

## **PLD 2001 Supreme Court 607**

**Present: Irshad Hasan Khan, CJ.**

**Muhammad Bashir Jehangiri,**

**Ch. Muhammad Arif and Qazi Muhammad Farooq, JJ**

**KHAN ASFANDYAR WALI and others---Petitioners**

**versus**

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

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

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

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

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

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

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

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

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

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

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

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

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

(viii) Whether section 18 of the impugned Ordinance which prohibits the Accountability Court to take cognizance of any offence under the impugned Ordinance except on a reference made by Chairman, National Accountability Bureau or an officer of the National Accountability Bureau duly authorised by him, amounts to excessive delegation?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 14 deals with the presumption against accused accepting illegal gratification. Section 15 provides for incurring of disqualification to contest elections or to hold public office by convicted persons. Sections 16, 16A and 16B respectively deal with the subjects of trial of offences, transfer of cases and contempt of Court. Section 17 relates to application of the Code of Criminal Procedure as also power of the Accountability Court to dispense with any of the provisions of the said Code. Cognizance of offences by the Accountability Court, power of Chairman, National Accountability Bureau or any officer authorised by him to call for

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

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

#### **(c) National Accountability Bureau Ordinance (XVI(II) of 1999)---**

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

#### **(d) National Accountability Bureau Ordinance (XVIII of 1999)---**

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

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

- ❖ creates a parallel and non-federal judicial system;
- ❖ denies the trial and Appellate Courts the power to grant bail and to suspend sentences and vests the . power to grant bail in the executive (Chairman, National Accountability Bureau);
- ❖ allows the prosecution to detain a person for 90 days without so much as an initial duly formulated and precise F.I. R. ;

- ❖ provides for unfair procedure in derogation of due process;
- ❖ creates new offences;
- ❖ is in vague, imprecise and sweeping language;
- ❖ reverses, for these offences, the burden of proof; and
- ❖ applies them retrospectively;
- ❖ delegates unfettered and unguided discretion to the executive, particularly as to the venue of the trial (question of federalism), plea bargaining and settlements;
- ❖ denies altogether the right of appeal in certain circumstances;

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

- ❖ It has been promulgated by the Federal Government without any legislative competence;
- ❖ It does not merely create a parallel judicial system, but a parallel system enabling the executive to exercise judicial powers, which is beyond the authority of the present dispensation, in that, conferment of judicial powers on the executive cannot be countenanced in law;
- ❖ It provides criminal penalty for civil debt/contractual obligations, default whereof was not punishable at the time of the execution of agreements in question, and even in the case of continuing breach, the same cannot be converted into an offence being hire by Article 12 (2) of the Constitution;
- ❖ It is unfair, unjust, inequitable and against the accepted norms of jurisprudence as held by this Court in the cases of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445) and Sh. Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504);
- ❖ It violates the provisions of sections 154, 200, 156, 157, 202, 161(4), (5), (6) and (7); ,169, 172, 173, 177, 179, 180, 185, 512, 494, 417 of the Code of Criminal Procedure, section 201 P.P.C: and Article 203 of the Constitution;
- ❖ The power of transfer/withdrawal. of cases from the ,Courts of ordinary jurisdiction for trial in the Accountability Courts without. the approval of the Court, vested in Chairman, National Accountability Bureau, being uncontrolled, militates against - the concept of independence of judiciary;
- ❖ Fundamental Rights cannot be Suspended in view of the judgment Syed Zafar Ali Shah v. General Pervez Musharraf (PLD . 2000 SC 869) and this Court, in the exercise of its jurisdiction under Article 184(3) of the Constitution, can strike. down the National Accountability Bureau Ordinance, being violative of Articles 8, 10 and 12 of the Constitution;
- ❖ Some. provisions of the National Accountability Bureau Ordinance are intra vires and others are ultra vires, but the doctrine of severability is not attracted in these cases, in that, the good parts cannot be separated from the bad ones and therefore the entire National Accountability Bureau Ordinance should be struck down in view of the fact that the field is totally and adequately occupied by the existing laws on the subject;
- ❖ It is an ex post facto law, the very thought whereof is abhorrent to the administration of justice;
- ❖ It is not a mere procedural law, but a substantive law and therefore the rules of evidence to reduce the rigour of standard of proof are unsustainable;

