IN THE SUPREME COURT OF PAKISTAN

(Advisory Jurisdiction)

Present

Mr.Justice Iftikhar Muhammad Chaudhry, CJ.
Mr.Justice Javed Iqbal
Mr.Justice Abdul Hameed Dogar
Mr.Justice Sardar Muhammad Raza Khan
Mr.Justice Muhammad Nawaz Abbasi
Mr.Justice Faqir Muhammad Khokhar
Mr.Justice Mian Shakirullah Jan
Mr.Justice M. Javed Buttar
Mr.Justice Saiyed Saeed Ashhad

REFERENCE NO. 2 OF 2005

Reference by the President of Pakistan under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973.

For the President	:	*Mr. Makhdoom Ali Khan,* *Attorney General for Pakistan.* *Raja Muhammad Irshad, Dy. Att: Gen.* *Mr. Nasir Saeed Sheikh, Dy. Att: Gen.* *Ms. Nahida Mehboob Ellahi, Dy: Att: Gen.* *Mr. Faisal H. Naqvi, Advocate.* *Mr. Uzair Karamat Bhandari, Advocate.* *Mr. Khurram M. Hashmi, Advocate.* *Mr. M.S. Khattak, AOR.*
For the Government of NWFP:		*Mr. Khalid Anwar, Sr. ASC.* *Haji M.A. Qayyum Mazhar, AOR.* *assisted by* *Mr. Muneeb Akhtar, Advocate.* *Mr. Bilal Shaukat, Advocate.* *Mr. Younas Tanoli, AG NWFP.* *Pir Liaqat Ali Shah, Addl: AG NWFP.*
On Court notice	:	*Mr. Aftab Iqbal Chaudhry,* *Advocate General (Punjab).* *Mrs. Afshan Ghazanfar Asstt: AG(Pb.)* *Syed Sajjad Hussain Shah, Ass: AG (Pb).* *Dr. Qazi Khalid Ali, Addl: AG Sindh.* *Mr. Salah-ud-Din Mengal, AG (Balochistan)*
Dates of hearing	:	*1st, 2nd, 3rd, and 4th August, 2005.*

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OPINION

IFTIKHAR MUHAMMAD CHAUDHRY, CJ. – *The President of Pakistan has referred the following questions of law for opinion of this Court under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution):-*

> *"i) Whether the Hisba Bill or any of its provisions would be constitutionally invalid if enacted?*
>
> *ii) Whether the Hisba Bill or any of its provisions, would, if enacted; be violative of the fundamental rights guaranteed in Part-II, Chapter 1 of the constitution, including but not limited to Articles, 9, 14, 16 to 20, 22 and 25 thereof?*
>
> *iii) Whether the Hisba Bill or any of its provisions would, if enacted, be violative of Articles 2A, 4, 203G, 212, 229 and 230 of the Constitution?*
>
> *iv) Whether the enactment of the Hisba Bill would encroach on an occupied field, violative of the Constitution by creating a parallel judicial system, undermine judicial independence and deny citizens their right of access to justice?*
>
> *v) Whether the enactment of the Hisba Bill would violate the principle of separation of powers enshrined in the Constitution?*
>
> *vi) Whether the Hisba Bill, and in particular Sections 10 and 23 thereof, is unconstitutionally overbroad and vague and suffers from excessive delegation?*
>
> *vii) If the answer to any one or more of the above questions is in the affirmative, whether the Governor, NWFP is obliged to sign into law the Hisba Bill passed by the NWFP Assembly?"*

2. Precisely stated, the circumstances which necessitated the seeking of opinion from this Court by the President of Pakistan, are that on 19th June, 2003, a draft Bill titled "HISBA BILL" was submitted under the N.W.F.P Rules of Business, 1985, to the Governor of NWFP for his approval prior to its presentation before the N.W.F.P Assembly. The Governor returned the draft bill to the

N.W.F.P Government (hereinafter referred to as the Provincial Government) on 26th June, 2003, with the advice that before moving it for leave to introduce, it may be appropriate, inter alia, to take the following into consideration:-

(i) *It is an established principle that legislation should be precise, clear and unambiguous so that the legitimate rights of the citizens are protected from the abuse or excess of powers vested in an authority. The draft bill in its present form is vague, more particularly the powers envisaged to be vested in the proposed Mohtasib. This lack of clarity and precision could lead to unnecessary and unlawful infringement of the rights of the citizens besides intrusion in the realm of such areas of private morality which may neither be desirable nor just and fair. Moreover, terms used in the draft Bill need to be clearly defined, such as, inter-alia, un-Islamic social etiquettes, Islamic moral values, respect and etiquettes for prayers etc.*

(ii) *Islam is indeed a complete code of life and any legislation in the name of Islam has to be exercised with caution and utmost care because if the powers thereunder are abused it inevitably damages the image of a dynamic religion. The draft Bill envisages to give wide discretionary powers to the proposed Mohtasib, particularly in section 23 thereof, however the powers have been vaguely worded. Such wide, vague and loosely worded/drafted legislation will inevitably cause immense difficulties for the citizens besides jeopardizing their civil liberties, privacy and constitutional rights.*

(iii) *The EXPLANATION to sub-section (iii) of section 2 of the proposed Bill categorically points out that this law would be invoked, when no other legal, judicial or administrative remedy is available. Contrary to it, five cases mentioned in sub-section (v) of Section 2 and various sub-sections of Section 9 are dealt by comprehensive Efficiency & Disciplinary laws/rules, NAB Ordinance and other punitive laws/rules.*

(iv) *There are valid and enforced laws relating to most of the powers mentioned in section 23 of the draft Bill. All such laws, inter-alia, relating to employment of children, Ehtaram-e-Ramazan, hoarding and black marketing, prohibition of wasteful expenditure in marriages, weights and measures, prevention of cruelty to animals, gambling, regulation of loudspeakers, vagrancy, price control and prevention of profiteering and many others are not only in existence and enforced by various institutions and authorities are provided there-under for administering these laws and the expenditure for which is paid by the exchequer. There is a need to examine all the laws, which are already in existence, and to make the respective executing authorities/ agencies more effective and accountable rather than creating parallel institutions and authorities in haste and vesting them with unbridled and vague powers. This would neither be in the interest of good governance or the citizens. Moreover, it will be an unnecessary burden on the already strained exchequer of the province.*

(v) *The draft bill proposes to touch upon certain laws which fall under the domain of Federal Legislation, inter-alia the Police order. Section 2 sub-section (iii) read with Section 20 of this proposed Bill refers to creation of Hisba force which is contrary to the Police Ordinance, 2002. Any change/ amendment in this Order would require permission from the President of Pakistan as it is included in Schedule-VI of the 1973 Constitution of the Islamic Republic of Pakistan.*

(vi) *Prior approval of the President would be required for extension of the proposed law to Provincially Administered Tribal Areas (PATA). It is therefore advisable to consult the Federal Government through Law and Justice Division and Interior Division before taking further action on the proposed bill.*

(vii) *Vide sub-section (16) of Section 2 of the proposed Bill, the definition of journalist is very vague. It accepts any person as a journalist who is MA (Journalism) or has attachment with journalism for ten years irrespective of the fact whether he holds journalism degree or any other such equivalent qualification.*

(viii) *The proposed appointment and removal of the Mohtasib and the procedure for conducting inquiries and investigations also need to be reviewed so as to make the respective procedures transparent and more accountable.*

(ix) *The matter being of a sensitive and important nature, instead of legislating in a haste, as a first stage the treasury benches may consider seeking the opinion of the Council of Islamic Ideology for the purposes of Article 230*

> *of the Constitution in respect of all the existing laws relating to the proposed powers enumerated in the draft Bill and to seek recommendations as to the measures of bringing such existing laws in conformity with the injunctions of Islam. In the second stage, clear precise and unambiguous legislation may be proposed in relation to areas/issues, which are not covered in the existing laws. It would also require taking into consideration prudent and diligent regard vis-à-vis the exchequer."*

3. The Provincial Government in compliance with the above advice of the Governor, agreed to refer the matter to the Council of Islamic Ideology (hereinafter referred to as CII). The CII rendered its opinion and pointed out inherent defects in the proposed legislation and specifically stated that the draft Hisba Bill violated a number of constitutional provisions and was capable of being exploited for political motives. The opinion of the Council was communicated to the Provincial Government on 18th September, 2004. The Provincial Government, without taking into consideration the opinion of the CII, tabled the draft Hisba Bill in the N.W.F.P Provincial Assembly on 11th July, 2005 and got it approved. The Governor of NWFP, on 11th July, 2005, requested the Prime Minister to make a request to the President of Pakistan for making a Reference to this Court for its opinion on the constitutionality of the draft Hisba Bill under Article 186 of the Constitution as serious questions of law of public importance are involved in the matter.

4. In the light of the request of the Governor and the attending controversy, the Hisba Bill which generated serious and substantial questions of constitutionality of fundamental human rights, the Prime Minister of Pakistan was pleased to advise the President of Pakistan to seek opinion of this Court and refer the above questions of law of public importance for opinion on the constitutionality of the draft Hisba Bill. As this Court is required to give its opinion about the constitutionality of the draft Hisba Bill, therefore, it is deemed appropriate to reproduce herein-below the following provisions from the draft Hisba Bill:-

> *" A BILL to provide for the establishment of the institution of Hisba in the North-West Frontier Province.*
>
> *WHEREAS sovereignty over the entire Universe belongs to Almighty Allah alone and the authority to be exercised by the people of Pakistan through their chosen representatives within the limits prescribed by Him is a sacred trust;*
>
> *AND WHEREAS implementation of Islamic way of life revolves around Amer-bil-Maroof and Nahi-unal-Munkir and to achieve this objective it is necessary apart from other steps to establish an institution of accountability which could keep a watch on securing legitimate rights of various classes of the society, including females, minorities and children and to protect them from emerging evils and injustices in the society;*
>
> *AND WHERE it is further necessary to extend the jurisdiction of Mohtasib to Government's administration and offices in order to have a check upon injustices, abuse of powers and other similar excesses;*
>
> *It is hereby enacted as follows :*
>
> ***"1. .Short title and commencement***
>
> *(1) This Act may be called the North-West Frontier Province Hisba Act, 2005.*
>
> *(2) It shall extend to whole of the North-West Frontier Province.*
>
> *(3) It shall come into force at once.*
>
> ***2. Definitions.*** *--- In this Act, unless the context otherwise requires,*
>
> *(a) "Agency" means a Department, Commission or any office of Provincial Government, a Corporation or similar other institutions which the Provincial Government may have established or which may be working under its control, the Secretariat of the Provincial Assembly of the North West Frontier Province, but does not include the High Court and the Courts working under its administrative control;*

(b) "Amer-bil-Maroof" means fulfilling the obligations of enjoining the good as laid down in Holy Quran and the Sunnah;
(c)…….
(d)…….
(e)…….
(f)…….
(g)…….
(h)…….
(i) "Mal-administration" includes all such decision, processes, recommendations, acts and deficiencies which –

(i) Is contrary to law, rules or regulations or is a departure from established practice or procedure, unless it is bona fide and for valid reasons; or

(ii) Is perverse, arbitrary, unreasonable, unjust, biased, oppressive or discriminatory; or

(iii) Is based on irrelevant grounds; or

(iv) Involves the exercise of powers or the failure or refusal to do so, for corrupt or improper motives, such as bribery, jobbery, favoritism, nepotism and administrative excesses; or

(v) Amounts to negligence, inattention, delay, incompetence, inefficiency and inaptitude in the administration or discharge of duties and responsibilities;

(j)…….

(k) "Nahi-unal-Munkir" means fulfilling the obligations of forbidding the evil as laid down in the Holy Quran and the Sunnah;
(l)…….
(m)…….
(n) "Provincial Advisory Council" means the Council established under this Act;
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(p)…….
(q)…….
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10. <u>Powers and duties of Mohtasib.</u>

The Mohtasib shall, on a written complaint of any person, or on reference from the High Court, the Supreme Court or the Provincial Assembly, or suo motu, shall have the power to-

(a) Enquire into the allegations of mal-administration against any Agency or its employees:

Provided that no Government servant, during his service, shall be entitled, in relation to affairs of his employment, to lodge a complaint with the Mohtasib;

(b) Protect/watch the Islamic values and etiquettes at the provincial level;

(c) Watch the media established by Government or working under the administrative control of Government to ensure that its publications are useful to the purpose of upholding Islamic values;

(d) Forbid persons, Agencies and authorities working under the administrative control of Government to act against shariah and to guide them to good governance;

(e) Formulate such directives and principles, which may help in making the conduct of authorities working under this section to be effective and purposeful;

(f) Extend help to the provincial administration in discharging its functions smoothly and effectively; provided that the Mohtasib shall not interfere in any mater which is sub-judice before a court of competent jurisdiction or which relates to external affairs of Pakistan or the relations or dealings of Pakistan with any foreign State or Government or relates to or is connected with the defence of Pakistan or any part thereof, the Military, Naval and Air Forces of Pakistan or the matters covered by laws relating to these forces;

(g) For the purposes of attaining the objectives of this Act, with particular reference to doing away with the mal-administration and to remove social injustices, take steps for providing facilities of training, study and research; and

(h) Mohtasib shall, in the discharge of his duties and functions, be entitled to engage the services of experts and Consultants with or without remuneration.

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12. <u>Implementation of orders, etc.</u>

(1) On completion of the action in relation to a complaint, the Mohtasib shall have the power to issue directive to the competent officer of the Department concerned for its implementation and may, at the same time, take up such steps as he considers expedient. The concerned Agency within the time limit mentioned in the directive, inform the Mohtasib about the action taken in that behalf, failing which the concerned Agency or competent officer, on the recommendation of the Mohtasib, shall render itself or himself, as the case may be, to the following actions:

(a) One or more actions under the law relating to removal from Service;

(b) In case of non-cooperation with the Mohtasib or his staff during investigation, legal action for interference in smooth functioning of Government.

(c) Where the Mohtasib is satisfied in respect of a complaint under consideration that any functionary of Government has committed a cognizable offence or rendered himself to civil liability, he shall direct the concerned Agency to initiate action as aforesaid in accordance with law.

(2) In case of non-compliance of the directive of the Mohtasib, he shall refer the matter to Government, which shall ensure its compliance and inform the Mohtasib of its compliance.

(3) A report of such non-compliance of the official shall form part of his personal file.

(4) The official concerned shall have the right of representation to the Chief Minister within a period of 30 days from the date of recommendation under sub-section(1).

14. Contempt of Mohtasib .

The Mohtasib shall mutatis mutandis have the same powers which are available to the High Court to punish a person who-

(a) Hinders or becomes a source of hindrance in the smooth proceedings before the Mohtasib or does any act causing difficulties in the completion of such proceedings;

(b) Gives such statement which defames Mohtasib, or any of his officials or representatives;

(c) Acts in a manner which, in relation to proceedings before the Mohtasib, influence the mind of the Mohtasib to take a partial decision; or

(d) Acts in a manner which, under any law for the time being in force, falls within the definition of contempt; provided that any comments made in good faith and in the public interest on any act or on report of the Mohtasib or his employer or representative shall not be treated as contempt.

(2) The person aggrieved against any order of the Mohtasib under sub-section (1) may, within thirty days of such order, appeal in the High Court, which shall be heard by a Division Bench of the said Court.

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23. Special powers of Mohtasib.

Without prejudices to the powers conferred by section 10, the Mohtasib shall have the following powers:-

(i) To monitor adherence of moral values of Islam at pubic places;

(ii) To discourage Tabdhir or extravagance, particularly at the time of marriages and other family functions;

iii) To follow code of Islam in giving dowry;

(iv) To discourage beggary;

(v) To monitor adherence of Islamic values and its respect and regard at the times of 'Iftar" and Taravih';

(vi) To discourage entertainment shows and business transactions at the times of Eideen and Jumma'ah prayers around mosques where such prayers are being held;

(vii) To remove causes of dereliction in performance and proper arrangement of Eidain and Jumu'ah prayers;

(viii) To discourage employment of under-age children;

(ix) To remove unnecessary delay in discharge of civil liability which is not disputed between the parties;

(x) To prevent cruelty to animals;

(xi) To remove causes of negligence in the maintenance of mosques;

(xii) To observe decorum of Islam at the times of Azan and Fard prayers;

(xiii) To prevent misuse of loud-speakers and sectarian speeches in mosques;

(xiv) To discourage un-Islamic and inhuman customs;

(xv) To check the tendency of indecent behaviour at public palaces including harassment of female;

(xvi) To eradicate the deal as profession in 'Taweez', 'Gunda', palmistry, sorcerery, etc;

(xvii) To protect the rights of minorities, particularly to regard the sanctity of their religious places and places where they perform their religious ceremonies;

(xviii) To eliminate un-Islamic traditions which effect the rights of women, particularly taking measures against their murder in the name of 'Ghairat', to remove the tendency of depriving them of their rights of inheritance, to eliminate the tradition of 'sura', and to protect their rights conferred by Shariah and law;

(xix) To monitor weights and measures and eliminate impurity;

(xx) To eliminate artificial price-hike;

(xxi) To protect Government properties;

(xxii) To eliminate bribery from Government Departments/offices;

(xxiii) To incite feelings of service to people at large amongst Government functionaries;

(xxiv) To advise those who are found to be disobedient to their parents;

(xxv) To perform any other function or functions which the Provincial Mohtasib determines from time to time in consultation with the Advisory Council;

(xxvi) To mediate amongst parties and tribes in matters pertaining to murders, attempts to murder and similar other crimes threatening to law and order situation.

(xxvii) To perform any other function/functions which the Provincial Mohtasib determines from time to time in consultation with the Advisory Council.

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25. <u>Restriction on the rights of hearing.</u>

(1) No court or authority shall be competent to question the legal status of the proceedings before a Mohtasib.

(2) No court or authority shall have the power to pass any injunction or any interim or a stay order with regard to any matter under consideration of the Mohtasib.

(3) No suit or legal proceeding shall lie against the Mohtasib or his employees for anything in good faith done or intended to be done.

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28. <u>Offences to be non-cognizable.</u>

(1) Defiance of the order of the concerned Mohtasib in the performance of his duties under section 23 of this Act shall be a non-cognizable offence punishable with

> *imprisonment for a term up to six months and a fine up to two thousand rupees. No court shall take cognizance of an offence under this section, except on a complaint in writing of the Mohtasib or his authorized representative.*
>
> *(2) The offence under sub-section (1) shall be tried by the court in accordance with Code of Criminal Procedure, 1898 (V of 1898) and the order shall be appealable.*
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> ***29……..***
> ***30……..***
> ***31……..***

5. Notices were issued to the Provincial Government of NWFP through Chief Secretary as well as Secretary Assembly, its Advocate General as well as the Advocates Generals of all other Provinces.

