and corrupt practices and hold accountable all those persons accused of such practices and matters ancillary thereto.? The purposes and objects of the NAB Ordinance have been detailed in its Preamble.

154.???????????????? The NAB Ordinance broadly falls in three parts.? First part consists of provisions, which are verbatim reproduction of some of the provisions of the Ehtesab Act, 1997.? It reads:

IDENTICAL SECTIONS OF NAB

VIZ-A-VIZ EHTESAB

NAB ORDINANCE	**EHTESAB ACT**
S.5(m) "Holder of public office" means a person who-- 0. (i) has been the President of Pakistan or the Governor of a Province. (ii) is, or has been the Prime Minister, Chairman Senate, Speaker of the National Assembly, Deputy Speaker National Assembly, Federal Minister, Minister of State, Attorney-General and other Law Officer appointed under the Central Law Officers Ordinance, 1970 (VII of 1970), Advisor to the Prime Minister, Special Assistant to the Prime Minister, Federal	S.2(i)(i) "Holder of public office means a person who-- (i) has been the President or the Governor of a Province; (ii) is, or has been, the Prime Minister, Chairman Senate, Speaker National Assembly, Deputy Chairman Senate, Deputy Speaker National Assembly, Federal Minister, Minister of State. Attorney-General and other Law Officer appointed under the Central Law Officers Ordinance, 1970 (VII of 1970), Advisor to the Prime Minister, Special Assistant to the Prime Minister, Federal Parliamentary Secretary, Member; of Parliament, Auditor-General, Political. Secretary, Advisor or Consultant to the Prime Minister, and the holder of a post or office with the rank or status of a Federal Minister or Minister of State;

Parliamentary Secretary, Member of Parliament, Auditor General; Political Secretary, Advisor or Consultant to the Prime Minister and holds or has held a post or office with the rank or status of a Federal Minister or Minister of State; (iii) is, or has been, the Chief Minister, Speaker Provincial Assembly, Deputy Speaker Provincial Assembly, Provincial Minister, Advisor to the Chief Minister, Special Assistant to the Chief Minister, Provincial-Parliamentary Secretary, Member of the Provincial Assembly, Advocate-General including Additional Advocate-?General and Assistant Advocate-General, Political Secretary, Advisor or Consultant to the Chief Minister and who holds or has held a post or office with the rank or status of a Provincial Minister;	(iii) is, or has been, the Chief Minister, Speaker Provincial Assembly, Deputy Speaker Provincial Assembly, Provincial Minister, Advisor to the Chief Minister, Special Assistant to Chief Minister, Provincial Parliamentary Secretary, Member of the? Provincial Assembly, Advocate? General, including Additional Advocate-General and Assistant Advocate-General,????? Political Secretary, Advisor or Consultant to the Chief Minister, and the holder of a post or office with the rank or status of a Provincial Minister;
(v) is, or has been, the Chairman or Vice-Chairman of a Zila Council, a municipal committee, a municipal corporation or a metropolitan????? corporation constituted under any Federal or Provincial law relating to local councils; and (p) "Property" includes any or all? movable and immovable properties situated within or outside Pakistan; and S.9. <u>Corruption and corrupt practices:</u> (a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices- (i) if he, accepts or obtains from any person or offers any gratification directly or indirectly, other than legal remuneration, as a motive or reward such as is specified in section 161 of the Pakistan Penal Code (Act XLV of 1860) for doing or for-bearing to do any official act, or for showing or for-bearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person; or (ii) if he accepts or obtains or offers any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or likely to be, concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with his official functions or from any person whom he knows to be interested in or related to the person so concerned; or (iii)?????? if he dishonestly or fraudulently misappropriates or otherwise converts for his own use, or for the use of any other I person,	(vi) is, or has been, the Chairman or Vice-Chairman of a Zila Council, a municipal committee, a municipal corporation or???? a metropolitan corporation constituted under any Federal or Provincial law relating to local councils. (k) "property" includes any or all movable and immovable properties, situated within or outside Pakistan, and S.3. <u>Corruption and corrupt practices:</u> (1). A holder of public office, or any other person covered hereby is said to commit the offence of corruption and corrupt: practices-- (a) if he accepts or obtains from any person any gratification other than legal remuneration, as a motive or reward such as is specified, in section 161 of the Pakistan Penal Code (Act XLV of 1860), for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person; or (b) if he accepts or obtains any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be likely to be, concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with his official functions, or from any person whom he knows to be interested in or, related to the person so concerned; or (c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use or for the use of an other person any

any property entrusted to him; or under his control, or wilfully allows any other person so to do; or (iv) if he by corrupt, dishonest, or illegal means, obtains or seeks to obtain for himself, or for his spouse and/or dependants or any other person, any property, valuable thing, or pecuniary advantage; or	property entrusted to him or under his control, as a holder of public office or wilfully allows any other, person so to do; or (d) if he, by corrupt, dishonest, or illegal means in abuse of his position as a holder of public office, obtains or seeks for himself, or for his spouse or dependents my property, valuable thing or pecuniary advantage; or
S.10. Punishment for corruption and corrupt practices: (b) Any person giving illegal gratification, or abetting, assisting or aiding a holder of a public office, or receiving or holding any property obtained or acquired by a holder of public office, through corruption or corrupt practices, or being a beneficiary of any asset, property or gain obtained through corruption or corrupt practices shall fall within the scope of this section and shall be liable to the same or a lesser punishment that may be awarded to a holder of a public office as may be deemed fit by the Court.	S.4. Punishment for corruption and corrupt practices.---(2) A person giving illegal gratification, or abetting, assisting or aiding a holder of a public office or receiving or holding any property obtained or acquired by a holder of public office through corruption or corrupt practices, or being a beneficiary, of any asset, property or gain obtained through corruption or corrupt practices shall fall within the scope of this section and shall be liable to the same or a lesser punishment than may be, awarded to a holder of a public office as may be deemed fit by the Court.
S.12: Power to freeze property: (a) The Chairman NAB or the Court trying a person for any offence as specified under this Ordinance, may at an time, if there appear reasonable grounds for believing that the accused has committed such an offence, order the freezing of his property, movable or immovable, or part thereof, whether in his possession or in the possession of any relative, associate or person on his behalf. (b) If the property ordered to be frozen under subsection (a) is a debt or other movable property, the freezing may be made; (i) by seizure; or (ii) by appointment of receiver; or (iii) by prohibiting the delivery of such property to the accused on to anyone on his behalf; or (iv) by all or any of such or other methods as the Court or the Chairman NAB, as the case may be, deem fit.	S.6. Power of the Court to freeze property.--(1) The Court trying a holder of public office for an offence under this Act tray, at any time; if there appear reasonable grounds for believing that the accused has committed such offence, order the freezing of his property, movable or immovable, or any part thereof, whether in his possession or in the possession of any person on his behalf. (2) If the property ordered to be frozen under subsection (1) is a debt or other movable property, the freezing may be made- (a) by seizure; or (b) by appointment of a receiver; or (c) by prohibiting the delivery of such property to the accused or to anyone on his behalf; or (d) by all or any of such methods as the Court may think fit.
(c) If the property ordered to be frozen is immovable, the freezing shall in the case of land paying revenue, be made through the Collector of the district in which the land is situated, and in all other cases-	(3) If the property ordered to be frozen is immovable, the freezing shall in the case of land paying revenue, be made through the Collector of the district in which the land is situated, and in all other cases--

(i) by taking, possession; or (ii) by appointment of receiver; or (iii) by prohibiting the payment of rent or delivery of property to the accused or to any other person his behalf; or (iv) by all or any of such methods as the Chairman NAB or the Court may deem fit:	(a) by taking possession; or (b) by appointment of a receiver; or (c) by prohibiting the payment of cent or delivery of property to the accused or to anyone on his behalf; or (d) by all or any of such methods as the Court may deem fit:
Section 12(e) The powers, duties and liabilities of x receiver, if any, appointed under this section shall be the same as those of a receiver appointed under Order XL of the Code of Civil Procedure, 1908 (Act V of 1908).	Section 6(5) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under Order XL of the Code of Civil Procedure, 1908 (Act V of 1908).
S.14. Presumption against accused accepting illegal gratification: (b) Wherein any trial of an offence punishable under section 165-A of the Pakistan Penal. Code, 1860 (Act XLV of 1860) it is proved that any gratification other than legal remuneration or any valuable thing has been given, or offered to be given, or attempted to be given, by any accused person, it shall be presumed, unless the contrary- is proved, that he gave, or offered to give, or attempted to give, that gratification, or that valuable thing, as the case may be, as a motive or a reward such as is specified in sections 161 to 163 of the said Code; or, as the case may be, without consideration or for a consideration which he believed to be inadequate. (c) In any trial of an offence punishable under this Ordinance, the fact that the accused person or any other person on his behalf,?????????? is in possession, for which the accused person cannot satisfactorily account, of property or pecuniary resources disproportionate to his known sources of income, or that such person has, at or about the time of the commission of the offence with which he is charged, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, the Court shall presume, unless the contrary is proved, that the accused person is guilty of the offence of corruption and/or corrupt practices and his conviction therefore, shall not be invalid by reason only that it is based solely on such a presumption.	Section 8(2) Where in any trial of an offence punishable under section 165-A of the Pakistan Penal Code (Act XLV of 1860), it is proved that any gratification other than legal remuneration or any valuable thing has been given or offered to be given or attempted to be given, by any accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give, that gratification or that valuable thing; as the case may be, as a motive or a reward such as is specified in sections 161 to 163 of the said Code, or as the case may be, without consideration or for consideration which he believed to be inadequate. (3) In any trial of an offence punishable under this Act, the fact that the accused person or any other, person on his behalf, is in possession, for which the accused person cannot satisfactorily account of property or pecuniary resources disproportionate to his known sources or income, or that such person has, at or about the time of the commission of the offence with which he is charged, obtained an accretion to his pecuniary resources or property for which lie cannot satisfactorily account, the Court shall presume, unless the contrary is proved, that the accused person is guilty of the offence of corruption and corrupt practices and his conviction therefore shall not be invalid by 'reason only that it is based solely on such presumption;
S.16-B. <u>Contempt of Court:</u> (a) abuses, interferes with or obstructs the process of the Court in any way or disobeys any order or direction of the Court; (b) scandalizes the Court or otherwise does anything which tends to bring the Court or a	S.22. Power to punish for contempt: (a) abuses, interferes with, impedes, imperils, or obstructs the process of the Chief Ehtesab Commissioner in any way or disobeys any order of the Chief Ehtesab Commissioner; . (b) scandalises the. Chief Ehtesab Commissioner or otherwise does anything,

person constituting the Court into hatred, ridicule or contempt; .	which tends to bring the Chief Ehtesab Commissioner, in relation to his office, into hatred, ridicule or contempt;
(d) does anything which, by any other law, constitutes, contempt of Court. Explanation. In this section, the expression "Court" means an Accountability Court. Note: Appeal is provided in Ehtesab Act before Supreme Court.	(d) does any other thing which, by any other law, constitutes contempt of Court: Provided that fait comments made in good faith and in the public in good faith and in the public interest on the working of the Chief Ehtesab Commissioner or any of his staff, or on the report of the Chief Ehtesab Commissioner after the completion of any inquiry or investigation shall not constitute contempt of the Chief Ehtesab Commissioner or his office. (2) Any person sentenced under subsection (1) may within thirty days of the passing of the order, appeal to the Supreme Court.
S.17. Provisions of the Code to apply: (a) notwithstanding anything contained in any other law for the time being in force, unless there is anything in consistent the provisions of this Ordinance, the provisions of the Code of Criminal Procedure, 1898 (Act V of 1989), shall mutatis mutandis, apply to the proceedings under this Order. (b) Subject to subsection (a), the provisions of Chapter XXIIA of the Code shall apply to trials under this Ordinance. (c) Notwithstanding any?thing contained in subsection (a) or subsection (b) or in any law for the time being in force, the Accountability Court may, for reasons. to be recorded, dispense with any provision of the Code and follow such procedure as it may deem fit in the circumstances of the case.	S.12. Provisions of the Code to apply: notwithstanding anything contained in any other law for the time being in force, unless there is anything inconsistent with the provisions of this Act, the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), shall mutatis mutandis, apply to the proceedings under this Act. (2) Subject to subsection (1), the provisions of Chapter XXII-A of the Code shall apply to trials under this Act. (3) Notwithstanding anything contained in subsection (1) or subsection (2) or in any law for the time being in force, the Court may, for reason to be recorded, dispense with any provision of the Code and follow such procedure as it may deem fit in the circumstances of the case.
S.18. Cognizance of offences: (a) The Accountability Court shall not take cognizance of any offence under this Ordinance except on a reference made by the Chairman NAB or an officer of the NAB duly authorised by him. (b) A reference under this Ordinance shall be initiated by the Chairmen National Accountability Bureau, on -- (i) a reference received from the appropriate Government; or (ii) receipt of a complaint; or (iii) its own accord.	S.15. Cognizance of offences, etc.---- (1) The Court shall not take co nuance of an offence under this Act except on a reference made by the Chief Ehtesab Commissioner. (2) A reference under this Act may be initiated by the Chief Ehtesab Commissioner on- (i) a reference received from the appropriate Government; or (ii) receipt of a complaint; or? (iii) his own accord. Sec.(3) Where the Chief Ehtesab Commissioner is of the opinion that it may be

(c) Where the Chairman NAB or an officer of the NAB duly authorised by is of the opinion that it is or may be necessary and appropriate to initiate proceedings against any person, he shall refer the matter for enquiry or investigation.	necessary to initiate proceedings on a reference, complaint or on his own accord, as the case may be, he shall refer the matter to the Ehtesab Cell for enquiry and investigation.
Sec. 18 (h). If a complaint is inquired into and investigated by the NAB and it is concluded that the complaint received was prima facie frivolous or has been filed with intent to malign or defame any person, the Chairman or Deputy Chairman NAB or the prescribed law officer may refer the matter to the Court, and if the complainant is found guilty he shall be punishable with imprisonment for a term which may extend, to one year, or with tine or with both.	Sec. (7): In the event that the Chief Ehtesab Commissioner is of the opinion that a complaint received by him is patently mala fide, or has been filed with the intent to malign or defame the holder of a public office, he may refer the matter to the Court and if the complainant is found guilty he shall be punishable with imprisonment for a term which ma extend to one ear, or with fine, or with both.
S. 24. Arrest: (c) The provisions of sub-section (a) shall also apply to cases, which have already been referred to the Court.	Sec. 16(3) The provisions of subsection (2) shall also apply to cases which have I already been referred to the Court.
Sec. 26(c). Subject to sub?section (d) the person to whom pardon has been granted under this section shall not - (i) in the case of a full pardon be tried for the offence in respect of which the pardon was granted; and (ii) in the case of a conditional pardon be awarded a punishment or penalty higher or other than that .specified in the grant of pardon notwithstanding the punishment or penalty authorized by law.	S.18(3). Subject to subsection (4), the person to whom pardon has been granted under this section shall not-- (a) in the case of a full pardon be tried for the offence in respect of which the pardon was granted; and (b) in the case of a conditional pardon be awarded a punishment or penalty higher or other than that specified in the grant of pardon notwithstanding the punishment or penalty, authorised by law.
S.29.???? Accused to be competent witness: Provided that the accused shall not be compelled to be a witness against himself: Provided further that, where an accused person appears as a witness of his own choice and refuses to answer any question, the Court may draw such adverse inference from such refusal as it may think proper.	Sec. 21: Provided that the accused shall not be compelled to be a witness against himself: Provided further that where an accused appears as a witness out of his own choice and refuses to answer any question, the Court may draw such adverse inference? from such refusal as it may think fit.
S.30. False evidence etc:--?(a) Notwithstanding anything contained in the preceding provisions or any other law already in force, on pronouncement of judgment, the Accountability Court shall have the jurisdiction and power to take cognizance of an offence committed in the course of the investigation or trial of a case by any officer, any witness, including an expert, who has tendered false evidence in the case, whether he deposed in Court or not, or any other person, under sections 176 to 182 of Chapter X, or sections 191 to 204, or 211 to 223, or 225-A of Chapter XI, of the Pakistan Penal Code 1860 (Act XLV of 1860), or under	S. 25. Cognizance of false evidence etc.---(1) Notwithstanding anything contained in the preceding provisions or any other law already in force, on pronouncement of judgment, the Court shall have jurisdiction and power to take cognizance of an offence committed in the course of the investigation or trial of a case by a police officer, a witness, including an expert, who has tendered false evidence in a case relating to a matter covered by his specialty, whether he deposed in Court or not or any other person, under sections 176 to 182 of Chapter X, or sections 191 to 204, or 211 to 223 or 225-A of Chapter XI of the Pakistan

any other law relating to false evidence and offences against public justice; and to summarily try him and award punishment provided for the offence under the law. (b) For the purpose of trial under subsection (a), the Court may, as nearly as may be, follow the procedure specified in Chapter XXII of the Code.	Penal Code (Act XLV of 1860), or under any other law relating to false evidence and offences against public justice, and to summarily try him and award punishment provided for the offence under the law. (2) For the purpose of trial under subsection (1), the Court may, as nearly as may be, follow the procedure specified in Chapter XXII of the Code.
S.33. Transfer of pending proceedings.---Any and all proceedings pending before. a Court under the Ehtesab Act, 1997 (IX of 1997), shall stand transferred to a Accountability Court as soon as it is constituted under this Ordinance within the same Province, and it shall not be necessary to recall any witness or again to record any evidence that , may have been recorded.	S.31(2)(a)-(c): (a) any proceeding pending before the special Court under the said orders shall continue as if the said orders had not been repealed. (b) ???????. (c) any proceeding pending before a Court under the Ehtesab Ordinance, 1997 (XX of 1997), shall continue under this Act and it shall not be necessary to re-call any witness or once again record any evidence that may have been taken down.

The second part comprises those provisions, which are similar to the ones in the Ehtesab Act, 1997 with some modifications, additions, deletions, etc. It reads:

MODIFIED SECTIONS OF NAB VIS-A-VIS EHTESAB

NAB ORDINANCE	**EHTESAB ACT**
Section-1 Title: The National Accountability Ordinance, 1999	Section- 1 Title: The Ehtesab Act, 1997
S. 2. Commencement:---This Ordi?nance shall be deemed to have come into force from 1st day of January 1985.	S. 1(2) Commencement. ---The Act will be applicable from the 6th day of November, 1990: (S.29. Protection against retrospective punishment. --- Nothing contained here in shall authorise the punishment of a person for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed and the Court while imposing a penalty, may, if necessary, modify it to such extent as may be necessary.)
S.4	S.1(2).

Application.---It extends to whole of Pakistan and shall apply to all persons in Pakistan and persons who are or have keen in the service of Pakistan wherever they may be including area which are part of Federally and Provincially administered tribunal areas.	Application. ---It shall apply to the holders of public offices since the 6th November, 1990.
S.5. Definitions. ----(a) "Accused" shall include a person in respect of whom there are reasonable grounds to believe, is or has been involved in the commission of any offence' friable under this Ordinance and/or is subject of investigation/inquiry by NAB, or concerned agency.	S.2. Definitions. ---(a) "Accused" shall include a person in respect of whom information under subsection (1), section 16 shall be deemed to have been recorded.
(e)"Chairman National Accountability Bureau" means a person who is appointed as such by the President of the Islamic Republic of Pakistan as mentioned in section 6(b) hereafter;	(c) "Chairman of the Ehtesab Cell' means a person either holding a full time salaried post as such, or a part time post with no entitlement to salary or allowances, whose name is notified hereunder with the authority to appoint members of the Ehtesab Cell;
(g) "Court"??????? means ? an Accountability Court which shall consist of a Judge who shall be appointed by the President of Pakistan after consultation with the Chief Justice of Pakistan by notification in the official Gazette, and a Judge other I than a serving District and Sessions Judge who shall hold office for a period of two years unless removed earlier by the President of Pakistan after consultation with the Chief Justice of Pakistan;	(f) "Court" means. a Bench of one or more Judges of the High Court nominated by the Chief Justice of the High Court;
(k) "National Accountability Bureau" means the Bureau set up and notified under this Ordinance, (hereinafter known as NAB); (1) "Freezing"??? includes attachment, sealing, prohibition, holding, ?????? controlling and/or managing any property either through a Receiver or otherwise as may be directed by the Court or Chairman NAB, and in case it is deemed necessary the disposal thereof, by sale through auction or negotiation subject to confirmation by the Court or by Chairman National Accountability Bureau as the case may be after public notice.	(g) "Ehtesab Cell" means a Cell set up by the Federal Government for the purpose of investigation and enquiry of offences under this Act; (h) "freezing"???? includes attachment, sealing, prohibition, holding, controlling or managing any property, either through a? receiver or otherwise, and in the case of property being livestock or perishable goods, disposal thereof;
(iv) is holding, or has held, an office or post in the service of Pakistan or any service in connection with the affairs of the Federation or of a Province, or of a local council constituted under any Federal or Provincial law relating to the constitution of local councils, of in the management of corporations, banks, financial institutions, firms, concerns, undertakings or any other institution or organization established, controlled or administered by or under the Federal Government or a Provincial Government, other than a person who is a member of any of the armed forces of Pakistan; or for the time being is subject to any law	(iv) is holding, or has held an office or post in Basic Pay Scale 18 or above in the service of Pakistan, or any service in connection with the affairs of the Federation, or of a Province or of a local? council constituted under any Federal or Provincial law relating to the constitution of local councils, or in the equivalent pay scale of management in corporations, banks,??????????? financial institutions, firms, concerns, undertakings or any other institution, or organisation established, controlled or administered by or under the Federal Government or a Provincial Government, other

relating to any of the said forces, except a person who is, or has been a member of the said forces and is holding, or- has held, a post or office in any public corporation, bank, financial institution, undertaking or other organization established, controlled or administered by or under the Federal Government or a Provincial Government; (vi) has served in and retired or resigned from or has been discharged or dismissed from the Armed Forces of Pakistan; "Explanation" For the purpose of this sub-clause the expressions "Chairman" and "Vice-Chairman" shall include "Mayor" and "Deputy Mayor" as the case may be, and the respective councillors therein.	than a person who is a member of the armed forces, or, for the time being is subject to any law relating to any of the said forces except a person who is, or has been a member of the said forces and is holding?????????? or has held an equivalent post or office in any public corporation, bank,????????? financial institution, undertaking or other organisation established. controlled or administered by or under the Federal Government or a Provincial Government; and (v) is holding or has held an office or post in Basic Pay Scale 17 or below of the nature specified in sub-clause (iv) and is involved in an offence committed by a person or persons falling within sub?-clauses (i) to (iv); Explanation.-- For the purpose of this sub-clause the expressions "Chairman" and "Vice-Chairman" shall include a Mayor and a Deputy Mayor as the case may be;
(n) "Offence" means the offences of corruption and corrupt practices as defined in this Ordinance and includes those offences as specified in the Schedule to this Ordinance.	(j)"offence" means the offence of corruption and corrupt practices;
S.6. National Accountability Bureau: (a) There shall be constituted a National Accountability Bureau for the whole of Pakistan. (b) Chairman???? National Accountability Bureau: (i) There shall be Chairman NAB to be appointed by the President and he shall hold office during the pleasure of the President. (ii) The Chairman NAB shall be appointed on such terms and conditions and shall have the status and privileges as may be determined by -the President.	S.2 (g) "Ehtesab Cell" (g) "Ehtesab Cell" means a Cell set up by the Federal Government for the purpose of investigation and enquiry of offences under this Act; (c) "Chairman of the Ehtesab Cell' means a person either holding a full time salaried post as such, or a part time post with no entitlement to salary or allowances, whose name is notified hereunder with the authority to appoint members of the Ehtesab Cell;
S.8. Prosecutor General Accountability (a) The Chairman NAB may appoint any person to act as the Prosecutor General Accountability, notwithstand?ing any other appointment or office the latter may concurrently hold, upon such terms and conditions as may determined by the Chairman. (b) The Prosecutor General shall give advice to the Chairman NAB upon such legal matters and perform such other duties of a legal character as may be referred or assigned to him by the Chairman NAB and in the performance of his duties, he shall have the right of audience in all	19. Special Prosecutor. ---The Chief Ehtesab Commissioner may, in consultation with the Ministry of Law and Justice, Government of Pakistan appoint Special Prosecutors for conducting prosecution of cases under this Act.

Courts established under this Ordinance and all other and Tribunals in Pakistan. (c) The Prosecutor General Accountability Bureau in consultation with the Attorney General for Pakistan may, with prior approval of the Chairman NAB, appoint Special Prosecutors to conduct prosecution of specific cases under this ordinance, before any Accountability Court or any other Court of Tribunal.	
Sec. 9 Corruption???????? and ????? corrupt practices: (b) All offences under this Ordinance shall be non?-bailable and, notwithstanding anything contained in sections 426, 491, 497, 498 and 561-A or any other provision of the Code, or any other law for the time being in force no Court including the High Court shall have jurisdiction to grant bail to any person accused of any offence under this Ordinance. (c) Where the Chairman NAB decides to release from custody or detention a holder of a public office or any other person accused of an offence under, this Ordinance, he shall do so after considering the gravity of the charge against such person and the accruing quantum of loss involved in the offence alleged to have been committed and may impose any reasonable conditions for such release. (d) The amount deposited by the accused with the NAB shall be transferred to the Federal Government or, as the case may be, a Provincial Government or the concerned bank or financial institution; etc., within one month from the date of such deposit. S.10. Punishment for, corruption and corrupt practices: (a) A person who commits the offence of corruption and corrupt practices shall be punishable with imprisonment for a term which may extend to 14 years, or with fine, or with both, and such of the assets and property of such person which is found to be disproportionate to the known sources of his income or which is acquired by money obtained through corruption and corrupt practices whether in his name or in the name of any of	Sec. 3 Corruption???????? and ????? corrupt practices: (2) All offences under this Act shall be non-bailable, and, notwithstanding anything contained in sections 497, 498 and 561-A or an other provision of the Code or any other law for the time being in force, no Court other than the Court defined in clause (t) of section 2 shall have jurisdiction to grant bail. (3) A holder of a public office or any other person accused of an offence under this Act shall not be released on bail by the Court if there appear reasonable grounds for believing that he has been guilty of such an offence. (4) Where a holder of a public office or any other person accused of an offence under this Act is released on bail, the amount of bail shall be fixed having regard to the gravity of the charge against such person and, where the charge specifies any amount in respect of which the offence is alleged to have been committed, shall not be less than the said amount: Provided that the Court may direct that the amount be deposited in Court. (5) No Court shall release an. accused person on bail unless the Chief Ehtesab Commissioner and the prescribed law officer have been given notice of the bail application and been given an opportunity of being heard. Explanation. ---In????????? this subsection, "prescribed??????? law officer" means? ?(a) in relation to an application before the Court, the Advocate-General; and (b) in relation to an application before the Supreme Court of Pakistan, the Attorney-General. S.4.

his dependants, or benamidars shall be liable to be forfeited to the appropriate Government.	Punishment for corruption and corrupt practices. ---(I) A person who commits the offence of corruption and corrupt practices shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both, and such of the movable or immovable property of such person, whether in his name or in the name of his dependents or benamidars obtained through such an offence during the tenure of his office, shall be liable to be forfeited to the appropriate Government: Provided that, where any person is convicted for an offence under clause (e) of section 3, the property, including bank deposits, found to be disproportionate to the known sources of his income shall be forfeited to the appropriate Government.
S. 11 Imposition of fine.---Where a person found guilty of an offence is sentenced to pay a fine, irrespective of whether or not a sentence of imprisonment is imposed, the amount of the fine shall in no case be less than the gain derived by the accused or any relative or associate which may be set off against the forfeited or frozen assets and property.	S.5 . Imposition of fine.---Where a person found guilty of an offence is sentenced to pay a fine, irrespective of whether or not a sentence of imprisonment is imposed, the amount of the fine shall in no case be less than the gain derived by the accused.
S.12 Power to freeze property. ---(d) If the property ordered to be frozen consists of livestock or is of a perishable nature, the Chairman NAB, or the Court may, if it deems proper and expedient, order the immediate sale thereof and the proceeds of the sale may be deposited with the Chairman NAB or the Court, or as either may direct as appropriate.	S.6 Power of the Court to freeze property.---(4) If the property ordered to be frozen consists of livestock or is of a perishable nature, the Court may, if it thinks expedient, order the immediate sale thereof and in such a case the proceeds of the sale may be invested in such Government securities or Government sponsored saying schemes as the Court may direct.
S.13. Claim or objection against freezing.-- (a) Notwithstanding the provisions of any law for the time being in force, the Accountability Court shall have exclusive jurisdiction to entertain and adjudicate upon all claims or objections against the freezing of any property under section 12 above. Such claims or objections shall be made before the Accountability Court within 14 days from the date of the order freezing such property- (b) The Court may for sufficient cause extend the time for tiling such claims or objections for a period not exceeding additional 14 days. (c) No appeal shall lie against an order made under Section 12 of this Ordinance. S.14.	S.7. Claim or objection against freezing.---(I) All claims or objections against the freezing of any property under section 6 shall be made within thirty days from the date of the order freezing such property: Provided that, where a person satisfies the Court that he had sufficient cause for not making the claim or objection, within such period, the Court may admit such claim or objection, as the case may be, after that period: Provided further that any claim or objection made within the period allowed under this subsection may, in the event of the death of a claimant Objector, be continued by his legal representatives.

