

**IN THE SUPREME COURT OF PAKISTAN**  
(Original Jurisdiction)

**PRESENT:**

MR. JUSTICE UMAR ATA BANDIAL, CJ  
MR. JUSTICE IJAZ UL AHSAN  
MR. JUSTICE SYED MANSOOR ALI SHAH

**CONST.P.21/2022 AND C.M.A.5029/2022**

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| 1. | Const.P.21/2022<br>(Under Article 184(3) for striking down the amendments made through the National Accountability (Amendment) Act, 2022 and the National Accountability (Second Amendment) Act, 2022 for being <i>ultra vires</i> to the Constitution) | Imran Ahmad Khan Niazi v. Federation of Pakistan through Secretary, Law and Justice Division, Islamabad and another |
| 2. | C.M.A.5029/2022<br>IN Const.P.21/2022<br>(Stay)   | Imran Ahmad Khan Niazi v. Federation of Pakistan through Secretary, Law and Justice Division, Islamabad and another |

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| For the Petitioner(s)/<br>Applicant(s) | : | Khawaja Haris Ahmad, Sr. ASC<br>Dr. Yasir Aman Khan, ASC<br><u>Assisted by:</u><br>Mr. Isaam Bin Haris, Advocate<br>Ms. Zaynib Chaudhary, Advocate<br>Mr. Muhammad Hashim Waqar,<br>Advocate<br>Barrister Faiza Asad, Advocate<br>Mr. Muhammad Shoaib Ilyas, Advocate  |
| Federation/Respondent<br>No.01         | : | Mr. Muhammad Makhdoom Ali Khan,<br>Sr. ASC<br>Mr. Anis Muhammad Shahzad, AOR<br><u>Assisted by:</u><br>Mr. Saad Muhammad Hashmi,<br>Advocate<br>Mr. Umair Muhammad Malik, Advocate<br>Kh. Aizaz Ahsan, Advocate<br>Mr. Yawar Mukhtar, Advocate<br>Kh. Azeem Armaghan, Advocate<br>Mr. Waqar Umar Farooq, Advocate<br><br>Ch. Aamir Rehman, Addl. AGP<br>Malik Javed Iqbal Wains, Addl. AGP<br>Raja Shafqat Abbasi, DAG |
| NAB/Respondent No.02                   | : | Mr. Mumtaz Yousf, Addl. Prosecutor<br>General  |

Mr. Muhammad Sattar Awan, Deputy  
Prosecutor General  
Qazi Babar Irshad, Special Prosecutor  
General  
Barrister Syeda Jugnu Kazmi, Special  
Prosecutor General

Date of Hearings : 19.07.2022 15.11.2022 10.02.2023  
29.07.2022 16.11.2022 14.02.2023  
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09.11.2022 07.02.2023 01.09.2023  
10.11.2022 08.02.2023 and  
14.11.2022 09.02.2023 05.09.2023

## J U D G M E N T

### UMAR ATA BANDIAL, CJ:

#### Surah Al-Anfal, Verse 27:

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

(Translation by Yusuf Ali)

Through the present Constitution Petition No.21 of 2022 the petitioner has challenged the amendments made to the National Accountability Ordinance, 1999 (“**NAB Ordinance**”) by the National Accountability (Amendment) Act, 2022 (“**First Amendment**”) and the National Accountability (Second Amendment) Act, 2022 (“**Second Amendment**”) (collectively referred to as the “**2022 Amendments**”).

### Origins and Content of the Unamended NAB Ordinance

2. Before delving into the facts giving rise to the present petition it would be appropriate to briefly set out the origins and

history of the NAB Ordinance. The NAB Ordinance was a successor of the Ehtesab Act, 1997 and was promulgated by the then Chief Executive of Pakistan, General Pervez Musharraf, on 16.11.1999 with retrospective effect from 01.01.01985. The NAB Ordinance is a special law enacted to *'eradicate corruption and corrupt practices and hold accountable all those persons accused of such practices.'*

To achieve its purposes the NAB Ordinance:

- i. Set up Special Courts for conducting trials of the offence of corruption and corrupt practices [refer Sections 5(g) and 16 of the NAB Ordinance prior to the 2022 Amendments];
- ii. Defined the categories of holders of public office who are subject to the NAB Ordinance. The two main categories are parliamentarians ("**elected holders of public office**") and 'persons in the service of Pakistan' [refer Section 5(m) of the NAB Ordinance prior to the 2022 Amendments];
- iii. Expanded the class of persons who could be investigated and prosecuted for the offence of corruption and corrupt practices [refer Section 5(o) of the NAB Ordinance prior to the 2022 Amendments];
- iv. Set up the NAB for the purposes of conducting pre-trial inquiries and investigations in relation to the offence of corruption and corrupt practices and to prosecute the same [refer Section 6 of the NAB Ordinance prior to the 2022 Amendments];
- v. Retained certain categories of the offence of corruption and corrupt practices from previous accountability laws whilst also adding certain new categories such as 'misuse of authority' and 'wilful default' [refer Section 9(a)(vi) and (viii) of the NAB Ordinance prior to the 2022 Amendments];
- vi. Declared the offence of corruption and corrupt practices non-bailable [refer Section 9(b) of the NAB Ordinance prior to the 2022 Amendments];
- vii. Retained certain evidentiary presumptions against accused persons whilst also adding a new category of presumption for

- persons accused of misusing their authority [refer Section 14 of the NAB Ordinance prior to the 2022 Amendments];
- viii. Permitted the Chairman NAB or any authorised officer of the Federal Government to seek mutual legal assistance from foreign States [refer Section 21 of the NAB Ordinance prior to the 2022 Amendments]; and
- ix. Introduced the concept of a plea bargain [refer Section 25(b) of the NAB Ordinance prior to the 2022 Amendments].

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

#### **Factual Background**

4. With the above context we can now lay down the facts relevant to the present petition. On 22.06.2022 the First Amendment to the NAB Ordinance became an Act of Parliament. Its essential features are:

- i. Its provisions have deemed effect from the date of commencement of the NAB Ordinance i.e., 01.01.1985 [refer Section 1(2) of the First Amendment];
- ii. It excludes the decisions, advice, reports, opinions tendered by and works, functions, projects, schemes executed by holders of public office and public/governmental bodies from the ambit of the NAB unless there is proof of the holders of public office or persons acting on their behalf having received any monetary or material benefit from the decisions, advice, reports, opinions, works, functions, projects or schemes [refer Section 2 of the First Amendment];
- iii. It has defined 'public at large' to mean at least 100 persons [refer Section 3 of the First Amendment];

- iv. It has altered the ingredients of the offences listed in Section 9(a)(v), (vi) and (ix) of the NAB Ordinance [refer Section 8 of the First Amendment];
- v. It has given Accountability Courts the power to grant bail to accused persons [refer Section 8 of the First Amendment];
- vi. It has omitted Section 14 of the NAB Ordinance which allowed the Accountability Court to draw various evidentiary presumptions against the accused [refer Section 10 of the First Amendment];
- vii. It has omitted Section 21(g) of the NAB Ordinance which allowed evidentiary material transferred by a foreign Government to be receivable as evidence in legal proceedings notwithstanding the provisions of the Qanun-e-Shahadat Order, 1984 [refer Section 14 of the First Amendment]; and
- viii. It has reduced the period of custody of the accused for the purposes of inquiry and investigation from 90 days to 14 days [refer Section 16 of the First Amendment].

