P L D 2024 Supreme Court 102

Present: Umar Ata Bandial, C.J., Ijaz ul Ahsan and Syed Mansoor Ali Shah, JJ

IMRAN AHMAD KHAN NIAZI ---Petitioner

Versus

FEDERATION OF PAKISTAN through Secretary, Law and Justice Division, Islamabad and another---Respondents

Constitution Petition No. 21 of 2022 and C.M.A. No. 5029 of 2022 in Constitution Petition No. 21 of 2022, decided on 30th October, 2023.

Per Umar Ata Bandial, CJ.; Ijaz ul Ahsan, J. agreeing; Syed Mansoor Ali Shah, J. dissenting. [Majority view]

(a) National Accountability Ordinance (XVIII of 1999)---

----Ss. 4, 5(n), 5(o), 9(a)(v), 14, 21(g) & 25(b)---National Accountability (Amendment) Act (XI of 2022), Ss. 2, 8, 10 & 14---National Accountability (Second Amendment) Act (XVI of 2022), Ss. 2, 3 & 14---Constitution of Pakistan, Arts. 9, 14, 23, 24 & 184(3)---Constitutional petition filed before the Supreme Court challenging amendments made to the National Accountability Ordinance, 1999 ("NAB Ordinance") by the National Accountability (Amendment) Act, 2022 ("First Amendment") and the National Accountability (Second Amendment) Act, 2022 ("Second Amendment") (collectively referred to as the "2022 Amendments")---Maintainability---The 2022 Amendments have rendered the NAB toothless in accomplishing its objective of eradicating corruption and corrupt practices and holding accountable all those persons accused of such practices and have left public property belonging to the people of Pakistan vulnerable to waste and malfeasance by the holders of public office, thereby ex-facie violating Articles 9, 14, 23 and 24 of the Constitution---Detailed reasons for finding the present Constitutional petition as maintainable stated.

Acts of corruption and corrupt practices do infringe the Fundamental Rights of the public and thus meet the test of Article 184(3) of the Constitution.

(Suo Motu Case No.19 of 2016) 2017 SCMR 683; Corruption in Hajj Arrangements in 2010's case PLD 2011 SC 963; Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. PLD 2010 SC 1109 ref.

The National Accountability (Amendment) Act, 2022 ("First Amendment") and the National Accountability (Second Amendment) Act, 2022 ("Second Amendment") (collectively referred to as the "2022 Amendments") have limited the NAB's jurisdiction thus excluding hundreds of pending references from trial before any forum and have also made the proof of the offence of corruption and corrupt practices significantly harder for references that satisfy the jurisdictional requirements of Section 4 and Section 5(o) of the National Accountability Ordinance, 1999 ("NAB Ordinance").

The 2022 Amendments exclude the jurisdiction of the NAB to investigate and prosecute holders of public office in two significant respects thereby ex-facie

violating Articles 9, 14, 23 and 24 of the Constitution by exonerating the holders of public office from their alleged acts of corruption and corrupt practices by failing to provide a forum for their trial. The 2022 Amendments have therefore rendered the NAB toothless in accomplishing its objective of 'eradicat[ing] corruption and corrupt practices and hold[ing] accountable all those persons accused of such practices' and have left public property belonging to the people of Pakistan vulnerable to waste and malfeasance by the holders of public office. Such interference in the NAB's jurisdiction and powers most certainly affects the Fundamental Rights of the people at large. Present Constitutional petition fulfils the requirements of Article 184(3) of the Constitution and so is maintainable.

Progress Report of NAB in OGRA's case 2015 SCMR 1813 ref.

(b) Constitution of Pakistan---

----Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution filed before the Supreme Court---Antecedents or standing of the petitioner---Not relevant---When the Supreme Court exercises jurisdiction under Article 184(3) of the Constitution it is not concerned with the antecedents or standing of the person who has filed the petition because that person is merely acting as an informant---Instead, the Court favours a substantive approach focusing more on the content of the petition and whether the same crosses the threshold set out in Article 184(3)---Locus standi (of petitioner) is not an impediment when the Court is exercising original jurisdiction (under Art. 184(3) of the Constitution).

Muhammad Yasin v. Federation of Pakistan PLD 2012 SC 132 and Muhammad Ashraf Tiwana v. Federation of Pakistan 2013 SCMR 1159 ref.

(c) Constitution of Pakistan---

----Art. 184(3)---Constitutional jurisdiction of the Supreme Court under Art. 184(3) of the Constitution---Scope---Vires of legislation---Supreme Court can consider and decide the vires of legislation in its original jurisdiction.

Mehram Ali v. Federation of Pakistan PLD 1998 SC 1445; Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504; Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265; Baz Muhammad Kakar v. Federation of Pakistan PLD 2012 SC 923 and Zulfiqar Ahmed Bhutta v. Federation of Pakistan PLD 2018 SC 370 ref.

(d) National Accountability Ordinance (XVIII of 1999)---

----Ss. 4, 5(n), 5(o), 9(a)(v), 14, 21(g) & 25(b)---National Accountability (Amendment) Act (XI of 2022), Ss. 2, 8, 10 & 14---National Accountability (Second Amendment) Act (XVI of 2022), Ss. 2, 3 & 14---Penal Code (XLV of 1860), S. 21---Prevention of Corruption Act (II of 1947), Ss. 2 & 5---Constitution of Pakistan, Arts. 9, 14, 23, 24, 25, 62(1)(f), 175(3), 184(3) & 260(1)---Constitutional petition filed before the Supreme Court challenging amendments made to the National Accountability Ordinance, 1999 ("NAB Ordinance") by the National Accountability (Amendment) Act, 2022 ("First Amendment") and the National Accountability (Second Amendment) Act, 2022 ("Second Amendment") (collectively referred to as the "2022 Amendments")---Vires of the "2022

Amendments"---Supreme Court declared sections 2, 8, 10 & 14 of the First Amendment and sections 2, 3 & 14 of the Second Amendment as ultra vires the Constitution---Detailed reasons for finding the said sections as ultra vires the Constitution stated.

The National Accountability (Amendment) Act, 2022 ("First Amendment") and the National Accountability (Second Amendment) Act, 2022 ("Second Amendment") (collectively referred to as the "2022 Amendments") have brought about the following modifications in the National Accountability Ordinance, 1999 ("NAB Ordinance"):

i. Section 3 of the Second Amendment has changed the definition of 'offence' in Section 5(o) of the NAB Ordinance by inserting a minimum pecuniary jurisdiction of Rs.500 million below which value the NAB cannot take cognizance of the offence of corruption and corrupt practices;

ii. Section 2 of the First Amendment by inserting subsections (a)-(f) into Section 4 of the NAB Ordinance and Section 2 of the Second Amendment by adding subsection (g) in Section 4 of the NAB Ordinance has excluded certain holders of public office from application of the NAB Ordinance and thereby limited its effect;

iii. Section 8 of the First Amendment has inserted new ingredients in the offence under Section 9(a)(v) of the NAB Ordinance and added explanations thereto. Section 9(a)(v) criminalizes the act of holding assets beyond means;

iv. Section 10 of the First Amendment has deleted Section 14 of the NAB Ordinance which provides evidentiary presumptions that may be drawn against the accused;

v. Section 14 of the First Amendment has deleted Section 21(g) of the NAB Ordinance which permitted foreign evidence to be admissible in legal proceedings under the mutual legal assistance regime; and

vi. Section 14 of the Second Amendment has added a second proviso to Section 25(b) of the NAB Ordinance whereby an accused who enters into a plea bargain duly approved by the Accountability Court under Section 25(b) can renege from the same if he has not paid the full amount of the bargain settlement as approved by the Accountability Court.

Section 3 of the Second Amendment

Section 3 of the Second Amendment has amended Section 5(o) of the NAB Ordinance to set the minimum pecuniary jurisdiction of the NAB at Rs.500 million for inquiring into and investigating cases involving the commission of the offence of corruption and corrupt practices. As a result, offences that cause loss valued at less than Rs.500 million no longer come within the ambit of the NAB. The principal focus of the NAB is to mainly prosecute mega scandals. Whilst the judgments of the Superior Courts indicate that the minimum pecuniary threshold of NAB should be Rs.100 million (except in limited circumstances where offences less than Rs.100 million cannot be prosecuted by any other accountability agency), Section 3 of the Second Amendment has increased this minimum threshold to Rs.500 million. No cogent argument was put forward by counsel for the respondent

Federation as to why Parliament has fixed a higher amount of Rs.500 million for the NAB to entertain complaints and file corresponding references in the Accountability Courts when the Superior Courts have termed acts of corruption and corrupt practices causing loss to the tune of Rs.100 million as mega scandals.

State v. Hanif Hyder 2016 SCMR 2031; Amjad Hussain v. National Accountability Bureau 2017 YLR 1 and Iftikhar Ali Haideri v. National Accountability Bureau 2019 YLR 255 ref.

Counsel for the respondent Federation submitted that merely because the minimum pecuniary threshold of the NAB has been increased does not mean that holders of public office stand absolved; that other accountability fora exist in the country where the trials of the accused holders of public office who have been removed from the jurisdiction of the NAB can be held. Counsel referred to the provisions of Prevention of Corruption Act, 1947 ("1947 Act") and Pakistan Penal Code, 1860 ("P.P.C.") amongst other laws. However, on a careful examination of these legislations it becomes clear that the two are applicable only to public servants. Under the Constitution persons in the service of Pakistan are those who are holding posts in connection with the affairs of the Federation or Province. As a result, such persons are either dealing with the property of the Federal/Provincial Government or with the pecuniary interests of the Federal/Provincial Government. They, therefore, come within the definition of public servant set out in the Pakistan Penal Code, 1860 ('P.P.C.") and adopted by the Prevention of Corruption Act, 1947 ('the 1947 Act') and so can be prosecuted under these laws for the offence of corruption and corrupt practices. However, elected holders of public office do not qualify as public servants under the guise of being in the service of Pakistan because Article 260 of the Constitution specifically excludes them from such service. Resultantly elected holders of public office are not triable either under the 1947 Act or the P.P.C. for the offence of corruption and corrupt practices.

R.S. Nayak v. A.R. Antulay AIR 1984 SC 684 and Zakir Hossain Sarkar v. State (70) DLR (2018) 203 ref.

By virtue of Section 3 of the Second Amendment elected holders of public office have been granted both retrospective and prospective exemption from accountability laws. Once excluded from the jurisdiction of the NAB no other accountability fora can take cognizance of their alleged acts of corruption and corrupt practices. Such blanket immunity offends Articles 9, 14, 23 and 24 of the Constitution because it permits and encourages the squandering of public assets and wealth by elected holders of public office as there is no forum for their accountability. This in turn affects the economic well-being of the State and ultimately the quality and dignity of the people's lives because as more resources are diverted towards illegal activities less resources remain for the provision of essential services to the people such as health facilities, education institutes and basic infrastructure etc. The immunity also negates Article 62(1)(f) of the Constitution which mandates that only 'sagacious, righteous, non-profligate, honest and ameen' persons enter Parliament. It also offends the equal treatment command of Article 25 of the Constitution as differential treatment is being meted out to persons in the service of Pakistan than to elected holders of public office. This is

because persons in the service of Pakistan can still be prosecuted for the offence of corruption and corrupt practices under the 1947 Act as they fall within the definition of public servants.

Section 3 of the Second Amendment is ultra vires the Constitution and of no legal effect on account of absolving persons accused of the offence of corruption and corrupt practices without a judicial verdict which amounts to legislative judgment. Since persons in the service of Pakistan can be tried for offences contained in Section 9(a)(i)-(v) of the NAB Ordinance under the 1947 Act, the bar

of Rs.500 million shall continue for such offences. To this extent Section 3 of the Second Amendment is declared to be intra vires the Constitution. However, on account of the fact that persons in the service of Pakistan cannot be tried for the offences noted in Section 9(a)(vi)-(xii) under the 1947 Act or any other accountability law the bar of Rs.500 million will not apply to them for such offences. Section 3 of the Second Amendment is therefore declared to be void and without legal effect for these offences for discharging the accused without trial which is tantamount to legislative judgment and is held to be so from the date of commencement of the Second Amendment.

Province of Punjab v. National Industrial Cooperative Credit Corporation 2000 SCMR 567 ref.

Section 2 of the 2022 Amendments

Section 2 of the 2022 Amendments has altered Section 4 of the NAB Ordinance. Section 2 of the 2022 Amendments is an attempt by Parliament to rein in the unguided powers of the NAB and to protect the bureaucracy from unnecessary harassment. However, the exceptions granted by Section 2 operate as an enmasse exemption for holders of public office from facing accountability. The freshly inserted condition that the NAB shall provide evidence of monetary or other material benefit received by the holder of public office or a person acting on his behalf to overcome the exceptions listed in Section 2 of the 2022 Amendments cannot be satisfied in the references already pending before the Accountability Courts. Therefore, where such condition will not be met by the NAB the result will be (and in fact has been) that references will be returned. Section 2 of the 2022 Amendments affects the same Fundamental Rights i.e., Articles 9, 14, 23 and 24 and raises the same problems in terms of the accountability of elected holders of public office as Section 3 of the Second Amendment, namely, that whilst persons in the service of Pakistan may still be investigated and prosecuted under the 1947 Act for the offences listed in Section 9(a)(i)-(v) of the NAB Ordinance, elected holders of public office will not be amenable to the jurisdiction of any other accountability fora for the offence of corruption and corrupt practices.

Section 2 of the 2022 Amendments is also declared to be void from the date of commencement of the 2022 Amendments. Section 2 of the 2022 Amendments insofar as these pertain to the offences set out in Section 9(a)(i)-(v) of the NAB Ordinance are declared to be intra vires the Constitution because persons in the service of Pakistan can be prosecuted for these offences under the 1947 Act. However, Section 2 is ultra vires the Constitution from the date of commencement

of the 2022 Amendments for the offences listed in Section 9(a)(vi)-(xii) of the NAB Ordinance because persons in the service of Pakistan cannot be tried for such offences under the 1947 Act or any other accountability law.

Sections 8 and 10 of the First Amendment

Section 8 of the First Amendment has significantly altered Section 9 of the NAB Ordinance which lays down various categories of the offence of corruption and corrupt practices. Apart from reducing the circumstances in which the offence of assets beyond means can be made out against the holder of a public office, the First Amendment has made another material change in Section 9(a)(v) of the NAB Ordinance, namely, the obligation on the NAB to prove that an accused has accumulated substantially disproportionate assets 'through corrupt and dishonest means.' This element was previously not a part of Section 9(a)(v). Prior to First Amendment the NAB was not required to demonstrate that the accused had obtained the resources or property 'through corrupt and dishonest means' because the mere presence of disproportionate assets led to the presumption that the accused had engaged in corrupt and dishonest conduct. Such a presumption is provided in Section 14(c) of the NAB Ordinance. The fact of the matter is that the proof of acquisition of assets 'through corrupt and dishonest means' itself constitutes a complete offence. Therefore, by changing Section 9(a)(v), the First Amendment has amalgamated two separate offences into one. As a result, the original offence contained in Section 9(a)(v) has now been rendered redundant. To further ensure the futility of the said offence all of the evidentiary presumptions contained in Section 14 of the NAB Ordinance sustaining the erstwhile offence under Section 9(a)(v) and the remaining offences in the NAB Ordinance have been omitted by Section 10 of the First Amendment.

Further, by the insertion of Explanation II to Section 9(a)(v) of the NAB Ordinance entries in bank statements have been removed from the scope of assets whereas banking transactions can only be regarded as assets if there is evidence of the creation of a corresponding asset through specific transactions. The source, object and quantum of credits/receipts in the bank accounts can now no longer be shown for proving the creation of assets. Nor can debit transfers from one account to another be used to show accumulation of money for the creation of an asset. It goes without saying that bank records are usually the most pivotal evidence in financial crimes. However, by virtue of Explanation II limited resort can be made to them. If accused persons cannot be held to account for owning or possessing assets beyond their means, the natural corollary will be that public assets and wealth will become irrecoverable which would encourage further corruption. This will have a direct adverse effect on the peoples' right to life and to public property because the economic well-being of the State will be prejudiced.

The amended Section 9(a)(v) and the omission of Section 14(c) would treat similarly placed persons differently because while elected holders of public office are relieved from prosecution for the offence under Section 9(a)(v), persons in the service of Pakistan will still have to go through the rigors of trial under the 1947

Act for the same offence. This would offend the equal treatment command of Article 25 of the Constitution.

The phrase 'through corrupt and dishonest means' used in Section 9(a)(v) along with its Explanation II is struck down from the NAB Ordinance from the date of commencement of the First Amendment for being unworkable. Additionally, Section 14 in its entirety is restored to the NAB Ordinance from the date of commencement of the First Amendment. Sections 8 and 10 of the First Amendment are declared invalid to this extent.

The amendments made in Section 9(a)(v) of the NAB Ordinance by Section 8 of the First Amendment are upheld in their entirety as persons in the service of Pakistan can be tried for the same offence under the 1947 Act. However, Section 10 of the First Amendment is struck down from the date of commencement of the First Amendment and Section 14(a), (b) and (d) stand restored to the NAB Ordinance because such presumptions do not exist in any other accountability law.

Section 14 of the First Amendment

Section 14 of the First Amendment has omitted Section 21(g) of the NAB Ordinance, which dealt with International Cooperation Request for mutual legal assistance. It is a common fact that many accused persons being tried under the NAB Ordinance have stashed their wealth and assets abroad in tax havens under fiduciary instruments. However, after the omission of the said provision the admissibility of foreign public documents shall be governed by Article 89(5) of the Qanun-e-Shahadat Order, 1984 ("1984 Order"). The process of admitting foreign public documents under the 1984 Order is protracted and cumbersome because it requires either the production of the original document or a copy which is certified not only by the legal keeper of the document but also by the Embassy of Pakistan. Further, the character of the document needs to be established in accordance with the law of the foreign country. Additionally, foreign private documents would need to be established through the procedure set out in Articles 17 and 79 of the 1984 Order which would require that two attesting witnesses from the foreign country enter personal appearance for proving the execution of the foreign private document. Such a process naturally entails time as the foreign evidence needs to pass through red tape. It therefore defeats the purpose for which Section 21(g) was inserted into the NAB Ordinance. By deleting Section 21(g) from the NAB Ordinance, Section 14 of the First Amendment has made it near impossible for relevant and

necessary foreign evidence to be used in the trials of accused persons. It therefore offends the Fundamental Rights of the people to access justice and protect public property from waste and malfeasance.

Section 21(g) is hereby restored in the NAB Ordinance for both elected holders of public office and persons in the service of Pakistan with effect from the date of commencement of the First Amendment for facilitating peoples right to access

justice and for protecting their public property from squander. Accordingly, Section 14 of the First Amendment is struck down for being illegal.

Section 14 of the Second Amendment

Section 14 of the Second Amendment has inserted two new provisos to Section 25(b) of the NAB Ordinance, which provision pertains to plea bargains entered into by accused persons. Despite the benign purposes behind introducing the second proviso to Section 25(b), the actual effect of it is that it nullifies Section 25(b) itself which was inserted in the NAB Ordinance to facilitate early recovery of the ill-gotten wealth through settlement where practicable because it places no restrictions on the accused from revoking the plea bargain entered into by him. Further, the second proviso gives the accused an uninhibited right to withdraw from a plea bargain without obtaining the approval of the Accountability Court which in the first place approved the plea bargain. The exclusion of the Accountability Court by the second proviso to Section 25(b) of the NAB Ordinance therefore undermines the independence of the Judiciary and is violative of Article 175(3) of the Constitution. Furthermore allowing an accused person to renege from his plea bargain would be tantamount to conferring an unlawful benefit on him i.e., he would escape the consequences (disqualification to contest elections or to hold public office) stipulated in Section 15(a) of the NAB Ordinance.

The second proviso to Section 25(b) is struck down from the NAB Ordinance from the date of commencement of the Second Amendment. As a result, Section 14 of the Second Amendment is declared to be void and of no legal effect to this extent.

Supreme Court directed that all orders passed by the NAB and/or the Accountability Courts placing reliance on the struck down Sections are declared null and void and of no legal effect. Therefore, all inquiries, investigations and references which have been disposed of on the basis of the struck down Sections are restored to their positions prior to the enactment of the 2022 Amendments and shall be deemed to be pending before the relevant fora. The NAB and all Accountability Courts shall proceed with the restored proceedings in accordance with law. The NAB and/or all other fora shall forthwith return the record of all such matters to the relevant fora and in any event not later than seven days from date of present judgment which shall be proceeded with in accordance with law from the

same stage these were at when the same were disposed of/closed/returned. Constitutional petition was allowed.

