

Form No: HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

W. P. No.769/2019

Amjad Mustafa Malik

Versus

Director General,
National Accountability Bureau & 4 others

Petitioners by : Mr Asad Manzoor Butt, Advocate.
Mr Abid Jalil, Advocate.
Mr Nauman Zafar, Advocate.

Respondents by : Sardar Muzaffar A. Khan, Addl. Dy. Prosecutor
General.
Barrister Rizwan Ahmed, Special Prosecutor.
Ch. Muhammad Tahir Mehmood, Asstt. Attorney
General.
Kh. Muhammad Farooq Mehta, Sr ASC.
Mr Muhammad Umar Vardag, Advocate.
Mr. Muhammad Ayub, Section Officer, M/o
Information.
Ch. Adil Javed, Assistant Director, PTA.
Mr M. Naeem Ashraf, Law Officer, PTA.
Malik Zubair, Dy. Director/I.O. NAB with record.

Date of Hearing : 18.12.2019

ATHAR MINALLAH, C.J.- Through this consolidated judgment, we will record our reasons for allowing the instant petition along with W.P. No.771/2019 titled '*Abdul Samad v. Director General, National Accountability Bureau & another*'. Abdul Samad, son of Ghulam Qadir, (*hereinafter referred to as the 'Petitioner No.1'*) and Amjad Mustafa Malik, son of Ghulam Mustafa (*hereinafter referred to as the 'Petitioner No.2'*), have sought judicial review of executive power whereby it is intended to deprive them of the right to liberty. They have

questioned the validity of actions taken by the Chairman of the National Accountability Bureau (*hereinafter referred to as the 'Bureau'*), who has ordered their arrest in the exercise of power vested under section 24 read with section 18(e) of the National Accountability Ordinance, 1999 (*hereinafter referred to as the 'Ordinance of 1999'*). Pursuant to the said orders, their respective warrants of arrest have been issued. It is not an ordinary case regarding the seeking of anticipatory bail. The constitutional jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 has been invoked, raising questions of paramount public importance in the context of fundamental rights guaranteed under the Constitution. The fundamental question raised in these petitions is the scope of power vested in the Chairman of the Bureau to order the arrest of a person under section 24 read with section 18(e) of the Ordinance of 1999. Whether the said power is absolute, unfettered and unquestionable or is to be strictly circumscribed by the purpose expressly described in the relevant provisions. Moreover, whether the exercise of this power is subject to the settled principles relating to the exercise of executive authority and discretion.

2. The Petitioners are working in the Pakistan Telecommunication Authority (*hereinafter referred to as the 'Authority'*). At the relevant time, Petitioner No.1 was appointed as Member (Compliance and Enforcement) i.e. from May 2015 till May 2018. He is currently posted as Director General (Strategy and Development). Petitioner No.2 is working as Director (Wireless) and he reports to the Director General (Licensing). According to the written report filed on

behalf of the Bureau, a source report was received and pursuant thereto the Chairman of the Bureau, vide letter dated 16.10.2018, had authorized investigation in the exercise of powers conferred under the Ordinance of 1999. It appears that an inquiry was not conducted prior to authorizing the investigation. The investigation pertains to approval granted in favour of M/S Warid Telcom (*hereinafter referred to as the 'Cellular Company'*) on 04.12.2014 to use 4G/LTE (1800 MHz) on its already acquired spectrum. It is alleged that by allowing the Cellular Company to use 4G/LTE technology on its acquired existing spectrum, the Authority had extended an illegal benefit which had caused a purported loss of US \$ 516 million. It is the case of the Bureau that the said approval was granted in violation of the laws which govern the Authority and the policies framed by the Government of Pakistan from time to time. The Bureau has annexed a document at page 22 (A/2) with its written report/comments which refers to and names a known dignitary of a foreign State as owner of the Cellular Company and the latter's relationship with a political figure of Pakistan. In order to properly appreciate the controversy in hand, it would be beneficial to refer to some other relevant facts in more detail.

3. The Authority has been established under section 3 of the Pakistan Telecommunication (Re-Organization) Act 1996 (*hereinafter referred to as the 'Act of 1996'*). The functions of the Authority and its powers are described in sections 4 and 5 respectively. The grant and renewal of license for telecommunication system / service and its terms and conditions exclusively vests in the Authority. Likewise, the function to receive an application for the use of radio frequency spectrum and then

to refer it to the Frequency Allocation Board (*hereinafter referred to as the '**Board**'*) for assigning spectrum is also within the domain of the Authority. The Authority is empowered to modify licenses, or the terms and conditions thereof, as has been described under sections 21 and 22 of the Act of 1996. The Authority was, therefore, unambiguously established as a regulator for all matters relating to telecommunication services and telecommunication systems. The Board is constituted in exercise of powers conferred under section 42 of the Act of 1996 by the Federal Government through a notification required to be published in the official gazette. The powers and functions of the Board are described in section 43 i.e. having exclusive authority to allocate and assign portions of radio frequency spectrum to the Government, providers of telecommunication services and telecommunication systems, radio and television broadcasting operations, public and private wireless operators and others. Sub section (4) of section 43 provides that in order to exercise its powers, the Board shall be guided by the applicable recommendations of the International Telecommunication Union or any of its standing committees or organizations, including the International Consultative Committee on Telecommunication, International Consultative Committee on Radio, the International Frequency Registration Board and other similar international organizations. Sub section (5) of section 43 provides that every application for the allocation and assigning of radio frequency spectrum shall, in the first instance, be made to the Authority which shall, after such inquiry as it may deem appropriate, refer the application to the Board within thirty days from receipt thereof. Sub section (6) of section 43 further explicitly provides that on receipt of an application under sub section (5), the Board shall