5. On 25.06.2022 the petitioner filed the titled Constitution Petition with the prayer that the First Amendment be struck down (albeit with the exception of a few beneficial changes) for violating the Fundamental Rights of the people of Pakistan enshrined in Articles 9 (security of person), 14 (inviolability of dignity of man), 19A (right to information), 24 (protection of property rights) and 25 (equality of citizens) of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**").

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

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

- ii. It has enlarged the category of holders of public office and public/governmental bodies excluded from the jurisdiction of the NAB [refer Section 2 of the Second Amendment];
- iii. It has limited the pecuniary jurisdiction of the NAB to cases involving loss of Rs.500 million or more thereby rendering the NAB incompetent to investigate and prosecute offences of corruption and corrupt practices which have caused a loss of less than Rs.500 million [refer Section 3 of the Second Amendment]; and
- iv. It has provided accused persons with the opportunity to renege from the plea bargains entered into by them and approved by the Accountability Court if they fail to make the complete payment as approved by the Accountability Court [refer Section 14 of the Second Amendment].

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

- i. The National Accountability (Amendment) Act, 2023 which became an Act of Parliament on 29.05.2023 ("**2023 Act**"). This Act has primarily amended Section 4 of the NAB Ordinance to provide a transfer mechanism for pending inquiries, investigations and references to the relevant agency, authority, department, court, tribunal or forum [refer Section 2 of the 2023 Act]; and
- ii. The National Accountability (Amendment) Ordinance, 2023 which was promulgated on 03.07.2023 ("**2023 Ordinance**") by the President. The main feature of this Ordinance is that

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

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

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

- i. 386 references were returned by the Accountability Courts to NAB in 2022 whereas 212 references were returned in 2023. Therefore, a total of 598 references have been returned so far. Of these 35 references pertain to elected holders of public office;
- ii. The public money involved in the returned references is more than Rs.150 billion;
- iii. 327 of the 386 references were returned in 2022 due to the minimum pecuniary jurisdiction of the NAB being increased to Rs.500 million under the Second Amendment;

- iv. Out of the 598 returned references only 54 have yet been transferred to other courts for further action of which 17 have been transferred to the Custom Court and 4 to the Banking Court. As a result, 544 references are with the NAB in storage; and
- v. 127 references remain with the Accountability Courts after the 2022 Amendments.

**Comparative Table of the 2022 Amendments**

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

| NAB Ordinance Prior to the 2022 Amendments   | 2022 Amendments  |
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| <p><b>4. Application:</b> It extends to the whole of Pakistan and shall apply to all persons in Pakistan, all citizens of Pakistan and persons who are or have been in the service of Pakistan wherever they may be, including areas which are part of Federally and Provincially Administered Tribal Areas.</p> | <p><b>4. Application:</b> (1) This Ordinance extends to the whole of Pakistan and shall apply to all persons, including those persons who are or have been in the service of Pakistan, except persons and transactions specified in sub-section (2).</p> <p>(2) The provisions of this Ordinance shall not be applicable to the following persons or transactions, namely:-</p> <p>(a) all matters pertaining to Federal, Provincial or Local taxation, other levies or imposts, including refunds, or loss of exchequer pertaining to taxation, transactions or amounts duly covered by amnesty schemes of Government of Pakistan;</p> <p>(b) decisions of Federal or Provincial Cabinet, their Committees or Sub-Committees, Council of Common Interests (CCI), National Economic Council (NEC), National Finance Commission (NFC), Executive Committee of the National Economic Council (ECNEC), Central Development Working Party (CDWP), Provincial Development Working Party (PDWP), Departmental Development Working Party (DDWP), Board of Directors of State Owned Enterprises (SOEs), Board of Trustees/Directors of all Statutory Bodies, the State Bank of Pakistan and such other bodies except where the holder of the</p> |



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

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| <p>of corruption and corrupt practices—<br/>         ...<br/>         (v) if he or any of his dependents or benamidars owns, possesses, or has acquired right or title in any assets or holds irrevocable power of attorney in respect of any assets or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for or maintains a standard of living beyond that which is commensurate with his sources of income;</p>   | <p>corruption and corrupt practices—<br/>         ...<br/>         (v) if he or any of his dependents or other benamidars, through corrupt and dishonest means, owns, possesses or acquires rights or title in assets substantially disproportionate to his known sources of income which he cannot reasonably account for.<br/> <i><b>Explanation I.</b></i>— The valuation of immovable property shall be reckoned on the date of purchase either according to the actual price shown in the relevant title documents or the applicable rates prescribed by District Collector or the Federal Board of Revenue whichever is higher. No evidence contrary to the later shall be admissible.<br/> <i><b>Explanation II.</b></i>— For the purpose of calculation of movable assets, the sum total of credit entries of bank account shall not be treated as an asset. Bank balance of an account on the date of initiation of inquiry may be treated as a movable asset. A banking transaction shall not be treated as an asset unless there is evidence of creation of corresponding asset through that transaction.</p> |
| <p><b>14. Presumption against accused accepting illegal gratification:</b><br/>         a. Where in any trial of an offence under clauses (i), (ii), (iii) and (iv) of subsection (a) of section 9 it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person any gratification, other than legal remuneration, or any valuable thing, or any pecuniary advantage from a person or any agent of a person, for any favour shown or promised to be shown by the accused, it shall be presumed, unless the contrary is proved, that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing or pecuniary advantage for himself or some other person, as the case may be, as a motive or a reward such as is specified in section 161 to 163 of the Pakistan Penal Code, 1860, (Act XLV of 1860), or, as the case may be, without consideration, or for a consideration which he believed to be inadequate.<br/>         b. Wherein any trial of an offence punishable under section 165A of the Pakistan Penal Code,</p> | <p>Section 14 omitted.</p>   |

1860 (Act XLV of 1860) it is proved that any gratification, other than legal remuneration or any valuable thing has been given, or offered to be given, or attempted to be given, by any accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give, or attempted to give, that gratification, or that valuable thing, as the case may be, as a motive or a reward such as is specified in section 161 to 163 of the said Code, or, as the case may be without consideration or for a consideration which he believed to be inadequate.

