

**AN ANALYTICAL STUDY OF THE NAB ORDINANCE 1999:**

**A SHARIAH PERSPECTIVE**



Submitted By

**MAAZ**

Reg#72-FSL/LLMSL/F21

Supervised By

**Dr. Hafiz Muhammad Siddique**

Assistant Professor

Faculty of Shariah & Law

International Islamic University, Islamabad

2025

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## **DEDICATION**

This dissertation is dedicated to

My Parents and Brothers

For their unwavering love, endless support, and boundless encouragement throughout my academic journey. Their sacrifices, guidance, and belief in my abilities have been the cornerstone of my perseverance. The values and wisdom they imparted have shaped not only this research but also my character and aspirations. I am grateful for the opportunities they provided and the sacrifices they made to ensure my education. This dedication stands as a token of my immense gratitude and love.

## ACKNOWLEDGEMENT

In the name of Almighty Allah, the Most Gracious, the Most Merciful.

Praise Allah, the Lord of all worlds, who has given me the knowledge, wisdom, and guidance to complete this thesis. I humbly express my deepest gratitude and unconditional praises to Allah, the Most Merciful, for His blessings and divine support throughout this academic journey.

I would also send abundant blessings and salutations upon the Prophet Muḥammad ﷺ, the epitome of wisdom and enlightenment, whose teachings continue to illuminate our paths and inspire us to seek knowledge.

Furthermore, I extend my sincerest gratitude to my beloved parents, whose unwavering love, support, and sacrifices have been my constant motivation. Their encouragement and prayers have propelled me forward in my pursuit of academic excellence. This thesis would not have been possible without the guidance and mentorship of my esteemed supervisor, Dr. Hafiz Muḥammad Siddique, whose scholarly expertise and invaluable insights have enriched my understanding of the subject matter.

I sincerely thank the Learned Judge Mr. Inam Ullah Wazir of the National Accountability Court Judge, Peshawar, for their diligence and expertise in overseeing national accountability matters. I am grateful for his invaluable contribution to this thesis by connecting me with leading IPO firms.

I am immensely grateful to the faculty members of International Islamic University, who have nurtured my intellectual growth and provided me with a conducive learning environment. Their dedication to education and commitment to fostering academic excellence have shaped my

academic journey.I would also like to extend my appreciation to my friends and colleagues for their continuous support.

## ABSTRACT

The National Accountability Bureau (NAB) Ordinance 1999 is a pivotal piece of legislation aimed at eradicating corruption and corrupt practices in Pakistan. From a Shariah perspective, the ordinance's effectiveness in promoting accountability and transparency can be evaluated.

The ordinance sets up the National Accountability Bureau, an autonomous body responsible for detecting, investigating, and prosecuting corruption cases.

Section 25-b of the ordinance allows accused individuals to enter into plea bargains, which can facilitate the recovery of looted wealth and provide an alternative to lengthy trials.

The ordinance enables the recovery of assets acquired through corrupt practices, with the goal of returning them to their rightful owners or utilizing them for public benefit.

The NAB Ordinance 1999 aligns with Shariah principles of justice and fairness by holding individuals accountable for corrupt practices and ensuring that they face consequences for their actions.

The concept of plea bargaining in the ordinance can be compared to "Diyatt" in Islamic law, where an offender can negotiate a settlement with the victim or their family. This similarity highlights the potential for plea bargaining to facilitate justice and recovery of assets in corruption cases.

The ordinance's emphasis on accountability and transparency reflects Shariah values of honesty, integrity, and responsibility.

Despite the ordinance's provisions, corruption remains a significant challenge in Pakistan, highlighting the need for more effective implementation and enforcement.

The ordinance's broad powers and discretionary authority may be misused, underscoring the importance of ensuring accountability within the NAB itself.

In conclusion, the NAB Ordinance 1999 has the potential to promote accountability and transparency in Pakistan, aligning with Shariah principles of justice and fairness. However, its effectiveness depends on implementation, and challenges persist in ensuring that the ordinance is used to achieve its intended goals.



## TRANSLITERATION TABLE

ا	a	ڈ	d	غ	gh	بھ	bh
ب	b	ذ	dh	ف	f	پھ	ph
پ	p	ر	r	ق	q	تھ	th
ت	t	ڑ	r	ک	k	ٹھ	th
ٹ	t	ز	z	گ	g	جھ	jh
ث	th	ژ	z	ل	l	چھ	ch
ج	j	س	s	م	m	دھ	dh
چ	ch	ش	sh	ن	n	ڈھ	dh
ح	h	ص	s	ں	n	ڑھ	rh
خ	kh	ط	t	ہ	h	کھ	kh
د	d	ظ	z	ی	y	گھ	gh

### Long Vowels

ا	ā
آ	ā
ی	ī
و	ū
و (Urdu)	ō
ے (Urdu)	ē

### Short Vowels

ا	a
ی	i
و	u

### Diphthongs

و	(Arabic) aw
و	(Persian/Urdu) au
و	(Turkish) ev
ی	(Arabic) ay
ی	(Persian/Urdu) ai
ی	(Turkish) ey

### Doubled

و	(Arabic) uww
و	(Persian) uvv
و	(Urdu) uvv
ی	iyy

أ (ع), when it appears at the middle or end of a word, is transliterated as elevated comma (') followed by the letter representing the vowel it carries. However, when أ appears at the beginning of a word it will be represented only by the letter representing the vowel it carries.

ع is transliterated as elevated inverted comma (').

ض as an Arabic letter is transliterated as (d), and as a Persian/Turkish/Urdu letter as (z).

و as an Arabic letter is transliterated as (w), and as a Persian/Turkish/Urdu letter is transliterated as (v).

أ is transliterated as (ah) in pause form and as (at) in construct form.

Article ا is transliterated as (al-) whether followed by a moon or a sun letter, however, in construct form it will be transliterated as ('l).

و as a Persian/Urdu conjunction is transliterated as (-o) whereas as an Arabic conjunction و is transliterated as (wa).

Short vowel (ا) in Persian/Urdu possessive or adjectival form is transliterated as (-i).

## **LIST OF ABBREVIATIONS USED**

NAO	National Accountability Ordinance
NAB	National Accountability Bureau
GCI	Global Perception Index
CPI	Corruption Perception Index
PPP	Pakistan People's Party
FIA	Federal Investigation Agency
CrPC	Criminal Procedure Code
PPC	Pakistan Penal Code
MP	Member of Parliament
SPE	Special Police Establishment
PSPE	Pakistan Special Police Establishment



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## **INTRODUCTION TO THE RESEARCH**

# INTRODUCTION TO THE RESEARCH

## 1. Introduction

National Accountability Ordinance was promulgated in the year 1999<sup>1</sup>, which is governed through National Accountability Bureau<sup>2</sup>. While the NAO, 1999 has deemed to be enforced from the 1<sup>st</sup> date of January 1985 and having a retrospective effect. It has generated much controversy regarding the following provisions which, seemingly, are repugnant to the Constitution of Pakistan<sup>3</sup> and in accordance with the *Shariah* injunctions as promulgated in the Constitution, 1973. To mention some, Section 5(m) convenes that the NAO, 1999 shall have effect all across Pakistan subject to some limitations which includes that it does not apply to armed forces which is an overt negligence of Article 25 of the Constitution, 1973. This is also against the spirit of Islam which needs to be analysed in accordance with the *Shariah*. Take burden of proof as an example. Traditionally, burden of proof refers to the legal requirement that in any given lawsuit a party who wants certain fact to be proven has to bear the legal responsibility to prove that fact in a court of law.

In criminal matters, particularly, the burden of proof used by the attorney for the complainant is that they have to prove their claims beyond any reasonable doubt. Section 14 of the NAO, 1999 surprisingly put the burden of proof on the accused. He is required to prove his innocence in any given case. This point needs elaboration in the light of *Shariah*. Another example is of plea bargaining. A plea agreement, also known as a plea bargain, is a negotiated resolution in which a defendant agrees to plead guilty to a lesser charge or fewer charges in exchange for a reduced sentence or other concessions from the prosecution. The

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<sup>1</sup> Hereinafter referred as to the “NAO, 1999”

<sup>2</sup> Hereinafter referred to as the “NAB”

<sup>3</sup> Hereinafter referred to as the “Constitution, 1973”



provisions of Article 25 put forth the concept of a plea bargain in which an offender is allowed to tender a certain sum of black money to the NAB Chairman and he gets a clean chit in the case.

Especially in the light of the plea bargaining provision permitting the Chairman to accept and recover sums of money from bank accounts (Article 25 of NAB Ordinance), black money plays a notorious role. When an accused person decides to negotiate and defend himself or herself in NAB under plea bargain, he or she may assure to repatriate or pay cash equivalent of money considered to have been procured through unlawful activities (black money). On his part, the accused will be allowed a lighter sentence or even let off the hook for the rest of prosecution as long as he pays the amounts stated as black money in the plea bargain.

The black money is to be paid to the NAB particularly to the NAB Chairman. This concept needs some *Shariah* analysis. Moreover, Section 26 empowers the NAB Chairman to grant any accomplice the pardon to extract the evidence against the co-accused. This also needs to be looked into within the frame of Islamic law injunctions.

In the Quran, Allah vehemently mentions that;

﴿يَا أَيُّهَا الَّذِينَ ءَامَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلّٰهِ وَلَوْ عَلَىٰ أَنْفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ ؕ إِن يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللّٰهُ أَوْلَىٰ بِهِمَا ؕ فَلَا تَتَّبِعُوا الْهَوَىَٰ أَنْ تَعْدِلُوا ؕ وَإِنْ تَلَوْا أَوْ نَعَرَضُوا فَقَانَ اللّٰهُ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا<sup>i4</sup>

*‘Believers! Be upholders of justice<sup>l</sup> and bearers of witness to truth for the sake of Allah,<sup>[165]</sup> even though it may either be against yourselves or against your parents and kinsmen, or the rich or the poor: for Allah is more concerned with their well-being than*

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<sup>4</sup> Al Quran 4:135

*you are. Do not, then, follow your own desires lest you keep away from justice. If you twist or turn away from (the truth), know that Allah is well aware of all that you do.)*'<sup>5</sup>

(Translation by: **Ala-Maududi**)

Quranic injunctions mention that it is against the justice to make someone approver in the crime in which he was abettor himself. However, the NAO, 1999 empowers the chief to make the abettor approver to extract proofs which he had not extracted otherwise.

The Hadith further addresses where the burden of proof rests.

لو يُعطى الناس بدعواهم لادعى ناس دماء قوم وأموالهم ولكن البينة على المدعي واليمين على من أنكر

*"Were people to be given by their claim, men would claim the fortunes and lives of [other] people, but the onus of proof is on the claimant, and the taking of an oath is incumbent upon him who denies."*<sup>6</sup>

The hadith mentions that the burden of proof lies upon the one making claims. But in the said law, the burden of proof lies upon the accused which is the sheer negligence of *Sharaiih*. Also, Qanoon-e-Shahadat Order, 1984 in its Article 117, overtly mentions that burden of proof shall lie on the one who makes claims. Further Section 2 of the Banker's Book Evidence, 1939 and Commercial Document Act 1939 clearly decline this new introduction in the law.<sup>7</sup> Moreover, NAO, 1999 in its provisions encompasses all the departments except establishment meaning thereby it treats one department with another

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<sup>5</sup> Al Quran 4:135

<sup>6</sup> Sunan Al Bayhaqy 21243

<sup>7</sup> **Bankers' Books Evidence Act, 1891**, section 2.

yardstick which is sheer negligence of the constitution which ensures that all individuals shall be treated equally and *Shari'ah* also teaches equality in which even the ruler is accountable before law. Adding more to it the ordinance in plea bargain implies that an offender may be relieved from the liabilities due to the public by tendering such an amount to the Chairman which has been agreed upon by the offender and the chairman. While *Shariah* opines differently as one cannot waive off the right of another person. The offender is liable for public money and the Chairman in his domain waives off that money which is against the spirit of *Shariah* in the totality.

It would be pertinent here to mention that some recent amendments have also been made to the said ordinance with the name of “National Accountability (Amendment) Ordinance 2023”. However, the point which is being discussed in the amendment is that the new amendment has just limited the jurisdiction of the authority that it cannot pursue cases worth more than 50 million rupees, yet the core questions raised in the proposals remain unchanged.

## **2. Significance of the Study**

The legal doctrinal evaluation of the NAO through Shariah lens is considered of far-reaching importance due to the scarcity of research that maps the modern legal systems of Pakistan to the Islamic jurisprudential epistemology. In this research, an exemplary analysis of various provisions is made including the burden of proof, plea bargaining and the approver to determine how far those provisions are adherent to justice as provided in the constitution of the Islamic republic of Pakistan, 1973 and Shariah law. Through considering of these crucial

questions, the work advances the goal that Pakistan's legal and accountability frameworks bear precise similarity to the principle of constitutional and Sharia law.

It is, therefore, timely that a study has been conducted in an attempt to clarify following controversies :

- ✓ Major controversy on whether the ordinance has been applied retrospectively.
- ✓ Controversy on the exclusion of the MILITARY personnel from its jurisdiction.
- ✓ Controversy on discretionary powers of the NAB Chairman.

The relevant provisions of the NAO violate all fundamental rights of equality in the Constitution and all Islamic edicts that call for equality for everyone before the law. Furthermore, the study aims to discover practices such as plea bargaining and the approver system as possible barriers to the Islamic ethical and judicial system as stipulated in the Shariah law.

This study is significant to scholars, lawyers and government since it offers empirical propositions for change in the NAO, 1999, to enhance compliance with Shariah and the Constitution. Moreover, it caters for a research gap in the Shariah approach which has been ignored in earlier research studies. Since the study provides an inclusive comparative understanding of the ordinance against Islamic law, it has the propensity to pave the way for a fair and tenable accountability regime in Pakistan, which would in turn win public confidence and strengthen the rule of law.

At last, this research contributes to the continuation of the ongoing research on rationalizing the principles of Islam with the existing structure of the political and legal system in Pakistan which is both Sharia-compliant and legally sustainable.

### **3. Literature Review**

The National Accountability Ordinance (NAB) 1999 has been the focus of academic work especially in appraising its conformity to Shari'ah. Several scholars have analyzed the features of its provisions and contributed to the understanding of the effects of the ordinance from the perspective of Pakistan law and general outlines of justice and accountability based on Shariah principles. The present review focuses on some of the latest and most informative articles in this field.