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

- ❖ It is a valid piece of legislation made and promulgated by the competent authority under the Chief Executive's Order No. 9 of 1999 dated 15-1-1999, as amended from time to time;
- ❖ The legislation has been duly acted upon and is being administered throughout the country inasmuch as numerous Accountability Courts have been established and Judges have been appointed to such Courts in consultation with the Chief Justice of Pakistan. This ensures the independence of the Courts and the judiciary in 'general. All these Courts are presided over by serving and retired District and Sessions Judges, who are under the direct supervisory control of the Chief Justices of the respective High Courts of the four Provinces: '
- ❖ The National Accountability Bureau Ordinance is a special law falling in the-series seeking to combat the evil of high level corruption. . For the first time; through the National Accountability Bureau Ordinance, members of hitherto an untouchable class of influential and powerful persons; not merely restricted to holders of public offices, but, also including bankers, businessmen, industrialists, bureaucrats and other persons, who are involved in corruption and corrupt practices as defined in the National Accountability Bureau Ordinance, fall within the purview of accountability in an effective and coherent manner;
- ❖ The National Accountability Bureau Ordinance seeks to:--
  - (i) re-define certain offences and re-prescribe their punishments;
  - (ii) provide for Special Courts and procedure for trial of specified offences;
  - (iii) provide for special agency for pre-trial investigation / inquiry namely, the National Accountability Bureau;

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

- ❖ Up to 2-4-2001, 759 authorized investigations have been undertaken by the National Accountability Bureau out of which 143 have been completed while 586 are in progress and 30 have been closed or suspended. Similarly out of 261 filed in the Accountability Courts, 120 have been decided with 73 convictions and 16 acquittals. 46 'plea bargaining' cases were concluded while 13 were rejected. Only 36 accused are in National Accountability Bureau custody for interrogation, 156 are in the judicial lockups, 56 have been released and 69 are at large; ,
- ❖ The National Accountability Bureau Ordinance was framed keeping in mind Articles 175, 202 and 203 of the Constitution and the principles laid down in Mehram Ali's case PLD 1998 SC 1445;
- ❖ It does not create a new offence with retrospective effect, but an offence, which is in the nature of continuation of wilful default' after coming into force of the National Accountability Bureau Ordinance;
- ❖ Section 5(r) does not negate the freedom of trade, business and profession as contemplated in Article 18 of the Constitution. It merely seeks to penalize deliberate evaders of due payments to financial institutions. Prosecution of genuine cases where there are no deliberate and wilful evasions is abandoned within the contemplation of the National Accountability Bureau Ordinance; .
- ❖ Section 5 (r), no doubt, is a Constitutional deviation in view of the provisions of Article 12 (2) of the Constitution, but on the ground of State survival and having regard to the

objectives of the Chief Executive coupled with the law declared in the case of Syed Zafar Ali Shah PLD 2000 SC 869, no objection can be taken to section 5. (r), particularly when adequate safeguards have been provided by making appropriate amendments in the Ordinance;

- ❖ Conciliation Committee has been established and no, proceedings against the loan defaulters can be initiated by the National Accountability Bureau without the recommendation of the Governor, State Bank of Pakistan. However, section 25-A requires to be further suitably amended so as to empower the Court of competent jurisdiction to decide as to whether or not accept the agreement/conciliation reached between the parties;
- ❖ The National Accountability Bureau Ordinance does not contravene the provisions of Articles 23/24 of the Constitution, in that, freezing of property of the accused persons (ill-gotten properties). is merely an interlocutory measure;
- ❖ The vires of the National Accountability Bureau Ordinance cannot be tested on the touchstone of the Fundamental Rights, which stood suspended by the Proclamation of Emergency of 28th May, 1998; which has been upheld by this Court in Syed Zafar Ali Shah's case PLD 2000 SC 869;
- ❖ The burden of proof on accused is not an alien concept in jurisprudence. There are number of existing laws, which place the burden of proof on the accused and/or require an accused to rebut a statutory presumption. Such a course is not violative of the equality clause(s) of the Constitution;
- ❖ The choice of Court to which a reference is sent for trial is a matter of procedure and no body has a vested right to demand that his case be tried by a particular Court/Bench;
- ❖ The power conferred on Chairman National Accountability Bureau is not uncontrolled and his discretion is to be exercised judiciously having regard to the provisions of section 24A of the General Clauses Act, 1897, which require reasons to be recorded in writing for a deviation while passing any discretionary order;
- ❖ The provisions of the Ordinance are in conformity with the established principles of procedure for criminal proceedings;
- ❖ The nature of investigation and inquiry under the National Accountability Bureau Ordinance is of special kind, which entails inquiry and investigation into such offences, and in most cases requires tedious efforts including careful perusal of voluminous records of companies/banks, which cannot be completed overnight and therefore the period of 90 days for custody has been prescribed;
- ❖ A The period of remand of 90 days is not violative of Article 10(2) of the Constitution, in that, section 24 (d) requires production of the accused before an Accountability Court within 24 hours of the arrest;
- ❖ Section 23 of the Ordinance, insofar as it prohibits transfer of any right, title, interest or creation of charge on property after Chairman, National Accountability Bureau has initiated investigation into the offences under the National Accountability Bureau Ordinance, is an interlocutory measure, in that, it is not desirable that persons accused of such offences should frustrate the objects of law by creating third party rights in respect of illegally acquired property thereby creating hurdle in the objects of law;
- ❖ Power vesting in Chairman, National Accountability Bureau under section 24 (a) of the National Accountability Bureau Ordinance to order arrest of the, accused if not already arrested at any stage of the investigation, is neither discriminatory nor violative of Article 25 of the Constitution, in that, similar powers are conferred upon police officers under section 54., Cr.P.C.;
- ❖ As to the case of voluntary return, i.e. 'plea bargaining' under section 25, the provision stands amended by virtue of Amendment Ordinance No. XXIV of 2000 and now, by

