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

Prologue

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

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

[1] Benjamin Cardozo, J., cited in Melvin I. Urofsky, Dissent and the Supreme Court. Its Role in the Court's History and the National Constitutional Dialogue. Pantheon Books, p. 13. See also the preface of my opinion in Hadayat Ullah v. Federation 2022 SCMR 1691.
[2] Ibid p.4
[3] Aharon Barak, The Judge in a Democracy. Princeton University Press. p.226
[4] Beverley McLachlin, Charter Myths, 33 U.B.C L. Rev. 23 , 31 (1999)

Court does not fight for its own power. The efforts of the Court should be directed towards protecting the Constitution and its values[5].

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

5. Steven Levitsky and Daniel Ziblatt in their recent book "How Democracies Die" have argued that two norms stand out as fundamental to a functioning democracy: *"mutual toleration"* and *"institutional forbearance."* These norms become more nuanced in the present context as we later on discuss the nature of the amendments to our accountability law in the country. "*Mutual toleration* refers to the idea that as long as our rivals play by constitutional rules, we accept that they have an equal right to exist, compete for power, and govern. We may

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[5] Aharon Barak, The Judge in a democracy. Princeton University Press. p. 240
[6] Jackson v. Her Majesty's Attorney General (2005) UKHL 56 per Lord Hope.
[7] R v. Parliamentary Commissioner [1998] 1 All ER 93 per Justice Sedley.
[8] Jurists Foundation v. Federal Government PLD 2020 SC 1.
[9] LDA v. Imrana Tiwana 2015 SCMR 1739.
[10] Ibid.

disagree with, and even strongly dislike, our rivals, but we nevertheless accept them as legitimate. This means recognizing that our political rivals are decent, patriotic, law-abiding citizens – that they love our country and respect the constitution just as we do. It means that even if we believe our opponents' ideas to be foolish or wrong-headed, we do not view them as an existential threat. Nor do we treat them as treasonous, subversive, or otherwise beyond the pale. We may shed tears on election night when the other side wins, but we do not consider such an event apocalyptic. Put another way, mutual toleration is politicians' collective willingness to agree to disagree.... [Political] parties can be rivals rather than enemies, circulating power rather than destroying each other. This recognition was a critical foundation for American democracy....when norms of mutual toleration are weak, democracy is hard to sustain." [11]

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

Summation of the matter

7. In the exercise of its legislative power conferred on it by Article 142(b) of the Constitution of the Islamic Republic of Pakistan ("Constitution") to make laws with respect to criminal law, criminal procedure and evidence, the Parliament comprising the chosen representatives of the people of Pakistan has made certain amendments in the National Accountability Ordinance 1999 ("NAB Ordinance"). The petitioner, a parliamentarian who chose not to participate in the process

[11] Levitsky & Ziblatt, How Democracies Die (2018) p. 102-109.
[12] ibid

of enactment of those amendments, either by supporting or opposing them in the Parliament, has instead, challenged those amendments in this Court invoking its original jurisdiction under Article 184(3) of the Constitution. it is the petitioner's assertion that the amendments made in the NAB Ordinance infringe the fundamental rights of the people of Pakistan in general and not of the persons who are to be dealt with in respect of their life, liberty and property under the NAB Ordinance. My learned colleagues, the Hon'ble Chief Justice and Hon'ble Justice Ijaz ul Ahsan ("majority"), have been convinced by the said assertion and have therefore declared most of the challenged amendments *ultra vires* the Constitution. With great respect, I have not been able to persuade myself to agree with them.