(e) Interpretation of statutes---

----Proviso to a section---Scope---Whilst a proviso can qualify or create an exception to the main section it cannot nullify the same.

Muhammad Anwar Kurd v. State 2011 SCMR 1560 ref.

Per Syed Mansoor Ali Shah, J; dissenting with Umar Ata Bandial, CJ. [Minority view]

(f) Constitution of Pakistan---

----Art. 184(3) & Part.II, Chapt. 1---Legislation---Judicial review---Scope---Courts can judicially review the acts of the legislators if they offend the Constitution, in particular the fundamental rights guaranteed by the Constitution---While examining this conflict of rights and the legislation, the courts must consider that they are dealing with a legislative document that represents multiple voices, myriad policy issues and reflective of public ethos and interests, voiced through the chosen representatives of the people; and remembering that undermining the legislature undermines democracy---With this background, only if such a legislation is in conflict and in violation of the fundamental rights or the express provisions of the Constitution, can the courts interfere and overturn such a legislation.

(g) Constitution of Pakistan---

----Art. 184(3)--- Legislation--- Judicial review--- Scope--- Judicial restraint, doctrine of---Courts have formulated the doctrine of judicial restraint which urges Judges considering constitutional questions to give deference to the views of the elected branches and invalidate their actions only when constitutional limits have clearly been violated---As the legislative acts of a legislature are the manifestation of the will of the people exercised through their chosen representatives, the courts tread carefully to judicially review them and strike them down only when their constitutional invalidity is clearly established beyond any reasonable doubt---Reasonable doubt is resolved in favour of the constitutional validity of the law enacted by a competent legislature by giving a constitution-compliant interpretation to the words that create such doubt.

Jurists Foundation v. Federal Government PLD 2020 SC 1 and LDA v. Imrana Tiwana 2015 SCMR 1739 ref.

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

----Ss. 4, 5(n), 5(o), 9(a)(v), 14, 21(g) & 25(b)---National Accountability (Amendment) Act (XI of 2022), Ss. 2, 8, 10 & 14---National Accountability (Second Amendment) Act (XVI of 2022), Ss. 2, 3 & 14---Penal Code (XLV of 1860), S. 21---Prevention of Corruption Act (II of 1947), Ss. 2 & 5---Qanun-e-Shahadat (10 of 1984), Art.122---Constitution of Pakistan, Arts. 9, 14, 23, 24, 25, 175(3) & 184(3)---Constitutional petition filed before the Supreme Court challenging amendments made to the National Accountability Ordinance, 1999

("NAB Ordinance") by the National Accountability (Amendment) Act, 2022 ("First Amendment") and the National Accountability (Second Amendment) Act, 2022 ("Second Amendment") (collectively referred to as the "2022 Amendments")---Vires of the "2022 Amendments"---The 2022 Amendments in no way take away or abridge any of the fundamental rights guaranteed by the Constitution to the people of Pakistan---Even after the 2022 Amendments elected holders of public offices (members of Parliament, Provincial Assemblies and Local Government Bodies, etc.) are still triable under the Prevention of Corruption Act 1947 ('PCA') and the Pakistan Penal Code 1860 ('P.P.C.')---Changes brought about by the 2022 Amendments relate to criminal law, criminal procedure and rules of evidence and fall within the legislative competence of the Parliament and in no way take away or abridge any of the fundamental rights---If Parliament can enact the NAB Ordinance in the exercise of its ordinary legislative power, it can surely amend the same in the exercise of the same legislative power---Detailed reasons given by His Lordship for disagreeing with the majority view stated.

The Parliament has, through the impugned National Accountability (Amendment) Act, 2022 ("First Amendment") and the National Accountability (Second Amendment) Act, 2022 ("Second Amendment") (collectively referred to as the "2022 Amendments"), merely changed the forums for investigation and trial of the offences of corruption involving the amount or property less than Rs.500 million. After the amendment, the cases of alleged corruption against the holders of public offices that involve the amount or property of value less than Rs.500 million are to be investigated by the anti-corruption investigating agencies and tried by the anti-corruption courts of the Federation and Provinces respectively, under the Prevention of Corruption Act 1947 and the Pakistan Criminal Law Amendment Act 1958, instead of the National Accountability Ordinance, 1999 ("NAB Ordinance"). This matter undoubtedly falls within the exclusive policy domain of the legislature, not justiciable by the courts. This and other challenged amendments, which relate to certain procedural matters, in no way take away or abridge any of the fundamental rights guaranteed by the Constitution to the people of Pakistan.

The majority view in the present case is not correct as even after the challenged amendments:

(i) the elected holders of public offices (members of Parliament, Provincial Assemblies and Local Government Bodies, etc.) are still triable under the Prevention of Corruption Act 1947 ('PCA') and the Pakistan Penal Code 1860 ('P.P.C.') for the alleged offences of corruption and corrupt practices and no one goes home scot-free. They are still triable under other laws. This aspect has been seriously misunderstood by the majority;

(ii) the challenged amendment of adding the threshold value of Rs.500 million for an offence to be investigated and tried under the NAB Ordinance, simply changes the forums for investigation and trial of the alleged offences of corruption and corrupt practices involving the amount or property less than Rs.500 million. The matter of defining a threshold of value for the investigation and trial of offences under the NAB Ordinance is undoubtedly a policy matter that falls within the exclusive domain of the legislature (Parliament), not of the courts. If a

legislature has the constitutional authority to pass a law with regard to a particular subject, it is not for the courts to delve into and scrutinize the wisdom and policy which led the legislature to pass that law; and

(iii) the said and other challenged amendments (law made by the Parliament) do not take away or abridge any of the fundamental rights guaranteed under Articles 9, 14, 23, 24 and 25 of the Constitution. The majority view has assumed the right to accountability of the elected holders of public offices through criminal prosecution as included in the fundamental rights to life, dignity and property guaranteed by Articles 9, 14 and 24 of the Constitution, without making any discussion for establishing its close relationship of such an extent with those fundamental rights that makes this right to be an integral part of them.

Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265 distinguished.

The omission of Section 14 of the NAB Ordinance by the 2022 Amendments has made no substantial effect in view of the provisions of Article 122 of the Qanun-e-Shahadat 1984. Clauses (a), (b) and (d) of the omitted Section 14 of the NAB Ordinance relate to the intention of the accused other than that which the character and circumstances of the act proved against him by the prosecution suggest. These clauses are, therefore, merely descriptive instances of the applicability of Article 122 read with its illustration (a) of the Qanun-e-Shahadat. And clause (c) of the omitted Section 14 of the NAB Ordinance that relates to possessing assets disproportionate to known sources of income is the descriptive instance of the applicability of Article 122 read with its illustration (b) of the Qanun-e-Shahadat. Notwithstanding such an innocuous effect, the change in the rules of evidence squarely falls within the scope of the legislative competence of the Parliament under Article 142(b) of the Constitution and unless such change offends any of the fundamental rights, it is not justiciable in courts.

Pir Mazharul Haq v. State PLD 2005 SC 63; Mansur-Ul-Haque v. Government of Pakistan PLD 2008 SC 166; State v. Idrees Ghauri 2008 SCMR 1118; Qasim Shah v. State 2009 SCMR 790; Rehmat v. State PLD 1977 SC 515 and Hashim Babar v. State 2010 SCMR 1697 ref.

Similar is the position with the addition of words "through corrupt and dishonest means" by the challenged amendments in Section 9(a)(v) of the NAB Ordinance: It also has no substantial effect on the mode of proving the offence of unaccounted assets possessed by a holder of public office beyond his known sources of income; as when the prosecution succeeds in proving that the particular assets of the accused are disproportionate to his known sources of income (legal means) and are thus acquired through some corrupt and dishonest means, the burden of proving the "fair and honest means" whereby the accused claims to have acquired the same, being within his knowledge, are to be proved by him as per provisions of Article 122, read with its illustration (b), of the Qanun-e-Shahadat.

The majority view has also declared ultra vires the Constitution the addition of Explanation II to Section 9(v) of the NAB Ordinance; the omission of clause (g) of Section 21; and the addition of second proviso to Section 25(b). However in declaring these amendments as ultra vires the Constitution, the majority view has

not explained how they infringe any of the fundamental rights or any other provision of the Constitution, nor could the counsel for the petitioner point out in his arguments any such infringement. These amendments being related to "criminal law, criminal procedure and evidence" fall within the legislative competence of the Parliament as per Article 142(b) of the Constitution and in no way take away or abridge any of the fundamental rights in terms of Article 8(2) of the Constitution.

The mode of holding the elected representatives accountable for the offences of corruption and corrupt practices through criminal prosecution has not been provided by the Constitution but by the sub constitutional laws - the P.P.C., the PCA and the NAB Ordinance. If Parliament can enact these laws in the exercise of its ordinary legislative power, it can surely amend them in the exercise of the same legislative power. The argument cannot be acceded to that Parliament after enacting these laws has no power to amend, modify or repeal them.

The counsel for the petitioner could not explain how the right to accountability of the elected holders of public offices through criminal prosecution under the NAB Ordinance is an integral part of the fundamental rights to life, dignity, property and equality or how it partakes of the same basic nature and character as the said fundamental rights so that the exercise of such right is in reality and substance nothing but an instance of the exercise of these fundamental rights. Nor could he establish that the "direct and inevitable effect" of the challenged amendments constitutes an infringement of these fundamental rights. The "effect" of the challenged amendments on these fundamental rights portrayed by him is so "remote and uncertain" that if such effect is accepted as an infringement of the fundamental rights then there would hardly be left any space and scope for Parliament to make laws on any subject; as all laws enacted by Parliament would "ultimately" reach any of the fundamental rights, particularly rights to life or property, in one way or the other through such a long winding conjectural path of farfetched "in turn" effects. Constitutional petition was dismissed.

Corruption in Hajj Arrangements' case 2010 PLD 2011 SC 963 and Bank of Punjab v. Haris Steel Industries PLD 2010 SC 1109 distinguished.

(i) Penal Code (XLV of 1860)---

----S. 21---Public servant---Scope---Every officer remunerated by the fees or commission for the performance of any public duty is a public servant under Section 21, P.P.C., irrespective of the fact whether the fee is paid by the Government or by any other public body or by an Act of Parliament under the Constitution.

Henly v. Mayor of Lyme (1928) 5 Bing 91 and R v. Whittaker (1914) 3 KB 1283 ref.

(j) Penal Code (XLV of 1860)---

----S. 21---Prevention of Corruption Act (II of 1947), Ss. 2 & 5---Public servant---Scope---Member of Parliament---To fall within the scope of the definition of "public servant" a person should be an officer; he should perform any public duty;

and he should be remunerated by fees or commission for the performance of that public duty---Member of Parliament is "holder of an office" and is thus an "officer" within the meaning and scope of this term used in clause ninth of Section 21, P.P.C.---Person in his position as a member of Parliament does perform a "public duty"---Furthermore a member of Parliament is, remunerated by fees (salary and allowances) for the performance of public duties---Member of Parliament, thus, fulfills all the three conditions to fall within the scope of the definition of "public servant" provided in the second limb of the latter part of clause ninth of Section 21, P.P.C., and is, therefore, triable as a "public servant" for the alleged commission of an offence of corruption and corrupt practices (criminal misconduct) under the Pakistan Penal Code, 1860 and the Prevention of Corruption Act, 1947.

McMillan v. Guest (1942) AC 561; Shorter Oxford English Dictionary, 6th ed., p. 1988; G.W. Railway Co. v. Bater [1920] 3 KB 266; G.W. Railway v. Bater [1922] 2 AC 1; Kanta Kathuria v. Manakchand Surana AIR 1970 SC 694; American Jurisprudence, 2nd ed. Vol. 63A, p. 667; Grahm Zellic, Bribery of Members of Parliament and the Criminal Law, Public Law (1979) 31 at p. 37; L.K. Advani v. C.B.I. 1997 Cri.LJ 2559; Anti Corruption Commission v. Shahidul Islam (6 SCOB [2016] AD 74; R v. Boston [1923] HCA 59; Narsimha Rao v. State AIR 1998 SC 2120; The Members of Parliament (Salaries and Allowances) Act, 1974; R v. Postmaster-General (1876) 1 QBD 663; National Embroidery Mills Ltd. v. Punjab Employees' Social Security Institution 1993 SCMR 1201; Accountant General, Bihar v. N. Bakshi AIR 1962 SC 505; Khurshid Soap and Chemical Industries v. Federation of Pakistan PLD 2020 SC 641; Abul Monsur v. State PLD 1961 Dacca 753; Mujibur Rahman v. State PLD 1964 Dacca 330; Emperor v. Sibnath Banerji AIR 1945 PC 156 and Shiv Bahadur Singh v. State of Vindhya Pradesh AIR 1953 SC 394 ref.

(k) Constitution of Pakistan---

----Art. 184(3)---Legislation---Judicial review---Scope---Courts cannot force the legislature to act upon their recommendations nor can they strike down any law competently enacted by the legislature which does not commensurate with their recommendations.

(l) Constitution of Pakistan---

----Art. 175(3)---Trichotomy of power, principle of---Scope---Constitution of Pakistan is based on the principle of trichotomy of power in which legislature, executive and judiciary have their separately delineated functions---Legislature is assigned the function to legislate laws, the executive to execute laws and the judiciary to interpret laws---None of these three organs are dependent upon the other in the performance of its functions nor can one claim superiority over the others---Each enjoys complete independence in their own sphere and is the master in its own assigned field under the Constitution---Any one of these three organs cannot usurp or interfere in the exercise of each other's functions, nor can one encroach upon the field of the others---This trichotomy of power is so important that it is said to be a basic feature of the Constitution, a cornerstone of the

Constitution, a fundamental principle of the constitutional construct, and one of the foundational principles of the Constitution.

Government of Balochistan v. Azizullah Memon PLD 1993 SC 341; Liaqat Hussain v. Federation of Pakistan PLD 1999 SC 504; Registrar, SCP v. Wali Muhammad 1997 SCMR 141; Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265; Government of KPK v. Saeed-Ul-Hassan 2021 SCMR 1376; Jurists Foundation v. Federal Government PLD 2020 SC 1; Dossani Travels v. Travels Shop PLD 2014 SC 1 and Mamukanjan Cotton Factory v. Province of Punjab PLD 1975 SC 50 ref.

(m) Legislation---

----Legislative power of Parliament---Scope---Doctrines of exhaustion and functus officio---Not applicable---What Parliament has done, Parliament can undo---Legislative power of Parliament does not exhaust by enactment of any law nor does Parliament become functus officio by making a law, on a particular subject---Doctrines of exhaustion and functus officio are not applicable to legislative powers---Legislature that has made any law is competent to change, annul, re-frame or add to that law---Even the legislature of today cannot enact a law, whereby the powers of a future legislature or of its own to amend a law are curtailed.

M.P. High Court Bar Association v. Union of India AIR 2005 SC 4114; Khan Asfandyar Wali v. Federation of Pakistan PLD 2001 SC 607 and LDA v. Imrana Tiwana 2015 SCMR 1739 ref.

(n) Constitution of Pakistan---

----Part.II, Chapt. 1---Fundamental rights, interpretation of---Progressive, liberal and dynamic approach---Fundamental rights guaranteed in the Constitution, an organic instrument, are not capable of precise or permanent definition delineating their meaning and scope for all times to come---With the passage of time, changes occur in the political, social and economic conditions of the society, which requires re-evaluation of their meaning and scope in consonance with the changed conditions---Therefore, keeping in view the prevailing socio-economic and politico-cultural values and ideals of the society, the courts are to construe the fundamental rights guaranteed in the Constitution with a progressive, liberal and dynamic approach---But this does not mean that the judges are at liberty to give any artificial meaning to the words and expressions used in the provisions of the fundamental rights, on the basis of their subjective ideological considerations---Progressive, liberal and dynamic approach in construing fundamental rights guaranteed in the Constitution must be guided by an objective criterion, not by subjective inclination.

Nawaz Sharif v. President of Pakistan PLD 1993 SC 473 ref.

(o) Constitution of Pakistan---

----Part.II, Chapt. 1---Fundamental rights---New rights---Objective criterion for recognizing new rights as fundamental rights---Objective criterion in such regard is to see whether the claimed right is an integral part of a named fundamental right or

partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right---Right is an integral part of a named fundamental right which gives life and substance to the named fundamental right.

Maneka Gandhi v. Union of India AIR 1978 SC 597 and Griswold v. Connecticut (1965) 381 US 479 ref.

(p) Constitution of Pakistan---

----Art. 184(3)---Legislation---Judicial review---Scope---Locus standi of a Parliamentarian to challenge the constitutional validity of an Act of Parliament---Parliament is a constitutional body, but being comprised of the chosen representatives of the people of Pakistan it attains the status of a prime constitutional body---Any action made or decision taken by the majority of a constitutional body is taken to be and treated as an action or decision of that body as a whole comprising of all its members, not only of those who voted for that action or decision---Any member of a constitutional body who was in the minority in making that decision can not challenge the validity of that decision in court---Principle that decisions taken by a majority of members in a constitutional body (like a parliament or legislature) usually cannot be directly challenged in court by those in the minority is rooted in the doctrine of parliamentary sovereignty and the separation of powers---Democratic systems are often built on the principle of majority rule; this ensures that decisions reflect the will of the majority while still respecting the rights of the minority---Allowing minority members to easily challenge majority decisions would undermine this fundamental democratic principle.

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

----Ss. 9 & 10---Prevention of Corruption Act (II of 1947), Ss. 2 & 5---Judges of the constitutional courts and Members of the Armed Forces---Accountable and fully

liable under the National Accountability Ordinance, 1999 and the Prevention of Corruption Act, 1947, like any other public servant of Pakistan.

Khan Asfandyar Wali v. Federation of Pakistan PLD 2001 SC 607 ref.

For Petitioner(s)/Applicant(s)

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Ch. Aamir Rehman, Addl. AGP, Malik Javed Iqbal Wains, Addl. AGP and Raja Shafqat Abbasi, DAG.

For NAB/Respondent No.02:

Mumtaz Yousf, Addl. Prosecutor General.

Muhammad Sattar Awan, Deputy Prosecutor General.

Qazi Babar Irshad, Special Prosecutor General.

Barrister Syeda Jugnu Kazmi, Special Prosecutor General.

Dates of hearing: 19th, 29th, July, 5th, 19th August, 1st September, 4th, 5th, 6th, 10th, 11th, 12th, 18th, 19th, 24th October, 8th, 9th, 10th, 14th, 15th, 16th, 17th, November, 6th, 7th, 8th, 12th, 13th, 14th, December, 2022, 10th, 11th, 12th, 17th, 18th, 19th, January, 7th, 8th, 9th, 10th, 14th, 15th, 16th, 21st, 22nd, 23rd February,

14th, 15th, 16th, March, 16th, May, 18th, 29th, 30th, 31st August, 1st and 5th September, 2023.

JUDGMENT

UMAR ATA BANDIAL, C.J.---

Surah Al-Anfal, Verse 27:

"O ye that believe! betray not the trust of Allah and the Messenger, nor misappropriate knowingly things entrusted to you."

(Translation by Yusuf Ali)

Through the present Constitution Petition No.21 of 2022 the

petitioner has challenged the amendments made to the National Accountability Ordinance, 1999 ("NAB Ordinance") by the National Accountability (Amendment) Act, 2022 ("First Amendment") and the National Accountability (Second Amendment) Act, 2022 ("Second Amendment") (collectively referred to as the "2022 Amendments").