classify the telecommunication services and may allocate or assign specific frequencies to the applicant. The expression 'Federal Government' has been expressly defined in clause (fa) of section 2 of the Act of 1996 as meaning 'the Federal Government in the Ministry of Information Technology and Telecommunication Division, unless for any specific purpose specified otherwise by notification in the official gazette, notification or amendment in the Rules of Business, 1973'. Section 8 empowers the Federal Government to issue policy directives to the Authority as and when it considers necessary on matters relating to telecommunication policy referred to in sub section (2) and that such directives are binding on the Authority. The latter, therefore, has the status of a regulator and all entities governed under the Act of 1996 are bound to follow the policy directives issued by the Federal Government. The Federal Government framed the De-Regulation Policy for the telecommunication sector which was approved by the Federal Cabinet on January 10, 2004 (*hereinafter referred to as the '**De-Regulation Policy**'*). The Federal Government, in order to give effect to its De-Regulation Policy, framed the Mobile Cellular Policy, dated 28.01.2004 (*hereinafter referred to as the '**Cellular Policy**'*). The objects of the said policy mentioned therein are reproduced as follows.-

Mobile Policy Objectives:

In addition to the broad Telecom sector objectives, as outlined in the Telecom Deregulation Policy, the following objectives specific to mobile cellular sector are expected to be achieved through this policy:

- i. Promotion of efficient use of radio spectrum;*
- ii. Increased choice for customers of Cellular mobile services at competitive and affordable price;*

- iii. *Private investment in the cellular mobile sector;*
- iv. *Recognition of the rights and obligations of mobile cellular operators;*
- v. *Fair competition amongst mobile and fixed line operators;*
- vi. *An effective and well defined regulatory regime that is consistent with international best practices.*

4. The expression 'scarce resource' is defined in clause (qc) of section 2 of the Act of 1996 as meaning radio frequency spectrum, right of way and numbering. Clause 5.1 of the Cellular Policy expressly provides that the Authority will issue new national "technology neutral" Mobile Cellular Licenses for a tenure of 15 years each. It has been provided that the Government of Pakistan had decided to grant 15 years new "technology neutral" national mobile cellular licenses. The relevant portion is reproduced as follows.-

The standards employed for licensed blocks of Spectrum shall conform to recognized international standards

The standardization process has resulted in some technologies being associated with specific spectrum. To date GSM and CDMA are two such technologies. In such circumstances the cellular License should be linked to the associated recognized standard. Where more than one standard could be adopted in any given block of spectrum the licensee shall have the right to choose which standard to employ.

5. Pursuant to the said policy, the allocation of spectrum was offered to interested eligible entities and in this regard a competitive transparent process was conducted through auction. The Cellular Company was one of the successful bidders and consequently it was granted a "technology neutral" license on 26.05.2004 for a period of fifteen years against payment of fee of US \$ 291 million.

6. In 2013 the Federal Government, vide letter dated 11.09.2013, constituted an Advisory Committee for auction of the available spectrum. The terms of reference regarding auction of spectrum for next generation mobile services were also publically notified. The policy directives in this regard were also issued by the Federal Government vide letter, dated 07.10.2013. The Authority, through a transparent process, appointed a consultant for conducting the auction proceedings i.e. M/s Value Partners Management Consultancy (*hereinafter referred to as the '**Consultant**'*). The relevant information regarding the bidding process was made public and was duly displayed on the website of the Authority. Through letter, dated 10.01.2014, addressed to the then Minister of State of the Federal Government, five cellular service providers including the Cellular Company, informed that one Mr. Ricardo Tavares had been appointed as a facilitator on their behalf. In response, the Federal Government, vide letter dated 17.02.2014, replied that the spectrum auction will be conducted in the most transparent manner and that interested parties may coordinate with the Authority and the Consultant. The bids were received till 14.04.2014 and on conclusion of the auction proceedings, the names of the successful bidders were declared on 17.04.2014. The Cellular Company did not submit its bid nor did it participate in the auction proceedings. The highest bid received for the use and allocation of the spectrum was US \$ 591 million. The Bureau, in its written report, has acknowledged that, according to the Cellular Company it had not participated in the auction proceedings because its existing spectrum had sufficient capacity to employ 4G/LTE technology. The Cellular Company filed an application before the Authority for permission to use 4G/LTE technology on its

existing spectrum and further requested that its license be amended accordingly. It appears from the written report submitted by the Bureau that the Authority, after processing the said application, granted permission on 04.12.2014 to use 4G/LTE (1800 MHz) technology on the already acquired spectrum. After expiry of the initial term of fifteen years, the license of the Cellular Company was duly renewed in 2019 and on the same terms and conditions, which are alleged to have been the result of corruption and corrupt practices. The renewal was pursuant to the payment of a fee which was determined by the Federal Government through a policy directive issued under the Act of 1996.