Presumption against accused accepting illegal gratifica?tion.--- (a) Where in any trial of a scheduled offence punishable under this Ordinance, it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person any gratification, other than legal remuneration, or any valuable thing, or any pecuniary advantage from a person or any agent of a person, for any favour shown or promised to be shown by the accused, it shall be presumed, unless the contrary is proved, that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thin or pecuniary advantage for himself or some other person, as the case may be, as a motive or a reward such as is specified in sections 161 to 163 of the Pakistan Penal Code, 1860 (Act XLV of 1860), or, as the case may be, without consideration, or for a consideration which he believed to be inadequate.	(2) The Court may, after such enquiry as it may deem fit, allow or disallow any claim or objection in whole or in part and pass the appropriate order thereon. (3) Any person aggrieved by an order passed under this section may prefer an appeal against such order to the Supreme Court within thirty days. S.8. Presumption against holder of public office accepting illegal gratification.---(1) Where in any trial of an offence punishable under section 161 to 165 of the Pakistan Penal Code (Act XLV of 1860), it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person any gratification, other than legal remuneration, or any valuable thing, or any pecuniary advantage ,from a person or any agent of a person; for any favour shown or promised to be shown by the accused, it shall be presumed, unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted, to obtain, that ratification or that valuable thing or pecuniary advantage for himself or some other person, as the case may be, as a motive or reward such as is specified in sections 161 to 163 of the said Code, or, as the case tray be, without consideration or for a consideration which he believed to be inadequate.
S.15. Disqualification to contest elections or to hold public office. (a) Where an accused person is convicted for the offence of corruption or corrupt practices as specified in the Schedule to this Ordinance, he shall stand disqualified for 21 years for seeking, or from being elected chosen appointed or nominated as a member or representative of any public office, or any statutory or local authority of the Government of Pakistan:	S.9. Disqualification to contest elections. ---(1) Subject to subsection (2), where a holder of a public office is convicted for an offence of corruption and corrupt practices and sentenced to a term of imprisonment for a term of not less than two years, he shall stand disqualified from being elected or chosen as and from being a member of the Majlis?e-Shoora (Parliament) or the Provincial Assembly, as the case may be, for a period of five years reckoned from the date when he is released. (2) If any question arises whether a member of the Majlis-e-Shoora (Parliament) or a Provincial Assembly has become disqualified from being a member, the Speaker or, as the case may be, the Chairman shall refer the question to the Chief Election Commissioner and, if the Chief Election Commissioner is of the opinion that the member has become disqualified he shall cease to be a member and his seat shall become vacant.
S.16. Trial of offences.---(a) Notwithstanding anything contained in any other law for the time being in force, all persons accused, of a scheduled offence, shall be prosecuted for such	S.10.???? ??????????? Trial of offences.-(1) Subject to the provisions of subsection (2), and notwithstanding anything contained in any? other law for time being in force, no person shall be prosecuted for the

offence by Court established pursuant to this Ordinance exclusively as constituted under section 5 (g) and the case shall be heard from day to day and disposed of within 30 days.	offence of corruption and corrupt practices by the Chief Ehtesab Commissioner save and except before a Bench of the High Court defined in clause (f) of section 2 and the case shall be heard from day to day and disposed of within sixty days. ?????????? (2) Where more Benches than one have been constituted in a High Court. The cases referred to the High Court shall be assigned to various Benches by the Chief Justice of the High Court. ??????????? Explanation.--- In this section, "High Court" means the High Court within 'the local limits of whose jurisdiction the offence is alleged to have been committed.
S.16-B. Contempt of Court. ?The Court shall have the power to punish for contempt of Court with imprisonment for a term which may extend to six months and with fine which may extend 'to one million rupees any person who - (c) does anything which tends to prejudice the determination of a matter pending or most likely to come up before the Court; or	??????????? S.22. Power to punish for contempt.---(1) The Chief Ehtesab Commissioner shall have the same powers, mutatis mutandis, as the??????????? Supreme Court has to punish any person for contempt who-- (c) does anything which tends to prejudice the determination of a matter pending before the Chief Ehtesab Commissioner;
S.18. Cognizance of offences.- (d) The responsibility for inquiry into and investigation of an offence alleged to have been committed under this Ordinance shall rest on the NAB to the exclusion of any other agency or authority, unless any such agency or authority is required to do so by the Chairman or an officer of the NAB duly authorised by him. (e) The Chairman NAB and such members, officers and/or servants of the NAB shall have and exercise, for the purposes of an inquiry and/or investigation the power to arrest any person, and all the powers of an officer-in-chafe of a Police Station under the Code, and for that purpose may cause the attendance of any person, and when if the assistance of any agency, police officer or any other official or agency, as the case may be, is sought by the NAB such official or agency shall render such assistance provided that no person shall be arrested without the permission of the Chairman or any officer duly authorized by the Chairman. NAB. (f) Any Inquiry and Investigation under this Ordinance shall be completed expeditiously as may be practical and feasible. (g) The Chairman NAB or by an officer of the NAB duly authorised by shall appraise the material and the evidence placed before him during the inquiry and the investigation, and if	S.15. Cognizance of offences etc.--- (4) The responsibility???? for enquiring into, or investigating, an offence alleged to have been committed under this Act shall rest on the Ehtesab Cell, to the exclusion of any other agency or authority, and the said Cell shall be required to examine all material, evidence and proof and for this purpose may cause the attendance of any person: Provided that the Ehtesab Cell may require the assistance of any agency, police officer or other official, if it so deems fit. (5) The Ehtesab Cell shall complete the enquiry and investigation under this Act within one month or as soon thereafter, as may be feasible. (6) On the completion of the enquiry and investigation indicating that the matter may

he decides that it would be proper and just to proceed further, he shall refer the matter to an Accountability Court.	require a reference to the Court it shall be the duty of the Ehtesab Cell to communicate to the Chief Ehtesab Commissioner its appraisal of the material and evidence in the form of a reference to him.
S.19. Power to call for information. ---The Chairman NAB or any authorized officer may, during the course of an inquiry or investigation in connection with contravention of any provision of this Ordinance:- (a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Ordinance or any rule or order made thereunder; (b) require any person to produce or deliver any document or thing useful or relevant to the inquiry; (c) examine any person acquainted with the facts and circumstances of the case; and (d) require any bank or financial institution, notwithstanding anything contained in any other law for the time being in force, to provide any??????????? information relating to any person whosoever.	S.20. Powers of the Chief Ehtesab Commissioner to seek assistance.-(1) The Chief Ehtesab Commissioner shall have the power to seek assistance and call for documents and information relevant to any proceedings pending before him under this Act, from any Department of the Federal Government or a Provincial Government, local authority, bank, financial institution or any other person or authority and it shall be the duty of such Department, local authority, bank, financial institution, person or authority to render such assistance or furnish such document or information as he may require: Provided that in any case in which a serious question of banking secrecy with wider implications is raised, the Chief Ehtesab Commissioner shall first consult the Federal Government. (2) Any document or information called for under subsection (I) shall only be used for the proposes of this Act.
S. 24. Arrest: (a) The Chairman NAB shall have the power, at any stage of the investigation under this Ordinance, to direct that the accused, if not already arrested, shall be arrested. (b) If the Chairman, NAB or an officer of the NAB duty authorised by him decides to refer the case to a Court, such reference shall contain the substance of the offence/ offences alleged to have been committed by the accused and a copy of such reference shall be forwarded to the Registrar of the Court to which the case has been sent to try the accused, and another copy shall be delivered to the accused. (d) Notwithstanding any?thing contained in the Code where the holder of a public office or any other person accused of an offence is arrested by NAB under this Ordinance NAB shall as soon as may be inform him of the grounds and substance on the basis of which he has been arrested and produce him before the Court established under this Ordinance within a period of 24 hours of arrest excluding the necessary for the journey from the place of arrest to the Court and such persons shall having regard to the facts and circumstances of	??????????? S.16. Effect of reference etc.--? ??????????? (1) Where a reference is made to the Chief Ehtesab Commissioner under subsection (6) of section, 15 such a reference shall be deemed to be an information recorded under section 154 of the Code. (2) The Chief Ehtesab Commissioner shall have the power to direct that the accused shall be arrested and the case referred to the Court for trial in accordance with law. The direction given by the Chief Ehtesab Commissioner shall contain the substance of the act of corruption and corrupt practices alleged to have been committed by the accused and a copy of such direction shall be forwarded to the Registrar of the Court having jurisdiction to try the accused and another copy shall be given to the accused on demand. (4) Where the holder of a public office or any other person accused of an offence under, this Act is arrested under the orders of the Chief Ehtesab Commissioner, and is produced before a Judicial Magistrate for police custody under section 167 of the Code, such Magistrate may authorise his detention in such custody ,for a term not exceeding fourteen days as a whole

the case be liable to be detained in the custody of the NAB for the purposes of enquiry and investigation for a period not exceeding 90 days provided that no accused arrested under this Ordinance shall be released without the written order of the Chairman NAB or .the order of the Court.	but he shall not be authorised to release him on bail without the consent of the Chief Ehtesab Commissioner.
S.25. Voluntary return/plea bargaining.---Where at any time whether before or after the commencement of the trial the holder of a public office or any other person accused of any offence under this Ordinance returns to the NAB, the assets or gains acquired through corruption of corrupt practices: (i) if the trial has not commenced, the Chairman NAB may release the accused and (ii) if the Court has taken cognizance of the offence or the trial has commenced the Chairman NAB, may, with the approval of the Court, release the accused. (2) The amount deposited by the accused with the NAB shall be transferred to the Federal Government or, as the case may be, a Provincial Government or the concerned bank or financial institution, etc, within one month from the date of such deposit. (3) Notwithstanding anything contained in section 15 or in any other law for the time being in force where a holder of a public office or any other person voluntarily comes forward to return the illegal gain made by him or loss caused by him to the State exchequer through corruption and corrupt practices, the Chairman NAB may accept the offer and determination of the amount of illegal gain or loss caused, as the case may be and its deposit with Nab discharge such person of all his liabilities relates to the matter or transactions in issue provided that the matter is not under enquiry or investigation or sub judice in any Court of law.	S.17. Voluntary return, etc.---Where before the commencement of trial or at any time, thereafter with the leave of the Court, the holder of public office or any other person accused of an offence under this Act voluntarily returns to the Chief Ehtesab Commissioner, the property, assets or gains acquired through corruption or corrupt practices, and discloses the full particulars relating thereto, the Court may not proceed with the trial subject to such conditions as to fine or penalty if any, as may be imposed by the Court and on condition that he resigns from office.
S.26.???? Tender of pardon to accomplice/plea--bargaining: (a) Notwithstanding any?thing contained in the Code, at any stage of investigation or inquiry, the Chairman may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to any offence, tender a full or conditional pardon to such a person on condition of his making a full an true disclosure of the whole of the circumstances within his knowledge relating to the said offence including the names of the persons involved therein whether as principals or abettors or otherwise. (b) Every person accepting a tender of pardon under sub?section (a) shall be examined by the	S.18. Tender of pardon to accomplice.---(1) Notwith?standing anything contained in the Code, in the case of an offence punishable under this Act, at any stage of investigation or inquiry, the Chief Ehtesab Commissioner may, with the approval of the Federal Government, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a full or conditional pardon to such a person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the said offence including the names of the persons involved therein whether as principals or abettors or otherwise.

Magistrate and shall also be examined as a witness in the subsequent trial.	(2) Every person accepting a tender of pardon under subsection (1) shall be examined by the Chief Ehtesab Commissioner and shall also be examined as a witness in the subsequent trial.
(d) Where the Chairman NAB certifies that in his opinion, any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence through wilful or reckless misstatement, not complied with the condition on which the tender was made, such a person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the said matter including the offence of giving false evidence, which he knows or ought to know is false. (e) Any statement made before a Magistrate by a person who has accepted a tender of pardon may be given in evidence against him at the trial.	(4) Where the Chief Ehtesab Commissioner certifies that in his opinion any person who has, accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such a person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the said matter including the offence of giving false evidence. (5) Any statement made before the Chief Ehtesab Commissioner or the Court by a person who has accepted a tender of pardon may be given in evidence against him at such trial.
S. 27. Power to seek assistance.--- The Chairman NAB, or an officer of the NAB, duly authorised by him, shall have the power to seek full and complete assistance and call for all or any documents an information relevant to car in connection with any matter or proceeding pending before the NAB, from any department of the Federal Government, Provincial Government, local authority, bank, financial Institution, person or any authority and institution or department in the public sector or the private sector, as he may deem it fit and proper to demand or require, provided that in any case in which a question of secrecy is involved or is raised at any time, the Chairman's decision shall be final. S.28. Appointment???????? of members of the staff and officers of the National Accountability??????????? Bureau (NAB)--(a) The Chairman NAB, or an officer of the NAB, duly authorised by him may appoint such officers and staff as he may consider necessary for the efficient performance of his function: and exercise of power under this Ordinance. (b) The officers and members of staff, shall be appointed by Chairman NAB or by a person authorised by the Chairman NAB. (c) The officers and members of staff shall be entitled to such salary, allowances and other term and conditions of services as the Chairman	S.20. Powers of the. Chief Ehtesab Commissioner to seek assistance.-(1) The Chief Ehtesab Commissioner shall have the power to seek assistance and call for documents and information relevant to any proceedings pending before him under this Act, from any Department of the Federal Government or a Provincial Government, local authority, bank, financial, institution or any other person or authority and it shall be the duty of such Department, 'local authority, bank, financial institution, person or authority to render such assistance or furnish such document or information as he may require: Provided that in any case in which a serious question of banking secrecy with wider implications is raised, the Chief Ehtesab Commissioner shall first consult the Federal Government. (2) Any document or information called for under subsection (1) shall only be used for the proposes of this Act. ??????????? 21. Appointment of members of staff and officers for the Chief Ehtesab Commissioner.---(1) The members of the staff and officers of the Chief Ehtesab Commissioner shall be appointed by the Federal Government in consultation with the Chief Ehtesab Commissioner.

NAB may, with the approval of the Chief Executive, determine.	(2) The members of the staff and officers of the Chief Ehtesab Commissioner shall be entitled to such salary, allowances and other terms and conditions of service as may be determined by the Federal Government.
S.29. Accused to be competent witness.---Any person charged with an offence punishable under this Act shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him:	23. Accused to be competent witness.---Any??????????? person charged with an offence punishable under this Act shall be a competent witness for the defence and may give-evidence on oath in disproof of the charges made against him or any person charged with him at the same trial.
S.30. False evidence etc.--- (c) The proceeding under subsection (a) may be initiated by the Court on its own accord at any time after the decision of the case or, in the event that there is an appeal, after the decision thereof, or on an application made by the Prosecutor or the person accused of an offence tried by the Court, within thirty days.	S.25. Cognizance of false evidence etc.---(3) The proceedings under subsection (1) may be initiated by the Court own its accord at any time-after the decision of the case, or, in the event that there is an appeal after the decision thereof, or on an application made by the special Prosecutor or the person accused of an offence tried by the Court, within ninety days.
S.32. Appeal: *???????????* (a) Any person convicted or the Prosecutor, General, Accountability, if so directed by NAB, aggrieved by the final judgment and order of the Court under this Ordinance may, within ten days of the final Judgement and order of the Accountability Court prefer an appeal to the High Court of the Province where the Court is situated.	S.26 Appeal. Any person sentenced by the Court under this Act may, within thirty days of - the decision or the, order prefer an appeal to the Supreme Court.
S.34. The President of the Islamic Republic of Pakistan in consultation with the Chief Justice of Pakistan may make rules for carrying out the purposes of this Ordinance and the said Rules, shall on promulgation be a part of this Ordinance.	
S.35. Repeal. ---(a) The Ehtesab Act, 1997 (Act IX of 1997) shall stand repealed from the date of promulgation of this Ordinance, provided that notwithstanding the repeal Of the said Act, any proceedings pending under Ordinance CXI of 1996, Ordinance No. XX of 1997 and the Ehtesab Act, 1997, before any Court established under the said Act of 1997 and/or any of the aforesaid Ordinances amending the same, shall continue under this Ordinance as transferred under subsection (b) of section 33 to an Accountability Court.	S. 31. Repeal.---(1) The Holders of Representative??????????? Offices (Punishment for Misconduct) Order, 1977, (P.P.P.O. 16 of 1977), the Parliament and Provincial Assemblies (Disqualification?????? for Membership) Order.????? 1977 (P.P.P.O. 17 of 1977), and the? Ehtesab Ordinance, 1997 (XX of 1997), are hereby repealed. ??????????? (2) Notwithstanding the repeal of the Holders of Representative????????? Offices (Punishment for Misconduct) Order, 1977, (P.P.P.O. 16 of 1977), the????????? Parliament

(b) Any case or proceeding pending under the aforesaid Ordinances and the Act of 1997 immediately before the commencement of this Ordinance and transferred to any Court established under this Ordinance shall be proceeded with and all subsequent proceedings shall be completed in accordance with an under the provisions of this Ordinance.	and Provincial??????????? Assemblies (Disqualification for Membership), Order, 1977, (P. P. P.O. 17 of 1977), and the Ehtesab Ordinance, 1997 (XX of 1997), -- (a) any proceeding pending before the special Court under the said orders shall continue as if the said orders had not been repealed. (b) any proceeding pending before the Special Court under the said Orders shall continue as if the said Orders had not been repealed: (b) any appointments made under the Ehtesab Ordinance, 1997 (XX of 1997), including specifically that of the Chief Ehtesab Commissioner by the President shall continue for the appointed terms; and (c) any proceedings, pending before a Court under the Ehtesab Ordinance, 1997 (XX of 1997); shall continue under this Act and it shall not be necessary to re-call any witness or once again record any evidence that may have been taken down.

The third part consists of altogether new provisions, phraseology whereof has been borrowed/taken from other enactments. It reads:

NEW SECTIONS OF NAB ORDINANCE
WITH CORRESPONDING PROVISIONS
IN OTHER STATUTES

NEW SECTIONS IN NAB ORDINANCE	CORRESPONDING PROVISION IN OTHER STATUTES
S. 5(c) "Assets" means any property owned, controlled by or belonging to any accused, whether directly or indirectly, or held Benami in the name of his spouse or relative or associate, whether within or outside Pakistan, for which they cannot reasonably account, or for which they cannot prove payment of full and lawful consideration;	S.2 (b) "assets" means any property owned, controlled or belonging to an accused, whether directly or indirectly, or whether within or without Pakistan for which they cannot reasonably account; (Control of Narcotic Substances Act, 1997)
5(d) "Associates" means- (i) any individual who is or has been managing the affairs for or keeping accounts of the accused or who enjoys or has enjoyed any benefit from the assets referred to above; (ii) any association of persons, body of individuals, partnership firms or private limited companies within the meaning of Companies Ordinance, 1984, of which such a person is or has been a member, partner or director or which has been promoted, floated, established or run by the same group of persons;	S. 2 (c) "associate", in relation to an accused, means- (ii) any individual who, is or has, at the relevant time been managing the affairs or keeping the accounts of an accused; (iii) any association of persons, body of individuals, firm or private limited company within the meaning of Companies Ordinance, 1984 (XLVII of 1984), of which an accused is, or has, at the relevant time been a member, partner or director:

(iii) any trustee of a private trust; and (iv) any person who ostensibly holds or is in possession or custody of any property of an accused on his behalf for the benefit and enjoyment of .the accused	(iv) any individual who is, or has been, at the relevant time a member, partner or director of any association of persons, body of individuals, firm or a private limited company referred to in sub-clause (iii); (v) a trustee of any trust created by an accused; or (vi) where the Special Court, for reasons to be recorded, considers that any property of an accused is held on his behalf by any other persons, such other person; (Control of Narcotic Substances Act, 1997)
5(fa) Conciliation Committee means the conciliation committee constituted under section 25-A;	S.2(b) "Conciliation Court: mean a Conciliation Court constituted under this Ordinance; (Conciliation Courts Ordinance 1961)
5(h) "Judge" means, a person who has been a Judge of the High Court, is, or has been a District and Sessions Judge qualified to be a Judge of the High Court or any lawyer who is qualified to be a Judge of the High Court;	S.3(3)(a) a Chairman, being a person who is, or has been or is qualified to be, Judge of a High Court; (Service Tribunals Act, 1973)
5(j) "Deputy Chairman" means the person appointed as Deputy Chairman of the National Accountability Bureau by the President of the-Islamic Republic of Pakistan;	----------
5(o) "Person" unless the context otherwise so requires, includes in the case of a corporate body, the sponsors, Chairman, Chief Executive, Managing Director, elected Directors, by whatever name called, and guarantors of the company or any one exercising direction or control of the affairs of such corporate body, and in the case of any firm, partnership or sole proprietorship, the partners, proprietors or any person having interest in the said firm, partnership or proprietorship, concern or direction or control thereof;	S.5(o)Explanation (ii) "person" includes a Hindu undivided family, a firm, an association or body of individuals, whether incorporated or not, a company and every other judicial person; (The???? Banking??????????? Companies Ordinance, 1962)
5(q) "Government Property" means both moveable and immovable properties belonging to the Government and includes gifts, donations, financial assistance, grants, aid received or collected in whatever name or for whatever purpose during the tenure of office;	S. 2(z) "Property" includes:- (i) all forms of property, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, real estate or personal property of every description; (ii) property used to commit, or to abet the commission of, an offence punishable under this Act;

	(Control of Narcotic Substances Act, 1997)
5(r) "Wilful default" a person is said to commit an offence of wilful default under this Ordinance if he does not pay, or continues not to pay, or return or repay the amount to any bank, financial institution, cooperative society, or a Government department or a statutory body or an authority established? or controlled by a Government on the date that it became due as per agreement containing the obligation to pay, return or repay or according to the laws, rules, regulations, instructions, issued or notified by the State Bank of Pakistan, or the bank, financial institution, cooperative society Government? Department statutory body or??????????? an authority established or controlled by Government, as the case may be and a period of 'thirty days ha expired thereafter: Provided that it is no wilful default under this Ordinance if the accused was unable to pay, return or repay the amount as aforesaid on account of any wilful breach of agreement or obligation or failure to perform statutory duty on the part of any bank, financial institution, cooperative society or a Government department or a statutory body or an authority established or controlled by Government.	? ---------
S.6.(a).... (b) Chairman NAB. (i) ..... (ii) The Chairman NAB shall be appointed on such terms and conditions and shall have the status and privileges as may be determined by the President. (iii) The Chairman NAB may resign his office by writing under his hand addressed to the President. (iv) The Chairman NAB may delegate any of his powers to, an Authorize performance of any of his functions by, an officer of the NAB as he may deem fit and proper, subject to such conditions, if any, as may be specified in the order, to carrying out the purposes of this Ordinance.	S.6. <u>Federal Tax Ombudsman.---</u> (1) The Federal Tax Ombudsman shall be entitled to such salary; allowances and privileges and other terms and conditions of service as the President may determine .... 4. (2) The Federal Tax Ombudsman may resign his office by writing under his hand addressed to the President. (Establishment of Office of Federal Tax Ombudsman Ordinance, 2000) -------
(c) <u>Acting Chairman, National Accountability Bureau.---</u>As and when the Chairman NAB is absent or unable to perform the functions of his office due to any reason whatsoever, the Deputy Chairman will act as the Chairman NAB, and in case the Deputy Chairman is absent or unable to perform the functions of the	7. Acting Federal Tax Ombudsman.---At any time when the office of the Federal Tax, Ombudsman is vacant, or the Federal Tax Ombudsman is absent or unable to perform his functions due to any cause, the President shall appoint an Acting Federal Tax Ombudsman. (Establishment of Office of Federal Tax??????????? Ombudsman Ordinance, 2000)

office, any other person duly authorized by the Chairman NAB, to act as Chairman NAB.	
S.7. Deputy Chairman, National Accountability Bureau.--- (a) There shall be a Deputy Chairman NAB appointed by the President in consultation with the Chairman NAB. The Deputy Chairman shall assist the Chairman in the performance of his duties and carry out such functions as may be directed by the Chairman. (b) The Deputy Chairman shall serve at the pleasure of the President.	---------
S.9. Corruption???????? and ????? Corrupt practices. (vi) misuses his authority so as to gain any benefit or favour for himself or any other person or to, render or attempt to do so or wilfully fails to exercise his authority to prevent the grant, or rendition of any undue benefit or favour which he could have prevented by exercising his authority; or (vii) if he has issued any directive, policy, or any SRO (Statutory Regulatory Order) or any other order which grants or enables any concession or benefit in any taxation matter or law or otherwise so as to benefit himself or any relative or associate or a benamidar or any other person; or (viii) if he commits an offence of wilful default.	S.5(c)(d) S.5. Criminal Misconduct. (c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use an property entrusted to him or under his control as a public servant or allows any other person so to do; or (d) if. he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; (Prevention of Corruption Act, 1947)
S. 12--- Power to freeze property. ??????????? Provided that any order of seizure, freezing, attachment order mentioned above by the Chairman NAB, shall remain in force for a period not exceeding 30 days unless confirmed by the Accountability Court, where the Reference under this Ordinance Provided further that notwithstanding that the order of NAB or the Court shall be effective from the time of passing thereof or proclamation thereof in a newspaper, widely circulated and dispatch at the last known address of the accused either by registered post A.D. or courier service or any other mode of electronic media as the Court may deem proper having regard to the facts and circumstances of the case.	S.37(1)(2) Freezing of assets, etc.---(1) Where the Special Court trying an offence punishable under this Act is satisfied that there appear reasonably grounds for believing that the accused has committed such an offence, it may order the freezing of the assets of the accused, his relatives and; associates. (2) Where in the opinion of the Director-General or an officer authorised under section 21 an offence is being or has been committed, he may freeze the assets of such accused and within seven days of the freezing shall lace before the Court the material on the basis of which the freezing was made and further continuation of the freezing or otherwise shall be decided by the Court.
S. 12(f). That the order of freezing mentioned above in section 12(a) to (e) shall, as the case	S.37 (2). Where in the opinion of the Director General or an officer authorised under section

may be, remain operative until final disposal by the Accountability Court or the Appellate??????????? Forum, notwithstanding filing of or pendency of an appeal under this Ordinance	21 an offence is being. or has been committed, he may freeze the assets of such accused and within seven days of the freezing shall place before the Court the material on the basis of which the freezing was made and further continuation of the freezing or otherwise shall be decided by the Court. (Control of Narcotic Substances Act, 1997)
S.14.???? Presumption against accused accepting illegal gratification. (d) Where a person is accused of an offence under, section??? 9(a) (vi) and (vii), the burden of proof that he used his authority, or issued any directive, or authorised the issuance of an policy or statutory rule or order (SRO), or made any grant or allowed any concession, in the public interest, fairly, justly, and for the advancement of the purpose of the enactment under which the authority was used, directive or policy or rule or order was issued or grant was made or concession was allowed shall lie on him, and in the absence of such proof the accused shall be guilty of the offence, and his conviction shall not be invalid by the reason that it is based solely on such presumption.	S.68. Presumption to the assets acquired through dealing in narcotics,---Where there is reasonable ground to believe that the assets of a person or any-part thereof were acquired before or at the time of, or after the commission of an offence under this Act and there was no other likely source of acquiring such assets on part thereof, it shall be presumed, unless the contrary is proved, that such assets or part thereof were acquired, generated or obtained through cultivation, manufacture, production, sale, purchase, dealing or trafficking of narcotic drugs, psychotropic substances or controlled substances. (Control of Narcotic Substances Act, 1997)
S.15. Disqualification to contest elections or to hold public office. Provided that any accused person who has availed the benefit of section 25 of this Ordinance shall also be deemed to have been convicted for an offence under this Ordinance, and shall stand disqualified for 21 years as above. (b) Any person convicted of an offence of corruption and/or corrupt practices as described at serial No. 1 of the Schedule shall not be allowed to apply for or be granted or allowed any financial facilities in the form of-any loan or advances from any bank or financial institution in the public sector, for a period of 10 years from the date of conviction.	---
S.16. Trial of offences. (b) The Court shall sit at such place or places as the Government may, by order, specify in this behalf.	S.15.???? Place of Sitting--- (1) Subject to subsections (2) and (3) a special Court shall ordinarily sit at such place or places as the Government may, by order, specify in that behalf. (Anti-Terrorism Act, 97) S.13. Establishment of Special Courts. (4) Notwithstanding anything contained in subsection (2) and subsection (3), the Federal Government or if so directed by the Government, the Provincial Government shall in addition to the existing Special Courts or

(c) Where more Courts than one have been established for an area, the Chief Justice of the High Court of the Province concerned shall, keeping in view the seniority and. status of the Judges of various Courts, designate a Judge of any such Court to be an Administrative Judge. (d) Notwithstanding anything contained in this section, if in respect of any case relating to an offence triable under this Ordinance, the Chairman NAB, having regard to the facts and circumstances of the case may tile a reference before, any Accountability Court established anywhere in Pakistan, and such Court shall have the jurisdiction to try the same.	such other special Courts as may be established in the area, establish one such additional special Court under this Act at the principal seat of the Lahore High Court and the High Court of Sindh and appoint a Judge of such High Court as a Judge of Special Court in consultation with the Chief Justice of the High Court concerned, and where a Judge of a High Court is appointed as Judge for any area under this Act he shall be the Administrative Judge for that area and such Administrative Judge may, in addition to the powers exercisable under this Act, either suo motu or on the application of any party, at any stage of the proceedings whether before or after the framing of charge, for sufficient cause including as mentioned in subsection (1) of section 28, transfer, withdraw or recall any case pending before any other special Court in that area and may either try the case himself or make it over for trial to any other special Court in that area. (Anti-Terrorism Act, 1997)
16-A. Transfer of cases.- (a) Notwithstanding anything contained in any other law for the time being in force, the Chairman NAB may apply to any Court of law or Tribunal that any case involving a scheduled offence under this Ordinance pending before such Court or Tribunal shall be transferred to a Court established under 'this Ordinance, then such other Court or Tribunal shall transfer the said case to any Court established under this Ordinance and it shall not be necessary for the Court to recall any witness or again to record any evidence that may have been recorded. (b) In respect of any case pending before a Court established under this Ordinance, the. Chairman NAB having regard to the facts and circumstances of the case and in the interest of justice and for the protection and, safety of witnesses it is necessary that such case is transferred for trial may direct the Prosecutor General Accountability to apply for the transfer of the case from any such Court in one Province to a Court in another Province or from one Court to a Court in another Province or from one Court in a Province to another Court in the same Province, provided that- (i) in case the transfer is intended from a Court in a Province to a Court in another Province to the Chief Justice of Pakistan; and? (ii) in case the transfer is intended from one Court in a Province to another Court in the same Province to the Chief Justice of the High Court and if the Chief Justice of Pakistan or, as the case may be, the Chief Justice of High Court considers it expedient in the interest of justice so to do, he may transfer the case from one Court to another Court and case so transferred shall be tried under this Ordinance without	S.49. Transfer of cases:- (1) Where more Special Courts than one are established within the territorial jurisdiction of a High Court, the High Court may, by order in writing, transfer a case, at any stage, from one special Court to another special Court in accordance with section 526 of the Code as if the special Court were a Court of Session. (2) On the establishment of Special Courts under sections 45 and 46, all cases where the sentence of an offence is two years or less, shall stand transferred to the respective special Court comprising a Judicial Magistrate of the First Class and all other cases to the respective special Courts comprising of Sessions Judges of Additional Sessions Judges. (3) Notwithstanding anything hereinbefore contained, a remand may be granted by the nearest Special Court comprising a Judicial Magistrate of the First Class. (Control of Narcotic Substances Act, 1997)

recalling any witness whose evidence may have been recorded.	
S.20. Reporting of suspicious financial transactions. (a) Not?withstanding anything contained in any law for the time being in force, it shall be the duty of all banks and financial institutions to take prompt and immediate notice of all unusual or large transactions with context to the account, which have no apparently genuine economic or lawful purpose and upon bona tide professional judgment of the. Bank suspicion that such transactions could constitute or be related to illegal or illicit activities, corruption or corrupt practices, the manager or director of such financial institution shall report all such transactions to the Chairman NAB forthwith by the quickest possible mode of communication to be confirmed in writing. (b) Whoever fails to supply the information in accordance with subsection (a) shall be punishable with rigorous imprisonment which may extend to 5 years, or with fine, or with both. (c) Where there are reasonable grounds to believe that the assets of a person or any art thereof were acquired through corruption or corrupt practices, and there was no other likely source of acquiring such assets or part thereof, .it shall be presumed, unless proved to the contrary by the accused person, that such assets or part thereof were acquired,??????????? generated or obtained through corruption and corrupt practices.	S.12. Fidelity and Secrecy. (4) Notwithstanding anything contained in subsections (1) and (2), the State Bank shall prepare, and submit to the Federal Government a special report every year on cases of write-off of loans, mark-up and other dues, or financial relief through a re? scheduling and restructuring of loans and subsidized loans provided by the nationalized commercial banks, in which established banking practices or authorized procedures have been departed from with a view to causing wrongful loss to the bank or conferring wrongful gain on any constituent or such departure has caused wrongful loss to the bank or conferred wrongful gain on any constituent. If the matters raised in the report relate to public interest, the Federal Government may, submit the report, or such part of its as relates to public; interest, to Parliament or to the Standing Committee of a House of Parliament dealing with Finance. (5) Notwithstanding anything contained in subsections (1) to (4) or any other law for the time being in force, the Council shall, as and when directed by the Federal Government publish a list of persons from whom any loans, advances or credits amounting to one million rupees or more obtained from a bank, financial institution, cooperative society or corporate body, either in their own names or in the names of their spouses, dependents or business concerns, whether mainly owned by them or have any share in such business concerns, whether mainly owned by them or have? any share in such business concerns, were due and have not been paid back for more than one year till the date as directed by the Federal Government. (The Banks (Nationalization) Act, 1974)
S.21. International Cooperation Request for mutual legal assistance: The Chairman NAB or any officer authorized by the Federal Government may request a Foreign State to do the following acts in accordance with the law of such State:- (a) have evidence taken, or documents or other articles produced; (b) obtain and execute search warrants or other lawful instruments authorizing search for things relevant to investigation or proceedings, in Pakistan believed to be located in that State, and if found, seize them; (c) freeze assets, by whatever processes are lawfully available in that State, to the extent to	S.57. Mutual legal assistance requests by Pakistan- (1) The Federal Government or an officer authorised by the Federal Government under subsection (3) of section 56 may request a foreign State to:- (a) have evidence taken, or documents or other articles produced; (b) obtain and execute search warrants or other lawful instruments authorising a search for things relevant to investigations or proceedings in Pakistan believed to be located in that State, and if found, seize them; (c) freeze assets, the subject of actions .or orders under sub?section (2) of section 37, by

which the assets are believed on reasonable grounds to be situated in that State; (d) confiscate articles and forfeit assets to the extent to which the articles or assets, as the case may be, are believed to be located in that State; (e) transfer to Pakistan any such evidence, documents, things, articles? assets or prods realized from the disposal of such articles or assets; and (f) transfer in custody to Pakistan a person detained in the foreign State who consents to assist Pakistan in the relevant investigation or proceedings.	whatever processes are lawfully available in that State, to the extent to which the assets are believed on reasonable grounds to be located in that State; (d) confiscate articles the subject of orders under subsection (2) of section 33 and forfeit assets the subject of orders under sub?section (2) of section 39 to the extent to which the articles or assets, as the case tray be, are believed to be located in that State; (e) transmit to Pakistan any such evidence, documents, things, articles, assets or proceeds realized from the disposal of such articles or assets; and (f) transfer in custody to Pakistan a person detained in the foreign State who consents to assist Pakistan in the relevant investigation or proceedings. (Control of Narcotic Substances Act, 1997)???????????
S.22. Jurisdiction (a) The Chairman NAB may investigate any suspected offence which appears to him on reasonable rounds to involve serious offences as given in the Schedule to this Ordinance, and has been referred to him, or of his own accord. (b) The Chairman NAB may, if he thinks tit, conduct any such investigation in conjunction with any other agency or any other person which/who is, in the opinion of the Chairman NAB, a proper Agency or person to be concerned in it.	-------
23. Transfer of property void. ?(a) Notwithstanding anything contained in any other law for the time being in force after the Chairman NAB has initiated investigation into the offences under, this Ordinance, alleged to have been committed by an accused person, such person or any relative or associate of such person or any other person on his behalf, shall not transfer by any means whatsoever, create a charge on any movable or immovable property owned by him or in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the. Accountability Court; and any transfer of any right, title or interest or creation of a charge on such property shall be void. (b) Any person who transfers, or creates a charge on property in contravention of subsection (a) shall be punishable with rigorous imprisonment for a term, which ma extend to three ears and shall also be liable to fine not exceeding the value of the property involved.	S.7-Transfer of property void. ?(1) After a special Court has taken cognizance of a scheduled offence alleged to have been committed by an accused person, such person or any relative of such person or other person on his behalf shall not, without the previous permission in writing of the Special Court, transfer, or create a charge on, any movable or immovable property owned by him or in his possession, while proceedings are pending before the Special Court; and any transfer of, or creation of a charge on, such property without such permission shall be void. (2) Any person who transfers, or creates a charge on, any property in contravention of subsection (1) shall be punishable with rigorous imprisonment for a term which may extend to three years and shall also be liable to fine. (Offences in respect of Banks (Special Courts) Ordinance, 1984)