Origins and Content of the Unamended NAB Ordinance

2. Before delving into the facts giving rise to the present petition it would be appropriate to briefly set out the origins and history of the NAB Ordinance. The NAB Ordinance was a successor of the Ehtesab Act, 1997 and was promulgated by the then Chief Executive of Pakistan, General Pervez Musharraf, on 16.11.1999 with retrospective effect from 01.01.1985. The NAB Ordinance is a special law enacted to 'eradicate corruption and corrupt practices and hold accountable all those persons accused of such practices.' To achieve its purposes the NAB Ordinance:

i. Set up Special Courts for conducting trials of the offence of corruption and corrupt practices [refer Sections 5(g) and 16 of the NAB Ordinance prior to the 2022 Amendments];

ii. Defined the categories of holders of public office who are subject to the NAB Ordinance. The two main categories are parliamentarians ("elected holders of public office") and 'persons in the service of Pakistan' [refer Section 5(m) of the NAB Ordinance prior to the 2022 Amendments];

iii. Expanded the class of persons who could be investigated and prosecuted for the offence of corruption and corrupt practices [refer Section 5(o) of the NAB Ordinance prior to the 2022 Amendments];

iv. Set up the NAB for the purposes of conducting pre-trial inquiries and investigations in relation to the offence of corruption and corrupt practices and to prosecute the same [refer Section 6 of the NAB Ordinance prior to the 2022 Amendments];

v. Retained certain categories of the offence of corruption and corrupt practices from previous accountability laws whilst also adding certain new categories

such as 'misuse of authority' and 'wilful default' [refer Section 9 (a) (vi) and (viii) of the NAB Ordinance prior to the 2022 Amendments];

vi. Declared the offence of corruption and corrupt practices non-bailable [refer Section 9(b) of the NAB Ordinance prior to the 2022 Amendments];

vii. Retained certain evidentiary presumptions against accused persons whilst also adding a new category of presumption for persons accused of misusing their authority [refer Section 14 of the NAB Ordinance prior to the 2022 Amendments];

viii. Permitted the Chairman NAB or any authorised officer of the Federal Government to seek mutual legal assistance from foreign States [refer Section 21 of the NAB Ordinance prior to the 2022 Amendments]; and

ix. Introduced the concept of a plea bargain [refer Section 25(b) of the NAB Ordinance prior to the 2022 Amendments].

3. The vires of the NAB Ordinance were challenged soon after its promulgation but the Court in Khan Asfandyar Wali v. Federation of Pakistan (PLD 2001 SC 607) upheld its provisions albeit with certain directions and observations. Since then despite three elected governments coming into power the NAB Ordinance has not been repealed and it remains the premier accountability law in the country.

Factual Background

4. With the above context we can now lay down the facts

relevant to the present petition. On 22.06.2022 the First Amendment to the NAB Ordinance became an Act of Parliament. Its essential features are:

i. Its provisions have deemed effect from the date of commencement of the NAB Ordinance i.e., 01.01.1985 [refer Section 1(2) of the First Amendment];

ii. It excludes the decisions, advice, reports, opinions tendered by and works, functions, projects, schemes executed by holders of public office and public/ governmental bodies from the ambit of the NAB unless there is proof of the holders of public office or persons acting on their behalf having received any monetary or material benefit from the decisions, advice, reports, opinions, works, functions, projects or schemes [refer Section 2 of the First Amendment];

iii. It has defined 'public at large' to mean at least 100 persons [refer Section 3 of the First Amendment];

iv. It has altered the ingredients of the offences listed in Section 9(a)(v), (vi) and (ix) of the NAB Ordinance [refer Section 8 of the First Amendment];

v. It has given Accountability Courts the power to grant bail to accused persons [refer Section 8 of the First Amendment];

vi. It has omitted Section 14 of the NAB Ordinance which allowed the Accountability Court to draw various evidentiary presumptions against the

accused [refer Section 10 of the First Amendment];

vii. It has omitted Section 21(g) of the NAB Ordinance which allowed evidentiary material transferred by a foreign Government to be receivable as evidence in legal proceedings notwithstanding the provisions of the Qanun-e-Shahadat Order, 1984 [refer Section 14 of the First Amendment]; and

viii. It has reduced the period of custody of the accused for the purposes of inquiry and investigation from 90 days to 14 days [refer Section 16 of the First Amendment].

5. On 25.06.2022 the petitioner filed the titled Constitution

Petition with the prayer that the First Amendment be struck down (albeit with the exception of a few beneficial changes) for violating the Fundamental Rights of the people of Pakistan enshrined in Articles 9 (security of person), 14 (inviolability of dignity of man), 19A (right to information), 24 (protection of property rights) and 25 (equality of citizens) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution").

6. The first hearing in the case took place on 19.07.2022. During the course of the petitioner's arguments the Second Amendment also became an Act of Parliament on 12.08.2022. The significant features of this amendment are:

i. Its provisions have deemed effect from the date of commencement of the NAB Ordinance i.e., 01.01.1985 [refer Section 1(2) of the Second Amendment];

ii. It has enlarged the category of holders of public office and public/ governmental bodies excluded from the jurisdiction of the NAB [refer Section 2 of the Second Amendment];

iii. It has limited the pecuniary jurisdiction of the NAB to cases involving loss of Rs.500 million or more thereby rendering the NAB incompetent to investigate and prosecute offences of corruption and corrupt practices which have caused a loss of less than Rs.500 million [refer Section 3 of the Second Amendment]; and

iv. It has provided accused persons with the opportunity to renege from the plea bargains entered into by them and approved by the Accountability Court if they fail to make the complete payment as approved by the Accountability Court [refer Section 14 of the Second Amendment].

The petitioner filed an application on 31.08.2022 for amending his Constitution Petition to also challenge the Second Amendment on the touchstone of the Fundamental Rights already raised in respect of the First Amendment. This application was allowed by the Court on 01.09.2022 with the consent of the learned counsel for the respondent Federation. Thereafter, the proceedings continued for more than a year and comprised of 53 hearings in total. During this period of one

year two further amendments were passed in relation to the NAB Ordinance, namely:

i. The National Accountability (Amendment) Act, 2023 which became an Act of Parliament on 29.05.2023 ("2023 Act"). This Act has primarily amended Section 4 of the NAB Ordinance to provide a transfer mechanism for pending inquiries, investigations and references to the relevant agency, authority, department, court, tribunal or forum [refer Section 2 of the 2023 Act]; and

ii. The National Accountability (Amendment) Ordinance, 2023 which was promulgated on 03.07.2023 ("2023 Ordinance") by the President. The main feature of this Ordinance is that it has re-inserted the evidentiary presumptions against the accused for certain categories of the offence of corruption and corrupt practices [refer Section 2 of the 2023 Ordinance]. Although this Ordinance has retrospective effect from the date of commencement of the NAB Ordinance the restoration of the presumptions will have no effect on the references that have already been returned by the Accountability Courts to the NAB due to the 2022 Amendments. The 2023 Ordinance has therefore brought about only a cosmetic change in the NAB Ordinance and it does not rectify the deficiency created by the omission of the presumptions by the First Amendment.

Although learned counsel for the petitioner filed his written submissions on the amendments brought about in the NAB Ordinance by the 2023 Act, the primary focus of the proceedings remained the 2022 Amendments and this judgment shall also only examine the vires of the 2022 Amendments though mention may be made of the 2023 Act and the 2023 Ordinance in passing.

7. It is also pertinent to mention here that as a result of the 2022 Amendments a large number of references filed by the NAB in the Accountability Courts were affected. The data, as provided by the Addl. Prosecutor General, NAB, is set out below:

i. 386 references were returned by the Accountability Courts to NAB in 2022 whereas 212 references were returned in 2023. Therefore, a total of 598 references have been returned so far. Of these 35 references pertain to elected holders of public office;

ii. The public money involved in the returned references is more than Rs. 150 billion;

iii. 327 of the 386 references were returned in 2022 due to the minimum pecuniary jurisdiction of the NAB being increased to Rs.500 million under the Second Amendment;

iv. Out of the 598 returned references only 54 have yet been transferred to other courts for further action of which 17 have been transferred to the Custom

Court and 4 to the Banking Court. As a result, 544 references are with the NAB in storage; and

v. 127 references remain with the Accountability Courts after the 2022 Amendments.

Comparative Table of the 2022 Amendments

8. Before we examine the contentions of the learned counsel for the parties, a comparative table detailing the pivotal changes brought about in the content of the NAB Ordinance by the 2022 Amendments is produced below:

NAB Ordinance Prior to the 2022 Amendments	2022 Amendments
4. Application: It extends to the whole of Pakistan and shall apply to all persons in Pakistan, all citizens of 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.	4. Application: (1) This Ordinance extends to the whole of Pakistan and shall apply to all persons, including those persons who are or have been in the service of Pakistan, except persons and transactions specified in subsection (2). (2) The provisions of this Ordinance shall not be applicable to the following persons or transactions, namely:- (a) all matters pertaining to Federal, Provincial or Local taxation, other levies or imposts, including refunds, or loss of exchequer pertaining to taxation, transactions or amounts duly covered by amnesty schemes of Government of Pakistan; (b) decisions of Federal or Provincial Cabinet, their Committees or Sub-Committees, Council of Common Interests (CCI), National Economic Council (NEC), National Finance Commission (NFC), Executive Committee of the National Economic Council (ECNEC), Central Development Working Party (CDWP), Provincial Development Working Party (PDWP), Departmental Development Working Party (DDWP), Board of Directors of State Owned Enterprises (SOEs), Board of Trustees/Directors of all Statutory Bodies, the State Bank of Pakistan and such other bodies except where the holder of the public office has received a monetary gain as a result of such decision; (c) any person or entity who, or transaction in relation

	thereto, which are not directly or indirectly connected with the holder of a public office except offences falling under clauses (ix), (x) and (xi) of subsection (a) of section 9; (d) procedural lapses in performance of any public or governmental work or function, project or scheme, unless there is evidence to prove that a holder of public office or any other person acting on his behalf has been conferred or has received any monetary or other material benefit from that particular public or governmental work or function, whether directly or indirectly on account of such procedural lapses, which the said recipient was otherwise not entitled to receive; (e) a decision taken, an advice, report or opinion rendered or given by a public office holder or any other person in the course of his duty, unless there is sufficient evidence to show that the holder of public office or any other person acting on his behalf received or gained any monetary or other material benefit, from that decision, advice, report or opinion, whether directly or indirectly, which the said recipient was otherwise not entitled to receive; (f) all matters, which have been decided by, or fall within the jurisdiction of a regulatory body established under a Federal or Provincial law; and (g) all matters where the funds, property or interest not involving or belonging to the appropriate government, except for the offences under clauses (ix), (x) or (xi) of subsection (a) of section 9.
5. Definitions: (n) "Offence" means the offences of corruption and corrupt practices and other offences as defined in this Ordinance and includes the offences specified in the Schedule to this Ordinance.	5. Definitions: (o) "Offence" means the offences of corruption and corrupt practices and other offences as defined in this Ordinance of value not less than five hundred million rupees and includes the offences specified in the Schedule to this Ordinance;

9. Corruption and Corrupt Practices: (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-- .. (v) if he or any of his dependents or benamidars owns, possesses, or has acquired right or title in any assets or holds irrevocable power of attorney in respect of any assets or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for or maintains a standard of living beyond that which is commensurate with his sources of income;	9. Corruption and Corrupt Practices: (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--- (v) if he or any of his dependents or other benamidars, through corrupt and dishonest means, owns, possesses or acquires rights or title in assets substantially disproportionate to his known sources of income which he cannot reasonably account for. Explanation I.- The valuation of immovable property shall be reckoned on the date of purchase either according to the actual price shown in the relevant title documents or the applicable rates prescribed by District Collector or the Federal Board of Revenue whichever is higher. No evidence contrary to the later shall be admissible. Explanation II.- For the purpose of calculation of movable assets, the sum total of credit entries of bank account shall not be treated as an asset. Bank balance of an account on the date of initiation of inquiry may be treated as a movable asset. A banking transaction shall not be treated as an asset unless there is evidence of creation of corresponding asset through that transaction.
14. Presumption against accused accepting illegal gratification: a. Where in any trial of an offence under clauses (i), (ii), (iii) and (iv) of subsection (a) of section 9 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	Section 14 omitted.

contrary is proved, that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing 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. b. Wherein any trial of an offence punishable under section 165A 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 clause (v) of subsection (a) of section 9 of 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 assets or pecuniary resources disproportionate to his known source 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 corrupt		

practices and his conviction therefor shall not be invalid by reason only that it is based solely on such a presumption. d. In any trial of an offence under clauses (vi) and (vii) of section 9 the burden of proof that he used his authority, or issued any directive, or authorized the issuance of any 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 the accused, 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: Provided that the prosecution shall first make out a reasonable case against the accused charged under clause (vi) or clause (vii) of subsection (a) of section 9.	
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 any or all of the following acts in accordance with the law of such State:- - .. (g) Notwithstanding anything contained in the Qanun-e-Shahadat Order 1984 (P.O. 10 of 1984) or any other law for the time being in force all evidence, documents or any other material transferred to Pakistan by a Foreign Government shall be receivable as evidence in legal proceedings under this Ordinance;	Section 21(g) omitted.
25. Voluntary return and plea bargain: (b) Where at any time after the authorization of investigation, before or after the commencement of the trial or during the pendency of an appeal,	25. Voluntary return and plea bargain: (b) Where at any time after the authorization of investigation, before or after the commencement of the trial or during the pendency of an appeal,

the accused offers to return to the NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence under this Ordinance, the Chairman, NAB, may, in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary, and if the accused agrees to return to the NAB the amount determined by the Chairman, NAB, the Chairman, NAB, shall refer the case for the approval of the Court, or as the case may be, the Appellate Court and for the release of the accused.	the accused offers to return to the NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence under this Ordinance, the Chairman, NAB, may, in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary, and if the accused agrees to return to the NAB the amount determined by the Chairman, NAB, the Chairman, NAB, shall refer the case for the approval of the Court, or as the case may be, the Appellate Court and for the release of the accused: Provided that statement of an accused entering into plea bargain or voluntary return shall not prejudice case of any other accused: Provided further that in case of failure of accused to make payment in accordance with the plea bargain agreement approved by the Court, the agreement of plea bargain shall become inoperative to the rights of the parties immediately.

9. It may be noticed from the provisions produced above that the 2022 Amendments have indeed brought about a significant change in the legal position under the NAB Ordinance. Whereas prior to the 2022 Amendments the NAB Ordinance applied to all persons in Pakistan after the 2022 Amendments the scope of NAB Ordinance has been significantly restricted with nearly all holders of public office exempted from its application unless there is proof of any monetary or material benefit being received by them or a person acting on their behalf. However, even if the NAB manages to overcome the exceptions listed in the amended Section 4 of the NAB Ordinance the jurisdictional hurdle of an accused having caused a minimum loss of Rs.500 million or more would still need to be crossed. If that is not done the accused will be ousted from the jurisdiction of the NAB. Therefore, it is only when the requirements of Section 4 and Section 5(o) of the NAB Ordinance (as altered by the 2022 Amendments) are satisfied can the accused person be inquired/ investigated into by the NAB and be tried in the Accountability Court.

10. However, by the addition of the new conditions in and explanations to Section 9(a)(v) coupled with the omission of Section 21(g) that permitted the admission of foreign evidentiary material in legal proceedings under the mutual legal assistance regime set up by the United Nations Convention against

Corruption, the burden cast on the prosecution to establish that a holder of public office has accumulated unaccounted domestic (or foreign) assets beyond his means has been made formidable. Along with that the presumption noted in Section 14(c) has also been deleted. The result of these amendments relating to proof of the offence of accumulated assets beyond means will be that in the future few persons will be prosecuted for such an offence by the NAB with still lesser convictions under Section 9(a)(v). The above result is in addition to the effect that the 2022 Amendments envisage the return of pending inquiries, investigations and references but do not provide any mechanism for then transferring them to the relevant agency, authority, department, court, tribunal or forum. That procedure was provided for the first time by the 2023 Act. However, the 2023 Act is applicable to only those inquiries, investigations and references of which either the NAB or the Accountability Court is seized. As noted above, there are hundreds of references that have been returned by the Accountability Courts to the NAB pursuant to the 2022 Amendments and prior to the 2023 Act. These references returned in the interregnum between the two amendments have gone into limbo, a fact affirmed by the record supplied by the Additional Prosecutor General, NAB.

11. At this stage it would also be appropriate to note that the offence of corruption and corrupt practice is an umbrella term used to describe different categories of offences noted in Section 9(a) of the NAB Ordinance. The 2022 Amendments have changed three such categories, namely:

i. Assets beyond means [refer Section 9(a)(v) of the NAB Ordinance];

ii. Misuse of authority [refer Section 9(a)(vi) of the NAB Ordinance]; and

iii. Cheating [refer Section 9 (a) (ix) of the NAB Ordinance].

Additionally, Section 9(a)(vii) which criminalised the issuance of any directive, policy, SRO or any other order which granted undue concession or benefit to the holder of public office, his relative, associate, benamidar or any other person has been omitted by the First Amendment. This judgment, however, shall only deal with Section 9(a)(v) as that is the category of the offence of corruption and corrupt practices which prima facie appears to have the widest implications of an adverse nature on the Fundamental Rights of the people.

Arguments of Counsel

12. Both the learned counsel for the petitioner and the learned counsel for the respondent Federation made extensive submissions on the maintainability and merits of the petition. Their main contentions were:

A. Submissions by the Petitioner

i. The titled petition is maintainable under Article 184(3) of the Constitution as the 2022 Amendments directly and adversely affect the Fundamental Rights of the people of Pakistan i.e., Articles 9, 14, 19A, 24 and 25 and violate a salient feature of the Constitution, namely, Parliamentary form of Government blended with Islamic provisions;

ii. The provisions of the 2022 Amendments have effectively decriminalised the offence of 'corruption and corrupt practices' thereby allowing the holders of

public office to retain their ill-gotten wealth whilst being exempted from prosecution under the NAB Ordinance. The specific sections of the 2022 Amendments that decriminalise the offence of 'corruption and corrupt practices' and exclude holders of public office from the province of the NAB will be discussed later in the judgment; and

iii. The Court is empowered under Article 184(3) of the Constitution to either strike down the 2022 Amendments or to direct the Federation to bring the 2022 Amendments in line with the requirements of the Constitution and Fundamental Rights.

B. Submissions by the Respondent Federation

i. The instant Constitution Petition is not maintainable because it does not satisfy the twin criteria laid down in Article 184(3) of the Constitution, the petitioner lacks bona fide and locus standi to challenge the 2022 Amendments and the petition at the present stage is premature and based on speculations and conjectures;

ii. No cogent reason has been given by the petitioner for not challenging the 2022 Amendments before the High Courts;

iii. The 2022 Amendments have been enacted after taking into consideration the criticisms levelled against the NAB Ordinance, including by the Superior Judiciary in its judgments/ orders; and

iv. An incorrect perception is being created that the 2022 Amendments have decriminalised the offence of corruption and corrupt practices because there exist other accountability foras in the country which can investigate, prosecute and try accused persons for the offences which no longer fall within the ambit of the NAB.

13. Apart from the above submissions, information was also sought from the Additional Prosecutor General, NAB (produced above in para 7) regarding the particulars of the references that have been returned to the NAB pursuant to the 2022 Amendments and their fate since. Written submissions were also provided by the learned Attorney General for Pakistan who predominantly attacked the maintainability of the present petition and endorsed the submissions of the learned counsel for the respondent Federation in toto.

14. Having heard the learned counsel for all the parties and having examined the available record the Court reserved its judgment on 05.09.2023. Our decision on the present petition and the reasons for the same are set out hereinbelow.

Maintainability

15. The learned counsel for the respondent Federation strongly objected to the maintainability of the titled petition for failing to satisfy the jurisdictional requirements of Article 184(3) of the Constitution. It was his case that the petitioner had failed to identify the precise Fundamental Right that had been violated by the 2022 Amendments. Additionally, he submitted that the petitioner lacked locus standi and bona fides to challenge the 2022 Amendments because firstly, when he was Prime Minister his government introduced many of the amendments that have

been consolidated by the 2022 Amendments and secondly, he had committed a dereliction of duty by refusing to sit in the National Assembly and raise concerns regarding the 2022 Amendments therein. Learned counsel also stated that the dispute raised by the petition in respect of the 2022 Amendments is hypothetical as there are no

facts before the Court as a result of which the Court will be considering and deciding the question of vires of the 2022 Amendments in the abstract.

16. In response, learned counsel for the petitioner consistently maintained his stance that the cumulative effect of the 2022 Amendments is that the offence of corruption and corrupt practices committed by the holders of public office has been decriminalised thereby violating the following Fundamental Rights of the people of Pakistan:

> "9. Security of person. No person shall be deprived of life or liberty save in accordance with law.
>
> 14. Inviolability of dignity of man, etc. (1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.
>
> 24. Protection of property rights. (1) No person shall be compulsorily deprived of his property save in accordance with law.
>
> 25. Equality of citizens. (1) All citizens are equal before law and are entitled to equal protection of law."

Learned counsel for the petitioner further submitted that since the 2022 Amendments directly and adversely affect the Fundamental Rights of the public not only are the conditions of Article 184(3) satisfied but also the objections of learned counsel for the respondent Federation regarding bona fides and locus standi of the petitioner lose force.