6. "Hisba" is an Arabic word, which in the plain language means "to count" or "accountability" or "to prohibit from evil things," as per available literary sources. The Institution of the office of "Hisba" did not exist at the time of Holy Prophet (PBHU) and the Khulafa-e-Rashideen. Initially the office of "Amil al-suk" was created by "Umayyads" to regulate markets. However, later on it was expended into the office of the "Mohtasib" by the "Abbasids." Reference in this behalf may be made to the following:---

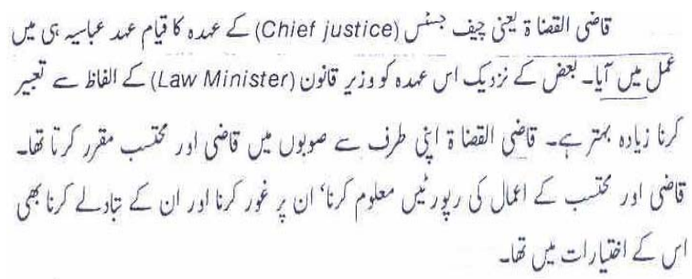
> ***1. <u>An Introduction to Islamic Law "</u>***
> *by Joseph Schacht*
>
> *"……..…The office of the 'inspector of the market' (ayopavouos, in Arabic amil al- suk or sahib al-suk, a literal translation) who had a limited civil and criminal jurisdiction; it was later, under the early 'Abbasids' to develop into the Islamic office of the muhtasib. Similarly, the Muslims took over from Sassanian administration the office of the 'clerk of the court' who became an assistant of the kadi; this was well known to the ancient authors."*
>
> ***2. <u>"A history of Islamic Law "</u>***
> *by N.J Coulson*
>
> *"One particular administrative office taken over by the Umayyad regime was that of the Byzantine market inspector, or agronomos. This official, bearing the equivalent Arabic title of 'amil as-suq, possessed limited powers of jurisdiction*

concerning such things as weights and measures used in the market and petty offences committed there. At a later stage he was entrusted with the peculiarly Islamic function of hisba, or the duty of safeguarding the proper standards of religious morality. Accordingly he now took the title of muhtasib, but still retained the market-place jurisdiction as a legacy of his historical origin."

3. "A History of the Arab People"
by Albert Hourani

"……In the market there was a special official, the muhtasib, who supervised prices, weights and measures, the quality of goods and the conduct of business; his authority was derived from, a verse of the Qur'an which enjoined upon Muslims the duty of 'bidding unto good and rejecting what is disapproved', and in some circumstances he was appointed from among the religious class, but in others from the military……"

4. ***"Islami Riasat Main Mohtasib Ka Kirdar "***
by Dr. M.S. Naz.



قاضی القضاۃ یعنی چیف جسٹس (Chief justice) کے عہدہ کا قیام عہد عباسیہ ہی میں
عمل میں آیا۔ بعض کے نزدیک اس عہدہ کو وزیر قانون (Law Minister) کے الفاظ سے تعبیر
کرنا زیادہ بہتر ہے۔ قاضی القضاۃ اپنی طرف سے صوبوں میں قاضی اور محتسب مقرر کرتا تھا۔
قاضی اور محتسب کے اعمال کی رپورٹیں معلوم کرنا' ان پر غور کرنا اور ان کے تبادلے کرنا بھی
اس کے اختیارات میں تھا۔

*8. To substantiate the above definitions, a good number of books can be quoted including "**the Concept of Administrative Accountability in Islam**" by Dr. Riaz Mehmood, **Urdu Daira Ma'arif-e-Islamia** (Urdu Encyclopedia of Islam) Vol. VIII, published under the auspices of University of Punjab Lahore, "**Ehkamul Sultania"** by Imam-Abul-Hassan Bin Muhammad Bin Habib-e-Baseeri (translated by Maulvi Syed Muhammad Ibrahim), "**Adbul Qazi**" by Dr. Mehmood Ahmed Ghazi, Edarai-e-Tehkekqat-e-Islami, "**Badae-ul-Sana'ay**" by Alama Allauddin Abubakar Bin Sulemani (translated by Prof. Khan Muhammad Chawla) and "**The Concise Encyclopedia of Islam**" by Cyril Glasse. Relevant portion from the last mentioned book is reproduced below:-*

> *"**Muhtasib.** A public functionary whose task, as it has existed since 'Abbasid times, has been that of supervising the merchants' quality and prices. The muhtasib checks and verifies weights and measures and the use of materials in crafts. He gives expert appraisal of the value of cloth, rugs, woven articles brass and copper utensil. These estimates are not binding as a price between buyer and seller, but are indicative of the fair market price. The muhtasib is still found in some traditional markets."*

9. A study of the definitions of "Hisba" from the above books indicates that although it was a very old institution but its inception is not well known. Some of the authors, as is evident from the above definitions, say that in the beginning, the terms "Hisba" and "Mohtasib" were not used but the terms "Sahib al-Suk" or "Amil ul-rusul " [incharge of Trade or Trade administrator/administrator of streets] were used. The word "Sahib ul-Suk" is said to be a translation of Greek term. However, history reveals that the term "Mohtasib" was started to be used instead of "Sahib ul-Suk" during the Khilafat of "Qazi Mamoon-ur-Rashid" and the "Mohtasib" used to look-after the market business in addition to his religious duties, such as to bring reformation in social life. A careful perusal of the documents on the subject, clearly depicts the fact that duties of the "Mohtasib" were to inspect instruments of the scales of weights and measures. These scales were so complicated and different that the peoples could easily deceive each other. In addition to it he had also to keep a vigilant eye over each kind of shortcoming and dishonesty that could be committed during the preparation and sale of commodities. It is also evident from the history books that keeping in view economic conditions of Muslims, the "Mohtasib" used to check prices of the goods but he had no power to determine them. He had also to ensure that construction and repairing of houses and the shops would not endanger the peace of the

*public or cause hurdles in the way of pedestrian and traffic. Streets cleanliness, repair of shelters for commuters and supply and drainage of water were amongst his duties and due to such functions "Mohtasib" in Islamic period used to be considered a City Officer. Unfortunately, at the end of middle ages, with the economic downturn and social crises, the office of "Mohtasib" started loosing its respect. During the era of "Mamlik" sometime the posts of Mohtasib, like other institutions, were grabbed by giving bribes. The buyer of this office reimbursed this money by imposing illegal levies. Eventually, fighting started to occur among the contenders of this post. Sometime this post was given to an Army Officer in reward to his performance or from strategic point of view. This office remained established in Muslim countries till the inception of 20th Century. It is most important to note that the office of "Mohtasib" effectively functioned, even when there was no codified law and there were no regular Governments to control the State affairs, to spread virtues and battle against evils as per the comprehensive meanings of the word "Hisba." In this behalf every Muslim can act as "Mohtasib" for himself as well as for others, in view of the Injunction of Holy Quran, (Surah Al-Imran verse 104), translation of which is "**And there must be a section among you to call towards good, to order the right and prevent the bad**." Similarly, Holy Quran in Surah Al-Nisa verse 59 ordained "**O Muslims, obey Allah, His Prophet (PBUH) and those in authority from amongst you.**" Dr. Riaz Mehmood in his book "**the Concept of Administrative Accountability in Islam,**" while taking into consideration both these Injunctions of Holy Quran and dealing with the subject of "Hisba" and "Legislature" (Chapter IX page 173), has opined as follows:-*

> *"……..In the third verse it is emphatically proposed that there must be a body to call to good, to beneficial*

state of affairs, to order good and to check bad. Lastly the men in authority or the men who have been assigned some work, who have been deputed or are engaged in the task of some peremptory nature must be obeyed. So a representative or consultative body has been provided. In Ul-Al-AMR the legislature, the executive and judiciary all are encompassed.

Dr. Sabhi Mehmasani has concluded by referring to many Quranic verses and traditions that Ijma is an admitted and proved source of Islamic law.

So the entity of Shura is established. Hadrat Umer formed a Shura.

It has also been discussed in the preceding chapters that the Holy Prophet (P.B.U.H.) and the rightly guided Caliphs conducted Ihtisab themselves. lhtisab of the public and officials had all along been there. However the nomenclature Muhtasib, appeared in the time of Caliph Mehdi.

The muhtasib and the shura are therefore to consult each other. Hisba and shura may coincide in a single body notwithstanding whatever qualification of piety or fiqh be laid down for them. Muhtasib is a successors wing of the ruler and the legislature i.e. parliament is the successor of shura.

Shura's link as mentioned in the encyclopaedia be reproduced below.

> *"Linked with these tasks was another which has caused modern scholars to stress the view that the traditions of antiquity concerning the councillors of the town were perpetuated in the duties of the Muhtasib."*

The councillor is the representative of the urban electorate at the local councils level. He too is often elected on party basis. The members of the parliament have comparatively larger constituencies. The functions are almost the same. They attend to the small disputes of the voters, redress their complaints and are the overall overseers of public officials. The councillors are also invested with some judicial matters.

The legislators move the bills in parliament keeping in view the problems of their respective areas. The parliament of Pakistan is officially called MAJLIS-I-SHURA.

Thus the members of the parliament (Legislature) themselves act as Muhtasibs in their areas and also advise the rulers.

In all countries where there is parliamentary form of government, the parliament (Legislature) almost acts as the Muhtasib of the executive. The same is the position in Pakistan. The relevant articles of the constitution of Islamic republic of Pakistan be referred in this respect.

*"**Article 9: THE CABINET***

> *1. There shall be a cabinet of ministers with the Prime Minister at its head, to aid and advise the president in the exercise of his functions."*
>
> *4. The cabinet, together with the Minister of State, shall be collectively responsible to the National Assembly."*

There is a bit of difference between the Ombudsman and Hisba, which would be discussed in chapter xi. However their relationship with the Legislature is almost the same. An excerpt from the annual report of Wafaqi Muhtasib of Pakistan, 1992 may be adverted to in this connection.

WAFAQI MOHTASIB VIS-A-VIS THE PARLIAMENT:

> *The institution of Wafaqi Mohtasib was established through a presidential order in 1983 (p.o. of 1983), during the days when the country was under Martial Law. The Ombudsman law thus does not stipulate linkage between this institution and the parliament which has created a contradiction in the context of the world-wide practice in similar institutions. In all the countries of the world, where this institution exists, the Ombudsman is considered to be a Parliamentary watchdog operating in administrative domain on behalf of the Parliament, to which alone he is responsible.*

After the restoration of democracy in Pakistan in 1985, this office has continuously been demanding creation of formal linkage between this institution and the parliament either through a constitutional amendment or by setting up of a Public Administration Committee of the Parliament, on the pattern of Public Accounts Committee but to no effect. All efforts seem to have been wasted.

> *Committee of this nature, would not only act as a liaison between the Mohtasib and the Parliament but would also provide necessary guidance and support to this institution in the performance of its functions in various fields. Matters relating to the Ombudsman institutions like its Annual report, budget proposal and amendments in the law, prudence demands, are required to be scrutinized first by that committee for the purposes of evolving bipartisan consensus before these are placed before the Parliament for consideration.*

10. NWFP Assembly, despite having all functional democratic institutions under the Constitution, intended to establish the institution of "Hisba," as per draft Hisba Bill. Its preamble identifies the following two objects :---

> *"**i)** Whereas implementation of Islamic way of life revolves around Amar-bil-Maroof and Nahi-unal-Munkir and to achieve this object, it is necessary apart from other steps to establish an institution of accountability, which could keep a watch on securing legitimate rights of various classes of the society, including females, minorities and children and to protect them from emerging evils and injustices in the society;*
>
> ***ii)** And whereas it is further necessary to extend the jurisdiction of Mohtasib to Government's administrations and Offices in order to have a check upon injustices, abuse of powers and other similar excesses.*

A careful perusal of above preamble demonstrates that the "Hisba Bill" was drafted to achieve two-fold objectives; one to establish an institution of accountability to fulfil the command of "Amar-bil-Maroof and Nahi-unal-Munkir," as far as personal lives of the different segments of the society are concerned; and second to extend the jurisdiction of "Mohtasib" to official affairs of the Provincial Government. So far as the second part is concerned, its object seems to be inline with the legislation already available on the subject i.e. the Establishment of Office of the Wafaqi

Mohtasib Order 1983, which has been mandated by the Constitution under Item 13 of the Federal Legislative List; Establishment of the Office of Ombudsman for the Province of Balochistan Ordinance, 2001; Punjab Office of the Ombudsman Act, 1997; Establishment of the Office of Ombudsman for the Province of Sindh Act, 1991, respectively. Definition clauses in the "Hisba Bill" and the other laws on the subject, relating to mal-administration in Government offices, are identical in substance.

*11. The concept of Ombudsman has been discussed in a "**Commentary on Ombudsman**" by Mubeen Ahmed Khan, substance whereof is that it is an institution which takes care of a large segment of population or the large number of the residents against the mal-administration of the Government functionaries. Dr. Riaz Mehmood in "**The Concept of Administrative Accountability in Islam"** in chapter Ombudsman: concept and growth: has described that Ombudsman is a person or an office which on complaint or reference or even suo motu can look into administrative actions, omissions and commissions of Government or Semi-Governmental agencies, affecting their subjects in case they in their own place term them a partial, improper, arbitrary, oppressive, harsh, discriminatory, biased, victimizing, or the result of neglect, lethargy or incompetence, and after necessary investigation, offer possible redressal, within statutory spheres. Three renowned scholars on the subject i.e. Geraled E. Caiden, Nail Macdermot and Ake Sandler have detailed the concept of Ombudsman in lucid manner: " a new and to many people, a foreign word is being heard more frequently, it is "Ombudsman." A term that refers to special office or officer to whom people can go with their grievances about the way their business with large anonymous bureaucracies has been handled. The Ombudsman records public complaints, investigates them, and reports the*

findings to the complainants and the organizations investigated. Should any wrong be discovered, it is expected that it will be put right, if not to the complete satisfaction of aggrieved party, then at least better than it would have been without the Ombudsman's intervention. For the public, the Ombudsman is a welcome device for assuring that justice is done and that bureaucracies treat their clients fairly, promptly and respectfully. For bureaucracy, it is an additional failsafe check on their operations, thus it provides additional protection for both public and bureaucracy, something that seems required as the transactions between them multiply."

12. It may be noted that in Pakistan, besides the offices of Ombudsman referred to herein before, at the Federal level, there is yet another office of Tax Ombudsman, established under Ordinance No.XXXV of 2000 titled as Establishment of Office of Federal Tax Ombudsman Ordinance 2000. The objects and the functions of the Tax Ombudsman are to diagnose, investigate, redress and rectify any injustice done to a person through mal-administration by functionaries, administering tax law. Thus, establishment of Federal and Provincial Ombudsman Offices including the Tax Ombudsman, are successfully serving the object of checking mal-administration in Government offices on the complaints of aggrieved persons.

13. The Government of NWFP is legally bound to establish the offices of the Zilla Mohtasibs, under Section 134 read with Third Schedule of the NWFP Local Government Ordinance, 2001. The functions and purposes of the Zilla Mohtasib are enumerated as follows :--

> ***134. Zilla Mohtasib.***
>
> *(1) Without prejudice to the provisions as contained in the North-West Frontier Province end enactment regarding Provincial Mohtasib, in every district there may be a Zilla Mohtasib.*

> *(2) The Zilla Mohtasib shall redress citizen's complaints against mal-administration of the holders of public offices in the local governments within the district.*
>
> ***Explanation***. *For the purpose of this section, the expression 'holders of public office' includes all functionaries of the District Government, Tehsil Municipal Administration, Union Administration, Nazimeen, Naib Nazimeen, District Police Officers and officials, members of the Councils and all officials of the Council.*
>
> *(3) All holders of public offices shall aid and assist the Zilla Mohtasib in exercise of his functions.*
>
> *(4) The Zilla Mohtasib shall hold office for a term of four years and shall be eligible for reappointment for a similar term.*
>
> *(5) The Zilla Mohtasib may resign his office by writing under his hand addressed to the Zilla Council through Naib Zilla Nazim.*
>
> *(6) The manner of selection, appointment, removal, terms and conditions of service, functions, and powers of the Zilla Mohtasib and procedures relating thereto shall be as given in the Third Schedule.*

14. The NWFP Local Government Ordinance, 2001 has constitutional protection as its alteration, repeal or amendment, without the previous sanction of the President, has been prohibited under Article 268 (2) read with Sixth Schedule of the Constitution of the Islamic Republic of Pakistan.

15. A comparative study of the duties and the powers of Zilla Mohtasib appointed under Section 134 of the NWFP Local Government Ordinance, 2001 reveals that the duties assigned to District Mohtasib appointed under Section 17 of Hisba Bill, relating to redress the grievances of the citizens against mal-administration by the holders of the public offices, are identical. Therefore, Provincial Government by creating Offices of " Zilla Mohtasib" under the Hisba Bill is not authorized to delegislate a provision of law having constitutional protection.

16. A cursory perusal of the laws on the establishment of the federal and provincial offices of the Ombudsman, makes it clear that under Section 12(1) of the Hisba Bill enormous powers have been given to "Mohtasib" to check the cases of mal-administration and implementation of its orders. Regarding disobeying the order of "Mohtasib" in terms of Section 10(b),(c) & (d) for non-performance of personal religious obligations by a citizen, the "Mohtasib" is competent to punish him for contempt. He can also lodge a complaint before a Magistrate, if there is 'Khilaf-warzi' of his orders, issued by him under Section 23(1), (2), (3), (5), (6), (7), (12), (14) and (27) of the Hisba Bill, which can entail imprisonment up to a period of six months and fine up to Rs.2000/-. Thus, the "Mohtasib" enjoys dual powers i.e. as an authority, exercising powers of a judicial officer, competent to punish a person for noncompliance of his orders and at the same time, as an investigator and prosecutor; authorized to submit complaint against a citizen, who in his arbitrary wisdom, failed to oblige him by accepting his orders, refraining him from or ordering him to perform certain actions, which in Mohtasib's view are in accordance with Islamic thoughts, etiquettes and faith as believed by him.

17. Plurality of powers at the command of "Mohtasib," as noted above, distinguish him from the "Ombudsman" functioning under other laws, which give Ombudsman an authority only to make recommendatory directions, having no binding effect, as held in ***National Bank of Pakistan v.Wafaqi Mohtasib*** *(NLR 1993 CLJ 171),* ***Tariq Majeed Chaudhry v. Lahore Stock Exchange*** *(PLD 1995 Lahore 572),* ***Pakistan International Airlines Corporation v. Wafaqi Mohtasib*** *(1998 SCMR 841),* ***East West Insurance Company Ltd. V. Wafaqi Mohtasib*** *(1999 MLD 3050),* ***Punjab Agricultural Development and Supplies Corporation v.***

Muhammad Rafiq Khan *(2002 PLC (CS) 1133),* ***Muslim Commercial Bank Ltd. v. Momin Khan*** *(2002 SCMR 958) and* ***Nazir Ahmed Khan v. Pakistan International Airlines Corporation*** *(2004 PLC (CS) 119).*

18. Article 175 (3) of the Constitution mandates that judicial powers of binding nature are not to be conferred upon the Authority exercising Executive powers of an investigator, prosecutor, etc. Section 10 of Hisba Bill, defines powers and duties of "Mohtasib" AND Section 12 prescribes the mode of implementation of orders of "Mohtasib." Section 14 gives him powers of contempt, as are vested under Contempt of Court Act, 1976, etc.

19. It is significant to note that Section 25 had placed a restriction on the rights of hearing. Analysis of this Section suggests that the powers of judicial review against the orders of "Mohtasib" have been excluded against all cannon of justice with an object to enforce broad, uncontrolled, open and oppressive authority of "Mohtasib," knowing well that the Courts functioning under Civil Procedure Code and Constitution had always exercised statutory and inherent jurisdiction to control sweeping powers of an Authority, particularly in penal acts, when considering them vague, arbitrary, unreasonable, etc.

20. Mr.Makhdoom Ali Khan, learned Attorney General contended that the judicial powers are to be exercised by Courts and not by Executives like "Mohtasib" under Hisba Bill. Such exercise of powers deny the right of access to justice to a citizen. [See ***Mehram Ali v. Federation of Pakistan*** *(PLD 1998 SC 1445),* ***Liaquat Hussain v. Federation of Pakistan*** *(PLD 1999 SC 504),* ***Khan Asfandyar Wali v. Federation of Pakistan*** *(PLD 2001 SC 607)].*

21. Learned counsel for Government of NWFP stressed that no judicial powers have been conferred upon the "Mohtasib" by Hisba Bill. The

powers exercisable by "Mohtasib" are corresponding to powers of "Wafaqi Mohtasib" and by the Mohtasibs of Provinces.