#### **1. *"Repugnancy to Islamic Injunctions: Analysis & Legitimacy of National Accountability Ordinance 1999" by Aamir Abbas, Atika Lohani, and Samza Fatima***

The current article provides a foundation for evaluating NAB Ordinance in respect of the Islamic law system. Abbas & Lohani & Fatima using the NAB Ordinance, evaluate how well it aligns to the Shariah through an assessment of the Pakistan Supreme Court decisions. The authors raise some important concerns including chances of getting a wrong judgment and justice for the accused and the fair justice systems. This paper examines some of the sections of the NAB Ordinance, which are not Shariah compliant in terms of burden of proof and right to be presumed innocent.

Without prejudice to the generality of the above, the article is seminal for assessing the Shariah compliant legal structure of accountability laws in Pakistan.

**2. “Research Articles on NAB Ordinance 1999” written by Syed Fakharuddin Shah, Zafar Abbas and Abdul Qayyum<sup>8</sup>:**

Shah, Abbas, and Qayyum emphasize its political aspect and point out that, because of the dangerous political influence, the NAB Ordinance cannot offer impartial justice. Although the article questions the political influence the NAB has not been able to avoid, it does not focus on Shariah aspects. However, the authors stress the significant internal problems of the NAB which makes the institution ineffective, ineffective, and this is an instructive comparison with Shariah concepts of justice and decentralization.

**3. “WHAT IS WRONG WITH NAB ORDINANCE” written by Muhammad Shahzaib Usman<sup>9</sup>:**

Some of the common legal issues identified by Usman are; The punishment provisions are retrospective in nature; Military personnel are out of the purview of NAB; and standards of proof are murkily defined. He also has concerns over the various powers accorded to the Chairman of NAB, which is detrimental to the theme of this research, that is transparency and fairness. While all times points out juridical

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<sup>8</sup> Syed Fakharuddin Shah and Zafar Abbas, "An Evaluation of the National Accountability Bureau (NAB) as Anti-Graft Body in the Political Perspective of Accountability in Pakistan," *Public Integrity* 25, no. 1 (January 2022): 1-13

<sup>9</sup> Muhammad Shahzeb Usman, "What is Wrong with the NAB Ordinance?" *Courting The Law*, May 9, 2019, <https://courtingthelaw.com/2019/05/09/commentary/what-is-wrong-with-the-nab-ordinance/>.

problems, it fails to discuss Shariah aspect of these issues. These conceptual considerations and the present absence of an in-depth exploration of the Islamic perspective on retrospective justice and the burden of proof indicate the value of moving to the next stage of conceptual clarification.

**4. "Approver: A Confused Entity in Criminal Proceedings" written by G. V. Mahesh Nath<sup>10</sup>:**

In his writing, Nath directs his attention towards the legal issues surrounding the topic of the approver in the criminal justice field. A pardoned co-accused, who is the subject of this paper, is a person who is acquitted in exchange for a testimonial role against other accused persons in the same case under the Indian legal system. Even though this article discusses the ethical problems and the consequent procedures regarding approver testifying, the Shariah perspective on the issue is not addressed. In Shariah circles, having an approver goes against Islamic law since the accomplices must be criminally prosecuted and banned from pardoning one another.

**5. "THE PLEA BARGAINING CONTROVERSY" written by Douglas A Smith<sup>11</sup>:**

In his article, Smith describes the ethical and legal issues related to plea bargaining in the area of the common law. He opposes the practice for example of forcing defendants to admit to their guilt in order to avoid more severe consequences, hence, raising

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<sup>10</sup> G. V. Mahesh Nath, "Approver: A Confused Entity in Criminal Proceedings," *SSRN*, accessed October 15, 2024, <https://ssrn.com/abstract=2288649>.

<sup>11</sup> Douglas A. Smith, "The Plea Bargaining Controversy," *Journal of Criminal Law and Criminology* 77, no. 3 (1987): 949–68,

the question of the fairness of such deals. Albeit the article provided necessary and sufficient information for the ethical implications of plea bargaining, it failed to cover the Shariah prospect which categorically frowns at expediencies in the dispensation of justice. The Sharia stresses the correct and just determination of guilt and varying innocence in the court through legal proof and not by compromise or bargaining.

**6. “Judicial Review of Public Action” a book written by Fazal Karim:**

In the paper investigating the function of judicial supervision in public actions, Karim discusses the responsibility of the court and fair trials and prosecution under the laws of Pakistan. This article discusses how the judiciary protects legalism; however, it neglects to discuss the Shariah appendage of equality and justness. This gap provides a unique opportunity to investigate how the concept of Islamic justice is compatible or incompatible with the procedural frameworks provided in the NAB Ordinance.

**7. “FLAWS IN NAB ORDINANCE- scrutiny and Analysis” written by Mr Abdullah Muhammad<sup>12</sup>:**

Muhammad’s article identifies some core constitutional issues with the NAB Ordinance including those to do with retroactive penalties and immunity of the military personnel. He objects to a denial of natural justice and the element of presumption of innocence. Nevertheless, his discussion of these issues does not take into consideration the Shariah. The aspect of Shariah relating to retrospective justice and the

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<sup>12</sup> Abdullah Mohammad, "Flaws in the National Accountability Ordinance (XVIII of 1999): Scrutiny and Analysis," *Courting The Law*, October 9, 2018, <https://courtingthelaw.com/2018/10/09/commentary/flaws-in-national-accountability-ordinance-xviii-of-1999-scrutiny-and-analysis/>.



burden of proof is seen in the previously uncovered areas that are fundamental to further analysis in the current thesis.

However, there is insufficient literature regarding the NAB Ordinance, especially from the Shariah point of view which makes the existing research imperative for the current study. The works reviewed do not adequately explore how Islamic notions of justice, justice and accountability endorse or disarm different provisions of the NAB Ordinance, especially the burden of proof, plea offering and the conception of the approver. This gap makes an analysis of the NAB Ordinance in the light of Shariah law imperative, which has been the focus of this thesis.

#### **4. Thesis statement**

The Islamic financial system based on the *Shariah* principle utilises various business models to provide credit facilities that are fundamentally different from conventional banking. The writing concerns the authority of the ordinance as it relates to *Shariah* law scrutinizing specific ideas such as the use of plea bargaining and burden of proof. These zones invite detailed scrutiny of Islamic Sharīah, the Consensus of the Muslim Community and the Constitution of Pakistan.

#### **5. Research Questions**

- 1) Is the concept of approver (waada muaaf gawah) permissible in Shariah and how is it relevant to the NAB ordinance, 1999?

2) Is the accused in any way responsible under Islamic law and the Constitution of Pakistan to prove his innocence? How does this principle work in the context of NAB Ordinance 1999?

3) To what extent does the application of the NAB Ordinance 1999's definitions of accountability, fairness, plea bargain and equity based on Shariah and constitutional law?

## **6. Objectives of Research**

The objective of the research is to bring forth the enacted law and the proposed suggestion.

1) NAB Ordinance 1999 and its relevance to the Shariah principles: the role of the approver and plea bargain.

2) To analyse how the burden of proof is managed under the NAB Ordinance 1999 and what are the differences between the NAB Ordinance 1999 and the rules set out in Islamic law and the Constitution of Pakistan.

3) To analyse if the NAB Ordinance 1999 promotes equity transparency and fairness across all sectors of Pakistan.

## **7. Research Methodology**

The research methodology which is being used in this study is the qualitative research. This method involves multifaceted steps like conducting a literature review, analysis of the primary and sources. Moreover, I have attempted to provide a comparative analysis to analyse the compatibility of the NAB procedure with *Shariah* compliance.

This involves a comparison of the mentioned law which is the NAB Ordinance. Researching the National Accountability Bureau (NAB) ordinance and its *Shariah* appraisal involves reviewing legal texts, analyzing relevant jurisprudence, consulting Islamic scholars, and assessing the compatibility of NAB's procedures with *Shariah* principles.

However, the scope of work is carefully constructed by using materials of different origins, like books, academic literature, journals, research papers, official documents and reliable online resources, to ensure that a detailed and varied analysis is presented. Finally, I aim to master the methodology used in the research to accomplish a detailed assessment of the NAB ordinance through a *Shariah* perspective which will add more knowledge and solve some issues that can be seen in this ordinance.

## **CHAPTER NO. ONE**

### **THE NATIONAL ACCOUNTABILITY ORDINANCE, 1999: AN ANALYSIS**

## CHAPTER 01

### THE NATIONAL ACCOUNTABILITY ORDINANCE, 1999: AN ANALYSIS

#### 1.1. Historical Background: The need to formulate an ordinance to control corruption

Corruption is a severe threat to a country's governance, growth, and economic stability. It undermines the rule of law, erodes sovereign legitimacy, and weakens institutional structures.<sup>13</sup> Corruption has historically hampered Pakistan's capacity to fund essential amenities such as education, healthcare, water, sanitation, and law enforcement. The reliance on public borrowing to fund expenditures and development programmes has resulted in huge public debt build-up, impeding future economic growth and governance quality.

Since the formation of Pakistan, the founding father of Pakistan Quaid-i-Azam Muhammad Ali Jinnah had made a firm commitment to eradicate corruption and bribery by referring them as “poison” and “one of the biggest curses from which India was suffering<sup>14</sup>. This eventually culminated in the passing of the Prevention of Corruption Act, of 1947, what was the first effort to fight corruption in the nation through legislation to address corruption in public officials. In the following years, other laws like the Public Representatives (Disqualification) Act of 1949 and the Elected Bodies (Disqualification) Ordinance of 1959 were enacted to expand the anti-corruption laws for public representatives.

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<sup>13</sup> Timothy Lindsey and Howard W. Dick, eds., *Corruption in Asia: Rethinking the Governance Paradigm* (Annandale: Federation Press, 2002).

<sup>14</sup> Pakistan Court Rejects Musharraf's Appeal against High Treason Verdict," *Dawn*, December 28, 2019, <https://www.dawn.com/news/1525270>.

Upon independence in 1947, the Special Police Establishment (SPE), was inherited by Pakistan and was later renamed as Pakistan Special Police Establishment (PSPE). The same year the Prevention of Corruption Act (PCA) of 1947 was passed to further widen the measures against corruption and to enable PSPE to investigate cases of bribery and corruption involving employees of the central government.<sup>15</sup> Over time, the scope of investigations to be conducted by the PSPE was enhanced to include cases under other laws such as the Official Secrets Act, of 1923, the Foreign Exchange Regulation Act, of 1947, the Passport (Offences) Act 1952 and the Customs Act 1959.

Notwithstanding these initial efforts with every new political regime, Corruption in Pakistan has continued, taking on different shapes. In the beginning, property owned by evacuees was a significant source of corruption. In between 1950s, export licences and voucher programmes became instruments for controlling foreign money and winning over the wealthy and powerful. In the 1970s, there was widespread corruption in state-owned businesses and financial institutions. By the 1980s, industrial and agricultural loans had emerged as a new source of funding. In the 2000s, there was mismanagement and inefficiency in State-Owned Enterprises (SOEs), stock market speculation, and theft of government subsidies. In the 1990s, there were problems such loan defaults and opaque privatisation procedures. Corruption grew entrenched in important businesses, including real estate, building, telecommunications, energy, and sugar<sup>16</sup>.

To tackle these high levels of corruption in Pakistan, a legislative body and ordinance were needed to nip this bud from its roots and to contribute to the prosperity

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<sup>15</sup> Ehsan Sadiq, "Anti-corruption Investigation Agencies in Pakistan: An Appraisal," ISSRA Papers 12 (2020): 47–73.

<sup>1616</sup> Umbreen Javaid, "Corruption and its Deep Impact on Good Governance in Pakistan," *Pakistan Economic and Social Review* 48, no. 1 (January 2010): 123–134,

of the country. Hence, the efforts to formulate such bodies began since the inception of Pakistan.

In 1961, for the expansion of Anti-corruption laws for the provincial government employees, the West Pakistan Anti-Corruption Establishment Ordinance was introduced which led to the formation of the Anti-Corruption Establishment (ACE) at the provincial level with a mandate to investigate complaints of corruption against provincial public servants. After got abolishing of One Unit system in 1970, every province set up its own ACE to prosecute cases of corruption at the provincial level<sup>17</sup>.

In the year 1974, the federal government replaced the PSPE with a newly constituted agency, the Federal Investigation Agency (FIA), on the basis of suggestions from the Police Reforms Committee which was supervised by Mr. G. Ahmed. The FIA, established by the Federal Investigation Agency Act of 1974, not only continued its anti-corruption mission but was also given new tasks to combat organised crime, including smuggling, drugs, and immigration-related offences.<sup>18</sup>.

FIA continued to be the main federal anti-corruption agency till the mid-1990s. However a significant political corruption increased between 1985 and 1995 and soon after the PPP was dismissed from power in November 1996 on charges of corruption, a new anti-corruption agency was established by the caretaker government named as Ehtesab (Accountability) Commission. Later on the Pakistan Muslim League government in 1997, renamed and remodelled the Ehtesab Bureau.

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<sup>17</sup> Ibid

<sup>18</sup> Alia Ahmed, Munir Ahmad, and Suleman Lodhi, "Measuring Corruption Perception: Application of Split-Questionnaire Methodology in Management Studies," *Measuring Corruption Perception: Using Split-Questionnaire Survey* (2010).

Following the takeover of power in October 1999, General (Retd.) Pervez Musharraf abolished the Ehtesab Bureau and established the National Accountability Bureau (NAB). The Ehtesab Act was likewise superseded by the National Accountability Ordinance (NAO) in 1999. The formation of the NAB was inspired not just by Pakistan's internal political dynamics, but also by global trends, as numerous nations established specialised anti-corruption organisations in the 1990s and 2000s<sup>19</sup>.

The establishment of the NAB drastically diminished the FIA's anti-corruption mandate. Under the NAO, the NAB has the jurisdiction to take over cases that were originally recorded with the FIA or other authorities and transfer them to the NAB at any time. Today, the NAB functions as Pakistan's premier anti-corruption investigating body.

However, till today, surveys on International levels which include Global Corruption Index (GCI) and Corruption Perception Index (CPI), show that Pakistan has continuously been at the forefront of countries with high rates of corruption<sup>20</sup>. Those essential service sectors which include land revenue, police, and judiciary are considered the most corrupt areas, while other areas like taxation, public banks, power, and civil works follow next. Moreover, corruption, especially in the informal sector which generates about 33.1 % of the country's GDP is still a vice<sup>21</sup>. Petty bribery has received attention as a form of corruption albeit being smaller than mega corruption it has a forcible impact on the everyday life of a common man thus over-emphasising the divide between “need-based” and “greed based” corruption.