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

Main premise of the majority judgment

7. The majority has found that the 'elected holders of public office are not triable either under the 1947 Act [Prevention of Corruption Act] or the PPC [Pakistan Penal Code] for the offence of corruption and corrupt practices'[13], and that by 'amending Section 5(o) of the NAB Ordinance to raise the minimum pecuniary threshold of the NAB to Rs.500 million, Section 3 of the Second Amendment has undone the legislative efforts beginning in 1976 to bring elected holders of public office within the ambit of accountability laws…Once excluded from the jurisdiction of the NAB no other accountability fora can take cognizance

[13] The majority judgment, para 29.

of their alleged acts of corruption and corrupt practices'[14]. On these findings, the majority has concluded that such 'blanket immunity offends Articles 9, 14, 23 and 24 of the Constitution because it permits and encourages the squandering of public assets and wealth by elected holders of public office as there is no forum for their accountability. This in turn affects the economic well-being of the State and ultimately the quality and dignity of the people's lives because as more resources are diverted towards illegal activities, less resources remain for the provision of essential services to the people such as health facilities, education institutes and basic infrastructure etc.'[15]

Reasons for dissent

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

> (i) the elected holders of public offices (members of Parliament, Provincial Assemblies and Local Government Bodies, etc.) are still triable under the Prevention of Corruption Act 1947 (PCA) and the Pakistan Penal Code 1860 (PPC) for the alleged offences of corruption and corrupt practices and no one goes home scot-free. They are still triable under other laws. This aspect has been, with respect, seriously misunderstood by the majority;
>
> (ii) the challenged amendment of adding the threshold value of Rs.500 million for an offence to be investigated and tried under the NAB Ordinance, simply changes the forums for investigation and trial of the alleged offences of corruption and corrupt practices involving the amount or property less than Rs.500 million. This matter falls within the exclusive policy domain of the legislature (Parliament); and
>
> (iii) the said and other challenged amendments (law made by the Parliament) do not take away or abridge any of the fundamental rights guaranteed under Articles 9, 14, 23, 24 and 25 of the Constitution of the Islamic Republic of Pakistan (Constitution).

I would elucidate the above three statements *seriatim*.

(i) Elected holders of public offices are triable under PCA and PPC

9. The answer to the question, whether the elected holders of public offices (i.e., members of Parliament and Provincial Assemblies, etc.) are triable for the alleged offences of corruption and corrupt practices under the PCA and the PPC, hinges upon the definition of the expression "public servant" provided in the latter part of clause ninth of Section 21 of the PPC. The majority has found that the elected holders of public offices do not fall within the definition of "public servant" and are

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[14] Ibid, para 31.
[15] Ibid, para 31.

therefore not triable for the alleged offence of corruption and corrupt practices either under the PCA or under the PPC. With respect I submit that before arriving at this finding, the majority has failed to fully examine the definition of the expression "public servant" provided in the latter part of clause ninth of Section 21, PPC, and have erroneously relied upon the two judgments from the foreign jurisdictions (*R.S. Nayak v. A.R. Antulay* AIR 1984 SC 684 and *Zakir Hossain v. State* 70 DLR [2018] 203), without noticing the difference of the provisions of Section 21, PPC, from the relevant provisions of the penal codes of those countries. The said difference is highlighted in the following comparative table:

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

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

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

commission for the performance of any public duty	commission for the performance of any public duty by the **Government**	**Government** by fees or commissions for the performance of any public duty

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

Analysis of Antulay relied upon by the majority

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

> (i) he is in the service of the Government; or
> (ii) he is in the pay of the Government; or
> (iii) he is remunerated by fees or commission for the performance of any public duty <u>by the Government</u>.[17]

The Indian Supreme Court formulated the question thus:

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

In the course of its discussion on the question, the Indian Supreme Court observed that '[t]he Legislature lays down the broad policy and has the power of purse. The executive executes the policy and spends from the Consolidated Fund of the State what Legislature has sanctioned. The Legislative Assembly enacted the Act enabling to pay to its members salary and allowances. And the members vote on the grant and pay themselves. Therefore, even though M.L.A. receives pay and allowances, he is not in the pay of the State Government because Legislature of a State cannot be included in the expression "State Government".'[19]

10.1. Responding to the contention that an M.L.A. does not perform any public duty, the Indian Supreme Court observed that 'it would be rather difficult to accept an unduly wide submission that M.L.A. is not performing any public duty....He no doubt performs public