c. In any trial, of an offence punishable under clause (v) of sub-section (a) of section 9 of this Ordinance, the fact that the accused person or any other person on his behalf, is in possession, for which the accused person cannot satisfactorily account, of assets or pecuniary resources disproportionate to his known source of income, or that such person has, at or about the time of the commission of the, offence with which he is charged, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, the Court shall presume, unless the contrary is proved, that the accused person is guilty of the offence of corruption and corrupt practices and his conviction therefor shall not be invalid by reason only that it is based solely on such a presumption.

d. In any trial of an offence under clause (vi) and (vii) of section 9 the burden of proof that he used his authority, or issued any directive, or authorized the issuance of any policy or statutory rule or, order (SRO), or made any grant or allowed any concession, in the public interest, fairly, justly, and for the advancement of the purpose of the enactment under which the authority was used, directive or policy or rule or order was issued or grant was made or concession was allowed shall lie on the accused, and in the absence of such proof the accused shall be guilty of the offence, and his conviction shall not be invalid by the reason that it is based solely on such presumption:

Provided that the prosecution shall first

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| <p>make out a reasonable case against the accused charged under clause (vi) or clause (vii) of sub-section (a) of section 9.</p>  |   |
| <p><b>21. International Cooperation Request for mutual legal assistance:</b> The Chairman NAB or any officer authorized by the Federal Government may request a Foreign State to do any or all of the following acts in accordance with the law of such State:—<br/>...<br/>(g) Notwithstanding anything contained in the Qanun-e-Shahadat Order 1984 (P.O. 10 of 1984) or any other law for the time being in force all evidence, documents or any other material transferred to Pakistan by a Foreign Government shall be receivable as evidence in legal proceedings under this Ordinance;</p>   | <p>Section 21(g) omitted.</p>   |
| <p><b>25. Voluntary return and plea bargain: ...</b><br/>(b) Where at any time after the authorization of investigation, before or after the commencement of the trial or during the pendency of an appeal, the accused offers to return to the NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence under this Ordinance, the Chairman, NAB, may, in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary, and if the accused agrees to return to the NAB the amount determined by the Chairman, NAB, the Chairman, NAB, shall refer the case for the approval of the Court, or as the case may be, the Appellate Court and for the release of the accused.</p> | <p><b>25. Voluntary return and plea bargain: ...</b><br/>(b) Where at any time after the authorization of investigation, before or after the commencement of the trial or during the pendency of an appeal, the accused offers to return to the NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence under this Ordinance, the Chairman, NAB, may, in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary, and if the accused agrees to return to the NAB the amount determined by the Chairman, NAB, the Chairman, NAB, shall refer the case for the approval of the Court, or as the case may be, the Appellate Court and for the release of the accused:<br/>Provided that statement of an accused entering into plea bargain or voluntary return shall not prejudice case of any other accused:<br/>Provided further that in case of failure of accused to make payment in accordance with the plea bargain agreement approved by the Court, the agreement of plea bargain shall become inoperative to the rights of the parties immediately.</p> |

9. It may be noticed from the provisions produced above that the 2022 Amendments have indeed brought about a significant change in the legal position under the NAB Ordinance.

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

10. However, by the addition of the new conditions in and explanations to Section 9(a)(v) coupled with the omission of Section 21(g) that permitted the admission of foreign evidentiary material in legal proceedings under the mutual legal assistance regime set up by the United Nations Convention against Corruption, the burden cast on the prosecution to establish that a holder of public office has accumulated unaccounted domestic (or foreign) assets beyond his means has been made formidable. Along with that the presumption noted in Section 14(c) has also been deleted. The result of these amendments relating to proof of the offence of accumulated assets beyond means will be that in the

future few persons will be prosecuted for such an offence by the NAB with still lesser convictions under Section 9(a)(v). The above result is in addition to the effect that the 2022 Amendments envisage the return of pending inquiries, investigations and references but do not provide any mechanism for then transferring them to the relevant agency, authority, department, court, tribunal or forum. That procedure was provided for the first time by the 2023 Act. However, the 2023 Act is applicable to only those inquiries, investigations and references of which either the NAB or the Accountability Court is seized. As noted above, there are hundreds of references that have been returned by the Accountability Courts to the NAB pursuant to the 2022 Amendments and prior to the 2023 Act. These references returned in the interregnum between the two amendments have gone into limbo, a fact affirmed by the record supplied by the Additional Prosecutor General, NAB.

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

- i. Assets beyond means [refer Section 9(a)(v) of the NAB Ordinance];
  - ii. Misuse of authority [refer Section 9(a)(vi) of the NAB Ordinance]; and
  - iii. Cheating [refer Section 9(a)(ix) of the NAB Ordinance].
- Additionally, Section 9(a)(vii) which criminalised the issuance of any directive, policy, SRO or any other order which granted undue

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

### **Arguments of Counsel**

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

#### **A. Submissions by the Petitioner**

- i. The titled petition is maintainable under Article 184(3) of the Constitution as the 2022 Amendments directly and adversely affect the Fundamental Rights of the people of Pakistan i.e., Articles 9, 14, 19A, 24 and 25 and violate a salient feature of the Constitution, namely, Parliamentary form of Government blended with Islamic provisions;
- ii. The provisions of the 2022 Amendments have effectively decriminalised the offence of 'corruption and corrupt practices' thereby allowing the holders of public office to retain their ill-gotten wealth whilst being exempted from prosecution under the NAB Ordinance. The specific sections of the 2022 Amendments that decriminalise the offence of 'corruption and corrupt practices' and exclude holders of public office from the province of the NAB will be discussed later in the judgment; and
- iii. The Court is empowered under Article 184(3) of the Constitution to either strike down the 2022

Amendments or to direct the Federation to bring the 2022 Amendments in line with the requirements of the Constitution and Fundamental Rights.

**B. Submissions by the Respondent Federation**

- i. The instant Constitution Petition is not maintainable because it does not satisfy the twin criteria laid down in Article 184(3) of the Constitution, the petitioner lacks *bona fide* and *locus standi* to challenge the 2022 Amendments and the petition at the present stage is premature and based on speculations and conjectures;
- ii. No cogent reason has been given by the petitioner for not challenging the 2022 Amendments before the High Courts;
- iii. The 2022 Amendments have been enacted after taking into consideration the criticisms levelled against the NAB Ordinance, including by the Superior Judiciary in its judgments/orders; and
- iv. An incorrect perception is being created that the 2022 Amendments have decriminalised the offence of corruption and corrupt practices because there exist other accountability foras in the country which can investigate, prosecute and try accused persons for the offences which no longer fall within the ambit of the NAB.