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<sup>19</sup> Jamshed Khan and Asmat Ullah Wazir, "Civil-Military Imbalance in the Administration of Pakistan: A Case Study of Musharraf Era," *Dialogue (Pakistan)* 6, no. 2 (2011).

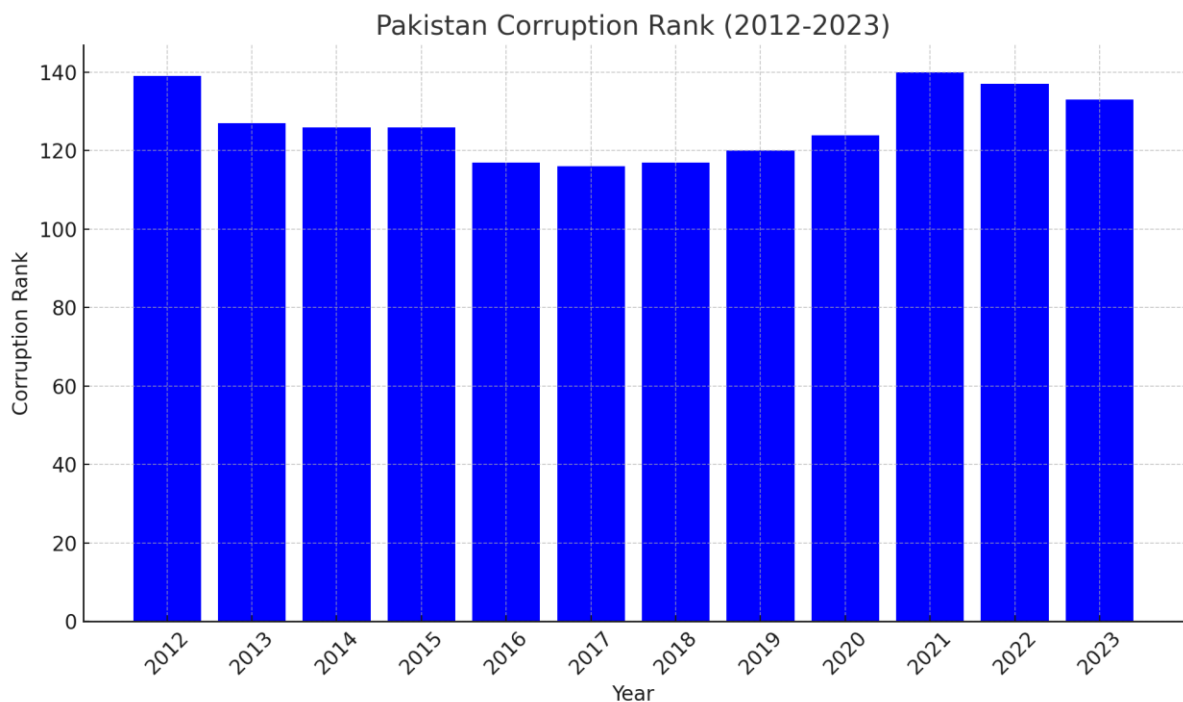
<sup>20</sup> Transparency International, "Global Corruption Barometer," *Transparency International*, accessed September 15, 2024, [https://www.transparency.org/en/gcb?gad\\_source=1&gclid=CjwKCAjwpbi4BhByEiwAMC8JnXu21ZAsuobx3\\_RhtyA-XhQshnJQodEHH2Q-eYF12POFMjjcEOBFABoChVsQAvD\\_BwE](https://www.transparency.org/en/gcb?gad_source=1&gclid=CjwKCAjwpbi4BhByEiwAMC8JnXu21ZAsuobx3_RhtyA-XhQshnJQodEHH2Q-eYF12POFMjjcEOBFABoChVsQAvD_BwE).

<sup>21</sup> Zafar Manzoor, Ghulam Shabbir, and Shabib Haider Syed, "The Measurement of Pakistan's Black Economy," *Pakistan Economic and Social Review* 56, no. 2 (Winter 2018): 211–229, <https://www.jstor.org/stable/26616771>.



There is a high level of corruption in Pakistan, as indicated by the 2023 Corruption Perceptions Index that was published by Transparency International. Pakistan is ranked 133rd out of 180 countries in terms of corruption. Between the years 1995 and 2023, Pakistan's average Corruption Rank was 113.04, with the highest point being 144.00 in 2005 and the lowest point being 39.00 which occurred in 1995<sup>22</sup>.

This underscores the importance of bringing amendments into the NAB ordinance for it to contribute more effectively to controlling the monster of corruption and cronyism.



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<sup>22</sup> Transparency International, "Global Corruption Barometer."

**This is the most recent graph showing the corruption rank of Pakistan from 2012 to 2023<sup>23</sup>.**

## **1.2. The dissection of the framework of the NAO, 1999 and major challenges in its application**

The NAO, 1999 is now the primary legislative framework which consists of 37 sections, was developed from Ehtesab Ordinance 1996 and Ehtesab Act, 1997.(References) The NAO, 1999 also tried to overcome the weaknesses of previous laws to support legal premise for NAB in order to bring stability to its operations efficiency and degree of autonomy by outlining the responsibilities and powers of the NAB, which was established in accordance with this ordinance with the intention of investigating, prosecuting, and reclaiming public funds that have been stolen in an unlawful manner<sup>24</sup>. It encompasses the processes of conducting investigations, recovering assets, and bringing criminal charges through specialist accountability tribunals<sup>25</sup>.

Here is a detailed dissection of the NAO, 1999.

⇒ Despite the fact that the Ordinance was passed in 1999, it was effective from January 1, 1985 which is an application of the legislature in retrospective manner. The NAB has the ability to examine previous crimes and has a longer window of opportunity to hold individuals accountable for corrupt activity as a result of the use of this retroactive application.

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<sup>23</sup> Corruption Perception Index 2024

<sup>24</sup> N. Ahmed, "The Dark Side of Authority: A Critical Analysis of Anti-Corruption Frameworks in Pakistan," *Social Justice & Global Development Journal (LGD)* 2 (2013): Abstract.

<sup>25</sup> Syed Salahuddin Ahmad, "The Role of Judiciary in Pakistan: Case of NAB," *Pakistan Journal of International Affairs* 2, no. 2 (2019).

⇒ The Ordinance has a Supersession nature over other laws which means that each and every legislation that is now in effect that deals with accountability and corruption is rendered superseded by the NAO, 1999. In accordance with this piece of law (Section 5), the NAB has the only jurisdiction to carry out accountability measures throughout the whole of Pakistan, hence preventing any other court systems from interfering with the implementation of these measures.

⇒ The NAO, 1999, under Section 6, stipulates that as part of the appointment process, the NAB Chairman along with a Prosecutor General is also required to be appointed to ensure that the organization continues to function without any interruptions. Moreover, their tenure in their respective offices are also fixed for a term of four years.

⇒ The NAO, gives the power to hold personnel who are alleged of being engaged in corrupt activities or the misuse of authority to the Chairman of the NAB under Section 24. The given power or jurisdiction may be used in such situations when there is adequate evidence or in such cases where preventative detention is crucial in order to avoid interfering with investigations or the accused's potential flight.

⇒ The Ordinance has given the NAB along with its officials a significant amount of power to fulfil the responsibilities that are imposed by the laws. These authorities have the capacity to investigate corruption cases, to freeze assets, to issue warrants, and to cooperate with global organizations in order to bring the assets that have been concealed in other countries under

Section 18. Moreover, to facilitate a more effective and efficient implementation of the NAB's objective, the Chairman has the right to delegate his powers to other members of the NAB under Section 6.

⇒ One of a notable feature of this ordinance is the inclusion of plea bargaining under Section 25, which is basically a legal mechanism that permits anybody accused of corruption to participate in discussions with the NAB. In addition to pleas bargain, Voluntary return is another characteristic that is incorporated in the NAO, 1999, in which if they want to avoid potential prosecution or lower the severity of their penalty, they have the choice of returning the stolen money in its whole or in instalments. The aim of such inclusions is to maintain accountability while simultaneously accelerating the recovery of public assets via the use of this approach.

⇒ The NAO, 1999 mandates under Section 16 to establish the Specialized Accountability Courts, for the purpose to expeditiously resolve the cases that involves corruption. These courts operate in order to assure that justice is not hindered and they work under a strict timeframe which helps to promote the purpose of the NAO, 1999, which is to resolve cases as speedily as possible.

⇒ One of the characteristic of NAO, 1999, under Section 15 is the protection of public institutions from future exploitation is the disqualification of the Persons who have been convicted of a crime from holding public office or participating in elections. Moreover, it is essential because it prevents individuals who have been engaged in corrupt activities from returning to the political or administrative arena or from holding administrative positions.

⇒ The law gives the NAB, the authority to confiscate and freeze assets that were obtained via conduct that is immoral and it has given the NAB, authority to hold these assets or manage them during the period of investigations, being conducted. It is also mentioned in the NAO, 1999 that if it is proven that they were acquired unlawfully, then they will ultimately be forfeited to the state.

⇒ This NAO, 1999 under Section 28, has authorised its governing body the NAB, to collaborate with International Organizations in order to recover assets that have been transported from Pakistan. By facilitating mutual legal help between Pakistan and other global nations, it basically contributes to the retrieval of the assets that have been embezzled and moved to other places.

⇒ The NAO, 1999 mandates to safeguard the witnesses who are engaged in investigations of corruption under Section 16. Due to such protections, witnesses are able to testify without the fear of incurring penalties which enables the NAB to swiftly acquire evidence and construct compelling cases against those who may be implicated in corrupt activities.

⇒ In accordance with Section 10 of the NAO, 1999, anyone who is proven guilty of corruption jeopardies harsh punishment. Some of the repercussions that may be imposed on the criminal include a maximum penalty of fourteen years in jail, substantial fines, and the confiscation of property gained by unlawful methods. These penalties encourage accountability in both the public and private sectors, and they also act as a deterrence against future crimes that are comparable to those that have been committed.

### **1.3. Aims and Objectives of NAO, 1999**

Holding the corrupt accountable has always been a burning issue in Pakistan and throughout the world. For the purpose of preventing and controlling of corruption at the top end of the pyramid, which is in the government and the public sector, there is the legal basis for the fight against corruption in the form of the NAO<sup>26</sup>. It establishes the legal prospect of the NAB and its functions, as well as, the respective power and jurisdiction of the NAB. It will be seen that the basic objective of the Act, therefore, is to rid government and business organisations of corrupt practices with focus made on top ranking public officials and politicians as well as major corporations that participate in corrupt transactions. The following is a list of the primary objectives of the NAO 1999.

#### **1. Complete Destruction of Corruption**

The NAO, 1999 has set its primary mission to eliminate the corruption in all of its manifestations within the commercial and governmental sectors of Pakistan. Illicit activities which includes bribery, kickbacks, theft of public money, and improper use of assets are all examples of corrupt practices. When somebody uses their position in public service for the purpose of acquiring personal advantage, is a simple example of corruption. The law grants the NAB, right to act as a regulatory body against such crimes which provides the NAB, capacity to launch investigations, punish individuals who violate the laws, and reclaim assets that have been stolen<sup>27</sup>.

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<sup>26</sup> Iqbalpasha Shaikh and Raana Khan, "Role of Law of National Accountability Ordinance (NAO) for Preventing Corruption in the Public Sector of Pakistan," *Russian Law Journal* 11, no. 5 (2023): 120–135.

<sup>27</sup> Muhammad Imran, Ghulam Murtiza, and Muhammad Sulyman Akbar, "Role of NAB in Eliminating Corruption from Pakistan: A Critical Analysis," *Annals of Human and Social Sciences* 4, no. 2 (2023): 157–169.

Since politicians often misuse their authority for own gains, the NAO targets corrupt activity is the public domain. It shall comprise of all individuals who have worked or are still working for the government of Pakistan. This category of people includes bureaucrats, politicians and armed forces for instance. While established as anti-corruption body, the NAB has the power to investigate not only public servants but also private individuals or companies of the private sector who are engaged in corrupt practices that would impact the state.

## **2. Taking Legal Action Against Officials of the Public Sector.**

One of the most noticeable features of the NAO, 1999 is the special emphasis on the strictness of penalties for public officials engaged in corrupt practices. The Act also empowers NAB to investigate into top government officials on grounds of corruption. They are ministers, bureaucrats, MPs etc.,<sup>28</sup>

One of the unique feature of the NAO is its ability to avoid typical legal and bureaucratic hurdles and barriers that would otherwise hinder or discourage serious people from being investigated. Accountability Courts are tribunals that have been established specifically to fast track the determination of cases of corruption. These tribunals exist in the NAB. For this reason, cases of corruption in public offices or misuse of public funds are guaranteed for prompt addressing and prevention of similar incidences will prevail in future.

## **3. The Recovery of Assets That Have Been Misappropriated**

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<sup>28</sup> Syed Fakharuddin Shah, Zafar Abbas, and Abdul Qayyum, "An Evaluation of the National Accountability Bureau (NAB) as Anti-Graft Body in the Political Perspective of Accountability in Pakistan," *Public Integrity* 25, no. 1 (2023): 104–116.

The most important objective of the NAB, 1999 is to recover all the assets that have been acquired through corrupt practices within the federal government of Pakistan through the legislation. As due to the excessive corruption, Pakistan has undergone a significant loss economically, leading to transfer of billions of rupees into our and other individuals' accounts. The NAB is empowered to search, seize and freeze such assets, and thus ensure that any embezzled government funds have been recovered to the national treasury.

The legislation also has given authority to the NAB for recovering the assets from domestic as well as international governments. In order to bring back the assets that corrupt officials have concealed elsewhere the NAB works with international organizations which emphasizes the value of international cooperation and responsibility in the global battle against corruption.

#### **4. Ensuring that the public is held accountable**

To increase public accountability, the NAO, 1999 formulated a framework which is both visible and enforceable for the purpose of scrutinizing public officeholders. By this piece of law, NAB is empowered to carry out both planned and supplementary audits and investigations of ministries, departments, parastatals and other state entities in order to ascertain whether public funds are utilised appropriately and economically.

Worse still, NAB has incorporated such tools through which citizens report fraudulent activities and misconduct in the fight against corruption. This participation in the community is aimed at developing a culture of responsibility to call on public



officials to be more ethical than the ordinary business person. The purpose of the Act is to bring back people's confidence on governmental institutions hence eliminate the culture of many officials being protected by the law from corrupt practices. This will be done through following any measured that is to be taken to prevent such occurrences.