S.24. Arrest. (e) All persons presently in custody shall immediately upon coming into force of this sub?section, unless previously produced before an Accountability Court, be produced before such Court as provided in subsection (d) and the Order authorising retention of custody by NAB shall be deemed to relate to the date of arrest. ? (f) The Chairman, NAB may declare and notify any place as a police station or sub-jail at his discretion.	6.(9) The Force may, in accordance with the law, establish as many police stations as are required for the efficient functioning of the Force and all police stations of Anti-Narcotics Task Force and Pakistan Narcotics Control Board shall be deemed to be the police stations of the Force; Explanation. ---For the purpose of this Act, the expression "police station" means and includes any place declared as such, by the Federal Government or a Provincial Government to be a police station within the meaning of the Code. (Anti-Narcotics Force Act, 1997)
S.25-A. Payment of Loans etc. (a) Where a person has been arrested or is in-the custody of NAB of apprehends such arrest or custody for the investigation of the charge against him of committing an offence of wilful default on account of non-?payment of dues to a bank or a financial institution or cooperative society, he may at any stage before or after such arrest or before, during or after such custody or investigation apply to the Governor State Bank of Pakistan for reconciliation of his liability through the conciliation committee and the Governor may, if he deems fit, refer the matter to the conciliation committee. (aa) The Governor, State Bank of Pakistan, shall constitute one or more conciliation committees for the purposes of this Ordinance. (b) The Conciliation Committee shall consist of a nominee of the Governor, State Bank of Pakistan; being a senior officer of the State Bank well-qualified in the profession of banking who shall be the Chairman of the Committee, two nominees of the NAB to be nominated by the Chairman NAB, two Chartered Accountants to be nominated by the Governor, State Bank of Pakistan, one Chartered Accountant to be nominated by the Council of the Institute of Chartered Accountants of Pakistan, Karachi, such nomination to be obtained by the Governor, State Bank of Pakistan, a Chartered Accountant to be nominated by the lender bank or financial institution. Explanation.-Where the lender is a consortium or group of banks or financial institutions, the lender means the lead bank or financial institution. (bb) The Chairman of the Conciliation Committee shall convene the meetings and	4(1). Where a case is, under this Ordinance, referable to conciliation, any party to the dispute may, in the prescribed manner, and on payment of the prescribed fee, apply to the Chairman of the Union Council concerned for, as the case may, to the member representing the ward or, in the case of a ward which has more members than one, to such one of them as may be determined in??????????? the prescribed manner for the constitution of a Conciliation Court for the settlement of the dispute and unless the Chairman or, as the case may be,, the member, for reasons to be recorded in writing, rejects the application, he shall proceed to constitute, in the prescribed manner, a Conciliation Court for the purpose: 5(1). A Conciliation Court shall be a body consisting of a Chairman and two representatives to be nominated, in .the prescribed manner, by each of the parties to the dispute. (The Conciliation Courts Ordinance, 1961.)

conduct proceedings of the Committee in the manner he deems tit.

(c) The Conciliation Committee, after examination of the record of the lending bank or financial institution and the borrower and after hearing the parties through their Chartered Accountant, shall determine the amount outstanding against the borrower calculated in accordance with law, rules, regulations and circulars of the State Bank of Pakistan and further determine the manner and the schedule of repayment having regard to the facts of each case. The borrower, if he so desires, shall be heard at commencement and before the conclusion of proceedings:

Provided that the borrower shall have the right to have access to, and instruct, the Chartered Accountant representing him before the Conciliation Committee even if the borrower is in the custody, during the proceedings of the Conciliation Committee.

(d) The Conciliation Committee shall conclude the reference within thirty days and. its recommendations shall be recorded by its Chairman and shall contain the views of all members of the Committee. The recommendations of the Conciliation Committee shall be submitted to the Governor, State Bank of Pakistan.

(e) The Governor, State Bank of Pakistan shall consider the recommendations submitted to him under subsection (d) and may accept the recommendations or may, for reasons to be recorded, pass such other appropriate order thereon as he deems fit. The acceptance of the recommendations of the Committee or passing any other order as aforesaid shall constitute the decision of the Governor, State Bank of Pakistan:

(f) Where the borrower undertakes to repay the amount as determined by the Conciliation Committee or the Chairman NAB, as the case may be, the Chairman NAB may release the accused for the purpose of this Ordinance.

(g) Notwithstanding anything contained in this Ordinance or any other law for the time being in force, if the Chairman NAB is satisfied that any agreement entered into between a bank or a financial institution, a cooperative society and a lender is vitiated by the provisions of section 23 or any other provision of the Contract Act, 1872 (IX of 1872), or any other law or the same is collusive or is against public interest, he may refuse to take such agreement into consideration for the purposes of conciliation Committee or the conclusion drawn by them.

(h) In the event of failure either of the Conciliation Committee to conclude the reference within thirty days of they commencement of the conciliation proceedings or the failure of the borrower to accept and implement the decision of the Governor, State

Bank of Pakistan regarding the payment and matters relating thereto, such failure to accept or implement the decision shall be referred to the Accountability Court subject to the provisions of section 31-D and the Court may proceed with the case thereafter; Provided that the period of thirty days may be extended by the Governor, State Bank of Pakistan by such further period or periods as he may find necessary having regard to the facts and circumstances of the case and for reasons to be recorded.	10. Where a certificate is issued that conciliation has failed, other under clause (b) of subsection (4) of section 5 or under sub-section (3) of section 8, any party to the dispute may seek its remedy in the Court in which it would in law be entitled- to seek such remedy if this Ordinance had not been promulgated. (The Conciliation Courts Ordinance 1961.)
S.28. Appointment of Officers and Staff in the National Accountability Bureau. (d) Subject to subsection (e) the provisions of the Civil Servants Act, 1973 shall not apply to the persons appointed in NAB. (e) Nothing contained in sub?section (d) shall apply to a person who is a civil servant within the meaning of the law relating to appointments as civil servants of the Federation or a Province and is deputed to or posted in NAB.	--------
S.31. Prohibition to hamper investigation: (a) Notwithstanding any? thing contained in any other law for the time being in force, if any person concerned with the inquiry and investigation and prosecution of a case consciously and, deliberately and with malice aforethought compromises, hampers, misleads, jeopardizes or defeats an investigation of a case under process before NAB or any concerned agency or, authority or any Courts or a Court, he shall be deemed to??? have committed the scheduled offence of corrupt practices and/or corruption. (b) No person will be proceeded with under this section except with the sanction of a Committee composing the Chairman NAB, Deputy Chairman NAB and the Prosecutor General Account?ability.	17. Obstructions to officers? ?Whoever hinders or obstructs any officer in the performance of his functions under this Act or wilfully furnishes w such officer any information which is, to his knowledge or belief, false in material particulars shall be punishable with rigorous imprisonment for a term which may extended to three years, or with fine, or with both. (The Control of Narcotic Substances Act, 1997)
S.31-A. Absconding to avoid service of warrants. Whoever absconds in order to avoid being served with any process issued by any Court or any other authority or officer under this ordinance or in any manner prevents, avoids or evades the service on himself of such process or conceals himself to screen himself from the proceedings or punishment under this Ordinance shall be guilty of an offence punishable with imprisonment which may extend to three years notwithstanding the provisions of sections 87 and 88 of Code of Criminal Procedure, 1898, or any other law for the time being in force.	87. Proclamation for person absconding. (1) if any Court is satisfied after taking evidence that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation. (The Criminal I Procedure Code, 1898)

S.31-B. Withdrawal from prosecution. Where at any stage of the proceedings, the Chairman NAB is of the opinion that ends of justice so require he may direct the Prosecutor General Account?ability to withdraw from prosecution of any person under this Ordinance and upon such withdrawal the accused shall be released if not required in any other case under this Ordinance.	494. Effect of withdrawal from prosecution. Any Public Prosecutor may, with the consent of the Court, before the judgment is pronounced, withdraw from the prosecution of any person either generally of in respect of any one or more of the offences for which he is tried; and upon such withdrawal,-- (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences; (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences. The Criminal Procedure Code, 1898)
S.31-C. Court to take cognizance of offence with prior approval of the State Bank. No Court established under this Ordinance shall take cognizance of an offence against an officer or as employee of a bank or financial institution for writing off, waiving, restructuring or refinancing any financial facility, interest or mark-up without prior approval of the State Bank of Pakistan.	-------
S.31-D. Inquiry, investigation or proceedings in respect of imprudent bank loans, etc. ?Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from Governor, State Bank of Pakistan: Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000, shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan.	----------
S.32. Appeal (b) All Appeals against the final Judgment filed before the High Court will be heard by a Bench of not less than two Judges constituted by the Chief Justice of the High Court and shall be finally disposed of within thirty days of the tiling of the appeal.	48. Appeal. (1) An. appeal against the order of a Special Court comprising a Sessions Judge or an Additional Sessions Judge shall lie to the High Court and shall be heard by a bench of not less than two judges of that Court.

(c) Notwithstanding any other law for the time being in force or this Ordinance, no appeal against any interlocutory order of the Court during the proceedings pending before it under this Ordinance, shall lie and an appeal shall lie only against the Final Judgment of the Court. (d) No stay of proceedings before the Court shall be granted by any Court on any ground whatsoever, nor proceedings thereof be suspended or stayed by any Court on any ground whatsoever.	(2) An appeal against the order of the special Court comprising a Judicial Magistrate shall lie to a special Court comprising a Sessions Judge or an Additional Sessions Judge. (The Control of Narcotic Substances Act, 1997)
S.36. Indemnity. No suit, prosecution, or any other proceedings shall lie against the Federal Government, Provincial Government, Chairman NAB, or any other member of the NAB or any person exercising any power or performing an function under this Ordinance or the Rules made hereunder for any act or thing which has been done in good faith or intended to be done under this Ordinance or the rules thereof.	75. Indemnity. No suit, prosecution or other proceedings shall lie against the Federal Government or Provincial Government or any officer of the Federal Government Or of a Provincial Government for anything in good faith, done or intended to be done in pursuance of this Act or the rules made thereunder. (The???? Control of Narcotic Substances Act, 1997)
S.37. Removal of difficulties order. The President may for the purpose of removing any difficulties in the enforcement of this Ordinance may make modifications, additions or omissions as may be deemed necessary, or expedient for the interest of the State.	20. Power to remove difficulties. ?(1) If any difficulty arises in giving effect to the provisions of this Act, the Federal Government may by order published in the official Gazette, make such provisions not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removal of the difficulty. (The Employment of Children Act, 1991)

155.???????????????? The NAB Ordinance is sought to be struck down insofar as it:

--???????? creates a parallel and non-federal judicial system;

--???????? denies the trial and appellate courts the power to grant bail and to suspend ??????? sentences and vests the power to grant bail in the executive (Chairman NAB);

--???????? allows the prosecution to detain a person for 90 days without so much as an initial duly formulated and precise FIR;

--???????? provides for unfair procedure in derogation of due process;

--???????? creates new offences;

--???????? is in vague, un-precise and sweeping language;

--???????? reverses, for these offences, the burden of proof; and

--???????? applies them retrospectively;

--???????? delegates unfettered and unguided discretion to the executive, particularly as to the venue of the trial (question of federalism), plea bargaining and settlements;

--???????? denies altogether the right of appeal in certain circumstances;

156.???????????????? It is also the case of the petitioners that some of the provisions of the NAB Ordinance are in conflict with some of the Fundamental Rights as also other provisions of the Constitution;

--???????? It has been promulgated by the Federal Government without any legislative competence;

--???????? It does not merely create a parallel judicial system, but a parallel system enabling the executive to exercise judicial powers, which is beyond the authority of the present dispensation, in that, conferment of judicial powers on the executive cannot be countenanced in law;

--???????? It provides criminal penalty for civil debt/contractual obligations, default whereof was not punishable at the time of the execution of agreements in question, and even in the case of continuing breach, the same cannot be converted into an offence being hit by Article 12 (2) of the Constitution;

--???????? It is unfair, unjust, inequitable and against the accepted norms of jurisprudence as held by this Court in the cases of *Mehram Ali and others v. Federation of Pakistan and others* (PLD 1998 S.C. 1445) and *Sh. Liaquat Hussain* v. *Federation of Pakistan* (PLD 1999 S.C. 504);

--???????? It violates? the provisions of sections 154, 200, 156, 157, 202, 167(4), (5), (6) & (7), 169, 172, 173, 177, 179, 180, 185, 512, 494, 417 of the Code of Criminal Procedure, section 201 PPC and Article 203 of the Constitution;

--???????? The power of transfer/withdrawal of cases from the courts of ordinary jurisdiction for trial in the Accountability Courts without the approval of the Court, vested in Chairman NAB, being uncontrolled militates against the concept of independence of judiciary;

--???????? Fundamental Rights cannot be suspended in view of the judgment in *Syed Zafar Ali Shah* v. *General Pervez Musharraf* (PLD 2000 S.C. 869) and this Court, in the exercise of its jurisdiction under Article 184(3) of the Constitution, can strike down the NAB Ordinance, being violative of Articles 8, 10 and 12 of the Constitution;

--???????? Some provisions of the NAB Ordinance are *intra vires* and others are *ultra vires*, but the doctrine of severability is not attracted in these cases, in that, the good parts cannot be separated from the bad ones and therefore the entire NAB Ordinance should be struck down in view of the fact that the field is totally and adequately occupied by the existing laws on the subject;
It is an *ex post facto* law, the very thought whereof is abhorrent to the administration of justice;

--???????? It is not a mere procedural law, but a substantive law and therefore the rules of evidence to reduce the rigour of standard of proof are unsustainable;

157.???????????????? The case of the Federation/respondents is that the NAB Ordinance does not suffer from any legal infirmity inasmuch as:

--???????? It is a valid piece of legislation made and promulgated by the competent authority under the Chief Executive?s Order No. IX of 1999 dated 15.11.1999, as amended from time to time;

--???????? The legislation has been duly acted upon and is being administered throughout the country inasmuch as numerous Accountability Courts have been established and Judges have been appointed to such courts in consultation with the Chief Justice of Pakistan.? This ensures the independence of the courts and the judiciary in general.? All these Courts are presided over by serving and retired District & Sessions Judges, who are under the direct supervisory control of the Chief Justices of the respective High Courts of the four Provinces;

--???????? The NAB Ordinance is a special law falling in the series seeking to combat the evil of high level corruption.? For the first time, through the NAB Ordinance, members of hitherto an untouchable class of influential and powerful persons, not merely restricted to holders of public offices, but also including bankers, businessmen, industrialists, bureaucrats and other persons, who are involved in corruption and corrupt practices as defined in the NAB Ordinance, fall within the purview of accountability in an effective and coherent manner;

The NAB Ordinance seeks to

(i) re-define certain offences and re-prescribe their punishments;
(ii) provide for Special Courts and procedure for trial of specified offences;
(iii) provide for special agency for pre-trial investigation/inquiry, namely, the National Accountability Bureau;

One of the objectives of the NAB Ordinance is the retrieval of the looted public money.? It also provides for ?plea bargaining?, which appears for the first time in such a law in Pakistan and in consequence

1064.600 million rupees have been recovered during a short span;

--???????? Up to 2.4.2001, 759 authorized investigations have been undertaken by the NAB out of which 143 have been completed while 586 are in progress and 30 have been closed or suspended.? Similarly out of 261 filed in the Accountability Courts, 120 have been decided with 73 convictions and 16 acquittals.? 46 ?plea bargaining? cases were concluded while 13 were rejected.? Only 36 accused are in NAB custody for interrogation, 156 are in the judicial lock-ups, 56 have been released and 69 are at large;
The NAB Ordinance was framed keeping in mind Articles 175, 202 and 203 of the Constitution and the principles laid down in *Mehram Ali?s case (supra)*;

--???????? It does not create a new offence with retrospective effect, but an offence, which is in the nature of continuation of ?wilful default? after coming into force of the NAB Ordinance;

--???????? Section 5(r) does not negate the freedom of trade, business and profession as contemplated in Article 18 of the Constitution.? It merely seeks to penalize deliberate evaders of due payments to financial institutions.? Prosecution of genuine cases where there are no deliberate and wilful evasions is abandoned within the contemplation of the NAB Ordinance;

--???????? Section 5 (r), no doubt, is a constitutional deviation in view of the provisions of Article 12 (2) of the Constitution, but on the ground of state survival and having regard to the objectives of the Chief Executive coupled with the law declared *in the case of Syed Zafar Ali Shah (supra),* no objection can be taken to section 5 (r), particularly when adequate safeguards have been provided by making appropriate amendments in the Ordinance;

--???????? Conciliation Committee has been established and no proceedings against the loan defaulters can be initiated by the NAB without the recommendation of the Governor, State Bank of Pakistan.? However, section 25-A requires to be further suitably amended so as to empower the Court of competent jurisdiction to decide as to whether or not accept the agreement/conciliation reached between the parties;

--???????? The NAB Ordinance does not contravene the provisions of Articles 23/24 of the Constitution, in that, freezing of property of the accused persons (ill-gotten properties) is merely an interlocutory measure;

--???????? The vires of the NAB Ordinance cannot be tested on the touchstone of the Fundamental Rights, which stood suspended by the Proclamation of Emergency of 28th May 1998, which has been upheld by this Court in *Syed Zafar Ali Shah?s case (supra);*
The burden of proof on accused is not an alien concept in jurisprudence.? There are number of existing laws, which place the burden of proof on the accused and/or require an accused to rebut a statutory presumption.? Such a course is not violative of the equality clause(s) of the Constitution;

--???????? The choice of Court to which a reference is sent for trial is a matter of procedure and no body has a vested right to demand that his case be tried by a particular Court/Bench;

--???????? The power conferred on Chairman NAB is not uncontrolled and his discretion is to be exercised judiciously having regard to the provisions of section 24A of the General Clauses Act, 1897, which require reasons to be recorded in writing for a deviation while passing any discretionary order;?

--???????? The provisions of the Ordinance are in conformity with the established principles of procedure for criminal proceedings;

--???????? The nature of investigation and inquiry under the NAB Ordinance is of special kind, which entails inquiry and investigation into such offences, and in most cases requires tedious efforts including careful perusal of voluminous records of companies/banks, which cannot be completed overnight and therefore the period of 90 days for custody has been prescribed;

--???????? The period of remand of 90 days is not violative of Article 10(2) of the Constitution, in that, section 24 (d) requires production of the accused before an Accountability Court within 24 hours of the arrest;?

--???????? Section 23 of the Ordinance, insofar as it prohibits transfer of? any right, title, interest or creation of charge on property after Chairman NAB has initiated investigation into the offences under the NAB Ordinance, is an interlocutory measure, in that, it is not desirable that persons accused of such offences should frustrate the objects of law by creating third party rights in respect of illegally acquired property thereby creating hurdle in the objects of law;

--???????? Power vesting in Chairman NAB under section 24 (a) of the NAB Ordinance to order arrest of the accused if not already arrested at any stage of the investigation, is neither discriminatory nor

violative of Article 25 of the Constitution, in that, similar powers are conferred upon police officers under section 54 Cr.P.C;

--???????? As to the case of voluntary return, i.e. ?plea bargaining? under section 25, the provision stands amended by virtue of Amendment Ordinance No. XXIV of 2000 and now, by virtue of section 25 (a) (ii), after cognizance of the offence has been taken by the Court or the trial has commenced, Chairman NAB may release the accused only with the approval of the Court;

--???????? There is no restraint on freedom of contract, in that the powers earlier vesting in Chairman NAB under section 25 (e) & (g) have now been vested in the Governor, State Bank of Pakistan by virtue of the Amendment Ordinance No. XXIV of 2000, thus clause

--???????? (g) of section 25 does not suffer from excessive delegation;
Section 32 (d) of the NAB Ordinance is subject to the Constitution and does not purport to oust the constitutional jurisdiction of the Courts;

--???????? The Civil Servants Act, 1973 continues to apply to civil servants, who are deputed to or posted in the NAB.? Those, who are appointed directly, are distinct and separate category and class of persons and therefore no violation of Article 25 of the Constitution is caused;
The mere fact that the Ehtesab Act, 1997 was competently and validly made and its *vires* were upheld by this Court does not curb the power of the Legislature to make a new law on the same subject;

--???????? The NAB Ordinance is neither discriminatory nor un-Islamic and in any case, its *vires* cannot be examined on the touchstone of Article 2A of the Constitution;
The method of appointment in respect of Chairman NAB is contained in section 6 (b) (I) and for other officers in section 28 *ibid.*? Provisions relating to transfer of cases qua the provincial courts within the territories of a Province and from one Province to another Province, do not suffer from excessive delegation;

--???????? As regards special treatment to be meted out to women accused, the provisions of section 167 Cr.P.C. are applicable and the same have not been ousted;

SUMMARY OF THE ORDINANCE

158.???????????????? The Ordinance intends to provide for the setting up of National Accountability Bureau so as to eradicate corruption and corrupt practices and hold accountable all persons accused of such practices and matters ancillary thereto as spelt out from the Preamble.

159.???????????????? Section 1 of the Ordinance describes the title of the Ordinance.? By virtue of Section 2 it came into force on 16.11.1999 and has been made retrospectively applicable with??? effect?? from??? the 1st day of January 1985. ??? Section 3 provides that the Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force.??????????? ? Section 4 covers its application and provides that it extends to whole of Pakistan and shall apply to all persons in Pakistan and persons who are or have been in the service of Pakistan wherever they may be including areas which are part of Federally and Provincially Administered Tribal Areas.

160.???????????????? Section 5 defines the expressions, ?accused?, ?appropriate government?, ?assets?, ?associates?, Chairman National Accountability Bureau?, ?Code?, ?conciliation committee?, ?Court?, ? Judge?, ?Deputy Chairman?, ?National Accountability Bureau?, ?freezing?, ?holder of public office?, ? offence?, ?person?, ?property?, ?government property? and ?wilful default?.? Section 6 deals with the constitution of National Accountability Bureau and appointments of its Chairman and Acting Chairman.? Sections 7 and 8 deal with the appointments of Deputy Chairman and the Prosecutor General Accountability respectively.? Sections 9 and 10 respectively deal with corruption and corrupt practices and punishments therefor.? The matters relating to imposition of fine, freezing of property and claim or objection against the freezing are respectively dealt with in sections 11, 12 and 13.

161.???????????????? Section 14 deals with the presumption against accused accepting illegal gratification.? Section 15 provides for incurring of disqualification to contest elections or to hold public office by convicted persons.? Sections 16, 16A and 16B respectively deal with the subjects of trial of offences, transfer of cases and contempt of court.? Section 17 relates to application of the Code of Criminal Procedure as also power of the Accountability Court to dispense with any of the provisions of the said Code.? Cognizance of offences by the Accountability Court, power of Chairman NAB or any officer authorised by him to call for information and reporting of suspicious? financial transactions by the banks and financial institutions for taking prompt action are dealt with under Sections 18, 19 and 20.? Section 21 deals with international cooperation and requests for mutual legal assistance.? Jurisdiction of Chairman NAB to investigate suspected offences is provided under section 22 while section 23 deals with the circumstances under which the transfer of property by an accused or his relatives etc, shall be void.? Section 24 deals with the arrest of the accused and other ancillary matters

leading to the trial before an Accountability Court.? Matters in relation to voluntary return/plea bargaining, payment of loans and tender of pardon to accomplice/plea bargaining are the subject matter of Sections 25, 25A and 26.? Section 27 deals with power of Chairman NAB or an officer authorised by him to seek assistance from any department of the Federal Government etc. and Section 28 pertains to appointment of members of the staff and officers of NAB.? Section 29 deals with the competence of the accused to be a witness and Sections 30, 31 and 31A encompass the subjects of false evidence, etc, prohibition to hamper investigation and abscondence of accused to avoid service of warrants.? Section 31B lays down the procedure for withdrawal from prosecution.? Section 31C provides that the Accountability Court shall take cognizance of an offence against an officer or employee of a bank or financial institution with prior approval of the State Bank of Pakistan.? Section 31D deals with inquiry, investigation or proceedings in respect of imprudent bank loans etc.? The matters in relation to appeal after conviction are dealt with under Section 32 and the subject of pending proceedings has been dealt with under Section 33.

162.???????????????? Section 34 lays down procedure for framing rules for carrying out the purposes of the Ordinance, which shall form part of the Ordinance itself.? The subjects of repeal and indemnity are dealt with under Sections 35 and 36 whereas Section 37 provides for issuance of removal of difficulties order by the President.? The Schedule of Offences provides for various terms of imprisonment in relation to the offences under the Ordinance.

MAINTAINABILITY OF PETITIONS UNDER ARTICLE 184 (3) OF THE CONSTITUTION

163.???????????????? Mr. Abid Hasan Minto at the outset vehemently argued that the Federation is submitting to the jurisdiction of this Court under extra-ordinary circumstances and would welcome any suggestions/amendments in the NAB Ordinance, but the same may not be treated as precedent.? While we appreciate the ingenuity and originality of the gracious offer made by Mr. Minto, nevertheless we are of the view that it is never safe to decide cases on concession simpliciter in matters involving questions of great public importance.? It is the duty of this Court to exercise powers and functions within the domain of its jurisdiction in respect of any law or provision of law which comes for examination to ensure that the majesty of the law prevails and erosions therein are prevented so that all persons live securely under the rule of law; to promote within the limits of judicial functions, the observance and attainment of Human and Fundamental Rights and to administer justice impartially among persons and between persons and the State which is *sine qua non* for the maintenance of Independence of Judiciary and encouragement of public confidence in the judicial system.
?
164.???????????????? Any legislative instrument which undermines Independence of Judiciary or abrogates or abridges any Fundamental Right may be regarded as repugnant to the spirit of the Constitution.? The Superior Courts have the power to declare such legislative instrument as unenforceable, partly or wholly, as the case may be, depending upon the nature of legislation and facts and circumstances of each case.? When the existence and safety of the country is endangered because of the economic disaster, this Court is the sole Judge, both of the proportions of the danger and when and how the same is to be prevented and avoided.? This is another circumstance for adjudicating the question of validity of the NAB Ordinance.?

165.???????????????? It is a settled constitutional principle that Bench should be independent of the Executive and arbiter of the Constitution to decide all disputed questions.? This is so because the Superior Courts in the exercise of their judicial powers have to check the arbitrary exercise of power by any other organ or authority of the State.? It rests with the Courts alone to define and limit the exercise of power by the Executive in terms of a legislative instrument.? Viewed from this angle, it is the duty of this Court to protect the Fundamental Rights guaranteed under the Constitution and the independence of the judiciary.? This Court is the ultimate guardian of the rights of the people.? It is, therefore, the duty of this Court to authoritatively interpret not only the validity of the NAB Ordinance but also its scope.

166.???????????????? When faced with this, Mr. Abid Hasan Minto argued that the petitioners are not entitled to invoke the jurisdiction of this Court under Article 184 (3) of the Constitution, in that, they do not satisfy the criteria laid down therein.? The petitioners, who are facing trial under the NAB Ordinance have an adequate remedy by way of an appeal under section 32 ibid.? Those who are not under trial, have no cause of action as they do not seek enforcement of any of the Fundamental Rights.?