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



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

**Maintainability**

15. The learned counsel for the respondent Federation strongly objected to the maintainability of the titled petition for failing to satisfy the jurisdictional requirements of Article 184(3) of the Constitution. It was his case that the petitioner had failed to identify the precise Fundamental Right that had been violated by the 2022 Amendments. Additionally, he submitted that the petitioner lacked *locus standi* and *bona fides* to challenge the 2022 Amendments because firstly, when he was Prime Minister his government introduced many of the amendments that have been consolidated by the 2022 Amendments and secondly, he had committed a dereliction of duty by refusing to sit in the National Assembly and raise concerns regarding the 2022 Amendments therein. Learned counsel also stated that the dispute raised by the petition in respect of the 2022 Amendments is hypothetical as there are no facts before the Court as a result of which the Court will be considering and deciding the question of *vires* of the 2022 Amendments in the abstract.

16. In response, learned counsel for the petitioner consistently maintained his stance that the cumulative effect of the 2022 Amendments is that the offence of corruption and corrupt practices committed by the holders of public office has been

decriminalised thereby violating the following Fundamental Rights of the people of Pakistan:

**“9. Security of person.** No person shall be deprived of life or liberty save in accordance with law.

**14. Inviolability of dignity of man, etc.** (1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.

**24. Protection of property rights.** (1) No person shall be compulsorily deprived of his property save in accordance with law.

**25. Equality of citizens.** (1) All citizens are equal before law and are entitled to equal protection of law.”

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

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

**“184. Original jurisdiction of Supreme Court.**

...

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

By virtue of the afore-noted provision the Court can pass appropriate orders in cases where the enforcement of a

Fundamental Right(s) affecting the public at large is involved. It is by now well-established in our jurisprudence that acts of corruption and corrupt practices do infringe the Fundamental Rights of the public and thus meet the test of Article 184(3). Reliance in this regard is placed on the decisions of the Court in **Suo Motu Case No.19 of 2016** (2017 SCMR 683); **Corruption in Hajj Arrangements in 2010** (PLD 2011 SC 963); **Bank of Punjab Vs. Haris Steel Industries (Pvt.) Ltd.** (PLD 2010 SC 1109). For reference relevant passages from the cases of **Corruption in Hajj Arrangements** (*supra*) and **Bank of Punjab** are produced below:

**“Corruption in Hajj Arrangements**

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

**Bank of Punjab**

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

assault on the said fundamental right to life and to property of the said public."

*(emphasis supplied)*

18. Although learned counsel for the respondent Federation had no cavil with the proposition that the Court can undertake proceedings in the original jurisdiction to check corruption and corrupt practices committed by the holders of public office, he stressed that unlike the cases previously decided by the Court the instant matter pinpoints no specific act of corruption and/or corrupt practice. In fact, the entire controversy raised by the petitioner is conjectural and academic. However, we are not persuaded with this argument of learned counsel because as noted above in paras 7 and 9-10, the 2022 Amendments have limited the NAB's jurisdiction thus excluding hundreds of pending references from trial before any forum and have also made the proof of the offence of corruption and corrupt practices significantly harder for references that satisfy the jurisdictional requirements of Section 4 and Section 5(o) of the NAB Ordinance. We think it would be a legal absurdity to hold that whilst the Court can take cognizance of individual acts of corruption and corrupt practices under Article 184(3) it cannot do so when amendments have been introduced in the accountability law i.e., the NAB Ordinance which exclude the jurisdiction of the NAB to investigate and prosecute holders of public office in two significant respects thereby *ex-facie* violating Articles 9, 14, 23 and 24 of the Constitution by exonerating the holders of public office from their alleged acts of corruption and corrupt practices by failing to provide a forum for their trial. The 2022 Amendments have therefore rendered the NAB toothless in accomplishing its objective

of 'eradicat[ing] corruption and corrupt practices and hold[ing] accountable all those persons accused of such practices' and have left public property belonging to the people of Pakistan vulnerable to waste and malfeasance by the holders of public office. Such interference in the NAB's jurisdiction and powers most certainly affects the Fundamental Rights of the people at large as noted by the Court in **Progress Report of NAB in OGRA Case** (2015 SCMR 1813):

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

*(emphasis supplied)*

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

19. Be that as it may, the learned counsel for the respondent Federation raised other preliminary objections to the petition as well. One of them being that the petitioner does not possess either *locus standi* or *bona fides* to challenge the 2022 Amendments because he never questioned the 2022 Amendments in Parliament. However, it is settled law that when the Court

exercises jurisdiction under Article 184(3) of the Constitution it is not concerned with the antecedents or standing of the person who has filed the petition because that person is merely acting as an informant. Instead, the Court favours a substantive approach focusing more on the content of the petition and whether the same crosses the threshold set out in Article 184(3). In this respect, we are fortified by the dicta of the Court in **Muhammad Yasin Vs. Federation of Pakistan** (PLD 2012 SC 132):

"24. Before concluding our discussion on the issue of maintainability of this petition we need to address the respondent's submission that the petition has been filed *mala fide*. We have found no lawful basis for this submission... we have already held in the case titled Moulvi Iqbal Haider versus Capital Development Authority and others (2006 SC 394 at 413) that the contents of a petition under Article 184 (3) *ibid* will override concerns arising on account of the conduct or antecedents of a petitioner..."  
(emphasis supplied)

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

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

20. We have already noted above that the instant petition satisfies the conditions of Article 184(3), therefore, any apprehensions about the *locus standi* and *bona fides* of the petitioner stand overridden. Insofar as the prior amendments passed during the petitioner's term as Prime Minister are concerned, the same were promulgated through different Ordinances all of which have lapsed and are no longer in the field.

On the other hand, the 2022 Amendments have come into being through Acts of Parliament and will remain on the statute book unless these are repealed by Parliament in the future. Further, the amendments brought about in the petitioner's tenure did not contain analogous retrospectivity clauses, as exist in the 2022 Amendments, as a result of which the impact of the Ordinances on pending references and past and closed transactions was limited.

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

22. Learned counsel for the respondent Federation lastly took exception with the Court exercising its original jurisdiction in this matter instead of first letting the High Courts decide the *vires* of the 2022 Amendments. He relied on **Manzoor Elahi Vs. Federation of Pakistan** (PLD 1975 SC 66) and **Benazir Bhutto Vs. Federation of Pakistan** (PLD 1988 SC 416) to reiterate that the Court's original jurisdiction is to be exercised sparingly and in deference to the High Courts jurisdiction under Article 199 of the Constitution. We are of the view that the Court's judgment in **Suo Motu No.1 of 2023** dated 01.03.2023 has already dealt with this point. For reference, the relevant passage is produced below:

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

*(emphasis supplied)*

We find ourselves in agreement with the dicta cited above and endorse it. Indeed, on an examination of the jurisprudence of the Court that has developed under Article 184(3) of the Constitution it becomes clear that since the decisions in **Manzoor Elahi** (*supra*) and **Benazir Bhutto** (*supra*) there have been numerous instances where the Court has considered and decided the *vires* of legislation



in its original jurisdiction. Some of these cases are **Mehram Ali Vs. Federation of Pakistan** (PLD 1998 SC 1445) which decided the *vires* of the Anti-Terrorism Act, 1997; **Liaquat Hussain Vs. Federation of Pakistan** (PLD 1999 SC 504) which decided the *vires* of the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998; **Asfandiyar Wali** (*supra*) which decided the *vires* of the NAB Ordinance; **Mobashir Hassan Vs. Federation of Pakistan** (PLD 2010 SC 265) which decided the *vires* of the National Reconciliation Ordinance, 2007; **Baz Muhammad Kakar Vs. Federation of Pakistan** (PLD 2012 SC 923) which decided the *vires* of the Contempt of Court Act, 2012; **Zulfiqar Ahmed Bhutta Vs. Federation of Pakistan** (PLD 2018 SC 370) which decided the *vires* of Sections 203 and 232 of the Elections Act, 2017.