#### **1.4. Problematic sections:**

Despite the NAO's importance in combating corruption, certain of the ordinance's clauses have drawn a lot of criticism due to their potential ethical and legal repercussions. The most disputed clauses are the following ones:

##### **1.5.1. Section 14: burden of proof**

The NAB Ordinance's burden of evidence clause, found in Section 14, is perhaps its most controversial section. In criminal law, it is the prosecution's responsibility to prove the defendant's guilt. However, Section 14 shifts this burden of proof to the accused, requiring them to provide evidence of the legitimacy of their acts or holdings against the defendant. Many legal experts have criticised this departure from the fundamental criminal law presumption of innocent as harsh.

Those who are opposed to this act argue that it undermines the basic rights of those who are charged, notably their right to a fair trial. The defendant finds themselves in a challenging situation as they are required to provide proof of their innocence even in situations when the prosecution's case lacks to be considered particularly strong. Due to the fact that the burden of proof has been changed, there has been an increase in the

number of concerns about unjust prosecutions, particularly in situations when the evidence presented by the NAB is circumstantial in nature.

### **1.5.2. Section 25(a): Plea Bargaining**

Section 25 of the NAO, 1999 is one of the provision that has initiated the greatest controversy is the option for a plea bargain. Plea agreements have been criticized for allowing dishonest persons to escape after paying significant penalties, despite the fact that they have assisted the NAB in recovering a considerable amount of embezzled cash. There have been several cases in which individuals who have been accused of major corruption have been provided with the option to return a part of the stolen money and therefore escape going to jail.

In light of the above discussion, allegations have been made that the NAB promotes an environment of impunity, making it possible for influential people to "buy their way out" of legal penalties. As a result, enabling powerful individuals to evade legal consequences through financial means. The allegations surrounding the NAB's application of plea bargaining suggest a potential bias in its negotiations, favouring individuals associated with the governing party while imposing more severe penalties on opposition leaders. This practice raises concerns regarding political manipulation within the legal framework.

### **1.5.3. Section 26: Discriminatory Justice and Approvers Provisions**

For the promotion of selective justice, Section 26 of the NAO, 1999 has been criticised, despite the intention of this section which is to motivate insiders to report

misbehaviour by allowing them to become approvers. People criticises on the basis that powerful people may use this provision to involve others for personal leniency which may result in scenarios where the "small fish" face prosecution, but those with more authority or influence escape significant repercussions by collaborating with NAB.

Furthermore, the implementation of approver requirements prompts ethical inquiries about differing levels of responsibility. Individuals who benefit from assuming the position of approvers may have significantly contributed to corrupt practices but evade complete responsibility, so compromising the objective of stringent anti-corruption enforcement.

#### **1.5.4. Political Abuse of the Authority of the NAB**

There is common opinion that the NAO is abused for political persecution. The NAB has been criticized for arresting only the opponents who formed the previous government, and not those involved with the current regime. This has helped contributed to developing abreast as an impression that NAB is in actuality a political vengeance agency rather than an organization with a absolute annihilate independence.

These accusations have not only been made worse by the broad discretionary powers afforded to the NAB chairman in terms of how investigations are commenced and terminated. Opponents insist that the NAB can effectively be manipulated for political aims, especially if the number of controls on the agency's powers is insufficient. This has aimed doubt at the bureau in regard to its capability to deliver justice without prejudice.

#### **1.5.5. Lack of disqualification for offenders under plea bargains:**

The absence of an instant disqualification provision for plea bargains in the NAO, 1999 is another matter that has to be addressed. In spite of the fact that Section 25(b) prohibits individuals from holding public office, there are a few individuals who are permitted to return to their posts after entering into plea deals with the NAB. This results in a gap that allows fraudulent people to continue to occupy public office even after they have participated in fraudulent exercise.

#### **1.5. Concise performance assessment of the National Accountability Bureau (NAB) since its establishment:**

Since the establishment of the NAO, 1999 till May 2022, the NAB has been successful in recovering Rs 864 billion from corrupt individuals directly as well as indirectly. It is noteworthy that the Bureau has achieved considerable results, such as accountability courts convicting 1,405 criminals and awarding large penalties, so maintaining a conviction rate of 66 percent. The National Audit Bureau (NAB) has received a total of 405,768 complaints, of which 405,212 have been resolved, while 556 concerns are still being reviewed. The Bureau has authenticated 100,865 complaints, and investigations have been completed for 100,425 of them. However, 779 investigations are still underway. Of the 9,883 enquiries that the NAB has conducted, 8,953 have been satisfactorily completed, and there are still 930 enquiries that are ongoing. There have been 4,547 investigations started by the Bureau, of which 4,201 have produced a resolution. There are now 346 investigations that are still underway. Since it was

established, the National Accountability Bureau (NAB) has presented 3,645 cases before accountability courts. Out of these cases, 2,398 have been decided in compliance with the law, while 1,237 references, which amount to a total of Rs 1,335 billion, are still being tried. Ninety-three of the 179 big corruption cases that have been identified are now being tried, sixty-eight of them have been settled, and nine enquiries and nine investigations are very close to being finished. These actions demonstrate the National Anti-Corruption Bureau's commitment to fighting corruption; yet, there are still difficulties to overcome in terms of settling unresolved cases and ongoing investigations<sup>29</sup>.

According to the annual report for 2022 published by the National Accountability Bureau (NAB), the entire amount of money recovered by the NAB from its inception, up until December 2022, amounts to Rs. 891.957 billion and stands at Rs. 26.556 billion rupees were gained through the Voluntary Return (VR) system, 65.696 billion rupees were obtained through the Plea Bargain (PB) system, and 121.658 billion rupees were obtained from bank defaults. Additionally, 59.709 billion rupees were recovered through the process of loan restructuring and rescheduling, 16.694 billion rupees were recovered from recoveries connected to PCBL, 57.684 billion rupees were recovered from court-imposed fines, and 543.960 billion rupees were recovered from indirect recoveries<sup>30</sup>.

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<sup>29</sup> "NAB Recovers Rs864b from Corrupt Elements Since Inception," *Daily Times*, accessed October 15, 2024, <https://dailytimes.com.pk/939453/nab-recovers-rs864b-from-corrupt-elements-since-inception/>.

<sup>30</sup> National Accountability Bureau, *NAB Annual Report 2022*, accessed September 15, 2024, [https://nab.gov.pk/Downloads/NAB\\_Annual\\_Report\\_2022.pdf](https://nab.gov.pk/Downloads/NAB_Annual_Report_2022.pdf).

## **1.6. Conclusion:**

In conclusion, it is of the utmost importance to underline that the National Accountability Ordinance of 1999 has had a substantial impact on Pakistan's battle against corruption. This legislation provides the National Accountability Bureau (NAB) with a comprehensive framework and a great deal of authority. Since it was established, the National Accountability Bureau (NAB) has accomplished a number of significant milestones, including those pertaining to the rate of convictions and the recovery of assets. These accomplishments have been accomplished via the targeting of prominent public officials, the recovery of stolen assets, and the introduction of accountability measures.

In spite of these accomplishments, there are still additional issues that need to be addressed. These issues include the public's view of selective justice and the possibility of political manipulation of the NAB's power. Furthermore, other problematic features within the NAO have generated ethical and legal concerns. These aspects include those that apply to the burden of proof, plea bargaining, and approvers' provisions, among others. A critical investigation of these problematic areas will be conducted in the next chapter, with the purpose of evaluating the potential impact that these areas may have on the efficiency and fairness of NAB's operations.

## **CHAPTER NO. TWO**

### **THE CONCEPT OF APPROVER AND PLEA BARGAIN ALONG WITH ACCUSED AND EQUALITY IN THE NAB ORDINANCE AND THE CONSTITUTION OF PAKISTAN**

## **CHAPTER 02:**

# **THE CONCEPT OF APPROVER AND PLEA BARGAIN ALONG WITH ACCUSED AND EQUALITY IN THE NAB ORDINANCE AND THE CONSTITUTION OF PAKISTAN**

### **2.1. Introduction**

This chapter is dedicated to analyzing the particular legal notions existing in the Pakistani legal system as the applicability of NAB, 1999: approver and plea bargain, accused, and equality. These are the basic concepts on the basis of which the accountability system of Pakistan operates. This chapter discusses these terms from within the context of Pakistani criminal law, as case law, statutory law and judicial precedents.

In examining these legal aspects, thus, this chapter offers a preliminary description of the Pakistani law regulation of the rights of the accused under the NAB Ordinance and the efficient running of the accountability mechanisms based on corruption-mired cases.

### **2.2. Approver and Pakistani Law**

In Pakistani law, an approver is someone who has been convicted of a crime but is forgiven in exchange for testifying against other culprits. This notion is used to bolster the prosecution's case by converting a member of the criminal organization into a state witness. Section 337 of the Code of Criminal Procedure, 1898 (CrPC) is the primary source of information on the concept of an approver. In exchange for thorough and true testimony



against other individuals suspected of participating in the same crime, the government is given the ability to pardon a co-conspirator.<sup>31</sup>

The accomplice must freely accept the offer of pardon and divulge all information truthfully. The pardon is granted only if the approver provides evidence that the prosecution considers critical to the case.<sup>32</sup>

The use of approvers is required under section 25 of the National Accountability Bureau (NAB) Ordinance, especially in situations involving corruption and financial crimes. Examining the approver's evidence is critical for exposing complicated corruption networks and ensuring the conviction of key individuals.<sup>33</sup>

The employment of approvers can occasionally be problematic, as their testimony may be motivated by a desire to avoid penalty. The testimony produced by a witness who has agreed to a plea agreement must be carefully evaluated by the courts, with the likelihood of undue influence or bias taken into account.<sup>34</sup>

It is clearly stated that the notion of an approver is authorised in the law of the National Accountability Bureau (NAB) Ordinance. The NAB Ordinance, which is the legal statute of Pakistan regulating the accountability and anti-corruption mechanisms in the country, also has provisions that enable the procedure of approvers in cases of corruption tribunals and trials.<sup>35</sup>

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<sup>31</sup> *Mehboob Ali Vs The State*, High court of Sindh at Karachi, Criminal Jail Appeal No. 121 of 2015 (Pakistan)

<sup>32</sup> NAB Ordinance 1999

<sup>33</sup> [https://senate.gov.pk/uploads/documents/1567518204\\_858.pdf](https://senate.gov.pk/uploads/documents/1567518204_858.pdf)

<sup>34</sup> Ibid

<sup>35</sup> ORDINANCE NO XIX OF 1999, ORDINANCE NO IV OF 2000

Section 26 of the act is where the idea of an approver is addressed. It empowers the NAB to offer an opportunity to grant a pardon to an accomplice in consideration of the fact that the accomplice is willing to give full and true disclosure of the circumstances and complicity in the offence.<sup>36</sup>

Where in connection with any case under investigation by the NAB the Chairman NAB or any other officer of the NAB duly authorized by him for that purpose desires to obtain evidence of any person, supposed to have been directly or indirectly concerned in, or privy to any offence, he may tender to such person a pardon on the condition that the person shall make a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence.<sup>37</sup>

### **2.3. Stance of the Constitution and NAO on the Plea Bargain**

It should be noted that the practice of plea bargaining while being practiced in many systems is not mentioned in the Constitution of Pakistan. The Constitution serves as a legal basis for criminal justice, as it guarantees the protection of individuals' rights, fair trials, and other features of legal proceedings. The plea bargain as practiced under the National Accountability Bureau (NAB) Ordinance, 1999 however raises several constitutional issues, especially the issues related to fundamental rights as provided in the Constitution of Pakistan.<sup>38</sup>

Plea bargaining is recognized as a legal practice under the NAB Ordinance of the country. It enables the accused to plea bargain for a reduced sentence, or any other

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<sup>36</sup> NAB Ordinance 1999

<sup>37</sup> Ibid

<sup>38</sup> Ali Z, 'Pakistan's National Accountability Ordinance and the Facilitation of Corrupt Practices' [2019] Contemporary South Asia 1 "<https://doi.org/10.1080/09584935.2019.1669140>" accessed 25 July 2024

consideration in exchange for assisting in the investigation or paying back for the wrong done. This mechanism is intended to streamline the justice delivery system and regain assets acquired fraudulently.<sup>39</sup>

Thus, despite the potential of plea bargaining as an anti-measure, it creates numerous ethical and legal concerns. Some people suggest that it might contribute to situations where some people are not held fully responsible for their actions. To tackle these issues, the process must be open and guarantee that justice will be done.

Section 25 of the NAB Ordinance 1999 covers plea bargaining. The defendants are asking for a plea from the NAB Chairman under section 25-B of the National Accountability Ordinance 1999. The Chairman determines whether or not the application is approved. After approving the application, he transfers the case to the Accountability Court for further assessment. The plea bargain provision in the NAB Act requires a defendant to pay an additional 15% fine on the total amount of money embezzled. In addition to the aforementioned penalties, he will lose his job immediately and be barred from standing for office for ten years if he is a politician.<sup>40</sup>

The plea bargain mechanism in section 25-B under the NAB Ordinance is related although not the same as the concept of an approver. For the accused persons, it enables them to reach a compromise by acknowledging that they would be willing to repay the proceeds of corruption so that they would not be prosecuted severely.<sup>41</sup>

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<sup>39</sup> ORDINANCE NO XIX OF 1999, ORDINANCE NO IV OF 2000

<sup>40</sup> Qasim Butt DM and Jabeen A, 'Corruption and Corrupt Practices: Analysis of the NAB Ordinance 1999 in the Perspective of Islamic Shari'ah' (2023) 2(2) Pakistan Journal of Law, Analysis and Wisdom 1

<sup>41</sup> Ibid

### **2.3.1. Legal Basis and Constitutional Framework**

Plea bargaining is mainly governed under the NAB Ordinance under provision 25-B whereby an accused person can agree to pay back the embezzled funds to reduce his or her particular punishment or get other forms of leniency. The Constitution, particularly in Articles 4, 9, 10A, and 25, provides a basis for examining the legality and fairness of plea bargains:<sup>42</sup>

#### **I. Article 4 (Right of individuals to be dealt with by law)**

Article ensures that the law should deal with every person. Plea bargaining like any other legal process must be done under the provision of the law hence should be fair.

#### **II. Article 9 (Security of person)**

This article preserves the sanctity of life and freedom of a person, and any loss of the two has to be under the law. Plea bargaining should not compromise this protection by pressuring people into submitting to unfavourable resolutions.