17. As the learned counsel for the respondent Federation

has primarily attacked the maintainability of the instant Constitution Petition, we shall examine that question first. The Court has been conferred original jurisdiction by Article 184(3) of the Constitution which reads:

> "184. Original jurisdiction of Supreme Court.
>
> ...
>
> (3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article."

By virtue of the afore-noted provision the Court can pass appropriate orders in cases where the enforcement of a Fundamental Right(s) affecting the public at large is involved. It is by now well-established in our jurisprudence that acts of corruption and corrupt practices do infringe the Fundamental Rights of the public

and thus meet the test of Article 184(3). Reliance in this regard is placed on the decisions of the Court in Suo Motu Case No.19 of 2016 (2017 SCMR 683); Corruption in Hajj Arrangements in 2010 (PLD 2011 SC 963); Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. (PLD 2010 SC 1109). For reference relevant passages from the cases of Corruption in Hajj Arrangements (supra) and Bank of Punjab are produced below:

"Corruption in Hajj Arrangements

28. ...However, when the cases of massive corruption, not only one, but so many came for hearing, therefore, this Court in the exercise of its constitutional jurisdiction had enforced fundamental rights of the citizens under Articles 4, 9, 14 and 25 of the Constitution... Undoubtedly, whenever the Court will notice that there is corruption or corrupt practices, it would be very difficult to compromise or digest it because the public money of the country cannot be allowed to be looted by any one whatsoever status he may have.

Bank of Punjab

25. A perusal of the above quoted provision [Art. 184(3)] would demonstrate that this Court was possessed of powers to make any order of the nature mentioned in Article-199 of the Constitution, if, in the opinion of this Court, a question of public importance relating to the enforcement of any of the Fundamental Rights was involved in the matter[.] As has been mentioned in the preceding parts of this order, what was at stake was not only a colossal amount of money/property belonging to at least one million depositors i.e. a large section of the public but what was reportedly at stake was also the very existence of the Bank of Punjab which could have sunk on account of the mega fraud in question and with which would have drowned not only the said one million depositors but even others dealing with the said Bank. And what had been sought from this Court was the protection and defence of the said public property. It was thus not only the right of this Court but in fact its onerous obligation to intervene to defend the said assault on the said fundamental right to life and to property of the said public."

(emphasis supplied)

18. Although learned counsel for the respondent Federation had no cavil with the proposition that the Court can undertake proceedings in the original jurisdiction to check corruption and corrupt practices committed by the holders of public office, he stressed that unlike the cases previously decided by the Court the instant matter pinpoints no specific act of corruption and/or corrupt practice. In fact, the entire controversy raised by the petitioner is conjectural and academic. However, we are not persuaded with this argument of learned counsel because as noted above in paras 7 and 9-10, the 2022 Amendments have limited the NAB's jurisdiction thus excluding hundreds of pending references from trial before any forum and have also made the proof of the offence of corruption and corrupt practices significantly harder for references that satisfy the jurisdictional requirements of Section 4 and Section 5(o) of the NAB Ordinance. We think it would be a legal absurdity to hold that whilst the Court can take cognizance of individual acts of corruption and

corrupt practices under Article 184(3) it cannot do so when amendments have been introduced in the accountability law i.e., the NAB Ordinance which exclude the jurisdiction of the NAB to investigate and prosecute holders of public office in two significant respects thereby ex-facie violating Articles 9, 14, 23 and 24 of the Constitution by exonerating the holders of public office from their alleged acts of corruption and corrupt practices by failing to provide a forum for their trial. The 2022 Amendments have therefore rendered the NAB toothless in accomplishing its objective of 'eradicat[ing] corruption and corrupt practices and hold[ing] accountable all those persons accused of such practices' and have left public property belonging to the people of Pakistan vulnerable to waste and malfeasance by the holders of public office. Such interference in the NAB's jurisdiction and powers most certainly affects the Fundamental Rights of the people at large as noted by the Court in Progress Report of NAB in OGRA Case (2015 SCMR 1813):

> "3. ...We may emphasize that NAB has been created as a principal watchdog against corruption in Pakistan. Corruption is itself rightly perceived as eating into the very foundation and vitals of society. A corruption watchdog which, therefore, does not function efficiently adversely affects inter alia, the fundamental rights in Articles 14, 18, 19A, 23 and 24 of the Constitution."
>
> (emphasis supplied)

Although the above observation was made by the Court in the context of the NAB's poor handling of the Oil and Gas Regulatory Authority Scam, we see no reason why the same rationale cannot apply to the present matter where the legislature through the 2022 Amendments has left the NAB ineffective in pursuing cases of corruption and corrupt practices exposing the public property of the people to misappropriation. We accordingly hold that the present Constitution Petition fulfils the requirements of Article 184(3) of the Constitution and so is maintainable.

19. Be that as it may, the learned counsel for the respondent Federation raised other preliminary objections to the petition as well. One of them being that the petitioner does not possess either locus standi or bona fides to challenge the 2022 Amendments because he never questioned the 2022 Amendments in Parliament. However, it is settled law that when the Court exercises jurisdiction under Article 184(3) of the Constitution it is not concerned with the antecedents or standing of the person who has filed the petition because that person is merely acting as an informant. Instead, the Court favours a substantive approach focusing more on the content of the petition and whether the same crosses the threshold set out in Article 184(3). In this respect, we are fortified by the dicta of the Court in Muhammad Yasin v. Federation of Pakistan (PLD 2012 SC 132):

> "24. Before concluding our discussion on the issue of maintainability of this petition we need to address the respondent's submission that the petition has been filed mala fide. We have found no lawful basis for this submission... we have already held in the case titled Moulvi Iqbal Haider v. Capital Development Authority and others (PLD 2006 SC 394 at 413) that the

contents of a petition under Article 184 (3) ibid will override concerns arising on account of the conduct or antecedents of a petitioner..."

(emphasis supplied)

Likewise, the Court in Muhammad Ashraf Tiwana v. Pakistan (2013 SCMR 1159) observed that:

"16. ...The questions which the contents of this petition have brought to light are, without doubt, matters of public importance and, as discussed above relate directly to the enforcement of fundamental rights. Therefore, concerns about the conduct or antecedents of the petitioner, if any, would stand overridden by the contents of the petition. We may also emphasize that exercise of jurisdiction under Article 184(3) ibid is not dependent on the existence of a petitioner..."

(emphasis supplied)

20. We have already noted above that the instant petition satisfies the conditions of Article 184(3), therefore, any apprehensions about the locus standi and bona fides of the petitioner stand overridden. Insofar as the prior amendments passed during the petitioner's term as Prime Minister are concerned, the same were promulgated through different Ordinances all of which have lapsed and are no longer in the field. On the other hand, the 2022 Amendments have come into being through Acts of Parliament and will remain on the statute book unless these are repealed by Parliament in the future. Further, the amendments brought about in the petitioner's tenure did not contain analogous retrospectivity clauses, as exist in the 2022 Amendments, as a result of which the impact of the Ordinances on pending references and past and closed transactions was limited.

21. The learned counsel for the respondent Federation also submitted that the petitioner could have voiced his grievances against the 2022 Amendments in the National Assembly as a member of the Opposition. Indeed, in the Court's recent judgment reported as Pakistan Peoples Party Parliamentarians v. Federation of Pakistan (PLD 2022 SC 574) the necessity of a robust Opposition for a healthy democracy was emphasised. However, the choice to remain in or walk out of Parliament is a political decision made consciously by parliamentarians and their political parties. The decision being political in nature the Court cannot and does not sit in judgment over such matters. In any event, we have already held above that locus standi is not an impediment when the Court is exercising original jurisdiction. Therefore, to dismiss the instant petition solely on the ground that the petitioner did not object to the 2022 Amendments in the National Assembly would result in the Court deciding the question of maintainability on the basis of an irrelevant consideration. More so when we have already held above that the 2022 Amendments do raise questions of public importance having a bearing on the Fundamental Rights of the people of Pakistan.

22. Learned counsel for the respondent Federation lastly took exception with the Court exercising its original jurisdiction in this matter instead of first letting the High Courts decide the vires of the 2022 Amendments. He relied on Manzoor Elahi v. Federation of Pakistan (PLD 1975 SC 66) and Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416) to reiterate that the Court's original jurisdiction is to be exercised sparingly and in deference to the High Courts jurisdiction under Article 199 of the Constitution. We are of the view that the Court's judgment in Suo Motu

No.1 of 2023 dated 01.03.2023 has already dealt with this point. For reference, the relevant passage is produced below:

> "45. ...Secondly, it appears that the petition under Article 184(3) [Manzoor Elahi v. Federation of Pakistan] was the first of its kind before the Court under the present Constitution... The jurisprudence as regards Article 184(3) was thus quite literally in its infancy. In the half-century that has since passed, things have of course changed enormously. The jurisprudence has matured, developed and deepened and the Court has developed an altogether more muscular approach in its understanding and application of Article 184(3). There has been a sea change in how the Court views this constitutional power. Thus, e.g., the observation of the learned Chief Justice, that "[t]his is an extraordinary power which should be used with circumspection" (pg. 79) is, with respect, hardly reflective of present times. Time does not stand still and nor does the jurisprudence of the Court. In the common law tradition, the law is connected to the past but not shackled by it."
>
> (emphasis supplied)

We find ourselves in agreement with the dicta cited above and endorse it. Indeed, on an examination of the jurisprudence of the Court that has developed under Article 184(3) of the Constitution it becomes clear that since the decisions in Manzoor Elahi (supra) and Benazir Bhutto (supra) there have been numerous instances where the Court has considered and decided the vires of legislation in its original jurisdiction. Some of these cases are Mehram Ali v. Federation of Pakistan (PLD 1998 SC 1445) which decided the vires of the Anti-Terrorism Act, 1997; Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504) which decided the vires of the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998; Asfandyar Wali (supra) which decided the vires of the NAB Ordinance; Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265) which decided the vires of the National Reconciliation Ordinance, 2007; Baz Muhammad Kakar v. Federation of Pakistan (PLD 2012 SC 923) which decided the vires of the Contempt of Court Act, 2012; Zulfiqar Ahmed Bhutta v. Federation of Pakistan (PLD 2018 SC 370) which decided the vires of Sections 203 and 232 of the Elections Act, 2017.

23. In light of the above discussion, we find there to be no merit in the objections raised by the learned counsel for the respondent Federation in respect of the maintainability of the present Constitution Petition. As a result, his objections are rejected and the titled petition is declared to be maintainable under Article 184(3) of the Constitution.

Impugned Provisions of the 2022 Amendments

24. In his Constitution Petition the petitioner has sought the nullification of virtually the entire 2022 Amendments. However, on a careful examination of these we are not convinced that the Fundamental Rights of the people of Pakistan are violated by each and every section of the 2022 Amendments. Our considered view at the outset about the provisions of the 2022 Amendments is that prima facie judicial scrutiny of only Sections 2, 8, 10 and 14 of the First Amendment and

Sections 2, 3 and 14 of the Second Amendment is required. These provisions have brought about the following modifications in the NAB Ordinance:

i. Section 3 of the Second Amendment has changed the definition of 'offence' in Section 5(o) of the NAB Ordinance by inserting a minimum pecuniary jurisdiction of Rs. 500 million below which value the NAB cannot take cognizance of the offence of corruption and corrupt practices;

ii. Section 2 of the First Amendment by inserting subsections (a)-(f) into Section 4 of the NAB Ordinance and Section 2 of the Second Amendment by adding subsection (g) in Section 4 of the NAB Ordinance has excluded certain holders of public office from application of the NAB Ordinance and thereby limited its effect;

iii. Section 8 of the First Amendment has inserted new ingredients in the offence under Section 9 (a) (v) of the NAB Ordinance and added explanations thereto. Section 9(a)(v) criminalizes the act of holding assets beyond means;

iv. Section 10 of the First Amendment has deleted Section 14 of the NAB Ordinance which provides evidentiary presumptions that may be drawn against the accused;

v. Section 14 of the First Amendment has deleted Section 21(g) of the NAB Ordinance which permitted foreign evidence to be admissible in legal proceedings under the mutual legal assistance regime; and

vi. Section 14 of the Second Amendment has added a second proviso to Section 25(b) of the NAB Ordinance whereby an accused who enters into a plea bargain duly approved by the Accountability Court under Section 25(b) can renege from the same if he has not paid the full amount of the bargain settlement as approved by the Accountability Court.

The remaining provisions of the 2022 Amendments may be considered later in an appropriate case.

Section 3 of the Second Amendment

25. As already noted above in para 6, Section 3 of the Second Amendment has amended Section 5(o) of the NAB Ordinance to set the minimum pecuniary jurisdiction of the NAB at Rs.500 million for inquiring into and investigating cases involving the commission of the offence of corruption and corrupt practices. As a result, offences that cause loss valued at less than Rs.500 million no longer come within the ambit of the NAB. The apparent rationale for enhancing the pecuniary jurisdiction is noted in the Statement of Objects and Reasons attached to the Second Amendment. It reads:

"...Through the insertion of proposed amendments, the pecuniary jurisdiction of the NAB has been fixed to take only action against mega scandals..."

(emphasis supplied)

The necessity to streamline the jurisdiction of the NAB and focus its efforts on mega scandals i.e., those involving an amount of Rs.500 million or more was

explained by learned counsel for the respondent Federation by reference to the jurisprudence of the Superior Courts. Reliance was placed on State v. Hanif Hyder (2016 SCMR 2031) wherein the Court observed:

> "2. During the hearing of these proceedings, we have noticed that the NAB in exercise of powers under section 9 of the NAB Ordinance has started taking cognizance of the petty matters and therefore, notice was issued to the D.G. NAB to submit report in regard to the enquiries and or investigations, which the NAB has undertaken in respect of the amounts involv[ing] less than 100 Million and References, if any, filed which involved amount less than 100 million. A list has been provided. It is evident from this list that prima facie the enquiries and investigations undertaken by the NAB are not of mega scandals and apparently petty matters have been enquired into on the complaints. This is not the wisdom behind legislation of NAB Ordinance. The NAB Ordinance was primarily legislated to counter mega scandals and book the persons who are involved in mega scandals of corruption and corrupt practices."
>
> (emphasis supplied)

A decision by the Division Bench of the Sindh High Court reported as Amjad Hussain v. National Accountability Bureau (2017 YLR 1) was also referred:

> "11. Learned PGA NAB on instructions from the Chairman NAB made written as well as oral submissions in order to assist the Court. He submitted that NAB was aware of this issue of pecuniary jurisdiction and in this respect had passed an SOP in respect of the monetary value of cases which NAB would pursue which is set out below for ease of reference.
>
> "Priority for Cognizance of Cases:
>
> ...
>
> iii. Cases of former/sitting legislators of National Assembly, Senate and Provincial Assemblies (including ministers/advisers etc.) and elected representatives of local bodies, where amount involved is more than Rs. 100 million.
>
> iv. Cases involving interest of members of public at large where the numbers of defrauded person are more than 50 persons and amount involved is not less than Rs. 100 million.
>
> v. Cases against public servants, whether serving or retired, Bankers, Businessmen and Contractors where amount involved is more than Rs. 100 million.
>
> ...
>
> 40. ...taking into account the above discussion on the pecuniary jurisdiction of NAB including NAB making the best use of its human resources, equipment, office space etc., and budget limitations we hereby endorse by way of judicial order the NAB's SOP for dealing with pecuniary jurisdiction which is set out at para 11 of this order... as we consider the figure of Rs.

100 M to be significantly large to justify the intervention of the NAB being the premier anti corruption body in the Country..."

(emphasis supplied)

The above dictum of the Sindh High Court was endorsed by the Islamabad High Court in Iftikhar Ali Haideri v. National Accountability Bureau (2019 YLR 255).

26. It becomes clear from the pronouncements of the Superior Courts quoted above that the principal focus of the NAB is to mainly prosecute mega scandals. But whilst the judgments of the Superior Courts indicate that the minimum pecuniary threshold of NAB should be Rs. 100 million (except in limited circumstances where offences less than Rs. 100 million cannot be prosecuted by any other accountability agency), Section 3 of the Second Amendment has increased this minimum threshold to Rs.500 million. No cogent argument was put forward by learned counsel for the respondent Federation as to why Parliament has fixed a higher amount of Rs.500 million for the NAB to entertain complaints and file corresponding references in the Accountability Courts when the Superior Courts have termed acts of corruption and corrupt practices causing loss to the tune of Rs. 100 million as mega scandals.

27. It is accepted that Parliament is empowered to legislate freely within its legislative competence laid down by the Constitution. However, it is also a settled principle of our constitutional dispensation that the three organs of the State i.e., the Legislature, the Executive and the Judiciary perform distinct functions and that one organ of the State cannot encroach into the jurisdiction of another organ. Reliance is placed on the case of Mobashir Hassan (supra):

"34. ... It is also to be borne in mind that Constitution envisages the trichotomy of powers amongst three organs of the State, namely the legislature, executive and the judiciary. The legislature is assigned the task of law making, the executive to execute such law and the judiciary to interpret the laws. None of the organs of the State can encroach upon the field of the others..."

(emphasis supplied)

Nonetheless, by enacting Section 3 of the Second Amendment we are afraid that Parliament has in fact assumed the powers of the Judiciary because by excluding from the ambit of the NAB Ordinance the holders of public office who have allegedly committed the offence of corruption and corrupt practices involving an amount of less than Rs.500 million Parliament has effectively absolved them from any liability for their acts. This is a function which under the Constitution only the Judiciary can perform (with the exception of the President who has been conferred the power to grant a pardon under Article 45 of the Constitution). A similar view was also taken by the Court in Mobashir Hassan (supra) when it was examining the vires of Section 7 of the National Reconciliation Ordinance, 2007 under which pending investigations and proceedings initiated by the NAB against holders of public office were withdrawn and terminated with immediate effect:

"119. So far as withdrawal from the cases inside or outside the country, as per Section 33[A] of the NAO, 1999, inserted through Section 7 of the NRO,

2007, is concerned, it would mean that the 'holders of public office' have been absolved from the charge of corruption and corrupt practices, therefore, by adopting such procedure, the legislative authority had transgressed its jurisdiction, because such powers are only available to the judiciary and the Constitution provides guarantee to secure the independence of the judiciary..."

(emphasis supplied)

28. Learned counsel for the respondent Federation attempted to justify this encroachment into the jurisdiction of the Judiciary by submitting that merely because the minimum pecuniary threshold of the NAB has been increased does not mean that holders of public office stand absolved. That other accountability fora exist in the country where the trials of the accused holders of public office who have been removed from the jurisdiction of the NAB can be held. The Court having regard to the fact, as noted above in para 2, that holders of public office under the NAB Ordinance fall into two categories i.e., elected holders of public office and persons in the service of Pakistan, posed the following query to learned counsel for the respondent Federation 'if the Accountability Court were to send/transfer a Reference against a parliamentarian [elected holders of public office] for lack of its jurisdiction, then which would be the competent transferee court to adjudicate the Reference and under which law?' In his written response, the learned counsel referred to the provisions of Prevention of Corruption Act, 1947 ("1947 Act"); Pakistan Penal Code, 1860 ("P.P.C."); Income Tax Ordinance, 2001; and Anti-Money Laundering Act, 2010. For present purposes the two relevant laws are the 1947 Act and the P.P.C.. However, on a careful examination of these legislations it becomes clear that the two are applicable only to public servants. Public servant is defined in the P.P.C. in Section 21 as follows:

"21. "Public servant".---The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:-

Second.- Every Commissioned Officer in the Military, Naval or Air Forces of Pakistan while serving under the Federal Government or any Provincial Government;

Third.- Every Judge;

Fourth.- Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to

preserve order in the Court; and every person specially authorized by a Court of Justice to perform any of such duties;

Fifth.- Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant;

Sixth.- Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;

Seventh.- Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Eighth.- Every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Ninth.- Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government, and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty;

Tenth.- Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district;

Eleventh.- Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election."

(emphasis supplied)

Section 2 of the 1947 Act also relies on Section 21 of the P.P.C. to define public servant. Therefore, in both laws the term 'public servant' has an identical meaning.

29. One example of public servants is given in Article 260 of the Constitution:

"260. Definitions. (1) In the Constitution, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them, that is to say,-

...