7. In a nutshell, it is the case of the Bureau that the permission granted by the Authority to the Cellular Company on 04.12.2014, regarding use of the next generation technology on its existing spectrum and consequently amending the terms and conditions of the license, constitutes the offence of misuse of authority. In the opinion of the Investigating Officer such permission could not have been granted without an auction. In other words the Cellular Company, in order to use the next generation technology, was required to participate in the auction and that additional spectrum ought to have been acquired. It is evident from the written report submitted by the Bureau and the arguments advanced at the Bar that the Investigation Officer has formed an opinion on the basis of his own interpretation of the provisions of the Act of 1996, the Cellular Policy and other directives of the Federal Government and has thus concluded that the permission granted by the Authority was illegal and constituted the offence of misuse of authority, which is punishable under the Ordinance of 1999. There is another interesting and

relevant aspect of the case in hand. It is obvious from the record that the Board had taken up the issue regarding interpretation of the legal provisions with the Federal Government vide letter, dated 10-05-2018. In response, the Federal Government, vide letter dated 19-07-2018, had explained the essential features of the Cellular Policy and had highlighted the meaning of the expression 'technology neutral'. The relevant portions of the said letter for adjudication of the controversy before us are reproduced as follows.-

"MoIT finds the contents of the above mentioned letter against some of the longest standing settled principles of the GoPs telecom sector policies."

*"In light of Cabinet approved Deregulation Policy 2003 and Cellular Mobile Policy 2004 **"Technology Neutrality"** means that any available technology to date can be employed to provide a specified service within the scope of the License of telecom Licenses in the assigned frequency band, which is still applicable as carried forward under the current Telecommunication Policy 2015 as formulated after more than a year of deliberations and stakeholder consultations including FAB. FAB management, in the referenced letter, has itself admitted the success of stable policy based on international best practices which is evident from the growth of the sector and widespread coverage of affordable service for the users. With this in view such a position by the ED FAB against well settled policy principle of "Technology Neutrality" is questionable and contrary to FAB's earlier stance since 2003/4 and have never been brought by ED FAB to the relevant for a like Auction Advisory Committees setup by the Federal Government for devising policies for the various spectrum Auctions conducted in 2014, 2016 and 2017, of*

which ED FAB -----, Detailed analysis of MoIT is placed at Annex III."

"Keeping the above listed institutional mandates in view, MoITT is of the opinion that FAB Board is not the right forum for deliberation on the settled core principles of Telecom Policy. However, it would be appropriate that the FAB Board looks into the matter of FAB management raising such objections without even the Boards approval and against the stipulated provisions of the Rules of Business. As per assigned mandates under the Pakistan Telecommunication (re-Organization) Act 1996 and RoB 19736 as mentioned above, this Ministry considers that being a policy matter the issue be dealt at the level of the MoIT&T where by default the consultation would duly include FAB, for better understanding of perspectives".

8. The Bureau, in disregard to the above interpretation of the Federal Government relating to its policy, and for reasons best known to it, requested the Ministry of Defence, Government of Pakistan, vide letter dated 04-09-2018, to appoint an expert to assist the Investigating Officer during the course of investigations. The Ministry of Defence, vide letter dated 07-09-2018, requested the Board to nominate an expert. It is apparent from the record that the Board was an interested party because it had challenged the authority of the regulator and the Federal Government. Consequently the Board, vide letter dated 17-09-2018, nominated one of its officials, namely, Muhammad Khalid Noor, Director General (SP&M/N&IC) as an expert to assist the Investigating Officer. The dispute regarding the interpretation of the provisions of the Act of 1996, the Cellular Policy and powers of the Authority and Board appear to have been raised by the latter in his report, copy whereof has been attached

with the comments filed by the Bureau. The official of the Board who was nominated as a purported expert supported the contention of the latter as is obvious from his report. According to assertions mentioned in the written report submitted by the Bureau, the Petitioners are one of the accused. The entire report does not disclose or attribute any role to the Petitioners nor is there any allegation that they had, directly or indirectly, made illegal gains or benefited in any manner. There is nothing on record to even remotely suggest the involvement of criminal intent or motive. The written report is self contradictory and the entire case of the Bureau is solely based on the interpretation of the provisions of the Act of 1996, the Cellular Policy and policy directives issued by the Federal Government. When the Investigating Officer was asked whether the petitioners had been cooperating during the investigation proceedings, he unambiguously answered in the affirmative. He was asked why detention or arrest of the Petitioners is required when the case was entirely based on the examination of official documents and, more so, on the interpretation of statutory provisions, notified policies of the Federal Government and other documents which are already in his possession. He was unable to give any plausible reason for depriving the Petitioners of their constitutional rights, except expressing an apprehension that the latter could either abscond or tamper with the documents.