#### **III. Article 10A (Right to a fair trial)**

The right of an accused to a fair trial is among the rights enshrined in the Constitution. This right must be upheld where plea bargaining is conducted under the NAB Ordinance, to guarantee that the accused properly comprehends the plea and that the procedure is not influenced by force or pressure.

#### **IV. Article 25 (Equality of citizens)**

This article also guarantees equality before the law together with protection of the law. In plea bargaining, the process must not in any way favour

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<sup>42</sup> Constitution of Pakistan, 1973

any person and should be kept equal to all persons, which is the principle of equality.

#### **2.4. Judicial Interpretation and Criticism**

It is also pertinent to mention here that the superior judiciary of Pakistan has specifically reviewed plea bargaining under the NAB Ordinance. For example, in **The State vs. Mohammad Iqbal** (*PLD 2012 SC 111*), Pakistan Supreme Court then debated on the constitutional lawfulness of the plea bargaining norm. The Court also pointed out that plea-bargaining under Section 25-B of NAB Ordinance is optional in nature or can only be employed with the consent of the accused. The Court pointed out that such a process should not be abused and must accord with best practices taking into account the rights of the accused as enshrined in Article 4, 9, 10A and 25 of the Constitution. The case again brought into perspective the role that judiciary has to play the ensuring that the Right of the accused is not in any way violated by plea bargaining especially the right to a fair trial.<sup>43</sup>

The opponents believe that this scenario may violate the Constitution since the accused can escape full responsibility, which will not serve the public interest of ensuring that justice prevails. Judges have pointed out that there is a requirement of clarity and uniformity in the use of plea bargaining to avert. For example, in **NAB vs. Muhammad Zia-ur-Rehman** (*PLD 2002 SC 53*), plea bargaining was considered by the Supreme Court of Pakistan to be ambiguous. The Court observed that although plea bargaining is legal under Section 25-B of the NAB Ordinance and that it should be done uniformly and deliberately, the process should not be whimsical and must respect the principles of

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<sup>43</sup> **The State vs. Mohammad Iqbal**. 2012. *PLD 2012 SC 111*.

equity and justice to reduce cases of abuse of such a process or the provision of differential treatment. The Court pointed out that the judiciary must assume an appropriate responsibility for the lawful use of plea bargaining as well as protection of constitutional rights of the accused.<sup>44</sup>

Although plea bargaining is used to secure quick justice and restitution of the proceeds, it cannot be conducted outside the Constitution. It is important to note that respect for the most important values of the Constitution is necessary for the legitimacy of the process as well as for fairness.<sup>45</sup>

## **2.5. Who is accused and how he is dealt with?**

A person who has been accused of committing corruption, corrupt activities, or other offences that fall within the purview of the National Accountability Bureau is referred to as an accused in accordance with the NAB Ordinance under **section 4**.<sup>46</sup> In cases brought before the National Accountability Bureau (NAB), the accused is allowed, under section 9, various protections that are included in the NAB Ordinance.<sup>47</sup> These provisions are intended to ensure that formalities are adhered to while also addressing the seriousness of the offenses. In accordance with the National Accountability Bureau Ordinance, section 9(a), an accused individual is defined as a person who has a reasonable cause to think that he is engaged in corrupt acts, as well as misappropriation

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<sup>44</sup> **NAB vs. Muhammad Zia-ur-Rehman**. 2002. *PLD 2002 SC 537*.

<sup>45</sup> *Ibid*

<sup>46</sup> **Government of Pakistan**. 1999. *National Accountability Bureau Ordinance, 1999*. Section 4.

<sup>47</sup> **Government of Pakistan**. 1999. *National Accountability Bureau Ordinance, 1999*. Section 9.

of money and abuse of authority.<sup>48</sup> All of them include governmental personnel, private persons, and private businesses.<sup>49</sup>

## **2.6. Procedure for Dealing with the Accused in Pakistani Law**

In the Pakistani legal system, the legal recognition of the accused is possible with the help of the Constitution and statutory laws and among these laws, the National Accountability Bureau (NAB) Ordinance 1999 has an important place. The accused is given some liberties for example the liberty of being tried fairly, the liberty of being represented by a lawyer, and the privilege against being compelled to be a witness against himself under sections **10, 10-A, 13(b), 14 (d) and 17 (c)**.

The NAB Ordinance also lays down the manner of investigation, arrest, and trial, thus the accused should not be prejudiced and should be afforded all his legal rights in **sections 10, 14(d), 17(c), 18, and 24**.

However, there are specific issues with the actual implementation of these rights especially in complex corruption-related matters. This regulation must be adequate to stop such violations and provide criteria for the proper legal behaviour of the power holders and the accused.

Following are the steps to deal with the accused person under NAO

### **I. Investigation and Inquiry**

The first stage is a complaint or information that results in an inquiry. If there is enough evidence, it moves to the investigation stage. This phase is also

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<sup>48</sup> **Government of Pakistan**. 1999. *National Accountability Bureau Ordinance, 1999*. Section 9a.

<sup>49</sup> NATIONAL ACCOUNTABILITY ORDINANCE (XVIII of 1999)

known as the responsive phase where the accused is allowed to defend themselves. The procedure for this phase is given in section 18 of NAO.

## **II. Arrest and custody**

If required, NAB can arrest the accused in the case. The arrest must follow certain legal procedures under section 24, which would mean that the accused should be informed of the reasons for the arrest and produced before an accountability court within 24 hours.

## **III. Bail and Remand**

Under section 16, the accused may be granted bail after which the accountability court dismisses or approves the bail depending on the specifics of the case. At times, the accused can be forwarded to NAB custody for further questioning to be conducted on him or her.

## **IV. Trial and legal Representation**

The accused has some rights like the right to an advocate, the right to challenge the witnesses and the right to give or produce evidence on his/ her side under sections 10 and 17c of the NAO. The accountability court conducts the trial and plays all the procedural aspects under natural justice.

## **V. Plea Bargain**

The accused may request a plea bargain under 25-b; in the NAB, if they agree to return the proceeds of the crime or testify against other criminals in



exchange for a lighter punishment. This process is supervised by the Chairman of NAB and needs the accountability court's sanction.

## **VI. Conviction and Execution of Sentences**

In case the accused is found guilty, then he is subjected to penalties as provided under the sections 10, 16 and 18 of NAB Ordinance, which is deportation, fines, and or barred from holding any position in government.

### **2.7. Rights of Accused**

The accused enjoys several protections under the NAB Ordinance and the Constitution,

including:

- The right to be informed of charges under Section 24(1) of NAO and Article 10-A of Constitution of Pakistan.
- The right to a presumption of innocence until proven guilty under Section 9 of NAO and Article 10-A of the Constitution of Pakistan.
- The right to an attorney under Article 10 of the Constitution and Section 18 (2) of the NAB ordinance.
- The protection of the right of an accused person not to be compelled to make statements and not to incriminate himself under Article 13 of Constitution of Pakistan and Section 25 of the NAB ordinance.
- The right to appeal against the conviction and the sentence passed under Section 32 of the NAO and Article 185 of the Constitution of Pakistan.

## **2.8. Concept of Equality in the Nab Ordinance and the Constitution**

Equality before the law under Articles 4 and 25 is one of the most important provisions of the Constitution of Pakistan and is well incorporated in the NAB Ordinance. This is a very important concept that provides all individuals with equal status before the eyes of the law.

### **2.8.1. Constitutional Basis**

#### **⇒ Article 25 (Equality of citizens)**

The equality of all citizens before the law as well as their rights to equal protection is stated in this article without any ambiguity. This one restricts discrimination of individuals based on sex, race, religion and place of origin.

#### **⇒ Article 4 (Right of individuals to be dealt with by law)**

This article fortifies the doctrine of equality and propounds that every person is protected by the law and has to be treated by the law.

### **2.8.2. Application in the NAB Ordinance**

The NAB Ordinance, while primarily targeting corruption and corrupt practices, incorporates the principle of equality through its provisions:

⇒ **Uniform Application**

NAB Ordinance under Section 2(a) applies to all categories of people without discrimination of their status in the society or the position they hold whether political, civil servants, business people, or private individuals.

⇒ **Non-Discriminatory Procedures**

The measures provided for investigation, arrest and trial in terms of the NAB Ordinance are equally applicable to all accused, hence they do not discriminate between individuals. Under sections **9, 24, and 16**.

⇒ **Fair Trial Rights**

The Constitution of Pakistan also provides the right of a fair trial which is also protected in the NAB Ordinance. These are the right to a fair trial in terms of legal representation, the right to be heard and the right of appeal meaning that the accused are equally treated under Sections 9, 16 and 24 again.

## **2.9. Judicial Oversight**

The superior judiciary in Pakistan holds an important position in observing, amongst others, the principle of equality in the application of the NAB Ordinance. The courts have stepped in where there are perceived cases of discrimination or prejudice with a repetition of this constitutional provision of equality.<sup>50</sup> This can be understood with the case of ‘**NAB v. Muhammad Nawaz**’ (PLD 2019 SC 261). In this case, the Supreme court examined the jurisdiction of NAB and its powers including investigation/Prosecution under the NAB Ordinance. The Court supervised as to whether

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<sup>50</sup> Salahuddin Ahmad DS, ‘The Role Of Judiciary In Pakistan: Case Of NAB’ (2019) 2(2) Pak. Journal of Int’L Affairs 1

the procedures adopted by NAB at the time of arrest, investigation, and detention were intra vires the constitution and procedural laws. The Court concluded that NAB must compulsorily follow all legal formalities, without violating the rights of the accused at any stage of the investigation and it certainly does so too. This included guaranteeing that the accused is told the allegations against them, is afforded the chance to ‘retain a lawyer’, and that if detained or arrested, this is done correctly and legally. They reminded the NAB of procedural fairness and the fact that NAB should uphold the law and protect the rights of the accused as much as possible.

This case has brought out an understanding on the power struggle between anti-corruption measures of the NAB and efforts to protect rights of individuals.

## **2.10. Challenges and Criticism**

However, some concerns have been observed and noted as follows: Nevertheless, the application of the NAB Ordinance has been criticized for partial accountability and political influence. To sum up, it can be stated that only true equality can be achieved through the proper and equal application of the law and the consideration of the discrepancies in the accused persons’ treatment.<sup>51</sup>

Equality is one of the principles incorporated in the Constitution of Pakistan and also in the NAB Ordinance. It is crucial to guarantee compliance with this principle in practice so that the public would trust the accountability process and the rule of law.<sup>52</sup>

Main challenges for proper implementation of the NAB Ordinance (NAO) include: politics and selective accountability issues. At the same time, the law is intended

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<sup>51</sup> Qasim Butt DM and Jabeen A, ‘Corruption and Corrupt Practices: Analysis of the NAB Ordinance 1999 in the Perspective of Islamic Shari‘ah’ (2023) 2(2) Pakistan Journal of Law, Analysis and Wisdom 1

<sup>52</sup> Ibid

to provide equal opportunities and protect individuals from discrimination, but practice shows that officials are inclined to turn a blind eye to unfair treatment of certain people in their favor for political reasons or other considerations or ignore violations by influential politicians or powerful business personalities. This erodes the confidence of the public in the accountability procedures and creates doubt on the through fairness of the judicial system. Moreover, different forms of abuse towards the accused persons, for instance, cases where they are treated differently or unfairly or else denied some rights as provided for in the country's law or where the law enforcement agencies provide a wide disparities in the handling of different cases as well as the protection accorded to the NAB ordinances complicate its implementation. To talk about equality and justice in the proper sense, these distinctions must be adjusted and obscured, making it equally clear for everyone that every person, regardless of their rank, is equal under the norms of the law.

A relevant case in this regard is **Suo Motu Case No. 16 of 2013**, also known as **Contempt of Court Case**. In this case, the Supreme Court of Pakistan on one hand noticed suo motu the arbitrary use of the NAB Ordinance while on the other hand political influence used to decide the accountability processes. The Court pointed out that while the accountability process was somewhat chaotic in its implementation, it only seemed to chase out political rivals, and even then, ineffectively, while ignoring the culpable associates of the political elites and alliances. The court said that it would like to see that equal treatment before the law is properly enforced, and reminded NAB that its actions should not be politically or discriminatory influenced. The Court also pointed out

that true fairness in the law can only be obtained if the law works the same for everyone regardless of one's political or social class.<sup>53</sup>

### **2.11. Conclusion**

The idea of an approver, as envisaged under the NAB Ordinance, points to the modality of using insider cooperation where he or she testifies and helps the authorities in tracing other members of a bigger corruption syndicate. As for the effectiveness of the function which helps to break the silence about corruption, it is necessary to note that this mechanism poses questions regarding legal motivation as opposed to ethical duties. Pakistani law allows the use of approvers in certain conditions, so there is a guarantee that the information given by an approver is not given for self-gain or under force. The legal measures and one that demands approval of the judiciary necessitates adherence to high standards in the justice system. Another essential factor is plea bargaining, which accelerates the judicial process and involves the accused person's plea of guilty in return for a mitigated penalty period. Although this practice is practically advantageous in the reduction of backlog, and ensuring that justice is delivered as swiftly as possible, this practice should be viewed against the constitutional rights of the accused persons to a fair trial and afforded due process. The present constitution provisions concerning plea bargaining focus on the aspect of voluntariness and rational decisions made without pressure. It makes sure that the rights of the accused are not violated while at the same time working under time-bound procedures. The term accused given under the NAB Ordinance has deep significant meanings. The ordinance describes specific practices

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<sup>53</sup> **Suo Motu Case No. 16 of 2013**, Pakistan Supreme Court.

about the accused to prevent violation of their rights during the investigation and court proceedings. This comprises the right of an accused person to be represented by an advocate of their choice, an accused person shall be presumed innocent until proven guilty, and an accused person shall not be compelled to be a witness against themselves. It has incorporated these protections in line with the constitution thus regarding the rule of law and human rights.

### **CHAPTER NO. THREE**

#### **APPROVER, PLEA BARGAIN, ACCUSED, AND CONCEPT OF EQUALITY IN ISLAMIC LAW**



## **CHAPTER NO 03:**

### **APPROVER, PLEA BARGAIN, ACCUSED, AND CONCEPT OF EQUALITY IN ISLAMIC LAW**

#### **3.1 Introduction**

The aspect of law in any given society is highly correlated with the ethical and moral standards of the society, which, in turn, emanate from religious practices. In Islamic law, specifically *Shariah* law. Aspects such as the approver, plea bargain, and how the accused is dealt with are considered very important. All of these concepts of law not only correspond to the principles of justice but also shed light on how much importance has been given to justice, accountability, and equality in a religion. In this chapter, I focus on the Islamic view of the legal concepts under consideration and how they fit into the framework of *Shariah*. Thus, the case study focuses on the approver's and the accused's rights, plea bargaining mechanisms, and their rationale within Islamic law. Furthermore, there is a need to discover the basic idea of equality in Islam with a focus on justice and the status of a person in the system.