22. Section 12 of the Hisba Bill prescribes implementation powers of "Mohtasib," and Article 11 of the President's Order No. 1 of 1983 Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983 [herein after referred to as "Wafaqi Mohtasib Order"] deals with the same subject. Same is the position in Provincial laws dealing with the Offices of Ombudsman. The Federal and Provincial "Mohtasibs" after having considered a matter communicate their findings; (a) to consider the matter further; (b) to modify or cancel the decision, process, recommendations, act or omission; (c) to explain more fully the act or decision in question; (d) to take disciplinary action against any public servant of any agency, under the relevant laws applicable to him; (e) to dispose of the matter or case within a specified time; (f) to take action on its findings and recommendations to improve the working and efficiency of the agency within a specified time; (g) to take any other step specified by the "Mohtasib." Whereas, under Section 12 of the Hisba Bill, "Mohtasib" has been given power ***to issue*** *Hukam-nama [order] to the competent officer of the department concerned for implementation and at the same time he is authorized to take such steps as he considers necessary. On receipt of "Hukam-nama" [order], concerned agency is bound to implement the same, failing which the action against concerned agency or delinquent officer under the law relating to removal from service or any other action, including criminal and civil proceedings, shall be directed by him. Difference between recommendation i.e. advice, proposal, suggestion, counsel, etc. and "Hukam-nama" [order] i.e. command, direction, instruction, etc. is well understood as per their plain dictionary meanings.*

Interpretation of both these expression by following golden rules of construction of statutes, to adhere to the ordinary meanings of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnancy, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further."

23. Learned Attorney General explained that under the Wafaqi Mohtasib Order, an agency has either to comply with recommendations on receipt of communication from "Mohtasib" or to inform him the reasons for not complying with the recommendations. But under Hisba Bill, an agency is bound to obey the "Hukam-nama" [order] of Mohtasib, otherwise it is to be implemented in the manner as liked by him as he has an authority under Section 12(1) to take up such steps as he considers expedient. He apprehended that "Mohtasib" would not be precluded to exercise such powers, under the garb of this authority, arbitrarily and callously for want of any check on him. He argued that it can also give rise to corruption and corrupt practices as historically and in the recent past, the office of Hisba had earned a bad name. In this behalf he invited attention to the references given herein before.

24. Learned Attorney General also contended that the "Hukam-nama" [order] of "Mohtasib" under Section 12(2) of the Hisba Bill is not confined to the extent of an agency in respect of official mal-administration but also is applicable to personal/individual religious rights of the citizens qua powers of "Mohtasib" under Section 10(b), (c) and (d). Whereas, in the Federal Mohtasib law and the laws prevailing on the subject in other Provinces, no such "Hukam-nama" [order] of binding nature can be

issued by the "Mohtasib." In case of non-compliance of "Hukam-nama" [order] of "Mohtasib," within stipulated time, the Officer of agency will expose himself for one or more actions, on recommendations of "Mohtasib" under the law relating to removal from service including facing criminal proceedings, if "Mohtasib" is satisfied that he has committed a cognizable offence and even a civil suit can also be registered against him under Section 12(1)(c) of the Hisba Bill. Surprisingly, against such a binding order of the Mohtasib, a right of appeal has been given to an aggrieved person before the Executive Head of the Province i.e. Chief Minister under Section 12(4) of the Hisba Bill. The official of the agency as an individual, to whom binding "Hukam-nama" [order] has been given, relating to his personal rights, could also face contempt proceedings, under Section 14 of the Hisba Bill. It may be visualized that a binding "Hukam-nama" [order] issued by the Mohtasib, under Section 12(1) has to be obeyed even if it is an unlawful "Hukam-nama" [order], though against illegal orders/unlawful orders, this Court in the case of ***Zahid Akhtar v. Government of Punjab*** *(PLD 1995 SC 530) and* ***Ramesh M. Udeshi v. The State*** *(2005 SCMR 648), has forbidden the Government Officials to implement such orders. Likewise, an individual having different religious standards/values of understanding the Sharia, as per his sect, is not bound to obey "Hukam-nama" [order] of "Mohtasib" but due to unbridled/ unfettered/arbitrary powers of "Mohtasib" he would have no option but to obey it. Thus, such conduct of "Mohtasib" is bound to create 'Fasad' among different sects of Islam, particularly between Sunnis and Ahl-e-Tashees. For exercising powers under Section 10(b) (c) & (d) and for implementation of "Hukam-nama" [order] under Section 12(1) of Hisba Bill, the citizens and "Mohtasib" both are required a lot of preparation,*

otherwise, it would be enough for fueling enormous sectarianism not only in NWFP but also in other parts of the country, including a serious threat to law and order and breaking down of constitutional apparatuses, prevailing in the country as well. The prominent jurists had always emphasized for adherence to rule of law acceptable to all the citizens and no sooner a distinction is created between man to man, in exercise of wide ranged unbalanced and un-Constitutional powers, by a particular individual like "Mohtasib," it will give rise to intolerance in the society as a whole and cause to increase against each other which may endanger peace and tranquility.

18. We are in quite agreement with the contention of learned Attorney General that ***private life, personal thoughts and the individual beliefs of citizens cannot be allowed to be interfered with.*** *The above discussion persuades us to hold that powers of passing order of judicial nature have been conferred upon "Mohtasib," being an Executive Officer, basically appointed under the Hisba Bill, to inquire/investigate into the cases of mal-administration of Government Agencies as well as in respect of the religious/personal affairs of the individuals and at the same time blocking the powers of judicial review by the Civil/Criminal Courts, which are under the protection of the Constitutional law. A right of appeal against a binding "Hukam-nama" [order] of "Mohtasib" has been made available to an Officer of agency before the Chief Minister, who being a political Head and Chief Executive of the Province, ordinarily is not expected to give independent decision. Strangely, against a binding "Hukam-nama" [order] of "Mohtasib" issued by him under Section 10 (b) (c) and (d) a citizen has no remedy and if he fails to obey such "Hukam-nama" [order] of "Mohtasib," he is liable to face contempt proceedings. The Hisba Bill to*

facilitate the citizens could have defined exhaustively number of terms used in Section 10 i.e. Islamic values etiquettes and Sharia, exhaustively, which should have been acceptable to the Muslims of all sects, including Sunnis, Ahl-e-Tashees, Brailvees, etc. but by using ambiguous terms of these expressions, citizens belonging to different sects have been led into absurdity. Admittedly, the Wafaqi Mohtasib has no authority to issue orders of binding nature, while implementing its findings. Under Article 11(2) of Presidential Order 1983, the agency can inform "Mohtasib" about the action taken on his recommendations or the reasons for not complying with the same and in any one of these situations, no action can be contemplated against the officer of the agency.

25. It is important to note that the Federal Mohtasib can only take action of defiance against an agency, if his recommendations are not complied with or no reason has been given to his satisfaction for non-compliance; otherwise he has no power to punish the officer/official of the agency. Moreover, against the recommendations of the Mohtasib, the aggrieved person including the complainant as well as the agency is competent to file a representation before the President, and not before the Prime Minister qua the Hisba Bill, whereas under Section 12 (4) of Hisba Bill, representation is maintainable before the Chief Minister. It is not understandable as to why powers of implementation of orders of Mohtasib, revolve around the Executive functionaries, instead of conferring such powers upon the Head of the Province i.e. the Governor. In the case of ***Shafaatullah Qureshi v. Federation of Pakistan*** *(PLD 2001 SC 142) it is held that the Office of Mohtasib has been created to redress the grievances of the citizens; findings of the "Mohtasib" are of recommendatory nature and not a judgment or decision; performance of*

quasi judicial functions by itself does not confer an authority onto a Court; whether an action is quasi judicial or purely executive, it depends upon the interpretation of the rules and the law, which the authority exercises. Similarly, in ***Mehram Ali****'s case (ibid), it is held that "the Courts/Tribunals which are manned and run by Executive Authorities, without being under the control and supervision of the High Court, in terms of Article 203 of the Constitution, can hardly meet the mandatory requirement of the Constitution." Relevant portion therefrom, is reproduced herein below:--*

(iii) *That our Constitution recognizes only such specific Tribunal to share judicial powers with the above Courts, which have been specifically provided by the Constitution itself Federal Shariat Court (Chapter 3-A of the Constitution), Tribunals under Article 212, Election Tribunals (Article 225). It must follow as a corollary that any Court or Tribunal which is not founded on any of the Articles of the Constitution cannot lawfully share judicial power with the Courts referred to in Articles 175 and 203 of the Constitution.*

(iv) *That in view of Article 203 of the Constitution read with Article 175 thereof the supervision and control over the subordinate judiciary vests in High Courts, which is exclusive in nature, comprehensive in extent and effective in operation.*

(v) *That the hallmark of our Constitution is that it envisages separation of the Judiciary from the Executive (which is founded on the Islamic Judicial System) in order to ensure independence of Judiciary and, therefore, any Court or Tribunal which is not subject to judicial review and administrative control of the High Court and/or the Supreme Court does not fit in with the judicial framework of the Constitution.*

(vi) *That the right of "access to justice to all" is a fundamental right, which right cannot be exercised in the absence of an independent judiciary providing impartial, fair and just adjudicatory framework i.e. judicial hierarchy. The Courts/Tribunals which are manned and run by executive authorities without being under the*

> *control and supervision of the High Court in terms of Article 203 of the Constitution can hardly meet the mandatory requirement of the Constitution.*
>
> *(vii) That the independence of judiciary is inextricably linked and connected with the process of appointment of Judges and the security of their tenure and other terms and conditions.*

26. Above principles of law have been reiterated in ***Liaqat Hussain*** *and* ***Khan Asfand Yar Wali*** *(ibid). Relevant para from the latter judgment is reproduced herein below :-*

> *"192. Section 9(c) read with Section 24(d) of the NAB Ordinance vests the power to release any person, accused of an offence under the NAB Ordinance, in the Chairman NAB, and that too on the basis of any conditions as he may think fit are unwarranted. The powers to set conditions for the release of an accused from custody or detention is a judicial power which ought not to be exercised except by a Court which is established under Article 175 of the Constitution and is subject to the supervisory jurisdiction of the High Court in terms of Articles 202 and 203."*

27. Mr. Khalid Anwar, learned Sr. ASC for Government of NWFP contended that under Section 14 of the Hisba Bill same powers of contempt of Court are available to "Mohtasib" which are being exercised by the Federal Mohtasib under Section 16 of Wafaqi Mohtasib Order, therefore, the authority to punish for contempt of the "Mohtasib" cannot be questioned.

28. In this behalf it may be noted that according to Section 14 of the Hisba Bill, "Mohtasib" enjoys powers to punish for contempt, a person who acts in a manner which under any law for the time being in force falls within the definition of the contempt; provided that any comments, made in good faith and in the public interest, on any act or on report of the "Mohtasib" or his employee or representative, shall not be treated as

contempt. Whereas under Article 16(d) of the Wafaqi Mohtasib Order, the "Mohtasib" has the same powers to punish a person for contempt as the Supreme Court enjoys for its contempt. Under the Contempt of Court Act, 1976, inter alia, a person is said to be guilty of contempt of Court, who disobeys or disregards any order, direction or process of a Court, which he is legally bound to obey. Admittedly, recommendation made by the Wafaqi Mohtasib does not enjoy the status of an order or direction, as discussed herein-above, whereas under Section 12 (1) of the Hisba Bill, the "Mohtasib" seeks the implementation of a "Hukam-nama" [order] of a binding nature, therefore, its disobedience would call for action of contempt of Court. Likewise, under Chapter X of PPC, non-compliance with the recommendations, has not been made punishable as contempt of Court, but disobedience to the order duly promulgated by public servant under Section 188 PPC is punishable. In Section 12 of the Hisba Bill, "Mohtasib" is authorized to issue directives to the competent officer of the department concerned, to implement his "Hukam-nama" [order] and he may take up at the same time, such steps, as he considers appropriate for implementation of "Hukam-nama" [order] as it is of binding nature by its implication, therefore, in exercise of these powers he can also direct to proceed against such persons (both officers of the agency and private citizens) under Section 188 PPC, whereas the Wafaqi Mohtasib in view of the recommendations made by him cannot issue such type of directions. Therefore, on account of the distinction between "Hukam-nama" [order] ***of a binding nature*** *and* ***recommendations of directory nature****, issued by the "Mohtasib" under the Hisba Bill and Federal Ombudsman, under Wafaqi Mohtasib Order, respectively, the action initiated for contempt of Court by the former would be more oppressive. Thus for these reasons, the*

power of contempt of Court conferred upon the "Mohtasib" under the Hisba Bill cannot be equated with that of the Federal Ombudsman.

29. There is yet another interesting aspect of the Hisba Bill namely as per Section 24, the "Mohtasib" with all his staff including Hisba Force shall be deemed to be a Public Servant within the meaning of Section 21 of the Pakistan Penal Code, therefore, in such capacity, after having passed a binding order in exercise of the powers, conferred upon him, under Section 10 with the aid and assistance of Hisba Police, which is provided to him according to Section 26 of the Act to conduct his affairs, he himself would be the strongest functionary to ensure the implementation of his orders, otherwise, any one either being the officer of the agency or an individual would face the extreme consequences, as discussed herein before.

30. By making available Hisba Police to the Mohtasib, another distinction has been created in between the Hisba Bill and the Wafaqi Mohtasib Order. The object of strengthening the arms of the "Mohtasib," under the Hisba Bill, is nothing but to implement his "Hukam-nama" [order] per force, if need be.

31. Learned counsel for the Government of NWFP contended that under Section 2 (h) of the Hisba Bill, definition of Hisba Police has been provided, according to which a police force will be deputed to work for the purposes of this Act. According to him the "Mohtasib" would be exercising the supervisory role and that "Mohtasib" will not go on roaming missions, catching hold of an axe, prosecuting and sending people to jail. He stated that according to his instructions, the Provincial Assembly believes not to arm any one with a general warrant to go and arrest to whom he pleased. It was pointed out to learned counsel that such assurances do not seem to be in consonance with the language as used in the Hisba Bill itself. Besides,

the questions posed by the President in this reference cannot be answered in view of instructions and assurances, whatsoever that may have been received by him from the NWFP Government.

32. On the other hand, learned Attorney General contended that as per Section 10 in general and Section 23 in particular of Hisba Bill, there is great assortment of activity and due to which the "Mohtasib" is authorized to pickup any one and then apply the provisions or put the investigator to work to pin such provision. According to him "Mohtasib" can virtually pickup a person to whom he may not like or select a group of unpopular persons and then look for their offence and that if such powers are allowed to continue to be exercised by an Executive Authority, there would be a great apprehension and danger of abuse of his powers.

33. It may be recalled that before the separation of Judiciary from the Executive, such powers were used by the Police as well as Executive Magistrates and in this conduct this Court had observed in the case of ***Government of Balochistan v. Azizullah Memon*** *(PLD 1993 SC 341) that "one of the modes for blocking the road of free access to justice is to appoint or handover the adjudication of rights and trial of offence in the hands of the Executive Officers." Ultimately, it held that "such provision incorporated in such like legislation shall be declared to be void being in conflict with Articles 9, 25, 175 and 203 of the Constitution." Thus, following the dictum laid down therein, we are of the opinion that the "Mohtasib" under Hisba Bill has been authorized to issue binding "Hukam-nama" [order] to implement the result of his investigation to the officer of the agency, relating to the Government affairs as well as to individuals in respect of their personal religious rights and due to non-compliance of the same, they would have to face penal consequences,*

details of which have been mentioned herein before. Thus, an Executive Authority, by issuing judicial orders of binding nature violates the fundamental right of the citizens enshrined in Articles 9, 25 read with Article 175 and 203 of the Constitution. The "Mohtasib" had not been appointed in accordance with the provision of Article 175 (1) and (2) of the Constitution, therefore, any order of penal nature passed by him against an agency or individual, would be in violation of the right of access to justice and would also tantamount to setting up a parallel judicial system, recognition whereof is not possible within the present constitutional judicial system prevailing in the country.

34. Learned Attorney General contended that the duty of Amar-bil-Maroof and Nahi-unal-Munkir, however, must be performed by the State in accordance with the Constitutional norms and the fundamental rights of the citizens, thus there is no room for the creation of an office of Hisba with penal powers of "Mohtasib" to implement his ***"Hukam-nama"*** *[order]. The "Mohtasib" cannot be vested with the authority to decide in his discretion, whether an act is inconsistent with Islamic morals and etiquettes or not. To substantiate his arguments he referred to :---*

1. ***"A brief on the Hisba Bill"*** *by Javed Ahmed Ghamedi.*
2. ***"Commanding Right and forbidding wrong"*** *by Michael Cook. (relevant at pages 186, 187, 474, 490, 491, 509, 510, 522-524)*
3. ***"Islami Riyasat Main Mohtasib Ka Kirdar"*** *by Dr. M.S. Naz. (relevant at pages 212, 279).*
4. ***"Three Year Report"*** *of Council of Islamic Ideology (1974-1977) (relevant pages 220, 222, 224, 225, 230, 231, 233, 236, 238, 242).*

35. On the other hand learned counsel for the NWFP Government contended that the Hisba Bill had focused mainly on mal-administration in government department/agency, and incidentally in the field of personal conduct on the basis of what is contained in the preamble of the

Constitution of Pakistan. He further stated that Islam is a religion, both for the individual and the society as a whole, being a complete "Deen" and a complete code of life. Therefore, every law promulgated for an individual or for Government Agencies must be in accordance with Islam. He read the definition of "Amar-bil-Maroof-wa-Nahi-unal-Munkir," under Section 2(b) and 2 (k) of the Hisba Bill and stated that as per this definition no powers are being conferred upon the "Mohtasib" except that as per the Quranic obligation, he has to fulfil the obligation of enjoining telling people to do the good and forbid wrong, and to achieve the object, Hisba Police has been deputed with the "Mohtasib" under the law to go and enquire, therefore, the role of "Mohtasib" is "supervisory enquiry role to ask question." He read out different parts of the Hisba Bill to substantiate that the Provincial Assembly has not promulgated it to violate the fundamental rights of the individuals and stated that in view of the simple provisions of the Bill this Court is not bound to answer the reference in affirmative.

36. Islamic jurists are unanimous on the point that except "Sallat" and "Zakat" no other religious obligation stipulated by Islam can be enforced by the State. There is also unanimity that the "Zakat" obligation was seriously enforced through State coercion by Hazrat Abu Bakar and for "Sallat" the only way is through 'Taleem, Tableegh, Talkeen and Targheeb.' Article 2 of the Constitution provides that Islam shall be the State religion of Pakistan. Article 227 of the Constitution stipulates that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in Holly Quran and Sunnah and no law shall be enacted, which is repugnant to such injunctions. Explanation attached thereto, being very important lays down that in the application of this clause to the personal

law of any Muslim sect, the expression 'Quran and Sunnah' shall mean, the 'Quran and Sunnah' as interpreted by that sect. Its sub-Article (2) says that the effect shall be given to the provisions of clause (1) only in the manner provided in that part and according to sub-Article (3) nothing in that part shall affect the personal laws of non-Muslim citizens or their status as citizens.