[16] This case was even otherwise decided *per incuriam* by the High Court Division of the Supreme Court of Bangladesh as the higher judicial authority of Bangladesh, that is the Appellate Division of the Supreme Court of Bangladesh, has in <u>Anti Corruption Commission v. Shahidul Islam</u> (6 SCOB [2016] AD 74) held that a member of Parliament is a public servant; see Article 111 of the Constitution of Bangladesh which declares that the law declared by the Appellate Division of the Supreme Court shall be binding on the High Court Division.
[17] AIR, Para 45. (Emphasis added)
[18] AIR, Para 54.
[19] AIR, Para 57. Internal quotation mark changed from single to double.

duties cast on him by the Constitution and his electorate. He thus discharges constitutional functions for which he is remunerated by fees under the Constitution and not by the Executive.'[20]

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

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

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

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

11. As per the second limb of the latter part of clause ninth of Section 21, PPC, every officer remunerated by fees or commission for the

[20] AIR, Para 59.
[21] AIR, Para 58. Internal quotation marks changed from single to double.
[22] AIR, Para 58.
[23] AIR, Para 61.
[24] AIR, Para 59.

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

(a) a person should be an officer,

(b) he should perform any public duty, and

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

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

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

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

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

13.1. As for the first condition of being an officer, the word "officer" has not been defined in the PPC. While it is obvious that it refers to a person who holds an office, the matter does not end here as then arises a further question, what the word "office" means. Though the word "office" is of indefinite content, it is ordinarily understood to mean a position to

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[25] Henly v. Mayor of Lyme (1928) 5 Bing 91.
[26] R v. Whittaker (1914) 3 KB1283.

which certain duties of a more or less public character are attached,[27] especially a position of trust, authority or service.[28] It is a subsisting, permanent and substantive position, which has an existence independent of the person who fills it, which goes on and is filled in succession by successive holders.[29] The position is an office whether the incumbent is selected by appointment or by election and whether he is appointed during the pleasure of the appointing authority or is elected for a fixed term.[30] The position of a member of Parliament squarely falls within the scope of this definition of "office"; as it is subsisting, permanent and substantive, which exists independent of the person who for the time being fills it and which goes on and is filled in succession by others after him.[31] A member of Parliament is therefore the "holder of an office" and is thus an "officer" within the meaning and scope of this term used in clause ninth of Section 21, PPC. The invaluable observations of Justices Isaacs and Rich made in *Boston*[32], also support the finding that the position of a member of Parliament is an office and the holder of this position is an officer. They observed:

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

(b) A member of Parliament performs a public duty

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

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[27] Lord Wright adopted this definition in McMillan v. Guest (1942) AC 561 for the purposes of that case.
[28] Shorter Oxford English Dictionary, 6th ed., p. 1988.
[29] This definition was given by Rowlatt J. in G.W. Railway Co. v. Bater [1920] 3 KB 266, adopted by Lord Atkinson in G.W. Railway v. Bater [1922] 2 AC 1 and reiterated by Lord Atkin in McMillan v. Guest (1942) AC 561. It was also adopted by Sikri, J. in Kanta Kathuria v. Manakchand Surana AIR 1970 SC 694 for holding that "there must be an office which exists independently of the holder of the office".
[30] American Jurisprudence, 2nd ed. Vol. 63A, p. 667.
[31] Grahm Zellic, Bribery of Members of Parliament and the Criminal Law, Public Law (1979) 31 at p. 37, relied upon by the Delhi High Court in L.K. Advani v. C.B.I. (1997 CriLJ 2559) and by the Appellate Division of the Supreme Court of Bangladesh in Anti Corruption Commission v. Shahidul Islam (6 SCOB [2016] AD 74) for holding that a member of Parliament is the holder of an office.
[32] R v. Boston [1923] HCA 59.
[33] Antulay case.
[34] Narsimha Rao v. State AIR 1998 SC 2120.