virtue of section 25 (a) (ii), after cognizance of the offence has been taken by the Court or the trial has commenced, Chairman, National Accountability Bureau may release the accused only with the approval of the Court;

- ❖ There is no restraint on freedom of contract, in that, the Powers earlier vesting in Chairman, National Accountability Bureau under section 25(e) and (g) have now been vested in the Governor, State Bank of Pakistan by virtue of the Amendment Ordinance No. XXIV of 2000, thus clause (g) of section 25 does not suffer from excessive delegation;
- ❖ Section 32 (d) of the National Accountability Bureau Ordinance is subject to the Constitution and does not purport to oust the Constitutional jurisdiction of the Courts;
- ❖ The Civil Servants Act, 1973 continues to apply to civil servants, who are deputed to or posted in the National Accountability Bureau. Those, who are appointed directly, are distinct and separate category and class of persons and therefore no violation of Article 25 of the Constitution is caused;
- ❖ The mere fact that the Ehtesab Act, 1997 was competently and validly made and its vires were upheld by this Court does not curtail the power of the Legislature to make a new law on the same subject; .
- ❖ The National Accountability Bureau Ordinance is neither discriminatory nor un-Islamic and in any case, its vires cannot be examined on the touchstone of Article 2A of the Constitution;
- ❖ The method of appointment in respect of Chairman, National Accountability Bureau is contained in section 6(b)(i) and for other officers in section 28 of the Ordinance. Provisions relating to transfer of cases qua the Provincial Courts within the territories of a Province and from one Province to another Province, do not suffer from excessive delegation;
- ❖ As regards special treatment to be meted out to women-accused, the provisions of section 167, Cr.P.C. are applicable and the same have not been ousted.

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

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

#### **(f) National Accountability Bureau Ordinance (XVII of 1999)---**

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

Bench should be independent of the Executive and arbiter of the Constitution to decide all  
disputed questions. This is so because the superior Courts, in the exercise of their judicial  
powers, have to check the arbitrary exercise of power by any other organ or authority of the  
State. It rests with the Courts alone to define and limit the exercise of power by the Executive in  
terms of a legislative instrument. It is the duty of Supreme Court to protect the Fundamental

Rights guaranteed under the Constitution and the independence of the judiciary. Supreme Court is the ultimate guardian of the rights of the people. It is, therefore, the duty of Supreme Court to authoritatively interpret not only the validity of the National Accountability Bureau Ordinance, 1999 but also its scope.

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

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

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

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

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

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

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

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

**(j) Legislation**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---Ss.5(g), 9(c), 16(c), 16-A(b), 24(d) & 32---Constitution of Pakistan (1973), Arts.175, 202, 203 & 184(3)---Establishment of Accountability Courts; trial of offences; transfer of cases; release of accused from custody: arrest and appeal under the Ordinance---Validity---Questions for consideration were as to whether provisions of the National Accountability Bureau Ordinance, 1999 were violative of the principles of trichotomy of powers as envisaged under the Constitution and whether the Ordinance created a parallel judicial system in disregard of the provisions of Arts. 175. 202 & 203 of the Constitution in the light of law laid down in Mehram Ali's case PLD 1998 SC 1445---Held, Judges of Accountability Courts had to be serving District and Sessions Judges qualified to be appointed as Judges of the High Court and such Judges were to be appointed for a period of three years in consultation with the Chief Justice of the concerned High Court and not with the Chief Justice of Pakistan as contemplated in S.5(g) of the National Accountability Bureau Ordinance, 1999---Employment of a retired Judge of a High Court or a