#### **3.2 *Shariah* Take on Approver**

The legal position of an approver, meaning a person who assists in the investigation by confessing to a crime and helping to incriminate others in the crime, is

unique in *Shariah* law. It consists of injunctions from Quran, Hadith which include sayings and deeds of Prophet Muhammad, Ijma, which is the consensus of scholars, and Qiyas which involves analogy and identifies justice, fairness as well as the freedom of individual rights.<sup>54</sup>

As the case indicates, the position of an approver, also known as the collaborator witness in *Shariah* law, raises a lot of ethical and legal issues. The importance of the witness is unmeasurable when it comes to the issue of justice since their credibility and reasons for providing information shape the entire justice system. The *Shariah* also regulates testimonies in a trial and disallows enticing a false or forced confession out of a person. Therefore, *Shariah* strongly emphasises repentance. The Quran encourages believers to seek forgiveness for their sins: This is the Saying of Allah:

﴿قُلْ يٰٓعِبَادِيَ الَّذِيْنَ اَسْرَفُوْا عَلٰٓى اَنْفُسِهِمْ لَا تَقْنَطُوْا مِنْ رَّحْمَةِ اللّٰهِ ۚ اِنَّ اللّٰهَ يَغْفِرُ الذُّنُوْبَ جَمِيْعًا ۚ اِنَّهٗ هُوَ الْغَفُوْرُ  
الْرِحِيْمُ<sup>55</sup>

“My servants who have committed excesses against themselves, do not despair of Allah’s Mercy. Surely Allah forgives all sins. He is Most Forgiving, Most Mercifu’<sup>56</sup>

(Translation by: Abul Ala Maududi)

Evidence is highly valued in *Shariah* and the credibility of the witnesses giving the evidence is highly important. After all, witnesses must be people who tell the truth and who are credible. Most of the verses of the Quran that encourage justice are addressed to the believers in general and are usually preceded by an imperative verb ‘be’.

*For instance:*

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<sup>54</sup> 1994 SCMR 932

<sup>55</sup> Al Quran 39:53

<sup>56</sup> Ibid

يَا أَيُّهَا الَّذِينَ ءَامَنُوا كُونُوا قَوَّامِينَ بِٱلْقِسْطِ شُهَدَآءَ لِلّٰهِ وَلَوْ عَلَىٰ أَنفُسِكُمْ ءَوِ ٱلْوَلَدَيْنِ وَٱلْأَقْرَبِينَ ؕ إِن يَكُنْ غَنِيًا أَوْ  
فَقِيرًا فَلَا تُزَيُّوهُمَا ؕ إِن تَكُونُوا تَارِكِينَ لَهَا فَٱللَّهُ يَبْزُقْهُمْ مِمَّا تَعْمَلُونَ ؕ إِنَّهُۥ سَٰعِدٌۢ بِٱلْعَمَلِ ؕ وَإِن تَلَوْا أَوْ تَعْرِضُوا فَإِنَّ ٱللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا ؕ ٱلْهُدَىٰ أَن تَعْدِلُوا ؕ فَٱلَّذِىٓ أَوْلَىٰ بِهِمَا ؕ فَلَا تَتَّبِعُوا

*'Believers! Be upholders of justice<sup>1</sup> and bearers of witness to truth for the sake of Allah,<sup>[165]</sup> even though it may either be against yourselves or against your parents and kinsmen, or the rich or the poor: for Allah is more concerned with their well-being than you are. Do not, then, follow your own desires lest you keep away from justice. If you twist or turn away from (the truth), know that Allah is well aware of all that you do.)'*<sup>57</sup>

(Translation by: **Ala-Maududi**)

In Islamic jurisdictions, Qadis (Judges) may decide on the circumstances of repentance and cooperation when they pass their judgments.

*Shariah* provides for certain penalties which are to be imposed for specific crimes; however, the matter is flexible if the offender regrets his/her actions and wants to amend his/her misconduct. The Prophet Muhammad (peace be upon him) emphasized mercy:

ٱلرَّٰحِمُونَ يَرْحَمُهُمُ ٱلرَّحْمٰنُ ٱرْحَمُوْا مَن فِى ٱلْأَرْضِ يَرْحَمْكُم مِّن فِى ٱلسَّمَآءِ ﴿٥٧﴾

“The merciful are shown mercy by Ar-Rahman. Be merciful on the earth, and you will be shown mercy from Who is above the heavens.”<sup>58</sup>

(Reference: Jami` at-Tirmidhi 1924, Book 27, Hadith 30)

### 3.2.1 Confession and Repentance

Consequently, an accusation in *Shariah* is a very powerful form of proving guilt as it includes a confession (*Iqrar*). In Islam *Iqrar* means to admit the interest of another against oneself. It can also be referred to as an admission to a liability or confession of an

<sup>57</sup> Al Quran 4:135

<sup>58</sup> Attaullah Q and Saqib L, ‘Tracing The Concept Of Negotiation In Law, Pakistani Legal System And Shari‘ah (Islamic Law)(A Comparative Study)’ (2017) 11(1) Jihāt al-Islām 1

offence by a person.<sup>59</sup> But the confession must be honest and genuine. While, in secular systems, an approver may be given some mercy in case he or she cooperates, Islamic law emphasises the intention of the Tawbah. This assertion holds the opinion that if an individual admits that he or she has committed a given crime and has repented, then God should forgive him or her. The Quran teaches us to repent and stresses that God will accept repentant individuals who want to change for the better.<sup>60</sup>

### 3.2.2 Evidence and Witnesses

An approver under *Shariah* also has a role in adducing evidence against other persons involved in the commission of the crime. Evidence in Islamic law is well defined and the rules concerning evidence are quite rigorous for a confession or testimony to be considered admissible in a court of law, it has to be made voluntarily and without any pressure, threats or promises being made to the accused and the same needs to be supported by other evidence in the form of witnesses or otherwise. These are the guidelines that an approver's testimony must meet for it to be considered valid in *Shariah* court.<sup>61</sup>

### 3.2.3 Hudud, Qisas, and Ta'zir (Defs)

Islamic criminal law is divided into three categories: Criminal punishments are of three types: Hudud, Qisas, and Ta'zir.

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<sup>59</sup> Ahmad Azam Mohd Shariff, and others, 2018. "Admissibility of Iqar as Evidence: The Issue of Voluntariness from Syariah Principles Perspective." *International Journal of Engineering & Technology* 7 (3.30): 104–108. [https://www.researchgate.net/publication/332683186\\_Admissibility\\_of\\_Iqar\\_as\\_Evidence\\_the\\_Issue\\_of\\_Voluntariness\\_from\\_Syariah\\_Principles\\_Perspective](https://www.researchgate.net/publication/332683186_Admissibility_of_Iqar_as_Evidence_the_Issue_of_Voluntariness_from_Syariah_Principles_Perspective).

<sup>60</sup> Attaullah Q and Saqib L, 'Tracing The Concept Of Negotiation In Law, Pakistani Legal System And Shari'ah (Islamic Law)(A Comparative Study)' (2017) 11(1) *Jihāt al-Islām* 1

<sup>61</sup> Ibid

i. Crimes such as theft, Zina adultery slander or false accusation, and it has a prescribed punishment as stated in Quran and Hadith. Since the evidential conditions are strict, and the principle of mercy is typically applied in addition to the legalistic one, these are called hudud. Hudud sanctions are seldom imposed.<sup>62</sup>

ii. Qisas are related to criminal offences that include manslaughter and bodily harm and the punishment can be an equal penalty or a fine (Diyah). Here the roles played by the victim or their heirs are rather important.<sup>63</sup>

iii. Ta'zir crimes which include offenses that are not classified as Hudud or Qisas provide judges with more room to decide on the penalty for the accused. In such situations, an approver's evidence can help influence the judge's decision, but such evidence has to be just, reasonable, fair, and within the law.<sup>64</sup>

### **3.2.4 Protection against Injustice**

Islamic law is very keen on ensuring that injustice does not prevail. An approver must be consistent with the objectives of Shariah; Maqasid (objectives) which are to protect religion, life, intellect, lineage, and property. Any utilization of an approver's testimony must be done in a manner that is not prejudicial to the accused or denies him or her rights.

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<sup>62</sup> Peters, Rudolph. 1982. "Hudud Crimes in the Islamic Criminal Justice System." NCJRS Virtual Library. Accessed December 23, 2024. <https://www.ojp.gov/ncjrs/virtual-library/abstracts/hudud-crimes-islamic-criminal-justice-system-p-195-201-1982-m>.

<sup>63</sup> Nigosian, S. A. 1984. "The Concept of Hudud in Islamic Law." *International Journal of Middle East Studies* 16 (2): 189–202. <https://www.jstor.org/stable/20847201>.

<sup>64</sup> Attaullah Q and Saqib L, 'Tracing The Concept Of Negotiation In Law, Pakistani Legal System And Sharī'ah (Islamic Law)(A Comparative Study)' (2017) 11(1) Jihāt al-Islām 1

According to the sources of Sharia, justice is highly valued, and judges and other authorities who have to make decisions should be fair.<sup>65</sup>

*Shariah* also recognises the role of an approver and it is all about maintaining justice and showing mercy at the same time. Thus, the testimony of an approver can be invaluable in the process of searching for the truth and combating crime, however, it is still subjected to various strict ethical and legal rules and requirements to be just and fair. The insistence on genuine remorse, clear proof, and provisions against oppression align with the objectives of *Shariah*, which is to do justice to the people and society as a whole and to preserve people's rights.<sup>66</sup>

### **3.3 What Does *Shariah* Tell About the Accused?**

The right of the accused to defence is accepted as one of the fundamental human rights and is seen as a vital component of securing justice in Islamic law. The previous section emphasizes Islamic law's outstanding ability to defend the rights of the accused. Investigating these rights reveals that they precede numerous human-enacted laws known as human rights. The preservation of these liberties is rooted in the pursuit of justice, which is a fundamental feature of Allah's law. This is made possible by the fact that Islamic law is revealed by the Creator of the universe, who has a thorough comprehension of His creation.

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<sup>65</sup> Maqasid e Shariah

<sup>66</sup> Ibid

(However, who can provide a more correct assessment than Allah to a people who are firm in their faith?)<sup>67</sup>

Relating to the justice and fairness of the accused in criminal law in Shariah. Islamic Sharia also does not allow any form of punishment without a valid trial and the Quran and Hadith both reiterate the concept of innocent until proven guilty. The accused shall be treated with respect and any force or pressure that can lead to a confession should not be used in any circumstances. *Shariah* law states that the procedure of charging someone with a crime is very rigorous and the accuser must prove the allegations against the accused.<sup>68</sup>

The principle of justice in *Shariah* is encapsulated in the Quranic verse: That is why the Quran calls upon the believers, saying:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا ۖ كُونُوا ۖ قَوَّامِينَ بِٱلْقِسْطِ شُهَدَآءَ لِلّٰهِ وَلَوْ عَلَىٰٓ أَنْفُسِكُمْ ؕ أَوِ ٱلْوَالِدِينَ وَٱلْأَقْرَبِينَ ۚ ۖ  
يَا أَيُّهَا الَّذِينَ ءَامَنُوا ۖ أَوْ تَعْرِضُوا ۖ فَإِنَّ ٱللَّهَ ۖ هُوَ ٱلْغَوَىٰ ۚ ۖ أَن تَعْدِلُوا ۖ إِن يَكُنْ غَنِيًّا أَوْ فَكِيرًا ۚ فَٱللَّهُ أُوْلَىٰٓ بِهِمَا ۖ فَلَا تَتَّبِعُوا  
ٱللَّهَ كَآنَ بِمَا تَعْمَلُونَ خَبِيرًا

*“Believers! Be upholders of justice, and bearers of witness to truth for the sake of Allah,<sup>[165]</sup> even though it may either be against yourselves or against your parents and kinsmen, or the rich or the poor: for Allah is more concerned with their well-being than you are. Do not, then, follow your own desires lest you keep away from justice. If you twist or turn away from (the truth), know that Allah is well aware of all that you do.)”<sup>69</sup>*

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<sup>67</sup> Muhammad Husni A, Muhammad Husni AB and Sabree Nasri M, ‘Rights of the Accused in the Islamic Legislation: A Comparative and Analytical Study’ [2019] Scholars International Journal of Law, Crime and Justice

<sup>68</sup> ‘Rights of the Accused Under Islamic Criminal Procedure (From Islamic Criminal Justice System, P 91-107, 1982, M Cherif Bassiouni, ed. - See NCJ-87479) | Office of Justice Programs’ (*Home | Office of Justice Programs*) <[www.ojp.gov/ncjrs/virtual-library/abstracts/rights-accused-under-islamic-criminal-procedure-islamic-criminal#:~:text=The%20accused%20has%20the%20absolute,to%20change%20his/her%20mind.](http://www.ojp.gov/ncjrs/virtual-library/abstracts/rights-accused-under-islamic-criminal-procedure-islamic-criminal#:~:text=The%20accused%20has%20the%20absolute,to%20change%20his/her%20mind.)> accessed 7

August 2024

<sup>69</sup> Al Quran 4:135

(Translation by: Abul Ala Maududi )

Cited in this verse is the fairness and justice to be administered to the accused.<sup>70</sup>

The basic strategy for obtaining justice is to punish those who deserve it while protecting innocent individuals from being penalized for the crimes of others. It is wrong to hold one person accountable for the actions of another. Allowing the convict to appeal and allowing them certain rights regarding the conviction, opposing party, or evidence is an important step towards achieving justice. This includes the creation of laws and regulations to ensure the use of this right, which gives the accused a final chance to defend themselves through the courts and the highest judicial council.<sup>71</sup> The accused is entitled to the following privileges under Islam:

### **3.3.1 Right of the accused to defend himself**

The *Shariah* guarantees the accused the right to defend himself before the judicial council. This right is regarded as valid by Islamic law, regardless of time or place, and it is emphasised in international constitutions and human rights declarations.<sup>72</sup>

While Islamic law does not directly establish the accused's ability to defend themselves, as conventional law does, this right covers other parts of Islamic law, including:

#### ***i. The Right of the Accused to Be Present***

The judge should not issue a judgment against an absent defendant. This is because the accused may offer evidence that contradicts the claims, regardless of the evidence presented against them. In the narrative of Umar bin Khattab (RA), a man with

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<sup>70</sup> Al Quran 4:135

<sup>71</sup> Ibid

<sup>72</sup> Ibid



a gouged eye appeared before him, demonstrating this point. Umar asked for the opponent's presence, and the guy replied, "*O Amir al Muminin, this is what you see.*" Umar then claimed that the man could have gouged both of his opponent's eyes. As a result, when the opponent arrived with two gouged eyes, Umar acknowledged that others' arguments should be regarded anyway. It is worth noting that none of Umar's companions expressed any disagreement with his assessment of the situation. According to Umar bin Abdul Aziz, Luqman advised against passing judgment until his opponent was present if a man with gouged eyes approached.<sup>73</sup>

To exercise this privilege, the accused must be visibly present within the judge's jurisdiction and not concealed. However, experts disagree in the situation of the reverse scenario. According to the Hanafi School of Law in *Al-Hidayah* (الهدية) by Burhan al-Din al-Marghinani, a person cannot be judged while they are not present.<sup>74</sup> Nonetheless, the some school of thoughts allow for the imposition of judgment on a person who is either absent from the country, or judicial council, or in hiding from the judiciary. They support this with the following declaration from Allah (swt): In Surah Nisa, Ayah 135, Allah says:

﴿يَا أَيُّهَا الَّذِينَ ءَامَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلّٰهِ وَلَوْ عَلَىٰ أَنْفُسِكُمْ أَوِ الْوَالِدَيْنِ وَالْأَقْرَبِينَ ۚ إِن يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللّٰهُ

أَوْلَىٰ بِهِمَا ۖ فَلَا تَتَّبِعُوا الْهَوَىَٰ أَنْ تَعْدِلُوا ۚ وَإِنْ تَلَوُّا أَوْ تَعْرِضُوا فَإِنَّ اللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا ۝٧٥

*“Believers! Be upholders of justice<sup>1</sup> and bearers of witness to truth for the sake of Allah,<sup>[165]</sup> even though it may either be against yourselves or against your parents and*

<sup>73</sup> Tantawi, Ali. 1355. Biography of Omar ibn alKhattab. Dar Al-Fikr, Damascus.