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

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

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

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

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

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[35] The Members of Parliament (Salaries and Allowances) Act, 1974.
[36] AIR, Para 59. Emphasis added.
[37] R v. Postmaster-General (1876) 1 QBD 663 per Justice Blackburn.
[38] National Embroidery Mills Ltd. v. Punjab Employees' Social Security Institution 1993 SCMR 1201 (5MB).
[39] Accountant General, Bihar v. N. Bakshi AIR 1962 SC 505 (5MB).
[40] Khurshid Soap and Chemical Industries v. Federation of Pakistan PLD 2020 SC 641.

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

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

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

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

16. It would also be pertinent to mention here that on the basis of the definition of "public servant" provided in the latter part of clause ninth of Section 21, PPC, the Dacca High Court, an erstwhile Pakistani High Court, held in the cases of *Abul Monsur*[42] and *Mujibur Rahman*[43] that a Minister is a public servant and is triable for the offences under the PCA. These cases referred to and relied upon the cases of *Sibnath Banerji*[44] and *Shiv Bahadur*[45] decided by the Privy Council and the Indian Supreme Court respectively, which had also held that a Minister is a public servant. The observations and reasoning of Justice Baquer in *Abul Monsur* for holding that a Minister is a public servant are quite instructive and worth quoting here:

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

[41] Narsimha Rao v. State AIR 1998 SC 2120 (5MB).
[42] Abul Monsur v. State PLD 1961 Dacca 753.
[43] Mujibur Rahman v. State PLD 1964 Dacca 330 (DB).
[44] Emperor v. Sibnath Banerji AIR 1945 PC 156.
[45] Shiv Bahadur Singh v. State of Vindhya Pradesh AIR 1953 SC 394 (5MB).

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

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

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

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

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

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

19. The majority has observed that 'No cogent argument was put forward by learned counsel for the respondent Federation as to why Parliament has fixed a higher amount of Rs.500 million for the NAB to entertain complaints and file corresponding references in the Accountability Courts when the Superior Courts have termed acts of corruption and corrupt practices causing loss to the tune of Rs.100

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[46] Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265.

million as mega scandals.'[47] With great respect, it is not the domain of the courts to determine what value of the amount or property involved in an offence of corruption and corrupt practice makes it one of "mega scandals" to be investigated and tried under the NAB Ordinance. Any observation by a court that the NAB should investigate the offences involving "mega scandals", indicating any threshold in this regard can at most be a recommendation to be considered by the legislature, which is not binding on the latter. The legislature may, in its wisdom, after considering the recommendation either enhance or reduce the proposed threshold or may simply decide not to act upon that. The courts cannot force the legislature to act upon their recommendations nor can they strike down any law competently enacted by the legislature which does not commensurate with their recommendations.

Principle of trichotomy of power

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

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[47] The majority judgment, para 25.
[48] Govt. of Balochistan v. Azizullah Memon PLD 1993 SC 341. See also Liaqat Hussain v. Federation of Pakistan PLD 1999 SC 504 per Ajmal Mian, J.
[49] Liaqat Hussain v. Federation of Pakistan PLD 1999 SC 504 per Ajmal Mian, J.
[50] Mamukanjan Cotton Factory v. Punjab Province PLD 1975 SC 50.
[51] Registrar, SCP v. Wali Muhammad 1997 SCMR 141 per Fazal Karim, J.
[52] Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265.
[53] Liaqat Hussain v. Federation of Pakistan PLD 1999 SC 504 per Saeeduzzaman Siddiqui, J.
[54] Govt of KPK v. Saeed-Ul-Hassan 2021 SCMR 1376.
[55] Jurists Foundation v. Federal Government PLD 2020 SC 1.
[56] Dossani Travels v. Travels Shop PLD 2014 SC 1.
[57] Mamukanjan Cotton Factory v. Punjab Province PLD 1975 SC 50.