retired District & Sessions Judge as Judge of the Accountability Court impinged upon the independence of judiciary---National Accountability Bureau Ordinance, 1999 had vested various judicial powers such as grant of bail and release of accused pending trial or appeal, exclusively in an executive Authority i.e. the Chairman, National Accountability Bureau, in violation of the principle of separation of powers--Powers to set conditions for the release of an accused from custody or detention was a judicial power which ought not to be exercised except by a Court which was established under Art. 175 of the Constitution and was subject to the supervisory jurisdiction of the High Court in term of Arts.202 & 203 of the Constitution---Instructive guidance for smooth and effective functioning of the Accountability Courts and terms of office of the Judges of such Courts including that of present incumbents were provided by the supreme Court with a direction that relevant provisions in the National Accountability Bureau Ordinance, 1999 be suitably amended.

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

Section 16A(b) provides that where the Chairman, National Accountability Bureau seeks transfer of a case from one Accountability Court to another within a Province, an application seeking such transfer shall be made to the Chief Justice of the High Court for that Province and where the transfer is sought from an Accountability Court in one Province to an Accountability Court in another Province, an application seeking such transfer shall be made to the Chief Justice of Pakistan. Section 32 provides that appeal from final judgment and order, of an Accountability Court shall lie to the High Court of the concerned Province. Section 34 provides that rules shall be framed by the President for carrying out the purposes of the impugned Ordinance in consultation with the Chief Justice of Pakistan.

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

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

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

Section 9(c) read with section 24(d) of the Ordinance vests the power to release any person accused of an offence under the Ordinance in the Chairman, National Accountability Bureau and that too on the basis of any conditions as he may think fit are unwarranted. Such vesting of power is unwarranted. The power to set conditions for the release of an accused from custody or

detention is a judicial power which ought not to be exercised except by a Court which is established under Article 175 of the Constitution and is subject to the supervisory jurisdiction of the High Court in terms of Articles 202 and 203.

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

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

There is a positive direction by Supreme Court in the case of Zafar Ali Shah's case PLD 2000 SC 869 that the Government shall accelerate the process of accountability in a transparent and coherent way. The Accountability Courts have since been established by the President in consultation with the Chief Justice of Pakistan who in turn had supported the recommendations of the concerned Chief Justices of the High Courts in their entirety without suggesting additional names for any of the intending appointees, it would, therefore, be in the interest of quick disposal of accountability cases and in the fitness of things that the. Present incumbents/Judges of the Accountability Courts are not disturbed from performing their functions at the respective places of their posting. They shall be deemed to have been appointed for a period of three years from the day they entered upon their respective offices. However, the Judges of the Accountability Courts shall perform their functions under the supervision and disciplinary control of the respective High Courts'.

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

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

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

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

---Ss.9(c) & 24(d)---Constitution of Pakistan (1973), Arts. 175, 202, 203 & 184(3)---Vires of National Accountability Bureau Ordinance, 1999--Provisions of S.9(c) read with S.24(d) of the Ordinance vest the power to release any person accused of, an offence under the Ordinance in the Chairman of the Bureau and that too on the basis of any conditions as he may think fit, are unwarranted-- -Powers to set conditions for the release of an accused from custody or detention

is a judicial power which ought to be exercised by a Court which is established under Art.175 of the Constitution and is subject to the supervisory jurisdiction of the High Court in terms of Arts.202 & 203 of the Constitution.