37. The explanation to Article 227 of the Constitution defining the expression 'Quran and Sunnah' was added by Constitution (Third Amendment) Order, 1980 (P.O. 14 of 1980). Addition of this explanation was considered necessary as there are more than one sect in Islam like Sunnis and Ahl-e-Tashee, etc. It is important to note that there had been remarkable differences between various schools of thought even on common interpretation, like what is the definition of Muslim. Learned Attorney General had referred to report of the Court of Enquiry, constituted under Punjab Act (II) 1954, to inquire into the Punjab Disturbances of 1953 and stated that Ulemas' had no unanimity before the Court of inquiry on the definition of 'Muslim,' because, everyone being a Muslim has his own interpretation of Quran and Sunnah. Therefore, Mohtasib, under the Hisba Bill cannot be empowered to determine in his discretion whether any act is consistent with Islamic moral values and etiquettes or not. A perusal of Section 10 clauses (Bey)(Jeem) and (Dal), shows that the "Mohtasib" has been authorized to protect/watch the Islamic values and etiquettes at the provincial level; watch the media established by Government or working under the administrative control of the Government to ensure that its publications are useful to the purpose of Islamic values; forbid persons, agencies and authorities working under the administrative control of Government to act against Sharia and to guide

them to good governance. Similarly, his powers and duties have been extended by conferring upon him special powers, under Section 23 of the Hisba Bill, which includes ***(1)*** *to monitor adherence of moral values of Islam at public places,* ***(2)*** *to discourage 'Tabdhir' or extravagance, particularly, at the time of marriages and other family functions;* ***(3)*** *to follow code of Islam in giving dowry;* ***(5)*** *to monitor adherence of Islamic values and its respect and regard at the times of 'Iftar' and 'Traveeh';* ***(6)*** *to discourage entertainment shows and business transactions at the times of 'Eidain' and 'Jumma'hs' prayers around mosque, where such prayers are being held;* ***(7)*** *to remove causes of dereliction in performance and proper arrangement of 'Eidain' and 'Jumm'ah' prayers;* ***(12)*** *to observe decorum of Islam at the time of 'Azan' and 'Fard' prayer;* ***(14)*** *to discourage un-Islamic and inhuman customs; and* ***(27)*** *to perform any other function or functions, which the Provincial Mohtasib determines from time to time in consultation with the Advisory Council. Defiance (Khilaf-warzi) of the order of the Mohtasib, in the performance of his duties under Section 23 of the Bill has been made a non-cognizable offence punishable with an imprisonment, for a term up to six months and a fine up to Rs.2000/- as per Section 28 of the Hisba Bill and cognizance will be taken on the complaint of "Mohtasib" or his authorized representative. No Court shall take cognizance of an offence under this Section except on a complaint in writing to "Mohtasib" or its authorized representative and as per sub-Section (2), the offence under Section (1) shall be tried by the Court in accordance with Code of Criminal Procedure, 1898 and the order shall be appealable. It is quite interesting to note that in respect of most of the personal rights of the individual Muslims, an offence has been created, if he/they had done "Khilaf-warzi" of the order passed by him.*

38. Learned Attorney General contended that the provisions of Sections 10, 12, 23 and 28 of the Hisba Bill are vague in nature and particularly, being penal, are liable to be declared un-constitutional. He further stated that such penal provisions must explicitly define the conduct of a criminal and unless it clearly and categorically defines its boundaries, it would be treated as an arbitrary enactment, because the citizens against whom a penal action is proposed, has no notice that on account of what type of conduct he is being charged and has been held responsible for penal consequences. Reference is made to ***Mehram Ali*** *(ibid),* ***Jamat-i-Islami Pakistan v. Federation of Pakistan*** *(PLD 2000 SC 111),* ***Kartar Singh v. State of Punjab*** *([1994] 3 SCC 569)* ***Dick Gragory v. City of Chicago*** *[22 L. Ed. 2d 134],* ***Margarete Papachristou v. City of Jacksonville*** *[31 L. Ed. 2d 110].*

39. He further contended that the State can control the fundamental rights by imposing reasonable restriction, in order to survive the test of Constitutional scrutiny, as it has been held in the case of ***Saiyyid Abul A'la Maudoodi v. Government of West Pakistan*** *(PLD 1964 SC 673),* ***Universal Tobacco Co. v. Pakistan Tobacco Board*** *(1998 CLC 1666),* ***Arshad Mehmood v. Government of Punjab*** *(PLD 2005 SC 193),* ***R. v. Chaulk*** *[1990] 3 SCR 1303 (Canada)],* ***Article 26 and the Employment Equality Bill 1996*** *[1997] 2 IR 321],* ***Article 26 and the Planning and Development Bill 1999*** *[2000 (2) IR 321],* ***Treatise on Constitutional Law*** *by Rotunda [3rd Edition Vol. IV 263-264],* ***Coates v. Cincinnati*** *[29 L.Ed. 2d 214],* ***Kunz v. New York*** *[95 L. Ed. 280].*

40. Mr. Khalid Anwar, learned counsel for Government of NWFP contended:-

a) *That the "Mohtasib" under the 'Hisba Bill' is being appointed keeping in view the concept of*

accountability, therefore, office of the "Mohtasib" is indeed integral to Islam.

He stated that the first "Mohtasib" was the Holy Prophet (PBUH) himself. He quoted that "the Holy Prophet (PBUH) checked the market and found that in a heap of corn, the wet corn had been placed under the dry corn; he said "he who deceives is not from me i.e. my class."

b) *That this reference has been mainly filed, as per its contents, because in 'Hisba Bill' NWFP Assembly has not taken into consideration the recommendations of the CII. According to him a perusal of the report indicates that no recommendations were made in accordance with 'Sharia.'*

c) *That the Hisba Bill is strictly as per the final report of CII, published in 1996 and this report has not been brought before the Court by the Federation intentionally.*

d) *That the Hisba Bill is not unconstitutional, vague and is not a penal law. According to him, it does not suggest any criminal action and the powers have only been given to "Mohtasib" to educate the general public to spend their lives according to injunction of Islam and he has not been authorized to send a person into jail.*

However, he admitted that only those citizens, who commit defiance of the "Mohtasib" order will be liable to prosecution under Section 28 of the Hisba Bill. He stressed that simple disobedience would not make a citizen liable to be punished.

e) *That the framers of Hisba Bill have not acted unconstitutionally by leaving a number of key*

concepts undefined, particularly as these terms are incapable of precise definition. According to him some degree of vagueness if inevitable, particularly with respect to Islamic issues, as Islam is like a vast ocean; those standing on its shore cannot even guess its depth and due to this reason, the framers of the Constitution deliberately did not even define Muslim exhaustively.

f) *That in the modern countries, like United Kingdom, general laws are being framed for anti-social behaviour. He referred to Anti-Social Behviour Order Law.*

g) *That the Hisba Bill is not an unreasonable restriction on fundamental rights. Legislature can make laws, which can place restriction upon personal matters. He quoted example of Muslim Family Laws Ordinance 1961, which controls the right of second marriage of a Muslim.*

h) *That the Hisba Bill is not discriminatory because "Mohtasib" will only decide issues according to the belief of that particular sect. He quoted an example that if "Mohtasib" goes and inquires from a particular individual as to why he is not saying his Zohar prayer; that person may then respond by saying that he belongs to Fiqa Jafria and he will say his "Zoharain" prayer.*

i) *That the "Mohtasib" will not be exercising judicial powers as he will only seek to enforce laws already on the books. For example if an FIR is not being registered, a citizen can approach to the "Mohtasib" who will then direct the SHO to register the FIR. "Mohtasib" can*

only ask Police to act expeditiously and to fulfil its duties; it cannot order them to arrest people.

j) *That the "Mohtasib" has no power with regard to private media organizations.*

41. First of all it may be noted that the recommendations of CII, dated 6th September 2004, were compiled/prepared by one of the members, i.e. Justice (R) Haziq-ul-Khairi. This report was considered by the Council in its 154th meeting, held on 12th/13th August 2004, and finalized after thorough consideration, wherein CII strongly advised against the enactment of the proposed legislation. In the report, it was also notified that the draft Hisba Bill has violated a number of constitutional provisions and was capable of being exploited for political ends. Reference in particular is required to be made to the following para of the above report:----

ادارہ حسبہ کا قیام مجوزہ صورت میں مقاصد شریعت کی تکمیل کی بجائے امر بالمعروف اور نہی عن المنکر کے بارے میں قرآن و سنت کے احکام کو متنازعہ بنانے کا باعث بن سکتا ہے اور مسائل کو حل کرنے کی بجائے مفاسد کا دروازہ کھول سکتا ہے۔ قانون بن جانے کی صورت میں کسی وقت کوئی حکومت بھی اس کو اپنے سیاسی اغراض و مقاصد کے حصول کے لئے غیر منصفانہ طریقے پر استعمال کر سکتی ہے۔

The reference of above para is sufficient to counter the arguments of learned counsel about non-expressing of opinion by the CII in accordance with Article 230 of the Constitution.

42. It is surprising to note that learned counsel for Government of NWFP read some portion from previous report including the final report of 1996 of CII, wherein general recommendations on proposed draft of legislation were made and finally in para- 30, the following five measures were suggested.

i) The institution of Hisba will be established on the pattern of Ombudsman by an Act of Parliament or by the order of the President.

ii) The laws relating to the matters and functions under the jurisdiction of the Hisba will be properly amended to facilitate the working of this Institution.

iii) For the education and guidance of the officials, appointed for the purpose of Hisba, a comprehensive guide book must be compiled and published, preferably by the Islamic Research Institution.

iv) For training courses for the officials to be appointed for this purpose, must be planned and conducted preferably by the Sharia Academy International Islamic University.

v) Courses on the subject of Hasab must be included in Islamic Studies, Law Colleges, Political Science and Civics syllabi and curricula.

43. It is important to note that in 2001, the Ministry of Religious Affairs referred to CII a proposed "Draft Law for the Performance of 'Sallat', Amar-bil-Maroof-wa-Nahi-unal-Munkir, (Establishment of Hisba), Ordinance 2000. This draft was examined by CII in its Annual Report 2000-2001 and submitted its opinion as follows:--

i) The Council recommended that the difference of doctrine among the various Muslim Schools of thoughts must be recognized and the views of one school must not be imposed on others.

ii) Hisba Officials must work on voluntary basis.

iii) Before appointment the Hisba Officials must be properly trained. Necessary training courses must be initiated for this purpose.

iv) The number of Ulemas' in the Hisba Board must be increased in order to ensure representations of the various schools of thoughts.

v) Balance of power and authority among the various officials must be clearly maintained.

vi) The law should be clear about the offences and punishments.

vii) The Ordinance is not clear about Hisba Officials; in some clauses they are defined as volunteers, not receiving any salaries and in others they are designated as public officers.

The above opinion clearly suggests that emphases of the CII was to make the law non-sectarian, free from ambiguities and conflict with other laws. Similarly, in the report dated 6th September 2004, the CII again stressed,

impliedly and expressly on the clarity, non-sectarian and non-conflictual nature of law on Hisba. The NWFP Government instead of showing haste might have studied in depth, all the reports of CII before moving the Bill in Assembly. However, the arguments raised by learned counsel for Government of NWFP that CII in its report dated 6th September 2004 had not made recommendations in terms of Article 230 of the Constitution, seems to be unfounded in view of the above discussion.

44. A perusal of clauses of Section 23, reproduced herein above, of the Hisba Bill, clearly suggest that the Bill is a penal statute. Language employed therein indicates that if citizens disobey the order of the Mohtasib, particularly passed with reference to the clauses of Section 23, noted herein-above, he/they will make him/themselves liable for prosecution.

*45. It is important to note that in English translation, word 'defiance' has been used in Section 28 of Hisba Bill, whereas in its Urdu text, the word 'Khilaf-warzi" i.e. disobedience has been used. As per "**Feroze Sons Urdu-English Dictionary"** (page 333) "Khilaf-warzi karna" means 'to oppose,' 'to disobey' and 'to misbehave.' Thus, reading the provisions of Section 10 clauses (b),(c) and (d) and Section 23 clauses (1), (2), (3), (5), (6), (7), (12), (14), particularly (27), disobedience (Khilaf-warzi) of the order of "Mohtasib" by a citizen entails penal consequences. Admittedly, in Section 10 (b), (c) and (d), expressions 'Islamic values and etiquettes', and 'Sharia' have been used, but without any definition. Similarly, 'Khilaf-warzi' of the order of Mohtasib, regarding clauses incorporated in Section 23, no definition has been provided. Likewise, any other issue, which would fall within the realm of 'Amar-bil-Maroof-wa-Nahi-unal-Munkir' would be*

dealt with under their open ended definitions as per Section 2(b) and 2(k) of Hisba Bill.

46. Essentially, discretionary powers have been conferred upon "Mohtasib" to create a new offence with the consultation of Provincial Advisory Council or whatever the case may be, in exercise of powers under Section 23(27) of the Hisba Bill. The "Mohtasib" being an Executive Officer under Hisba Bill has been authorized to lodge a report before the Court, either himself or through his authorized representative against the citizen, who is guilty of "Khilaf-warzi" (disobedience) of his orders, passed under any of the clauses of Section 23 of the Hisba Bill, referred to herein before. In respect of some of the items noted in Section 23 of the Hisba Bill, substantive laws already exist which have been framed either by the Federation of Pakistan or by Provincial Governments, detail of which is mentioned herein below:--

	Laws already in field:	***Grounds of challenge***
Section 23. Special Powers of Mohtasib.— *Without prejudice to the powers conferred by section 10, and along with the duties of amar bil maroof and nahi unal munkir the Mohtasib shall have the following powers:*	-	-
(i) *To monitor adherence of moral values of Islam at public places;*	*Pakistan Penal Code, 1860 (Sections 295-B, 295-C, 296, 298, 298-A & 298-B).* *Prevention of Gambling Act, 1977.* *NWFP Prevention of Gambling Ordinance, 1978.* *West Pakistan Prohibition of Opium Smoking Ordinance, 1960.*	• *Freedom of Assembly* • *Vague* • *Overbroad* • *No definite legislative guidelines*

	Ehteram-e-Ramazan Ordinance, 1981.	
(ii) *To discourage exhibition of extravagance, particularly at the time of marriages and other family functions;*	*NWFP (Prohibition of Firing and use of Explosive Substance at Marriages and other Ceremonies) Act, 1988.* *Marriage Functions (Prohibition of Ostentatious Display and Wasteful Expenses) Ordinance 2000.*	• *Privacy* • *Freedom of Assembly* • *Vague*
(iii) *To follow code of Islam in giving dowry;*	*Dowry and Bridal Gifts (Restriction) Act, 1976.*	• *Privacy* • *Vague* • *Over broad* • *Suffers from excessive delegation*
(v) *To monitor adherence of Islamic values and its respect and regard at the times of iftar and taravih;*	*Ehteram-e-Ramazan Ordinance, 1981.*	• *Freedom of religion* • *Excessive*
(vi)*To discourage entertainment shows and business transactions at the time of Eidain and Jummah prayers around mosques where such prayers are being held;*	-	• *Freedom of trade and business* • *Vague* • *Suffers from excessive delegation*
(vii) *To remove causes of dereliction in performance and proper arrangement of Eidain and Jummah prayers;*	-	• *Freedom of religion* • *Lacks specificity* • *Lacks proportion*
(xii) *To observe decorum of Islam at the time of Azan and Fard prayers;*	-	• *Freedom of Assembly* • *Freedom of religion* • *Vague* • *Excessive* • *Suffers from excessive delegation*
(xiv) *To discourage un-Islamic and inhuman customs;*	*Code of Criminal Procedure, 1898 (Sections 156A, 156B, 401)* *Pakistan Penal Code 1860 (Sections 310, 310A)*	• *Denial of due process* • *Violative of right to life, privacy, trade, business and profession, free speech, religion and equality.* • *Vague* • *Overbroad* • *Suffers from excessive delegation* • *Disproportionate*
(xxvii) *To perform any other functions which the Provincial Mohtasib determines from time to*	-	• *Vague* • *Overbroad* • *Suffers from excessive delegation*

time in consultation with the Advisory Council;		

47. The perusal of above comparative table suggests that a citizen shall not be prosecuted because of non-violation of the codified penal offences but on account of 'Khilaf-warzi' of the order of "Mohtasib," although with reference to their respective schools of thoughts, they are rightly following the Islamic values and Sharia. Besides, in respect of some of the provisions of the Constitution, they have their own personal laws, according to Muslim Sharia but the "Mohtasib" by curtailing their such rights, shall interfere in their personal liberties as well like under Section 23 clause (1), every Muslim according to his own school of thoughts, has his own moral values.

48. Likewise, the "Mohtasib" would have direct interference/access in the family functions in the garb of discouraging 'Tabdhir' or extravagance at the time of marriages and other family functions. Such exercise of the powers would not only interfere in their personal life, freedom of assembly, liberty, dignity and privacy, which is strictly prohibited in Islam. In this behalf reference may be made to the following passage from ***"Commanding Right and Forbidding Wrong in the Islamic Thought"*** *by Michael Cook :---*

> *"Less directly related to the spectrum of views set out above is concern, with what we would call respect for privacy. There is no single category that corresponds to this in Islamic terms; rather, there are three basic, mutually supporting principles at work here. The first is the prohibition of spying and prying; this is enshrined in Q49:12 The second is the duty not to divulge what would dishonour a Muslim; this is laid down in a Prophetic tradition. The third is the sanctity of a home, which rests on Koranic stipulations regarding the way one should enter the homes of others (Q2:189, Q24:27). All these*

> *values are strongly reflected in the materials, we are concerned in this chapter.*
>
> *The prohibition of spying comes into play when Ibn Masud is asked about a man whose beard drips with wine, and responds that God has forbidden spying (Tajassus); we can take action, he says, only if the offence is out in the open (in yazhar lana shay), which is perhaps to say that we must actually see the man drinking.*
>
> *The duty not to divulge finds expression in an anecdote about the companion, Uqba ibn Amir al-Juhani (d 58/677f), who settled in Egypt and was Muawiya 's Governor there in 44-7/665-7. His Secretary, Dukhayn al-Hajri, explained to him that he had neighbours who drank wine and proposed to summon the police (shurat) to arrest them. Uqba told him not to do this, but rather to counsel and threaten them (verbally). He did so, but to no effect; so he again proposed to call in the Police. Uqba once more told him not to, and quoted a tradition he had heard from the Prophet (PBUH): who ever keeps hidden what would disgrace a believer (man stara mu'minan), it is as though he had restored a buried baby girl (Mawuda) to life from her tomb. The sanctity of the home is at the center of an exchange which takes place in Basra between a certain Abu l-Rabi al Sufi and Sufyan al-Thawri regarding the activities of what I take to be the officially appointed censors (Mohtasiba): ABU L-RABI: Abu Abdallah! when I' m with these censors, we go into the homes of these vile people, (Khabithin) clambering over the walls. SUFYAN: Don't they have door? ABU L-RABI: Well yes, but we rush in so they don't escape. SUFYAN condemns this misconduct in no uncertain terms, and one of those present unkindly asks: Who let him in here. …….."*

49. For discouraging exhibition of extravagance at the time of marriage and other family functions, there are already two laws, as it has been pointed out in the above comparative chart. Out of them, one is Federal and the other is Provincial. This Court, in the case of ***Muhammad Siddique v. Government of Pakistan*** *(PLD 2005 SC 1), had maintained Marriage Functions (Prohibition of Ostentatious Displays and Wasteful*

Expenses) Ordinance 2000 (II of 2000). As per this Ordinance, lawgivers had defined criminality for violation of the relevant provisions of the Ordinance and no one can be prosecuted unless the case of such individual falls within the defined boundaries of the law. It being explicit, elaborate and well defined, is in force throughout the country including the NWFP. Thus, it is held that any action taken in this behalf by the Mohtasib, would violate the provisions of Articles 9, 14 and 16 of the Constitution.

50. For 'Khilaf-warzi' (disobedience) of the order of Mohtasib in not following the code of Islam in giving dowry under Section 23 (3) of the Hisba Bill, a citizen can be prosecuted, though, already there are defined provisions of law on this subject, details of which have been given in the above chart. The access of "Mohtasib" in such private affairs of an individual, without giving him notice or defining the boundaries of the violation of such penal provisions, would tantamount to denying liberty, dignity and privacy of fundamental rights enshrined under Articles 9 and 14 of the Constitution by means of a vague, overbroad and excessive legislation because a citizen will not be liable for violating the laws already on the subject but for doing "Khilaf-warzi" (defiance) of Mohtasib's order.