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

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

21. Although after explaining that the main premise of the majority judgment that the elected holders of public offices are not triable either under the PCA or under the PPC for the offence of corruption and corrupt practices is, in my humble opinion, not correct, it is not necessary to discuss the other related NAB amendments that have also been declared *ultra vires* the Constitution by the majority. Yet, I find it appropriate to briefly discuss such amendments.

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

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

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[58] The majority judgment, para 38.

respect, I would say that no such effect has occurred by the omission of Section 14 from the NAB Ordinance.

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

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

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

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

Clauses (a), (b) and (d) of the omitted Section 14 of the NAB Ordinance relate to the intention of the accused other than that which the character and circumstances of the act proved against him by the prosecution suggest. These clauses are, therefore, merely descriptive instances of the applicability of Article 122 read with its illustration (a) of the *Qanun-e-Shahadat*. And clause (c) of the omitted Section 14 of the NAB Ordinance that relates to possessing assets disproportionate to known sources of income is the descriptive instance of the applicability of Article 122 read with its illustration (b) of the *Qanun-e-Shahadat*. That being the legal position, this Court in *Mazharul Haq*[60] by referring to *Rehmat*[61] (wherein the scope of Section 106 of the Evidence Act, now Article 122 of the *Qanun-e-Shahadat*, had been explained) held:

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

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

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[59] For detailed discussion on the difference between "legal burden" and "evidential burden", see Khurram Ali v. Tayyaba Bibi PLD 2020 SC 146 and State v. Ahmed Omar Sheikh 2021 SCMR 873 per Yahya Afridi, J.
[60] Pir Mazharul Haq v. State PLD 2005 SC 63. See also Mansur-Ul-Haque v. Government of Pakistan PLD 2008 SC 166; State v. Idrees Ghauri 2008 SCMR 1118; Qasim Shah v. State 2009 SCMR 790.
[61] Rehmat v. State PLD 1977 SC 515.
[62] Hashim Babar v. State 2010 SCMR 1697.

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

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

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

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

(ii)-C Constitutionality of other amendments

25. The majority has declared *ultra vires* the Constitution the following amendments also: (i) the addition of Explanation II to Section 9(v), which provides that for the purpose of calculation of movable assets, the sum total of credit entries of bank account shall not be treated as an asset but rather the bank balance of an account on the date of initiation of inquiry may be treated as a movable asset and that a banking transaction shall not be treated as an asset unless there is evidence of creation of corresponding asset through that transaction; (ii) the omission of clause (g) of Section 21, which omission has made applicable the provisions of the *Qanun-e-Shahadat* to documents or any other material transferred to Pakistan by a Foreign Government in legal

proceedings under the NAB Ordinance; and (iii) and the addition of second proviso to Section 25(b), which provides that in case of failure of accused to make payment in accordance with the plea bargain agreement approved by the Court, the agreement of plea bargain shall become inoperative to the rights of the parties immediately. With great respect, I would say that in declaring these amendments as *ultra vires* the Constitution, the majority has not explained how they infringe any of the fundamental rights or any other provision of the Constitution, nor could the learned counsel for the petitioner point out in his arguments any such infringement. These amendments being related to "criminal law, criminal procedure and evidence" fall within the legislative competence of the Parliament as per Article 142(b) of the Constitution and in no way take away or abridge any of the fundamental rights in terms of Article 8(2) of the Constitution.

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

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

27. The learned counsel for the petitioner attempted to establish that the challenged amendments have abridged the fundamental rights of the people of Pakistan to life (Art. 9), dignity (Art. 14), property (Art. 24) and equality (Art. 25). His argument was quite circuitous: that the challenged amendments have deprived the people of Pakistan form holding accountable through criminal prosecution their elected representatives for committing breach of trust with regard to public money and property; that the challenged amendments operate to bring to halt or abort the criminal prosecution of the holders of public offices for offences involving embezzlement of public money and property; that the challenged amendments have excluded certain acts of holders of public offices from the definition of the offences of corruption and corrupt

practices and have made the proof of others impossible; that in absence of a strong accountability law, the holders of public offices would continue to indulge in loot and plunder of public money and property which were to be used for the welfare of the people of Pakistan in providing the basic necessities of life, such as, health and education facilities, etc.; that the challenged amendments have thus deprived the people of Pakistan from their fundamental rights to life, dignity, property and equality.