"service of Pakistan" means any service, post or office in connection with the affairs of the Federation or of a Province, and includes an All-Pakistan Service, service in the Armed Forces and any other service declared to be a

service of Pakistan by or under Act of [Majlis-e-Shoora (Parliament)] or of a Provincial Assembly, but does not include service as... member of a House or a Provincial Assembly;"

(emphasis supplied)

It may be noticed that under the Constitution persons in the service of Pakistan are those who are holding posts in connection with the affairs of the Federation or Province. As a result, such persons are either dealing with the property of the Federal/ Provincial Government or with the pecuniary interests of the Federal/ Provincial Government. They, therefore, come within the definition of public servant set out in the P.P.C. and adopted by the 1947 Act and so can be prosecuted under these laws for the offence of corruption and corrupt practices. However, elected holders of public office do not qualify as public servants under the guise of being in the service of Pakistan because Article 260 of the Constitution specifically excludes them from such service. Further, although no authoritative pronouncement has been delivered in this respect by the Superior Courts of Pakistan, the Indian Supreme Court in R.S. Nayak v. A.R. Antulay (AIR 1984 SC 684) has categorically held that members of the Legislative Assembly (equivalent to our elected holders of public office) are not public servants within the meaning of Section 21 of the Indian Penal Code, 1860 (which is similar to Section 21 of the P.P.C.).[1] Further the Bangladesh Supreme Court in Zakir Hossain Sarkar v. State [70 DLR (2018) 203] has noted that a Member of Parliament (equivalent to our elected holders of public office) is not a public servant because he is neither appointed by the Government nor paid by it and he does not discharge his constitutional duties of law-making in accordance with the rules and regulations made by the Executive (para 23 of that judgment). The result is that contrary to what learned counsel for the respondent Federation has submitted elected holders of public office are not triable either under the 1947 Act or the P.P.C. for the offence of corruption and corrupt practices.

30. This legal situation also explains why the Holders of Representative Offices (Prevention of Misconduct) Act, 1976 ("1976 Act") was enacted and Holders of Representative Offices (Punishment for Misconduct) Order, 1977 ("1977 Order") was promulgated. Both these laws applied only to holders of representative office i.e., elected holders of public office and subjected them to prosecution for offences similar to those prescribed in the NAB Ordinance. If the submission of learned counsel for the respondent Federation is correct that elected holders of public office can be tried under the 1947 Act and the P.P.C. then there would have been no need to pass the 1976 Act or the 1977 Order since both the 1947 Act and the P.P.C. precede these laws. Ultimately, the 1976 Act was repealed by the Parliament and Provincial Assemblies (Disqualification for Membership) (Amendment) Ordinance, 1990 whereas the 1977 Order was repealed by the Ehtesab Act, 1997. As noted above in para 2, the Ehtesab Act, 1997 was the predecessor of the NAB Ordinance and the latter repealed the former. This chain of legislative events shows that in 1976 Parliament became aware of the vacuum in the law whereby persons in the service of Pakistan could be held to account for their corruption and corrupt practices but elected holders of public office could not. Therefore, Parliament

passed the 1976 Act. The said Act was then succeeded by multiple legislations which had the same object i.e., accountability of elected holders of public office with the NAB Ordinance being the latest and the most comprehensive effort so far to accomplish this objective.

31. By amending Section 5(o) of the NAB Ordinance to raise the minimum pecuniary threshold of the NAB to Rs.500 million, Section 3 of the Second Amendment has undone the legislative efforts beginning in 1976 to bring elected holders of public office within the ambit of accountability laws because by virtue of Section 3 elected holders of public office have been granted both retrospective and prospective exemption from accountability laws. Once excluded from the jurisdiction of the NAB no other accountability fora can take cognizance of their alleged acts of corruption and corrupt practices as noted above. Such blanket immunity offends Articles 9, 14, 23 and 24 of the Constitution because it permits and encourages the squandering of public assets and wealth by elected holders of public office as there is no forum for their accountability. This in turn affects the economic well-being of the State and ultimately the quality and dignity of the peoples lives because as more resources are diverted towards illegal activities less resources remain for the provision of essential services to the people such as health facilities, education institutes and basic infrastructure etc. The immunity also negates Article 62(1)(f) of the Constitution which mandates that only 'sagacious, righteous, non -profligate, honest and ameen' persons enter Parliament. It also offends the equal treatment command of Article 25 of the Constitution as differential treatment is being meted out to persons in the service of Pakistan than to elected holders of public office. This is because persons in the service of Pakistan can still be prosecuted for the offence of corruption and corrupt practices under the 1947 Act as they fall within the definition of public servants (refer para 29 above). The 1947 Act shares some of the essential features of the NAB Ordinance, namely, it provides for the prosecution of public servants who have accumulated assets beyond means [refer Section 5(1)(e) of the 1947 Act] and it permits the drawing of an evidentiary presumption against public servants who cannot account for their disproportionate pecuniary resources or property [refer Section 5(3) of the 1947 Act]. Consequently, if Section 3 of the Second Amendment is allowed to remain on the statute book there will be an anomalous situation in that elected holders of public office will be exempted from accountability under the amended and much relaxed requirements of the NAB Ordinance even though

they 'while acting as trustees and the chosen representatives of the people, take decisions which are often of grave consequence for the protection of the economic, political and over-all national interests of the people of Pakistan. In other words, theirs is a fiduciary duty of the highest order' [ref: Mehmood Akhtar Naqvi v. Federation of Pakistan (PLD 2012 SC 1089) at para 6 of Justice Jawwad S. Khawaja's concurring note] whilst the persons in the service of Pakistan will

have to undergo the rigours of accountability laws without exception. Such a situation cannot be countenanced by either the Constitution or the law.

32. In this regard, we must also note that the learned counsel for the respondent Federation filed his concise statement on 12.09.2023 wherein he has attached the

decision/ guideline of the Chairman NAB dated 08.08.2023 in respect of returned references. The decision/ guideline reads:

> "Therefore, a policy/decision has been made by the competent authority that all References which have been returned to NAB shall now be placed before the Accountability Courts by filing an application pleading this amendment as per case law laid down in the judgment Adam Amin Chaudhry v. NAB in W.P. No.3787/2022 and requesting that the Reference be revived and re-examined, the viewpoint of the NAB be solicited and thereafter it be forwarded in terms of section 4(4)(d) of the National Accountability (Amendment) Act, 2023 to the appropriate forum."
>
> (emphasis supplied)

We have already noted above in para 6 that the 2023 Act has provided a mechanism for transferring pending inquiries, investigations and references to the relevant agency, authority, department, court, tribunal or forum if the NAB or Accountability Courts are seized of these matters. But returned references can by no stretch of the imagination be considered as pending before the Accountability Courts. Therefore, the above decision/ guideline issued by Chairman NAB a year after the

First Amendment to seek the revival of the 544 references returned to the NAB that are lying in storage to have them forwarded to the appropriate forum cannot vest jurisdiction in the Accountability Courts to reopen cases of which it is not seized. In any event, the decision/ guideline still does not resolve the pivotal issue i.e., that there is neither an accountability law other than the NAB Ordinance and

an investigating authority other than the NAB nor any accountability forum other than the Accountability Court where the acts of corruption and corrupt practices committed by elected holders of public office can be investigated and prosecuted. The decision/ guideline may therefore prove effective only in cases of corruption and corrupt practices where the accused are persons in the service of Pakistan. Consequently, the decision/ guideline issued by Chairman NAB has no bearing on the vires of Section 3 of the Second Amendment which is unconstitutional on account of absolving persons accused of the offence of corruption and corrupt practices without a judicial verdict which amounts to legislative judgment [refer

Province of Punjab v. National Industrial Cooperative Credit Corporation (2000 SCMR 567) at para 8].

Declaration on Section 3 of the Second Amendment

A. Elected Holders of Public Office

i. On account of our analysis noted above in paras 27- 32, Section 3 of the Second Amendment is declared to be ultra vires the Constitution and of no legal effect from the date of commencement of the Second Amendment.

B. Persons in the Service of Pakistan

ii. The cases of persons in the service of Pakistan can be categorised under two headings, namely, offences which are common to both the 1947 Act and the NAB Ordinance and offences which are unique to the NAB Ordinance.

iii. The offences which are common to the 1947 Act and the NAB Ordinance are those listed in Section 9(a)(i)-(v) of the NAB Ordinance whereas the offences in 9 (a) (vi)- (xii) are distinct to the NAB Ordinance.

iv. Since persons in the service of Pakistan can be tried for offences contained in Section 9(a)(i)-(v) of the NAB Ordinance under the 1947 Act the bar of Rs.500 million shall continue for such offences. To this extent Section 3 of the Second Amendment is declared to be intra vires the Constitution.

v. However, on account of the fact that persons in the service of Pakistan cannot be tried for the offences noted in Section 9(a)(vi)-(xii) under the 1947 Act or any other accountability law the bar of Rs.500 million will not apply to them for such offences. Section 3 of the Second Amendment is therefore declared to be void and without legal effect for these offences for discharging the accused without trial which is tantamount to legislative judgment and is held to be so from the date of commencement of the Second Amendment.

Section 2 of the 2022 Amendments

33. Section 2 of the 2022 Amendments has altered Section 4 of the NAB Ordinance. For reference Section 4, as amended by the 2022 Amendments, is produced below:

"4. Application: (1) This Ordinance extends to the whole of Pakistan and shall apply to all persons, including those persons who are or have been in the service of Pakistan, except persons and transactions specified in subsection (2).

(2) The provisions of this Ordinance shall not be applicable to the following persons or transactions, namely:-

(a) all matters pertaining to Federal, Provincial or Local taxation, other levies or imposts, including refunds, or loss of exchequer pertaining to taxation,

transactions or amounts duly covered by amnesty schemes of Government of Pakistan;

(b) decisions of Federal or Provincial Cabinet, their Committees or Sub-Committees, Council of Common Interests (CCI), National Economic Council (NEC), National Finance Commission (NFC), Executive Committee of the National Economic Council (ECNEC), Central Development Working Party (CDWP), Provincial Development Working Party (PDWP), Departmental Development Working Party (DDWP), Board of Directors of State Owned Enterprises (SOEs), Board of Trustees/Directors of all Statutory Bodies, the State Bank of Pakistan and such other bodies except where the holder of the public office has received a monetary gain as a result of such decision;

(c) any person or entity who, or transaction in relation thereto, which are not directly or indirectly connected with the holder of a public office except offences falling under clauses (ix), (x) and (xi) of subsection (a) of section 9;

(d) procedural lapses in performance of any public or governmental work or function, project or scheme, unless there is evidence to prove that a holder of public office or any other person acting on his behalf has been conferred or has received any monetary or other material benefit from that particular public or governmental work or function, whether directly or indirectly on account of such procedural lapses, which the said recipient was otherwise not entitled to receive;

(e) a decision taken, an advice, report or opinion rendered or given by a public office holder or any other person in the course of his duty, unless there is sufficient evidence to show that the holder of public office or any other person acting on his behalf received or gained any monetary or other material benefit, from that decision, advice, report or opinion, whether directly or indirectly, which the said recipient was otherwise not entitled to receive;

(f) all matters, which have been decided by, or fall within the jurisdiction of a regulatory body established under a Federal or Provincial law; and

(g) all matters where the funds, property or interest not involving or belonging to the appropriate government, except for the offences under clause (ix), (x) or (xi) of subsection (a) of section 9."

Prior to the 2022 Amendments Section 4 of the NAB Ordinance read:

"4. Application: It extends to the whole of Pakistan and shall apply to all persons in Pakistan, all citizens of 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."

34. From the comparison of the unamended and amended versions of Section 4 it becomes plain that exceptions have been created for the decisions, advice, reports, opinions of and works, functions, projects, schemes undertaken by holders of

public office and public/ governmental bodies unless there is evidence of the holder of public officer or a person acting on his behalf having received monetary or other material benefit. Such exceptions are novel not only to the NAB Ordinance

but also other accountability laws such as the 1947 Act. The rationale behind introducing these exceptions in the NAB Ordinance is explained in the Statement of Objects and Reasons attached to the First Amendment:

> "Currently National Accountability Bureau (NAB) is dealing with a large number of inquiries and investigation in addition to handling mega corruption cases. Under the existing regime a number of inquiries have been initiated against the holders of Public Office and government servants on account of procedural lapses where no actual corruption is involved. This has enhanced NAB's burden and had an adverse impact on the workings of the Federal Government. Additionally, NAB has also assumed parallel jurisdiction and is inquiring into matters pertaining to taxation, imposition of levies etc., and therefore interfering in the domain of tax regulatory bodies. As such, a number of amendments have been proposed to redefine the operational domain of NAB."

The Court appreciates the efforts of Parliament to address and rectify what has long been regarded unguided discretion of the NAB authorities. The Court as far back in Asfandyar Wali (supra) observed in relation to the NAB Ordinance that:

> "228. ...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."
>
> (emphasis supplied)

35. Clearly then Section 2 of the 2022 Amendments is an attempt by Parliament to rein in the unguided powers of the NAB and to protect the bureaucracy from unnecessary harassment. However, the exceptions granted by Section 2 operate as an en-masse exemption for holders of public office from facing accountability. The freshly inserted condition that the NAB shall provide evidence of monetary or other material benefit received by the holder of public office or a person acting on his behalf to overcome the exceptions listed in Section 2 of the 2022 Amendments cannot be satisfied in the references already pending before the Accountability Courts. Therefore, where such condition will not be met by the NAB the result will

be (and in fact has been) that references will be returned. In this regard, our analysis set out above in paras 27-32 being highly relevant is adopted because Section 2 of the 2022 Amendments affects the same Fundamental Rights i.e., Articles 9, 14, 23, 24 and raises the same problems in terms of the accountability of elected holders of public office as Section 3 of the Second Amendment, namely, that whilst persons in the service of Pakistan may still be investigated and prosecuted under the 1947 Act for the offences listed in Section 9(a)(i)-(v) of the NAB Ordinance, elected holders of public office will not be amenable to the jurisdiction of any other accountability fora for the offence of corruption and corrupt practices.

Declaration on Section 2 of the 2022 Amendments

A. Elected Holders of Public Office

i. For suffering from the same defects as noted above in paras 27-32, Section 2 of the 2022 Amendments is also declared to be void from the date of commencement of the 2022 Amendments.

B. Persons in the Service of Pakistan

ii. Section 2 of the 2022 Amendments insofar as these pertain to the offences set out in Section 9(a)(i)-(v) of the NAB Ordinance are declared to be intra vires the Constitution because persons in the service of Pakistan can be prosecuted for these offences under the 1947 Act.

iii. However, Section 2 is ultra vires the Constitution from the date of commencement of the 2022 Amendments for the offences listed in Section 9(a)(vi)-(xii) because persons in the service of Pakistan cannot be tried for such offences under the 1947 Act or any other accountability law.

Sections 8 and 10 of the First Amendment

36. Section 8 of the First Amendment has significantly altered Section 9 of the NAB Ordinance which lays down various categories of the offence of corruption and corrupt practices. For present purposes, the changes brought about in Section 9(a)(v) of the NAB Ordinance are relevant. The Section as it existed prior to and after the First Amendment is produced below:

"Prior to the First Amendment

9. Corruption and Corrupt Practices: (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-

...

(v) if he or any of his dependents or benamidars owns, possesses, or has acquired right or title in any assets or holds irrevocable power of attorney in respect of any assets or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for or maintains a

standard of living beyond that which is commensurate with his sources of income;

After the First Amendment

9. Corruption and Corrupt Practices: (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-

...

(v) if he or any of his dependents or other benamidars, through corrupt and dishonest means, owns, possesses or acquires rights or title in assets substantially disproportionate to his known sources of income which he cannot reasonably account for.

Explanation I.--The valuation of immovable property shall be reckoned on the date of purchase either according to the actual price shown in the relevant title documents or the applicable rates prescribed by District Collector or the Federal Board of Revenue whichever is higher. No evidence contrary to the later shall be admissible.

Explanation II.--For the purpose of calculation of movable assets, the sum total of credit entries of bank account shall not be treated as an asset. Bank balance of an account on the date of initiation of inquiry may be treated as a movable asset. A banking transaction shall not be treated as an asset unless there is evidence of creation of corresponding asset through that transaction."

(emphasis supplied)

37. It may be noticed from the above that apart from reducing the circumstances in which the offence of assets beyond means can be made out against the holder of a public office, the First Amendment has made another material change in Section 9(a)(v), namely, the obligation on the NAB to prove that an accused has accumulated substantially disproportionate assets 'through corrupt and dishonest means.' This element was previously not a part of Section 9(a)(v). This is evident from the ingredients of Section 9(a)(v) which were well-established in the jurisprudence of the Court and required that the NAB prove that:

i. The accused is a holder of public office;

ii. The nature and extent of the pecuniary resources of the property found in the accused's possession;

iii. The known sources of income of the accused; and

iv. The resources or property found in the possession of the accused are objectively disproportionate to his known sources of income [ref: Muhammad Hashim Babar v. State (2010 SCMR 1697) at para 4].

Once the NAB had established the above-mentioned four elements the accused was presumed to be guilty of the offence of corruption and corrupt practices unless he

could account for the resources or property so recovered from him. The NAB was not required to demonstrate that the accused had obtained the resources or property 'through corrupt and dishonest means' because the mere presence of disproportionate assets led to the presumption that the accused had engaged in corrupt and dishonest conduct. Such a presumption is provided in Section 14(c) of the NAB Ordinance. The fact of the matter is that the proof of acquisition of assets 'through corrupt and dishonest means' itself constitutes a complete offence. Therefore, by changing Section 9(a)(v) the First Amendment has amalgamated two separate offences into one. As a result, the original offence contained in Section 9(a)(v) has now been rendered redundant. To further ensure the futility of the said offence all of the evidentiary presumptions contained in Section 14 of the NAB Ordinance sustaining the erstwhile offence under Section 9(a)(v) and the remaining offences in the NAB Ordinance have been omitted by Section 10 of the First Amendment. The presumption relevant to Section 9(a)(v) of the Ordinance existed in Section 14(c). This latter provision read:

"14. Presumption against accused accepting illegal gratification: ...

c. In any trial, of an offence punishable under clause (v) of sub-section (a) of section 9 of 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 assets or pecuniary resources disproportionate to his known source 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 corrupt practices and his conviction therefor shall not be invalid by reason only that it is based solely on such a presumption."

(emphasis supplied)

38. Further, by the insertion of Explanation II to Section 9(a)(v) entries in bank statements have been removed from the scope of assets whereas banking transactions can only be regarded as assets if there is evidence of the creation of a corresponding asset through specific transactions. The source, object and quantum of credits/ receipts in the bank accounts can now no longer be shown for proving the creation of assets. Nor can debit transfers from one account to another be used to show accumulation of money for the creation of an asset. It goes without saying that bank records are usually the most pivotal evidence in financial crimes. However, by virtue of Explanation II limited resort can be made to them. On a first reading, the changes to Section 9(a)(v), the addition of Explanation II and the omission of Section 14(c) might appear innocuous in nature but their effect both individually and collectively has actually rendered the offence of corruption and corrupt practices in the category of assets beyond means pointless. If accused persons cannot be held to account for owning or possessing assets beyond their means, the natural corollary will be that public assets and wealth will become irrecoverable which would encourage further corruption. This will have a direct

adverse effect on the peoples' right to life and to public property because the economic well-being of the State will be prejudiced.

39. Additionally, when other accountability laws are examined in this context such as the 1947 Act, it become obvious that no similar or corresponding changes have been made in that Act in relation to the offence of assets beyond means. The relevant provisions from the 1947 Act are produced below for reference:

> "5. Criminal Misconduct.-- (1) A public servant is said to commit the offence of criminal misconduct:
>
> ...
>
> (e) If he, or any of his dependents, is in possession, for which the public servant cannot reasonably account of pecuniary resources or of property disproportionate to his known sources of income.
>
> ...
>
> (3) In any trial of an offence punishable under subsection (2) 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 pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume unless the contrary is proved, that the accused person is guilty of criminal misconduct and his conviction therefore shall not be invalid by reason only that it is based solely on such presumption."
>
> (emphasis supplied)

We have already held above in paras 29 and 31 that persons who are in the service of Pakistan can still be tried under the 1947 Act for the offence of corruption and corrupt practices even if they stand excluded from the jurisdiction of the NAB pursuant to the amendments made in Section 4 of the NAB Ordinance. However, the same cannot be said of elected holders of public office because they only fall within the purview of the NAB Ordinance. The amended Section 9(a)(v) and the omission of Section 14(c) would treat similarly placed persons differently because while elected holders of public office are relieved from prosecution for the offence under Section 9(a)(v), persons in the service of Pakistan will still have to go through the rigors of trial under the 1947 Act for the same offence. This would offend the equal treatment command of Article 25 of the Constitution. Insofar as the other presumptions contained in Section 14 of the NAB Ordinance for the other categories listed in Section 9(a) ibid are concerned, the same too stand revived as their omission will prevent the recovery of public assets and wealth from the holders of public office thereby defeating the peoples Fundamental Rights of accessing justice and protecting their public property. Moreso, when presumptions comparable to those in Section 14(a) [presumption as to motive] and (d) [presumption as to guilt] for the categories of 'illegal gratification,' 'obtaining a valuable thing without consideration,' 'fraudulent misappropriation,' 'obtaining

property/valuable thing/ pecuniary advantage through illegal means' and 'misuse of authority' do not exist in any other accountability law, including the 1947 Act.