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

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

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

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

---Ss.5(r) & 2---Constitution of Pakistan (1973), Arts. 12, 18 & 184(3)--Constitutional petition under Art.184(3) of the Constitution before the Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---"Wilful default" ---Contention was that creation of a new offence of "wilful default" with retrospective effect was violative of Art.12 of the Constitution and definition of "wilful default" as given in S.5(r) of the Ordinance negated the freedom of trade, business or profession as contemplated by Art.18 of the Constitution---Validity---Non-payment of loan/dues in terms of the agreement within the contemplation of S.5(r) of the Ordinance is a continuing breach of duty or obligation, which itself is continuing. If duty to repay the loan/dues continues from day to day and the non-performance of that duty/obligation from that point of view is continuing default in the repayment of loan and if it is continuing, there is a fresh starting point of limitation every day as the wrong continues---No limitation and no question of retrospectivity is involved as long as the duty remains undischarged--Offence contemplated under S.5(r) of the Ordinance is the one which is committed over a span of time, therefore the last act of the offender controls the innocence or otherwise of the party---Nature of default contemplated is not the default which is committed once and for all, it is a continuous default and on every occasion the default occurs and recurs, it constitutes an act or omission which continues and therefore a fresh act---Offence contemplated under S.5(r) of the Ordinance is not retrospective but prospective in nature---Viewed in the perspective stated the transformation of the alleged civil action flowing out of the contractual obligations, into an "offence" under the Ordinance did not suffer from any flaw whatsoever---Punishments and creation of offences by the Ordinance are protected by Art.12 of the Constitution, in that, under Art.12 of the Constitution ex post facto legislation can neither create new offences nor provide for more punishment for - an offence than the one which was available for it when committed, this is the limited impact of Art.12 of the Constitution---Only prohibition as to retrospectivity of the offence, contemplated under Cl.(1), (a)(b) of Art. 12 of the Constitution, therefore, is not attracted in circumstances---Supreme Court, however, in order to ensure across-the-board accountability issued directions under Art.37 read with Art. 187 of the Constitution for the application of S.5(r) of the Ordinance which shall be suitably incorporated in the Rules to be framed under S.34 of the Ordinance, which shall on promulgation become part of the Ordinance--Adoption of the directions shall not affect the initiation of investigation and its continuation to its logical end or the proceedings pending before any Authority/Court under the National Accountability Bureau Ordinance, 1999.

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

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

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

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

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

It was in the above backdrop that the Ordinance was promulgated and amendments made therein, subsequently. . The plea that a person entering into contractual obligations before the promulgation of the impugned Ordinance cannot be made to suffer for his alleged failure to clear his said indebtedness under the impugned Ordinance and that too as an offence, loses all significance in the light of the above circumstances. It is not the case of any one that they have been willing to account for the ill-gotten wealth and that it was not their inaction which has placed them in the predicament in which they find themselves today. The sources of amassing wealth by the specific individuals and juristic persons being what they are, they should not expect any lenient view in the cases, against them provided the action taken against them is not

contrary to a valid piece of law. More so, when the efforts on behalf of Bureau in putting them under notice of 30-days in terms of section 5(r) of the impugned Ordinance also fell on deaf ears. Viewed in this perspective, the transformation of the alleged civil action flowing out of the contractual obligations, into an "offence" under the impugned Ordinance, does not suffer from any flaw whatsoever.

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

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

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

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

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

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

as per report of the Governor, State Bank of Pakistan, Rs.356 billion were payable by the bank defaulters up to 12-10-1999. There being no accountability and transparency, economic stability in the country was highly precarious and there was an overall economic slowdown as GDP growth during the past three years had hardly kept pace with the growth of population and that Pakistan has a debt burden which equals the country's entire national income.

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

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

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

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

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

which continues and is therefore a fresh act. Looked at from this angle the offence contemplated under section 5(r) is not retrospective but prospective in nature.

Article 12 of the Constitution does not deprive the Legislature of its power to give retrospective effect to an enactment, which the Legislature is competent to enact. It merely provides that no law shall authorise the punishment of a person for an act or omission that was not punishable by law at the time of the act or omission; or for an offence by a penalty greater than, or of a kind different from,- the penalty prescribed by law for that offence at the time the offence was committed. Seen in this perspective, the act of `wilful default', is not an act or omission which was punishable by law at the time the same was committed but an act or omission committed 30 days ,after the promulgation of the Ordinance whereby the offence of `wilful default' under section 5(r) was created. As stated above, it was in the nature of a continuous wrong, which was converted into an offence prospectively i.e. in a case where such wrong/wilful default continued even after the expiry of 30 days of the promulgation of the impugned Ordinance and not retrospectively. In other words, it is a case where the punishment is prescribed in relation to the breach of a continuing duty which is not performed -even within 30 days after the coming into force of the Ordinance. By no stretch of imagination it could be termed retrospective in operation, particularly in view of the statement made by counsel of the Federation that no prosecution was launched in respect. of `wilful default' where re-payment of loan etc. was made good within 30 days of the promulgation of the Ordinance.