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

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

[63] Ibid, para 31.

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

30. 'What Parliament has done, Parliament can undo.'[64] The legislative power of Parliament does not exhaust by enactment of any law nor does Parliament become *functus officio* by making a law, on a particular subject. The doctrines of exhaustion and *functus officio* are not applicable to legislative powers.[65] A legislature that has made any law is competent, as enunciated in *Asfandyar*,[66] to change, annul, re-frame or add to that law. Even the legislature of today cannot enact a law, as held in *Imran Tiwana*,[67] whereby the powers of a future legislature or of its own to amend a law are curtailed. Therefore, if Parliament can enact the NAB Ordinance, it can also repeal the entire law or amend the same.

31. Further, holding a right to be included in or to be an integral part of a fundamental right guaranteed in the Constitution, is a very serious matter that has the effect of curtailing the legislative powers of Parliament in terms of Article 8(2) of the Constitution. This matter, therefore, demands a thorough and in-depth analysis of the relation of the claimed right with the fundamental right guaranteed in the Constitution, on the basis of an objective criterion. With great respect, I would say that the majority has assumed the right to accountability of the elected holders of public offices through criminal prosecution as included in the fundamental rights to life, dignity and property guaranteed by Articles 9, 14 and 24 of the Constitution, without making any discussion for establishing its close relationship of such an extent with those fundamental rights that makes this right to be an integral part of them.

32. No doubt, the fundamental rights guaranteed in the Constitution, an organic instrument, are not capable of precise or permanent definition delineating their meaning and scope for all times to come. With the passage of time, changes occur in the political, social and economic conditions of the society, which requires re-evaluation of their meaning and scope in consonance with the changed conditions. Therefore, keeping in view the prevailing socio-economic and politico-cultural values and ideals of the society, the courts are to construe the fundamental rights guaranteed in the Constitution with a progressive,

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[64] Mukesh Kumar Misra v. Union of India (W.P. No. 2398 of 2001 decided on 3 July 2001) by the High Court of Madhya Pradesh, approvingly cited by the Supreme Court of Indian in M.P. High Court Bar Association v. Union of India AIR 2005 SC 4114.
[65] Ibid.
[66] Khan Asfandyar Wali v. Federation of Pakistan PLD 2001 SC 607.
[67] LDA v. Imrana Tiwana 2015 SCMR 1739.

liberal and dynamic approach.[68] But this does not mean that the judges are at liberty to give any artificial meaning to the words and expressions used in the provisions of the fundamental rights, on the basis of their subjective ideological considerations. The progressive, liberal and dynamic approach in construing fundamental rights guaranteed in the Constitution must be guided by an objective criterion, not by subjective inclination.

Objective criterion for recognizing new rights as fundamental rights

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

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

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[68] Nawaz Sharif v. President of Pakistan PLD 1993 SC 473.
[69] Maneka Gandhi v. Union of India AIR 1978 SC 597 .
[70] Griswold v. Connecticut (1965) 381 US 479.
[71] Maneka Gandhi v. Union of India AIR 1978 SC 597; Watan Party v. Federation of Pakistan PLD 2012 SC 292 (9MB); Jamat-e-Islami v. Federation of Pakistan PLD 2009 SC 549 (9MB).