9. The learned counsels for the Petitioners have been heard at length. It is their case that the Investigating Officer and the Chairman of the Bureau are exercising the power to order the arrest of the Petitioners arbitrarily. They have stressed that the powers vested in the Chairman of the Bureau to order the arrest of the Petitioners is neither unbridled

nor unfettered and cannot be used to achieve any purpose other than the object for which the legislature has empowered them in this regard. They have strenuously argued that the dispute is between the Board and the Authority and no offence has been committed. It is their case that the cellular policy directives issued by the Federal Government from time to time are being grossly misinterpreted and that there is not an iota of incriminating material collected during the investigation which would even remotely indicate mens rea on the part of the Petitioners so as to justify their arrest. The arrest of the Petitioners in the facts and circumstances of this case would be in violation of their constitutionally guaranteed rights and the principles relating to fair trial. They have alleged that the Petitioners are being pressurized by the Investigating Officer to enter into a plea bargain or to persuade the Cellular Company to do so.

10. The learned Additional Deputy Prosecutor General has appeared along with the Investigating Officer of the Bureau. They were not able to give a reasonable explanation for restricting the Petitioners' right to liberty by arresting them. They have argued on the basis of their own interpretation of the Cellular Policy and provisions of the Act of 1996 that the permission granted in favour of the Cellular Company amounted to misuse of authority. They have referred to various provisions of the Cellular Policy and other official documents in support of the contention that permission to use an available technology on the existing spectrum could not have been granted and that it was mandatory for the Cellular Company to have participated in the auction held by the Authority or seek consent from the Board. The documents which they have referred to

relate to the auction of spectrum, having no nexus with granting permission to a licensee to employ an available technology on its already acquired spectrum. The Investigating Officer explicitly stated that he did not accept the interpretation of the expression 'Technology Neutral' described in the letter, dated 19-07-2018, issued by the Ministry and defined in the Act of 1996 as meaning the Federal Government.

11. The learned counsels for the Petitioners and the learned Additional Deputy Prosecutor General of the Bureau have been heard and the record perused with their able assistance.

12. The Petitioners have invoked the extraordinary discretionary jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (*hereinafter referred to as the 'Constitution'*) seeking judicial review of the power exercised by the Chairman of the Bureau under clause (a) of section 24 read with section 18(e) of the Ordinance of 1999 whereby the latter has ordered their arrest. It is the case of the Petitioners that the power vested under section 24 read with section 18(e) of the Ordinance of 1999 is not absolute, unbridled or unfettered nor can it be exercised arbitrarily and unnecessarily for achieving any purpose other than the one explicitly mentioned *ibid*. It is their case that unnecessary and arbitrary exercise of power to order their arrest, if executed, would gravely violate their fundamental rights guaranteed by the Constitution, besides causing irreversible damage to their repute. The questions which have arisen for our consideration are (i) whether the power to order arrest of an accused under section 24 read with section 18(e) of the Ordinance of 1999 is unfettered and absolute (ii) if the answer is in the negative, then whether

the exercise of this power is subject to the purpose expressly mentioned by the legislature and the constitutionally guaranteed rights (iii) whether the principle of presumption of innocence is attracted in the case of an accused who has not been convicted under the Ordinance of 1999 (iv) in case the answer to the last question is in the affirmative, then how protection of the fundamental rights guaranteed under the Constitution could simultaneously be balanced while achieving the public interest and object for which the Ordinance of 1999 has been enacted (v) whether the principles of 'proportionality' and 'unreasonableness' are relevant in this context and, lastly, the principles and law enunciated by the superior courts regarding deprivation of liberty. In order to answer these questions, which are definitely of paramount public importance, because they involve the likelihood of restricting the constitutionally guaranteed fundamental rights, it would be beneficial to survey the provisions of the Ordinance of 1999, the principles enunciated by the superior courts regarding power to arrest, the constitutional rights which are affected and the principles adopted by constitutional courts for the judicial review of executive power.

The Ordinance of 1999.

13. The Ordinance of 1999 was enacted with the object and purpose of providing effective measures for the detection, investigation, prosecution and speedy disposal of cases involving corruption, corrupt practices, misappropriation of property, kickbacks, commissions and for matters connected and ancillary or incidental thereto. Section 3 gives an

overriding effect to the provisions of the Ordinance of 1999 and provides that, notwithstanding anything contained in any other law, the provisions ibid shall have effect. Section 5 defines various expressions. Section 9 describes offences while section 10 prescribes the punishment for corruption and corrupt practices. The maximum punishment prescribed in clause (a) of section 10 is rigorous imprisonment for a term which may extend to fourteen years with a fine, while the assets and pecuniary resources found to be disproportionate to the known sources of income, acquired from funds obtained through corruption and corrupt practices, are liable to be forfeited. Moreover, the offences specified in the Schedule to the Ordinance of 1999 are punishable in the manner specified therein. Section 11 provides that the fine imposed upon conviction shall not be less than the gain derived by the accused or any relative or associate, due to commission of the offence. The Chairman of the Bureau has been empowered to freeze the property of an accused, or part thereof, if it appears to the latter that there are reasonable grounds for believing that the accused has committed an offence. The tender of pardon is another extraordinary power of the Chairman under section 26. Section 15 provides for disqualification to contest an election or to hold public office upon conviction of an accused. The disqualification to contest elections is for a period of ten years from the date the convicted person has been released after serving the sentence. Clauses (c), (d), (e) and (f) of section 18 describe the powers relating to the inquiry or investigation of an offence. A plain reading of section 18 as a whole shows that the legislature, in its wisdom, has divided the proceedings into various stages i.e. (i) initiation of proceedings and, in this context, formation of an opinion by the Chairman, or an officer authorized by him, has been made