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

#### **Impugned Provisions of the 2022 Amendments**

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

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

- i. Section 3 of the Second Amendment has changed the definition of 'offence' in Section 5(o) of the NAB Ordinance by inserting a minimum pecuniary jurisdiction of Rs.500 million below which value the NAB cannot take cognizance of the offence of corruption and corrupt practices;
- ii. Section 2 of the First Amendment by inserting sub-sections (a)-(f) into Section 4 of the NAB Ordinance and Section 2 of the Second Amendment by adding sub-section (g) in Section 4 of the NAB Ordinance has excluded certain holders of public office from application of the NAB Ordinance and thereby limited its effect;
- iii. Section 8 of the First Amendment has inserted new ingredients in the offence under Section 9(a)(v) of the NAB Ordinance and added explanations thereto. Section 9(a)(v) criminalizes the act of holding assets beyond means;
- iv. Section 10 of the First Amendment has deleted Section 14 of the NAB Ordinance which provides evidentiary presumptions that may be drawn against the accused;
- v. Section 14 of the First Amendment has deleted Section 21(g) of the NAB Ordinance which permitted foreign evidence to be admissible in legal proceedings under the mutual legal assistance regime; and
- vi. Section 14 of the Second Amendment has added a second proviso to Section 25(b) of the NAB Ordinance whereby an accused who enters into a plea bargain duly approved by the Accountability Court under Section 25(b) can renege from the same if he has not paid the full amount of the bargain settlement as approved by the Accountability Court.

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

### **Section 3 of the Second Amendment**

25. As already noted above in para 6, Section 3 of the Second Amendment has amended Section 5(o) of the NAB Ordinance to set the minimum pecuniary jurisdiction of the NAB at

Rs.500 million for inquiring into and investigating cases involving the commission of the offence of corruption and corrupt practices. As a result, offences that cause loss valued at less than Rs.500 million no longer come within the ambit of the NAB. The apparent rationale for enhancing the pecuniary jurisdiction is noted in the Statement of Objects and Reasons attached to the Second Amendment. It reads:

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

*(emphasis supplied)*

The necessity to streamline the jurisdiction of the NAB and focus its efforts on mega scandals i.e., those involving an amount of Rs.500 million or more was explained by learned counsel for the respondent Federation by reference to the jurisprudence of the Superior Courts. Reliance was placed on **State Vs. Hanif Hyder** (2016 SCMR 2031) wherein the Court observed:

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

*(emphasis supplied)*

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

"11. Learned PGA NAB on instructions from the Chairman NAB made written as well as oral submissions in order to assist the Court. He submitted that NAB was aware of this issue of pecuniary jurisdiction and in this respect had passed an SOP in respect of the monetary value of cases which NAB would pursue which is set out below for ease of reference.

**"Priority for Cognizance of Cases:**

...

iii. Cases of former/sitting legislators of National Assembly, Senate and Provincial Assemblies (including ministers/advisers etc.) and elected representatives of local bodies, where amount involved is more than Rs.100 million.

iv. Cases involving interest of members of public at large where the numbers of defrauded person are more than 50 persons and amount involved is not less than Rs.100 million.

v. Cases against public servants, whether serving or retired, Bankers, Businessmen and Contractors where amount involved is more than Rs.100 million.

...

40. ...taking into account the above discussion on the pecuniary jurisdiction of NAB including NAB making the best use of its human resources, equipment, office space etc., and budget limitations we hereby endorse by way of judicial order the NAB's SOP for dealing with pecuniary jurisdiction which is set out at para 11 of this order... as we consider the figure of Rs.100 M to be significantly large to justify the intervention of the NAB being the premier anti corruption body in the Country..."

*(emphasis supplied)*

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

26. It becomes clear from the pronouncements of the Superior Courts quoted above that the principal focus of the NAB is to mainly prosecute mega scandals. But whilst the judgments of the Superior Courts indicate that the minimum pecuniary threshold of NAB should be Rs.100 million (except in limited circumstances where offences less than Rs.100 million cannot be prosecuted by any other accountability agency), Section 3 of the

Second Amendment has increased this minimum threshold to Rs.500 million. No cogent argument was put forward by learned counsel for the respondent Federation as to why Parliament has fixed a higher amount of Rs.500 million for the NAB to entertain complaints and file corresponding references in the Accountability Courts when the Superior Courts have termed acts of corruption and corrupt practices causing loss to the tune of Rs.100 million as mega scandals.

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

**Mobashir Hassan** (*supra*):

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

*(emphasis supplied)*

Nonetheless, by enacting Section 3 of the Second Amendment we are afraid that Parliament has in fact assumed the powers of the Judiciary because by excluding from the ambit of the NAB Ordinance the holders of public office who have allegedly committed the offence of corruption and corrupt practices involving an amount of less than Rs.500 million Parliament has effectively absolved them from any liability for their acts. This is a function which under the Constitution only the Judiciary can perform (with the exception of the President who has been conferred the power to

grant a pardon under Article 45 of the Constitution). A similar view was also taken by the Court in **Mobashir Hassan** (*supra*) when it was examining the *vires* of Section 7 of the National Reconciliation Ordinance, 2007 under which pending investigations and proceedings initiated by the NAB against holders of public office were withdrawn and terminated with immediate effect:

"119. So far as withdrawal from the cases inside or outside the country, as per Section 33[A] of the NAO, 1999, inserted through Section 7 of the NRO, 2007, is concerned, it would mean that the 'holders of public office' have been absolved from the charge of corruption and corrupt practices, therefore, by adopting such procedure, the legislative authority had transgressed its jurisdiction, because such powers are only available to the judiciary and the Constitution provides guarantee to secure the independence of the judiciary..."