167.???????????????? We are afraid, the preliminary objection has no force inasmuch as under Article 184 (3) the only requirement is that the petition should raise a question of public importance with regard to the enforcement of a Fundamental Right.? Since the NAB Ordinance affects the public at large, question of its validity is a question of public importance.? Under somewhat similar circumstances, in the *case of Mehram Ali (supra)* the validity of the Anti-Terrorism Act was examined and a number of provisions were struck down being violative of the provisions of the Constitution.? This question was also dealt with in the admitting order vide paragraphs 4 and 5 thereof, which read thus:

?The above questions are matters of first impression and of great public importance involving Fundamental Rights as ordained by Article 184(3) of the Constitution and as commented upon by this Court in the case of *Syed Zafar Ali Shah and others v. General Pervez Musharaf, Chief Executive of Pakistan and others* (2000 SCMR 1137) wherein it was observed that: ?The validity of National Accountability Ordinance, 1999 will be examined separately in appropriate proceedings at appropriate stage.

?As observed at the outset of the hearing today that in these petitions the question of validity of the impugned Ordinance alone shall be examined and not individual grievances of the petitioners raised in some of the petitions either directly or indirectly: However, the petitioner shall not be debarred from raising their respective pleas available under the law through appropriate proceedings before appropriate fora in accordance with law. It is also clarified that admission of these petitions shall not operate as stay of proceedings before NAB, Accountability Courts or any other Court in relation to the matters arising out of the impugned Ordinance. Of course, such proceedings shall be decided on their own merit and in accordance with law. It is further clarified that the petitioners herein or any accused whose cases are pending in Accountability Courts shall be at liberty, if so advised, to approach the appropriate forum under the Ordinance for redress of their grievances in accordance with law.?

Also refer to the following observations in the *case of Syed Zafar Ali Shah (supra)*:
?That the Superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Armed Forces, if challenged, in the light of the principles underlying the law of State necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or any order issued by the Chief Executive or by any person or authority acting on his behalf??.. ?That the courts are not merely to determine whether there exists any nexus between the orders made, proceedings taken and acts done by the Chief Executive or by any authority or person acting on his behalf, and his declared objectives as spelt out from his speeches dated 13th and 17th October, 1999, on the touchstone of State necessity but such orders made, proceedings taken and acts done including the legislative measures, shall also be subject to judicial review by the Superior Courts??.?That the validity of the National Accountability Bureau Ordinance, 1999 will be examined separately in appropriate proceedings at appropriate stage.?

This is another circumstance for examining the vires of the NAB Ordinance.? Thus visualized, the preliminary objections as to the maintainability of the Constitution Petitions raised by Mr. Abid Hasan Minto are hereby repelled.

168.???????????????? Mr. Aziz A.Munshi, learned Attorney General also made a half-hearted attempt to raise a preliminary objection that these petitions are not maintainable on the ground that the questions raised therein by the petitioners relate to individual grievances which can only be considered by the competent judicial forum in accordance with law.? He spent quite some time to argue that after adjudication? by the Court in the first instance the appellate remedy provided by law can be invoked by the petitioners depending upon merits of each case. The petitions do not involve a question of public importance with reference to enforcement of any of the Fundamental Rights conferred by Part II of the Constitution and, according to him, in any case some of the Fundamental Rights still stand validly suspended by Proclamation dated 28.5.1998.?

169.???????????????? We are afraid, the objections are *ex facie* frivolous in that a bare reading of the admitting note would show that the petitions were admitted to regular hearing *inter alia* to examine whether the promulgation of the impugned Ordinance? whereby it deems to have come into force with effect from 1.1.1985? being retrospective, contravenes the Fundamental Rights enshrined in Article 12? of the Constitution in so far as it creates a new offence of ?wilful default? as also the question whether the impugned Ordinance creates a parallel judicial system in disregard of the provisions of Articles 175, 202 and 203 of the Constitution and is violative of the law laid down by this Court in the case of *Mehram Ali* (supra).?? It is therefore the duty of the Court to examine the points raised in the petitions and pronounce authoritative judgement thereon.? The preliminary objection as to maintainability of the petitions is *ex facie* fallacious and is hereby overruled.

COMPETENCE OF FEDERAL LEGISLATURE TO PROMULGATE NAB ORDINANCE

170.???????????????? Before examining the merits of the case, it is necessary to deal with the preliminary objection raised by Mr. M. Akram Sheikh, learned Senior ASC and supported by Mr. Abdul Hafeez Pirzada, learned Senior ASC that the impugned Ordinance was wholly void and liable to be struck down? in that the Federal Legislature was not competent to promulgate the same under any provision of the Constitution? and/or the subjects contained in the Federal Legislative List/Concurrent Legislative List.? The precise objection was that the impugned legislation exclusively falls within the competence of the Provincial Legislatures and the promulgation of the same has the effect of invading the provincial autonomy.

171.???????????????? M/s Abdul Hafeez Pirzada and Muhammad Akram Sheikh vehemently argued that under the Provincial Lists in the Government of India Act, 1935, 1956 Constitution, Interim Constitution of 1972, the Central List of 1962 Constitution as also the Federal Legislative List and Concurrent List in the 4th Schedule of 1973 Constitution, the constitution and organization of all courts except the Supreme Court is a Provincial Legislative subject and under Article 142 (c) of the Constitution the Parliament or the President cannot make laws in respect thereof.? The NAB Ordinance and the creation of Accountability Courts thereunder are violative of the Constitution and the Fundamental Rights.
172.???????????????? The learned counsel further argued that clause (2) of Article 175 deals with conferring of jurisdiction on the courts and under Article 142 there is a clear distribution of law making powers between the Parliament and the Provincial Assemblies.? Under Article 142 (c) where a legislative power is not mentioned in the Federal or the Concurrent List, the residuary powers vest exclusively in the concerned Provincial Legislature. Their precise submission was that the Federal Government can set up a court only in the Federal territory and not in any Province.

173.???????????????? Mr. Abid Hasan Minto did not agree with the arguments of M/S Abdul Hafeez Pirzada and Muhammad Akram Sheikh regarding competence of the Federal Legislature to deal with jurisdiction of the Courts as also the NAB Ordinance being an invasion on the provincial autonomy.?? He referred to Article 175, Entry 55 of Part I of the Federal Legislative List and Entries 1, 2, 4, 46 and 47 of the Concurrent Legislative List to contend that the Federal Government does have the power to enact laws providing for establishment of courts, which would function in the areas whether federal or provincial, as specified in the enactment.

174.???????????????? In rebuttal, Mr.Abdul Hafeez Pirzada submitted that some Constitutional instruments prior to 1973 invested the Provincial Legislature and Governments with power to establish courts.? In 1973 departure was made and all residuary powers were vested in the Provinces because this was one of the agreements on which consensus had been reached, that is why, there is no Entry providing that the power to establish courts was provincial, because that is provincial by virtue of the residuary powers.? He argued that any subject on which there is no categorical provision in the Federal Legislative List or in the Concurrent Legislative List is provincial.? He referred to *Messrs Gadoon Textile Mills and 814 others v. WAPDA and others* (1997 SCMR 641) to contend that just because a law is subject matter of the Concurrent Legislative List does not *ipso facto* confer executive authority on the Federal Government. All that the Concurrent Legislative List says is that both the Parliament and the Provincial Legislatures shall be competent to legislate in respect of subjects provided therein, but the Concurrent Legislative List does not vest executive authority in the Federation with respect to any matter within the exclusive legislative field of a Province.? In support of the above contention, reference was made to Articles 97 and 137 of the Constitution, which read as under :
?97.?? Subject to the Constitution, the executive authority of the Federation shall extend to the matters with respect to which Majlis-e-Shoora (Parliament) has power to make laws, including exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan.
??????????? Provided that the said authority shall not, save as expressly provided in the Constitution or in any law made by Majlis-e-Shoora (Parliament), extend in any Province to a matter with respect to which the Provincial Assembly has also power to make laws.?
??
137. Subject to the Constitution, the executive authority of the Province shall extend to the matters with respect to? which the Provincial Assembly has power to make laws :
??????????? Provided that, in any matter with respect of which both Majlis-e-Shoora (Parliament) and the Provincial Assembly of a Province have power to make laws, the executive authority of the Province shall be subject to, and limited by, the executive authority expressly conferred by the Constitution or by law made by Majlis-e-Shoora (Parliament) upon the Federal Government or authorities thereof.

He further argued that if the Federal law impinges on the legislative authority of a Province and enacts on any subject within the Concurrent Legislative List, it has to expressly oust the executive authority of a Province, otherwise even with respect to a Federal law, the executive authority will vest in the Province concerned.

175.???????????????? It would be advantageous to refer to the above provisions of the Constitution.? Article 175 of the Constitution reads:-
175. (1)??????????? There shall be a Supreme Court of Pakistan, a High Court for each province and such other courts as may be established by law.
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 Judiciary shall be separated progressively from the Executive within [fourteen] years from the commencing day.

Entries 55, 56, 58 and 59 of the Federal Legislative List read as under:-

?**55.**????? Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List and, to such extent as is expressly authorised by or under the Constitution, the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers.
56.?????? Offences against laws with respect to any of the matters in this Part.
58.?????? Matters which under the Constitution are within the legislative competence of [Majlis-e-Shoora (parliament)] or relate to the Federation.
59.?????? Matters incidental or ancillary to any matter enumerated in this Part.?

Entries 1, 2, 4, 46 and 47 of the Concurrent Legislative List are as follows:
Criminal law, including all matters included in the Pakistan Penal Code on the commencing day, but excluding offences against laws with respect to any of the matters specified in the Federal Legislative List and excluding the use of naval, military and air forces in aid of civil power.
Criminal procedure, including all matters included in the Code of Criminal Procedure, on the commencing day.
4.????????? Evidence and oath; recognition of laws, public acts and records and judicial proceedings.
46.?????? Offences against laws with respect to any of the matters in this List; jurisdiction and powers of all courts except the Supreme Court, with respect to any of the matters in this List.
Matters incidental or ancillary to any matter enumerated in this List.

Entry 1 of the Concurrent Legislative List relates to criminal law, including all matters included in the Pakistan Penal Code, but excluding offences against laws with respect to any of the matters specified in the Federal Legislative List.? Entries 2, 3 and 4 of the Concurrent Legislative List empower the Federal Government to legislate on matters relating to criminal/civil procedures as well as evidence/oath, etc.?

176.???????????????? It may also be noted that section 6 Cr.P.C. describes the criminal courts and ?any other court established by or under any other law?.? Thus, the Federal Government is competent to make a law providing for special courts and the procedure under which the courts will function and dispense justice.? The objection of the petitioners that it is a case of ?occupied field?, is not well-founded, inasmuch as, such a situation arises where a legislation is already in the field, which is not the case here.? It is well settled that a Legislature, which has made any law, is competent to change, annul, re-frame or add to that law.? Admittedly, the Provincial Legislatures have not made any legislation on the subject.

177.???????????????? In *Shamas Textile Mills Ltd and others* v. *The Province of Punjab and 2 others* (1999 SCMR 1477) this Court dealt with the scope of distribution of legislative powers under Articles 141, 142 and 143 of the Constitution, the conflict in legislation between the Federal and the Provincial Legislatures, resolution by the Judiciary in the event of any inconsistency and the principles relating to the doctrine of ?occupied field? as well as the central and provincial law making power under Article 162 of the 1962 Constitution.? The head notes on the above aspects from the judgment authored by one of us (Muhammad Arif, J.) are as under:
?Distribution of legislative powers? Conflict between the Federal Legislature and Provincial Legislature? Resolution by judiciary? In the event of any inconsistency between the Federal Law and Provincial Law the mandate of the Constitution, as contained in Art. 143 is to prevail Principles.. Doctrine of occupied field? Applicability,
??????????? In a unitary form of Government, all the legislative powers, of necessity, vest in the Legislature of the given country. In the Federal form of Government, however, the legislative powers vest in the respective Legislatures in line with the dispensation under the Constitutional document/s concerned.
??????????? It is in the sphere of distribution of legislative powers in a federal set up that a conflict between the legislation by the Federal/Central Legislature and Provincial/State Legislature can arise for resolution by the Judiciary.
??????????? Articles 141, 142 and 143 of 1973 Constitution respectively deal with? (1) extent of Federal and Provincial Laws; (2) subject-matter of Federal and Provincial Laws, and (3) inconsistency between Federal and Provincial Laws.
??????????? Under Article 141 [(Majlis-e-Shoora) (Parliament)] may make laws for the whole or any part of Pakistan and a Provincial Assembly may make laws for the Province or any part thereof. Under Article 142 (Majlis-e-Shoora (Parliament) has exclusive powers to make laws with respect to any matter in the Federal Legislative List and [(Majlis-e-Shoora (Parliament)] and Provincial Assembly also have powers to make laws with respect to any matter in the Concurrent List. Under clause (c) of Article 142 a Provincial Assembly shall and {(Majlis-e-Shoora (Parliament)} shall not, have power to make laws with respect of any matter not enumerated in either the Federal Legislative List or the Concurrent Legislative List. Further, in the event of any inconsistency between the Federal? law and the Provincial law, the mandate of the Constitution as contained in Article 143 is that then the Act of [(Majlis-e-Shoora (Parliament)] whether passed before or after the Act of the Provincial Assembly, or, as the case may be, the existing law, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy be void.

??????????? The doctrine of occupied field is a concomitant of the larger doctrine of pith and? substance and incidental encroachment under the doctrine of pith and substance with all its concomitants, postulates for its applicability on a competition between Federal legislation and Provincial legislation and it would be erroneous to invoke the doctrine where there is no such competition, merely because a Provincial law conflicts with another law which has not been passed by the Federal Legislature but deals with a matter in the Federal List. Similar is the case where a Federal Statute provides that the Provincial Government may extend the operation of a law to any part of the Province and the legislation is brought into operation by the Provincial Government, the law does not lose its Federal character and does not become invalid when it comes into conflict with another? Federal law.
??????????? Article 143 does not apply to the resolution of inconsistency between two ?existing laws? in that it applies only when there is a conflict between a Federal law passed under the Constitution and an existing law, whether Provincial or Federal. In such a case, if the Federal law is passed with respect to a matter in the Federal List or Concurrent List, it would be intra vires the Federal Legislature and as regards the question of its repugnancy to an ?existing law?, the Federal law would prevail on the principle of re-peal by implication which rests on the principle that if the subject-matter of the latter legislation is identical with that of the earlier one, then, the earlier law stands repealed by the latter enactment.?

178.???????????????? This is not the first time that the Federal Government has promulgated laws providing for creation of offences, the procedure and the punishments therefor and the establishment of courts in the Provinces.? Enforcement of the Anti-Terrorism Act, 1997 is a classic example of the above power of the Federal Government in the recent past.? Articles 175, 202 and 203 of the Constitution provide a framework on Judiciary, i.e. there shall be a Supreme Court of Pakistan, a High Court for each Province and such other courts, as may be established by law.? The words, ?such other courts as may be established by law? are relatable to the subordinate courts referred to in Article 203 of the Constitution. Article 225 of the Constitution also empowers the Federal Government to establish Election Tribunals, which operate within the Provinces.? However, the functioning of any court or tribunal, beyond the control and supervision of the High Court concerned in terms of Article 203 of the Constitution, does not fulfil the mandatory requirement of the Constitution, in that, under Article 203 read with Article 175 of the Constitution, the supervision and control of the subordinate judiciary exclusively vests in the High Courts.? The above principles were also recognized by a 5-member Bench of this Court in the *case of Mehram Ali* (*supra*) wherein it was *inter alia* held that the provisions of the Anti-Terrorism Act, 1997 were valid except those which militated against the concept of independence of Judiciary or which were repugnant to the provisions of Articles 175 and 203 etc.? Accordingly, directions were issued for making appropriate amendments in the Act.? Some other statutes were also promulgated by the

Federal Legislature including the following:

The Foreign Exchange Regulation Act, 1947;

Pakistan Criminal Law (Amendment) Act, 1958;

Prevention of Anti-National Activities Act, 1974;

Suppression of Terrorist Activities (Special Courts) Act, 1975;

Drugs Act, 1976;

The Emigration Ordinance, 1979;

Offences in respect of Banks (Special Courts) Ordinance, 1984;

The Terrorist Affected Areas (Special Courts) Act, 1992;

The Control of Narcotic Substances Act, 1997;

Anti-Terrorism Act, 1997.
???????????
179.???????????????? It would thus be seen that the Constitution does confer power on the Federal Legislature to establish criminal courts or tribunals and not necessarily those criminal courts, which fall within the purview of section 6 Cr. P. C.? It is also beneficial to refer to the following observations of this Court in the case reported as *Abdul Hafeez* v. *The State* (PLD 1981 S.C. 352):
6.???????? The next point argued was that the phrase ?inferior criminal Court? has reference only to the criminal Courts established under the Criminal Procedure Code and if any criminal Court is established under any other or special law the same would not fall within the ambit of section 435/439 and its proceedings and orders will not be revisable by the High Court.? The contention has no merit and at this place we may reproduce section 6 which occurs in Part II, Chapter II of the Cr.P.C. and reads as follows:-

?PART II?Constitution and Powers of Criminal

Courts and Offices

CHAPTER II?Of the Constitution of Criminal

Court and Offices

A?*Classes of Criminal Courts*:
Section? 6.?*Classes? of? Criminal? Courts.*?Besides?? the? High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of criminal Court in (Pakistan), namely:-
Courts of Session;
??????????????
Magistrates of the first class:

Magistrates of the second class:

Magistrates of the third class.?

A perusal of the above will show that the classes of the criminal Courts as given in section 6 are not exhaustive, because, it contemplates that such Courts may as well be ?constituted under any law other than this Code?.? This may be read with Article 175 of the Constitution of 1973, which is headed as ? Establishment and jurisdiction of Courts? and states that (1) There shall be a Supreme Court of Pakistan, a High Court for each Province and such other Courts as may be established by law.

Combined effect of these two provisions is that ?criminal Courts? are not necessarily only those which are mentioned in section 6 of the Criminal Procedure Code, but this term will also include such other criminal Courts which are constituted under any other law.? Thus--the Court of a Municipal Magistrate of Calcutta was held to be a ?criminal Court? in *Abdoola Haroon & Co.* v. *Corporation of Calcutta* A I R 1950 Cal. 36 and

Ram Gopal Goenka v. *Corporation of Calcutta* A I R 1925 Cal. 1251.
the Court of the village headman under the Burma Village Act III of 1898 was held to be a criminal Court in *Naga E.* v. *King-Emperor* A I R 1924 Rang. 23; the Court of a village Panchayat constituted under U. P. Village Panchayat Act VI of 1920 was held to be a criminal Court in *Kamlapati Panth and others* v. *Emperor* A I R 1926 All. 27; and
the Court of a village Panchayat constituted under the Punjab Village Panchayat Act II of 1939, was held as a criminal Court in *Dhirjoo* v. *Kamna and another* A I R 1950 Hima Pra. 40.

That the constitution of criminal Courts is not confined and restricted to such Courts as are mentioned in Cr.P.C. is further clear from the fact that the words used in section 435 are ?any inferior criminal Court?, and the word ?any? as is well known is not a word of limitation but of enlargement of the scope of the word next following it which means that it covers all types of criminal Courts constituted under any other law as well.? For the general proposition that the power to make law includes the power to enforcing their observance? by creating Courts or Tribunals of justice, see *Mirza Gulzar Beg* v. *The Station House Officer, Railway Police and others* ?(1), and which we may add, will embrace the power, to create Courts of various types including ?criminal Courts?.
Examined in the light of the above, it is clear, that a Drug Court is also a criminal Court.

It would be advantageous to reproduce the following observations from the case reported as *Mirza Gulzar Beg* v. *Station House Officer, Railway Police Station, Lahore and 3 others* (PLD 1977 Lahore 435), which read as under:
?6.??????? It was then submitted that the establishment of a special Tribunal under the Defence of Pakistan Ordinance and Rules was unauthorized as the Constitution of Pakistan did not authorise setting up of such tribunals of exclusive jurisdiction and that even otherwise the establishment of such Tribunals was violative of Article 25 of the Constitution of which dealt with ?equality of citizens? and laid down that ?(1) All citizens are equal before law and are entitled to equal protection of law. (2) There shall be no discrimination on the basis of sex alone.? (3) Nothing in this article shall prevent the State from making any special provision for the protection of women and children.?? It was submitted that the establishment of Special Tribunals under the Defence of Pakistan Rules/Ordinance purported to be discriminatory with regard to the offences of the kind to be dealt with thereunder.? The contention has no merit.? It was laid down in *Brig. (Retd.) F. B. Ali and another* v. *The State* (1), that trial of persons who committed a particular type of offence or offences by a Special Tribunal did not offend against Article 25 of the Constitution.? Similarly, if the Defence of Pakistan Ordinance and the Defence of Pakistan Rules are valid laws as laid down in *Malik Muhammad Suleman M. N. A.* ?v. *Islamic Republic of Pakistan* ?(2), then establishment of Special Tribunals thereunder does not suffer from any lack of power.? It is well known that numerous tribunals in the country are functioning, for example, Authority under the Payment

of Wages Act, Industrial Tribunals/Labour Courts, Income-tax Appellate Tribunals etc. etc.? It is not necessary for setting up a Tribunal that there should be a specific sanction in the Constitution for that purpose.? The real test is to see the subject-matter and pith and substance of the relevant law under which a tribunal is established.? If that law falls within the competence of the appropriate Legislature then the establishment of Special Tribunals under that law and on those subjects which fall under that law would be a matter well covered by that law and no exception could be taken against their establishment on the score on which it is being advanced before me.? Indeed apart from the High Courts or Supreme Court, it will be difficult at the present day to find any Court/Tribunal which does not owe its existence to an Act of the legislature. ?Were I to hold that such Acts were *ultra vires,* practically the whole administration of justice in the country would cease to exist.? The power to make laws, in my opinion, includes the power to enforcing their observance by the creation of Courts or Tribunals of justice.? See *Parmeshwar Ahir* v. *Emperor* (3), where it was held that Special Tribunals could be created under the Defence of India (Criminal Amendment) Act IV of 1915, which was an Act corresponding or similar to the present Defence of Pakistan Ordinance.? The point raised by the learned counsel has no substance even on the bare wording of the Article 175(1) of the Constitution, where it is laid down that, ?there shall be a Supreme Court of Pakistan, a High Court for each Province *and such other Courts as may be established by law.?*? Clause (2) of this Article states 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?.? This shows that the Constitution does confer power on appropriate Legislature to create and establish Courts of all types including Special Courts or Tribunals and can regulate their jurisdiction by the relevant law.? Learned counsel cited no case in support of his plea and nor he referred to any provision of any law, Constitution or any other text.? He just enunciated the proposition but did not try to substantiate or support it in any manner before me.? However, I have examined the point in some detail and finding no force therein, the same is hereby repelled.?

180.??????????????? As to the question regarding invasion of the provincial autonomy, it may be observed that all laws relating to the jurisdiction of courts and for filing causes before the courts, whether civil or criminal, do not take their queue on the principle of federation.? In civil law, it is the cause of action that determines, in most cases, where the suit has to be filed ? where the defendant resides - where the debtor resides. So, there are variety of considerations but none relatable to federal territorial character.? In criminal cases, the general principles are contained in sections 177 to 182 Cr.P.C. i.e. where the crime takes place, the courts in that area have jurisdiction and it matters little whether the person belongs to one or the other Province. ?It is the crime, its nature and the place of crime that determine the place where the trial has to take place.? Section 178 Cr.P.C. authorizes the provincial governments to determine the venue of trial of offences.? It is a law of procedure, the scheme of which is not concerned with the
question of provincial autonomy.? Where a crime has taken place in various parts of the country or is spread over various places, any of the courts of those areas is competent to take cognizance of the matter.? In determining where the matter has to be tried, no consideration is given to the provincial nature of the society, autonomous nature of the Provinces or to the fact that the accused belongs to one or the other Province.? All these matters have no concern with the concept of provincial autonomy except the High Courts, which have been created under the Constitution for each Province. Mr. Abid Hasan Minto rightly contended that the scheme of the creation of the Supreme Court is not of that character.? It is not a Federal Court.? It is the apex Court.? It is a Court for the whole of Pakistan and *it does not go by the principle of federation* in that fashion in which the allocations are made and distributions take place.? In its own wisdom, the Supreme Court may decide how to manage its composition.? That is a different thing, but the Constitution does not do that, it looks into it as an apex Court.?

181.??????????????? The arguments advanced by M/s M. Akram Sheikh and Abdul Hafeez Pirzada are not sustainable. The NAB Ordinance has been competently promulgated and is neither *ultra vires* the Constitution nor does it invade the provincial autonomy in any manner.

182.??????????????? Let us now deal with the remaining questions formulated in the ?admitting order? topic-wise.

WHETHER ESTABLISHMENT OF ACCOUNTABILITY COURTS IN THEIR PRESENT FORM CREATES A PARALLEL JUDICIAL SYSTEM.

183.??????????????? The details of the topic find mention in question No. (i) which reads as under: ?Whether the Impugned Ordinance creates a parallel judicial system in disregard of the provisions of Articles 175, 202 and 203 of the Constitution and is violative of the law laid down by this court in the case of Mehram Ali and others versus the Federation and others (PLD 1998 SC 1445)??

184.??????????????? Mr. Abid Hasan Minto argued that in *Mehram Ali*?s case, this Court held that other than such judicial courts and tribunals which find specific mention in the Constitution itself, all courts established under Article 175 would be subordinate to the Superior Judiciary, i.e. the High Courts and the Supreme Court. This subordination of courts and their supervision and administrative control by the superior courts was held to be a *sine qua non* of the Independence of Judiciary.

185.??????????????? Section 5(g) provides that a judge of an Accountability Court will be appointed by the President after consultation with the Chief Justice of Pakistan and he can only be removed from office earlier than the statutory period by the President, after consultation with the Chief Justice of Pakistan. **?** Section 16(c) provides that where more than one Accountability Courts have been established for an area, the Chief Justice of the High Court of the Province concerned shall designate an administrative judge from amongst the Accountability Courts/Judges in that area. **??**

186.??????????????? Section 16A(b) provides that where the Chairman NAB seeks transfer of a case from one Accountability Court to another within a Province, an application seeking such transfer shall be made to the Chief Justice of the High Court for that Province and where the transfer is sought from an Accountability Court in one Province to an Accountability Court in another Province, an application seeking such transfer shall be made to the Chief Justice of Pakistan. **????** Section 32 provides that appeals from final judgement and order of an Accountability Court shall lie to the High Court of the concerned Province. Section 34 provides that rules shall be framed by the President for carrying out the purposes of the impugned Ordinance in consultation with the Chief Justice of Pakistan.

187.??????????????? Mr. Minto argued that the above provisions, entailing appointment and removal of judges, transfer of cases, designation of administrative judges, hearing of appeals and framing of rules, put the Accountability Courts amply and effectively under the subordination and control of the Superior Courts.? Section 5(g) provides a statutory security of tenure in that the judges of Accountability Courts are to remain in office for two years and their earlier removal, if at all, can only take place after consultation with the Chief Justice of Pakistan and not at the whim of the executive.

188.??????????????? On these premises it was argued that the Impugned Ordinance does not create a parallel judicial system and merely creates ?special courts? in pursuance of Article 175 of the Constitution to function under the effective control of the Superior Courts while guaranteeing their independence by providing statutory security of tenure for their judges. The principles laid down in *Mehram Ali?s case*, it is submitted, are fulfilled.

189.??????????????? Notwithstanding the above provisions cited by Mr. Abid Hasan Minto, the questions which require consideration are (i) whether the above provisions of the impugned Ordinance are violative of the principle of trichotomy of powers as envisaged under the Constitution and (ii) whether the Ordinance has created a parallel judicial system in disregard of the provisions of Article 175, 202 and 203 of the Constitution in the light of the law laid down in *Mehram Ali* (supra).

190.??????????????? It is true that under Section 5(g) of the Ordinance a Judge of an Accountability Court is appointed by the President of Pakistan in consultation with the Chief Justice of Pakistan and he cannot be removed earlier than the statutory period of two years after consultation with the Chief Justice of Pakistan. It is also true that as a matter of fact except few, all the Judges of the Accountability Courts are from the subordinate judiciary who were appointed through a consultative? process.? Though the Chief Justice of Pakistan is the sole consultee for appointment of a Judge of Accountability Court, nevertheless, he had obtained written recommendations from the Chief Justices of the concerned High Courts and only those persons were appointed who were recommended by the concerned Chief Justice.

191.??????????????? Be that as it may, the provision of Section 5(h) which permits the employment of a retired Judge of a High Court or a retired District and Sessions Judge does impinge upon the Independence of Judiciary. The statutory appointment of persons other than serving Judges is two years while a Sessions Judge serving on deputation as Judge, Accountability Court can be reverted to the subordinate judiciary at any stage as no statutory terms of deputation have been prescribed.? Additionally, having regard to the principles of separation of powers and in consonance with the concept of Independence of Judiciary,? judicial powers cannot be exercised by executive functionaries. The NAB Ordinance vests various judicial powers such as grant of bail and release pending trial or appeal, exclusively in an executive authority, i.e. the Chairman NAB, in violation of the principle of separation of powers.

192.??????????????? Section 9(c) read with Section 24(d) of the NAB Ordinance vests the power to release any person accused of an offence under the NAB Ordinance in the Chairman NAB and that too on the basis of any conditions as he may thinks fit are unwarranted. The power to set conditions for the release of an accused from custody or detention is a judicial power which ought not to be exercised except by a court which is established under Article 175 of the Constitution and is subject to the supervisory jurisdiction of the High Court in terms of Articles 202 and 203.

193.??????????????? We are of the view that for smooth and effective functioning of the Accountability Courts all the Judges should be serving District and Sessions Judges qualified to be appointed as Judges of the High Court.? They should be appointed for a period of three years in consultation with the Chief Justice of the concerned High Court and not with the Chief Justice of Pakistan as contemplated in Section 5(g) of the NAB Ordinance. During their term of appointment as such they shall not be transferred to any other place nor removed from service except on ground of misconduct, or physical or mental infirmity by the competent authority i.e. the High Court concerned, after following the procedure prescribed in the relevant rules in that regard. They shall be entitled to same remuneration, privileges, facilities and allowances as are admissible to their counterparts who are performing functions in respect of Courts and Tribunals established by the Federal Government. They shall not be paid the salaries and privileges as are admissible to Judges of the High Court except security arrangements if and when required having regard to the nature of their work.? Remuneration already drawn for the period they performed their functions as Judges of the Accountability Courts shall not be recovered being hit by the doctrine of past and? closed transaction. Further, appointment and posting as Judge of Accountability Court shall not debar such Judge from being elevated as Judge of a High Court if so appointed in terms of Article 193 of the Constitution.

194.??????????????? The present incumbents/Judges of the Accountability Courts who are not serving District and Sessions Judges shall be given an option to serve as such on the last pay/salary drawn at the time of their retirement as District and Sessions Judges for the remainder part of their term of three years otherwise their services shall be dispensed with by giving them three months salary.