as a pre-condition (ii) after the opinion has been formed, the competent person refers the matter for inquiry or investigation, (iii) the powers in relation to conducting an inquiry and investigation are expansive, (iv) after the conclusion of the inquiry and investigation, the material and evidence collected is required to be placed before the Chairman, or such officer authorized in this behalf and the latter decides whether or not it would be proper and just to proceed further and, lastly, (v) the test for proceeding further has been expressly provided i.e. subjecting the filing of a Reference to sufficiency of material, which would justify doing so (vi) the trial is exclusively regulated and conducted by special courts i.e Accountability Courts. The legislature has expressly used the expression 'expeditiously' in relation to the completion of an inquiry or investigation. Section 18(e) unambiguously confines the exercise of power to arrest an accused "for the purposes of an inquiry or investigation" and that the inquiry or investigation are mandated to be completed as "expeditiously as may be practical and feasible". Likewise statutory safeguards have been provided for the purposes of filing a Reference. Section 18(b) empowers the Chairman, or an officer authorized in this behalf, to institute criminal proceedings for a frivolous complaint, if it has been filed with the intent to 'malign or defame' any person. This is an offence punishable with imprisonment, which could extend to one year. Clause (a) of section 24 empowers the Chairman of the Bureau to direct the arrest of an accused at 'any stage of the inquiry or investigation'. Sections 24 and 18(e) are not exclusive of each other and thus have to be read together in the context of the power to arrest an accused. Section 24 further provides that, notwithstanding anything contained in the Code of Criminal Procedure, 1898 (*hereinafter referred to as the 'Cr.P.C.'*) if a

person is arrested, then, as soon as possible, it is the statutory duty of the Bureau to inform him of the grounds and substance on the basis of which he has been arrested and to produce him before the Court within a period of twenty four hours of arrest, excluding the time of journey from the place of arrest to the Court. Moreover, it is provided in clear language that a person who has been arrested shall be liable to be detained in the custody of the Bureau for the 'purpose of inquiry and investigation' for a period not exceeding ninety days. The legislature has further made it mandatory for the Court to ensure that a person is remanded to custody for a period not exceeding 15 days at a time, and every subsequent remand is subject to the said restriction and recording of reasons. Section 31 and 31-A have obviously been inserted with the intent that the proceedings and trial are concluded rapidly, efficiently and with speed. There is yet another crucial aspect and that is the power vested in the Bureau under section 25 of the Ordinance of 1999 to refer a case to the Court for approval of plea bargain. This unique feature is not provided in other penal statutes. The unambiguous language of section 25(b) makes the validity of an offer made by an accused subject to being 'voluntary'. It is obvious that factors such as unreasonable delay in the conclusion of a trial, incarceration for an indefinite period or arbitrary exercise of power to arrest an accused may have serious consequences in relation to the 'voluntary' consent of the accused. The Ordinance of 1999, therefore, is a special law and the proceedings consist of various stages. The first stage is of receiving information, which can be in the form of a reference received from an appropriate government, or a complaint, or the Bureau may initiate it on its own accord. The second stage is to order an inquiry or investigation, while formation of an opinion

by the competent authority that it is necessary and appropriate to do so, is a precondition. The third stage is inquiry or investigation proceedings, which are to be completed expeditiously. The Chairman or any other authorized person is empowered to arrest an accused 'for the purposes of inquiry or investigation'. The accused after arrest can be kept in detention by the Bureau for the purposes of inquiry or investigation for a period not exceeding ninety days. After inquiry or investigation has been completed then the next stage is of filing a reference and the decision by the Chairman is circumscribed by appraisal of evidence and the evidence placed before him/her. The last stage is that of trial. A plain reading of the provisions of the Ordinance of 1999 unambiguously shows that the power to arrest has been expressly restricted to and can only be used 'for the purposes of an inquiry or investigation'. It, therefore, means that the object of arrest is to enable the investigating officer to conduct an inquiry or investigation effectively and efficiently and to conclude it expeditiously. From the language used in the provisions it is obvious that arrest of an accused is not mandatory, rather it has been left to the discretion of the authorized person to exercise this power, as and when necessary, for achieving the intended object. It is an executive power and thus its exercise is subject to safeguards to prevent abuse or excess. The next important factor to consider is how superior courts have interpreted the statutory provisions which empower an executive authority to arrest an accused.

Principles and law regarding the exercise of the power of arrest.