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

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

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

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

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

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

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

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

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

"4. At the outset, we would indicate that the nature of proceedings before the High Court is somewhat similar to those pending in this Court. in Vineet Narain v. Union of India ((1996) 2 SCC 199) and Anukul Chandra Pradhan v. Union of India ((1996) 6 SCC 354) and, therefore, the High Court is required to proceed with the matter in a similar manner. It has to be borne in mind that the purpose of these proceedings is essentially to ensure performance of the statutory duty by the CBI and the other Government agencies in accordance with law for the proper implementation of the rule of law. To achieve this object a fair, honest and expeditious investigation into every reasonable accusation against each. and every person reasonably suspected of involvement in the alleged offences. has to be made strictly in accordance with law. The duty of the Court in such proceedings is, therefore, to ensure that the CBI and other Government agencies do their duty and do so strictly in conformity with law. In these proceedings, the Court is not required to go into the merits of the accusation or even to express any opinion thereon, which is -a matter for consideration by the competent Court in which the charge-sheet .is filed and the accused have to face trial. It is, therefore, necessary that- not even an observation relating to the merits of the accusation is made by the Court in these proceedings lest it prejudices the accused at the trial. The nature of these proceedings may be described as that of `continuing mandamus' to require performance of its duty, by the CBI and the other Government agencies concerned. The agencies concerned must bear in mind and, if needed, be reminded of the caution administered by Lord Denning in this behalf in R. v. Metropolitan Police Commr. (1968) 1 All ER 763/(1968) 2 QB 118). Indicating the duty of the Commissioner of Police, Lord Denning stated thus : (All ER p.769)

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

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

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

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

Adoption of the above course shall not affect the initiation of investigation and ' its continuation. to its logical end or the proceedings pending before any authority/Court under National Accountability Bureau Ordinance. These instructions are being issued under Article 37 read with

Article 187 of the Constitution, which empowers Supreme Court to issue any appropriate directions, orders or decrees, as may be necessary for doing complete justice in any case or matter pending before it which are enforceable throughout Pakistan.

**(t) Public life---**

---Principles enumerated.

Following are the seven principles of public life:

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

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

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

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

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

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

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

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

**(u) National Accountability Bureau Ordinance (XVIII of 1999)---**

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

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

---S.12---Constitution of Pakistan (1973), Art.184(3)---Constitutional petition under Art. 184(3) of Constitution of Pakistan (1973), before. Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Freezing the property of accused by Chairman of the Bureau---Validity---Provision of S.12, National Accountability Bureau Ordinance, 1999 so far as it vests the power in Chairman of the Bureau. to pass an order of seizure, freezing, attachment or prohibitory order by taking possession, or by appointment of receiver, or prohibiting the payment of rent or delivery of property to the accused or to any other person on his behalf which shall remain in force for a period not exceeding thirty days, suffers from excessive delegation, ends of justice would be fully met if the period contemplated under the first proviso to cl.(c) of S.12 is curtailed to fifteen days---Provisions contained in S.12(f) that the order of freezing mentioned in S. 12(a) to (e) shall, as the case may be, remain operative until final disposal by the Accountability Court or the Appellate forum impinge upon the independency of judiciary and suffers from excessive delegation in that it is for the Accountability Court alone to determine the

period of duration during which the freezing shall remain operative till final disposal of the reference by the Accountability Court---Provision of S.12(t) of the, Ordinance makes operative the freezing order notwithstanding filing, or pendency of appeal under, the Ordinance which is against the concept of independence of judiciary -- Ends of justice will be fully met if cl.(f) of S.12 of the Ordinance providing for continuation of freezing of property after the accused has been' acquitted is suitably amended to provide for continuation of such freezing for a period not exceeding ten days to be reckoned from the date of receipt of the certified copy of the order to enable the Bureau for filing an appeal against the acquittal order and thereafter it would be for the appellate forum to pass appropriate orders.

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

#### **(w) National Accountability Bureau Ordinance (XVIII of 1999)---**

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

The purported denial of the right of appeal is violative not only of Article 2A of the Constitution but also power of the superior Courts to correct such orders through exercise of their Constitutional. jurisdiction. Clearly, the denial of right of appeal is contrary to. the norms of

justice as also violative of principles of natural justice. Thus, ..section 13(c) which denies the right of appeal is violative of the principles of the Islamic Injunctions and the same needs to be suitably amended so as to allow right of appeal to the accused as well as to, the non-accused/third party whose claim or objection against freezing of property is dismissed by the Accountability Court.

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

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

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

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

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

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

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

The Accountability Courts have been established to deal exclusively with corruption and corrupt practices and hold accountable those accused of such practices and matters ancillary thereto so

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

Viewed from 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 counterproductive in relation to the principle of good governance. If decision making level officials responsible for issuing orders, SROs etc. are not protected for performing their official acts in good faith, the public servants and all such officers at the level of decision making would be reluctant to take decisions and/or avoid or prolong the same on one pretext or another which would ultimately lead to paralysis of State-machinery. Such a course cannot be countenanced by Supreme Court.

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

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

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

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

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

#### **(y) Interpretation of statutes-----**

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

#### **(z) Criminal trial---**

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

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

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

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

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

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

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

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

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

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

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

accused must be placed on equal footing and to this extent, S. 16A is ultra vires the Constitution and needs to be suitably amended---Principles.