195.??????????????? There is a positive direction by this Court in the case of Zafar Ali Shah (supra) that the Government shall accelerate the process of accountability in a transparent and coherent way.? The Accountability Courts have since been established by the President in consultation with the Chief Justice of Pakistan who in turn had supported the recommendations of the concerned Chief Justices of the High Courts in their entirety without suggesting additional names for any of the intending appointees, it would, therefore, be in the interest of quick disposal of accountability cases and in the fitness of things that the present incumbents/Judges of the Accountability Courts are not disturbed from performing their functions at the respective places of their posting.? They shall be deemed to have been appointed for a period of three years from the day they entered upon their respective offices. However, the Judges of the Accountability Courts shall perform their functions under the supervision and disciplinary control of the respective High Courts.

196.??????????????? Budgetary allocations already sanctioned/ear-marked for establishment of Accountability Courts, their presiding officers, staff and for other allied matters, shall remain operative notwithstanding the fact that Judges of the Accountability Courts shall be under the disciplinary control of the concerned High Courts and not the Federal Government.? The relevant provisions in the NAB Ordinance, therefore, be suitably amended.

?? **BAIL**

197.??????????????? It was held in the case of Zafar Ali Shah (supra) that the powers of the superior courts under Article 199 of the Constitution ?remain available to their full extent?.notwithstanding anything contained in any legislative instrument enacted by the Chief Executive.? Whereas, Section 9(b) of the NAB Ordinance purports to deny to all courts, including the High Courts, the jurisdiction under Sections 426, 491, 497, 498 and 561A or any other provision of the Code of Criminal Procedure or any other law for the time being in force, to grant bail to any person accused of an offence under the NAB Ordinance. It is well settled that the Superior Courts have the power to grant bail under Article 199 of the Constitution, independent of any statutory source of jurisdiction such as Section 497 of the Criminal Procedure Code, Section 9(b) of the NAB Ordinance to that extent is *ultra vires* the Constitution.? Accordingly, the same be amended suitably.

?RETROSPECTIVITY? AND ?WILFUL DEFAULT?

198.??????????????? Now we will take up questions No. (ii) and (iii) of the ?admitting order? together as the same are inter-connected.? Former question is as to whether Section 2 of the NAB Ordinance whereby it deems to have come into force with effect from 1.1.1985 is violative of Article 12 of the Constitution in so far as it creates a new offence of ?wilful default? with retrospective effect and the latter is as to whether Section 5(r) which defines ?wilful default? negates the freedom of trade, business or profession as contemplated by Article 18 of the Constitution.?

199.??????????????? Under Section 5(r) ?wilful default? has been defined as under:

?Wilful default?? a person is said to commit an offence of wilful default under this Ordinance if he does not pay, or continues not to pay, or return or repay the amount to any bank, financial institution, co-operative society, or a Government department or a statutory body or an authority established or controlled by a Government on the date that it became due as per agreement containing the obligation to pay, return or repay or according to the laws, rules, regulations, instructions, issued or notified by the State Bank of Pakistan, or the bank, financial institution, co-operatives society, Government Department, statutory body or an authority established or controlled by a Government, as the case may be, and a period of thirty days has expired thereafter:
??????? Provided that it is not wilful default under this Ordinance if the accused was unable to pay, return or repay the amount as aforesaid on account of any wilful breach of agreement or obligation or failure to perform statutory duty on the part of any bank, financial institution, cooperative society or a Government department or a statutory body or an authority established or controlled by Government.?

In Black?s Law Dictionary the words ?default? and ?wilful? have been defined as under :
?**Default:** By its derivation, a failure. An omission of that which ought to be done;??Specifically, the omission or failure to perform a legal or contractual duty, to observe a promise or discharge an obligation (e.g. to pay interest or principal on a debt when due); or to perform an agreement??The term also embraces the idea of dishonesty, and of wrongful act, or an act of omission discreditable to one?s profession???

?**Willful:** Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate.? Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary.
??????????? ?Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification.?
?An act or omission is ?willfully? done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.? It is a word of many meanings, with its construction often influenced by its context.????.
??????????? ?A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently.? A willful act differs essentially from a negligent act.? The one is positive and the other negative.?
??????????? ?Under Bankruptcy Code provision excepting from discharge debts ?for willful and malicious injury by the debtor?.? ??, term ?willful? means deliberate or intentional, *i.e.* deliberate or intentional act which necessarily leads to injury.????.
??????????? ?Act is ?willful? within meaning of section of Internal Revenue code imposing penalty for willful failure to pay federal income and social security taxes withheld from employees if it is voluntary, conscious and intentional; no bad motive or intent to defraud the United Sates need be shown, and a ? reasonable cause? or ?justifiable excuse? element has no part in definition.????.
??????????? ?Under the Model Penal Code, a requirement that an offense be committed ?willfully? is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears. ???.
??????????? ?In civil actions, the word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental.? But when used in a criminal context it generally means an act dome with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely.? The word is also employed to characterise a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act?.??.

It would be appropriate to refer to some decisions of the superior Courts from Pakistan and foreign jurisdiction wherein ?wilful default? has been dilated upon, which would help understand the real import of the expression.? In *Haji Ismail Dossa v. Monopoly Control Authority* (PLD 1984 Karachi 315), it has been observed:
?**25.**????? The learned Authority noted that ignorance of law is no excuse and proceeded to consider the meaning of the word ?default? as interpreted by various authorities. Relying on the authorities of our Superior courts where word ?default? has been interpreted it followed the dictum that default would seem to embrace every failure by the defendant to perform his contract unless prevented by the superior force over which he had no control.?? The entire emphasis of the learned Authority is on the meaning of the work ?default? as interpreted by the judgements of our superior courts.? In majority of these cases the Courts were considering the provisions of West Pakistan Urban Rent Restriction Ordinance, where the word "default" has been used.? In section 19 of the Ordinance, however, words used are ?wilfully failed to register". There is a sharp difference in the meaning of the word ?default? and ?wilful default? or ?wilful failure?.? There can be no cavil with the meaning of ?default? as stated by the learned Authority, but will this meaning apply to ?wilful default? or ?wilful failure?.? The fact that the word ? failure? has been qualified by the word ?wilful? indicates that the ?failure? or ?default? should be wrongful or intentional.? ?Wilful failure? as it is apparent, will occur when a party has purposely failed to comply with the provisions or intentionally avoided to comply, knowing full well that he is duty-

bound to do so.? In such cases the party knows that he has to do a certain act but intentionally persists to follow a different course.? If the failure is without any intention it will be a ?default? or ?failure? simpliciter, but if it is intentional it will amount to ?wilful default? or ?wilful failure?.? In this regard reference can be made to *Horabin v. British O v. Airways corporation* (1), where the meaning of ?wilful misconduct? has been explained in the following manner:
??????????? ?Wilful misconduct is misconduct to which the will is a party, and it is wholly different in kind from mere negligence or carelessness, however, gross that negligence or carelessness may be.? The will must be a party to the misconduct, and not merely a party, to the conduct of which complaint is made.? As an example if the Pilot of an Aircraft knowingly does some thin which subsequently a Jury find amounted to misconduct, that fact alone does not show that he was guilty of wilful misconduct.? To establish wilful misconduct on the part of this imaginary Pilot, it must be shown not only that he knowing (and in that sense wilfully) did the wrongful act, but also that, when he did it, he was aware that he was committing misconduct.?

????????????????????? Barry, J., has illustrated it in the ?? following words:--

?The same act may amount on one occasion to mere negligence, and on another to wilful misconduct. ? Two men driving motor cars may both pass traffic right after they have changed from yellow to red.? In both cases there are the same act, a same traffic light, the cross-road, and the same motor-car.? In the first case the man may have been driving a little too fast.? He may not have been keeping a proper look-out, and he may not have seen the light (although he ought to have seen them) until he was too close to them and was unable to stop, and, therefore, crossed the road when the light was against him.? He was not intending to do anything wrong, to disregard the provisions of the Road Traffic Act or to endanger the lives of any one using the road, but he was careless in not keeping a proper look-out, and in going too fast, and as a result, without intending to do anything wrong he committed an act which was clearly an act of misconduct.? The second driver is in a hurry.? He knows all about the lights, and he sees in plenty of time that they are changing from yellow to rend, but he says to himself; ?Hardly any traffic comes out of this side road which I am about to cross.? I will go on.? I am not going to bother to stop.?? He does not expect an accident to happen but he knows that he is doing something wrong.? He knows that he should stop, and he is able to stop, but does not and he commits exactly the same act as the other driver.? but in that frame of mind no Jury would have very much difficulty to the conclusion that he had committed an act of wilful misconduct.?
??????????? ?While determining whether the appellant has wilfully failed, the finding that he has defaulted, will not be sufficient to impose penalty unless it is established that he has intentionally and purposely defaulted knowing full well that he had to get himself registered.?

In *The Federation of Pakistan through the General Manager, N.W. Railway, Lahore v. Syed Hasham Ali Shah* (PLD 1954 Lahore 769), Ortcheson, J. (as he then was), observed:
?I therefore find myself entirely unable to agree either that misconduct can be equated with mere negligence or that, as held by Suhrawardy, J., misconduct is something distinct from wilful misconduct.? The word ?wilful? is defined in the Concise Oxford Dictionary as ?for which compulsion or ignorance or accident cannot be pleaded as excuse: intentional; deliberate? while misconduct is defined primarily as ?improper conduct?.? Unless his will is a party to his action, a man cannot be held guilty of misconduct.? [p.776]F

In the above, Rahman, J. (as he then was), observed:

?Misconduct? may be intentional conduct inasmuch as the act or omission may have the feature of voluntariness included in it but it should still be distinguishable from intentional or wilful misconduct.? To my mind, ?misconduct? includes any highly improper or wrong conduct involving something more than mere negligence and ?culpable neglect of an official in regard to his office? in the words of the Oxford Dictionary, would be one form of it.? Misconduct, on the one side, has to be something more than negligence simpliciter and on the other less than ?wilful misconduct?. At least while fixing the lower boundary of the scope of its connotation.? This may be a matter of some nicety in the circumstances of a particular case but the line has to be drawn somewhere consistently with the provisions of the statute and the language of the risk-note.? The expression used in Risk Note-B may be regarded as a term of art in as much it is meant to be a compendious term covering *inter alia* ?the commission of an offence like mischief, criminal misappropriation, criminal breach of trust or theft by a Railway servant.? These grosser forms of misconduct (if I might so describe them) which may be taken as corresponding to the ?wilful misconduct? of English law, would *a fortiori* be included within the term ?misconduct? and consequently the necessity for equating ?misconduct? with ?wilful misconduct? vanishes.? [p.? 782]G

In re: CITY EQUIRABLE FIRE INSURANCE COMPANY?S CASE ([1925] 1 Chancery 407) at page 409 of report, ?wilful neglect or default? has been dealt with in the following words:

?Wilful Neglect or Default.?An act, or an omission to do an act, is wilful where the person who acts, or omits to act, knows what he is doing and intends to do what he is doing, but if that act or omission amounts to a breach of that person?s duty, and therefore to negligence, he is not guilty of wilful neglect or default unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of his duty.?

At page 431 of the report, it is observed:

???Brown L.J. expressed himself as follows: ?Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances ? not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction.? The other word which it is sought to define is ?wilful?.? That is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in Courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will.? It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent.?? If these words of Bowen L.J. be read without reference to the facts of the case in which they were used, I should agree that the word ? wilful? in art. 150 was superfluous, and qualifies in no way a director?s liability for negligence. For a director acting under compulsion, or at a time when his mind was no longer functioning, could hardly be said to be guilty of negligence or default?words that by themselves surely connote free agency and spontaneous action of the will????

At page 434 it was further observed:

?If I may say so with respect, the difficulty is not so much in ascertaining the meaning of the adjective ? wilful?, as in ascertaining precisely what is the noun to which the adjective is to be applied.? An act, or an omission to do an act, is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty, and therefore to negligence, is the person guilty of wilful negligence.? In my opinion that question must be answered in the negative unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty??..?

At page 435 it was observed:

????Brett L.J. said (1): ?In a contract where the term wilful misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do or to omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing which he is doing is wrong; I think that if he knows that what he is doing will seriously damage the goods of a consignor, then he knows that what he is doing is a wrong thing to do; and also, as my Lord has put it, if it is brought to his notice that what he is doing or omitting to do, may seriously endanger the things which are to be sent, and he wilfully persists in doing that against which he is doing that against which he is warned, careless whether he may be doing damage or not, then I think he is doing a wrong thing, and that that is misconduct, and that, as he does it intentionally, he is guilty of wilful misconduct; or if he does, or omits to do something which everybody must know is likely to endanger or damage the goods, then it follows that he is doing that which he knows to be a wrong thing to do. Care must be taken to ascertain that it is not only misconduct but wilful misconduct, and I think that those two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission?????

In a very recent judgement passed by a Full Bench of the Lahore High Court, Lahore, the question of ? wilful default? has been dealt with in the case *Mrs. Shahida Faisal v. Federation of Pakistan* (PLD 2000 Lahore 508), relevant portion whereof reads thus:
?24.????? From its reading, it is quite clear that a person who does not pay/return/repay the amount due to any bank, financial institution or statutory institutions within thirty days, that person becomes wilful defaulter and is liable to be proceeded under the Ordinance.? This is, however, only subject to an exception that wilful default must not have been occasioned or caused by the lending institution due to its wilful breach of agreement/contractual obligations.? Seen from the above angle, it clearly follows that the circumstances of default became an offence punishable under the first Ordinance.? Thereafter; the expression of ?wilful? was added to it at Serial No.1 in amending Ordinance No. IV of 2000.? From the above, two questions arise i.e. as to what is the nature of this offence and secondly whether it was/is hit by the principle of retrospectivity.? With regard to first it is also to be seen in the context of the afore-described circumstances where-under this was made an offence.? The case of the petitioner is that it is a non-continuing offence while the case of the N.A.B. is that it was/is a continuing one. Such question was

considered by the apex Court of neighbouring India in State of Bihar v. Deokaran Nenshi AIR 1973 SC 908 in following terms:-
?A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all.? It is one of those offences which arises out of a failure to obey or comply with a rule or its requirements and which involved a penalty, liability for which continues until the rules or its requirement is obeyed or complied with.? On every occasion that such disobedience or non-compliance occurs and recurs there is the offence committed.? The distinction between the two kinds of offences is between an act or omission which constitutes and offence once and for all and an act or omission which continues and, therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all.?
?The rule, so enunciated, was reaffirmed in AIR 1984 SC 1688.?
?**25.**????? The question ?whether a particular offence is continuing or not? depends upon the language of the Statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting a particular act as an offence.? Turning to the matter in hand in this petition, it is quite clear that the detenus did not pay the debt within the period committed by them.? They did not make any promise to pay before the Court even.? Seen from the above context, we have no option but to hold that the offence committed by the detenus is a continuing offence.?
?**26**????Seen from the above chronological perspective, we have no difficulty in saying that act/omission of non-payment/non-repayment of loans was made a continuing offence.? The nature of continuing offence cannot be examined from the date of first happening of that offence.? This applies to the phenomena of default.? The defaulter is under duty to pay his liability and commits continuing offence on each occasion and on each moment he does not pay his liability.? The declaration of Chief Executive, can safely be said has no nexus with the nature of offence.? The declaration was intended to provide opportunity to defaulter to clear their liabilities and save themselves from criminal proceedings.? On this view of the matter we are of the considered opinion that offence of wilful default as defined in the Ordinance is a continuing offence.?

200.??????????????? As to retrospective operation of the offence of ?wilful default, the learned Full Bench of the High Court, in the above report, after referring extensive case-law on the subject from Indian jurisdiction, concluded as under:
?**29.** ???? In view of the facts and circumstances of the case in hand, we are very clear in our mind that the offence of wilful default incorporated in Schedule to Ordinance No. XVIII of 1999 as amended by 19 of 1999 and 4 of 2000 is a continuing offence and petitioners who had neither paid the principal amount nor its mark-up **cannot seek benefit under section 12 of Constitution; that the rule of retrospectivity is not applicable to offence which is continuing in nature.?**

It would be advantageous to refer the case of *Municipal Corporation of Delhi v. Moti Lal* (1972 Cr.L.J. 1536) wherein, as to continuing offence, it was held as under :
?**9.** ?As we have observed, to attract Section 403 Cr.P.C. in prosecutions under the Prevention of Food Adulteration Act the sample lifted must be of the same thing from the same place at the same time from the same person.? If any of these four elements is missing, it cannot be said that only one offence of storing for sale has been committed.? For example, if a man is driving his car late in the evening without lights and is stopped and challaned, it cannot be said that he cannot be challaned again at all during the course of the same evening.? The prohibition is with regard to driving after lighting up time without lights.? If a man is caught once, it gives him no immunity that he can continue the offence throughout the evening.? But he cannot be challaned from this offence more than once at the same time and at the same place.? Similarly, storing for sale of any adulterated article of food is a continuing offence and in any case if the storing is at more than one place and samples are lifted from two places at different times, there will be two distinct offences.?

201.??????????????? For the last several years there has been tremendous increase in allegations of massive corruption against divergent strata of the society.? The necessity for creating the offence of ? wilful default? arose because in the past the prosecution agency and other government agencies had not properly carried out their public duty to investigate the offences disclosed due to the alleged involvement of several persons holding high offices in the executive, public offices, etc. Indifferent/casual attitude of the concerned agencies to conduct and proceed with the investigation is understandable.? This is, indeed, a grave situation.?? This Court can take judicial notice of the fact that great loss of public revenue owing to enormous corruption and failure to recover the looted money through huge bank loan defaults pose a serious threat to economic life, financial stability, credit and security of Pakistan including the unity and integrity of the nation.? These are the circumstances in which the *vires* of the impugned Ordinance are to be judged, which was promulgated for an expeditious and thorough probe into corruption and corrupt practices and holding accountable those accused of such practices, which had already been delayed for several decades. The validity of the impugned Ordinance is also to be judged keeping in view the extraordinary circumstances prevailing in the country and the adverse impact of lacking probity in the public life leading to highest degree of corruption.? Such a situation has also adversely affected the foreign investment and funding from the International Monetary Fund as well as the World Bank who

have warned that future aid to Pakistan shall be subject to the requisite steps being taken to eradicate corruption. If the pervading corruption in the society is permitted to continue unchecked it would lead to economic disaster.
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202.??????????????? It was on 12th October, 1999, that the situation prevailing in the country in the sphere of economic debacle was recognised.? The factors leading to the above situation on the ground, included the acts and omissions of persons who were the Members of the National and Provincial Assemblies,? the Senate,? the Civil Services, in business and/or working for gain in other disciplines in the country.

203.??????????????? In *Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others* (PLD 2000 SC 869) this Court took notice of the pleadings of the parties, and after considering the adverse effects of the inaction etc. of all concerned to collect the looted wealth of the country from those who were responsible therefor, it was observed that the action taken on 12.10.1999 was justifiable and that the speeches of the Chief Executive dated 13.10.1999 and 17.10.1999 correctly spelt out the plan/scheme to be adhered to by him for the purposes of making recovery thereof.? It was held that Chief Executive of the Islamic Republic of Pakistan is entitled, *inter alia*, to perform all such acts and promulgate all legislative measures as would establish or lead to the establishment of the declared objectives of the Chief Executive as spelt out in his speeches referred above. The Chief Executive in his speech dated 17.10.1999 clearly stated:
?Revival of economy is critical. Our economy is in deep trouble and revolutionary steps are needed to put it back on track. The Pakistani people were subjected to betrayal of their trust.? Their hard-earned money was frozen or taxed in violation of State commitment.? We need to restore this trust.??
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?The process of accountability is being directed especially towards those guilty of plundering and looting the national wealth and tax evaders. It is also directed towards loan defaulters and those who have had their loans rescheduled or condoned.? The process of accountability will be transparent for the public to see.? My advice to the guilty is to return voluntarily national wealth, bank loans and pay their taxes before the hand of law forces them to do so with penalty.? As a last chance I urge all defaulters to come forth and settle their debts within a period of four weeks, after which their names will be published and the law will take its due course.? They owe this to Pakistan and I expect their spirit of patriotism to guide them.?

It was in the above backdrop that the impugned Ordinance was promulgated and amendments made therein, subsequently.? The plea taken by the petitioners that a person entering into contractual obligations before the promulgation of the impugned Ordinance cannot be made to suffer for his alleged failure to clear his said indebtedness under the impugned Ordinance and that too as an offence, loses all significance in the light of the above circumstances.? It is not the case of any one of the petitioners that they have been willing to account for the ill-gotten wealth and that it was not their inaction which has placed them in the predicament in which they find themselves today.? The sources of amassing wealth by the specific individuals and juristic persons being what they are, they should not expect any lenient view in the cases against them provided the action taken against them is not contrary to a valid piece of law. More so, when the efforts on behalf of NAB in putting them under notice of 30-days in terms of Section 5(r) of the impugned Ordinance also fell on deaf ears.? Viewed in this perspective, the transformation of the alleged civil action flowing out of the contractual obligations, into an ?offence? under the impugned Ordinance, does not suffer from any flaw whatsoever.
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204.??????????????? An eleven-Member Bench of this Court in Review Petitions *Wasim Sajjad and others v.? Federation of Pakistan through Secretary, Cabinet Division and others*? (PLD 2001 SC 233) upheld the judgment in *Zafar Ali Shah* (supra). In *Zafar Ali Shah* (supra), shortest possible time was given to the Chief Executive for restoration of civil rule after achieving the declared objective which necessitated the military take over and proclamation of emergency spelt out from the above speeches of Chief Executive dated 13th and 17th October, 1999.? We also hereby reaffirm by way of emphasis that the validation and legitimacy accorded to the present Government is conditional, inter-linked and intertwined? with the holding of general elections to the National Assembly, the Provincial Assemblies and the Senate of Pakistan within the time frame laid down by this Court leading to restoration of the democratic institutions, that is to say, the elections must be held and Assemblies restored by 12-10-2002.?

205.??????????????? It is true that unless a proper investigation is made and it is followed by equally proper prosecution, the efforts to recover the looted money would be an exercise in futility.?? The need for a strong and competent prosecution machinery is a *sine qua non* for a fair and competent investigation.? Investigation and prosecution are inter-linked.? If the conduct of those who are guilty of not discharging their contractual obligations in the re-payment of loans then in order to revive the economy in the light of the declared objectives of the Chief Executive particularly his speech dated 17.10.1999 and the law laid down in Zafar Ali Shah?s case (supra), there does not appear to be any bar to promulgate the legislation to make such conduct amounting to an ?offence? and the same must be

duly investigated and the offender against whom a *prima facie* case is made out should be expeditiously prosecuted through a fair trial.? It is well known that the international agencies like the International Monetary Fund and the World Bank have warned Pakistan time and again that future aid to the country may be subject to appropriate steps being taken to eradicate corruption.

206.???????????????? In the Commonwealth Finance Ministers Meeting held on 21-23rd September, 1999 noticed in the case of? Zafar Ali Shah?s case (supra) it was *inter alia* observed that: C*orruption, which undermines development, is generally an outcome and a symptom of poor governance. It has reached global proportions and needs to be attacked directly and explicitly.?*? In this context and in the interest of state survival any appropriate strategy/legislation for ameliorating the situation and reviving the economy has to be judged in the light of the test laid down in Zafar Ali Shah?s case (supra).? It may be re-emphasised that in the judgment in Zafar Ali Shah?s case (supra), which was upheld in review, it was stated in unambiguous terms that the Chief Executive is entitled to perform all acts and promulgate all legislative measures as are highlighted in paragraph-6 of the Short Order, clause (v) whereof reads as under :
?**(v).**???? That these acts, or any of them, may be performed or carried out by means of Orders issued by the Chief Executive or through Ordinances on his advice.?

207.???????????????? The *de facto* and *de jure* status of the present regime was recognised for a transitional period to prevent any further destabilisation and with a view to create corruption free atmosphere at national level through transparent accountability; revive the economy before restoration of democratic institutions under the Constitution, in that, the Constitution offered no solution to the crisis. In these circumstances, the Court took judicial notice of the fact that the people of Pakistan generally welcomed the army takeover due to avowed intention of the Chief Executive to initiate the process of across-the-board and transparent accountability against persons from every walk of life against whom corruption and abuse of national wealth have been alleged, and take appropriate measures for stabilising the economy and restoring the democratic institutions within the shortest possible time after achieving his declared objectives. This will be another factor which shall be kept in mind while examining the validity of the impugned Ordinance.

208.???????????????? Yet another factor, which is to be taken into consideration while judging the validity of the impugned Ordinance would be that one of the grounds on which validation and legitimacy was accorded to the present regime as stated in the case of *Zafar Ali Shah* (supra) was that the representatives of the people, who were responsible for running the affairs of the State were themselves accused of massive corruption and corrupt practices in the public as well as private spheres and were benefiting therefrom.? They were resisting the establishment of good governance. There was a general perception that corruption was being practised by diversified strata including politicians, parliamentarians, public officials and ordinary citizens and there was? no political and economic stability in the country. The bank loan defaults were rampant, in that, as per report of the Governor, State Bank of Pakistan, Rs.356 billion were payable by the bank defaulters upto 12.10.1999.? There being no accountability and transparency, economic stability in the country was highly precarious and there was an overall economic slowdown as GDP growth during the past three years had hardly kept pace with the growth of population and that Pakistan has a debt burden which equals the country?s entire national income.

209.???????????????? The seven principles of Public Life, stated in Volume-I of Lord Nolan?s Report (1995) titled: ?Standards in Public Life?, are also needed to be kept in view.? The principles are as follows:

The Seven Principles of Public Life

Selflessness

Holders of public office should take decisions solely in terms of the public interest.? They should not do so in order to gain financial or other material benefits for themselves.

Integrity

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that influence them in the performance of their official duties.

Objectivity

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Honesty

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership

Holders of public office should promote and support these principles by leadership and example.?

210.???????????????? If the conduct of a holder of public office amounts to an offence, it must be investigated forthwith and if a *prima facie* case is made out against the offender we see no reason why he should not be prosecuted for the majesty and maintenance of rule of law.? A duty is cast on the judiciary to ensure the rule of law and guard against erosion therein.? In the past the government agencies had failed to perform their statutory duties to investigate matters and to prosecute all persons who were found to have committed offences of corruption, corrupt practices and recovery of government dues with a view to protect the persons involved, who were very influential and powerful.????????????

211.???????????????? In view of persistence of corruption and genuine emergent need for the recovery of outstanding amounts from those persons who have committed default in the repayment of amounts to banks, financial institutions, government and other agencies and all measures having failed to recover the same through ordinary Courts of law, it became necessary to promulgate this extraordinary legislation in the extraordinary circumstances prevalent in the country.? Had the Government agencies and the Revenue authorities performed their duties and legal obligations justly, fairly and in accordance with law and had there been proper investigation into alleged offences committed by important politicians, bureaucrats and the persons who were recipient of money from any unlawful sources given for unlawful considerations, there would have been no need to promulgate the impugned Ordinance.? But when the matter discloses a clear nexus between crime/ corruption and powerful persons holding public offices which poses a serious threat to the economy? as well as the very existence of the country, then to prevent erosion of the rule of law and to take steps for restoration of democracy in the country within the time frame laid down by this Court, it will have to be examined whether the mechanism involved for recovery of amounts from the wilful defaulters for reviving the economy is in conformity with the declared objectives of the Chief Executive.? Applying the above principles, we are led to irresistible conclusion, after hearing the learned counsel for the petitioners at length, that there was a need for creation of an offence of ?wilful default? and mechanism for recovery of the same as is purported to have been done under Section 5(r) of the impugned Ordinance.

Also refer the Prevention of Corruption Act, 1947 (Act II of 1947) which was a political dispensation under the colonial rule, wherein a post war situation was taken note of, in that, a lot of things were happening in the society which were breeding corruption, necessitating the enactment of the above ?Act.? The Act became a permanent law and is on the statute book even today.

213.???????????????? Reference may also be made to ?The Racketeer Influenced and Corrupt Organisations Act, 1970? of USA, commonly known as RICO Act. It was passed by the United States Congress as a powerful tool in the fight against organized crime, which enables persons financially injured by a pattern of criminal activity to bring a RICO claim in state or federal court, and to obtain damages three times the amount of their actual harm, plus their attorneys fees and costs.? It has not only been successfully used against members of the Mafia, but also against legitimate business persons, etc. (Refer http://www.ricoact.com/).

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214.???????????????? It would thus be seen that the RICO Act was meant to protect society from the malfeasance of organized crime, but it was also intended to protect business from corruption and weed out criminal business practices. It can also be used to recover losses caused by business corruption. The RICO Act is complicated, but no more complicated than many other laws.? If a business runs across corruption in its midst, it is the best weapon. Refer Civil RICO Report, Vol. 16, No.1, May 10, 2000. In Section 1961 of the RICO Act, the ?racketeering activity? has been defined thus:

?Sec. 1961. Definitions

As used in this chapter -

(1) "racketeering activity" means

(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year;

(B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1081 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-2424 (relating to white slave traffic),

(C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds),

(D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States,

(E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or

(F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain.?

Key Concepts of RICO Jurisprudence are illustrated in the following cases:

?RICO encompasses both legitimate and illegitimate enterprises. *United States v. Turkette*, 452 U.S. 576 (1981)

Under RICO, at section 1962(c), there must be a distinction between the RICO "person" and the RICO "enterprise."? An individual cannot "associate" with himself. This is known as the person/enterprise distinction. *River City Markets, Inc. v. Fleming Foods West, Inc.*, 960 F.2d 1458 (9th Cir. 1992)

With regard to the person/enterprise distinction, one can associate with a group of which one is a member while the member and the group remain distinct.? *Riverwoods? Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339 (3d Cir. 1995)

RICO's person/enterprise distinction is NOT met by alleging that a corporate person associated with its own employees,? agents, subdivisions or affiliates.? *Riverwoods? Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339 (3d Cir. 1995)

Under RICO, section 1962(c), there also must be a distinction between the enterprise and the racketeering activity; in other words, members of an enterprise must be linked by more than their participation in the same pattern of racketeering activity.? This is known as the racketeering activity/enterprise distinction.???? *McDonough v. National Home Ins. Co.*, 108 F.3d 174 (8th Cir. 1997)

A RICO enterprise need not be economically motivated. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1993)

To be liable under section 1962(c), a person must participate in the operation or management of the enterprise itself.? *Reves v. Ernst & Young*, 507 U.S. 170 (1993)

Securities fraud is not a predicate act UNLESS the defendant has already been criminally convicted for the offense. 18 U.S.C. ? 1964(c)

A RICO? claim can be predicated on mail and wire fraud alone but should not be so predicated.? "Common Sense"

The factors of continuity plus relationship combine to produce a pattern.?? *H.J. Inc. v. Northwestern Bell Tele.* Co., 492 U.S. 299 (1989)

A close-ended pattern must generally last one year.???? Grimmet v. Brown, 75 F.3d 506 (9th Cir. 1996)

A plaintiff only has standing to the extent that the injury to business or property occurred "by reason of " the conduct constituting the violation;? a defendant who violates section 1962(c) is not liable for treble damages to everyone who might have been injured by other conduct nor is the defendant liable to those who have not been injured. *Sedima, S.P.R.L. v. Imrex co., Inc.*, 473 U.S. 479 (1985) *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992)

Always bring a section 1962(c) and (d) claim; never bring a section 1962(a) or section 1962(b) claim without the section 1962(c) claim. *The Racketeer Influenced and Corrupt Organizations* (RICO) Act, 18 U.S.C. ?? 1961-68 (1994)

State courts have concurrent jurisdiction over RICO claims. *Tafflin v. Levitt*, 493 U.S. 455 (1990).? ??See http://www.ricoact.com/rules_of_rico_jurisprudence.htm

215.????????????????? The matter may be looked at from another angle as well.? The mere fact that at the time of entering into an agreement no punishment was prescribed for default in payment of loan or bank dues, as the case may be, cannot possibly mean that the duty of the defaulter to re-pay the loan/dues also expired.? The duty still remains.? It continues till the loan/dues are re-paid as required under the agreement.? Therefore, non-payment of loan/dues in terms of the agreement within the contemplation of Section 5(r) is a continuing breach of duty or obligation, which itself is continuing if duty to re-pay the loan/dues as aforesaid continues from day to day and the non-performance of that duty/obligation from that point of view must be held to be a continuing default in the repayment of loan. Therefore, if it is continuing, there is a fresh starting point of limitation every day as the wrong continues. Viewed from this angle, there is no limitation and no question of retrospectivity involved as long as the duty remains undischarged.