Declaration on Sections 8 and 10 of the First Amendment

A. Elected Holders of Public Office

i. For the foregoing reasons the phrase 'through corrupt and dishonest means' used in Section 9(a)(v) along with its Explanation II is struck down from the NAB Ordinance from the date of commencement of the First Amendment for being unworkable. Additionally, Section 14 in its entirety is restored to the NAB Ordinance from the date of commencement of the First Amendment. Sections 8 and 10 of the First Amendment are declared invalid to this extent.

B. Persons in the Service of Pakistan

ii. The amendments made in Section 9 (a) (v) of the NAB Ordinance by Section 8 of the First Amendment are upheld in their entirety as persons in the service of Pakistan can be tried for the same offence under the 1947 Act.

iii. However, Section 10 of the First Amendment is struck down from the date of commencement of the First Amendment and Section 14(a), (b) and (d) stand restored to the NAB Ordinance because such presumptions do not exist in any other accountability law.

Section 14 of the First Amendment

40. Section 14 of the First Amendment has omitted Section 21(g) of the NAB Ordinance. This provision provided that:

"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 any or all of the following acts in accordance with the law of such State:--

...

(g) Notwithstanding anything contained in the Qanun-e-Shahadat Order, 1984 (P.O. 10 of 1984) or any other law for the time being in force all evidence, documents or any other material transferred to Pakistan by a Foreign Government shall be receivable as evidence in legal proceedings under this Ordinance;"

The primary objective of Section 21(g) in particular and Section 21 in general was explained by the Court in Mobashir Hassan (supra):

"99. ...A perusal of above Section [21] indicates that on account of international cooperation, request for mutual legal assistance means, the NAB or any officer, authorized by the Federal Government, has been empowered to make a request to a Foreign State to do any or all things mentioned therein... for achieving the object to save the assets outside the country, allegedly

belonging to the nation, a mechanism has been provided on the basis of international cooperation.

...

104. The Government of Pakistan is also signatory to the above UN Convention [against Corruption] as it has been ratified by Pakistan on 31st August, 2007, regarding international cooperation in criminal matters in accordance with Articles 44 to 50 of the above noted UN Convention, according to which, where appropriate and consistent with their domestic legal system, the State Parties shall consider assisting each other in investigation or proceedings in civil and administrative matters, relating to corruption.

...

129. Section 21 of the NAO, 1999 is a comprehensive provision of law, which spells out the nature of the request to a Foreign State for mutual legal assistance... We believe that to curb the culture of corruption and corrupt practices globally it has become necessary to enact such law on the basis of which the objects noted hereinabove could be achieved.

130. ...A perusal of UN Convention Against Corruption indicates that... State parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption; as well as affording to one another the widest measure of mutual legal assistance in investigations, prosecutions, and judicial proceedings in relation to the offences covered by the Convention; prevention and detection of transfers of proceeds of crime. On the other hand, the promulgation of the NRO, 2007, instead of preventing corruption and corrupt practices, has encouraged the same..."

(emphasis supplied)

41. It is a common fact that many accused persons being tried under the NAB Ordinance have stashed their wealth and assets abroad in tax havens under fiduciary instruments. However, after the omission of the said provision the admissibility of foreign public documents shall be governed by Article 89(5) of the Qanun-e-Shahadat Order, 1984 ("1984 Order") which reads:

"89. Proof of other public documents. The following public documents may be proved as follows:

...

(5) Public documents of any other class in a foreign country, by the original, or by a copy certified by the legal keeper thereof with a certificate under the seal of a notary public, or of a Pakistan Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original,

and upon proof of the character of the document according to the law of foreign country."

It may be observed that the process of admitting foreign public documents under the 1984 Order is protracted and cumbersome because it requires either the production of the original document or a copy which is certified not only by the legal keeper of the document but also by the Embassy of Pakistan. Further, the character of the document needs to be established in accordance with the law of the foreign country. Additionally, foreign private documents would need to be established through the procedure set out in Articles 17 and 79 of the 1984 Order which would require that two attesting witnesses from the foreign country enter personal appearance for proving the execution of the foreign private document. Such a process naturally entails time as the foreign evidence needs to pass through red tape. It therefore defeats the purpose for which Section 21(g) was inserted into the NAB Ordinance i.e., that after State cooperation led to the receipt of relevant foreign evidence the same would be directly admissible in legal proceedings initiated under the NAB Ordinance without fulfilling the onerous conditions of Article 89(5) of the 1984 Order. By deleting Section 21(g) from the NAB Ordinance Section 14 of the First Amendment has made it near impossible for relevant and necessary foreign evidence to be used in the trials of accused persons. It therefore offends the Fundamental Rights of the people to access justice and protect public property from waste and malfeasance.

Declaration on Section 14 of the First Amendment

42. Section 21(g) is hereby restored in the NAB Ordinance for both elected holders of public office and persons in the service of Pakistan with effect from the date of commencement of the First Amendment for facilitating peoples right to access justice and for protecting their public property from squander. Accordingly, Section 14 of the First Amendment is struck down for being illegal.

Section 14 of the Second Amendment

43. Section 14 of the Second Amendment has inserted two new provisos to Section 25(b) of the NAB Ordinance. The said provision pertains to plea bargains entered into by accused persons:

"25. Voluntary return and plea bargain: ...

(b) Where at any time after the authorization of investigation, before or after the commencement of the trial or during the pendency of an appeal, the accused offers to return to the NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence under this Ordinance, the Chairman, NAB, may, in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary, and if the accused agrees to return to the NAB the amount determined by the Chairman, NAB, the Chairman,

NAB, shall refer the case for the approval of the Court, or as the case may be, the Appellate Court and for the release of the accused:

Provided that statement of an accused entering into plea bargain or voluntary return shall not prejudice case of any other accused:

Provided further that in case of failure of accused to make payment in accordance with the plea bargain agreement approved by the Court, the agreement of plea bargain shall become inoperative to the rights of the parties immediately."

(emphasis supplied)

44. For present purposes we are concerned only with the second proviso to Section 25(b) of the NAB Ordinance which renders a plea bargain entered into by an accused person inoperative if the accused fails to make the complete payment as approved by the Accountability Court. Read on its own this proviso appears to protect the interests of the State by ensuring prompt recovery of looted public money and this intention is also reflected in the Statement of Objects and Reasons attached to the Second Amendment:

" ...Section 25 is related to protect the interest of the Government that in case persons entering into plea bargain fail to make payment pursuant to the payment approved by the court, the plea bargain agreement will become infructuous."

45. However, despite the benign purposes behind introducing the second proviso to Section 25(b), the actual effect of it is that it nullifies Section 25(b) itself which was inserted in the NAB Ordinance 'to facilitate early recovery of the ill-gotten wealth through settlement where practicable' [ref: Asfandyar Wali case (supra) at para 267] because it places no restrictions on the accused from revoking the plea bargain entered into by him. It is established law that whilst a proviso can qualify or create an exception to the main section it cannot nullify the same [ref: Muhammad Anwar Kurd v. State (2011 SCMR 1560) at para 22]. Further, the second proviso gives the accused an uninhibited right to withdraw from a plea bargain without obtaining the approval of the Accountability Court which in the first place approved the plea bargain. The Court in the case of Asfandyar Wali (supra) recognised that plea bargain is in the nature of compounding an offence and therefore it should be subject to the sanction of the Accountability Court. We see no reason and none was advanced by learned counsel for the respondent Federation as to why the Accountability Court should be excluded from the revocation of an agreement which compounded the offence committed by the accused. The exclusion of the Accountability Court by the second proviso to Section 25(b) of the NAB Ordinance therefore undermines the independence of the Judiciary and is violative of Article 175(3) of the Constitution.

46. Moreover, it is an admitted fact that under the proviso to Section 15(a) of the NAB Ordinance (disqualification to contest elections or to hold public office) an accused person who enters into a plea bargain suffers the same consequences as an accused person who is convicted of the offence of corruption and corrupt practices under Section 9(a). Such consequences are that the accused person either forthwith

ceases to hold public office, if any, held by him or further stands disqualified for a period of ten years for seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body etc. Therefore, allowing an accused person to renege from his plea bargain would be tantamount to conferring an unlawful benefit on him i.e., he would escape the consequences stipulated in Section 15(a) of the NAB Ordinance.

Declaration on Section 14 of the Second Amendment

47. The second proviso to Section 25(b) is struck down from the NAB Ordinance from the date of commencement of the Second Amendment for exceeding its purpose by nullifying Section 25(b), for violating the independence of the Judiciary and for enabling accused persons to avoid the consequences of Section 15(a). As a result, Section 14 of the Second Amendment is declared to be void and of no legal effect to this extent.

Conclusion

48. On the basis of the above discussion the Court holds:

i. The titled Constitution Petition is maintainable on account of violating Articles 9 (security of person), 14 (inviolability of dignity of man), 24 (protection of property rights) and 25 (equality of citizens) of the Constitution and for affecting the public at large because unlawful diversion of State resources from public development projects to private use leads to poverty, declining quality of life and injustice.

ii. Section 3 of the Second Amendment pertaining to Section 5(o) of the NAB Ordinance that sets the minimum pecuniary threshold of the NAB at Rs.500 million and Section 2 of the 2022 Amendments pertaining to Section 4 of the NAB Ordinance which limits the application of the NAB Ordinance by creating exceptions for holders of public office are declared void ab initio insofar as these concern the references filed against elected holders of public office and references filed against persons in the service of Pakistan for the offences noted in Section 9(a)(vi)-(xii) of the NAB Ordinance;

iii. Section 3 of the Second Amendment and Section 2 of the 2022 Amendments pertaining to Sections 5(o) and 4 of the NAB Ordinance are declared to be valid for references filed against persons in the Service of Pakistan for the offences listed in Section 9(a)(i)-(v) of the NAB Ordinance;

iv. The phrase 'through corrupt and dishonest means' inserted in Section 9 (a) (v) of the NAB Ordinance along with its Explanation II is struck down from the date of commencement of the First Amendment for references filed against

elected holders of public office. To this extent Section 8 of the First Amendment is declared void;

v. Section 9(a)(v) of the NAB Ordinance, as amended by Section 8 of the First Amendment, shall be retained for references filed against persons in the service of Pakistan;

vi. Section 14 and Section 21(g) of the NAB Ordinance are restored from the date of commencement of the First Amendment. Consequently, Sections 10 and 14 of the First Amendment are declared void; and

vii. The second proviso to Section 25(b) of the NAB Ordinance is declared to be invalid from the date of commencement of the Second Amendment. Therefore, Section 14 of the Second Amendment is void to this extent.

49. On account of our above findings, all orders passed by the NAB and/or the Accountability Courts placing reliance on the above Sections are declared null and void and of no legal effect. Therefore, all inquiries, investigations and references which have been disposed of on the basis of the struck down Sections are restored to their positions prior to the enactment of the 2022 Amendments and shall be deemed to be pending before the relevant fora. The NAB and all Accountability Courts are directed to proceed with the restored proceedings in accordance with law. The NAB and/or all other fora shall forthwith return the record of all such matters to the relevant fora and in any event not later than seven days from today which shall be proceeded with in accordance with law from the same stage these were at when the same were disposed of/closed/returned.

50. The titled Constitution Petition is allowed in these terms.

Sd/-
Umar Ata Bandial, H.C.J.

Sd/-
Ijaz ul Ahsan, J.

Sd/-
Syed Mansoor Ali Shah, J.
I dissent and have attached
my separate note.

SYED MANSOOR ALI SHAH J*.---I have read the judgment authored by the Hon'ble Chief Justice of Pakistan to which my learned brother Justice Ijaz ul Ahsan has concurred ("majority judgment") provided to me last night. With great respect, I could not make myself agree to it. Due to the paucity of time, I cannot fully record reasons for my dissent and leave it for my detailed opinion to be recorded later. However, in view of the respect that I have for my learned colleagues and for their opinion, I want to explain, though briefly, why I am unable to agree with them.

2. In my humble opinion, the primary question in this case is not about the alleged lopsided amendments introduced in the NAB law by the Parliament but about the paramountcy of the Parliament, a house of the chosen representatives of about 240 million people of Pakistan. It is about the constitutional importance of parliamentary democracy and separation of powers between three organs of the State. It is about the limits of the jurisdiction of the Court comprising unelected

judges, second judging the purpose and policy of an enactment passed by the Parliament, without any clear violation beyond reasonable doubt, of any of the fundamental rights guaranteed under the Constitution or of any other constitutional provision.

3. The majority judgment has fallen short, in my humble opinion, to recognize the constitutional command that 'the State shall exercise its power and authority through the chosen representatives of the people' and to recognize the principle of trichotomy of powers, which is the foundation of parliamentary democracy. The majority has fallen prey to the unconstitutional objective of a parliamentarian, of transferring a political debate on the purpose and policy of an enactment from the Houses of the Parliament to the courthouse of the Supreme Court. Without setting out a clear and objective test for determining how the claimed right to have accountability of the parliamentarians is an integral part of any of the fundamental rights guaranteed under the Constitution, the majority judgment through a long winding conjectural path of far-fetched "in turn" effects has tried hard to "ultimately" reach an apprehended violation of the fundamental rights. The majority judgment has also fallen short to appreciate that what Parliament has done, Parliament can undo; the legislative power of the Parliament is never exhausted. If

the Parliament can enact the NAB law, it can also repeal the entire law or amend the same.

4. For these and further reasons to be recorded in my detailed opinion later, with great respect, I disagree with my learned brothers and dismiss this petition.

Sd/-
Judge

Order of the Bench

By majority of 2:1 (Justice Syed Mansoor Ali Shah dissenting) Constitution Petition No.21 of 2022 is allowed.

Sd/-
Umar Ata Bandial, H.C.J.

Sd/-
Ijaz ul Ahsan, J.

Sd/-
Syed Mansoor Ali Shah, J.

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SYED MANSOOR ALI SHAH, J.---Benjamin Cardozo said: 'The voice of the majority may be that of force triumphant, content with the plaudits of the hour and recking little of the morrow. The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years ... the [dissenters] do not see the hooting throng. Their eyes are fixed on eternities.'[1] Antonin Scalia was right when he said that '[d]issents augment rather than diminish the prestige of the Court'[2]. Courts must rise above the 'hooting throng' and keep their eyes set on the future of democracy, undeterred by the changing politics of today. Courts unlike political parties don't have to win popular support. Courts are to decide according to the Constitution and the law even if the public sentiment is against them.

Prologue

2. One of the foundations of democracy is a legislature elected freely and periodically by the people. Without a majority rule, as reflected in the power of the legislature, there is no democracy[3]. Justice McLachlin rightly said that in democracies, "the elected legislators, the executive and the courts all have their role to play. Each must play that role in a spirit of profound respect for the other. We are not adversaries. We are all in the justice business, together"[4].

3. Courts must realize that legislation is an elaborate undertaking which is an outcome of debate and deliberations of public, social and economic policy considerations. Role of a judge in a democracy recognizes this central role of the Legislature. The courts can judicially review the acts of the legislators if they offend the Constitution, in particular the fundamental rights guaranteed by the Constitution. While examining this conflict of rights and the legislation, the courts must consider that they are dealing with a legislative document that represents multiple voices, myriad policy issues and reflective of public ethos and interests, voiced through the chosen representatives of the people. And remembering that undermining the legislature undermines democracy. With this background, only if such a legislation is in conflict and in violation of the fundamental rights or the express provisions of the Constitution, can the courts interfere and overturn such a

legislation. At the foundation of this approach is the basic view that the Court does not fight for its own power. The efforts of the Court should be directed towards protecting the Constitution and its values[5].

4. The delicate institutional balance between various institutions in the constitutional scheme is largely maintained through mutuality of respect which each institution bestows on the other.[6] In a parliamentary form of government, the executive (Government) is usually constituted from amongst the representatives of the majority party in the legislature (Parliament) and is thus, in a sense, a part of the latter. It is, therefore, very rare that the executive and the legislature come in a head-on collision against each other in the performance of their assigned functions under the Constitution. In this system of government, the judiciary is seen more often than not as an opponent of the executive or the legislature. This impression can only be removed, or at least moderated, by "mutuality of respect"[7] between the judiciary and other organs of the State, particularly between the judiciary and the legislature. The courts have formulated the doctrine of judicial restraint which 'urges Judges considering constitutional questions to give deference to the views of the elected branches and invalidate their actions only when constitutional limits have clearly been violated'[8]. As the legislative acts of a legislature are the manifestation of the will of the people exercised through their chosen representatives, the courts tread carefully to judicially review them and strike them down only when their constitutional invalidity is clearly established beyond any reasonable doubt.[9] A reasonable doubt is resolved in favour of the constitutional validity of the law enacted by a competent legislature by giving a constitution-compliant interpretation to the words that create such doubt.[10]

5. Steven Levitsky and Daniel Ziblatt in their recent book "How Democracies Die" have argued that two norms stand out as fundamental to a functioning democracy: "mutual toleration" and "institutional forbearance." These norms become more nuanced in the present context as we later on discuss the nature of the amendments to our accountability law in the country. "Mutual toleration" refers to the idea that as long as our rivals play by constitutional rules, we accept that they have an equal right to exist, compete for power, and govern. We may disagree with, and even strongly dislike, our rivals, but we nevertheless accept them as legitimate. This means recognizing that our political rivals are decent, patriotic, law-abiding citizens - that they love our country and respect the constitution just as we do. It means that even if we believe our opponents' ideas to be foolish or wrong-headed, we do not view them as an existential threat. Nor do we treat them as treasonous, subversive, or otherwise beyond the pale. We may shed tears on election night when the other side wins, but we do not consider such an event apocalyptic. Put another way, mutual toleration is politicians' collective willingness to agree to disagree.... [Political] parties can be rivals rather than enemies, circulating power rather than destroying each other. This recognition was a critical foundation for

American democracy.... when norms of mutual toleration are weak, democracy is hard to sustain."[11]

6. "The second norm critical to democracy's survival is what we call institutional forbearance. Forbearance means patient self-control; restraint and tolerance... Where norms of forbearance are strong, politicians do not use their institutional prerogatives to the hilt, even of it is technically legal to do so, for such action could imperil the existing system.... Think of democracy as a game that we want to keep playing indefinitely. To ensure future rounds of the game, players must refrain from either incapacitating the other team or antagonizing them to such a degree, that they refuse to play again tomorrow. If one's rival quits, there can be no future games .... the opposite of forbearance is to exploit one's institutional prerogatives in an unrestrained way. Legal scholar Mark Tushnet call this "constitutional hardball"; ..it is a form of institutional combat aimed at permanently defeating one's partisan rivals - and not caring whether the democratic game continues."[12] With this understanding of democracy, "mutuality of respect" and "institutional forbearance", we are to deal with the present case.

Summation of the matter

7. In the exercise of its legislative power conferred on it by Article 142(b) of the Constitution of the Islamic Republic of Pakistan ("Constitution") to make laws with respect to criminal law, criminal procedure and evidence, the Parliament comprising the chosen representatives of the people of Pakistan has made certain amendments in the National Accountability Ordinance 1999 ("NAB Ordinance"). The petitioner, a parliamentarian who chose not to participate in the process of enactment of those amendments, either by supporting or opposing them in the Parliament, has instead, challenged those amendments in this Court invoking its original jurisdiction under Article 184(3) of the Constitution. It is the petitioner's assertion that the amendments made in the NAB Ordinance infringe the fundamental rights of the people of Pakistan in general and not of the persons who are to be dealt with in respect of their life, liberty and property under the NAB Ordinance. My learned colleagues, the Hon'ble Chief Justice and Hon'ble Justice Ijaz ul Ahsan ("majority"), have been convinced by the said assertion and have therefore declared most of the challenged amendments ultra vires the Constitution. With great respect, I have not been able to persuade myself to agree with them.