<sup>74</sup> Al-Marghinani. 2007. *Al-Hidayah: The Guidance*. Vol. 2, 45-46. Cairo: Dar al-Kutub al-Islamiyyah.

<sup>75</sup> Al Quran 4:135

*kinsmen, or the rich or the poor: for Allah is more concerned with their well-being than you are. Do not, then, follow your own desires lest you keep away from justice. If you twist or turn away from (the truth), know that Allah is well aware of all that you do.).*<sup>76</sup>

(Translation by: Abul Ala Maududi)

They argue that the responsibility to uphold justice applies to both living and departed individuals, and hence judgment can be pronounced on both. They further argue that the judgment imposed on an absent person does not violate the accused's right to defend oneself in court. They believe that the presence of the accused at the judgement serves as a strong argument that can be heard and exploited, even if it ends in the reversal of a ruling.<sup>77</sup>

## **ii. The Right of the Accused to Equality**

The right to defence is based on the notion of fair treatment for all parties involved in a legal dispute. This right must be offered to all parties without discrimination or prejudice. Being Muslim or non-Muslim does not preclude the accused from dealing with him fairly and equally. According to Allah (swt), the most virtuous person is one who has the deepest fear of God. As Allah (swt) says in Surah Al Madina verse no. 8:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا كُونُوا قَوِّمِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ ۚ وَلَا يَجْرِمَنَّكُمْ شَتَائُ قَوْمٍ عَلَىٰ ءَلَّا تَعْدِلُوا ۚ ءَاعْدِلُوا هُوَ أَقْرَبُ لِلتَّقْوَىٰ ۚ  
وَاتَّقُوا اللَّهَ ۚ إِنَّ اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ ۝٨

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<sup>76</sup> Al Quran 4:135

<sup>77</sup> Muhammad Husni A, Muhammad Husni AB and Sabree Nasri M, 'Rights of the Accused in the Islamic Legislation: A Comparative and Analytical Study' [2019] Scholars International Journal of Law, Crime and Justice

*“Believers! Be upright bearers of witness for Allah, and do not let the enmity of any people move you to deviate from justice. Act justly, that is nearer to God-fearing. And fear Allah. Surely Allah is well aware of what you do.”<sup>78</sup>*

*(Translation by: Abul Ala Maududi)*

Serve as unbiased witnesses to equitable behaviours while keeping strong in your allegiance to Allah. Do not let others' hatred towards you deflect you from the road of justice and lead you astray from righteousness. Practice justice, as it is integrally tied with piety. According to Allah (SWT), it is critical to value justice over intimate connections, favouritism, and civility. Allah (SWT) requires believers to be consistent in their pursuit of justice, even if it means opposing themselves, their parents, or relatives. Islam mandates judges to consider the main procedures and needs of litigation to provide equity for all parties involved in a legal dispute. This demonstrates the need to treat plaintiffs similarly in terms of summons, listening, and enabling them to freely speak their defence without regard for wealth, power, or social rank. The Prophet (saw) taught from Al Quran the need for judges to treat all parties equally in terms of their appearance, gestures, and attention, without favoring one over the other.<sup>79</sup>

According to Umar bin Khattab's letter to Abu Musa al-Ashri, all individuals should be treated similarly in terms of demeanour, advice, and decisions.<sup>80</sup> This is to prevent those in positions of power from seeking your benefits, as well as to ensure that the weak do not lose faith in your ability to treat them fairly.

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<sup>78</sup> Al Quran 5:8

<sup>79</sup> Ibid

<sup>80</sup> Ibn Majah, Muhammad. 2007. *Sunan Ibn Majah*. Translated by Muhammad Tufail. Hadith 2315. Riyadh: Darussalam Publishers.

Abdullah bin Zubair was in bed when Amr bin Zubair reported him to Saeed bin al-As. Saeed requested that Abdullah bin Zubair sit near him on the bed when he arrived. However, Abdullah bin Zubair declined and instead reclined on the ground. He claimed that this was the Sunnah or ruling of the Messenger of Allah (saw), according to which the two parties involved in a dispute should appear in front of the judge.<sup>81</sup>

The judge's decision to invite one of the parties to join his council and receive them with a smile and delight [demonstrates unfairness, which will result in two negative results. Initially, the party who is given a positive welcome by the judge will regard the judge as biased in their favour. Second, the opposing party will lose confidence in the judge's impartiality. Traditional legal experts have not thoroughly addressed the concept of equality between the two parties involved in a legal conflict, despite its importance in instilling trust in the judicial system and helping the establishment of truth and fair judgment.

### *iii. The right of the accused for the judge to hear his view*

The right of the accused to present their case before the judge is a fundamental tenet in Islamic law that assures fairness between opponents. This right is inherent and should not be relinquished under any circumstances, because every person has the right to be heard. This notion is based on a Hadith that the Prophet Muhammad (peace be upon him) revealed to Ali bin Abi Talib (may Allah be pleased with him) when he designated him as a judge in Yemen. Ali bin Abi Talib (may Allah be pleased with him) described how he addressed the Messenger of Allah, saying, "*O Messenger of Allah, you have*

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<sup>81</sup> **Al-Tabari, Tarikh al-Tabari** (History of al-Tabari), Volume 4: Events of the Caliphate of Abdullah bin Zubair.

*appointed me as a judge, but I am young and inexperienced in matters of judiciary...?"*

According to the Prophet Muhammad (peace be upon him), Allah will give you the ability to converse confidently and bring guidance to your heart. When two opponents are present, it is critical to wait until both parties have been heard equally before passing a verdict.<sup>82</sup>

This hadith clearly states that a court should not pass judgment on the accused individual until he or she has heard their side of the case. If the judge fails to do so, the decision is ruled illegal since the Messenger of Allah (saw) condemned giving judgment without first hearing the accused's argument, implying that such an action is invalid. The judiciary's legitimacy is dependent on the presence of the accused to mount a defense. Allah (SWT) in the Holy Quran in Surah Sad verse 23:

إِنَّ هَذَا أَخِي لَهُ تِسْعٌ وَتِسْعُونَ نَعْجَةً وَلِيَ نَعْجَةً وَاحِدَةً فَقَالَ أَكْفُلْنِيهَا وَعَرَّنِي فِي الْخِطَابِ

*“Behold, this is my brother; he has ninety-nine ewes and I have only one ewe.” And yet he said: “Give her into my charge,” and he got the better of me in argument.)”<sup>83</sup>*

(Translation by: Abul Ala Maududi)

According to the Holy Quran, Prophet Dawood (AS) made a verdict without hearing from the accused:

قَالَ لَقَدْ ظَلَمَكَ بِسُؤَالِ نَعَجِكَ إِلَىٰ نَعَجَةٍ وَإِنَّ كَثِيرًا مِّنَ الْخُلَطَاءِ لَيَبْغِي بَعْضُهُمْ عَلَىٰ بَعْضٍ إِلَّا الَّذِينَ ءَامَنُوا وَعَمِلُوا الصَّالِحَاتِ وَقَلِيلٌ مَّا هُمْ وَظَنَّ دَاوُدُ أَنَّمَا فَتَنَّاهُ فَاسْتَغْفَرَ رَبَّهُ وَخَرَّ رَاكِعًا وَأَنَابَ ﴿١٧﴾

<sup>82</sup> Bukhari, Muhammad ibn Isma'il. 1997. *Sahih al-Bukhari*. Translated by Muhammad Muhsin Khan. Hadith 7172. Riyadh: Darussalam Publishers.

<sup>83</sup> Al Quran 38:23

“David said: “He has certainly wronged you in seeking to add your ewe to his ewes; and indeed many who live together commit excesses, one to the other, except those that believe and act righteously; and they are but few.” (While so saying) David realized that it is We Who have put him to test; therefore, he sought the forgiveness of his Lord, and fell down, bowing and penitently turning (to Him).”<sup>84</sup>

(Translation by: Abul Ala Maududi )

Dawood (AS) regarded the judgement unjust because both opponents did not testify. He immediately asked forgiveness and expressed his regret to Allah, as Allah (swt) said:

فَعَفَرْنَا لَهُ ذَلِكَ وَإِنَّ لَهُ عِنْدَنَا لَزُلْفَىٰ وَحُسْنَ مَّآبٍ

*Thereupon We forgave him his shortcoming and indeed (an exalted position of) nearness awaits him, and an excellent resort.*”<sup>85</sup>

(Translation by: Abul Ala Maududi)

This text functions as a divine instruction from Allah (swt) to His Prophet Dawood, as well as a cautionary message to all future judges until the Day of Judgement. The significance of hearing both viewpoints of an argument before rendering a decision is underscored. Neglecting to do so is regarded as a deviation from the path of truth and a surrender to personal desires. On the Day of Judgement, individuals who engage in such conduct will be subjected to severe penalties, as Allah (swt) said:

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<sup>84</sup> Ibid

<sup>85</sup> Al Quran 38:25

يَا دَاوُدُ إِنَّا جَعَلْنَاكَ خَلِيفَةً فِي الْأَرْضِ فَاحْكُم بَيْنَ النَّاسِ بِالْحَقِّ وَلَا تَتَّبِعِ الْهَوَىٰ فَيُضِلَّكَ عَنْ سَبِيلِ اللَّهِ ۚ

إِنَّ الَّذِينَ يَضِلُّونَ عَنْ سَبِيلِ اللَّهِ لَهُمْ عَذَابٌ شَدِيدٌ بِمَا نَسُوا يَوْمَ الْحِسَابِ ۚ ٢٦

*“(We said to him): “O David, We have appointed you vicegerent on earth.*

*Therefore, rule among people with justice and do not follow (your) desire lest it should lead you astray from Allah’s Path. Allah’s severe chastisement awaits those who stray away from Allah’s Path, for they had forgotten the Day of Reckoning.”*<sup>86</sup>

(Translation by: Abul Ala Maududi)

#### ***iv. The Right of the Accused Not To Prove His Innocence***

For almost fourteen centuries, the principle of presumption of innocence unless proven guilty has been a cornerstone of Islamic law, as mentioned expressly in the Holy Quran and Sunnah. Under Islamic law, the defendant is accountable for providing proof. According to the Prophet (saw),

"البينة على المدعي واليمين على من أنكر"

*"the burden of proof lies on the defendant."*

(Reference: Tirmidhi, Muhammad ibn Isa. 2007. *Jami` at-Tirmidhi*. Translated by Abu Khaliyl. Hadith 1341. )

As a result, the defendant is expected to prove their guilt and culpability for the offence. The defendant is deemed innocent until proven guilty, and they are not required to demonstrate their innocence. Nonetheless, the accused might produce evidence in

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<sup>86</sup> Al Quran 38:26

court to counter the charges, prove their innocence, or provide a solid alibi to avoid criminal culpability.<sup>87</sup>

v. *The Accused's Right to Choose the Way of His Defence*

The flexibility to choose the techniques of defense emphasizes the accused's right to self-protection under Islamic law. Whether the influence is physical, psychological, or obtained via any other means, it is strictly unlawful to subject the accused to any sort of influence during questioning that may weaken their willingness or pressure them into making admissions.<sup>88</sup>

Furthermore, it is strictly unlawful to impose pressure on the accused during their questioning, regardless of reason, to obtain a confession for the crime being investigated. According to the Prophet (saw),

" إِنَّ اللَّهَ وَضَعَ عَنْ أُمَّتِي الْخَطَأَ وَالنَّسْيَانَ وَمَا اسْتُكْرِهُوا عَلَيْهِ "

*"Allah has pardoned my Ummah for their mistakes, forgetfulness, and actions that they were forced to commit."*

(Reference: Sunan Ibn Majah 2045)

As a result, any confession obtained under coercion will not be recognised or considered valid. According to the story, people from Alkalain had their belongings stolen, and people from Hakah were blamed. They sought Numan bin Basheer, a companion of the Prophet (saw), who imprisoned the accused for some time before releasing them. The accused later returned to Numan and expressed unhappiness with the lack of physical punishment and interrogation. Numan questioned in response to their desires. I am capable of defeating them if you wish. If your belongings are discovered,

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<sup>87</sup> Kumar Y, 'The Rights of Accused In Islamic Legal System In Pre Independent India' (2013) 74(4) The Indian Journal of Political Science 1

<sup>88</sup> Ibid



you will be informed of the outcome. Nonetheless, if they are not found, I will subject you to the same torture that I give them. Furthermore, they enquired: Is this your decision? The individual said, "*This is the decree of Allah (swt) and his Messenger (saw).*" Abu Dawood reported that the person used a frightening attitude, implying that a beating would follow a confession.<sup>89</sup> To be more specific, the permissible beating is defined as hudud or taazir, and it is only administered when responsibility is determined.<sup>90</sup>

According to Imam Malik, a confession delivered by the accused under threat, intimidation, detention, or physical abuse is not considered legitimate. This is because such confessions are compelled<sup>91</sup>. A confession by the accused is only accepted if it is given willingly, without external coercion, and when the accused feels completely free, safe, and at rest.