216.????????????????? It is also instructive to refer to Section 23 of Limitation Act, 1908 which prescribes that in the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.? It is within the competence of the Legislature to treat a continuing wrong as an offence independent of the contract so that the offence so created is applicable to a case where there is a continuing breach of contract which has been converted into an offence, with a view to helping the general public at large in that sphere.?? It could, therefore, be rightly urged that there will practically be no limitation of prosecution under Section 5(r) of the Ordinance as long as the duty to re-pay the loan/debt/bank dues continues under an agreement or contract and the same remains undischarged.? The offence contemplated under Section 5(r) is the one which is committed over a span of time, therefore, the last act of the offender controls the innocence or otherwise of the party. The nature of default contemplated here is not the default which is committed once and for all.? It is a continuous default. Thus on every occasion the default occurs and recurs, it constitutes an act or omission which continues and is therefore a fresh act. Looked at from this angle the offence contemplated under Section 5(r) is not retrospective but prospective in nature.

217.???????????????? Notwithstanding the above findings, the next question which requires consideration whether Section 5(r) is hit by clause (1) of Article 12 of the Constitution which contemplates thus:
?**(1)** No law shall authorize the punishment of a person ?

(a) for an act or omission that was not punishable by law at the time of the act or omission; or
(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.?

218.???????????????? Article 12 of the Constitution does not deprive the legislature of its power to give retrospective effect to an enactment, which the legislature is competent to enact. It merely provides that no law shall authorise the punishment of a person for an act or omission that was not punishable by law at the time of the act or omission; or for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.? Seen in this perspective, the act of ?wilful default?, is not an act or omission which was punishable by law at the time the same was committed but an act or omission committed 30-days after the promulgation of the Ordinance whereby the offence of ?wilful default? under Section 5(r) was created.? As stated above, it was in the nature of a continuous wrong, which was converted into an offence prospectively i.e. in a case where such wrong/wilful default continued even after the expiry of 30-days of the promulgation of the impugned Ordinance and not retrospectively.? In other words, it is a case where the punishment is prescribed in relation to the breach of a continuing duty which is not performed even within 30-days after the coming into force of the Ordinance.? By no stretch of imagination it could be termed retrospective in operation, particularly, in view of the statement made by Mr. Abid Hasan Minto on behalf of the Federation that no prosecution was launched in respect of ?wilful default? where re-payment of loan etc. was made good within 30-days of the promulgation of the Ordinance.
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219.???????????????? So far as the punishments and creation of offences by the impugned Ordinance are concerned, they are protected by Article 12 of the Constitution, in that, under Article 12 of the Constitution *ex post facto* legislation can neither create new offences nor provide for more punishment for an offence than the one which was available for it when committed.? This is the limited impact of Article 12 of the Constitution.? Therefore, the only prohibition as to retrospectivity of the offence, contemplated under clause (1) (a) (b) of Article 12 of the Constitution, is not attracted here.? However, in order to ensure across-the-board accountability we order the following directions for the application of Section 5 (r) of the impugned Ordinance.? The same shall be suitably incorporated in the Rules to be framed under Section 34 of the Ordinance, which shall on promulgation become part of the Ordinance.?
i.????????? No prosecution for ?wilful default? shall be launched before the expiry of 30 days statutory notice and an additional 7 days notice shall also be served on the alleged defaulter to satisfy Governor, State Bank of Pakistan that he has not committed any ?wilful default?. The report of Governor, State Bank of Pakistan as to the *prima facie* guilt or innocence will be subject to the final decision of the Accountability Court. The same procedure will be followed with regard to recovery of other public dues falling within the contemplation of Section 5(r) of the Ordinance. The Governor, State Bank of Pakistan shall record his recommendations within 7-days with reasons therein.
ii.????????? Any settlement arrived at with the defaulters by the Chairman, National Accountability Bureau or compounding of any offence shall be subject to the decision of the Accountability Court.
iii.???????? In respect of any person who is being investigated under the Ordinance, if the final report after full investigation, is that no *prima facie* case is made out to proceed further and the case must be closed against him, that report must be promptly submitted to the Accountability Court concerned for its satisfaction that the concerned authorities have not failed to perform their legal obligations and have reasonably come to such conclusion.? The final decision in the matter would be by the concerned Accountability Court.? The Accountability Court shall conclude the trial expeditiously after giving fair opportunity to the accused.
iv.???????? Everyone against whom there is reasonable suspicion of commission of a crime under the NAB Ordinance is to be treated equally and if need be, proceedings may be held in camera to the extent necessary in public interest and to avoid prejudice to the accused.
v.???????? The concerned prosecuting agencies shall conduct their responsibilities and functions without being influenced by extraneous consideration.
vi.???????? The Chairman NAB shall ensure reasonable and expeditious time-frame for the completion of investigation and launching of prosecution.
vii.??????? The Chairman NAB should take time-bound steps to establish a grievance redressal mechanism to promptly deal with the complaints received from the public against the Bureau.

viii.?????? While attending to nature of duty and functions of the officer engaged in the investigation of an offence, the following observations made in *Union of India and Others v. Sushil Kumar Modi and Others* (1997 (4) SCC 770), be kept in view:
??????????? ?**4.**??????? At the outset, we would indicate that the nature of proceedings before the High Court is somewhat similar to those pending in this Court in Vineet Narain v. Union of India (1996 (2) SCC 199) and Anukul Chandra Pradhan v. Union of India (1996 (6) SCC 354) and, therefore, the High Court is required to proceed with the matter in a similar manner.? It has to be borne in mind that the purpose of these proceedings is essentially to ensure performance of the statutory duty by the CBI and

the other government agencies in accordance with law for the proper implementation of the rule of law.? To achieve this object a fair, honest and expeditious investigation into every reasonable accusation against each and every person reasonably suspected of involvement in the alleged offences has to be made strictly in accordance with law. The duty of the Court in such proceedings is, therefore, to ensure that the CBI and other government agencies do their duty and do so strictly in conformity with law.? In these proceedings, the Court is not required to go into the merits of the accusation or even to express any opinion thereon, which is a matter for consideration by the competent court in which the charge sheet is filed and the accused have to face trial.? It is, therefore, necessary that not even an observation relating to the merits of the accusation is made by the Court in these proceedings lest it prejudice the accused at the trial.? The nature of these proceedings may be described as that of ?continuing mandamus? to require performance of its duty by the CBI and the other government agencies concerned.? The agencies concerned must bear in mind and, if needed, be reminded of the caution administered by Lord Denning in this behalf in R. v. Metropolitan Police Commr., (1968(1) All ER 763/1968 (2) QB 118).? Indicating the duty of the Commissioner of Police, Lord Denning stated thus : (All ER p.769) :

?I have no hesitation, however, in holding that, like every constable in the land, *he should be, and is, independent of the executive.? He is not subject to the orders of the Secretary of State*,?I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, *to enforce the law of the land.* He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace.? He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; *but in all these things he is not the servant of anyone, save of the law itself.? No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not prosecute this man or that one.? Nor can any police authority tell him so.? The responsibility for law enforcement lies on him.? He is answerable to the law and to the law alone.?*

The nature of such a proceeding in a court of law was also indicated by Lord Denning, as under :

?A question may be raised as to the machinery by which he could be compelled to do his duty.? *On principle, it seems to me that once a duty exists, there should be a means of enforcing it.? This duty can be enforced.* I think, either by action at the suit of the Attorney General; or *by the prerogative order of mandamus.?* (emphasis supplied).?

ix.???????? Unless a competent prosecution follows a fair and competent investigation, the ultimate analysis would be violative of the principle of fair trial. A panel of competent lawyers of experience? and impeccable reputation should be prepared with the advice of Ministry of Law, Justice and Human Rights. Their services should be utilised as prosecuting lawyers in cases of significance on reasonable remuneration. For terms and conditions of their services, guidance may be sought from the Central Law Officers Ordinance, 1970, prescribing method for the appointment of Standing Counsel and Deputy Attorney Generals.

220.???????????????? Adoption of the above course shall not affect the initiation of investigation and its continuation to its logical end or the proceedings pending before any authority/Court under NAB Ordinance.? These instructions are being issued under Article 37 read with Article 187 of the Constitution, which empowers this Court to issue any appropriate directions, orders or decrees, as may be necessary for doing complete justice in any case or matter pending before it which are enforceable throughout Pakistan.

221.???????????????? Suitable amendments shall also be made under Section 37 of the Ordinance to provide for consultation by the President of the Islamic Republic of Pakistan with the Chief Justice of Pakistan for modifications, additions or omissions. This disposes of questions No. (ii) and (iii) of the ? admitting order?.

Power of Chairman NAB To Freeze Property

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222.???????????????? Section 12 of the NAB Ordinance confers upon the Chairman NAB, the un-challengeable power to freeze the property of an accused.? The power to deprive an individual of the legitimate use of his property is no minor concern but is one which goes to the root of the case.? It is the duty of the Superior Courts to protect citizens from being deprived of their liberty and property, except in accordance with the Constitution and the laws, subject to reasonable restrictions.? Section 12 *ibid*, in so far as it vests the power in the Chairman NAB to pass any order of seizure, freezing, attachment or prohibitory order by taking possession, or by appointment of receiver, or prohibiting the payment of rent or delivery of property to the accused or to any other person on his behalf which shall remain in force for a period of not exceeding thirty days, suffers from excessive delegation. The ends of justice would be fully met if the period contemplated under the first proviso to clause (c) of Section 12 is curtailed to fifteen days.? Likewise, the provisions contained in clause (f) thereof that the order of freezing mentioned in Section 12(a) to (e) shall, as the case may be, remain operative until final disposal by the Accountability Court or the Appellate Forum impinges upon the Independence of Judiciary and suffers from excessive delegation in that it is for the Accountability Court alone to determine the period of duration during which the freezing shall remain operative till final disposal of the reference by the Accountability Court.? Similarly, clause (f) also makes operative the freezing order notwithstanding

filing or pendency of appeal under the Ordinance.? This provision is against the concept of Independence of Judiciary.? It is true that Section 12 (a)(c)(iv) of the Ordinance provides for interlocutory measure to ensure that property relating to the accused is not dealt with by him or on his behalf pending investigation. Similar provisions exist in other laws, in respect of civil as well as criminal liability. Rules 1 and 2? Order XXXIX of the Code of Civil Procedure provide for passing of such orders. Section 37(2) of the Control of Narcotic Substances Act 1997 and the Criminal Law Amendment Act 1964 also contemplate powers to freeze property.? Nevertheless, it is for the appellate Court alone to decide having regard to the merits of each case justly, fairly and in accordance with law whether or not the order of freezing shall remain operative upon filing of or during the pendency of an appeal under the Ordinance.? However, the ends of justice will be fully met if clause (f) of Section 12 of the Ordinance providing for continuation of freezing of? property after the accused has been acquitted is suitably amended? to provide for continuation of such freezing for a period not exceeding ten days to be reckoned from the date of receipt of the certified copy of the order to enable the NAB for filing an appeal against the acquittal order.? Thereafter it would be for the appellate forum to pass appropriate orders.

223.???????????????? Clause (c) of Section 13, which relates to claim or objection against freezing, also denies the right of appeal against an order made under Section 12 of the Ordinance. In *Pakistan through Secretary, Ministry of Defence v. The General Public* (PLD 1989 SC 6) it was held by the Shariat Appellate Bench of this Court, as under:
?The Federal Shariat Court in its impugned judgment has also held that the right of appeal was recognised by the Holy Prophet (Peace be upon him) as well as by the Khulafa-e-Rashideen and discussed this question in great detail. Nothing has been shown to us in refutation thereof. The plea, thus, that barring the right of appeal does not offend against the injunctions of Islam, cannot be accepted.?

The purported denial of the right of appeal is violative not only of Article 2A of the Constitution but also power of the Superior Courts to correct such orders through exercise of their constitutional jurisdiction. Clearly, the denial of right of appeal is contrary to the norms of justice as also violative of principles of natural justice. Also refer?? *Messrs Chenab Cement Product (Pvt) Ltd. and others v. Banking Tribunal, Lahore and others* (PLD 1996 Lahore 672). Thus, Section 13(c) which denies the right of appeal is violative of the principles of the Islamic injunctions and the same needs to be suitably amended so as to allow right of appeal to the accused as well as to the non-accused/third party whose claim or objection against freezing of property is dismissed by the accountability Court.?

BURDEN OF PROOF

224.???????????????? Under Section 14(d) of the impugned Ordinance, reproduced in the earlier part of the judgement, the ?burden of proof? has been placed on the person accused of an offence under Section 9 (a) (vi) and (vii) *ibid*. Placing of ?burden of proof? on an accused is not an unfamiliar concept in legal parlance. There is a large number of Statutes wherein the ?burden of proof? has been placed on the accused. Following is the list of some of the laws, which place the burden of proof on an accused:

?Section 178-A of the Seas Custom Act (VIII of1878

Section 24 (1) of the Foreign Exchange Regulation Act (VII of1947)

Section 34 of the Drugs Act (XXXI of 1976)

Section 9 of the Passport Act (XX of 1974)

Sections 8 & 14 of the Essential Supplies Act (III of 1957)

Section 5 of the Explosive Substances Act (VI of 1908)

Sections 8 & 13 of the FATA Food Stuff Control Regulations (I of1994)

Sections 8 & 12 of Foodstuffs (Control) Act (XX of 1958)

Sections 5 & 19 of Hoarding and Black Market Act (XIV of 1948)

Section 33 of Prevention of Smuggling Act (XII of 1977)

Section 14 of the Price Control and Prevention of Profiteering and Hoarding Act (XXIX of 1977)

Section 112 of the Railways Act (IX of 1890)

Section 9 of the Foreigners Act (XXXI of 1946)

Section 77 of the Punjab Excise Act (I of 1914)

Section 9 of the Offences in Respect of Banks (Special Courts) Ordinance 1984

Reference may also be made to the following laws which require an accused to rebut a statutory presumption against him:

Sections 4 & 5 (3) of the Prevention of Corruption Act (II of 1947)

Sections 29, 30 and 68 of the Control of Narcotic Substances Act (XXV of 1997)

Section 25 of the Terrorist Affected Areas (Special Courts) Act (X of 1992)

Section 8 of the Suppression of Terrorist Activities (Special Courts) Act (XV of 1975)

Sections 4 (2) and 9 of the Prevention of Gambling Act (XXVIII of 1977)

Section 32 of the Dangerous Drugs Act (II of 1930)

Section 10 of the Opium Act (I of 1878)

Section 76 of the Punjab Excise Act (I of 1914)

Section 9 of Punjab Prevention of Gambling Ordinance (VII of 1978)

Section 11 of the Punjab Vagrancy Ordinance (XX of 1958)

Section 53 of the Sindh Abkari Act (V of 1878)

Section 8 of the West Pakistan Prohibition of Opium Smoking Ordinance (II of 1960)

Section 8 of the Ehtesab Act (IX of 1997)

Section 24 (2), (3) & (4) of the Foreign Exchange Regulation Act (VII of 1947)

Where ?burden of proof? is placed or presumptions are raised by a law on a class of persons that it creates, then as long as such presumptions are raised or ?burden of proof? is placed uniformly in respect of persons to whom such a law applies, there is no violation of the equality clause/s of the Constitution.? Laws raising presumptions against and placing onus of proof upon an accused have repeatedly been challenged in various jurisdictions and it has consistently been the view of Courts that subject to their uniform application and there being a rational connection between the facts presumed and the facts proved, such laws are valid.?? It would be advantageous to refer to case-law on the question of placing of ?burden of proof? on the accused and ?presumption? against him in regard to a particular offence provided in a special enactment. In *State of Madras v. A. Vaidyanatha Iyer* (PLD 1958 SC (Ind.) 264), it was observed:

?Therefore where it is proved that a gratification has been accepted, then the presumption shall at once arise under the section. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused.? It may here be mentioned that the Legislature has chosen to use the words ?shall presume? and not ?may presume?, the former a presumption of law and latter of fact. Both these phrases have been defined in the Indian Evidence Act, no doubt for the purpose of that Act, but S. 4 of the Prevention of Corruption Act is in *pari materia* with the Evidence Act because it deals with a branch of law of evidence e.g., presumptions, and therefore should have the same meaning. ?shall presume? has been defined in the Evidence Act as follows:

?Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved.?

?It is a presumption of law and therefore it is obligatory on the Court to raise this presumption in every case brought under S. 4 of the Prevention of Corruption Act because unlike the case of presumption of fact, presumption of law constitute a branch of jurisprudence.? While giving the finding quoted above the learned Judge seems to have disregarded the special rule of burden of proof under S.4 and therefore his approach in this case has been on erroneous lines.?

In Muhammad Siddiq v. The State (1977 SCMR 503), the following view was taken:

?**6.** ?????? The learned counsel for the petitioner argued before us that the approach of the Courts below was erroneous, inasmuch as they had discussed the case from the angle whether the defence plea was

true or not, whereas the correct approach should have been that the prosecution had established its case. We do not find much force in this submission. It is an admitted fact that the tainted money was recovered from the petitioner. Thereafter the onus shifted upon him to explain how he had received it.? Consequently, the Courts below were justified in closely analysing the defence plea advanced by the petitioner.?

?**7.**??????? It was next contended that the High Court had misread the evidence while holding Ghulam Rasul to be an independent witness.? He referred us to certain statements made in Court to show that Ghulam Rasul was the cousin brother of the complainant.? Since the conviction was based on the evidence of the complainant coupled with that of Ghulam Rasul, who was erroneously considered to be an independent witness, it (conviction) stood vitiated.?

?**8.**??????? It is true that Ghulam Rasul P.W. was a relation of the complainant, but we are of the opinion that in the circumstances of the case the conviction is not liable to be set aside merely on account of the above misreading of evidence.? The petitioner was caught red-handed with the tainted money and, thereafter, the onus on the prosecution was very light to establish his guilt.? The remaining evidence on the record was sufficient to discharge the said burden.?

Also refer *Ghulam Ali v. The State* (PLD 1963 (W.P.) Karachi 582) wherein it was held:

?**9.**??????? In *Ikramuddin v. The State* (PLD 1958 Kar. 21), Bachal, J., in respect of a similar matter under the Anti-corruption Act, opined that the presumption against the accused under section 4 of the Act is not to be drawn until the explanation offered by the accused is considered and found unsatisfactory. Where the accused offers a reasonable explanation which is acceptable and which raises a doubt as to the truth of the prosecution case, the presumption cannot be drawn.? But if the Court feels justified in drawing a presumption against the accused after due consideration of the explanation, then the burden is on the accused to displace the presumption of criminal misconduct.?

?**10.**????? Their Lordships of the Supreme Court in *Mir Ahmed v. The State* (PLD 1962 SC 489) held:

???where there is a question of correct treatment of a plea in defence which is of factual nature and is supported by evidence and circumstances, the decision must not be taken in relation to the accused?s special pleading, but must rest on examination of the entire evidence, and if thereafter the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, this opinion reacts upon the whole case, and the accused is entitled to the benefit of such doubt, on the ground that the prosecution has not proved its case beyond reasonable doubt.?

Reliance can also be placed on *Ghulam Muhammad v. The State* (1980 P.Cr.L.J. 1039) wherein it was observed:

?**10.**????? I have carefully considered the above legal proposition. Section 4(1) of the Prevention of Corruption Act, 1947 embodies a special rule of evidence which is contrary to the well recognised legal principle, that in a criminal case the onus to prove the guilt of the accused is always on the prosecution because the accused is presumed to be innocent. This departure from the well settled legal principle was necessitated by the fact that in corruption cases it was found extremely difficult for the prosecution to prove that the money or valuable thing accepted or obtained by a public servant was by way of illegal gratification because no explicit reliance could be placed on the uncorroborated statement of the bribe giver in that behalf as his position was that of an accomplice. So in order to overcome the above difficulty section 4(1) of the Prevention of Corruption Act, 1947 was enacted. Now in view of the aforementioned statutory provisions it is no longer necessary for the prosecution to prove that the money or other valuable thing accepted or obtained by a public servant was received for doing or showing an undue favour in return for the said money or the valuable thing. I am in respectful agreement with the interpretation of the provisions of section 4(1) of the Prevention of Corruption Act, 1947 as made in Muhammad Saleem?s case. In *Muhammad Siddique v. The State* (1977 SCMR 503) the Supreme Court has also held that once the tainted money is recovered from the accused the onus to explain how he received it shifts upon him. Thus the prosecution case is not affected adversely merely because the statement of Muhammad Siddique is not corroborated by any evidence that the appellant had demanded illegal gratification from him and that the money paid to him which later on was recovered from him was by way of illegal gratification. The question of the appellant?s guilt is to be determined on the explanation given by him with regard to the money received by him from Muhammad Siddique.?

Reference may also be made to *Badshah Hussain v. The State* (1991 PCr.LJ 2299), wherein it was held:

?Presumption?Burden to dispel presumption on accused?Once it was proved to the satisfaction of the court that tainted money recovered from accused had passed on to accused, the burden would be on accused to displace presumption arising under S.4 of the Act of commission of offence, which would be discharged if the accused person established his case by a preponderance of probability.? [p.2303]C

In *Abdul Razak Rathore v. The State* (PLD 1992 Karachi 39), it was observed:

?**10.**????? The presumption in section 4 of the Prevention of Corruption Act, 1947arises only upon proof that the accused person has accepted any amount as illegal gratification.? In the case of *Sultan Ali v. The State* reported in PLD 1971 Kar. 78, a learned Single Judge of this Court observed that it would be an outrage on common sense and reason to infer that under section 4 of the Prevention of Corruption Act, 1947, the presumption has itself been displaced and that the offence of bribery must be held to be established the moment the money is passed into the possession of the accused without further proof that it was accepted as an illegal gratification. When the law raises a presumption against the accused and calls upon him to prove the contrary, it is well-settled that the contrary can be said to be proved if the accused succeeds in establishing that the act attributed to him is capable of an interpretation other than that suggested by the prosecution.?? The proof of the contrary need not necessarily be by evidence, oral or documentary; but it may be furnished by the statement of the accused himself or by the circumstances of the case.

?**11.**????? In Kazi Nizamuddin v. The State reported in PLD 1979 Karachi 294, a learned Single Judge of this Court examined the provisions of section 4 of the Prevention of Corruption Act, 1947, and observed as follows:-

?It is true that section 4 of the Prevention of Corruption Act, 1947 provides for presumption in favour of prosecution when the tainted money has been passed into the hands of the accused and the burden would be upon him to prove that it was not accepted by him as illegal gratification but this would require consideration of two important points. Firstly that whether the money in question was tainted as alleged by the prosecution and secondly what is the standard of proof required from the accused when per statutory requirements presumption operates against him.? On the first point, it has been argued before me that in the instant case when the complainant is not supporting the prosecution allegation that the marked notes were meant to be delivered as illegal gratification and both the complainant and the appellant in the instant case unanimously state that money was given and returned for some other purpose, which has nothing to do with the allegation of bribe, the money which was passed to the appellant during the raid was not tainted at all.? On the second point, it has been argued before me that in the instant case when presumption operates against the appellant under section 4 of the said Act, the burden of proof which falls upon the appellant is not greater but lesser than the general standard of burden of proof on the prosecution which makes it imperative upon the prosecution to prove guilt of accused beyond any reasonable doubt. In this context it is further contended before me that in such a case when law raises a presumption against the accused and calls upon him to prove the contrary, it is well-settled that contrary can be said to be proved if the accused succeeded in establishing that the act attributed to him is capable of interpretation other than that suggested by the prosecution. The proof of the contrary need not necessarily be by evidence, oral or documentary, but it may be furnished by the statement of the accused or by the circumstances of the case.?

Also see *Shabbir Ahmed v. The State* (PLD 1996 Karachi 537), wherein it was observed:

?**5**??In my view the presumption imposed in section 4 of the Prevention of Corruption Act is not unrebuttable which can be rebutted by the statement of accused or by the circumstances of the case.? The burden is still on the prosecution to prove beyond reasonable doubt that the tainted money was passed on to the accused and the same was recovered from his personal search.? In this connection reference can be made to the cases of *Sultan Ali v. The State* (PLD 1971 Karachi 78), *Kazi Niazmuddin v. The State* (PLD 1979 Karachi 294) and *Abdul Razak Rathore v. The State* (PLD 1992 Karachi 39).

?**6.**??????? Mr. Shahadat Awan, Advocate for appellant has argued that admittedly the raiding party has not seen passing of tainted money nor have heard conversation between the complainant and the appellant according to the learned counsel for the appellant this creates doubts in the prosecution case and the impugned conviction is not sustainable.? He has referred to the following cases:-

(i)???????? Allah Din and another v. The State 1975 PCr.LJ 1289;

(ii)??????? Noor Ahmad v. The State 1991 PCr.LJ 1015;

(iii)?????? Ghulam Rasool v. The State 1994 PCr.LJ 120;

(iv)?????? Nazir Ahmad v. The State 1988 PCr.LJ 120;

(v)??????? Muhammad Akhtar Siddiqui v. The State 1994 MLD 2029.

?**7.**??????? The superior Courts have never sustained a conviction in an Anti-Corruption case where the Magistrate was not able to hear the conversation between the complainant and the accused nor in a case where the Magistrate was not able to see passing of tainted money from the complainant to the accused.? In the instant case, it is an admitted fact that P.W.2 was sitting in the house of the complainant and came

out after the revived signal ?from the concerned Mashir.? By that time the conversation between the complainant and the appellant was concluded and the tainted? money had already passed.? Therefore, in my considered view this is not sufficient piece of evidence to sustain the conviction ordered by the learned trial Court.?

?**8.**??????? In the case of *Bashir v. The State* PCr.LJ 670, the Magistrate who was supervising the trap as well as the other raiding party did not state at trial about passing of money nor heard conversation between the complainant and the accused. Benefit of doubt was extended and the accused was acquitted.? In the case of Arshad Mirza v. The State PLD 1988 Lahore 640, the transaction regarding payment of illegal gratification was neither seen nor the conversation between the complainant and accused was heard by the raiding party and, therefore, the conviction was set aside.? In the case of Muhammad Akhtar Siddiqui v. The State 1994 MLD 2029 a learned Single Judge of Lahore High Court Mr. Raja Afrasiyab Khan, J. (as his lordship then was) allowed the appeal and set aside the conviction order after considering the cases of *Muhammad Tahir v. The State* 1992 PCr.LJ 490, *Nazir Ahmad v. The State* 1988 PCr.LJ 775 and *Tariq Mahmood v. The State* 1985 PCr.LJ 1105. Following is the relevant portion of the said reported case:--

?The prosecution had to prove that the members of the raiding party not only saw the payment of the tainted money to the accused but also overheard the conversation between the bribe-giver and the bribe receiver.? In my view, the prosecution evidence does not inspire confidence in these circumstances. It is, therefore, not at all worth credence????

?**9.**??????? After exclusion of the evidence of P.W.2 and P.W.4 the only evidence remains in the field is of Mashir Nazarat Ali who is the same person to whom Begum Alfaraz was married with. In his cross-examination he has admitted that the complainant had informed him regarding his harassment by the appellant.? He has also admitted that he was not able to hear the conversation between the complainant and the accused. He has simply witnessed passing of tainted money.? Therefore, his evidence is also of no worth to sustain a conviction.? On the question of solitary evidence of the complainant, Mr. Shahadat Awan, Advocate for the appellant has cited an unreported case of *Inayat Masih v. The State* Criminal Appeal No. 9 of 1993 where a learned Single Judge of this Court after referring to the cases of *Muhammad Ramzan v. The State* 1990 PCr.LJ 633, *Noor Ahmad v. The State* 1991 PCr.LJ 1015 and *Malik Zafar v. The State* 1989 MLD 4215 held that it would not be safe dispensation of justice to base conviction on the evidence of such interested witness.? Appeal was allowed and the conviction was set aside.?

In *The State of West Bengal v. The Attorney General for India, Intervener.* (AIR 1963 SC 255), it was held:

??**(11)??** This is a deliberate departure from the ordinary principle of criminal jurisprudence, under which the burden of proving the guilt of the accused in criminal proceedings lies all the way on the prosecution.? Under the provision of this sub-section the burden on the prosecution to prove the guilt of the accused must be held to be discharged if certain facts as mentioned therein are proved; and then the burden shifts to the accused and the accused has to prove that in spite of the assets being disproportionate to his known sources of income, he is not guilty of the offence.? There can be no doubt that the language of such a special provision must be strictly construed.? If the words are capable of two constructions, one of which is more favourable to the accused than the other, the Court will be justified in accepting the one which is more favourable to the accused.? There can be no justification however for adding any words to make provision of law less stringent than the legislature has made it.?

225.**????????????????** It will be instructive to refer to LIMA Declaration made at the conclusion of 8th International Anti Corruption Conference in LIMA (Peru) in September, 1997, referred to by Ch. Mushtaq Ahmed Khan in his written submissions, wherein following steps have been enumerated, which may make both prevention and prosecution more effective:
?30. ???? Countries should improve the effectiveness of their laws dealing with corruption to the maximum extent possible consistent with their constitutions and international human rights norms including:-

- ✍ Abolishing any requirement to prove that an official who received an illegal gift actually give favours in return;
- ✍ Providing a system for the declaration of assets by persons holding public positions of trust (and their families) and placing on them the obligation to justify increases out of line with legitimate sources of income;
- ✍ Introducing the periodic or random monitoring of the assets and lifestyles of significant decision makers in the public sector (and their families and associates), where appropriate by an independent agency;

✍ Laws which effectively empower the freezing, seizure and confiscation of the illicitly acquired wealth of officials found guilty of corruption wherever it may be and by whomsoever it may be held;
✍ Providing appropriate protection for witnesses (and their families) and protecting whistle blowers;
✍ Providing a system for the recording of gifts received by officials;
✍ ensuring that officials at all levels cannot hide behind immunities but are fully subject to corruption laws; and
✍ Debarring convicted criminals from standing for political office and appointment to positions of public rest.
We may also refer to an Urdu Book under the title:

urdu

by Shamsul Ulema Allama Shibli Nomani referred to by Mr. Muhammad Ikram Chaudhry as to the concept of separation and independence of Judiciary introduced by Hazrat Umer Farooq (May Allah be pleased with him) during his Caliphate:-

urdu

In the above biography the author has quoted Arabic version of Hazrat Umer Farooq?s above?? and has deduced the following principles therefrom:

urdu

26.??????????????????? Article 121 of the Qanun-e-Shahadat Order, also places burden of proof on the accused, which reads as under:
?121.? ***Burden of proving that case of accused comes within exceptions.?***When a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Pakistan Penal Code (Act XLV of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.?