*(emphasis supplied)*

28. Learned counsel for the respondent Federation attempted to justify this encroachment into the jurisdiction of the Judiciary by submitting that merely because the minimum pecuniary threshold of the NAB has been increased does not mean that holders of public office stand absolved. That other accountability fora exist in the country where the trials of the accused holders of public office who have been removed from the jurisdiction of the NAB can be held. The Court having regard to the fact, as noted above in para 2, that holders of public office under the NAB Ordinance fall into two categories i.e., elected holders of public office and persons in the service of Pakistan, posed the following query to learned counsel for the respondent Federation '*if the Accountability Court were to send/transfer a Reference against a parliamentarian [elected holders of public office] for lack of its jurisdiction, then which would be the competent transferee court to adjudicate the Reference and under which law?*' In his written

response, the learned counsel referred to the provisions of Prevention of Corruption Act, 1947 ("**1947 Act**"); Pakistan Penal Code, 1860 ("**PPC**"); Income Tax Ordinance, 2001; and Anti-Money Laundering Act, 2010. For present purposes the two relevant laws are the 1947 Act and the PPC. However, on a careful examination of these legislations it becomes clear that the two are applicable only to public servants. Public servant is defined in the PPC in Section 21 as follows:

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

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

*Third.-* Every Judge;

*Fourth.-* Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court; and every person specially authorized by a Court of Justice to perform any of such duties;

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

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

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

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

*Ninth.-* Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make

any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government, and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty;

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

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

*(emphasis supplied)*

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

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

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

...

"service of Pakistan" means any service, post or office in connection with the affairs of the Federation or of a Province, and includes an All-Pakistan Service, service in the Armed Forces and any other service declared to be a service of Pakistan by or under Act of [Majlis-e-Shoora (Parliament)] or of a Provincial Assembly, but does not include service as... member of a House or a Provincial Assembly;"

*(emphasis supplied)*

It may be noticed that under the Constitution persons in the service of Pakistan are those who are holding posts in connection with the affairs of the Federation or Province. As a result, such



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

30. This legal situation also explains why the Holders of Representative Offices (Prevention of Misconduct) Act, 1976 ("**1976**

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<sup>1</sup> Later case-law from the Indian jurisdiction has included Members of the Legislative Assembly in the definition of public servant but the said case-law does not pertain Section 21 of the Indian Penal Code, 1860 as the law in India changed in 1988.

**Act")** was enacted and Holders of Representative Offices (Punishment for Misconduct) Order, 1977 ("**1977 Order**") was promulgated. Both these laws applied only to holders of representative office i.e., elected holders of public office and subjected them to prosecution for offences similar to those prescribed in the NAB Ordinance. If the submission of learned counsel for the respondent Federation is correct that elected holders of public office can be tried under the 1947 Act and the PPC then there would have been no need to pass the 1976 Act or the 1977 Order since both the 1947 Act and the PPC precede these laws. Ultimately, the 1976 Act was repealed by the Provincial Assemblies (Disqualification for Membership) (Amendment) Ordinance, 1990 whereas the 1977 Order was repealed by the Ehtesab Act, 1997. As noted above in para 2, the Ehtesab Act, 1997 was the predecessor of the NAB Ordinance and the latter repealed the former. This chain of legislative events shows that in 1976 Parliament became aware of the vacuum in the law whereby persons in the service of Pakistan could be held to account for their corruption and corrupt practices but elected holders of public office could not. Therefore, Parliament passed the 1976 Act. The said Act was then succeeded by multiple legislations which had the same object i.e., accountability of elected holders of public office with the NAB Ordinance being the latest and the most comprehensive effort so far to accomplish this objective.

31. By amending Section 5(o) of the NAB Ordinance to raise the minimum pecuniary threshold of the NAB to Rs.500 million, Section 3 of the Second Amendment has undone the legislative efforts beginning in 1976 to bring elected holders of public office within the ambit of accountability laws because by virtue of Section 3 elected holders of public office have been granted both retrospective and prospective exemption from

accountability laws. Once excluded from the jurisdiction of the NAB no other accountability fora can take cognizance of their alleged acts of corruption and corrupt practices as noted above. Such blanket immunity offends Articles 9, 14, 23 and 24 of the Constitution because it permits and encourages the squandering of public assets and wealth by elected holders of public office as there is no forum for their accountability. This in turn affects the economic well-being of the State and ultimately the quality and dignity of the peoples lives because as more resources are diverted towards illegal activities less resources remain for the provision of essential services to the people such as health facilities, education institutes and basic infrastructure etc. The immunity also negates Article 62(1)(f) of the Constitution which mandates that only '*sagacious, righteous, non-profligate, honest and ameen*' persons enter Parliament. It also offends the equal treatment command of Article 25 of the Constitution as differential treatment is being meted out to persons in the service of Pakistan than to elected holders of public office. This is because persons in the service of Pakistan can still be prosecuted for the offence of corruption and corrupt practices under the 1947 Act as they fall within the definition of public servants (refer para 29 above). The 1947 Act shares some of the essential features of the NAB Ordinance, namely, it provides for the prosecution of public servants who have accumulated assets beyond means [refer Section 5(1)(e) of the 1947 Act] and it permits the drawing of an evidentiary presumption against public servants who cannot account for their disproportionate pecuniary resources or property [refer Section 5(3)

of the 1947 Act]. Consequently, if Section 3 of the Second Amendment is allowed to remain on the statute book there will be an anomalous situation in that elected holders of public office will be exempted from accountability under the amended and much relaxed requirements of the NAB Ordinance even though they *'while acting as trustees and the chosen representatives of the people, take decisions which are often of grave consequence for the protection of the economic, political and over-all national interests of the people of Pakistan. In other words, theirs is a fiduciary duty of the highest order'* [ref: **Mehmood Akhtar Naqvi Vs. Federation of Pakistan** (PLD 2012 SC 1089) at para 6 of Justice Jawwad S. Khawaja's concurring note] whilst the persons in the service of Pakistan will have to undergo the rigours of accountability laws without exception. Such a situation cannot be countenanced by either the Constitution or the law.

32. In this regard, we must also note that the learned counsel for the respondent Federation filed his concise statement on 12.09.2023 wherein he has attached the decision/guideline of the Chairman NAB dated 08.08.2023 in respect of returned references. The decision/guideline reads:

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

*(emphasis supplied)*

We have already noted above in para 6 that the 2023 Act has provided a mechanism for transferring pending inquiries, investigations and references to the relevant agency, authority, department, court, tribunal or forum if the NAB or Accountability Courts are seized of these matters. But returned references can by no stretch of the imagination be considered as pending before the Accountability Courts. Therefore, the above decision/guideline issued by Chairman NAB a year after the First Amendment to seek the revival of the 544 references returned to the NAB that are lying in storage to have them forwarded to the appropriate forum cannot vest jurisdiction in the Accountability Courts to reopen cases of which it is not seized. In any event, the decision/guideline still does not resolve the pivotal issue i.e., that there is neither an accountability law other than the NAB Ordinance and an investigating authority other than the NAB nor any accountability forum other than the Accountability Court where the acts of corruption and corrupt practices committed by elected holders of public office can be investigated and prosecuted. The decision/guideline may therefore prove effective only in cases of corruption and corrupt practices where the accused are persons in the service of Pakistan. Consequently, the decision/guideline issued by Chairman NAB has no bearing on the *vires* of Section 3 of the Second Amendment which is unconstitutional on account of absolving persons accused of the offence of corruption and corrupt practices without a judicial verdict which amounts to legislative judgment [refer **Province of Punjab Vs. National Industrial Cooperative Credit Corporation** (2000 SCMR 567) at para 8].