According to Imam Ibn Hazm, the Holy Quran, Sunnah, and Ijma do not justify physical assault, imprisonment, or intimidation as methods of questioning. The behaviours in question were specifically condemned by Allah (swt) through the words of His Messenger (saw), who proclaimed that one's blood, riches, honor, and skin are sacred and should not be harmed.<sup>92</sup>

Islamic principles forbid the destruction or disrespect of a Muslim's bodily or moral integrity. The only conditions under which a Muslim may be physically disciplined

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<sup>89</sup> **Abu Dawood, Sulayman ibn al-Ash'ath.** 2008. *Sunan Abu Dawood*. Translated by Muhammad Tufail. Hadith 4423. Riyadh: Darussalam Publishers.

<sup>90</sup> Muhammad Husni A, Muhammad Husni AB and Sabree Nasri M, 'Rights of the Accused in the Islamic Legislation: A Comparative and Analytical Study' [2019] Scholars International Journal of Law, Crime and Justice 2 (9): 301-308

<sup>91</sup> **Malik ibn Anas.** 2004. *Al-Muwatta of Imam Malik*. Translated by Aisha Abdurrahman Bewley. Riyadh: Darussalam Publishers.

<sup>92</sup> **Ibn Hazm, Ali ibn Ahmad.** 2003. *Al-Muhalla bi'l Athar*. Translated by Imran Ahsan Khan Nyazee. Beirut: Dar al-Fikr.

or mistreated are those mandated by the Holy Quran or the Prophet Muhammad's established traditions.<sup>93</sup>

*Shariah* law protects the accused's right to self-defense by allowing them to recant their confession before the execution of the punishment, even if it comes after the sentence has been imposed. This principle is demonstrated by the instance of Maiz bin Malik. He was hunted and stoned till he died while attempting to flee after being sentenced to death by stoning. After obtaining this information, the Prophet (saw) asked as to why they had denied his desire to leave. This phrase implies that the reversal of a confession is the result of wanting to avoid a beating. As a result, the punishment will be reversed, even if it occurs after conviction. This is because the implementation of Hudood is the next step in the judicial system.<sup>94</sup> However, the implementation of the taazir sentence is unaffected by this retraction of a confession.

After researching the rights of the accused in Islam, I concluded that:

- The practice of detaining them is considered wise and reasonable. This is especially true when there is circumstantial evidence to support the allegations, there are lingering concerns about the defendant's innocence, or the defendant has a history of criminal activity.
- Accused individuals should not be detained until there is clear circumstantial or strong proof. Throughout the judicial process, including evidence collection and investigation, the presumption of innocence requires

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<sup>93</sup> Muhammad Husni A, Muhammad Husni AB and Sabree Nasri M, 'Rights of the Accused in the Islamic Legislation: A Comparative and Analytical Study' [2019] Scholars International Journal of Law, Crime and Justice 2 (9): 301-308

<sup>94</sup> Bukhari, Muhammad ibn Isma'il. 1997. *Sahih al-Bukhari*. Translated by Muhammad Muhsin Khan. Riyadh: Darussalam Publishers. Hadith 6824.

that the accused be treated with care and kindness. According to the Messenger of Allah (saw), the following principle applies:

"ادرؤوا الحدود ما استطعتم"

*"Prevent the imposition of punishments based on mere suspicion" and*

*"Prevent the imposition of punishments to the greatest extent possible."*<sup>95</sup>

### **3.4 Islam and Plea Bargain**

Plea bargaining is a deliberative process in which the prosecution and defense teams agree to dismiss one or more criminal charges against the defendant without proceeding to trial. Prosecutors use this method to offer concessions to defendants in exchange for plea agreements. As a result of these agreements, the prosecution often agrees to dismiss charges against the defendant, decrease accusations against him, pursue him for one offence while abandoning others, or make a sentence concession to the defendant.<sup>96</sup>

It can be stated that the idea of plea bargaining is not directly rooted in classical Islamic law: Quran and compromise. The emphasis is on the fact that the offenders regret their actions and try to correct the wrongs. Though the principle of settling might not be strange to Islamic law, the need for fairness and justice must be observed at all times.<sup>97</sup>

Scholars have different opinions concerning this aspect, and if the bargain leads to justice and the offender regrets his actions, then plea bargaining is allowed. However, any

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<sup>95</sup> **Tirmidhi, Muhammad ibn Isa.** 2007. *Jami` at-Tirmidhi*. Translated by Abu Khaliyl. Hadith 1354. Riyadh: Darussalam Publishers.

<sup>96</sup> Herman, G. Nicholas. *Plea bargaining*. Juris Publishing, Inc., 2012.

<sup>97</sup> Yahaya Abikan I, 'The Concept of Plea Bargaining Under Nigerian Law and Islamic Law' (2021) 6 Crescent University Law Journal 1

form of plea bargaining has to be critically examined to avoid compromising the objectives of the justice system.<sup>98</sup>

Plea bargaining is not an accepted technique in Islamic criminal proceedings. Such options are not permitted in Hudud offences. In the context of qisas, the victim or their legal representatives must decide whether compensation should be sought instead of punishment. Furthermore, the victim's heirs may get blood money (diyyah) rather than seeking vengeance (qisas). The sentencing for ta'zir offences is chosen by administrators or judges, which is why there is debate over plea bargaining. Babaji and Danjuma emphasise that individuals can reconcile and absolve the perpetrator in the case that their rights are infringed. In such cases, the forgiving individual may be compensated for their act of forgiveness. As a result, plea bargaining may be admissible under Islamic Law of Crimes for Qisas or Ta'azir charges, but not for Hudud offences.<sup>99</sup>

However, plea bargaining is only authorised in matters involving public issues. As a result, a financial institution, organisation, or individual may agree to terms that are less than the amount owed. Nonetheless, the public purse will be depleted when a considerable quantity of debt forgiveness is granted, as is the case when state wealth is at stake, such as in the case of public officeholders. As a result, if a public official does harm to the state's wealth, they will be held accountable for the entire amount.<sup>100</sup> The following verse supports this view:

وَالَّذِينَ كَسَبُوا السَّيِّئَاتِ جَزَاءُ سَيِّئَةٍ بِمِثْلِهَا وَتَرْهَقُهُمْ ذِلَّةٌ مَّا لَهُمْ مِنَ اللَّهِ مِنْ عَاصِمٍ كَأَنَّمَا أُغْشِيَتْ وُجُوهُهُمْ قِطْعًا مِّنَ اللَّيْلِ مُظْلِمًا أُولَٰئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ

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<sup>98</sup> Ibid

<sup>99</sup> Ibid

<sup>100</sup> Ibid

“Those who do evil deeds, the recompense of an evil deed is its like, and humiliation shall spread over them and there will be none to protect them from Allah. Darkness will cover their faces as though they were veiled with the dark blackness of night. These are the people of the Fire and in it they shall abide.”<sup>101</sup>

*(Translation: Abul Ala Maududi )*

### **3.5. Equality and Islam**

In the Islamic Shariah, equality is considered to be one of the essential principles that are applicable. It is also a component of the moral and legal theory that defines Islam. According to Shariah law, all individuals are protected, regardless of their economic or social level, their skin color, or their gender. This idea, which affirms the worth and value of human life, originates from the Islamic sources, which are the Qur'an and the Sunnah. The following are some of the ways in which equality may be seen and assessed in respect to their legal ties. As stated in the revelation of the Qur'an, all human beings are equal in the eyes of Allah, and this concept is reflected in the administration of justice in the framework of social life. Once more, Sharia law forbids any kind of preferential treatment to be given to any individual, any position, or any amount of money in the context of judicial proceedings. In order to provide justice to the people in a way that is devoid of prejudice, judges are instructed to avoid any kind of bias. In addition, the principle of equality that is included in the Shariah is relevant to the rights and responsibilities of both the person who is accused and the one who approves of it. Each party is afforded certain advantages in order to ensure that they are able to provide and receive a fair trial and to comply with the law. The accused, for example, is

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<sup>101</sup> Al Quran 10: 27

presumed innocent until proved guilty, and as a result, they are allowed the opportunity to have a fair trial. In a similar vein, the individual who gives evidence against the accused must be authentic in order to be regarded an approver. This is because Islam places a high level of prohibition on presenting false testimony. Additionally, plea bargains, which are a relatively new practice in the criminal justice system, should also be investigated in light of the ideals of justice and equality that are outlined in Islam. The agreement that is reached must not in any way be damaging to the rights of the parties to the contract, and it must also be in accordance with the goals of Shariah, which are justice, the prevention of injustice, the prevention of damage, and the general benefit of society.<sup>102</sup>

### **3.6. Conclusion**

Therefore, understanding the concepts of approver, plea bargain, accused and equality within Islamic law shows a deep appreciation of justice and fairness in the religion. Islamic law based on the principles of the Qur'an and hadith has always adopted principles of right and justice in the treatment of people in society. The rights and responsibilities granted to an approver and the accused show the rationale of duties and rights as well as showing some measures of fairness. The concept of Plea bargaining is not mentioned in any of the classical texts, however, if plea bargaining is for the larger good of society and does not undermine justice, it will not contradict Shariah. The general concept of equality runs throughout the Islamic legal system and it directs that none of the people should be discriminated against. This principle is not an abstract concept that one only reads in books and hears in law school but one that is exercised in

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<sup>102</sup> 'Equality in Islam' (*Islamweb*) <[www.islamweb.net/en/article/109364/equality-in-islam](http://www.islamweb.net/en/article/109364/equality-in-islam)> accessed 7 August 2024

the performance of legal activities and the dispense of justice. In this way, Islamic law pursues justice and equal rights for all people, and justice reigns in society.

In short, the comparison of the concepts of the accused, plea bargain, and approver under *Shariah* and the NAB Ordinance has similarities and differences. Thus, the main approaches based on two different systems are still quite different even when they attempt to pursue justice. I would like to stress that an approver in terms of *Shariah* law and under the NAB Ordinance is not the same, and it traces its origin from two different legal and ethical systems. *Shariah* focuses on Tawbah, Akhlaq, and Rahmah, whereas the NAB Ordinance implements legal tools to involve cooperation and enhance anti-corruption cases. It is necessary to comprehend these distinctions when comparing and examining legal systems' interactions concerning accountability and justice.

## **CHAPTER NO. FOUR**

### **CONCLUSION & RECOMMENDATION**



## CHAPTER 04

### CONCLUSION & RECOMMENDATION

#### CONCLUSION:

From this research, it is possible to establish the areas of compliance and noncompliance with Islamic *Shariah* laws in the NAB Ordinance 1999. Considering these differences and adjusting the ordinance to the *Shariah* principles, will enable Pakistan to increase the efficiency and justice of combating corruption.

In light of my key findings, I am able to conclude that

- I. The role of an approver is not known in the classical *Shariah*. However, Islamic law as a system of values is based on repentance (*tawbah*) and truthful testimony (*shahada*). Although, *Shariah* law has a concept of cooperation to achieve justice, the role of an approver per se as defined in present day legal jurisprudence is not recognised. An approver is recognized in the NAB Ordinance to provide the accused in a case of corruption an opportunity to become a state witness when entertained. This practice is intended to fight corruption networks and to restore stolen money.
- II. Regarding proof in Islamic jurisprudence, it is stated that the proof rests upon the accuser (*al-bayyina ‘ala man idda’a*), and the accused is not guilty until proven otherwise. This principle shields people from prejudice and/or discrimination. In context of the presumption of innocence, the Constitution of Pakistan 1973 also states the same thing as that of the Constitution of the United States of America. However, some provisions of the NAB Ordinance shift the burden of proof on the

accused and in this context, they have to prove their innocence which is against the spirit both of Islam and the Constitution.

- III. A feature of Islamic law is the protection of the rights of the weaker party in any given social stratum. People expect accountability in all fields and it cannot be differentiated based on department or the person working in it. On the same note, while the NAB Ordinance seeks to ensure that officials responsible for the misuse of public funds are brought to book, the existence of different laws and procedures as per the various sectors or individuals negates the equality and fairness issue.
- IV. There is no exact equivalent in *Shariah* to the plea bargain where an accused person seeks to be charged with a lighter offence or receives less severe punishment in exchange for the return of the proceeds of the crime. But Islamic law also permits the concept of compensation and pardon subject to the condition of justice and benevolence. The NAB Ordinance also has provisions for plea bargains whereby the accused allows for the recovery of the embezzled funds. Although this mechanism is quite practical, it should be used in such a way that it conforms to the set ethical and legal measures of corruption and unfair practices.
- V. Sharia law also requires the rules and laws to be rational and there should be no contradiction among them. Inconsistencies in laws that address an issue can create confusion and injustices to the users of the legal systems. It is dangerous to have different laws regulating the same matter because it confuses the people and defeats the purpose of the rule of law. The proper coordination of these laws is very important to sustain order in the judicial system as well as equity

## **RECOMMENDATIONS:**

Some recommendations ensue the thesis. Particularly, for the appointment of the chairman of the National Accountability Bureau and the body of accountability itself.

I. The chairman of the NAB should be an impartial and meticulous person, so that no one could question his appointment: otherwise, mud slinging would be the phenomenon of every day.

II. Moreover, since the body is accountability body, the head of such body should be an autonomous person in order to dispense accountability without any fear.

III. There is a need to adopt new laws in the NAB Ordinance in alignment with the *Shariah perspective* for the burden of proof and accused. The provisions that make it difficult for the accused to adhere to both Islamic and constitutional provisions should be reviewed. The spirit of law and principles of justice in Islam should be respected by implementing equal and just rules across all the sectors of the country. Harmonising the NAB Ordinance with other existing laws to remove the contradictions that are present in the system of laws is very crucial. The strategy of plea bargaining and the work of approvers should have specific rules and regulations which would eliminate cases of misuse and unfairness. Improving the NAB's transparency and accountability will help the general public trust the organization and fight the monster of corruption. State authorities should also ensure that NAB officials are up-to-date with knowledge of the existing laws and legal policies as well as ethical standards.

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