51. A citizen can be held liable for "Khilaf-warzi" (defiance) of the orders of "Mohtasib" purportedly passed by him during watching Islamic values in his own perspective at the time of 'Iftar' and 'Traveeh' within mischief of Section 23(5) of Hisba Bill. A perusal of above table would show that two laws are already available on the subject which lay down parameters for taking action against a citizen, who violates the law out of any of them but the Mohtasib by passing any "Hukam-nana" [order] can hold any citizen for 'Khilaf-warzi" i.e. disobedience of the same. Said

provision of law is not only vague but also violates right of freedom of religion of citizen under Article 20. It is a fact that different sects of Muslims have got separate values and etiquettes for the "Ehteram-e-Ramzan," inasmuch as, timing of 'Iftar' among 'Sunnis' and 'Ahl-e-Tashee' are different from each other. Similarly, there is no unanimity that what would be the number of 'Rakats' of 'Traveehs' and the interference by the "Mohtasib" would deny right guaranteed to the citizen under Article 20 of the Constitution on the basis of excessive delegation of powers

52. Under Section 23 (6) of the Hisba Bill, "Mohtasib" has been allowed to discourage entertainment shows and business transactions at the time of Eid prayer and Jumma prayer around Eidgah and Jamaa Mosques. In NWFP there are provisions of law on this subject incorporated in NWFP Local Government Ordinance 2001. The business of a person cannot be controlled/curtailed except by imposing reasonable restrictions in accordance with law, because it is a matter of common observance that on the occasion of prayers of Eidain and Jumma, people do small businesses like selling balloons, sweets etc, to earn their livelihood, particularly they carry on their business when such congregations are over and people start returning home and this practice is going on since centuries. Curtailment of rights of citizens in such manner would negate right of freedom of trade and business according to Article 18 of the Constitution, by means of a vague legislation which suffers from excessive delegation.

53. Under Section 23 (7) "Mohtasib" is authorized to remove causes of dereliction in performance and proper arrangements of Eidain and Jumma prayers. Offering of prayer or "Sallat," again is a personal obligation on an individual being the Haqook Allah. Religiously the "Mohtasib" is not

authorized to check negligence/disregard of a person who has abandoned "Sallat" for one or the other reason. Allowing such interference by Mohtasib would deny the right of freedom to profess religion to an individual. The CII in 1978-79 had extensively considered this issue and opinioned that as far as "Fard Namaz" is concerned, if it is not offered, there should not be any penal consequences. The following eminent Islamic jurists have expressed their thoughts in the above report of CII:-

> ***Mr. Justice Muhammad Gul:-*** *There can be no gain saying the fact that ( ) [Sallat] is the foremost among the injunctions of Islam and yet the fact remains that the Holy Quran has not prescribed any punishment for its non-observance although it is replete with the stern warnings about the chastisement both here and herein after, resulting from its non-observance. This is in sharp contrast with the punishment prescribed for crimes, directly affecting the orderly existence of society e.g. murder, causing hurt, adultery, fornication, perjury, etc. Historically too, it is not controverted that the Holy Prophet (PBUH) the first Four Caliphs of Islam, while they exhorted the faithfuls to be steadfast in the observance of ( ) [Sallat] its non-observance was not made a penal offence. Even after the Islamic State was firmly established and its boundaries had spread far and wide: any laxity or failure in observance of ( ) [Sallat] was not made a penal offence; although it was never doubted that it was quintessence of Islam.*
>
> ***Mr.Justice (Rtd.) Kadir Nawaz Awan:-*** *It is true that Namaz is one of the five pillars: It is also true that many Ayats in Qur'an Pak refer to its strict observance and finally that we Muslims do not offer Namaz regularly. Quran Sharif does not lay down any punishment for its non-performance. Accordingly, no authority can lay down any kind of punishment for its non-performance as it amounts to sin and not an offence.*

Mr. Justice Muhammad Afzal Cheema:- *I have not been able to endorse the proposed legislation of the NWFP Government for converting into an offence an act of omission to offer five time prayers. The object, namely to ensure regular offering of prayers is no doubt very salutary but the proposed means of achievement are wholly unwarranted and impracticable. There can be hardly any doubt as to the physical and spiritual benefit of Namaz on which great emphasise has been laid in the Holy Qur'an, the offering of prayers is a personal affair between man and his creator. If offered conscientiously it changes the whole outlook of a man and is perhaps the best kind of worship aimed at self reform and purification which is a life long process.*

The best mode of inculcation of Namaz is by training, persuasion and practical demonstration which should start from childhood and should be followed up into schools and colleges.

Dr. Moinuddin Baqai:- *As other members of the Council of Islamic Ideology have opined, Quran and Sunnah and Islamic jurisprudence do not specify non-observance of prayer as an offence, for which an Islamic State should specify worldly punishment. Punishment is provided for offence which violates Haquk-ul-Ibad ( ) or which results in the disruption of social order.*

Dr. Miss. Kaniz Yousuf:-- *I am in agreement with the opinion expressed by Mr. Justice Muhammad Gul on the subject. Islam enjoins two types of obligations upon Muslims. Haquk Allah and Haquq al-Ibad. Offering of prayers is Haquk Allah and only Allah can punish in this case. No punishment is imposed on Muslim for laxity or failure in the observance of 'Salat' in terms of Fiqhah.……..*

Dr. Prof. Shamim Akhtar*:--- Neither in the Qur'an nor in the hadith has any punishment been sanctioned against non-observance of prayers as in case of penal offences such as theft, murder, adultery, fornication, etc. To my*

knowledge there is no evidence in the early history of Islam to the effect that the same has been penalized by law or fait either by the Prophet (PBUH) or by the pious Caliphs or their successors. This is not to say however, that no odium was attached to the one who failed to observe prayers.……

……

……There developed in Islamic State the institution of Mohtasib, who was entrusted with the enforcement of "Maruf" (law) and prevention of "Munkir" (illegality). He took administrative action to facilitate public welfare and to curb the vices and social evils. The official duties of Mohtasib were varied, ranging from the checking of weights and measures, regulation of traffic on the ferries, demolition of dilapidated buildings, to prevention of cruelty to animals and of undue chastisement of students by teachers etc. He could also order the holding of congregational prayer and admonish those who habitually abstained from prayers but was not permitted to interfere with the beliefs and rituals of Muslims belonging to denomination other than his own.

It may be pointed out that these matters fell outside the jurisdiction of judicial officers, Qazis and was the responsibility of Muhtasib, who treated them as administrative problems. As for the purposed legislation, while it is laudable to make sustained and practical efforts to induce the Muslims to observe prayers one fails to understand why would non-observance be declared a penal offence when the Quran and Sunnah and precedents of pious Caliphate have not done so.

……In my opinion, as by force making people to pray would not serve such of its purpose, it is not advisable to make this a cognizable offence and to prescribe any punishment by legislation for this purpose. All that we can do is to adopt measures of persuasion and exhortation for those who were not regular in their prayers. We may exercise moral pressure, arrange public lectures and publish light literature to preach and propagate the significance and role of prayer and its importance in the

life of an individual and in Muslim Society. We may utilize the mass media for this purpose.

Maulana Ehtesham-ul-Haq Thanvi:---

یہاں سے یہ غلط فہمی بھی دور ہونی چاہئیے کہ نماز جیسی خالص عبادت کو قانون اور ضابطے کے ذریعے ادا کرانا مقصود نہیں ہے۔ اور نہ ایسا کرنا عبادت کی روح کے لئے مفید ہے بلکہ قانون کے ذریعے نماز پڑھنا ممکن بھی نہیں کیونکہ قانون ایسے امور کے لئے وضع کیا جا سکتا ہے جن کے ثبوت و عدم ثبوت کا فیصلہ الفاظ قانون کی روشنی میں ممکن ہو۔ اور صلواۃ و صوم دونوں کو قانونی الفاظ میں منضبط کرنا ممکن نہیں ہے۔ اور جن الفاظ کو قانون میں منضبط کیا جائے گا وہ الفاظ حصول مقصد میں قاصر و ناکام ہونگے اور ہو سکتا ہے کہ معاشرہ میں اس کا استہزاء کیا جائے۔ ہمارا مقصود صرف یہ ہے کہ ترک صلواۃ کے مظاہرہ کو قانون کے ذریعے روکا جا سکتا ہے۔ جیسے ماہ صیام میں روزہ نہ رکھنے پر احتساب نہیں ہے۔ علی الاعلان اور سب کے سامنے کھانے پینے پر احتساب ہے کہ یہ ترک صوم کا مظاہرہ ہے۔ اسلامی احکام اور فرائض کا اور علی الاعلان خلاف ورزی اور مظاہرہ شعائر اسلام کی بے حرمتی ہے۔ اور اسی طرح عام نافرمانی کی فضا پیدا ہوتی ہے۔ شریعت اسلامیہ نے معصیت کے مظاہرہ کو روکنے کا اس درجہ اہتمام کیا ہے کہ جو گناہ سب کی نظروں سے چھپ کر کیا گیا ہے اس کی توبہ علی الاعلان جائز نہیں کیونکہ یہ بھی بالواسطہ اعلان معصیت ہے۔

54. In view of above consensus, the arguments of learned counsel for Government of NWFP, become redundant that Hisba Bill is in accordance with Islam. If the proposed legislation is accepted and is made into law, then a citizen who is held responsible for causing dereliction shall be liable to punishment for six months on the "Hukam-nama" [order] of "Mohtasib" by a Magistrate under Section 28 of the Hisba Bill. Besides, there is no provision of the Sharia, which mandates for the imposition of penalties for vague offences. However, if any provision of Sharia has defined relevant offence, like Hadood laws, penalties can be imposed.

55. The scheme of various sub-Sections of Section 23 indicates that the "Mohtasib" is empowered to straightaway lodge complaints either himself or through his representative to the Magistrate for 'Khilaf-warzi' of his order, without providing opportunity of hearing, against a citizen, despite that this Court has held in a number of cases that "the principles of the natural justice are in accordance with Islam and cannot be avoided." [see ***Pakistan Vs. Public at Large*** *(PLD 1987 SC 304)* ***The Province of Punjab v. National Industrial Cooperative Credit Corporation*** *(2000 SCMR 567)].*

56. Learned counsel for NWFP contended that legislature can make laws which intrude upon personal matters of citizens as under Muslim Family Laws Ordinance, 1961, right to a second marriage has been controlled.

57. Argument raised by him seems to be unfounded. First of all it may be seen that learned Attorney General had not stated that no law can be made which impinges upon a private domain but his argument was that no unreasonable and vague law can be made. Besides, if in any specific law, private rights of the individual have been curtailed, such law has not been upheld by the Court if it violates any Constitutional provision. It means that any law dealing in any manner with fundamental rights must be upheld, irrespective of the fact that it is vague and overbroad and suffers from excessive delegation.

58. "Mohtasib" under Section 23(12) of the Hisba Bill, in exercise of additional powers conferred upon him has been empowered to observe decorum of Islam at the time of "Azan" and "Fard" prayer. A Muslim, having different school of thought from that of "Mohtasib" cannot be compelled to observe such decorum of Islam at the time of "Azan" and "Fard" prayer, which are not recognized by his faith, therefore, interference by the Mohtasib in such personal religious affairs of an

individual would tantamount to denying a fundamental right of freedom of Assembly and freedom to profess religion and to manage religious institution. The Hisba Bill has no detail of the manner, in which "Mohtasib" would observe decorum of Islam of the Muslim, belonging to different school of thought, therefore, this provision is not only vague but had conferred excess jurisdiction upon the "Mohtasib" and "Khilaf-warzi" (defiance) of any of his such instructions would call for prosecution of the individual. As majority of the provisions of Hisba Bill, particularly under discussion, suffer from vagueness, therefore, such like provision have always been termed unconstitutional being violative of the due process. Learned counsel for Government of NWFP stated that "Mohtasib" will only decide the issue according to the belief of that particular sect. It means that for deciding any issue, "Mohtasib" must possess accurate, comprehensive knowledge in respect of all the sects. A perusal of Section 3 of Hisba Bill indicates that for his appointment no condition of having knowledge of all sects of Islam has been made as his qualification. It may be noted that as it has been discussed above, saying of "prayers and observing decorum of Islam at the time of "Azan" and "Fard Namaz" cannot be regulated by means of a legislation because if non-offering of the prayers [Sallat] by a Muslim cannot be made a penal offence, then how it is possible that due to non-observing decorum of Islam at the time of Azan and Fard prayer, recommendation can be made for the prosecution of such citizen, who had made "Khilaf-warzi" (disobedience) of the order of "Mohtasib" in not observing decorum of Islam at the time of Azan and Fard prayer. Therefore, for such reason, clause 23 (12) of Hisba Bill cannot impose unreasonable restriction on the right of freedom of assembly and religion. It may not be out of context to note at this stage that the State

does not regulate the private belief of individuals, but if the exercise of such private beliefs, in terms of the rights guaranteed under the constitution, causes the breach of the public order, only then the State comes forward to regulate such personal beliefs. In ***Jibendra Kishore Achharyya Chowdhury v. The Province of East Pakistan*** *(PLD 1957 SC 9), it is observed as follows:---*

> *"…… In the light of these rules of construction of constitutional instruments it seems to me that what Article 18 means is that every citizen has the right to profess, practice and propagate his religion and every sect of a religious denomination has the right to establish, maintain and manage its religious institutions, though the law may regulate the manner in which religion is to be professed, practiced and propagated and religious institutions are to be established, maintained and managed. The words "the right to establish, subject to law, religious institutions" cannot and do not mean that such institutions may be abolished altogether by the law. Speaking of the right of political franchise, Chief Justice Shaw of the Supreme Judicial Court of Massachusetts remarked in Copen v. Foster (12 Pick 485-488).*
>
> > *"That in all cases where the Constitution has conferred a political right or privilege, and where the Constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power, to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that rights which are designed to secure and facilitate the exercise of such right, in a prompt, orderly and convenient manner ….. Nevertheless such a construction would afford no warrant for such an exercise of legislative power, as under the pretence and colour of regulating, should subvert or*

> *injuriously restrain the right itself."*

This principle is, in my opinion, fully applicable to the interpretation of the extent of religious freedom recognized by Article 18 of our Constitution. That Article inter alia guarantees the right to establish, maintain and manage religious institutions, but concedes to the legislature the power to regulate the manner in which such institutions may be established, maintained and managed. It does not, however, empower the legislature to make a law that hereafter no institutions of a religious character shall be established, maintained or managed or that an existing religious institution shall be abolished. The Article appears to me to proceed on the well-known principle that while legislature may not interfere with mere profession or belief, law may step in when professions break out in open practices inviting breaches of peace or when belief, whether in publicly practicing a religion or running a religious institution, leads to overt acts against public order. In the present case no question of law and order being involved, I am constrained to differ from the view taken of this fundamental right by the High Court."

In ***Miss Benazir Bhutto v. Federation of Pakistan and others*** *(PLD 1988 SC 416) it has been observed that :---*

"……..In regard to the violation of Article 18 of the Constitution, the view expressed in Copen v. Foster, 12 Pick 485-488, in relation to right of political franchise was held to be applicable to its interpretation to the extent of religious freedom recognized by Article 18 of the Constitution. And it was observed:

> *" The Article appears to me to proceed on the well-known principle that while legislature may not interfere with mere profession or belief, law may step in when professions break out in open practices inviting*

> *breaches of peace or when belief whether in publicly practicing a religion or running a religious institution, leads to overt acts against public order."*

and as no question of law and order was involved, the Court differed from the view taken of this Fundamental Right by the High Court. Messrs East and West Steamship Company v. Pakistan, PLD 1958 SC 41 follows the same principle as laid down in Jibendra Kishore Achharyya Chowdhury and others v. The Province of East Pakistan PLD 1957 SC 9."

In ***Zaheeruddin vs. The State*** *(1993 SCMR 1718), in this context, it was held: -*

> *"The above views as they are prevalent, in the above jurisdiction, do go to show that freedom of religion would not be allowed to interfere with the law and order or public peace and tranquility. It is based on the principle that the State will not permit anyone to violate or takeaway the fundamental rights of others, in the enjoyment of his own rights and that no one can be allowed to insult, damage or defile the religion of any other class or outrage their religious feelings, so as to give rise to law and order situation. So whenever or wherever the state has reasons to believe, that the peace and order will be disturbed or the religious feelings of others may be injured, so as to create law and order situation, it may take such minimum preventive measures as will ensure law and order."*

From perusal of above judgments, following principles are highlighted.

1. *While legislature may not interfere with mere profession or belief, law may step in when professions breakout in open practices inviting breaches of peace or when belief, whether in publicly practising a religion or running a religious institution, lead to overt act against public order.*

> *2. Whenever or wherever the State has reasons to believe that the peace and order will be disturbed or the religious feeling of others may be injured, so as to create law and order situation, it may take such minimum preventive measures, as will ensure law and order.*

59. Admittedly in view of the above judgments, this Court while following the above principles in celebrated judgment of ***Zaheeruddin*** *(ibid), and examining constitutionality of the action taken under Section 144 Cr.P.C. and Anti-Islamic Activities of the Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984 (XX of 1984), declared the above Ordinance a valid law, holding that freedom of religion is based on the principle that the State will not permit any one to violate or takeaway the fundamental rights of others in the enjoyment of his own rights and that no one can be allowed to insult, damage or defy the religion of any other class or outrage their religious feeling, so as to give rise to law and order situation. Thus, we are of the considered opinion that under Section 23 (12) of the Hisba Bill no restriction on freedom of assembly or freedom of religion, the fundamental rights guaranteed under the Constitution be imposed.*

60. Section 23 (14) confers power upon the "Mohtasib" to discourage un-Islamic and in-human customs. The Provincial Assembly had failed to define expression "un-Islamic." If the possibility of unanimity amongst different sects, on a preliminary or basic concept, is not possible, as observed herein-above, with reference to enquiry report of former Chief Justice of Pakistan Mr. Justice Muhammad Munir, that religious jurists, who appeared before the Enquiry Court could not develop consensus on definition of "Muslim," then how is it possible that there would be consistency between them on the definition of "un-Islamic" and "in-human" Customs. In this country, as far as another segment of society i.e.

non-Muslims (minorities) is concerned, it is not clear whether they are also bound to follow Islamic and human customs? In this judgment at a number of places, we have observed that indefinite, un-certain and not susceptible of being understood provision of law on account of its vagueness cannot be enforced for the purpose of prosecution of a person, if he is found guilty of disobeying any such provision, in respect whereof, he has no information/ notice to know that what is prohibited i.e. Islamic or un-Islamic, such law is treated as un-constitutional. Essentially, such a wide ranged powers conferred upon "Mohtasib" by Section 23(14), allowing him to create in his own discretion an offence for the purpose of prosecution, under Section 28 would deny due process of law, security of a person, dignity of a man, freedom of speech and freedom to profess religion. This provision of law would also violate the freedom of trade, business or profession because if a citizen is indulging in such a business which according to "Mohtasib" is un-Islamic, he would be lodging a complaint for its prosecution, without determining that no restriction can be imposed, except subject to the provision of law. The affected persons would also be discriminated by the "Mohtasib" in exercising wide ranged undefined powers. Thus, the provisions failing to satisfy constitutional scrutiny, with reference to the fundamental rights discussed herein-above, are unconstitutional.

61. It was vehemently contended by the learned counsel for Government of NWFP that Islamic State is a welfare State. The lawmakers had an obligation to frame laws in conformity with the Injunctions of Islam, as laid down in the Holy Quran and Sunnah, and to achieve the object that general public may live with peace and calm without transgressing on the rights of each other, the Government of NWFP had promulgated the Hisba Bill. To emphasize his arguments, he contended that the European community

borrowed concept of a welfare State from the Religion of Islam and in the modern countries like the United Kingdom general laws are being framed for curbing Anti Social Behaviour. He read out the whitepaper on Anti Social Behaviour (ABSO).