### **Declaration on Section 3 of the Second Amendment**

#### **A. Elected Holders of Public Office**

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

## **B. Persons in the Service of Pakistan**

- ii. The cases of persons in the service of Pakistan can be categorised under two headings, namely, offences which are common to both the 1947 Act and the NAB Ordinance and offences which are unique to the NAB Ordinance.
- iii. The offences which are common to the 1947 Act and the NAB Ordinance are those listed in Section 9(a)(i)-(v) of the NAB Ordinance whereas the offences in 9(a)(vi)-(xii) are distinct to the NAB Ordinance.
- iv. Since persons in the service of Pakistan can be tried for offences contained in Section 9(a)(i)-(v) of the NAB Ordinance under the 1947 Act the bar of Rs.500 million shall continue for such offences. To this extent Section 3 of the Second Amendment is declared to be *intra vires* the Constitution.
- v. However, on account of the fact that persons in the service of Pakistan cannot be tried for the offences noted in Section 9(a)(vi)-(xii) under the 1947 Act or any other accountability law the bar of Rs.500 million will not apply to them for such offences. Section 3 of the Second Amendment is therefore declared to be void and without legal effect for these offences for discharging the accused without trial which is tantamount to legislative judgment and is held to be so from the date of commencement of the Second Amendment.

### **Section 2 of the 2022 Amendments**

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

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

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

(a) all matters pertaining to Federal, Provincial or Local taxation, other levies or imposts, including refunds, or loss of exchequer pertaining to taxation, transactions or amounts duly covered by amnesty schemes of Government of Pakistan;

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

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

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

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

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

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

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

**"4. Application:** It extends to the whole of Pakistan and shall apply to all persons in Pakistan, all citizens of Pakistan and persons who are or have been in the service of Pakistan wherever they may be, including areas which are part of Federally and Provincially Administered Tribal Areas."

34. From the comparison of the unamended and amended versions of Section 4 it becomes plain that exceptions have been created for the decisions, advice, reports, opinions of and works, functions, projects, schemes undertaken by holders of public office and public/governmental bodies unless there is evidence of the holder of public officer or a person acting on his behalf having received monetary or other material benefit. Such exceptions are novel not only to the NAB Ordinance but also other accountability laws such as the 1947 Act. The rationale behind introducing these exceptions in the NAB Ordinance is explained in the Statement of Objects and Reasons attached to the First Amendment:

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

The Court appreciates the efforts of Parliament to address and rectify what has long been regarded unguided discretion of the



NAB authorities. The Court as far back in Asfandyar Wali (*supra*) observed in relation to the NAB Ordinance that:

"228. ...To protect decision making level officers and the officers conducting inquiry/investigation from any threats, appropriate measures must be taken to relieve them of the anxiety from the likelihood of harassment for taking honest decisions.

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

*(emphasis supplied)*

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

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

### **Declaration on Section 2 of the 2022 Amendments**

#### **A. Elected Holders of Public Office**

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

#### **B. Persons in the Service of Pakistan**

- ii. Section 2 of the 2022 Amendments insofar as these pertain to the offences set out in Section 9(a)(i)-(v) of the NAB Ordinance are declared to be *intra vires* the Constitution because persons in the service of Pakistan can be prosecuted for these offences under the 1947 Act.
- iii. However, Section 2 is *ultra vires* the Constitution from the date of commencement of the 2022 Amendments for the offences listed in Section 9(a)(vi)-(xii) because persons in the service of Pakistan cannot be tried for such offences under the 1947 Act or any other accountability law.

### Sections 8 and 10 of the First Amendment

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

#### **"Prior to the First Amendment**

**9. Corruption and Corrupt Practices:** (a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices—

...

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

#### **After the First Amendment**

**9. Corruption and Corrupt Practices:** (a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices—

...

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

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

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

*(emphasis supplied)*

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

- i. The accused is a holder of public office;
- ii. The nature and extent of the pecuniary resources of the property found in the accused's possession;
- iii. The known sources of income of the accused; and
- iv. The resources or property found in the possession of the accused are objectively disproportionate to his known sources of income [ref: **Muhammad Hashim Babar Vs. State** (2010 SCMR 1697) at para 4].

Once the NAB had established the above-mentioned four elements the accused was presumed to be guilty of the offence of corruption and corrupt practices unless he could account for the resources or property so recovered from him. The NAB was not required to demonstrate that the accused had obtained the resources or property 'through corrupt and dishonest means' because the mere presence of disproportionate assets led to the presumption that the accused had engaged in corrupt and dishonest conduct. Such a presumption is provided in Section 14(c) of the NAB Ordinance. The fact of the matter is that the proof of acquisition of assets 'through corrupt and dishonest means' itself constitutes a complete offence. Therefore, by changing Section 9(a)(v) the First

Amendment has amalgamated two separate offences into one. As a result, the original offence contained in Section 9(a)(v) has now been rendered redundant. To further ensure the futility of the said offence all of the evidentiary presumptions contained in Section 14 of the NAB Ordinance sustaining the erstwhile offence under Section 9(a)(v) and the remaining offences in the NAB Ordinance have been omitted by Section 10 of the First Amendment. The presumption relevant to Section 9(a)(v) of the Ordinance existed in Section 14(c). This latter provision read:

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

c. In any trial, of an offence punishable under clause (v) of sub-section (a) of section 9 of this Ordinance, the fact that the accused person or any other person on his behalf, is in possession, for which the accused person cannot satisfactorily account, of assets or pecuniary resources disproportionate to his known source of income, or that such person has, at or about the time of the commission of the, offence with which he is charged, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, the Court shall presume, unless the contrary is proved, that the accused person is guilty of the offence of corruption and corrupt practices and his conviction therefor shall not be invalid by reason only that it is based solely on such a presumption."

*(emphasis supplied)*

38. Further, by the insertion of Explanation II to Section 9(a)(v) entries in bank statements have been removed from the scope of assets whereas banking transactions can only be regarded as assets if there is evidence of the creation of a corresponding asset through specific transactions. The source, object and quantum of credits/receipts in the bank accounts can now no longer be shown for proving the creation of assets. Nor can debit transfers from one account to another be used to show accumulation of money for the creation of an asset. It goes without saying that bank records are usually the most pivotal evidence in

financial crimes. However, by virtue of Explanation II limited resort can be made to them. On a first reading, the changes to Section 9(a)(v), the addition of Explanation II and the omission of Section 14(c) might appear innocuous in nature but their effect both individually and collectively has actually rendered the offence of corruption and corrupt practices in the category of assets beyond means pointless. If accused persons cannot be held to account for owning or possessing assets beyond their means, the natural corollary will be that public assets and wealth will become irrecoverable which would encourage further corruption. This will have a direct adverse effect on the peoples' right to life and to public property because the economic well-being of the State will be prejudiced.