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

Conclusion: Petition is meritless

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

Locus standi of the petitioner

36. Before parting with this opinion, I want to bring on record my reservations on the *locus standi* of a parliamentarian to challenge the constitutional validity of an Act of Parliament. Parliament is a constitutional body, but being comprised of the chosen representatives of the people of Pakistan it attains the status of a prime constitutional body. Any action made or decision taken by the majority of a constitutional body is taken to be and treated as an action or decision of that body as a whole comprising of all its members, not only of those who voted for that action or decision, such as a decision made by the majority of a Cabinet of Ministers, the majority of a Bench of this Court or of all Judges in an administrative matter, the majority of the Judicial Commission of Pakistan or the majority of the Supreme Judicial Council, etc. Can any member of these constitutional bodies who was in the minority in making that decision challenge the validity of that decision in court? Not, in my opinion. The principle that decisions taken by a majority of members in a constitutional body (like a parliament or legislature) usually cannot be directly challenged in court by those in the minority is rooted in the doctrine of parliamentary sovereignty and the

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[72] Corruption in Hajj Arrangements in 2010 PLD 2011 SC 963.
[73] Bank of Punjab v. Haris Steel Industries PLD 2010 SC 1109.

separation of powers. There is a clear division between the legislative, executive and judiciary branches. This division ensures that each branch can function independently without undue interference from the others. If the judiciary could easily overturn majority decisions within a legislative body based solely on the objections of the minority, it would disrupt this balance and infringe on the independence of the legislative process. The principle of parliamentary sovereignty holds that the decisions of the Parliament, when made according to its rules and procedures, are supreme. This means that courts cannot typically interfere with the internal workings or decisions of the Parliament. Democratic systems are often built on the principle of majority rule. This ensures that decisions reflect the will of the majority while still respecting the rights of the minority. Allowing minority members to easily challenge majority decisions would undermine this fundamental democratic principle.

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

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

38. This case was heard on over 50 dates of hearing and during these prolonged hearings a question was also raised as to whether the judges of the constitutional court and the members of the Armed Forces enjoy exemption from the NAB Ordinance. I find that the generally professed opinion that members of the Armed Forces and the judges of the constitutional courts are not triable under the anti-corruption

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[74] Ashraf Tiwana v. Pakistan 2013 SCMR 1159.
[75] PLD 2022 SC 306.

criminal laws of the land, requires some clarification. To maintain the said opinion, the reference is usually made to the case of *Asfandyar*[76]. This Court in *Asfandyar* observed that the non-applicability of the NAB Ordinance to the members of the Armed Forces and the judges of the Superior Courts is not discriminatory as they are held accountable under the Army Act 1952 and under Article 209 of the Constitution respectively. It appears that to secure the independence of these important national institutions, the Court made this observation in the context that if a member of the Armed Forces or a judge of a Superior Court is alleged to` have committed an offence of corruption and corrupt practices, he is at first to be proceeded against by his departmental authority; once he is found guilty of such offence by his departmental authority and is removed from his official position, only then can he be investigated and tried under the anti-corruption criminal laws of the land, i.e., the NAB Ordinance or the PCA as the case may be. If we do not read and understand the observations made by the Court in *Asfandyar* in this way, the legal position would be clearly hit by the basic constitutional value and the non-negotiable fundamental right of equality before law. The other holders of public offices, in addition to facing the civil consequences of their corruption and corrupt practices, are to suffer criminal punishment of undergoing the sentence of imprisonment and the forfeiture of the unaccounted-for assets, while the members of the Armed Forces and the judges of the constitutional courts would go scot-free in this regard. After removal from the official position, they would be set free to enjoy the assets accumulated by them through corrupt means. Such reading and understanding of the observation of the Court would allow the members of the Armed Forces and the judges of the constitutional courts to be unjustly enriched and then allowed to retain this unlawful enrichment without any accountability, this would make the members of the Armed forces and the judges of the constitutional courts untouchable and above the law; any such reading would be reprehensible and revolting to the conscience of the people of Pakistan and bring the Court into serious disrepute. We must, therefore, strongly shun the above generally professed opinion and be clear that members of Armed Forces and the judges of the constitutional courts are fully liable under the NAB Ordinance, like any other public servant of Pakistan.

Judge

[76] Khan Asfandyar Wali v. Federation of Pakistan PLD 2001 SC 607.

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