6(sic). The Parliament has, through the challenged amendment, merely changed the forums for investigation and trial of the offences of corruption involving the amount or property less than Rs.500 million. After the amendment, the cases of alleged corruption against the holders of public offices that involve the amount or property of value less than Rs.500 million are to be investigated by the anti-corruption investigating agencies and tried by the anti-corruption courts of the Federation and Provinces respectively, under the Prevention of Corruption Act 1947 and the Pakistan Criminal Law Amendment Act 1958, instead of the NAB Ordinance. This matter undoubtedly falls within the exclusive policy domain of the legislature, not justiciable by the courts. In my opinion, this and other challenged amendments, which relate to certain procedural matters, in no way take away or

abridge any of the fundamental rights guaranteed by the Constitution to the people of Pakistan. Hence, my dissent.

Main premise of the majority judgment

7(sic). The majority has found that the 'elected holders of public office are not triable either under the 1947 Act [Prevention of Corruption Act] or the P.P.C. [Pakistan Penal Code] for the offence of corruption and corrupt practices'[13], and that by 'amending Section 5(o) of the NAB Ordinance to raise the minimum pecuniary threshold of the NAB to Rs.500 million, Section 3 of the Second Amendment has undone the legislative efforts beginning in 1976 to bring elected holders of public office within the ambit of accountability laws ... Once excluded from the jurisdiction of the NAB no other accountability fora can take cognizance of their alleged acts of corruption and corrupt practices'[14]. On these findings, the majority has concluded that such 'blanket immunity offends Articles 9, 14, 23 and 24 of the Constitution because it permits and encourages the squandering of public assets and wealth by elected holders of public office as there is no forum for their accountability. This in turn affects the economic well-being of the State and ultimately the quality and dignity of the people's lives because as more resources are diverted towards illegal activities, less resources remain for the provision of essential services to the people such as health facilities, education institutes and basic infrastructure etc.'[15]

Reasons for dissent

8. With utmost respect, the majority view, in my humble opinion, is not correct as even after the challenged amendments:

(i) the elected holders of public offices (members of Parliament, Provincial Assemblies and Local Government Bodies, etc.) are still triable under the Prevention of Corruption Act 1947 (PCA) and the Pakistan Penal Code 1860 (P.P.C.) for the alleged offences of corruption and corrupt practices and no one goes home scot-free. They are still triable under other laws. This aspect has been, with respect, seriously misunderstood by the majority;

(ii) the challenged amendment of adding the threshold value of Rs.500 million for an offence to be investigated and tried under the NAB Ordinance, simply changes the forums for investigation and trial of the alleged offences of corruption and corrupt practices involving the amount or property less than Rs.500 million. This matter falls within the exclusive policy domain of the legislature (Parliament); and

(iii) the said and other challenged amendments (law made by the Parliament) do not take away or abridge any of the fundamental rights guaranteed under

Articles 9, 14, 23, 24 and 25 of the Constitution of the Islamic Republic of Pakistan (Constitution).

I would elucidate the above three statements seriatim.

(i) Elected holders of public offices are triable under P.C.A. and P.P.C.

9. The answer to the question, whether the elected holders of public offices (i.e., members of Parliament and Provincial Assemblies, etc.) are triable for the alleged offences of corruption and corrupt practices under the P.C.A. and the P.P.C., hinges upon the definition of the expression "public servant" provided in the latter part of clause ninth of Section 21 of the P.P.C. The majority has found that the elected holders of public offices do not fall within the definition of "public servant" and are therefore not triable for the alleged offence of corruption and corrupt practices either under the P.C.A. or under the P.P.C. With respect I submit that before arriving at this finding, the majority has failed to fully examine the definition of the expression "public servant" provided in the latter part of clause ninth of Section 21, P.P.C., and have erroneously relied upon the two judgments from the foreign jurisdictions (R. S. Nayak v. A.R. Antulay AIR 1984 SC 684 and Zakir Hossain v. State 70 DLR [2018] 203), without noticing the difference of the provisions of Section 21, P.P.C., from the relevant provisions of the penal codes of those countries. The said difference is highlighted in the following comparative table:

Latter part of clause ninth of Section 21 of the Pakistan Penal Code	Clause twelfth (a) of Section 21 of the Indian Penal Code	Clause twelfth (a) of Section 21 of the Penal Code of Bangladesh
every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty;	Every person in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;	Every person in the service or pay of the Government or remunerated by the Government by fees or commissions for the performance of any public duty;

A bare reading of the above definitions shows that the notable difference between the definition in the Pakistan Penal Code (P.P.C.) and the definitions in the Indian Penal Code (I.P.C.) as well as in the Bangladesh Penal Code (B.P.C.) is that the word "Government" has been used once in the P.P.C. while in the I.P.C. and the B.P.C., it has been used twice. It is the absence of the word "Government" in the second limb of the definition provided in the P.P.C. that makes the real difference, which I will explain later, in the meaning and scope of these definition clauses of "public servant" in three penal codes. The word "or" used after the word "Government" in the P.P.C. and after the first word "Government" in the I.P.C. and the B.P.C. signifies that there are actually two types of officers (word "officer" used in the P.P.C.) or persons (word "person" used in the I.P.C. and B.P.C.) that fall

within the scope of "public servant" as defined therein. When the two limbs of the above three definitions are split, they take the following forms:

Splitting of second part of clause ninth of Section 21 of Pakistan Penal Code	Splitting of clause twelfth (a) of Section 21 of the Indian Penal Code	Splitting of clause twelfth (a) of Section 21 of the Penal Code of Bangladesh
i. Every officer in the service or pay of the Government ii. Every officer remunerated by fees or commission for the performance of any public duty	i. Every person in the service or pay of the Government ii. Every person remunerated by fees or commission for the performance of any public duty by the Government	i. Every person in the service or pay of the Government Every person remunerated by the Government by fees or commissions for the performance of any public duty

Having set out the relevant provisions of the penal codes of the three countries and the difference between them, we can now better appreciate the ratio of the cases relied upon by the majority.

Analysis of Antulay relied upon by the majority

10. Since in Zakir Hossain[16] the High Court Division of the Supreme Court of Bangladesh has mainly relied upon Antulay, it is this latter case decided by the Indian Supreme Court that requires a minute examination. The word "Government" has also been used in the IPC, as aforenoted, in relation to a person 'remunerated by fees or commission for the performance of any public duty'. In Antulay, the Indian Supreme Court therefore observed that a person would be a public servant under Clause (12) (a) of Section 21, IPC, if:

(i) he is in the service of the Government; or

(ii) he is in the pay of the Government; or

(iii) he is remunerated by fees or commission for the performance of any public duty by the Government.[17]

The Indian Supreme Court formulated the question thus:

> [W]hether M.L.A. [Member of Legislative Assembly of a State] is in the pay of the Government of a State or is remunerated by fees for the performance of any public duty by the Government of a State?[18]

In the course of its discussion on the question, the Indian Supreme Court observed that '[t]he Legislature lays down the broad policy and has the power of purse. The executive executes the policy and spends from the Consolidated Fund of the State what Legislature has sanctioned. The Legislative Assembly enacted the Act enabling to pay to its members salary and allowances. And the members vote on the grant and pay themselves. Therefore, even though M.L.A. receives pay and

allowances, he is not in the pay of the State Government because Legislature of a State cannot be included in the expression "State Government".[19]

10.1. Responding to the contention that an M.L.A. does not perform any public duty, the Indian Supreme Court observed that 'it would be rather difficult to accept an unduly wide submission that M.L.A. is not performing any public duty....He no doubt performs public duties cast on him by the Constitution and his electorate. He thus discharges constitutional functions for which he is remunerated by fees under the Constitution and not by the Executive.'[20]

10.2. After a thorough discussion on the pro and contra arguments, the Indian Supreme Court answered the question in the negative by concluding that '[t]he expression "Government and Legislature",...are distinct and separate entities. ... [T]he expression "Government" in Section 21(12) (a) [of the IPC] clearly denotes the executive and not the Legislature. M.L.A. is certainly not in the pay of the executive. Therefore, the conclusion is inescapable that even though M.L.A. receives pay and allowances, he can not be said to be in the pay of the Government i.e. the executive'[21] nor is he 'remunerated by fees paid by the Government i.e. the executive.'[22] On this conclusion, the Indian Supreme Court held that an M.L.A. 'is thus not a public servant within the meaning of the expression in Clause (12) (a) [of Section 21 of the IPC]'[23].

10.3. The close examination of the Antulay thus reveals that it was decided on the ratio that even though an M.L.A. receives pay and also performs public duties, he does not receive that pay from the Government nor is he remunerated by fees by the Government but rather he is remunerated by fees under the Constitution. Therefore, he does not fall within the definition of "public servant" under clause (12) (a) of Section 21 of the IPC. The deciding factor in that case was the requirement of being in the pay of the Government or being remunerated by fees by the Government. At the cost of repetition but for clarity and emphasis, it is restated that the Indian Supreme Court held:

> [An M.L.A.] no doubt performs public duties cast on him by the Constitution ... for which he is remunerated by fees under the Constitution and not by the Executive [Government].[24]

It is, therefore, the absence of the word "Government" in the second limb of the latter part of clause ninth of Section 21, P.P.C., that makes the real difference in the meaning and scope of the relevant definition clauses of "public servant" in the penal codes of three countries.

11. As per the second limb of the latter part of clause ninth of Section 21, P.P.C., every officer remunerated by fees or commission for the performance of any public

duty is a public servant. Thus, to fall within the scope of this definition of "public servant":

(a) a person should be an officer,

(b) he should perform any public duty, and

(c) he should be remunerated by fees or commission for the performance of that public duty.

There is no condition that for the performance of public duty, the fees or commission is to be paid by the Government. Therefore, every officer remunerated by the fees or commission for the performance of any public duty is a public servant under Section 21, P.P.C., irrespective of the fact whether the fee is paid by the Government or by any other public body or by an Act of Parliament under the Constitution.

12. This statutory definition of a "public servant" in the P.P.C. fully corresponds to the common law definition formulated by Chief Justice Best in Henly[25] in the terms that 'every one who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer'. In a similar vein, Justice Lawrence held in Whittaker[26] that a 'public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer'. In these common law definitions articulated by the two distinguished judges, like the definition provided in Section 21, P.P.C., there is no emphasis on who makes the payment from a public fund for the performance of public duty.

13. What, therefore, needs determination is whether a member of Parliament fulfills all the above three conditions to fall within the scope of the definition of "public servant" provided in the ninth clause of Section 21, P.P.C. Applicability of each of the three conditions to a member of Parliament is examined next.

(a) A member of Parliament is an officer, i.e., a holder of an office

13.1. As for the first condition of being an officer, the word "officer" has not been defined in the P.P.C. While it is obvious that it refers to a person who holds an office, the matter does not end here as then arises a further question, what the word "office" means. Though the word "office" is of indefinite content, it is ordinarily understood to mean a position to which certain duties of a more or less public character are attached,[27] especially a position of trust, authority or service.[28] It is a subsisting, permanent and substantive position, which has an existence independent of the person who fills it, which goes on and is filled in succession by successive holders.[29] The position is an office whether the incumbent is selected by appointment or by election and whether he is appointed during the pleasure of the appointing authority or is elected for a fixed term.[30] The position of a member of Parliament squarely falls within the scope of this definition of "office"; as it is subsisting, permanent and substantive, which exists independent of the person who

for the time being fills it and which goes on and is filled in succession by others after him.[31] A member of Parliament is therefore the "holder of an office" and is thus an "officer" within the meaning and scope of this term used in clause ninth of Section 21, P.P.C. The invaluable observations of Justices Isaacs and Rich made in Boston[32], also support the finding that the position of a member of Parliament is an office and the holder of this position is an officer. They observed:

> A Member of Parliament is, ... in the highest sense, a servant of the State; his duties are those appertaining to the position he fills, a position of no transient or temporary existence, a position forming a recongnized place in the constitutional machinery of government Clearly a member of Parliament is a "public officer" in a very real sense, for he has..."duties to perform which would constitute in law an office".

(b) A member of Parliament performs a public duty

13.2. As a duty in the discharge of which the public is interested, is a "public duty", anyone can hardly dispute that a person in his position as a member of Parliament does perform a "public duty". 'He no doubt performs public duties cast on him by the Constitution',[33] which include enacting laws, regulating public funds and sanctioning expenditures therefrom, and overseeing the functioning of the Government (Cabinet of Ministers), etc. These duties are such in which the public has an interest; they are, therefore, public duties.[34]

(c) A member of Parliament is remunerated by fees, i.e., salary and allowances

13.3. So far as the remuneration for the performance of these public duties is concerned, a member of Parliament is remunerated by salary and allowances under an Act of Parliament.[35] In Antulay, such salaries and allowances were treated as "fees" by holding that a member of the Legislative Assembly 'no doubt performs public duties cast on him by the Constitution ... for which he is remunerated by fees under the Constitution'.[36] The words "remuneration" and "fees" are of wide amplitude; they include "compensation in whatever shape". In R v. Postmaster-General,[37] Justice Blackburn observed:

> I think the word 'remuneration' ... means a quid pro quo. If a man gives his services, whatever consideration he gets for giving his services seems to be a remuneration for them.

This definition of the word "remuneration" was adopted by this Court in National Embroidery Mills[38] for holding that 'the word "remuneration" has a wider significance than salary and wages' and that it 'includes payments made, besides the salary and wages.' Justice Blackburn's statement was also relied upon by the Indian Supreme Court in Bakshi[39] in support of the observation that the expression "remuneration", in its ordinary connotation, means reward, recompense, pay, wages or salary for service rendered. A "fee", like remuneration, also means a quid pro quo,[40] and in this regard is synonymous with "remuneration". Article 260 of our Constitution defines the word "remuneration" to include salary. The word "fees" used in the definition of "public servant" under consideration, being synonymous

with the word "remuneration", also includes salary and allowances. A member of Parliament is, therefore, remunerated by fees (salary and allowances) for the performance of public duties.

14. A member of Parliament, thus, fulfills all the three conditions to fall within the scope of the definition of "public servant" provided in the second limb of the latter part of clause ninth of Section 21, P.P.C., and is, therefore, triable as a "public servant" for the alleged commission of an offence of corruption and corrupt practices (criminal misconduct) under the P.P.C. and the P.C.A.

Reference to cases holding members of Parliament and Ministers as public servants

15. In this conclusion, I am fortified by the judgment of the Indian Supreme Court delivered in the case of Narsimha Rao[41]. In that case, while interpreting the provisions of Section 2(c)(viii) of the Indian Prevention of Corruption Act 1988 it was held that a member of Parliament is a public servant within the meaning and scope of those provisions and is therefore triable under the said Act. To see the relevancy of that case to this case, it would be expedient to cite here the provisions of the Indian law on the basis of which the Indian Supreme Court so held. They are as follows:

(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty;

(Emphasis added)

A bare reading of the above provisions shows that they contain two conditions that are common to the definition of "public servant" considered in this case: (a) a person should hold an office, i.e., he should be an officer, and (b) he should perform any public duty. The only missing condition which is present in the definition considered in this case but is not there in the above provisions is that of being "remunerated by fees". This third condition, the Indian Supreme Court had already held in Antulay, is also fulfilled by a member of Parliament as he receives salary and allowance.

16. It would also be pertinent to mention here that on the basis

of the definition of "public servant" provided in the latter part of clause ninth of Section 21, P.P.C., the Dacca High Court, an erstwhile Pakistani High Court, held in the cases of Abul Monsur[42] and Mujibur Rahman[43] that a Minister is a public servant and is triable for the offences under the PCA. These cases referred to and

relied upon the cases of Sibnath Banerji[44] and Shiv Bahadur[45] decided by the Privy Council and the Indian Supreme Court respectively, which had also held that a Minister is a public servant. The observations and reasoning of Justice Baquer in Abul Monsur for holding that a Minister is a public servant are quite instructive and worth quoting here:

The last lines "and every officer in the service or pay of the Crown or remunerated by fees or commission for the performance of any public duty"

> are very comprehensive. The Clause begins with "Every officer" and then again adds "and every officer" before closing. There is no disjunctive 'or'. Under those circumstances the inclusion of Minister in the category does not seem to be hit by the ejusdem generis rule ... The popular notion that a Minister is a public servant of the first order, does not seem to be absolutely erroneous. At any rate no person could be a more public person than a Minister in the sense that his duties are with the public and he is the people's man in the Government of the country ... The language of a statute is not unoften extended to new things which were not known and could not have been contemplated by the Legislature when it was passed. Of course subject to this that the thing coming afterwards is a species of the genus that the Legislature dealt with...It cannot be denied that the Minister is a species of the genus although the Minister may combine in himself other features that do not wholly apply in the case of ordinary officers and public servants ... The categories of public servants are never closed particularly in the background of the total change in the conception of 'public servant' in modern times. In a society imbued with a sense of wider and wider public service and duties, there can be no justification for confining the connotation of public servant literally to the concept of public servants as prevailing in 1850. Nor has it been so confined. The Minister in aiding and advising the Governor represents the public and in doing so, he performs a duty owed to the public in the most literal sense of the term. Criminal misconduct on the part of a Minister is the more reprehensible and there can be no valid reason for keeping his position sacrosanct and above the law on purely technical grounds. Law being not very far from the ethical sense of the community it is not to be given a meaning that is revolting to society.

Unfortunately, all these cases escaped the notice of the majority. It may also be pertinent to mention that elected officer holders or members of Parliament may commit corruption or corrupt practices, inter alia, through the following means: (i) Bribery: by accepting bribes from individuals or businesses in exchange for political favors, contracts, or regulatory decisions; (ii) Embezzlement: by misappropriating public funds for personal use, often by diverting money meant for public projects or services; (iii) Kickbacks: by receiving a portion of money from contracts or projects awarded to specific companies in return for steering those contracts their way; (iv) Nepotism and cronyism: by appointing family members or close associates to government positions or awarding them contracts without fair competition; (v) Extortion: by forcing individuals or businesses to pay money through threats or coercion; (vi) Money laundering: by concealing the origins of illegally obtained funds by making them appear legitimate through a series of transactions; (vii) Shell companies: by creating fake companies to funnel money illicitly, making it difficult to trace the funds back to the corrupt politician; (viii) Fraudulent land deals: by illegally acquiring public or private land and then selling it for personal gain; (ix) Insider trading: by using non-public information gained through political office to make profitable investments in the stock market; (x) Tax evasion: by underreporting income or using offshore accounts to hide money and avoid paying taxes. All these acts are triable for the offences of corruption and corrupt practices not only under the P.C.A. and the P.P.C. but they are also triable

for different offences under the Income Tax Ordinance 2001, the Anti-Money Laundering Act 2010 and the Elections Act 2017, etc.

(ii) Change of forum for investigation and trial of certain offences falls within the policy domain of legislature (Parliament)

17. Since the members of Parliament (elected holders of public office) being "public servants" are triable under the P.P.C. and the P.C.A. for the alleged commission of the offences of corruption and corrupt practice (criminal misconduct), the observation of the majority that once excluded from the jurisdiction of the NAB no other accountability fora can take cognizance of their alleged acts of corruption and corrupt practices, respectfully submitted, does not stand. Similar is the position with the observation of the majority that by excluding from the ambit of the NAB Ordinance the holders of public office who have allegedly committed the offence of corruption and corrupt practices involving an amount of less than Rs.500 million, Parliament has effectively absolved them from any liability for their acts. Reliance on Mobashir Hassan[46] is, therefore, also not well placed.

18. The effect of adding the said threshold of value by the challenged amendments in the NAB Ordinance is simply that the cases of alleged corruption and corrupt practices (criminal misconduct) against the members of Parliament and Provincial Assemblies that involve the amount or property of value less than Rs.500 million shall now be investigated and tried under the PCA by the respective anti-corruption investigating agencies and anti-corruption courts of the Federation and Provinces. The matter of defining a threshold of value for the investigation and trial of offences under the NAB Ordinance is undoubtedly a policy matter that falls within the domain of the legislature, not of the courts. If a legislature has the constitutional authority to pass a law with regard to a particular subject, it is not for the courts to delve into and scrutinize the wisdom and policy which led the legislature to pass that law.