14. Crimes and offences are of different nature and categories. A broad distinction is that of offences under the general law and those which are dealt with under specially enacted laws. Crimes can also be divided according to their characteristics and impact such as violent or non violent crimes. Crimes such as murder, rape and child molestation are categorized as offences associated with violence, while white collar crimes are distinct. The latter are crimes involving complex and complicated financial or other data analysis. The perpetrators of a white collar crime are mostly professionals or experts and they know how to cover up the crime by shrewdly erasing its traces. This distinction is a relevant factor to be taken into consideration when the power of arrest is exercised. The precedent law in the context of power of arrest, under the general law and the Ordinance of 1999, needs to be examined. The apex Court, after exhaustively examining the provisions of Cr.P.C. in the case titled "*Muhammad Bashir v. Station House Officer, Okara*" [PLD 2007 SC 539] has held that arrest of an accused by a police officer would not be justified on the sole ground that a FIR was registered and because the latter was nominated therein. There must be sufficient incriminating material to justify deprivation of liberty. The august Supreme Court has explicitly declared arbitrary exercise of power to arrest as 'abuse of authority'. This view has been recently reaffirmed by a larger Bench of the august Supreme Court in the case titled "*Mst. Sughran v. The State*" [PLD 2018 SC 595] by observing;

"(VI) Ordinarily no person is to be arrested straightaway only because he has been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the investigating officer by any person until the

investigating officer feels satisfied that sufficient justification exists for his arrest and for such justification he is to be guided by the relevant provisions of the Code of Criminal Procedure, 1898 and the Police Rules, 1934. According to the relevant provisions of the said Code and the Rules a suspect is not to be arrested straightaway or as a matter of course and, unless the situation on the ground so warrants, the arrest is to be deferred till such time that sufficient material or evidence becomes available on the record of investigation prima facie satisfying the investigating officer regarding correctness of the allegations leveled against such suspect or regarding his involvement in the crime in issue."

15. The august Supreme Court in the case titled "*Manzoor and 4 others v. The State*" [PLD 1972 SC 81] has emphasized the foundational principles for protecting liberty and avoiding unnecessary incarceration, and the relevant portion is reproduced as follows.-

"It is important to remember that bail is not to be withheld as a punishment. There is no legal or moral compulsion to keep people in jail merely on the allegation that they have committed offences punishable with death or transportation, unless reasonable grounds appear to exist to disclose their complicity. The ultimate conviction and incarceration of a guilty person can repair the wrong caused by a mistaken relief of interim bail granted to him, but no satisfactory reparation can be offered to an innocent man for his unjustified incarceration at any stage of the case albeit his acquittal in the long run."

16. The above elucidation of law is in the context of the general law relating to the power of arrest but is equally applicable to the Ordinance of 1999. In the case of the latter statute, the first case in which the provisions were examined and interpreted in great detail by the

august Supreme was "*Khan Asfandiyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others*" [PLD 2001 SC 607]. The power of arrest and the factors required to be taken into consideration while exercising the discretion have been specifically dealt with and the observations provide guidelines in this regard. In the context of remand, it has been observed that it was well established that remand is not granted in routine because 'the liberty of citizens must be protected, subject to law and the Constitution'. As a precondition, the requirement of sufficiency of evidence against an accused must be satisfied in order to exercise the power of arrest. It is implicit in the last four lines of paragraph 250 of the judgment that justification for the arrest is subject to satisfaction on the basis of sufficient incriminating material and evidence. The nexus of the power to arrest with that of its express purpose is also evident from the observations. Likewise, the apex Court was also mindful of the conflicting fundamental rights. It has been held that 'it is the duty of this Court to jealously safeguard the liberty of the citizens and to strike down a law or suggest amendments for protecting the same or avoiding undue harassment to them' and that 'prolonged detention of an accused without sufficient cause for such detention makes inroads on the personal liberty of citizens as guaranteed under the Constitution which cannot be countenanced by this Court'. Regarding the role of the Bureau and the Chairman, it has been observed that the "Chairman NAB cannot under any principle of jurisprudence simultaneously assume the role of prosecutor and judge." It has been unambiguously held, in the context of the executive power vested in the Chairman to order the arrest of an accused, that "we have no doubt in our minds that while exercising powers under section 24(a) of the

impugned Ordinance the Chairman NAB shall consider the facts and circumstances of each case justly, fairly, equitably in accordance with law and in conformity with the provisions of section 24 A of the General Clauses Act, 1897 and not in a discriminatory manner". It has been further held that "any order passed by him is subject to correction in appropriate cases by the superior courts in the exercise of their Constitutional jurisdiction". While enunciating the law in relation to the exercise of executive power to order arrest, the highest Constitutional Court has highlighted the significance of safeguarding the liberty of an accused. It has declared it a duty of a Constitutional Court to correct any excess of this power and shield an accused from its abuse. The applicability of the principle of proportionality, reasonableness and the need to adopt means that would cause least prejudice to the conflicting rights guaranteed by the Constitution is undoubtedly inherent in the law expounded by the august Supreme Court, regarding the power to order arrest under the Ordinance of 1999.

17. In the case titled '*Rafiq Haji Usman v Chairman NAB and others*' [2015 SCMR 1575] the august Supreme Court has emphasized that existence of criminal intent and motive was a pre requisite for attracting the offences under the Ordinance of 1999. The petitioner in that case was seeking bail and it was observed by the august Supreme Court that bail should not be withheld as a punishment.