A bare perusal of the above provision would show that the onus to prove innocence may be shifted on to the accused, where existence of certain circumstances bringing his case within the ambit of general or special exceptions contained in the Pakistan Penal Code, is necessary to be proved for getting an acquittal, absence of which shall be presumed by the Court. We are, therefore, not inclined to hold that where a person is accused of an offence and the burden of proving innocence is shifted on to him having regard to the peculiar circumstances mentioned in any provision of law, the same can be derogatory to ordinary dispensation of criminal justice or violative of Articles 4 and 25 of the Constitution.?? The same view was correctly taken by a Full Bench of the Lahore High Court in the case of *Liaqat Parvez Khan v. Government of the Punjab through Home Secretary* (PLD 1992 Lahore 517).?

??????????????????????
227.??????????????????? It is well settled that matters relating to remedy, mode of trial, the manner of taking evidence and forms of actions are all matters relating to procedure.?? It is also well settled principle of interpretation of statutes that only a matter of procedure would be retrospective. However, if in this process any existing rights are affected on the basis of a statute the same would not operate retrospectively unless the legislature had either by express enactment or necessary intendment given the legislation retrospective effect. Viewed from whatever angle the placing of burden of proof on the accused, in the facts and circumstances of this case in juxtaposition with Section 14(d) of the Ordinance falls within the realm of procedural law.? Thus visualized, the plea raised on behalf of the petitioners that the *ratio* of *Nabi Ahmed (supra)* is applicable to all situations in the realm of substantive law, cannot stand a detailed scrutiny thereof.? Even the assertion that *Nabi Ahmed (supra)* was followed in *Bhai Khan (supra)* by a learned Single Judge of the Lahore High Court, Lahore and therefore, it should be considered as applicable to the facts and circumstances of the present *lis* as well, also falls in the same

category.? Clearly, the cases of *Nabi Ahmed and Bhai Khan (supra)* are distinguishable and confined to the facts and circumstances of those cases.
???????????

228.???????????????? The Accountability Courts have been established to deal exclusively with corruption and corrupt practices and hold accountable those accused of such practices and matters ancillary thereto so that cases can be decided speedily as also to guard against delays in investigation and to forestall the acts of the suspects who have been able to abuse the process of law by stalling investigations at initial stages through litigation of sorts.? As to the validity of Section 14(d), that if a holder of public office or any other person has issued any directive, policy or SRO (Statutory Regulatory Order) or any other order which grants or enables any undue concession or benefit in any taxation matter or law or otherwise so as to benefit himself or any relative or associate or a *benamidar* or any other person is concerned, suffice it to say that there may be cases where the accusation cannot be supported by direct evidence and is a matter of inference of corrupt motive for the decision with nothing to prove directly any illegal gain to the decision maker.? To protect decision making level officers and the officers conducting inquiry/investigation from any threats, appropriate measures must be taken to relieve them of the anxiety from the likelihood of harassment for taking honest decisions.

229.???????????????? Viewed in the above context, although shifting of burden of proof on an accused in terms of Section 9(a)(vi)(vii) read with Section 14(d) may not be bad in law in its present form, but would certainly be counter productive in relation to the principle of good governance.? If decision making level officials responsible for issuing orders, SROs etc. are not protected for performing their official acts in good faith, the public servants and all such officers at the level of decision making would be reluctant to take decisions and/or avoid or prolong the same on one pretext or another which would ultimately lead to paralysis of State-machinery.? Such a course cannot be countenanced by this Court.

230.???????????????? Be that as it may, the prosecution has to establish the preliminary facts whereafter the onus shifts and the defence is called upon to disprove the presumption.? This is also the consistent stand taken by Mr. Abid Hasan Minto as well as the learned Attorney General who adopted his arguments.? This interpretation appears to be reasonable in the context of the background of the NAB Ordinance and the rationale of promulgating the same notwithstanding the phraseology used therein. We are also of the view that the above provisions do not constitute a bill of attainder, which actually means that by legislative action an accused is held guilty and punishable.? For safer dispensation of justice and in the interest of good governance, efficiency in the administrative and organizational set up, we deem it necessary to issue the following directions for effective operation of Section 14(d):

1. The prosecution shall first make out a reasonable case against the accused charged under Section 9 (a)(vi) & (vii) of the NAB Ordinance.

2. In case the prosecution succeeds in making out a reasonable case to the satisfaction of the Accountability Court, the prosecution would be deemed to have discharged the *prima facie* burden of proof and then the burden of proof shall shift to the accused to rebut the presumption of guilt.?

DISQUALIFICATION TO CONTEST ELECTIONS OR TO HOLD PUBLIC OFFICE.

231.???????????????? The provision of clause (a) of Section 15 of the NAB Ordinance providing disqualification from being elected, chosen, appointed or nominated as a member or representative of any public office, or any statutory or local authority of the Government of Pakistan for a period of 21 years is too excessive and the same be suitably amended so as to provide disqualification for a period of 10 years to be reckoned from the date the convict is released after serving his sentence.

232.???????????????? The proviso to clause (a) of Section 15 ibid providing disqualification for 21 years shall also be suitably amended to provide disqualification for 10 years to be reckoned from the date the convict is discharged of his liabilities relating to matter on transaction in issue.

VENUE OF TRIAL

233.???????????????? The relevant question reads: ?Whether section 16(d) of the impugned Ordinance which authorises the Chairman NAB to select the venue of the trial by filing a reference before any Accountability Court established anywhere in Pakistan suffers from excessive delegation?

234.???????????????? It is true that ordinarily, the jurisdiction to try a person for an offence does not depend upon the place where the offender is found, but the place where crime is committed.? Generally speaking, all crime is local.? These principles are also enshrined in the general law relating to proceedings in criminal prosecution and jurisdiction of the criminal courts as also trials.? Section 177 Cr.P.C. also provides that every offence ordinarily be inquired into and tried by a court within the local limits of whose jurisdiction it is committed.? However, notwithstanding the above provision, the Provincial Government under section 178 *ibid* may direct that any cases or class of cases in any district sent for trial to a court of Sessions, may be tried in any Sessions Division provided such direction is not repugnant to any direction previously issued by the High Court under section 526 Cr.P.C. or any other law for the time being in force. Thus, the determination of venue of trial under the Ordinance in terms of section 16 (d) does not contravene the concepts of ?federalism? and/or Provincial autonomy.

TRANSFER OF CASES

235.???????????????? Article 175 of the Constitution provides for the establishment and jurisdiction of the Supreme Court of Pakistan, a High Court for each Province and such other courts as may be established by law.? Apart from establishment of the courts as aforesaid, the Constitution or the law may provide for the subjects in respect of which that power may be exercised and the manner of exercise of such power.? It may demarcate/identify the territories/place or places in which a particular court shall function.? It may specify the persons in respect of whom the judicial power to hear and determine will be exercisable.? Put differently, it may provide for the subject-matter over which the judicial power is to be exercised, the manner of exercise of jurisdiction, the right to adjudicate upon a particular subject-matter and the authority to exercise in a particular manner.

236.???????????????? Article 175 (3) provides that the Judiciary shall be separated progressively from the Executive within 14 years from the commencing day.? After expiry of the stipulated period, the cut-

off date of 23rd March, 1994, had been given by the Supreme Court to enable the Provincial Governments to finalise separation of Judiciary from the Executive.? Guidelines for achieving this objective as well as financial independence of the Judiciary were also laid down by this Court in the case of *Government of Sind* v. *Sharaf Faridi* (PLD 1994 S.C. 105).

237.???????????????? Article 203 of the Constitution provides that the supervision and control over the subordinate Judiciary exclusively vests in the High Court concerned.? It comprehends all supervisory powers both judicial as well as administrative as to the working of the subordinate courts including the disciplinary matters.? Any provision in any law, direction or order empowering any executive functionary to have administrative supervision and control over the subordinate Judiciary either directly or indirectly, would militate against the concept of separation of powers and independence of Judiciary as envisaged under Article 175 and the Objectives Resolution as laid down by this Court in the *case of Sharaf Faridi (supra)*.? It would thus be seen that even under the general law, the power to order cases to be tried at different places falls within the domain of executive authority, which could not be termed as violative of judicial independence.? Be that as it may, Mr. Abid Minto rightly contended that Article 203 of the Constitution is applicable to the courts under the NAB Ordinance and such courts are subordinate to the High Courts and therefore the power of superintendence vested in the High Court prevails over these courts within the hierarchy of the courts of the country and for the purposes of the Constitution.? We are also of the considered view that the High Court, in appropriate proceedings whenever it is made to appear to it that a fair trial cannot be held before any Accountability Court at a particular place and it is expedient for the ends of justice that any offence under the NAB Ordinance be tried by any Accountability Court other than the court seized of the matter, may transfer the case accordingly.

238.???????????????? Section 16A (b) (i) & (ii) of the NAB Ordinance purports to achieve the above objective by empowering Chairman NAB to direct the Prosecutor General Accountability to apply for transfer of a case from any such court in one Province to a Court in another Province or from one Court to a Court in another Province or from one Court in a Province to another Court in the same Province.? The above section, however, does not meet the ends of justice, in that, the Chairman NAB has been given the choice to make a move before the appropriate Chief Justice through the Prosecutor General, but such right is not available to the accused.

239.???????????????? The above provision, insofar as it denies access to an accused person for the redress of his grievance in the matter of transfer of a case from one court to another, is *ultra vires* Article 4 of the Constitution, which envisages the right of access to justice to all, which is equally founded in the doctrine of ?due process of law?.? In *Al-Jehad Trust* v. *Federation of Pakistan* (1996 S.C. 324), it was held that the right of access to justice includes the right to be treated in accordance with law, the right to have a fair and proper trial and the right to have an impartial court or tribunal.? Without having an independent Judiciary, the Fundamental Rights enshrined in the Constitution will be meaningless.? In *Jibendranath Kishore Acharya Chaudhry* v. *Province of East Pakistan* (PLD 1957 S.C. [Pak.] 9), this Court held that equality of citizens gives rise to two basic questions: *first*, to what extent the Legislature can delegate legislative functions to other bodies; and *secondly*, what control the Judiciary can exercise over departmental tribunals?? As to the first, the rule is that while the Legislature cannot confer on any other body power to make whatever laws it likes, it can, by its Acts, define the outline of the legislative

power within the limited field to carry out the purposes of the legislation.? In *Government of Baluchistan* v. *Azizullah Memon* (PLD 1993 S.C. 341), it was held that the Legislature cannot frame such law as may bar right of access to courts of law and justice.? Any law, which denies the right of access to courts and justice, is violative of Article 25 of the Constitution.? It is true that the expression, ? equal protection of law?, does not place any limitation on the power of the State to make reasonable classification of citizens in that regard, but if such classification is without any reasonable basis, it would tantamount to denying that right to a category of persons and the same being discriminatory is liable to be struck down.

240.???????????????? In *Zulfiqar Ali Bhutto* v. *The State* (PLD 1979 S.C. 53), it was held that the rule regarding holding an open trial is not rigid and inflexible nor could it be pressed to its breaking point in defeating very ends of justice.? The Presiding Officer or the Magistrate concerned is empowered to forbid access of the public generally or any particular person remaining in Court at any stage of inquiry or trial for sufficient reasons in interests of administration of justice.

241.???????????????? Paragraph 3, chapter 1 of the High Court Rules & Orders of the Lahore High Court, volume III provides as follows:

3. Court house in an open Court.? -- Section 352 of the Code of Criminal Procedure lays down that the place where a Criminal Court is held, ?shall be deemed an open Court to which the public generally may have access so far as the same can conveniently contain them?, but the discretion to exclude the public from the ordinary Court room rests with the presiding Magistrate.? When, however, the presiding Magistrate, for any reason, excludes the public by holding his Court in a building such as a jail, to which the public is not admitted (and he is not entitled to do so without permission of the Department concerned), he should obtain the sanction of Government thereto, through the District Magistrate, and should inform the High Court that sanction has been accorded.

It is not necessary to comment upon the case law cited from the Indian jurisdiction as well as decisions of the learned Judges in Chambers of the High Courts.? Suffice it to say that the controversy on the subject stands concluded by a judgement of this Court in the light of the observations made in the *case of Zulfiqar Ali Bhutto* (supra).

242.???????????????? Resultantly, in the matter of transfer of cases from one court to another, either within a Province or from one Province to another, as contemplated under section 16A, the prosecutor and the accused must be placed on equal footing.? To this extent, section 16A is declared *ultra vires* the Constitution and needs to be suitably amended.

243.???????????????? This also disposes of the objection under Section 16A (a) (i) (ii) of the impugned Ordinance regarding ?transfer of cases?.

POWER OF ACCOUNTABILITY COURT TO DISPENSE WITH ANY PROVISION OF CODE OF CRIMINAL PROCEDURE

244.???????????????? Seventh Question that: ?Whether section 17(c) of the impugned Ordinance which enables the Accountability Court to dispense with any provision of the Code of Criminal Procedure, 1898, and follow such procedure as it may deem fit in the circumstances of the case is violative of

Articles 4 and 25 of the Constitution? is devoid of any force, in that, no vested right exists in matters of procedure.? Section 12(3) of the Ehtesab Act, 1997 also contained a similar provision, which was not held *ultra vires* the Constitution in *Federation of Pakistan v. M. Nawaz Khokhar* (PLD 2000 SC 26).? However, sufficient guidelines have been given as to the scope of Section 12(3) of the Ehtesab Act, 1997 in Benazir Bhutto v. The State (PLD 1999 SC 937), which read thus:

?21.????? The phrase ?as it may deem fit? used in Section 12(3) of the Act clearly signifies that Court has full and complete power to follow such procedure in order to do justice but in the exercise of such power, it must act justly, fairly and in accordance with law.? The above phrase does not imply following arbitrary procedure but must be construed to follow only such procedure which is just and proper for doing justice between the parties and not in violation of any law???.

Article 24A of the General Clauses Act, 1897, reads thus:

?24A. *Exercise of power under enactments.*---(1) Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment.?
?(2)????? The authority, office or person making any order or issuing any direction under the powers conferred by or under any enactment shall, so far as necessary or appropriate, give reasons for making the order or, as the case may be, for issuing the direction and shall provide a copy of the order or, as the case may be, the direction to the person affected prejudicially.?

Thus visualised, the Court?s power to dispense with a provision of Criminal Procedure Code is not uncontrolled and will be governed by the principles enshrined in Section 24A (supra).? If the Accountability Court deems fit to make departure from the provisions of the Criminal Procedure Code reasons will have to be recorded in writing under the section.? In appropriate cases such reasons are justiciable in the exercise of constitutional jurisdiction of the Superior Courts at the instance of an aggrieved party.? Section 164 of the Qanun-e-Shahadat Order provides that: ?*In such cases as the court may consider appropriate, the court may allow to be produced any evidence that may have become available because of modern devices or techniques?.*

245.???????????????? The upshot of the whole discussion is that in terms of the impugned provision of section 17(c) of the NAB Ordinance, an Accountability Court shall not exercise its discretion arbitrarily but on sound judicial principles by assigning valid reasons.? We, therefore, hold that Section 17(c) is not violative of Articles 4 and 25 of the Constitution.

COGNIZANCE OF OFFENCES BY THE ACCOUNTABILITY COURT

246.???????????????? Question No. (viii) of the ?admitting order? reads thus:

?(viii)??? Whether section 18 of the impugned Ordinance which prohibits the Accountability Court to take cognizance of any offence under the impugned Ordinance? except on a reference made by Chairman NAB or an officer of the NAB duly authorised by him amounts to excessive delegation??

247.???????????????? As to above question, suffice it to say that the offences under the NAB Ordinance are special in nature and their investigation and inquiry extends to complicated transactions, bank accounts and books of account for which aid of experts may be required by investigating authority to unearth and detect such offences.? It is, therefore quite reasonable as well as practical that the investigating agency should first thoroughly inquire into suspected offences and then decide whether or

not to refer the same to an Accountability Court.? There is, therefore, no excessive delegation of power in the above section.? It may be observed that the Ehtesab Act, 1997 also contained a similar provision, which was declared to be a valid piece of legislation by this Court in *M. Nawaz Khokhar* (supra).

ARREST/DETENTION AND REMAND OF THE ACCUSED

248.???????????????? Question No. (ix) of the ?admitting order? is to the following effect:

(ix)?????? Whether section 24(d) of the impugned Ordinance which empowers the Chairman NAB to detain in his custody an accused person up to a period of ninety days after having produced him once before the Accountability Court, such power vesting in executive authority is contrary to the right of equal protection and also opposed to the spirit of Fundamental Rights contained in Clause (2) of Article 10 of the Constitution?

249.???????????????? The petitioners have challenged the validity of clause (d) of Section 24 *ibid* in so far it relates to detention of the accused in the custody of NAB for the purposes of inquiry and investigation for a period of ninety days.? Article 10 of Part II of the Constitution provides safeguards as to arrest and methodology for the production of an accused before a Magistrate, communication of grounds, rights of the accused to be defended by counsel, arrest under detention law, constitution of Review Board, proceedings before Review Board and maximum period of detention.? In the case in hand, we are not dealing with a law regarding preventive detention and, therefore, the provisions relating thereto in Article 10 ibid are not relevant for the purpose of the controversy raised herein.? We find that the provisions of clause (d) of Section 24 ibid are in substantial compliance of the provisions of clauses (1) and (2) of Article 10 of the Constitution which provide :? *?(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice;* and *(2) Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.?* ?However, the above clause is *ultra vires* to the extent that it denies the right of the accused to consult and be defended by a legal practitioner of his choice. To this extent clause (d) of Section 24 of NAB Ordinance requires to be suitably amended.

250.???????????????? It is true that in terms of Sections 167 and 344 Cr.P.C. when an accused is arrested he is bound to be produced before a Magistrate within a period of twenty-four hours and beyond such period police cannot detain him without seeking permission from a Magistrate and that no Magistrate can remand an accused to custody for a term exceeding fifteen days at a time, respectively.? It is also well established that remand is not to be granted in routine and the liberty of citizens must be protected subject to the law and the Constitution.?? It is provided in NAB Ordinance that Cr.P.C. applies subject to any inconsistency with the Ordinance.? The provisions contained in clause (d) of Section 24 ibid in so far as they relate to the remand of an accused, are inconsistent with the provisions of the Cr.P.C. inasmuch as under sub-section (1) of Section 344 of the Cr.P.C. the maximum period of remand is fifteen days.? Mr.Baber Awan has rightly contended that several provisions of the impugned Ordinance are inconsistent with what has been laid down in Cr.P.C.? But, as pointed out above, the Cr.P.C. is applicable subject to any inconsistency with the Ordinance.? Therefore, the mere fact that sub-section (1) of Section 344 Cr.P.C. provides maximum remand for a period not exceeding fifteen days at a time,? does not,? *ipso facto* confer a right on a person accused of an offence under NAB Ordinance, to be detained for a period of not more than fifteen days at a time. We may also, however, refer to the explanation added to sub-section (2) of Section 344 Cr.P.C. which provides that if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained in that behalf, this is a reasonable cause for a remand.?

251.???????????????? Mr.Abid Hassan Minto appearing for the Federation also stated at the Bar that under Section 24(d), a maximum period of 90 days is provided for detention in connection with investigation etc., which is not automatic or that the accused is to be detained for 90 days straight away.? Generally, the accused is produced before the Court after every 10/15 days, in some cases even with an interval of 3-4 days, and the Court, keeping in view the facts and circumstances of the case, determines the period of further custody.? It is reasonable if the accused is directed to be produced before the Court after every 15 days or earlier keeping in view the facts and circumstances of each case, for appropriate orders.

252.???????????????? Be that as it may, it is the duty of this Court to jealously safeguard? the liberty of the citizens and to strike down a law, or suggest amendment thereto for protecting the same or avoiding

undue harassment to them.

253.???????????????? After carefully listening to the submissions of the learned counsel for the parties, we are inclined to the view that the outer limit of ninety days fixed in clause (d) of Section 24 of NAB Ordinance appears to be excessive. We are of the view that prolonged detention of an accused without sufficient cause for such detention, makes an inroad on the personal liberty of citizens as guaranteed under the Constitution, which cannot be countenanced by this Court.?

254.???????????????? We, therefore, direct that clause (d) of Section 24 of the Ordinance be also amended to the extent that the Accountability Court shall not remand an accused person to custody under clause (d) of Section 24 of the impugned Ordinance for a term exceeding fifteen days at a time.? If sufficient and reasonable cause appears for further remand, after the expiry of the first fifteen days, the accused shall be brought before the Court for appropriate orders and that in no case, each remand shall be for a period more than fifteen days at a time. It is further directed that the Court passing order of remand as referred to above, shall forward a copy of such order with reasons for making it to the High Court concerned.? Suitable amendments be made accordingly.

255.???????????????? The Chairman NAB cannot under any principle of jurisprudence simultaneously assume the role of prosecutor and Judge.? The power of judicial review and the matters relating to the administration of justice solely vest with the judiciary and such powers cannot be entrusted to the NAB being violative of the very concept of Independence of Judiciary.

256.???????????????? In view of the above, we hold that the proviso to clause (d) of Section 24 *ibid* in so far as it contains the provision that:? ??no accused arrested under this Ordinance shall be released without the written order of the Chairman NAB??? is *ultra vires* being repugnant to the concept of Independence of Judiciary.? Suitable amendment be made so as to delete the words? ?without the written order of the Chairman NAB or?.

257.???????????????? Question No. (xi) relates to the point: ?Whether section 24(a) of the impugned Ordinance, empowering the Chairman NAB at any stage of the investigation under the impugned Ordinance, to direct that the accused, if not already arrested, shall be arrested, tantamounts to conferment of unbridled and unfettered powers of determining if an accused is to be arrested or not, is violative of Article 25 of the Constitution??

258.???????????????? The above contention is without any force.? We are inclined to agree with Mr. Minto that the powers conferred by the impugned provision are part of normal powers relating to inquiries and investigation.? Similar powers are conferred upon Police Officers by the Criminal Procedure Code under Section 54 thereof.? However, we have no doubt in our minds that while exercising powers under section 24(a) of the impugned Ordinance the Chairman NAB shall consider the facts and circumstances of each case justly, fairly, equitably, in accordance with law and in conformity with the provisions of Section 24A of the General Clauses Act, 1897 and not in a discriminatory manner.? Any such order passed by him is subject to correction in appropriate cases by the Superior Courts in the exercise of their constitutional jurisdiction. It is, therefore, difficult to hold that section 24(a) is ex facie *ultra vires* Article 25 of the Constitution.

259.???????????????? Question No. (xii) that: ?Whether in so far as section 24(c) of the impugned Ordinance which enjoins that the provision of clause (a) thereof shall also apply to cases which have already been referred to the Accountability Court, offends the provisions of Articles 4 and 25 of the Constitution on the ground of retrospectivity in its operation? is also devoid of any force, in that, there is no element of retrospectivity in clause (c) of Section 24 of the impugned Ordinance.? Besides, Articles 4 and 25 of the Constitution have nothing to do with the concept of retrospective operation of a law.

260.?????????????????? This disposes of Questions No. (ix), (xi) and (xii).

TRANSFER OF PROPERTY

261.?????????????????? Section 23 of the impugned Ordinance provides that where an investigation has been initiated into an offence under the NAB Ordinance, alleged to have been committed by an accused person, such person or any relative or associate of such person or any other person on his behalf is not authorised to transfer by any means whatsoever, create a charge on any movable or immovable property owned by him or in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the Accountability Court, and any transfer of any right, title or interest or creation of a charge on such property shall be void.

262.?????????????????? It was argued that in so far as Section 23? *ibid* prohibits transfer of property merely because an investigation has been initiated at the discretion of the Chairman NAB is violative of Articles 23 and 24 of the Constitution which guarantee rights to property.? In so far as the above section makes any such transfer void even though both the transferor and the transferee be genuinely unaware of such investigation, the section offends Articles 2A, 4, 23, 24 and 25 of the Constitution.? We are not inclined to hold that the above provision is in conflict with the aforementioned Articles of the Constitution in that reasonable restrictions in the public interest may be imposed by a law on the right to hold, acquire or dispose of property.? The NAB Ordinance by its very nature is a law relating to acquisition and retention of ill-gotten property and to recover the same.

263.?????????????????? Furthermore, Section 23 ibid is an interlocutory measure to prevent persons accused of such offences to frustrate the objects of law by creating third party interest in respect of illegally acquired property, thereby creating hurdles in the object of law i.e. to eradicate corruption and corrupt practices and hold accountable all those persons accused of such practices and matters ancillary thereto.? The purpose of this power is more to preserve the property acquired by the accused through corruption and corrupt practices so that ultimately if the guilt is proved the same can be taken back from him in accordance with law.? Section 23 of the NAB Ordinance is also preventive in nature and prescribes penalties for the accused person who attempts to alienate or transfer by any means property after the Chairman NAB has initiated investigation, inquiry or proceedings have commenced against him in an Accountability Court. Put differently, it is in the nature of a restraint order.? The protective measures are not by way of punishment but with a view to ensure that the final decision is not rendered redundant.

264.?????????????????? Additionally, somewhat similar provisions are contained in Section 7 of the Offences in respect of Banks (Special Courts) Ordinance, 1984 which provides that:? ?After a Special Court has taken cognizance of a scheduled offence alleged to have been committed by an accused person, such person or any relative of such person or other person on his behalf shall not, without the previous permission in writing of the Special Court, transfer, or create a charge on, any movable or

immovable property owned by him or in his possession, while proceedings are pending before the Special Court; and any transfer of, or creation of a charge on, such property without such permission shall be void.?? Viewed in this perspective, transfer of property by the accused or his relatives etc. seems permissible with the approval of the Court.? We therefore, direct that Section 23 ibid be suitably amended to reflect that transfer of property by an accused person or any relative or associate of such person or any other person on his behalf or creation of a charge on any movable or immovable property owned by him or in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the Accountability Court, shall not be void if made with prior approval in writing of the Judge, Accountability Court, subject to such terms and conditions as the Judge may deem fit in consonance with the well established principles of law for passing interlocutory orders in consonance with the objects of the Ordinance.

PLEA BARGAINING

265.???????????????? Question No. (xiii) relates to ?plea bargaining?.? It reads thus:

?Whether the case of voluntary return (plea of bargaining) under section 25 of the impugned Ordinance is derogatory to the concept of independence of judiciary in so far as where the trial has commenced the Court cannot release the accused without ?consent? of the Chairman NAB??

???????????
266.???????????????? A perusal of the Preamble of the NAB Ordinance shows that it is a composite and an extensive law and its interpretation has to be done in a manner different from the normal interpretation placed on purely criminal statutes.? This law deals with, among others, setting up of the National Accountability Bureau, which is an executive as well as administrative authority and an investigating agency; which deals with several aspects of ?corruption?, etc.? The NAB does not merely deal with crimes of corruption, it also deals with their investigation and settlement out of court.? Bargain out of court is now an established method by which things are settled in several developed societies.? It was necessary in cases where the criminal is a potential investor and is inter-linked with the economy of the society, he should be given an opportunity to play his role in the society after he has cleared his liability.? There appears to be nothing amiss insofar as it does not oust the jurisdiction of the Accountability Courts to exercise their judicial power in appropriate proceedings.? Rather this is in the nature of a facility provided to the accused. There is nothing wrong with the NAB Ordinance providing for a procedure of bargaining.

267.???????????????? Moreover, the scheme for exploring the possibility of settlement during investigation/inquiry stage by the Charmin NAB cannot be ignored straight away.? At the outset, most of the lawyers tend to consider the question of settlement out of Court.? There is need to focus attention on this significant facet of the matter. The rationale behind the Ordinance is not only to punish those who were found guilty of the charges levelled under the Ordinance but also to facilitate early recovery of the ill-gotten wealth through settlement where practicable.? The traditional compromise, settlement, compoundability of offence during the course of proceedings by the Courts after protracted litigation is wasteful.? Viewed in this perspective, a power has been vested in the Chairman NAB to facilitate early settlement for recovery of dues through ?plea bargaining? where practicable.? Lawyers are often interested in settling the disputes of their clients on just, fair and equitable basis.? There are different approaches to settlement.? Plea bargaining is not desirable in cases opposed to the principles of public policy. Chairman NAB/Governor, State Bank of Pakistan, while involved in plea bargaining negotiations, should avoid using their position and authority for exerting influence and undue pressure

on parties to arrive at settlement.? However, in the interest of revival of economy and recovery of outstanding dues, any type of alternate resolution like the ?plea bargaining? envisaged under Section 25 of the Ordinance should be encouraged.? An accused can be persuaded without pressure or threat to agree on a settlement figure subject to the provisions of the Ordinance. Establishing this procedure at the investigation/inquiry stage greatly reduces determination of such disputes by the Court.? However, as the plea bargaining/compromise is in the nature of compounding the offences, the same should be subject to approval of the Accountability Court. Accordingly, Section 25 of the impugned Ordinance be suitably amended.

DISCRETION OF CHAIRMAN NAB TO REJECT RECOMMENDATIONS OF ? COMMITTEE? AND GOVERNOR, STATE BANK OF PAKISTAN

268.??????????????? Question No. (xiv) is to the effect:?Whether section 25A (e) and (g) give unfettered discretion to the Chairman NAB to reject the recommendations of a duly appointed committee and to refuse to recognise a settlement arrived at between a creditor and a debtor amounts to excessive delegation and restraint on the freedom of contract on the touchstone of Articles 4, 18 and 25 of the Constitution??

269.??????????????? The above provisions of Section 25A (e) and (g) in their present form suffer from excessive delegation of power, in that, these provisions confer unfettered discretion on the Chairman NAB to reject the recommendations of a duly appointed committee and to refuse to recognize a settlement arrived at between a creditor and a debtor.? We, therefore, direct that the recommendations made by the Governor, State Bank of Pakistan shall be binding on the Chairman NAB except for valid reasons to be assigned in writing subject to approval of the Accountability Court, to be accorded within a period not exceeding 7-days.? Suitable amendment be made in Section 25A (e) and (g).

STAY OF PROCEEDINGS BEFORE ACCOUNTABILITY COURT

270.??????????????? Let us now examine Question (xv) to the effect whether Section 32(d) of the impugned Ordinance purports to oust the jurisdiction of the Superior Courts from exercising their jurisdiction under Article 184(3) and Article 199 of the Constitution?

271.??????????????? Section 32 of the Ordinance provides appeal before the High Court at the instance of any person convicted or the Prosecutor General Accountability.?? However, it prohibits appeal against an interlocutory order of the Court during the proceedings pending before it under this Ordinance and provides an appeal only against the final judgment of the Accountability Court.? The main attack of the petitioners is directed against clause (d) thereof which provides that no stay of proceedings before Accountability Court shall be granted by any Court on any ground whatsoever, nor proceedings thereof be suspended or stayed by any Court on any ground whatsoever.?