62. Learned Attorney General contended that there is no cavil with framing laws in accordance with the Injunctions of Holy Quran and Sunnah and according to beliefs of different sects as per mandate of Constitution but provisions of Hisba Bill cannot be tested on the ground that in European countries, identical anti-social laws are being framed. He explained that ASBO law 2004 is not a vague law as it contains all characteristics of a valid law.

63. There is no doubt that Article 227 of the Constitution mandates for promulgating laws in conformity with the Injunctions of Islam as laid down in Holy Quran and Sunnah. Explanation to Article 227 provides that the expression Quran and Sunnah shall mean the Quran and Sunnah as interpreted by any Muslim sect as far as it relates to the personal laws. Applying this very test on some of the provisions of Section 23 of Hisba Bill, we have already observed that as Hisba Bill does not provide definition of Islamic value and Sharia with reference to the belief of various Muslim sects, therefore, due to such vagueness, it is not sustainable. We are in quite agreement with the learned Attorney General that ASBO Law 2004 is not a vague law as it contains intelligible, comprehensible, understandable and tangible provisions, therefore, Hisba Bill 2004 cannot be equated with the ASBO Law 2004.

64. Section 23(27) of Hisba Bill confers powers upon "Mohtasib" to perform any other function/functions which the Provincial Mohtasib determines from time to time in consultation with the Advisory Council. In

Urdu text of the Hisba Bill 'word' (Amar) or (Amoor) i.e. order or orders has been mentioned, essentially 'order' mean 'command' as per its ordinary meaning. Viewing this provision with some of the other provisions of Section 23, which have been discussed herein-above and have been found vague, suffering from excessive delegation and without definite legislative guidelines , it is also suffering from excessive delegation. One feels no hesitation in holding that by conferring sweeping powers on "Mohtasib" lawgivers had conferred the authority of making laws to him and then to lodge prosecution against the citizens, who have made "Khilaf-warzi" (disobedience) of his "Hukam-nama" [order], clearly places embargo upon exercising the fundamental rights conferred upon them under Article 9, 14, 20 and 25 of the Constitution. In other words, any thing, uttered by the "Mohtasib" in respect of 'Amar' or 'Amoors' (function) would become the law. Would it not be highly discriminatory. Legislation can delegate its powers in a number of statutes but after having its own control and safeguard in place which is only possible when definite guidelines are given, otherwise blatant conferment of powers would make such a statute unconstitutional. In ***Haji Ghulam Zameer v. A.B. Khundkar*** *(PLD 1965 Dacca 156), it is observed as under:---*

> *"It was next argued that the penal provision of the Ordinance, as embodied in sections 4, 5 and 6 thereof, is also invalid on the ground that it is too vague, too wide, too undetermined and too volatile for anybody to understand and anticipate what acts are being prohibited by the Legislature. The argument is founded on the proposition that the expression 'law,' as embodied in Article 2 and all other Articles of the Constitution, connotes intelligible comprehensive, understandable and tangible laws. To make penal provisions in advance and to leave them to be applied to a maze of an*

> *undefined mass of individual orders which may be made without even a "public notification" is to leave the liberty of citizens to the mercy of the gambling freaks of unforeseeable dooms. Each order served on an individual would be a code by itself. There can be thousands of such orders. This principle is specially important because under the Ordinance there is no requirement that orders made there under should be under a "notified order" as is the case in respect of the Essential Supplies (Temporary Powers) Act or similar enactments. An unanticipated order can, under the Ordinance, be made in any individual case and a breach thereof would attract the penal provisions of the Ordinance. In the following cases it has been held that the Act is too indefinite and uncertain as a penal statute, as it does not classify or define, with any degree of certainty those who are subject to the operation of the Act."*

In the case of ***Asfand Yar Wali*** *(ibid) it has been observed that:---*

> *"269. The above provisions of section 25A (e) and (g) in their present form suffer from excessive delegation of power, in that, these provisions confer unfettered discretion on the Chairman NAB to reject the recommendations of a duly appointed committee and to refuse to recognize a settlement arrived at between a creditor and a debtor. We, therefore, direct that the recommendations made by the Governor State Bank of Pakistan shall be binding on the Chairman NAB except for valid reasons to be assigned in writing subject to approval of the Accountability Court to be accorded within a period not exceeding seven days. Suitable amendment be made in Section 25A (e) and (g)."*

In ***Director Food NWFP v. Madina Flour and General Mills*** *(PLD 2001 SC 1), this Court observed as followed:---*

> *"8. It is true that Provincial Legislature is competent to promulgate appropriate legislation*

> *for abolishing wheat quota or to regulate the supply of the same provided the above threshold-requirements are met and the Fundamental Rights contained in the Constitution are not violated. Here, the N.W.F.P. Government has the power to determine the supply of wheat in its absolute discretion. The law does not lay down the methodology or guidelines for allocation of wheat quota. The High Court was, therefore, right in holding that Article 18 and Article 25 of the Constitution were violated by the impugned legislation. We may also add that clause (a) of section 2 of the Act was saved by holding that the same is not violative of the Constitution."*

In ***Pakistan Tobacco Co. Ltd. vs. Government of NWFP*** *(PLD 2002 SC 460) it was held "there is consensus of the judicial opinion that delegation of powers should not be uncontrolled, unbridled and to check the arbitrary attitude of the Executive in exercise of powers the legislature must provide some guidelines basing on the policy of the government to exercise such powers."*

In ***Dick Gregory v. City of Chicago*** *(22 L. Ed. 2d 134), United State Supreme Court observed that :--*

> *"It is because of this truth, and a desire both to promote order and to safeguard First Amendment freedoms, that this Court has repeatedly warned States and governmental units that they cannot regulate conduct connected with these freedoms through use of sweeping dragnet statutes that may, because of vagueness, jeopardize these freedoms. In those cases, however, we have been careful to point out that the Constitution does not bar enactment of laws regulating conduct, even though connected with speech, press, assembly, and petition, if such laws specifically bar only the conduct deemed obnoxious and are carefully*

and narrowly aimed at that forbidden conduct.…….…….…….…….…

The disorderly conduct ordinance under which these petitioners were charged and convicted is not, however, a narrowly drawn law, particularly designed to regulate certain kinds of conduct such as marching or picketing or demonstrating along the streets or highways. Nor does it regulate the times or places or manner of carrying on such activities. To the contrary, it might better be described as a meat-ax ordinance, gathering in one comprehensive definition of an offense a number of words which have a multiplicity of meanings, some of which would cover activity specifically protected by the First Amendment. The average person charged with its violation is necessarily left uncertain as to what conduct and attitudes of mind would be enough to convict under it. Who, for example could possibly foresee what kind of noise or protected speech would be held to be "improper"? That, of course, would depend on sensibilities, nerves, tensions and on countless other things.…….…….…….…….…….…….…

Their guilt of "disorderly conduct" therefore turns out to be their refusal to obey instanter an individual policeman's command to leave the area of the Mayor's home. Since neither the city council nor the state legislature had enacted a narrowly drawn statute forbidding disruptive picketing or demonstrating in a residential neighborhood, the conduct involved here could become "disorderly" only if the policeman's command was a law which the petitioners were bound to obey at their peril. But under our democratic system of government, lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat. Laws, that is valid laws, are to be made by representatives chosen to make laws for the future, not by police officers whose duty is to enforce law already enacted and to make arrests

> *only for conduct already made criminal.…….”*

65. Admittedly, different parts of Section 23 discussed herein-above including sub-Section (27) confer unfettered/unbridled/unchanalized powers on “Mohtasib” under Hisba Bill being an Executive functionary for the purpose of this provision, therefore, these powers are liable to be declared ultra vires the Constitution in view of the following principles:---

I. ***Waris Meah v. State***
(PLD 1975 SC (Pak)157)

> *“Here, not only is there discretion in the specified authorities whether they will proceed at all against any member of the class concerned, viz. offenders against the Act, but there is also an unfettered choice to pursue the offence in any one of three different modes which vary greatly in relation to the opportunity allowed to the alleged offender to clear himself, as well as to the quantum and nature of the penalty which he may incur. The scope of the unguided discretion so allowed is too great to permit of application of the principle that equality is not infringed by the mere conferment of unguided power, but only by its arbitrary exercise. For in the absence of any discernible principle guiding the choice of forum, among the three provided by the law, the choice must always be, in the judicial view point, arbitrary to a greater or less degree. The Act, as it is framed, makes provision for discrimination between persons falling, qua its terms, in the same class, and it does so in such manner as to render it impossible for the Courts to determine, in a particular case, whether it is being applied with strict regard to the requirements of Article 5 (1) of the Constitution.”*

II. ***F.B. Ali v. State***
(PLD 1975 SC 506)

> *“It is first sought to be contended that the Ordinances were not law at all because they purported to unreasonably deprive a citizen of even the norms of a*

judicial trial. But this generalization cannot be accepted. Law has not been defined in the Constitution of 1962 and, therefore, in its generally accepted connotation, it means positive law, that is to say, a formal pronouncement of the will of a competent law-giver. There is no such condition that a law must in order to qualify as a law also be based on reason or morality. The Courts cannot strike down a law on any such higher ethical notions nor can Courts act on the basis of philosophical concepts of law as pointed by me in the case of Asma Jilani (PLD 1972 SC 139). This claim was abandoned even in England as long ago as 1871 when Willes, J., in the case of Lee Vs. Bude & Torrington Junction Railway Co. (2) said:-

> *" We sit here as servants of the Queen and the Legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, Lords, and Commons? I deny that any such authority exists …… the proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them."*
>
> *……*
>
> *Where, however, the law itself makes no classification but leaves the selection to an outside agency or an administrative body without laying down any guidelines, thus enabling the body or authority to pick and choose, a legitimate complaint may be made on the ground that the law itself permits discriminatory application. Such was the position which came under consideration by this Court in the case of Waris Meah Vs. The State [PLD 1957 SC (Pak) 157] where this Court struck down the law on the ground that it was violative of this particular right……"*

3. ***Province of Punjab v. Manzoor Ahmed Wattoo***
(1998 CLC 1585)

"……..It is clear that no guidelines or parameters have been provided for Government in making the nomination of the Sarpanch of the

Panchayat. The Government is free to pick and choose any person of its choice without any qualifications. The discretion of the Government has not been structured which is absolute and arbitrary. The impugned Ordinance is ex facie discriminatory. It is also capable of being administered in a discriminatory and arbitrary manner in violation of Article 25 of the constitution of Pakistan which guarantees the equality before law and equal protection of law."

4. ***Pak. Tobacco Co. Ltd. v. Government of NWFP***
(PLD 2002 SC 460)

In Vasanthlal Manganbhai Sajanwal v. The State of Bombay, 1961 SCR 341: (AIR 1961 SC 4) the above proposition was summarized in following words :-

> *"A statute challenged on the ground of excessive delegation must therefore, be subject to two tests, (1) whether it delegates essential legislative function or power, and (2) whether the Legislature has enunciated its policy and principle for the guidance of the delegate."*

Likewise a learned Division Bench of Lahore High Court, Lahore in case of Muhammad Aslam and others v., Punjab Government and others (1996 MLD 685) following the judgments from our own jurisdiction in the cases reported in PLD 1958 SC 41, PLD 1965. Dacca 156, PLD 1966 SC 854 PLD 1988 SC 416 has held that naked, unbridled and unguided powers cannot be conferred upon the outside agency like executive.

66. The observations noted herein-above are based on the following two tests, (1) whether it delegates essential legislative functions or powers (2) whether the legislature has enunciated its policy or principle for the guidance of the delegatee ***Vasanlal Maganbhai vs. State of Bombay*** *[AIR 1961 SC 4]. Applying above test to the provisions of Section 23, discussed herein-above in detail, suggest to hold that none of these tests have been*

fulfilled, therefore, for violation of the provisions of Articles 4, 9, 14, 16, 18, 20, 25 of the Constitution, these provisions are not sustainable being ultra vires the constitution.

67. The legislature is under the bounden duty to define the crime explicitly, putting the citizens on notice and when the statute is vague and the notice is denied to the citizens, it creates arbitrariness. In this behalf reference be made to the case of ***Mehram Ali*** *(ibid). In this case Section 5(2)(i) of the Anti-Terrorism Act was struck down because no checks or guidelines were provided for exercise of powers. Relevant para therefrom is reproduced herein below:-*

> *"The conferment of power on the officers referred to in clause (i) of subsection (2) of section 5 without being fired upon by the accused is not justifiable. An officer of any of the above forces under the present provision can kill any person, if he considers that in all probability the former is likely to commit a terrorist act or scheduled offence. The formation of opinion as to the probability or likelihood of commission of offence will vary from person to person as it depends on subjective satisfaction. There is no check or guideline provided for the exercise of the above power conferred by the above provision. We are, therefore, of the view that the aforesaid provision in its present form is not sustainable. The same may be amended and it may be provided that the officer can fire upon an accused person if he has been himself fired upon by him.*

68. It may be noted that some vague expressions i.e. "internal disturbances," "illegal strikes," "go slows and lock outs" in terms of Section 7-A of the Anti-Terrorism Act, 1997 came up for consideration before this Court in the case of ***Jamat-i-Islami Pakistan*** *(ibid), and while taking into consideration meaning of the word 'vague,' it was held as follows:-*

"12. It is well-settled that Statutes must be intelligibly expressed and reasonably definite and certain. An act of the Legislature to have the force and effect of law must be intelligibly express and statutes which are too vague to be intelligible are a nullity. Certainty being one of the prime requirements of a statute, a statute in order to be valid must be definite and certain. Anticipated difficulty in application of its provisions affords no reason for declaring a statute invalid where it is not uncertain. Reasonable definiteness and certainty is required in statues and reasonable certainty is sufficient. Reasonable precision, and not absolute precision or meticulous or mathematical exactitude, is required in the drafting of statutes, particularly as regards those dealing with social and economic problems.

Clearly, the language of the statute and, in particular, statute creating an offence must be precise, definite and sufficiently objective so as to guard against an arbitrary and capricious action on the part of the State functionaries who are called upon to enforce the statute. It is well settled that penal statutes contemplate notice to ordinary person of what is prohibited and what is not. Mr. M. Akram Sheikh, learned A.S.C. for the petitioners, was right in contending that Article 4 of the Constitution relating to the rights of individual to be dealt with in accordance with law, is in the nature of "due process" clause. To enjoy protection of law and to be treated in accordance with law is the inalienable right of every citizen and no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. No person shall be prevented from or be hindered in doing that which is not prohibited by law and no person shall be compelled to do that which the law does not require him to do. Every citizen has the inalienable right under the Constitution to know what is prohibited by law and what the law does not require him to do. It is, therefore, incumbent upon the State to express in clear terms susceptible of being understood by an ordinary citizen of what is prohibited and to provide definite standards to guide discretionary actions of Police Officers so as to prevent arbitrary and discriminatory operation of section 7-A of the Act. In other words, it must be spelt out from a bare reading of

> *section 7-A as to what constitutes "internal disturbance," "illegal strikes," " go-slows" and "lock-outs" in terms of section 7-A of the Act.*

Likewise, in the case of ***Kartar Sindh v. State of Punjab*** *[1994] 3 SCC 569], Indian Supreme Court held as follows:-*

> *"130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasized that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizen to "steer far wider of the unlawful zone, than if the boundaries of the forbidden areas were clearly marked."*

The above principle has been reiterated by United States Supreme Court in the case of ***Margarete Papachristou v. City of Jacksonville*** *(31 L. Ed. 2d 110). Relevant para therefrom reads as under :--*

> *"This ordinance is void for vagueness, both in the sense that it " fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," United States v Harriss. And because it encourages arbitrary and erratic arrests and convictions. Thornbill v Alabma. Living under a rule of law entails various suppositions, one of which is that "[all persons] are entitled to be informed as to what the State commands or forbids." Lanzetta v New Jersey……*
>
> *…….*
>
> *……..*
>
> *This aspect of the vagrancy ordinance before us is suggested by what this Court said in 1876 about a broad criminal statute enacted by Congress: "It would certainly be dangerous if the legislature could set a net*

> *large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set."*

69. Section 25 of Hisba Bill has placed complete restriction on the right of hearing by the Courts against the proceedings before a Mohtasib. The right of hearing being essentially a principle of natural justice has got well-entrenched rules in our system of administration of justice. The mere denial of the right of hearing to a citizen against whom Mohtasib has passed an order, is by itself sufficient to declare the provisions of section 25 of Hisba Bill to be ultra vires the constitution. Besides, no absolute ouster of jurisdiction of Courts is possible as the Constitution itself confers powers of judicial scrutiny upon the superior Courts, therefore, a subordinate legislature cannot take away such rights. In the Hisba Bill the word "Court" has not been defined but in its ordinary meaning it would include the subordinate Courts as well as Superior Courts exercising constitutional jurisdiction. In ***Abbasia Cooperative Bank (now Punjab Provincial Cooperative Bank Ltd) Vs. Hakeem Hafiz Muhammad Ghaus*** *(PLD 1997 SC 3) it was observed, as under :--*

> *"5. The next question which arises for consideration in the case is, whether the Civil Court was competent to examine the validity of the auction conducted by the authorities? The Civil Court under section 9 of the Code of Civil Procedure are competent to try all suits of civil nature except those of which their jurisdiction is barred either expressly or by necessary implication. It is a well-settled principle of interpretation that the provision contained in a statute ousting the jurisdiction of Courts of general jurisdiction is to be construed very strictly and unless the case falls within the letter and spirit of the barring provision, it should not be given effect to. It is also well-settled law that where the jurisdiction of the Civil Court to examine the*

> *validity of an action or an order of executive authority or a special tribunal is challenged on the ground of ouster of jurisdiction of the Civil Court, it must be shown (a) that the authority or the tribunal was validly constituted under the Act; (b) that the order passed or the action taken by the authority or tribunal was not mala fide; (c) that the order passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or tribunal; and (d) that in passing the order or taking the action, the principles of natural justice were not violated. Unless all the conditions mentioned above are satisfied, the order or action of the authority or the tribunal would not be immune from being challenged before a Civil Court. As a necessary corollary, it follows that where the authority or the tribunal acts in violation of the provisions of the statutes which conferred jurisdiction on it or the action or order is in excess or lack of jurisdiction or mala fide or passed in violation of the principles of natural justice, such an order could be challenged before the Civil Court in spite of a provision in the statute barring the jurisdiction of Civil Court. In the case before us, the action of the Cooperative Authorities in auctioning the suit property for recovery of the loan against respondent No.1 was challenged in the suit as contrary to the provision of the Ordinance and M.L.O. 241.*

In ***Khan Asfandyar Wali Vs. Federation of Pakistan*** *(PLD 2001 SC 607), and it was held, as follows :*

> *"It was held in the case of Zafar Ali Shah (supra) that the powers of the superior Courts under Article 199 of the Constitution "remain available to their full extent…notwithstanding anything contained in any legislative instrument enacted by the Chief Executive" Whereas, section 9(b) of the NAB Ordinance purports to deny to all Courts, including the High Courts, the jurisdiction under sections 426, 491, 497, 498 and 561A or any other*

> *provision of the Code of Criminal Procedure or any other Law for the time being in force, to grant bail to any person accused of an offence under the Nab Ordinance. It is well settled that the superior Courts have the power to grant bail under Article 199 of the Constitution, independent of any statutory source of jurisdiction such as section 497 of the Criminal Procedure Code, section 9(b) of the NAB Ordinance to that extent is ultra vires the Constitution. Accordingly, the same be amended suitably."*

The above principle was also highlighted in the case of ***Zafar Ali Shah Vs. Pervez Musharraf, Chief Executive of Pakistan*** *(PLD 2000 SC 869), the relevant para therefrom is reproduced below: -*

> *"Stability in the system, success of the Government, democracy, good governance, economic stability, prosperity of the people, tranquility, peace and maintenance of law and order depend to a considerable degree on the interpretation of constitution and legislative instruments by the superior Court. It is, therefore, of utmost importance that the Judiciary is independent and no restraints are placed on its performance and operation. It claims and has always claimed that it has the right to interpret the Constitution or any legislative instrument and to say as to what a particular provision of the Constitution or a legislative instrument means or does not mean, even if that particular provision is a provision seeking to oust the jurisdiction of this Court. Under the mandate of the constitution, the Court exercise their jurisdiction as conferred upon them by the constitution or the law. Therefore, so long as the Superior Courts exist, they shall continue to exercise powers and functions within the domain of their jurisdiction and shall also continue to exercise power of judicial review in respect of any law or provision of law, which comes for examination before the superior Courts to ensure that all persons are able to live securely*

> *under the rule of law; to promote, within the proper limits of judicial functions, the observance and the attainment of human and fundamental Rights; and to administer justice impartially among persons and between the persons and the State, which is a sine qua non for the maintenance of independence of Judiciary and encouragement of public confidence in the Judicial system."*

70. Section 25 of the Hisba Bill can also not survive the constitutional scrutiny for violation of Article 2A of the Constitution which guarantees fundamental rights of equality before law, freedom of thought, expression, belief, faith, worship and association subject to law and morality as well as the independence of judiciary. The language of Section 25(1) (2) of Hisba Bill makes it abundantly clear that by ousting the jurisdiction of the Courts the rights of the citizens have been curtailed and the right of access to justice has also been denied as discussed herein-above.