18. In the case titled '*The State v Anwar Saifullah Khan*' [PLD 2016 SC 276] the august Supreme Court, in the context of the Ordinance of 1999, has observed and held that in order to constitute an offence there must be existence of mens rea and the element of conscious

knowledge and conscious participation on the part of the accused with the object of obtaining illegal means and undue benefit. The offences under the Ordinance of 1999 would be attracted, therefore, if there is sufficient material regarding mens rea and the element of obtaining illegal means or undue benefit. The offences under the Ordinance of 1999 are obviously criminal in nature which could result in conviction following trial. Mere irregularity or violation of law, regardless of its seriousness, will not attract the offences under the Ordinance of 1999 in the absence of incriminating material indicating mensrea, conscious knowledge and illegal gain or benefit. The incriminating material must, prima facie, indicate criminal intent or motive.

19. In the case titled "*Tallat Ishaq Vs. National Accountability Bureau through Chairman and others*" [PLD 2019 S.C 112], the august Supreme Court has held and observed in the context of the grant of bail in cases relating to the Ordinance of 1999 as follows.-

"(d) In an appropriate case through exercise of its jurisdiction under Article 199 of the Constitution a High Court may grant bail to an accused person arrested in connection with an offence under the National Accountability Ordinance, 1999 and section 9(b) of the said Ordinance does not affect the jurisdiction of a High Court conferred upon it by the Constitution. The constitutional jurisdiction of a High Court is, however, an extraordinary jurisdiction meant to be exercised in extraordinary circumstances and not in run of the mill cases or as a matter of course".

"(f) Ordinarily bail is allowed to an accused person on the ground of delay only where the delay in the trial or the period of custody of the accused person is shocking, unconscionable or inordinate and not otherwise. The primary consideration

for grant of bail on the ground of such delay is undue hardship and more often than not prima facie merits of the case against the accused person are also looked into before admitting him to bail on the ground of delay”.

20. A larger Bench of the august Supreme Court further elaborated the law laid down in the *Tallat Ishaq* case supra in [PLD 2019 SC 445] "*Chairman National Accountability Bureau, Islamabad through Prosecutor General Accountability, Islamabad Vs. Mian Muhammad Nawaz Sharif and 2 others*". The relevant portion is reproduced as follows.-

"With reference to many a precedent case a Larger Bench of this Court has clarified in the case of "Tallat Ishaq v. National Accountability Bureau, etc" (Civil Petition No. 632 of 2019 decided on 01.10.2018) that in cases under the National Accountability Ordinance, 1999 bail may be granted through exercise of Constitutional jurisdiction of a High Court only in extraordinary circumstances and in cases of extreme hardship but in the present cases no such extraordinary circumstance or hardship had been referred to by the High Court in the impugned judgments passed by it".

21. In a recent case the august Supreme Court in the case titled "*National Accountability Bureau through Chairman v. Murad Arshad and others*" [PLD 2019 S.C. 250] has held;

"Since the promulgation of Ehtesab Act, 1997 as succeeded by NAO, 1999 jurisdiction of Trial Court i.e. Accountability Court has been expressly ousted to concede bail, which in turn has burdened all the High Courts with load of bail application under Article, 199 of the Constitution, 1973. As held in the case of Hema Misra (Supra) jurisdiction under

Article, 199 of the Constitution has to be exercised with circumspection and caution as extraordinary jurisdiction is invoked and exercised to advance the cause of justice and not to frustrate it or to defeat the intent of law. The jurisdiction under Article, 199 of the Constitution, 1973 are therefore to be exercised to prevent miscarriage of justice and abuse of NAO, 1999. Such jurisdiction is not to be exercised as a substitute of power under sections 426,491, 497,489 and 561-A of Code of Criminal Procedure 1898 liberally and indiscriminately converting High Court into wholly Court of ordinary criminal jurisdiction."

22. What transpires from the above highlighted principles and law is this; be it the general law or a special law, such as the Ordinance of 1999, the power to arrest an accused cannot be exercised mechanically and deprivation of liberty or intrusions into fundamental rights guaranteed by the Constitution are required to be adequately and demonstrably justified. The power to arrest is to be exercised fairly, justly, equitably and without discrimination. There must be sufficient incriminating material to justify arresting an accused. The 'incriminating material' must be of the nature which, prima facie, indicates involvement of the accused in the commission of the offences under the Ordinance of 1999. The material brought on record should, prima facie, show existence of criminal intent or motive, mens rea, element of conscious knowledge and participation with the object of obtaining illegal gain or benefit. In the absence of these crucial elements, arrest of an accused would amount to an abuse of the power to arrest vested under the Ordinance of 1999. Mere allegations of misuse of authority would not justify depriving an accused of liberty because an irregularity or wrong decision sans criminal intent, mens rea and illegal gain or benefit does not attract the offences