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

**"5. Criminal Misconduct.** – (1) A public servant is said to commit the offence of criminal misconduct:

...

(e) If he, or any of his dependents, is in possession, for which the public servant cannot reasonably account of pecuniary resources or of property disproportionate to his known sources of income.

...

(3) In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume unless the contrary is proved, that the accused person is guilty of criminal misconduct and his conviction therefore shall not be invalid by reason only that it is based solely on such presumption."

*(emphasis supplied)*

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

## Declaration on Sections 8 and 10 of the First Amendment

### A. Elected Holders of Public Office

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

### B. Persons in the Service of Pakistan

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

### Section 14 of the First Amendment

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

**"21. International Cooperation Request for mutual legal assistance:** The Chairman NAB or any officer authorized by the Federal Government may request a Foreign State to do any or all of the following acts in accordance with the law of such State:—

...

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

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



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

...

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

...

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

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

*(emphasis supplied)*

41. It is a common fact that many accused persons being tried under the NAB Ordinance have stashed their wealth and assets abroad in tax havens under fiduciary instruments. However, after the omission of the said provision the admissibility of foreign

public documents shall be governed by Article 89(5) of the Qanun-e-Shahadat Order, 1984 ("**1984 Order**") which reads:

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

...

(5) Public documents of any other class in a foreign country, by the original, or by a copy certified by the legal keeper thereof with a certificate under the seal of a notary public, or of a Pakistan Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of foreign country."

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

to access justice and protect public property from waste and malfeasance.

### **Declaration on Section 14 of the First Amendment**

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

### **Section 14 of the Second Amendment**

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

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

*(emphasis supplied)*

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

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

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

was advanced by learned counsel for the respondent Federation as to why the Accountability Court should be excluded from the revocation of an agreement which compounded the offence committed by the accused. The exclusion of the Accountability Court by the second proviso to Section 25(b) of the NAB Ordinance therefore undermines the independence of the Judiciary and is violative of Article 175(3) of the Constitution.

46. Moreover, it is an admitted fact that under the proviso to Section 15(a) of the NAB Ordinance (disqualification to contest elections or to hold public office) an accused person who enters into a plea bargain suffers the same consequences as an accused person who is convicted of the offence of corruption and corrupt practices under Section 9(a). Such consequences are that the accused person either forthwith ceases to hold public office, if any, held by him or further stands disqualified for a period of ten years for seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body etc. Therefore, allowing an accused person to renege from his plea bargain would be tantamount to conferring an unlawful benefit on him i.e., he would escape the consequences stipulated in Section 15(a) of the NAB Ordinance.

#### **Declaration on Section 14 of the Second Amendment**

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

## Conclusion

48. On the basis of the above discussion the Court holds:
- i. The titled Constitution Petition is maintainable on account of violating Articles 9 (security of person), 14 (inviolability of dignity of man), 24 (protection of property rights) and 25 (equality of citizens) of the Constitution and for affecting the public at large because unlawful diversion of State resources from public development projects to private use leads to poverty, declining quality of life and injustice.
  - ii. Section 3 of the Second Amendment pertaining to Section 5(o) of the NAB Ordinance that sets the minimum pecuniary threshold of the NAB at Rs.500 million and Section 2 of the 2022 Amendments pertaining to Section 4 of the NAB Ordinance which limits the application of the NAB Ordinance by creating exceptions for holders of public office are declared *void ab initio* insofar as these concern the references filed against elected holders of public office and references filed against persons in the service of Pakistan for the offences noted in Section 9(a)(vi)-(xii) of the NAB Ordinance;
  - iii. Section 3 of the Second Amendment and Section 2 of the 2022 Amendments pertaining to Sections 5(o) and 4 of the NAB Ordinance are declared to be valid for references filed against persons in the Service of Pakistan for the offences listed in Section 9(a)(i)-(v) of the NAB Ordinance;
  - iv. The phrase 'through corrupt and dishonest means' inserted in Section 9(a)(v) of the NAB Ordinance along with its Explanation II is struck down from the date of commencement of the First Amendment for references filed against elected holders of public office. To this extent Section 8 of the First Amendment is declared void;
  - v. Section 9(a)(v) of the NAB Ordinance, as amended by Section 8 of the First Amendment, shall be retained for references filed against persons in the service of Pakistan;
  - vi. Section 14 and Section 21(g) of the

NAB Ordinance are restored from the date of commencement of the First Amendment. Consequently, Sections 10 and 14 of the First Amendment are declared void; and

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

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

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

Sd/-  
**Chief Justice**

Sd/-  
**Judge**

I dissent and have attached  
my separate note.

Sd/-  
**Judge**

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

2. In my humble opinion, the primary question in this case is not about the alleged lopsided amendments introduced in the NAB law by the Parliament but about the paramountcy of the Parliament, a house of the chosen representatives of about 240 million people of Pakistan. It is about the constitutional importance of parliamentary democracy and separation of powers between three organs of the State. It is about the limits of the jurisdiction of the Court comprising unelected judges, second judging the purpose and policy of an enactment passed by the Parliament, without any clear violation beyond reasonable doubt, of any of the fundamental rights guaranteed under the Constitution or of any other constitutional provision.

3. The majority judgment has fallen short, in my humble opinion, to recognize the constitutional command that 'the State shall exercise its power and authority through the chosen representatives of the people' and to recognize the principle of trichotomy of powers, which is the foundation of parliamentary democracy. The majority has fallen prey to the unconstitutional objective of a parliamentarian, of transferring a political debate on the purpose and policy of an enactment from the Houses of the Parliament to the courthouse of the Supreme Court. Without setting out a clear and objective test for determining how the claimed right to have accountability of the parliamentarians is an integral part of any of the fundamental rights guaranteed under the Constitution, the majority judgment through a long winding conjectural path of far-fetched "in turn" effects has tried hard to "ultimately" reach an apprehended violation of the fundamental rights. The majority judgment has also fallen short to appreciate



that what Parliament has done, Parliament can undo; the legislative power of the Parliament is never exhausted. If the Parliament can enact the NAB law, it can also repeal the entire law or amend the same.

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

Sd/-  
**Judge**

Islamabad,  
15<sup>th</sup> September, 2023.  
Approved for reporting.

**Order of the Bench**

By majority of 2:1 (Justice Syed Mansoor Ali Shah dissenting)

Constitution Petition No.21 of 2022 is allowed.

Sd/-  
**Chief Justice**

Sd/-  
**Judge**

Sd/-  
**Judge**

Islamabad  
Announced on 15.09.2023.

Sd/-  
**Chief Justice**

**APPROVED FOR REPORTING.**