71. In the present set up of administration of justice the Judicial forums are empowered to take cognizance of the offences which are capable to stand the test of constitutional scrutiny. Under Section 23 of the Hisba Bill the 'Mohtasib' has been empowered to lodge a complaint before a Magistrate under Section 28 for the purpose of trial of a citizen who has allegedly done Khilaf –warzi (defiance) of his Hukam-nama [Order]. Most of the provisions of Section 23 as discussed herein-above have been found ultra vires the Constitution. Therefore, investing powers in a Court to take cognizance under Section 28 on the complaint of the Mohtasib in respect of such offences is not warranted. Consequently, such forums created for trial of the citizens shall also be acting contrary to the provisions of Article 4 of the Constitution which guarantees that every individual should be dealt with in accordance with law. Therefore, being contrary to this provision of the Constitution, Section 28 is declared to be ultra vires the Constitution.

72. Learned counsel for NWFP Government contended:--

a) *That opinion rendered by Supreme Court has no binding effect because it is not a decision between parties.*

b) *That "Mohtasib" and the person who allegedly is going to be affected by this opinion is not before the Court as such it has no legal value*

c) *That the decision of the Court in terms of Article 189 is binding on the Executive and Judicial Authorities if rendered on a lis and Legislature is not bound with such decision as Court could not regulate the process of legislation. Thus, opinion of the Court would have no effect upon legislation.*

d) *The Constitutionality of Hisba Bill could adequately be dealt with after its becoming an Act of Assembly, in appropriate proceedings. In the following judgments parameters have been laid down for assuming jurisdiction by the Courts despite absolute ouster clause.*

See : ***In re: Kerala Education Bill 1957*** *(AIR 1958 SC 956),*

In re: U/s 213 Government of India Act, 1935 *(AIR 1944 FC 73),*

Umayal Achi v. Lakshmi Achi *(AIR 1945 FC 25),*

Attorney General for Ontario v. Attorney General of Canada *[1912] AC 571 and*

Attorney General for the Province of British Columbia v. Attorney General for Dominion of Canada *[1914] AC 153.]*

73. We have considered the judgments relied upon by the learned counsel. The opinions expressed therein had been overruled by subsequent judgments by the Indian Supreme Court itself. In ***re: Special Courts Bill, 1978*** *(AIR 1979 SC 478), it was held as under:--*

> *101. There was some discussion before us on the question as to whether the opinion rendered by this Court in the exercise of its advisory jurisdiction under*

Art. 143 (1) of the Constitution is binding as law declared by this court within the meaning of Art. 141 of the Constitution. The question may have to be considered more fully on a future occasion but we do hope that the time which has been spent in determining the questions arising in this reference shall not have been spent in vain. In the cases of Estate Duty Bill, 1944 FCR 317 at pp. 320, 332, 341: (AIR 1944 FC 73 at pp. 74, 75, 79, 82); U. P. Legislative Assembly, (1965) 1 SCR 413 at pp. 446, 447: (AIR 1965 SC 745 at pp. 762, 763) and St. Xavier's College, (1975) 1 SCR 173 at pp. 201, 202 (AIR 1974 SC 1389 at pp, 1401, 1402) the view was expressed that advisory opinions do not have the binding force of law, In Attorney General for Ontario v, Attorney General for Canada (1912) AC 571 at p. 589 it was even said by the Privy Council that the opinions expressed by the Court in its advisory jurisdiction "will have no more effect than the opinions of the law officers." On the other hand, the High Court of Calcutta in Ram Kishore Sen v. Union of India, AIR 1965 Cal 282 and the High Court of Gujarat in Chhabildas Mehta v. Legislative Assembly, Gujarat State, (1970) 2 Guj LR, 729 have taken the view that the opinion rendered by the Supreme Court under Art. 143 is law declared by it within the meaning of Art. 141. In The province of Madras v. Boddu Paidanna & Sons, 1942 FCR 90: (AIR 1942 FC 33) the Federal Court discussed the opinion rendered by it in the Central Provinces case, 1939 FCR 18: (AIR 1949 FC 1) in the same manner as one discussed a binding judgment. We are inclined to the view that though it is always open to this Court to re-examine the question already decided by it and to overrule, if necessary, the view earlier taken by it, in so far as all other courts in the territory of India are concerned they ought to be bound by the view expressed by this Court even in exercise of its advisory jurisdiction under Art. 143 (1) of the Constitution. We would also like to draw attention to the observations made by Ray C.J., in St. Xaviers College (AIR 1974 SC 1389) that even if the opinion given in the exercise of advisory jurisdiction may not be binding, it is entitled to great weight. It would be strange that a decision given by this Court on a question of law in a dispute between two

> *private parties should be binding on all courts in this country but the advisory opinion should bind no one at all, even if, as in the instant case, it is given after issuing notice to all interested parties, after hearing everyone concerned who desired to be heard, and after a full consideration of the questions raised in the reference. Almost everything that could possibly be urged in favour of and against the Bill was urged before us and to think that our opinion is an exercise in futility is deeply frustrating. While saying this, we are not unmindful of the view expressed by an eminent writer that although the advisory opinion given by the Supreme Court has high persuasive authority, it is not law declared by it within the meaning of Art. 141. (See Constitutional Law of India by H. M. Seerval, 2nd Edition, Vol II, Page 1415, para 25.68)*

*In **re: Presidential Reference No.1 of 1998** (AIR 1999 SC 1) the Court recorded following statement of Attorney General:---*

> *"9. We record at the outset the statements of the Attorney General that .-----(1) the Union of India is not seeking a review or re-consideration of the judgment in the second Judges case, and (2) that the Union o India shall accept and treat as binding the answers of this Court to the questions set out in the Reference."*

As per the material available on the official web-site of the Department of Justice Canada, there have been 76 references by the Federal Government alone to the Supreme Court since 1867 to 1981 and it states:---

> *"the Court issues an advisory opinion in the form of judgment as a legal pronouncement from the highest Court in the land. It has always been treated as binding."*

*Similarly **Peter W. Hogg** in **Constitutional Law of Canada** (4th Ed. Page 227) states as under :---*

> *"But there do not seem to be any recorded instances where a reference opinion was disregarded by the parties, or where it was not followed by a subsequent*

> *court on the ground of its advisory character. In practice, reference opinions are treated in the same way as other judicial opinions. (**emphases provided**)*

*Likewise, Mohamed Sameh M. Amer in **The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations** (page 116) states as under:-*

> *"Thus far the ICJ has delivered advisory opinions in twenty-four cases, and in no case has the requesting organ rejected the Court's opinion or acted contrary to its substance; on the contrary, the Court's opinions have been received and respected by the organs."*

*74. National Assembly of Pakistan, after obtaining opinion from the Supreme Court in re: **Special Reference under Article 187 of the Interim Constitution**, on 8th July 1973 passed a resolution, expressing its opinion that the Government of Pakistan may accord a formal recognition to Bangladesh and initiate such constitutional measures as may be necessary, therefore, at a time when, in the judgment of the Government, such recognition is in the best national interest of Pakistan and will promote a fraternal relationship between the two communities. A writ petition was filed seeking declaration that the resolution passed by the National Assembly in its Session held on 8th July 1973 be declared to be without lawful authority and the respondent be restrained from announcing any 'recognition of Bangladesh.' A learned Division Bench of the Lahore High Court while disposing of the petition in the case of **Hakim Muhammad Anwar Babri v. Federation of Pakistan** (PLD 1974 Lahore 33), held as under :---*

> *5. From what has been written above, it will be evident that the resolution in question was passed after obtaining the advice and opinion of the Supreme Court. The Supreme Court held that such a resolution could be passed, and after that to ask this Court to declare that*

> *such a resolution could not have been passed or that it was without lawful authority is an attempt to ask us to sit in judgment over the views of the Supreme Court. Obviously, such an attempt cannot succeed because in Article 189 of the Constitution of the Islamic Republic of Pakistan, it is written that: -*
>
> > *"Decisions of Supreme Court binding on other Courts-Any decision of the Supreme Court shall, to the extent that if decides a question of law or is based upon or enunciates a principle of law, be binding on all other Courts in Pakistan."*

75. It is true that opinion by the Court on the reference by the President is not a decision between the parties but the Court undertakes an extensive judicial exercise during which the arguments advanced by the Advocates appearing on behalf of the parties summoned by the Court are evaluated and appreciated and then an opinion is formed, therefore, it has binding effect as held in above quoted judgments as well as by eminent jurists on the Constitution.

76. From the language of Articles 189 and 190 of the Constitution, it is concluded that opinion expressed by the Supreme Court in a reference under Article 186 is required to be esteemed utmost by all the organs of the State, therefore, it would not be fair to say that the opinion expressed by the Supreme Court on Presidential Reference under Article 186 of the Constitution has no binding effect.

77. Under Article 116 of the Constitution, the Governor of the Province is required to assent to a bill which has been passed by the Assembly in accordance with the Constitution. Arguments raised by learned counsel, firstly, are premature as at this stage it is not possible to ascertain whether the Governor will assent to the Bill or not. Secondly, two positions could be visualized in respect of a Bill, namely, if in judicial scrutiny by this Court for the purpose of forming its opinion, it is held that it is intra vires

the Constitution then Article 116 of the Constitution would lay an obligation on the Governor to assent to it. If the opinion is formed that either the Bill as a whole or some of its parts are ultra vires the Constitution then the Governor being Constitutional Head of a Province would not assent to the Bill particularly on noticing violation. In present case, the provisions of the Hisba Bill namely Sections 10(b), (c), (d), 12(1)(a), (b) and (c), Section 23(1), (2), (3), (5), (6), (7), (12), (14) and (27), Section 25(1) & (2) and Section 28 , have been declared ultra vires the Constitution of Islamic Republic of Pakistan, therefore, in its present form, the Governor is not bound to assent to the same. To strengthen this argument, reference may be made to ***Attorney General for New South Wales v. Trethowan*** *(47 CLR 97). In this case, two bills were passed but without the majority of the electors, therefore, the Governor was restrained from assenting to the same unless and until the majority of the voters had approved them.*

78. In addition to above judgment,, this Court in a number of cases has held that a Government functionary is bound to obey and carry out only lawful orders and acts and is not bound to become a party to the acts, which are not in accordance with law. Reference in this behalf may be made to ***Zahid Akhtar v. Government of Punjab*** *(PLD 1995 SC 530),* ***Yaqoob Shah v XEN PESCO*** *(PLD 2002 SC 667),* ***Secretary Education NWFP v. Mustamir Khan*** *(2005 SCMR 17) and* ***The State v. Udeshi M. Ramesh*** *(2005 SCMR 648).*

79. It is equally important to note that once some of the Sections of a Bill have been declared unconstitutional, it would not mean that leftover Sections of the Bill have been declared in accordance with the Constitution. Their Constitutionality remains open to be questioned, which can be upheld

or struck down as or when challenged before a competent forum, as held by Irish Supreme Court in ***re: In the matter of Article 26 of the Constitution and in the matter of The Housing (Private Rented Dwellings) Bill, 1981*** *([1983] I.R. 181). Relevant para therefrom reads as under:---*

> *"It is to be noted that the Court's function under Article 26 is to ascertain and declare repugnancy (if such there be) to the Constitution in a referred bill or in the specified provision or provisions thereof. It is not the function of the Court to impress any part of a referred bill with a stamp of constitutionality. If the Court finds that any provision of a referred bill or of the referred provisions is repugnant, then the whole bill fails for the President is then debarred from signing it- thus preventing it from becoming an Act. There thus may be areas of a referred bill or of referred provisions of a bill which may be left untouched by the Court's decision. The authors of a bill may therefore find the Court decision less illuminating than they would wish it to be."*

*I****n the matter of Article 26 of the Constitution and in the matter of the Matrimonial Home Bill, 1993*** *[1994] 1 IR 305, the above principle of declaring some parts of a Bill unconstitutional was upheld.*

80. Learned counsel for Government of NWFP contended that the Courts on the basis of legislative controversial matters between the Federal and Provincial Government may not invalidate the Provincial legislation. In support of his contention he relied upon ***Duport Steels Ltd. v. Sirs and others*** *([1980] 1 All ER 529) and* ***Union of India v. Elphinstone Spinning and Weaving Co. Ltd.*** *[2001] 4 SCC 139.*

81. We have examined both these judgments in light of the arguments of the learned counsel. The judgment in ***Duport Steels Ltd.*** *(ibid) is from English jurisdiction, where the Courts at the relevant time, were not empowered to invalidate legislation for want of such Constitutional*

mandate. Second judgment, in the case of ***Union of India*** *(ibid), pertains to a fiscal matter. Admittedly, sufficient privilege is always given to the fiscal matters then to the law laid down by the Legislature, as it has been pronounced in* ***Elahi Cotton Mills Ltd. v. Federation of Pakistan*** *(PLD 1997 SC 582), wherein it has been held that " Courts, while interpreting laws relating to economic activities, view the same with greater latitude then the laws relating to civil rights such as freedom of speech, religion etc., keeping in view the complexity of economic problems, which do not admit of solution through any doctrinaire of strait jacket formula. Whereas penal statutes are to be interpreted strictly against the State and liberally in favour of accused [****Understanding Statutes*** *2d Ed. by S.M.Zafar page 243]. Therefore, following this principle, the penal statute calls for strict constitutional scrutiny, as such the second judgment cited by the learned counsel in support of his arguments is of no help to him. Thus, it is held that the Court seized with a Reference wherein constitutionality of a law/bill is required to be examined to form an opinion , it would not be transgressing its jurisdiction and is bound to inform the President about the constitutional status of the bill which is likely to become an Act of Parliament or Assembly.*

82. The learned counsel for NWFP Government questioned the maintainability of the Reference on following grounds:-

i) The bill has not been enacted into law as yet, therefore, Reference being premature, deserves to be dismissed.

ii) The request made by the Governor to the Prime Minister requesting him for filing of Reference without advice of the Chief Minster is illegal.

iii) On the advice of the Prime Minister, the President is only competent to refer the question of law which relates to federal law and not with respect to a provincial law.

iv) Under Article 186 of the Constitution, this Court can only express its opinion on question of law whereas in instant Reference, a mixed question of law and fact has been raised, therefore, this Court is not bound to answer the same.

83. Before addressing the arguments of learned counsel, it would be appropriate to reproduce herein-below different Articles from Government of India Act, 1935, Constitution of Pakistan, 1956, Constitution of Pakistan, 1962, Interim Constitution of Islamic Republic of Pakistan, 1972 and Constitution of Pakistan, 1973, conferring the advisory jurisdiction on the Supreme Court:-

Government of India Act 1935	***Article 213:*** *(1) If at any time it appears to the Governor General that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Federal court upon it, he may in his discretion refer the question to that court for consideration, and the court may, after such a hearing as they think fit, report to the Governor General thereon.* *(2) No report shall be made under this section save in accordance with an opinion delivered in open court with concurrence of a majority of the judges present at the hearing of the case, but noting in this subsection shall be deemed to prevent a judge who does not concur from delivering a dissenting opinion.*
Constitution of Pakistan 1956	***Article 162:*** *If at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public important that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that court for consideration, and the court may, after such hearing as it thinks fit, report its opinion thereon to the President.*
Constitution of Pakistan 1962	***Article 59:*** *(1) If, at any time, the President considers that it is desirable to obtain an opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.* *(2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President.*

Interim Constitution of the Islamic Republic of Pakistan 1972	***Article 187:*** *(1) If any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.* *(2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President.*
Constitution of Pakistan 1973	***Article 186:*** *(1) If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.* *(2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President.*

84. Under Article 106 of the Constitution of Peoples Republic of Bangladesh; Article 177 of Constitution of Republic of Sri Lanka; Article 130 of Constitution of Malaysia; Section 19 of Constitution of Independent State of Papua New Guinea; Article 123 of the Constitution of Republic of Fiji Islands; Section 53 of the Canadian Supreme Court Act, 1985, Section 4 of the Judicial Committee Act, 1833, "United Kingdom;" Article 26 of Constitution of Ireland; Article 14 of the Covenant of League of Nations (including amendments adopted on December, 1924), Article 65 of the Statute of Permanent Court of International Justice (Amendments by the Protocol of September 14, 1929), Article 96 of Charter of United Nations; Article 165 of the Statute of International Court of Justice and Article 143 of the Indian Constitution; confer same jurisdiction upon their Supreme Courts as is being enjoyed by this Court.

85. Article 143 from the Indian Constitution; Section 53 of the Canadian Supreme Court Act, 1985 and Article 26 of the Constitution of Ireland, are reproduced herein-below having identical features/ characteristics to Article 186 of the Constitution.

Constitution of India

Article 143:

(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

(2) The President may, notwithstanding anything in… the proviso in article 131 refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

Canadian Supreme Court Act 1985

Section 53:

(1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning.

(a) The interpretation of the Constitution Acts;

(b) The constitutionality or interpretation of any federal or provincial legislation;

(c) The appellate jurisdiction respecting educational matters, by the Constitution Act, 1867, or by any other Act or law vested in the Governor in Council; or

(d) The powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

(2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court ejusdem generis with enumerations contained in subsection.

(1), With reference to which the Governor in Council sees fit to submit any such question.

(3) Any question concerning any of the matters mentioned in subsections (1) And (2), and referred to Court by the Governor in Council, shall be conclusively deemed to be an important question.

(4) Where a reference is made to the Court under subsection (1) or (2), it is the duty of the Court to hear and consider it and to answer each question

so referred, and the Court shall certify to the Governor in Council, for his information, its opinion on each question, with the reasons for each answer, and the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court, and any judges who differ from the opinion of the majority shall in like manner certify their opinions and their reasons.

(5) Where the question relates to the constitutional validity of any Act passed by the legislature of any province, or of any provision in any such Act, or in case, for any question, the attorney general of the province shall be notified of the hearing in order that the attorney general may be heard if he thinks fit.