272.??????????????? It is well settled that constitutional jurisdiction vesting in the High Courts under Article 199 of the Constitution cannot be taken away? or abridged, or curtailed by subordinate legislation.? The above provision in so far as it purports to oust the jurisdiction of the Superior Courts from exercising the jurisdiction whether under Articles 184(3) or 199 of the Constitution is *ultra vires*. Refer *Inayat Ullah and others v. M.A.Khan and others* (PLD 1964 SC 126), *Nagina Silk Mills, Lyallpur v.? Income-Tax Officer* (PLD 1963 SC 322),? *Abdul Rashid v. Pakistan* (PLD 1962 SC 42), *Muhammad Anwar v. Government of West Pakistan* (PLD 1963 Lah. 109),? *Abdul Rahim v. Chancellor of West Pakistan University of Engineering and Technology* (PLD 1964 Lah. 376), *Mrs.Shahida Zahir Abbasi and 4 others v. President of Pakistan as Supreme Commander of the Armed Force, Islamabad and others* (PLD 1996 SC 632).?? However, by way of abundant caution,? Section 32 be suitably amended so as to clarify in unambiguous terms that ouster of jurisdiction does not embrace the Superior Courts in the

exercise of their constitutional jurisdiction. Needless to observe that High Courts shall exercise this power sparingly in rare and exceptional circumstances for valid reasons to be recorded in writing.

273.???????????????? Question (xvi) in the admitting order is to the effect whether various provisions of the Impugned Ordinance grant arbitrary and unfettered discretion to the Chairman NAB e.g? (i) under Section 9(c) of the impugned Ordinance to set whatever conditions he feels with respect to the release of an accused from custody,? (ii) under Section 18(g) to refer or not a case to an Accountability Court and (iii) under Section 25A(g) to refuse to recognize a settlement arrived at between a creditor and debtor.

274.???????????????? We have already held that the Chairman NAB is not competent to reject a settlement arrived at between a creditor and debtor through the intervention of Governor, State Bank of Pakistan without the approval of the Accountability Court.

275.???????????????? The powers vesting in the Chairman NAB to release an accused from custody having regard to the gravity of the charge against him, favour the accused. However, while doing so, he is to record valid reasons in writing.? As regards the vesting of powers with the Chairman NAB under Section 18(g) to refer or not a case to the Accountability Court after perusal of the material and evidence collected during inquiry and investigation, suffice it to say that this power corresponds to the normal powers vested in all Police Officers or Officers of investigating agencies.? Reference may be made to Section 170 Cr.P.C. which reads as under :

?**170.**? Case to be sent to Magistrate when evidence is sufficient.?(1)**?** If, upon an investigation under this Chapter it appears to the officer in charge of the Police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to? a Magistrate empowered to take cognizance of the offence upon a police-report and to try the accused or send him for trial or, if the offence is bailable and the accused? is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

(2)??????? When the officer in charge of a police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) ?????? Omitted

(4)? *Rep. By the Code of Criminal Procedure (Amndt.) Act (II of 1926), S.2.*

(5)? The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.?

276.???????????????? Clearly, the existence of sufficient evidence is a condition precedent for the police acting under Section 170 Cr.P.C. and for making a request to the Magistrate to take cognizance of the offence. It is for the officer in charge of a police station to decide whether there is sufficient evidence to justify the forwarding of the accused to the competent Magistrate.? As stated above, a corresponding provision is contained in Section 18(g) to which no exception can be taken subject to compliance with the procedure laid down in Section 170 Cr.P.C. so far as it is applicable.? To this extent Section 18(g) be suitably amended.

APPOINTMENT OF OFFICERS AND STAFF OF NAB

277.???? **???????????** Question (xvii) formulated in the admitting order is whether to exclude the officers and staff of the NAB, who have not been deputed or posted to NAB from the Federation or a Province, from the category of civil servants within the purview of Section 2(b) of the civil Servants Act, 1973, is violative of Article 25 of the Constitution.

278.???????????????? A perusal of Section 28(d) of the Ordinance shows that it creates two categories of persons serving in NAB. The first category is of persons directly appointed to whom the Civil Servants Act, 1973 does not apply. The second category is comprised of persons who are civil servants deputed to or posted in NAB. The Civil Servants Act, 1973 continues to apply to such persons. The officers and staff of the NAB are two different categories and classes of employees, therefore, no violation of Article 25 is involved.

279.???????????????? Question (xviii) in the admitting order is to the effect whether the alleged violation of principles of Universal Declaration of Human Rights of 1948 and Cairo Declaration on Human Rights in Islam are justiciable in these proceedings.

280.???????????????? It is not necessary to deal with this question in these proceedings and the same shall be considered in some other appropriate case, in that, the order proposed to be passed here does not contravene the above Declaration.

281.???????????????? Question (xix) is whether the impugned Ordinance is liable to be struck down on the ground that earlier Ehtesab Act, 1997 was competently and validly made and its vires were upheld by this Court and therefore there is no necessity for enacting the same.
???????????
282.???????????????? This question has already been dealt with in the preceding paragraphs.? Suffice it to say that new laws are not made only when previous laws have been declared invalid.? The mere fact that Ehtesab Act, 1997 was competently and validly made and its vires were upheld by this court does not in any way prescribe any limitation on the competent legislature to make a new law on the subject. The question of ?occupied field? has already been dealt with earlier. It is not necessary to deal with this question any further.

283.???? ???????????? Question (xx) is with respect to whether the vires of the Impugned Ordinance can be examined on the touchstone of Article 2A of the Constitution having regard to the law laid down by this court in the case of *Hakim Khan and 3 others versus Government of Pakistan through Secretary Interior and others* (PLD 1992 SC 595).

284.???????????????? It is not necessary to deal with the above question. Suffice it to say that the learned counsel for the petitioners have not been able to point out any of the provisions to be repugnant to the Injunctions of Quran and Sunnah.? Furthermore, we have directed numerous amendments/substitutions etc so as to render the impugned Ordinance to be *intra vires* the Constitution.

285.**????????????????** Question (xxi) deals with the point whether the provisions for appointment of Chairman and other officials in the NAB are discriminatory inasmuch as they do not lay down any qualifications in that regard or methodology for their appointment.

286.???????????????? The method of appointment in respect of Chairman NAB is contained under Section 6(b) (i) of the impugned Ordinance, which makes the following reading:
?6.(b)(i) ?There shall be Chairman NAB to be appointed by the President and he shall hold office during the pleasure of the President.?

287.???????????????? In so far as the provisions relating to methodology for appointment of Chairman NAB and Deputy Chairman NAB without prescribing any qualifications in that regard are concerned, it may be observed that there are numerous other instances where no specific qualifications have been prescribed for certain appointments.? Such examples include appointment of Governor of a Province, Director General FIA under Federal Investigation Agency Act, 1974, Managing Director of PIA under

the Pakistan International Airlines Act, 1956 and Federal Tax Ombudsman under Establishment of Office of Federal Tax Ombudsman Ordinance, 2000.? However, in view of the importance of the National Accountability Bureau, its objectives of eradication of corruption and corrupt practices and to ensure the process of accountability to be conducted in a coherent and transparent manner, it is essential that its independence is maintained.? With a view to achieving the above objective we hold that clause (b)(i) of Section 6 to the effect that the Chairman NAB, ?shall hold office during the pleasure of the President? is *ultra vires* being repugnant to the concept of independence of an institution.

288.???????????????? Section 6, therefore, requires to be suitably amended in the following terms.

(a) ?????? The Chairman NAB shall be appointed by the President in consultation with the Chief Justice of Pakistan.

(b) ?????? The Chairman NAB shall hold office for a period of three years.

(c)??????? The Chairman NAB shall not be removed from office except on the grounds of removal of a Judge of the Supreme Court of Pakistan.

(d)??????? The Chairman NAB shall be entitled to such salary, allowances and privileges and other terms and conditions of service, as the President determines and these terms shall not be varied during the term of his office.

(e)??????? The Chairman NAB may, by writing under his hand, addressed to the President, resign his office.

289.???????????????? In order to ensure continuity of the accountability process and in the light of the decision in Zafar Ali Shah (supra) that the process of accountability be accelerated, we direct that the present incumbent of the office of Chairman NAB shall be deemed to have been appointed for a term of three years from the day he entered upon his office.

290.???????????????? Section 7of the impugned Ordinance provides for the appointment of Deputy Chairman, NAB.? Clause (b) of Section 7 *ibid* reads thus:

?7.(b) ?The Deputy Chairman shall serve at the pleasure of the President.?

In view of our observation in the immediately preceding paragraph, Section 7(b) be suitably amended as under:?

??????????? The Deputy Chairman shall hold office for a minimum period of two years and shall not be removed except on ground of misconduct as defined under Section 2(4) of the Government Servants (Efficiency And Discipline) Rules, 1973.

PROSECUTOR GENERAL ACCOUNTABILITY

291.???????????????? Appointment of Prosecutor General Accountability has been provided in Section 8 of the impugned Ordinance, Clause (a) whereof reads as under:

?8.(a): ?The Chairman NAB may appoint any person to act as the Prosecutor General Accountability, notwithstanding any other appointment or office the latter may concurrently hold, upon such terms and conditions as may be determined by the Chairman.?

?

292.???????????????? In view of the legal nature of duties of the Prosecutor General Accountability, he must be a person qualified to be appointed as a Judge of the Supreme Court of Pakistan in that his duty

is to give advice to the Chairman NAB upon such legal matters and to perform such other duties of a legal character as may be referred or assigned to him by the Chairman NAB and, in the performance of his duties, he has a right of audience in all courts including the High Courts and the Supreme Court.? Section 8(a), therefore, be amended so as to provide as follows:

(a)??????? The Prosecutor General Accountability shall hold an independent office on whole time basis and shall not hold any other office concurrently.
(b)??????? He shall be appointed by the President in consultation with the Chief Justice of Pakistan and Chairman, NAB on such terms and conditions as may be determined by the President.
(c)??????? His remuneration and fringe benefits shall in no case exceed those of the Attorney General for Pakistan, who is the Principal Law Officer of the country and holder of a constitutional office.???????????
(d)??????? He shall hold a tenure post of not less than two years.?
(e)??????? His services shall not be dispensed with except on the grounds prescribed for removal of a Judge of the Supreme Court.
(f)???????? He shall not be permitted to conduct private cases and in lieu thereof he may be allowed a special allowance.????
(g)??????? He may, by writing under his hand addressed to the President of Pakistan, resign his office.

In the interest of continuity of accountability process, the incumbent Prosecutor General shall continue in office on the existing terms and conditions of his service till his successor is appointed or he is found suitable to be retained in service as such subject to recommendations of the consultees as aforesaid.

INDEPENDENT PROSECUTION AGENCY

293.???????????????? A panel of competent lawyers of experience and impeccable reputation shall be prepared in consultation with the Law and Justice Division.? Their services shall be utilized as Prosecuting Counsel in cases of significance at reasonable fee on case-to-case basis.? Even during? the course of investigation of an offence, the advice of a lawyer chosen from the panel should be taken by the NAB.

294.???????????????? Every prosecution which results in the discharge or acquittal of the accused must be reviewed by a lawyer on the panel and, on the basis of the opinion given, responsibility should be fixed for dereliction of duty, if any, of the concerned officer.? In such cases, strict action should be taken against the officer found guilty of dereliction of duty in accordance with law.

295.???????????????? Steps shall be taken for the constitution of an able and impartial agency comprising persons of unimpeachable integrity to perform functions of investigation and inquiry, etc. by the National Accountability Bureau.

296.???????????????? Till the constitution of the aforesaid body, Special Counsel shall be appointed for the conduct of important trials? in consultation with the Law and Justice Division.

TRANSFER OF CASES

297.**????????????????** Question (xxii) in the admitting note deals with the issue whether the provisions relating to transfer of cases qua the Provincial Courts within the territories of a Province and from one Province to another, suffer from excessive delegation.**???????** The above question has been thoroughly discussed in the preceding paragraphs while dealing with Section 16(d) of the impugned Ordinance.? No further examination of the impugned provision is called for.

SPECIAL TREATMENT TO WOMEN ACCUSED

298.???? **???????????** Question (xxiii) in the admitting order dated 12.9.2000 says whether in the absence of any provision in the impugned Ordinance regarding special treatment to be meted out to women-accused is not violative of the mandate under Article 25(3) of the Constitution and Section 167 of the Criminal Procedure Code. Suffice it to say that there is no direction in Article 25 to make special provisions for women. It merely permits that provisions with regard to women may be made. In any case, since the provisions of the Criminal Procedure Code apply where such provisions are not specifically over-ridden or ousted in the NAB Ordinance, therefore, provisions relating to women-accused under the Cr.P.C. shall apply to the impugned Ordinance as well.?

WITHDRAWAL FROM PROSECUTION

299.???????????????? Section 31B of the NAB ordinance empowers the Chairman NAB to direct the Prosecutor General Accountability to withdraw from prosecution of any person and release him if not required in any other case under the ordinance if he is of the opinion that ends of justice so require.

300.???????????????? Withdrawal of cases can neither be controlled by the Chairman NAB nor the Prosecutor General or Deputy Prosecutor General.? Such course can be resorted to only if the Accountability Court so permits.? Suitable amendment be made in Section 31B of the Ordinance.

PERFORMANCE OF NAB

301.**????????????????** The report as to performance of the NAB and the submissions made by Mr. Maqbool Elahi Malik, learned Advocate General Punjab at the bar may be summed up as follows:

1. NAB INQUIRIES/INVESTIGATIONS:

i) 759 investigations against 256 politicians, 383 bureaucrats, 38 businessmen, 16 persons from armed forces and 66 others:

a) 143 investigations completed;
b) 586 investigations are in progress
c) 30 investigations are suspended.

REGIONS:

ii) Accountability cases (politicians):

a) 92 from Punjab
b) 17 from NWFP
c) 20 from Balochistan
d) 37 from Sindh

POLITICAL SPECTRUM:

iii)???????? a)???????? 54 belong to PPP
b) 72 belong to PML
c) 40 other fringe parties

BUREAUCRATS:

???????????????????????? iv)??????? a)???????? 109 BPS 20 & above
b) 257 BPS 19 & above

Total:???????????????? 366

?????????????????????? 2.? SUMMARY OF PROSECUTION TILL 2.4.2001:

i) 216 cases filed
ii) 120 decided:
a) 89 court decisions
b) 31 plea bargaining
iii) 172 cases still pending

3. ??????? CLASSIFICATION OF OFFENCES IN ?????? REFERENCES FILED:

i) 63 ? corruption and corrupt practices
ii) 65 assets beyond means
iii) 70 misuse of authority
iv) 31 embezzlement
v) 23 wilful default
vi) 9 under section 31A against absconders

4.? PLEA BARGAINING:

i) 87 cases received
ii) 46 bargained
iii) 25 under process
iv) 13 rejected

Amount paid:????????????????????????????? Rs.774.305 million
Amount to be paid further: ?????? Rs.290.295 million
Total payable:????????????????????????????? Rs.1064.600 million

?????????????????????? 5.? STATUS OF ACCUSED:

i) Arrest warrants issued for 318 persons
ii) 36 persons in NAB custody
iii) 157 persons in judicial lock up
iv) 56 persons released
v) 69 persons are at large

6.? BANK DEFAULT CASES:

i) On 31.1.2001 direct recovery:????? 37.341 billion
ii) Money recovered through plea bargaining::?? 1.064 billion
iii) Recovery through courts:?????????????????????? ?????????? 1.056 billion

Total recovery: 40 billion
Adding other recoveries e.g. PTCL, CDA, Customs duty evasion: ?? 11 billion

Hence total recoveries amount to Rs. 51 billion

?????????????????????? 7.? NAB?S IMPACT ABROAD:

i) Arrest of Admiral (Retd.) Mansoor-ul-Haq
ii) Co-operation of the UK Authorities appropos corruption of Benazir Bhutto & Asif Ali Zardari

8.? NAB?S OTHER AREAS OF ACTION:

i) Land scam
ii) Co-operatives
iii) Organized illegal emigration
iv) Utility bills

302.????????????????? We do not subscribe to the view that the performance of the NAB under its Chairman was not satisfactory in comparison to that of the Ehtesab Bureau and other functionaries

created under the Ehtesab Act. Mr. Maqbool Elahi Malik has also placed on record copy of Operational Instruction No.1 (Marked Confidential) issued by NAB, salient features whereof read as under:

?The genesis of corruption in Pakistan is rooted in our historical, social and political history.? The inherited system of governance has led to concentration of powers & privileges, thus glamorizing corruption in the society.? Corruption is not a cause but a symptom of breakdown of systems & ethics.? Fortunately, the tide is turning against the corruption, which lends a big support to NAB.? At the same time, failing to deliver would have adverse consequences and therefore, cannot be ignored.? The present government has taken the challenge up-front and NAB has to deliver with a spirit of ?JIHAD? in the shortest possible time.?

Para 2 of the Instruction lays down the aims and objectives of NAB within the parameters of the NAB Ordinance and seven-point agenda of the present Government. These are:

a. Identification, investigation and prosecution of cases of corruption ensuring speedy disposal.
b. Urgent recovery of the state money and other assets misappropriated through corruption, corrupt practices and misuse of authority.
c. Induce a deterrence against corruption in the society in general and amongst corrupt institution/persons in particular.
d. Develop a culture/mechanism of institutionalized accountability by every public/private organization.
e. Structure NAB?s organization on long term basis which is task oriented by highly professional.

The Instructions, amongst others, contain caution to be exercised against the individual acts of misconduct or misuse of authority, focus on operation, the capacity factor prioritization-parameters and process, review of ongoing cases, limiting factors, i.e. the society?s balance is not disturbed, the economic activity is not damaged and the campaign is conducted without harassment, principles of operational functions, functional matters, investigation functions, overseas investigations, teamwork, actions? following formal investigations, plea bargaining within the parameters of the law, prosecution functions, functional spectrum and organization, pre-trial function, organizational aspect, etc. The directions contained in the operational instruction No.1 appear to be laudable provided they are implemented in letter and spirit. However, apart from any internal instructions? issued by the NAB for carrying out the objectives of the NAB Ordinance, it would be appropriate that? rules as envisaged under the NAB Ordinance are framed as expeditiously as possible to make the process of accountability transparent in a coherent manner and in the light of the observations made in this judgment.

ACCOUNTABILITY OF ARMED FORCES

303.??????????????? It was contended that Section 5 (m) of the impugned Ordinance, which defines ? holders of public office?, excludes a person who is a member of any of the Armed Forces of Pakistan, or for the time being, is subject to any law relating to any of the said Forces, therefore, it is discriminatory in so far as the accountability of the Armed Forces is concerned.

304.??????????????? The learned counsel for the petitioners have overlooked the constitutional safeguards provided to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law for his actions being challenged under constitutional jurisdiction of the High Court by virtue of Article 199 (2)(3) of the Constitution as well as Article 8, which lays down that the laws inconsistent with or in derogation of Fundamental Rights shall be void.? Sub-clause (a) of Clause (3) of Article 8 provides as under:

?**(3)** The provisions of this Article shall not apply to-
(a) any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them.?

305.?????????????????? Article 63(1) providing for disqualifications for membership of Majilis-e-Shoora (Parliament), in sub-clause (g) thereof, lays down:
?**(g)** he is propagating any opinion, or acting in any manner, prejudicial to 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.??

The above is the rationale for not including the members of the Armed Forces within the purview of the NAB Ordinance.? This, however, does not mean that they are immune from accountability.? The Pakistan Army Act, 1952 (XXXIX of 1952) (hereinafter called the Act) as well as the Pakistan Army Act Rules, 1954 (hereinafter called the Rules) are self-contained Codes, which provide for prosecution and punishment in cases involving corruption, corrupt practices, illegal gratification and for matters connected therewith and incidental thereto.? Officers and persons enrolled in army service are subject to Section 2 of the Act.? Offences of corruption and corrupt practices etc. corresponding to and *ejusdem generis* with the offences contained in Section 9 of the NAB Ordinance, 1999 are provided for in Sections 27, 40, 42, 47 and 55 of the Act.? Section 27 of the Act prescribes ?offences against property or persons of inhabitant of country where serving? which is punishable with rigorous imprisonment for a term which may extend to fourteen years; Section 40 of the Act deals with ?fraudulent offence? in respect of property which is punishable with rigorous imprisonment for a term which may extend to five years; ?Illegal gratification? falls under Section 42 of the Act, which is punishable with rigorous imprisonment for a term which may extend to five years; Section 47 relates to ?False documents? which is punishable with rigorous imprisonment for a term which may extend to seven years; and? Section 55 of the Act provides for ?violation of good order and discipline? and prescribes punishment for its breach, which may extend to five years.

306.?????????????????? Section 176 of the Act prescribes power of the Federal Government to make rules for the purposes thereof. Rule 13 read with Rule 157 of the Rules deal with investigation of charges, remand for trial, court of inquiry and summary of evidence. Sections 80 to 142, contained in Chapters IX to XI of the Act provide for constitution, jurisdiction and powers of Court Martial.? Following data shows corruption cases tried in the ?Three Services? during the year 1999-2000:

Data of Cases of Corruption Tried in The Three Services
During the year 1999-2000

	Army	PAF	PN
Dismissal/Court Martials during year 1999-2000, relating to Corruption/Corrupt Practices/Frauds/Embezzlements/Illegal Gratifications, etc.	16	16	9

307.?????????????????? Viewed in the above perspective, it is wrong to contend that members of the Armed Forces are immune from accountability.? Admittedly, they are subject to accountability in accordance with the methodology laid down in the Act and the Rules.

ACCOUNTABILITY OF NATIONAL ACCOUNTABILITY BUREAU

308.?????????????????? The accounts of the National Accountability Bureau shall be kept in such form and in accordance with such principles and methods as the Auditor General of Pakistan may prescribe.?

309.?????????????????? The accounts shall be audited by the Auditor General, Pakistan annually and his report shall be submitted to the President of Pakistan.??

310.?????????????????? The Chairman NAB shall submit his Annual Report to the President of Pakistan as to affairs and? performance of the National Accountability Bureau by 15th January of each succeeding year.

311.?????????????????? A mechanism shall be evolved by the Chairman NAB for redressal of the grievances against the functionaries of the National Accountability Bureau.

ACCOUNTABILITY OF SUPERIOR JUDICIARY

312.?????????????????? Under Article 209 of the Constitution of the Islamic Republic of Pakistan, 1973, the Supreme Judicial Council of Pakistan consists of ?

?(a)????? the Chief Justice of Pakistan;
? (b)????? the two next most senior Judges of the Supreme Court; and
(c)??????? the two most senior Chief Justices of High Courts.?

Clause (5) of the above Article reads as under:

?(5) If, on information received from the Council or from any other source, the President is of the opinion that a Judge of the Supreme Court or of a High Court-
(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or
(b) may have been guilty of misconduct,

the President shall direct the Council to inquire into the matter.?

A perusal of the above clause indicates that the right to move the Supreme Judicial Council (SJC) against a Judge of the Superior Courts under Article 209 of the Constitution is not available to any individual.? Secondly, the President alone on the advice of Prime Minister or the Cabinet as the case may be, can refer a case of the Judge of the Superior Courts to Supreme Judicial Council for holding an enquiry against him.? Thirdly, the jurisdiction of Supreme Judicial Council to hold an enquiry against the Judge of a Superior Court arises only when a reference is made to it by the President in this behalf.? Fourthly, the enquiry by the Supreme Judicial Council against the Judge of a Superior Court under Article 209 ibid, is limited only to two points, namely (i) the incapacity of the Judge to perform the duties of his office properly arising from any physical or mental incapacity and (ii) misconduct of the Judge concerned.? Lastly, the findings of the Supreme Judicial Council in such an enquiry are recommendatory in nature and the action, if any, is to be taken by the President on the advice of the Prime Minister or the Cabinet.? Refer *Malik Asad Ali* v. *Federation of Pakistan* (PLD 1998 SC 161).? However, in order to make the Supreme Judicial council more effective and functional and to ensure that the Judges of the Superior Courts observe the Code of Conduct in letter and spirit, the Chief Justice of Pakistan/Chairman Supreme Judicial Council convened meetings of the Council on 29.3.2000, 13.4.2000 and 30.4.2000 respectively wherein decisions, *inter alia*, were taken to make it obligatory on every Judge to take all steps necessary to expedite cases, and effectively control the processing thereof with a view to deciding the same expeditiously and to strictly adhere to the Code of Conduct, pursuant to the provisions contained in Articles II, IX and X of the Code of Conduct.? Article X provides for quick disposal of cases.? The Judges of the Superior Courts have to work and conduct themselves under the Code of Conduct already prescribed for them.? They are oath-bound to preserve the Code and act in accordance with its dictates.? The Code of Conduct is a fairly comprehensive document and covers both the public and private conduct of Judges.? It lays down essential norms of behaviour to be observed in the interest of maintaining decorum and judicial propriety.? The Supreme Judicial Council is a unique institution, which comprises the senior most Judges in judicial hierarchy and entrusted with the onerous responsibility of deciding complaints that are referred to it through references by the President alone.? It is an essential prerequisite of the independence of judiciary that there is put in place a system of accountability.? It should, therefore, be the endeavour of the Judges of the Superior Courts to make the Code fully applicable and ensure that it is strictly adhered to.? As held in the case of *Zafar Ali Shah* (supra), the Judges of the Superior Courts are not immune from accountability. They are accountable only in the manner laid down under Article 209 of the Constitution.? We may also observe that no question was raised by the learned counsel for the petitioners in regard to the accountability of Judges vis-?-vis NAB Ordinance.? However, we thought it in the fitness of things to reaffirm the observations in the case of *Zafar Ali Shah* (supra) that the Judges of the Superior Courts are not immune from accountability and that it is for the President to make a reference if in a case such a course is desirable at his end.

PAST AND CLOSED TRANSACTIONS

313.???????????????? M/s Abdul Hafeez Pirzada, K.M.A.Samdani and M.Akram Sheikh vehemently argued and reiterated that the impugned Ordinance should be struck down as a whole on the ground of being void. They argued that even if some of the provisions contained therein are good and the others bad, the good ones will also have to be struck down for the reason that the doctrine of severability is not attracted in such a case. In support of their contention they placed reliance on *Yousaf Ali v. Muhammad Aslam Zia and 2 others* (PLD 1958 SC [Pak.] 104), wherein it was held that *??Where the Legislature clothes an order with finality, it always assumes that the order which it declares to be final is within the powers of the authority making it, and no party can plead as final an order made in excess of the powers of the authority making it, in the eye of the law such order being void and non-existent.? And if on the basis of a void order subsequent orders have been passed either by the same authority or by other authorities, the whole series of such orders, together with the superstructure of rights and obligations built upon them, must, unless some statute of principle of law recognizing as legal the changed position of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which they are founded.?* ?The principle laid down in the case of *Yousaf Ali* (supra) is not attracted here, in that, neither the impugned legislation has been found to be void nor any order passed under the Ordinance purported to be void is subject matter here. The individual grievances of any of the

petitioners are not being examined in these proceedings. Also refer Zafar Ali Shah (supra) vide paragraph No.283 whereof it was observed :

?283.?..On the question of legislative power in relation to Court?s declaration of law, the matter stands concluded by the judgment of this Court in *Muhammad Yusuf v. The Chief Settlement and Rehabilitation Commissioner Pakistan, Lahore and another* (PLD 1968 SC 101) in the following terms:

?This judgment was delivered on the 2nd November 1964, and its consequence was that as from that date all Courts subordinate to the Supreme Court and all executive and quasi-judicial authorities were obliged by virtue of the Constitution to apply the rule as laid down by the Supreme Court in cases coming up before them for decision. It did not have, and it cannot be contended that it had, the effect of altering the law as from the commencement of the Act so as to render void of its own force all relevant orders of the Settlement Authorities or of the High Court made in the light of the earlier interpretation which was that the exercise of the delegated power was subject to the provisions in Chapter VI of the Act.? ?

In Zafar Ali Shah?s case (supra) a specific direction was given that the Government shall accelerate the process of accountability in a coherent and transparent manner justly, fairly, equitably and in accordance with law. It was also observed that ?the order passed therein will not affect the trials conducted and convictions recorded including proceedings for accountability pursuant to various orders made and Orders/laws promulgated by the Chief Executive or any person exercising powers or jurisdiction under his authority and the pending trials/proceedings may continue subject to this order? (emphasis provided).? We see no reason to modify the above order of an eleven-Member Bench of this Court which is even otherwise binding on this Bench.

314.???????????????? We, therefore, direct that this Order shall not affect the trials conducted and convictions recorded or any order passed or proceedings taken thereunder and the pending trials/proceedings may continue subject to this order.

CREDIBILITY OF JUDICIAL PROCESS

315.???????????????? An Accountability Judge has to bear in mind that expeditious trial and its early conclusion are necessary for the ends of justice and credibility of the judicial process.? Any dilatory tactics of the accused shall not prevent the Court from concluding the trials most expeditiously, within the time frame laid down in the NAB Ordinance.? Any observation made by this Court in this Order shall have no bearing on the merits of the cases pending before the Accountability Courts, which shall be decided in accordance with law.? Care must be taken by the Accountability Courts to ensure that the credibility of the judicial process is not undermined in any manner whatsoever.

316.???????????????? Before concluding we would like to record our highest appreciation for Mr. Aitzaz Ahsan, Senior ASC; Mr. Muhammad Akram Sheikh, Senior ASC: Mr. Abdul Hafeez Pirzada, Senior ASC; Mr. K.M.A. Samdani, ASC; Ch. Mushtaq Ahmad Khan, Senior ASC; Mr. Muhammad Ikram Ch., ASC; Dr. A. Basit, ASC; Dr. Z. Baber Awan, ASC; Mr. Abdul Haleem Pirzada, Senior ASC; the learned Attorney General for Pakistan, Mr. Abid Hasan Minto, Senior ASC and Mr. Maqbool Ilahi Malik, Advocate General, Punjab assisted by their team members, for the valuable assistance rendered to the Court in resolving this complex matter of great public importance.? We also record our highest appreciation for setting an exemplary tradition by the learned counsel appearing on either side, in particular, the Senior Advocates of this Court in limiting the amount of time allowed to each side for arguments. Such limits can be helpful to the Court and the parties but should be imposed with care and caution and only after consultation with counsel to ensure a fair hearing.

317.???????????????? We, therefore, allow these petitions with the observations that this order and the directions contained therein shall come into force with immediate effect.? However, the Federal Government is directed to formally promulgate appropriate legislative instruments, as soon as possible, but preferably, within a period of two months from today in order to make necessary amendments, modifications, alterations, or substitutions, as the case may be, to give effect to the above directions.? No costs.

318.???????????????? The Registrar of this Court shall send copies of this judgment to all the learned Chief Justices of the High Courts; Secretary,? Law, Justice & Human Rights Division, Government of Pakistan; and Chairman, National Accountability Bureau.

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319.???????????????? The Secretary, Law, Justice & Human Rights Division, shall, within three days of the receipt of the copy of the judgment, forward copies of the same to all the Presiding officers of the Accountability Courts throughout Pakistan.

(Sd.)

Irshad Hasan Khan, CJ

(Sd.)

Muhammad Bashir Jehangarir, J.

(Sd.)

Ch. Muhammad Arif, J.

(Sd.)

Qazi Muhammad Farooq, J.

M.B.A./K-35/S ?? Oreder Accordingly

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