Article 175 of the Constitution provides for the establishment and jurisdiction of the Supreme Court of Pakistan, a High Court for each Province and such other Courts as may be established by law. Apart from establishment of the Courts as aforesaid, the Constitution or the law may provide for the subjects in respect of which that power may be exercised and the manner of exercise of such power. It may demarcate/identify the territories/place or places in which a particular Court shall function. It may specify the persons in respect of whom the judicial power to hear and determine will be exercisable. Put differently, it may provide for the subject-matter over which the judicial power is to be exercised, the manner of exercise of jurisdiction, the right to adjudicate upon a particular subject matter and the authority to exercise in a particular manner.

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

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

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

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

reasonable classification of citizens in that regard, but if such classification is without any reasonable basis, it would tantamount to denying that right to a category of persons and the same being discriminatory is liable to be struck down.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

accused is directed to be produced before the Court after every 15 days or earlier keeping in view the facts and circumstances of each case, for appropriate orders.

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

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

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

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

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

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

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

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

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

---S.24(c)---Constitution of Pakistan (1973), Art.184(3)---Constitutional petition under Art. 184(3) of the Constitution before Supreme Court---Vires of National Accountability Bureau

Ordinance, 1999---No element of retrospectivity in cl.(c) of S.24 of the Ordinance having been found, same was not ultra vires the Constitution.

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

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

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

Additionally, somewhat similar provisions are contained in section 7 of the Offences in Respect of Banks (Special Courts) Ordinance, 1984 which provides that: ".After a Special Court has taken cognizance of a\_ scheduled offence alleged to have been committed by an accused person, such person or any relative of such person or other person on his behalf shall not, without the previous permission in writing of the Special Court, transfer, or create a charge on, any movable or immovable property owned by him or in his possession, while proceedings are pending before the Special Court; and any transfer of, or creation of a charge on such property without such permission shall be void". Viewed in this perspective, transfer. of property by the accused or his relatives etc. seems permissible with the approval of the Court. Supreme Court, therefore, directed that section 23 be suitably amended to reflect that transfer of property by an accused person or any relative or associate of such person or any other person on his behalf or creation of

a charge on any movable or immovable property owned by him **E**

or in his possession, while the inquiry, investigation or proceedings are pending before the National Accountability Bureau or the Accountability Court, shall not be void if made with prior approval in writing of the Judge, Accountability Court, subject to such terms and conditions as the Judge may deem fit in consonance with the well-established principles of law for passing - interlocutory orders in consonance with the objects of the Ordinance.

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

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

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

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

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

Moreover, the scheme for exploring the possibility of settlement during investigation/inquiry stage by the Chairman, National Accountability Bureau cannot be ignored straightaway. At the outset, most of the lawyers tend to consider the question of settlement out of Court. There is need to focus attention on this significant facet of the matter. The rationale behind the Ordinance is not only to punish those who were found guilty of the charges levelled under the Ordinance but also to facilitate early recovery of the ill-gotten wealth through settlement where practicable. The traditional compromise, settlement, compoundability of offence during the course of proceedings by the Courts after protracted litigation is wasteful. Viewed in this perspective, a power has been vested in the Chairman, National Accountability Bureau to facilitate early settlement for recovery of dues through 'plea bargaining' where practicable. Lawyers are often interested in settling the disputes of their clients on just, fair and equitable basis. There are different approaches to settlement. Plea bargaining is not desirable in cases opposed to the principles of public policy. Chairman, National Accountability Bureau/Governor, State Bank of Pakistan, while involved in plea bargaining negotiations, should avoid using their position and authority for exerting influence and undue pressure on parties to arrive at settlement. However, in the interest of revival of economy and recovery of outstanding dues, any type of alternate resolution like the 'plea bargaining' envisaged under section 25 of the Ordinance should be encouraged. An accused can be persuaded without pressure or threat to agree on a settlement figure subject to the provisions of the Ordinance. Establishing this procedure at the investigation/inquiry stage greatly reduces determination of such disputes by the Court. However, as the plea bargaining/compromise is in the nature of compounding the offences, the same should be subject to approval of the Accountability Court. Accordingly, section 25 of the impugned Ordinance be suitably amended.

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

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

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

## **(mm) Interpretation of statutes---**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---[As amended], Preamble---Constitution of Pakistan (1973), Art. 184(3)--Constitutional petition under Art. 184(3) of the Constitution before Supreme Court ---Vires of National Accountability Bureau Ordinance, 1999---Question to the effect whether the alleged violation of principles of universal declaration of Human Rights, 1948 and Cairo Declaration on Human Rights in Islam are justiciable in the proceedings before Supreme Court under Art. 184(3) of the Constitution was left by the Supreme Court to be considered in some other appropriate case, in that, the order proposed to be passed in the present proceedings did not contravene the said declaration.