19. The majority has observed that 'No cogent argument was put forward by learned counsel for the respondent Federation as to why Parliament has fixed a higher amount of Rs.500 million for the NAB to entertain complaints and file corresponding references in the Accountability Courts when the Superior Courts have termed acts of corruption and corrupt practices causing loss to the tune of Rs.100 million as mega scandals.'[47] With great respect, it is not the domain of the courts to determine what value of the amount or property involved in an offence of corruption and corrupt practice makes it one of "mega scandals" to be investigated and tried under the NAB Ordinance. Any observation by a court that the NAB should investigate the offences involving "mega scandals", indicating any threshold in this regard can at most be a recommendation to be considered by the legislature, which is not binding on the latter. The legislature may, in its wisdom, after considering the recommendation either enhance or reduce the proposed threshold or may simply decide not to act upon that. The courts cannot force the legislature to act upon their recommendations nor can they strike down any law competently

enacted by the legislature which does not commensurate with their recommendations.

Principle of trichotomy of power

20. Our Constitution is based on the principle of trichotomy of power in which legislature, executive and judiciary have their separately delineated functions. The legislature is assigned the function to legislate laws, the executive to execute laws and the judiciary to interpret laws. None of these three organs are dependent upon the other in the performance of its functions nor can one claim superiority over the others.[48] Each 'enjoys complete independence in their own sphere'[49] and is 'the master in its own assigned field'[50] under the Constitution. Any one of these three organs cannot usurp or interfere in the exercise of each other's functions,[51] nor can one encroach upon the field of the others[52]. This trichotomy of power is so important that it is said to be a 'basic feature of the Constitution',[53] a 'cornerstone of the Constitution,'[54] a 'fundamental principle of the constitutional construct',[55] and 'one of the foundational principles of the Constitution'[56]. In view of this constitutional arrangement of separation of powers between three organs of the State, this Court strongly repelled in Mamukanjan[57] an argument challenging the vires of a law enacted by the legislature on the ground that the law was enacted to undo the effect of a judgment passed by a High Court, thus:

> The argument...is without substance and which if accepted would indeed lead to startling results. It would strike at the very root of the power of Legislature, otherwise competent to legislate on a particular subject, to undertake any remedial or curative legislation after discovery of defect in an existing law as a result of the judgment of a superior Court in exercise of its constitutional jurisdiction. The argument overlooks the fact, that the remedial or curative legislation is also "the end product" of constitutional jurisdiction in the cognate field. The argument if accepted, would also seek to throw into serious disarray the pivotal arrangement in the Constitution regarding the division of sovereign power of the State among its principal organs; namely, the executive, the Legislature and the judiciary each being the master in its own assigned field under the Constitution.

(Emphasis added)

With great respect, I would submit that the above observations of the majority, in the words used in Mamukanjan, 'throw into serious disarray the pivotal arrangement in the Constitution regarding the division of sovereign power of the State among its principal organs'.

21. Although after explaining that the main premise of the majority judgment that the elected holders of public offices are not triable either under the P.C.A. or under the P.P.C. for the offence of corruption and corrupt practices is, in my humble opinion, not correct, it is not necessary to discuss the other related NAB

amendments that have also been declared ultra vires the Constitution by the majority. Yet, I find it appropriate to briefly discuss such amendments.

(ii)-A No substantial effect of omission of Section 14 of the NAB Ordinance

22. The omission of Section 14 of the NAB Ordinance has made no substantial effect in view of the provisions of Article 122 of the Qanun-e-Shahadat 1984. The omitted Section 14 of the NAB Ordinance provides inter alia that in a trial of an offence punishable under Section 9(a)(v) of the NAB Ordinance, if the fact is proved that the accused is in possession of assets or pecuniary resources disproportionate to his known source of income, the Court shall presume, unless the contrary is proved, that the accused person is guilty of the offence of corruption and corrupt practices. The majority judgment has held that the omission of Section 14(c), along with the change made in Section 9(a)(v), might appear innocuous in nature but their effect both individually and collectively has actually rendered the offence of corruption and corrupt practices pointless in the category of assets beyond means, and if accused persons cannot be held to account for owning or possessing assets beyond their means, the natural corollary will be that public assets and wealth will become irrecoverable which would encourage further corruption.[58] With respect, I would say that no such effect has occurred by the omission of Section 14 from the NAB Ordinance.

23. The different clauses of the omitted Section 14 of the NAB Ordinance are actually the descriptive instances of the applicability of the principle of "evidential burden"[59] enshrined in Article 122 of the Qanun-e-Shahadat 1984 (formerly Section 106 of the Evidence Act 1872), which provides:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

The illustrations of Article 122 of the Qanun-e-Shahadat are also quite instructive to understand the scope thereof, which are as follows:

> (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
>
> (b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

Clauses (a), (b) and (d) of the omitted Section 14 of the NAB Ordinance relate to the intention of the accused other than that which the character and circumstances of the act proved against him by the prosecution suggest. These clauses are, therefore, merely descriptive instances of the applicability of Article 122 read with its illustration (a) of the Qanun-e-Shahadat. And clause (c) of the omitted Section 14 of the NAB Ordinance that relates to possessing assets disproportionate to known sources of income is the descriptive instance of the applicability of Article 122 read with its illustration (b) of the Qanun-e-Shahadat. That being the legal position, this Court in Mazharul Haq[60] by referring to Rehmat[61] (wherein the scope

of Section 106 of the Evidence Act, now Article 122 of the Qanun-e-Shahadat, had been explained) held:

> [T]he ordinary rule that applies to criminal trials, viz., that the onus lies on the prosecution to prove the guilt of the accused, is not in any way modified by the rule of evidence contained in this section [14 of the NAB Ordinance] which cannot be used to make up for the inability of the prosecution to produce evidence of circumstances necessary to prove the guilt of the accused. It is only in cases where the facts proved by the evidence give rise to a reasonable inference of guilt unless the same is rebutted, that such inference can be negative[d] by proof of some fact which, in its nature, can only be within the special knowledge of the accused.
>
> (Emphasis added)

Also in Hashim Babar[62] referred to in the majority judgment, this legal position was reiterated, thus:

> It is also settled principle of law that the initial burden of proof [legal burden] is on the prosecution to establish the possession of properties by an accused disproportionate to his known sources of income to prove the charge of corruption and corrupt practices under NAB Ordinance, 1999 and once this burden is satisfactorily discharged, onus [evidential burden] is shifted to the accused to prove the contrary and give satisfactory account of holding the properties...

Therefore, in view of the provisions of Article 122 of the Qanun-e-Shahadat, the omission of Section 14 from the NAB Ordinance by the challenged amendments does not have any substantial effect. Notwithstanding such an innocuous effect, the change in the rules of evidence squarely falls within the scope of the legislative competence of the Parliament under Article 142(b) of the Constitution and unless such change offends any of the fundamental rights, it is not justiciable in courts.

(ii)-B No substantial effect of addition of words "through corrupt and dishonest means" in section 9(a)(v) of the NAB Ordinance

24. Similar is the position with the addition of words "through corrupt and dishonest means" by the challenged amendments in Section 9(a)(v) of the NAB Ordinance: It also has no substantial effect on the mode of proving the offence of unaccounted assets possessed by a holder of public office beyond his known sources of income; as when the prosecution succeeds in proving that the particular assets of the accused are disproportionate to his known sources of income (legal means) and are thus acquired through some corrupt and dishonest means, the burden of proving the "fair and honest means" whereby the accused claims to have acquired the same, being within his knowledge, are to be proved by him as per provisions of Article 122, read with its illustration (b), of the Qanun-e-Shahadat.

(ii)-C Constitutionality of other amendments

25. The majority has declared ultra vires the Constitution the following amendments also: (i) the addition of Explanation II to Section 9(v), which provides

that for the purpose of calculation of movable assets, the sum total of credit entries of bank account shall not be treated as an asset but rather the bank balance of an account on the date of initiation of inquiry may be treated as a movable asset and that a banking transaction shall not be treated as an asset unless there is evidence of creation of corresponding asset through that transaction; (ii) the omission of clause (g) of Section 21, which omission has made applicable the provisions of the Qanun-e-Shahadat to documents or any other material transferred to Pakistan by a Foreign Government in legal proceedings under the NAB Ordinance; and (iii) and the addition of second proviso to Section 25(b), which provides that in case of failure of accused to make payment in accordance with the plea bargain agreement approved by the Court, the agreement of plea bargain shall become inoperative to the rights of the parties immediately. With great respect, I would say that in declaring these amendments as ultra vires the Constitution, the majority has not explained how they infringe any of the fundamental rights or any other provision of the Constitution, nor could the learned counsel for the petitioner point out in his arguments any such infringement. These amendments being related to "criminal law, criminal procedure and evidence" fall within the legislative competence of the Parliament as per Article 142(b) of the Constitution and in no way take away or abridge any of the fundamental rights in terms of Article 8(2) of the Constitution.

(iii) Challenged amendments (law made by the Parliament) do not take away or abridge any of the fundamental rights

26. Despite my repeated questions during the prolonged hearings of the present case, the learned counsel for the petitioner could not pinpoint which of the fundamental rights guaranteed by the Constitution has either been "taken away" or "abridged" by the Parliament by making the challenged NAB Amendment Acts. Needless to mention that as per Article 8(2) of the Constitution, the Parliament cannot make any law which "takes away or abridges" the fundamental rights conferred by Chapter 1 of Part II of the Constitution (Articles 9-28) and if it does so a High Court under Article 199 and this Court under Article 184(3) of the Constitution can declare it to have been made without lawful authority (ultra vires) and of no legal effect (void).

27. The learned counsel for the petitioner attempted to establish that the challenged amendments have abridged the fundamental rights of the people of Pakistan to life (Art. 9), dignity (Art. 14), property (Art. 24) and equality (Art. 25). His argument was quite circuitous: that the challenged amendments have deprived the people of Pakistan form holding accountable through criminal prosecution their elected representatives for committing breach of trust with regard to public money and property; that the challenged amendments operate to bring to halt or abort the criminal prosecution of the holders of public offices for offences involving embezzlement of public money and property; that the challenged amendments have excluded certain acts of holders of public offices from the definition of the offences of corruption and corrupt practices and have made the proof of others impossible; that in absence of a strong accountability law, the holders of public offices would continue to indulge in loot and plunder of public money and property which were to be used for the welfare of the people of Pakistan in providing the basic necessities of life, such as, health and education facilities, etc.; that the challenged

amendments have thus deprived the people of Pakistan from their fundamental rights to life, dignity, property and equality.

28. This argument of the learned counsel for the petitioner have prevailed with the majority in holding that the blanket immunity granted to the elected holders of public offices offends Articles 9, 14, 23 and 24 of the Constitution because it permits and encourages the squandering of public assets and wealth by elected holders of public office as there is no forum for their accountability. And this in turn, according to the majority, affects the economic well-being of the State and ultimately the quality and dignity of the people's lives because as more resources are diverted towards illegal activities, less resources remain for the provision of essential services to the people such as health facilities, education institutes and basic infrastructure, etc.[63]

29. With respect, I am completely at a loss to understand the correlation of the claimed right to the accountability of the elected representatives through criminal prosecution with fundamental rights to life (Art. 9), dignity (Art. 14), property (Art. 24) and equality (Art. 25). The Constitution by itself provides only one mode to hold the elected representatives accountable, that is, by exercising the right of vote in the election. The mode of holding the elected representatives accountable for the offences of corruption and corrupt practices through criminal prosecution has not been provided by the Constitution but by the sub-constitutional laws - the P.P.C., the P.C.A. and the NAB Ordinance. If Parliament can enact these laws in the exercise of its ordinary legislative power, it can surely amend them in the exercise of the same legislative power. The argument cannot be acceded to that Parliament after enacting these laws has no power to amend, modify or repeal them.

Doctrines of exhaustion and functus officio, not applicable to legislative powers

30. 'What Parliament has done, Parliament can undo.'[64] The legislative power of Parliament does not exhaust by enactment of any law nor does Parliament become functus officio by making a law, on a particular subject. The doctrines of exhaustion and functus officio are not applicable to legislative powers.[65] A legislature that has made any law is competent, as enunciated in Asfandyar,[66] to change, annul, re-frame or add to that law. Even the legislature of today cannot enact a law, as

held in Imran Tiwana,[67] whereby the powers of a future legislature or of its own to amend a law are curtailed. Therefore, if Parliament can

enact the NAB Ordinance, it can also repeal the entire law or amend the same.

31. Further, holding a right to be included in or to be an integral part of a fundamental right guaranteed in the Constitution, is a very serious matter that has the effect of curtailing the legislative powers of Parliament in terms of Article 8(2) of the Constitution. This matter, therefore, demands a thorough and in-depth analysis of the relation of the claimed right with the fundamental right guaranteed in the Constitution, on the basis of an objective criterion. With great respect, I would say that the majority has assumed the right to accountability of the elected holders of public offices through criminal prosecution as included in the

fundamental rights to life, dignity and property guaranteed by Articles 9, 14 and 24 of the Constitution, without making any discussion for establishing its close relationship of such an extent with those fundamental rights that makes this right to be an integral part of them.

32. No doubt, the fundamental rights guaranteed in the Constitution, an organic instrument, are not capable of precise or permanent definition delineating their meaning and scope for all times to come. With the passage of time, changes occur in the political, social and economic conditions of the society, which requires re-evaluation of their meaning and scope in consonance with the changed conditions. Therefore, keeping in view the prevailing socio-economic and politico-cultural values and ideals of the society, the courts are to construe the fundamental rights guaranteed in the Constitution with a progressive, liberal and dynamic approach.[68] But this does not mean that the judges are at liberty to give any artificial meaning to the words and expressions used in the provisions of the fundamental rights, on the basis of their subjective ideological considerations. The progressive, liberal and dynamic approach in construing fundamental rights guaranteed in the Constitution must be guided by an objective criterion, not by subjective inclination.

Objective criterion for recognizing new rights as fundamental rights

33. In this regard, the objective criterion, as articulated by Justice Bhagwati,[69] is to see whether the claimed right is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right. A right is an integral part of a named fundamental right which gives, in the words of Justice Douglas,[70] "life and substance" to the named fundamental right. Further, the question whether a State action (legislative or executive) constitutes an infringement of a fundamental right is determined by examining its "direct and inevitable effect" on the fundamental right.[71]

34. The learned counsel for the petitioner could not explain how the right to accountability of the elected holders of public offices through criminal prosecution under the NAB Ordinance is an integral part of the fundamental rights to life, dignity, property and equality or how it partakes of the same basic nature and character as the said fundamental rights so that the exercise of such right is in reality and substance nothing but an instance of the exercise of these fundamental rights. Nor could he establish that the "direct and inevitable effect" of the challenged amendments constitutes an infringement of these fundamental rights. The "effect" of the challenged amendments on these fundamental rights portrayed by him is so "remote and uncertain" that if such effect is accepted as an infringement of the fundamental rights then there would hardly be left any space and scope for Parliament to make laws on any subject; as all laws enacted by Parliament would "ultimately" reach any of the fundamental rights, particularly rights to life or property, in one way or the other through such a long winding conjectural path of farfetched "in turn" effects. The acceptance of "remote and uncertain effect" on a fundamental right as an infringement of that right, I am

afraid, would thus reduce to naught the principle of trichotomy of power which is, as aforesaid, a 'basic feature of the Constitution', a 'cornerstone of the Constitution,' a 'fundamental principle of the constitutional construct', and 'one of the foundational principles of the Constitution'. Reference by the learned counsel for the petitioner and reliance of the majority on the cases of Corruption in Hajj Arrangements[72] and Haris Steel Industries,[73] submitted with respect, is misplaced as the executive actions impugned therein had a "direct and inevitable effect", not "remote and uncertain effect", on the fundamental rights of the people of Pakistan.

Conclusion: Petition is meritless

35. As discussed above, the learned counsel for the petitioner has utterly failed to clearly establish beyond any reasonable doubt that the challenged amendments in the NAB Ordinance are constitutionally invalid on the touchstone of "taking away" or "abridging" any of the fundamental rights, in terms of Article 8(2) of the Constitution. I find the petition meritless and therefore dismiss it.

Locus standi of the petitioner

36. Before parting with this opinion, I want to bring on record my reservations on the locus standi of a parliamentarian to challenge the constitutional validity of an Act of Parliament. Parliament is a constitutional body, but being comprised of the chosen representatives of the people of Pakistan it attains the status of a prime constitutional body. Any action made or decision taken by the majority of a constitutional body is taken to be and treated as an action or decision of that body as a whole comprising of all its members, not only of those who voted for that action or decision, such as a decision made by the majority of a Cabinet of Ministers, the majority of a Bench of this Court or of all Judges in an administrative matter, the majority of the Judicial Commission of Pakistan or the majority of the Supreme Judicial Council, etc. Can any member of these constitutional bodies who was in the minority in making that decision challenge the validity of that decision in court? Not, in my opinion. The principle that decisions taken by a majority of members in a constitutional body (like a parliament or legislature) usually cannot be directly challenged in court by those in the minority is rooted in the doctrine of parliamentary sovereignty and the separation of powers. There is a clear division between the legislative, executive and judiciary branches. This division ensures that each branch can function independently without undue interference from the others. If the judiciary could easily overturn majority decisions within a legislative body based solely on the objections of the minority, it would disrupt this balance and infringe on the independence of the legislative process. The principle of parliamentary sovereignty holds that the decisions of the Parliament, when made according to its rules and procedures, are supreme. This means that courts cannot typically interfere with the internal workings or decisions of the Parliament. Democratic systems are often built on the principle of majority

rule. This ensures that decisions reflect the will of the majority while still respecting the

rights of the minority. Allowing minority members to easily challenge majority decisions would undermine this fundamental democratic principle.

37. The majority has referred to and relied upon the case of Ashraf Tiwana[74] to repel the objection as to the locus standi of the petitioner, wherein this Court held that the exercise of jurisdiction under Article 184(3) of the Constitution is not dependent on the existence of a petitioner. But in doing so, the majority has missed the point that Ashraf Tiwana was decided before the decision of a five-member Bench of this Court in S.M.C. No.4/2021,[75] holding inter alia that the Chief Justice of Pakistan is the sole authority by and through whom the jurisdiction of this Court under Article 184(3) of the Constitution can be invoked suo motu, i.e., without the "existence of a petitioner". After this decision in S.M.C. No.4/2021, the question of locus standi of a petitioner cannot so easily be brushed aside. However, as I have

found this petition even otherwise meritless, I leave these questions for full consideration and authoritative decision in any other appropriate case.

Judges of the constitutional courts and Members of the Armed Forces are accountable under the NAB Ordinance and the PCA

38. This case was heard on over 50 dates of hearing and during these prolonged hearings a question was also raised as to whether the judges of the constitutional court and the members of the Armed Forces enjoy exemption from the NAB Ordinance. I find that the generally professed opinion that members of the Armed Forces and the judges of the constitutional courts are not triable under the anti-corruption criminal laws of the land, requires some clarification. To maintain the said opinion, the reference is usually made to the case of Asfandyar[76]. This Court in Asfandyar observed that the non-applicability of the NAB Ordinance to the members of the Armed Forces and the judges of the Superior Courts is not discriminatory as they are held accountable under the Army Act 1952 and under Article 209 of the Constitution respectively. It appears that to secure the independence of these important national institutions, the Court made this observation in the context that if a member of the Armed Forces or a judge of a Superior Court is alleged to` have committed an offence of corruption and corrupt practices, he is at first to be proceeded against by his departmental authority; once he is found guilty of such offence by his departmental authority and is removed from his official position, only then can he be investigated and tried under the anti-corruption criminal laws of the land, i.e., the NAB Ordinance or the PCA as the case may be. If we do not read and understand the observations made by the Court in Asfandyar in this way, the legal position would be clearly hit by the basic constitutional value and the non-negotiable fundamental right of equality before law. The other holders of public offices, in addition to facing the civil consequences of their corruption and corrupt practices, are to suffer criminal punishment of undergoing the sentence of imprisonment and the forfeiture of the unaccounted-for assets, while the members of the Armed Forces and the judges of the constitutional courts would go scot-free in this regard. After removal from the official position,

they would be set free to enjoy the assets accumulated by them through corrupt means. Such reading and understanding of the observation of the Court would allow the members of the Armed Forces and the judges of the constitutional courts to be unjustly enriched and then allowed to retain this unlawful enrichment without any accountability, this would make

the members of the Armed forces and the judges of the constitutional courts untouchable and above the law; any such reading would be reprehensible and revolting to the conscience of the people of Pakistan and bring the Court into serious disrepute. We must, therefore, strongly shun the above generally professed opinion and be clear that members of Armed Forces and the judges of the constitutional courts are fully liable under the NAB Ordinance, like any other public servant of Pakistan.

Sd/-
Judge

MWA/I-11/SC Petition allowed.