(6) The Court has power to direct that any person interested or, where there is a class of persons interested, any one or more persons as representatives of that class shall be notified of the hearing on any reference under this section, and those persons are entitled to be hard thereon.

(7) The Court may, in its discretion, request any counsel to argue the case with respect to any interest that is affected and with respect to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation.

Judicial Committee Act 1833 (United Kingdom)

Section 4 His Majesty may refer any other matter to the committee

….. It shall be lawful for his Majesty to refer to the said judicial committee for hearing or consideration any such other matter whatsoever as his Majesty shall think fit: and such committee shall thereupon hear to consider the same, and shall advise his Majesty thereon manner aforesaid.

Constitution of Ireland

Article 26

(1) This article applies to any Bill passed or deemed to have been passed by both Houses of Parliament other than a Money Bill, or a Bill expressed to be a Bill containing a proposal to amend the Constitution, or a Bill the time for the consideration of which by the Senate shall have been abridged under Article 24.

> *(1.1) The President may, after consultation with Council of State, refer any Bill to which this article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof.*
> *(1.2) Every such reference shall be made not later than the seventh day after the date on which such Bill have been presented by the Prime Minister to the President for his signature.*
> *(1.3) The President shall not sign any Bill the subject of a reference to the Supreme Court under this article pending the pronouncement of the decision of the Court.*
> *(2.1) The Supreme Court consisting of not less than five judges shall consider every question referred to it by the President under this article for a decision, and, having heard arguments by or on behalf of the Attorney General and by counsel assigned by the Court, shall pronounce its decision on such question in open court as soon as may be, and in any case not later than sixty days after the date of such reference.*
> *(2.2) The decision of the majority of the judges of the Supreme Court shall, for the purpose of this article, be the decision of the Court and shall pronounced by such one of those judges as the Court shall direct, and no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed.*
>
> *(3.1) In every case in which the Supreme Court decides that any provision of a Bill the subjection of a reference to the Supreme Court under this article is repugnant to the Constitution or to any provision thereof, the President shall decline to sign such Bill.*
> *(3.2) If, in the case of a Bill to which Article 27 applies, a petition has been addressed to the President under that article, that article shall be complied with.*
> *(3.3) In every other case the President shall sign the Bill as soon as may be after the date on which the decision of the Supreme Court shall have been pronounced.*

86. A comparison of above Articles with Article 186 of the Constitution, conferring advisory jurisdiction upon this Court, reveals that in Article

*213 of the Government of India Act 1935 and Article 162 of the Constitution of Pakistan, 1956, the phrase a question of law has risen or is likely to arise, identical to Article 143 of the Constitution of India, has been used. In Article 59 and Article 187 of the Constitution, 1962 and 1972, as well as in Article 186 of the Constitution, 1873, words "any question of law" have been used. By pre-fixing word "any" scope of Article 186 of the Constitution has been widened. Mr. Justice (R) Muhammad Munir, former Chief Justice of Pakistan in his book "**The Commentary on the Constitution of Pakistan, 1973,** has observed that "present Article has replaced these words "any question of law" which are more comprehensive in their scope and cover both question of law that has arisen and question of law that is likely to arise." Words "any" has always been interpreted by the Courts broadly. Reference may be made to the case of **Bank of Bahawalpur versus Chief Settlement and Rehabilitation Commissioner** (PLD 1977 SC 164). In this case, a full bench of this Court, on the basis of **Queen vs. Rowlands and others** (1880) Q.B.D 5308 and **Duek versus Bates** (1884) 12 Q.B.D 79, has held that "the word "any" is an expression of utmost generality removing all limitations or qualifications. In **Ch.Zahoor Elahi vs. The State** (PLD 1977 SC 273), it was held that the word "any" is used at no less than 7 places in Section 13(1) (b). It is a word of very wide amplitude and defined in **Stroud's Judicial Dictionary** as "a word which excludes limitations or qualifications." Acceptably, Constitutional document is interpreted broadly so as to cover all exigencies. A narrow construction has no room in the context of constitutional dispensation (Understanding of Statutes – Canons – Construction –Second Edition 850) by S.M. Zafar. In **Benazir Bhutto v. President of Pakistan** (PLD 1998 SC 388), it was held that "Constitution is*

the supreme law of the land to which all laws are subordinate. Constitution is an instrument by which government can be controlled. The provisions in the Constitution are to be considered in such a way which promotes harmony between the different provisions and should not render any particular provision to be redundant as the intention is that the Constitution should be workable to ensure survival of the system which is enunciated therein for the governance of the country." In ***Special Re. No.1 of 1957*** *(PLD 1957 SC 219) it was held that "effect should be given to every part and every word of the Constitution. Hence as a general rule, the Courts should avoid a construction which renders any provision meaningless or inoperative and must lean in favour of a construction which will render every word operative rather than one which may make some words idle and nugatory." In this context, reference can also be made to the cases of* ***The State v. Zia-ur-Rehman*** *(PLD 1973 SC 49) and* ***Federation of Pakistan v. Saeed Ahmed Khan*** *(PLD 1974 SC 151). In* ***Mian Muhammad Nawaz Sharif v. Federation of Pakistan*** *(PLD 1993 SC 473) it was also held that "while interpreting fundamental rights, the approach of the Court should be dynamic, progressive and liberal keeping in view ideals of the people, socio-economic and politico cultural values which in Pakistan are enshrined in the Objectives Resolution so as to extend the benefit of the same to the maximum people." In the case of* ***Al-Jehad Trust versus Federation of Pakistan*** *(PLD 1996 SC 324), it was held that "approach of the Court while interpreting a constitutional provisions has to be dynamic, progressive and oriented with the desire to meet the situation which has arisen effectively because efforts should be made to construe the provision broadly so that it may be able to meet the requirement of ever changing society. General words cannot be considered*

in isolation but the same are to be considered in the context in which they are employed." These observations have been reiterated in ***Bahadar Khan v. Atta Ullah Mengal*** *(1999 SCMR 1921) and* ***Pakistan Tobacco Company*** *(ibid), we feel no hesitation in holding that Constitution makers by using the expression 'any question of law' in Article 186 of the Constitution had widened its scope and had also covered disputes which are likely to arise. We may observe that if such construction is not placed on the expression 'any question of law' there is apprehension that the provision of advisory jurisdiction will become redundant.*

87. The President, when desires to obtain opinion of the Supreme Court on any question of law which he considers of public importance, he bears in his mind the significance of public importance, persuading him to seek opinion of Supreme Court, therefore, he being the custodian of Constitution, in capacity as a symbol of head of Federating units under the Constitution seeks guidance of the Court with no object except to avoid controversies and to ensure that Constitutional provisions are fully enforced in the good governance of Federal as well as Provincial Government as it may be, as such no embargo can be placed on the authority of the President of Pakistan to seek the advice on the question of law, which is likely to arise. Likewise, the Court is bound to express opinion in respect of those events which are likely to occur in future. At this juncture reference to the events that took place in Pakistan in December 1971, would not be out of context, on account of which Bangladesh emerged. When confronted with such situation, a chaos was prevailing and the Government was not decisive either to recognize Bangladesh or not and to resolve the situation, it felt it necessary to move a resolution in the National Assembly which would express that holding of trials in Dacca or

outside Pakistan or among the prisoners of war or civilian internees on alleged criminal charges would seriously jeopardize efforts towards reconciliation of peace in the sub-continent and would also be contrary to the International Law of Justice, therefore, considering the issue to be of public importance a Reference on the question "can a resolution of the purport described in paragraph 6 above and envisaging such constitutional measures as may be necessary before according of formal recognition, be validly adopted by the National Assembly, was made by the President of Pakistan. Admittedly, it was purely a question which was likely to arise because till then National Assembly had not passed a resolution, therefore, in view of such a concrete example, the arguments raised by learned counsel for the Government of NWFP loses its value.

88. In ***Re. Reference under section 213 of the Government of India Act, 1935*** *(AIR 1944 FC 73) it was held "the fact that the question referred related to future legislation cannot by itself be regarded as valid objection." Section 213 of the Government of India Act, 1935, empowers the Governor General of India to make a Reference when questions of law "are likely to arise." It is most important that in similar situation with which we are presently confronted i.e. whether the Hisba Bill has been passed by the NWFP Assembly, in accordance with the Constitution. The Indian Supreme Court examined the same proposition in* ***re. Kerala Education Bill 1957*** *(AIR 1958 SC 956) and observed "The principles established by judicial decisions clearly indicate that the complaint that the questions referred to us relate to the validity, not of a Statute brought into force but of a bill which has yet to be passed into law by being accorded the assent of the President is not a good ground for not entertaining the reference." Inasmuch as there are cases in which references have been*

*made even to consider proposed amendments by way of putting a bill before the law makers. [**In re. Sea Customs Act, 1878 Section 20(2)** (AIR 1963 SC 1760)]. In this Reference it was proposed to amend sub-section (2) of Section 20 of the said Act (Sea Customs Act) so as to amend the provisions of sub-section (1) of that section in respect of goods belonging to the Government of a State irrespective whether goods are used or not for the purposes set out in the said sub-section (2) as at present in force. One of the terms of Reference was "whereas governments of certain States have expressed the view that the amendments as proposed in the said draft of the Bill (emphasis provided) may not be constitutionally valid as the provisions of Article 289 read with the definitions of 'taxation' and tax in clause 28 of Article 366 of the Constitution of India precluded the Union from imposing or authorizing the imposition of any tax, including customs duties and excise duties, on or in relation to any property of a State except to the extent permitted by clause-2 read with clause-3 of the said Article 289." There is yet another category of References in which the president filed a Reference even before Bill was tabled in the Parliament and it was held that it makes no difference that bill is pending, since President was competent to make a Reference at any stage .[**In re: Special Courts Bill 1978** (AIR 1979 SC 478)].*

*89. It may not be out of context to note that in a country like Canada, the advisory jurisdiction of Supreme Court is invariably invoked and the Court had been examining legislative proposal before making the same as law. The jurisdiction invariably has been invoked not only in respect of Constitutionality of a Federal law but the constitutionality of a provincial law as well. Reference may be made to **the Constitutional Law of Canada** by Peter W. Hogg (244, 228 and 229), wherein the commentator*

has observed "the reference procedure has been used mainly for constitutional questions. It has rarely been used to seek answers to non-constitutional questions, although it is available for that purpose as well. The questions referred are usually about the constitutionality of a federal law (or a proposed federal law), but the constitutionality of a provincial law can also be referred, and this has been done from time to time."

90. The importance of seeking opinion of the Supreme Court has been well explained by the same author in following words:-

> *"A balanced assessment of the reference procedure must acknowledge its utility as a means of securing an answer to a constitutional question. As noted earlier, the reference procedure has been used mainly in constitutional cases. This is because it enables a government to obtain an early and (for practical purpose) authoritative ruling on the constitutionality of a legislative programme. Sometimes questions of law are referred in advance of the drafting of legislation; sometimes draft legislation is referred before it is enacted; sometimes a statute is referred shortly after its enactment; often a statue is referred after several private proceedings challenging its constitutionality promise a prolonged period of uncertainty as the litigation slowly works its way up the provincial or federal court system. The reference procedure enables and early resolution of the constitutional doubt."*

91. One another commentator P. Macklem, in ***Canadian Constitutional Law****, Volume-I 1994, has opined that "one of the most distinctive features of the Canadian Judicial Review is its frequent resort to the constitutional reference. This frequency can be demonstrated by a survey of the leading cases: those reaching the Privy Council up to 1949, the Supreme Court of Canada thereafter, decided from 1867 to 1981. Of 282 cases involving constitutional issues, 77 had their origins in a constitutional reference while 205 involved concrete cases. Nor does the fact that over a quarter, of*

the leading decisions were given in such proceedings reveal the full significance of constitutional references. In terms of impact on the political, social and economic affairs of the country the decisions in these cases have had an effect far beyond their numerical proportion."

92. The Supreme Court of Ireland has on various occasions examined the vires of pending bills under its advisory jurisdiction details whereof are available in Constitutional Law in Ireland by James Casey which reads as under:-

> *"Article 26 has so far been used seven times, viz:*
>
> *(a) The Offences against the State (Amendment) Bill 1940[1940] I.R.470.*
> *(b) The School Attendance Bill 1942[1943] I.R.334.*
> *(c) The Electoral Amendment Bill 1961[1961] I.R. 169*
> *(d) The Criminal Law (Jurisdiction) Bill 1975 [1977] I.R. 129.*
> *(e) The Emergency Powers Bill 1976 [1977] I.R. 159.*
> *(f) The Housing (Private Rented Dwellings) Bill 1981 [1983] I.R. 181.*
> *(g) The Electoral (Amendment) Bill 1983 [1984] I.L.R.M. 539."*

93. Thus, above discussion leads us to conclude that President in exercise of powers under Article 186 of the Constitution is empowered to seek opinion of this Court in its advisory jurisdiction in respect of any question of law which has arisen or is likely to arise including the Bills passed by Provincial Assemblies.

94. Learned counsel for NWFP relying upon the decision in ***Attorney General for Ontario versus Hamilton Street Railways*** *Privy Council (1903) A.C 524, has emphasized that the courts will not decide the speculative question, the Supreme Court can only give decision on a concrete case. The argument has no substance in view of the discussion made herein-above. So far as, the law relied upon by him is concerned, it pertains to the year 1903 whereas, in the meanwhile, number of constitutional changes in different countries have taken place wherein the*

advisory jurisdiction of the Courts have been extended and invoked to determine the constitutional questions of public importance.

95. The learned counsel also relied upon ***ref: under Section 213 Govt. of India Act 1935*** *(AIR 1944 FC 73) and read minority opinion of Sir Zafarullah Khan, J. who declined to answer the question whereas the majority of the Hon'ble Judges had answered the reference, while holding "the fact that the question referred relates to future legislation cannot by itself be regarded as an objection." In this very context, it was further observed that some instances were brought to our notice in which Reference had been made under the corresponding provision in the Canadian Supreme Court Act when the matter was at the stage of Bill. It may be pointed out that the comments made by Sir Zafarullah Khan in his judgment, were the views made by* ***Justice Frank Furter in an article published by Harvard Law Review*** *but not in a judicial decision. Reference may be made to footnote 13 at page 80 of the judgment. In* ***re: Special Courts Bill 1978*** *(AIR 1979 SC 478), the Supreme Court of India ruled that it was not for the Court to refuse to answer the Reference. This Court in* ***ref: No.1 of 1988*** *(PLD 1989 SC 75), reference of which has already been made herein-above, has expressed the same view.*

96. The objection of the learned counsel for NWFP that President is only competent to refer a question of law which relates to a federal law and not with respect to a provincial law is also not sustainable in view of the comprehensive and broad language employed in Article 186 of the Constitution. As per history special reference No. 1 of 1957 (PLD 1957 SC 219), reference was made by the President asking the Supreme Court whether under the circumstances Governor can dissolve the Government of a province. Similarly, in Reference No.1 of 1988, the President of

Pakistan through Secretary Ministry of Law, Justice and Parliamentary Affairs, asked the Supreme Court whether a Chief Minister could authenticate expenditure from the Provincial Consolidated Fund when the Provincial Assembly stood dissolved. As it has been pointed out herein-above that Indian Supreme Court also entertained a Reference dealing with the Provincial subject i.e ***Kerala Education Bill 1957*** *(AIR 1958 SC 956). Likewise, in* ***ref: under Article 143 of the Constitution of India*** *(AIR 1965 SC 745), the Indian Supreme Court held as under:----*

> *"At the hearing of this reference, Mr. Varina has raised a preliminary objection on behalf of the Advocate General of Bihar. He contends that the present reference is invalid under Art. 143(1) because the questions referred to this Court are not related to any of the entries in Lists I and III and as such, they cannot be said to be concerned with any of the powers, duties or functions conferred on the President by the relevant articles of the Constitution. The argument appears to be that it is only in respect of matters falling within the powers, functions and duties of the President that it would be competent to him to frame questions for the advisory opinion of this Court under Art. 143(1). In our opinion, this contention is wholly misconceived. The words of Art. 143 (1) are wide enough to empower the President to forward to this Court for its advisory opinion any question of law or fact which has arisen or which is likely to arise, provided it appears to the President that such a question is of such a nature or of such public importance that it is expedient to obtain the opinion of this Court upon it …..…."*

97. Identical observations have been made by this Court in ***ref: No.1 of 1988*** *(PLD 1989 SC 75) reference of which has already been made herein-above. In this very context under the Constitutional Law of Canada by Peter Hogg, reference of which has already been made, it has been*

observed that the constitutionality of a provincial law can also be referred and this has been done from time to time.

98. Learned counsel vehemently stressed about the competency of the Governor to approach the Prime Minister for filing a Reference by the President without seeking advice of the Chief Minister. Under Article 105 of the Constitution, the Governor is supposed to act on the advice of the Chief Minister but there are certain areas where he can act in his discretion under the Constitution. The Constitution is silent as to how the Governor will communicate with the Prime Minister and if the argument of the learned counsel prevails, it would lead to an anomalous position that the Governor cannot communicate with the Prime Minster except on the specific advice of the Chief Minister. In the instant case, the Governor was involved at pre-legislative stage by the Chief Minister as he was asked to express his opinion about the Hisba Bill and in view of his observation the bill was referred to the CII but the objection raised by the Governor as well as by the CII in its report dated 6th September 2004, were not removed, therefore, the Governor who had already come into picture had no Constitutional restraints to communicate with the Prime Minister. The argument of the learned counsel in this behalf loses its value for the reason that it is not the Governor who had made the Reference but the President of Pakistan on the basis of the advice from the Prime Minister notwithstanding the fact as to why the Governor had communicated with the Prime Minster, but in any case, it cannot be considered un-constitutional. It has been rightly held in ***ref: No.1 of 1988*** *(PLD 1989 SC 75) that the President is the sole judge of the public importance to question the desirability of referring it to the Supreme Court. Therefore, the objection being without substance is kept out of consideration.*

99. It is also objected to by the learned counsel that reference is not competent because it is not inter se the parties. This Court in exercise of advisory jurisdiction under Article 186 of the Constitution, has to express its opinion on constitutionality of the Hisba Bill, therefore, presence of the parties is not called for. Advisory jurisdiction of this Court is definitely different and distinct from the jurisdiction under Article 184 and 185 of the Constitution. Reference may be made to ***In re: Special Reference under Article 187 of the Interim Constitution of the Islamic Republic of Pakistan*** *(PLD 1973 SC 563) wherein question with regard to adopting a resolution by the National Assembly for formal recognition of Bangladesh was examined by this Court in absence of the parties. Thus, this objection being without substance is turned down.*

OPINION OF THE COURT

On having dilated upon the questions referred to by the President of Pakistan, the Court is of the unanimous opinion that Section 10 (Bey), (Jeem), (Dal); Section 12(1) (Alif), (Bey), (Jeem); Section 23(1), (2), (3), (5), (6), (7), (12), (14), (27); Section 25(1), (2) and Section 28 of the 'Hisba Bill' 2005, passed by the Provincial Assembly of NWFP, are ultra vires the Constitution of the Islamic Republic of Pakistan, 1973. The above referred Sections of the Hisba Bill are violative of Articles 2A, 4, 9, 14, 16, 17, 18, 19, 20 and 25 as well as 175 of the Constitution being vague, overbroad, unreasonable, based on excessive delegation of jurisdiction, denying the right of access to justice to the citizens and attempting to set up a parallel judicial system.

The Governor of the North-West Frontier Province may not assent to Hisba Bill in its present form as its various Sections noted herein-above have been declared ultra vires the Constitution of the Islamic Republic of Pakistan, 1973.

Herein-above are the reasons for our opinion (short order) dated 4th August, 2005.

REFERENCE ANSWERED ACCORDINGLY

C.J .

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Islamabad,
August, 2005.
Irshad /*

APPROVED FOR REPORTING