**(ss) National Accountability Bureau Ordinance (XVII of 1999)---**

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

**(tt) National Accountability Bureau Ordinance (XVIII of 1999)---**

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

**(uu) National Accountability Bureau Ordinance (XVIII of 1999)---**

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

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

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

- (a) The Chairman, National Accountability Bureau shall be appointed by the President in consultation with the Chief Justice of Pakistan.
- (b) The Chairman, National Accountability Bureau shall hold office for a period of three years.
- (c) The Chairman, National Accountability Bureau shall not be removed from office except on the grounds of removal of a Judge of the Supreme Court of Pakistan.
- (d) The Chairman, National Accountability Bureau shall be entitled to such salary, allowances and privileges and other terms and conditions of service, as the President determines and these terms shall not be varied during the term of his office.
- (e) The Chairman, National Accountability Bureau may, by writing under his hand, addressed to the President, resign his office.'

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

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

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

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

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

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

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

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

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

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

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

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

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

Operational Instruction No. 1 (Marked Confidential) issued by National Accountability Bureau, salient features whereof read as under:

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

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

- (a) Identification, investigation and prosecution of cases of corruption ensuring speedy disposal.
- (b) Urgent recovery of the State money and other assets misappropriated, through corruption, corrupt practices and misuse of authority.
- (c) Induce a deterrence against corruption in the society in general and amongst corrupt institution/persons in particular. '
- (d) Develop a culture/mechanism of institutionalized accountability by every public/private organization.
- (e) Structure National Accountability Bureau's organization on long term basis which is task oriented by highly professional.

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

#### **(bbb) National Accountability Bureau Ordinance (XVIII of 1999)---**

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

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

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

Article 63(1) of the Constitution provides for disqualifications for membership of Majilis-e-Shoora (Parliament), in sub-clause (g) thereof, which is the rationale for not including the members of the Armed Forces within the purview of the National Accountability Bureau Ordinance. This, however, does not mean that they are immune from accountability. The Pakistan Army Act (XXXIX of 1952) as well as the Pakistan Army Act Rules, 1954 are

self-contained Codes, which provide for prosecution and punishment in cases involving corruption, corrupt practices, illegal gratification and for matters connected therewith and incidental thereto. Officers and persons enrolled in army service are subject to section 2 of the Act. Offences of corruption and corrupt practices etc. corresponding to and ejusdem generis with the offences contained in section 9 of the National Accountability Bureau Ordinance, 1999 are provided for in sections 27, 40, 42, 47 and 55 of the Act. Section 27 of the Act prescribes 'offences against property or persons of inhabitant of country where serving' which is punishable with rigorous imprisonment for a term which may extend to fourteen years; section 40 of the Act deals with 'fraudulent offence' in respect of property which is punishable with rigorous imprisonment for a term which may extend to five years; 'illegal gratification' falls under section 42 of the Act, which is punishable with rigorous imprisonment for a term which may extend to five years; section 47 relates to "false documents" which is punishable with rigorous imprisonment for a term which may extend to seven years; and section 55 of the Act provides for "violation of good order and discipline" and prescribes punishment for its breach, which may extend to five years.

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

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

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

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

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

---[As amended], Preamble---Constitution of Pakistan (1973), Arts.209 & 184(3)--Constitutional petition under Art.184(3) of the Constitution before Supreme Court---Vires of National Accountability Bureau Ordinance; 1999---Accountability of superior judiciary---Procedure---Judges of the superior Court's are not immune from accountability and it is for the President to make a reference under Art.209 of the Constitution if in a case such a course is desirable at his end.

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

"(a) the Chief Justice of Pakistan;

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

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

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

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

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

(b) may have been guilty of misconduct, .

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

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

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

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

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

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

**(fff) National Accountability Bureau Ordinance (XVIII of 1999)---**

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

### **(ggg) Administration of justice---**

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

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

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

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

M.Akram Sheikh, Senior Advocate Supreme Court assisted by Dr.Amjad Hussain Bokhari, Khurram Hashim, Farrukh Hussain Lodhi, Barrister Akhtar Khan, Sherjeel Adnan, Advocates Supreme Court and M. A. Zaidi, Advocate-on-Record for Petitioner (in C.Ps. Nos. 1s to 17 of 2000).

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

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

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

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

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

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

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

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

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

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

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

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

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

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