under the Ordinance of 1999. The power of arrest under the Ordinance of 1999 cannot be exercised in an indiscriminate, reckless or wanton manner because there are conflicting fundamental rights guaranteed under the Constitution which cannot be ignored. The august Supreme Court in the above referred judgments has used expressions such as 'unconscionable', 'extra ordinary circumstances' and 'extreme hardship' as grounds for releasing an accused on bail. Moreover, in the case of Murad Ashraf and others supra, it has held in the context of liberty of an accused that the purpose of exercising jurisdiction under Article 199 of the Constitution is to prevent miscarriages of justice and abuse of the Ordinance of 1999. It is obvious that exercising power of arrest excessively, in an arbitrary manner and which has the effect of limiting the conflicting constitutionally guaranteed rights unnecessarily, definitely amounts to abuse of such executive power. In such an eventuality deprivation of liberty and curtailment of other rights guaranteed by the Constitution would be unconscionable, expose the person to extreme hardship and thus give rise to extraordinary circumstances. The Bureau misconstrues the judgments of the august Supreme Court relating to release of an accused who has been arrested under the Ordinance of 1999 as giving unfettered and absolute power to arrest an accused. It would be atrocious to imagine or read into the law laid down in the above cited judgments approval of abuse of the executive power of arrest. To the contrary, the apex Court in the above discussed precedent law has highlighted the importance of safeguarding the rights guaranteed by the Constitution against abuse of executive power to arrest an accused. What are those rights which are affected when an accused is arrested?

Rights that could be affected by arresting an accused under the Ordinance of 1999

a) Right to be presumed innocent.

23. Fair trial is a constitutionally guaranteed right under Article 10 A of the Constitution. It declares that for the determination of rights and obligations, inter alia, in any criminal charge, an accused shall be entitled to a fair trial and due process. The importance of fair trial cannot be overstated. It is a guarantee to prevent injustices and for this reason it has been declared as the 'golden thread' of the criminal justice system. It ensures that the victims as well as the accused have confidence in the criminal justice system. Independence and impartiality of the legal process is the foundation of a fair trial. As a corollary, treating a person as guilty before the charges are proved in a fair trial is a negation of the independence and impartiality of the legal process. It is for this reason that the presumption of innocence is crucial and its recognition is a foundational principle of the right to a fair trial. The serious consequences which may follow a conviction is the reason for imposing the onerous duty on the State to prove a criminal charge beyond reasonable doubt. It is because of this crucial presumption that, despite being alleged of committing an offence and regardless of its gravity, the accused retains his or her fundamental rights, such as the right to liberty and inviolability of dignity. The intrusions into the said constitutionally guaranteed rights will be legitimate and lawful if they can be adequately justified in the context of the relevant law. William Blackstone, the eminent English jurist, had stated in his book published in 1760 that it is better that ten guilty persons escape than that one innocent suffers. The Prophet

Mohammad (peace be upon him), had said fourteen centuries ago that it is better to let go hundred guilty persons than to punish one innocent. This saying laid the foundation of the embedded principle of presumption of innocence in the Islamic criminal jurisprudence. The principle of presumption of innocence does not mean that an accused becomes immune from being arrested. However, it is one of the most relevant factors which is required to be taken into consideration whenever the power of arrest is exercised. The Bureau, under the Ordinance of 1999, has been established to achieve a paramount public interest. In order to enable it to achieve the intended object, the legislature has clothed it with extensive powers, the exercise whereof can have serious consequences in relation to the constitutionally guaranteed rights of liberty and inviolability of dignity. The power to order the arrest of an accused during inquiry or investigation can have deleterious effects, not only for the latter but other family members as well. In order to justify an arrest of a person in a non violent crime, who is presumed to be innocent, the authority empowered in this regard has to show that there were no other less intrusive means or alternatives. Does an accused under the Ordinance of 1999 retain the presumption of innocence before being convicted? It could be argued that there is no such presumption, keeping in view section 14 *ibid*, because it contemplates reverse onus. Does this provision affect the principle of presumption of innocence at the stage of inquiry or investigation i.e before conviction is handed down by a special court following a fair trial? Section 14, for the first time, was interpreted by the august Supreme Court in the case titled "*Khan Asfandiyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others*" [PLD 2001 S.C. 607] and it was held

therein that the prosecution has to establish the preliminary facts and after that the onus shifts and the defence is then required to be called upon to disprove the presumption. For safer dispensation of justice and in the interest of good governance, the august Supreme Court in the context of section 14(d) has observed and held that the prosecution shall first make out a reasonable case against the accused charged under section 9(a) (vi) and (vii) of the Ordinance of 1999 and, in case the prosecution succeeds in making out a reasonable case to the satisfaction of the learned Accountability Court, only then it would be deemed to have discharged the prima facie burden of proof and, in such an eventuality, it would shift to the accused so that the latter rebuts the presumption of guilt. The above principles and law were reiterated by the august Supreme Court in the cases titled "*Pir Mazhar ul Haq and others v. The State through Chief Ehtesab Commission, Islamabad*" [PLD 2005 S.C. 63], "*Syed Qasim Shah v. The State*" [2009 SCMR 790], "*Muhammad Siddiqui Farooq v. The State*" [2010 SCMR 198], "*Hashim Babar v. The State*" [2010 SCMR 1697] and "*Khalid Aziz V. The State*" [2011 SCMR 136]. The august Supreme Court has eloquently summed up the law and principles in the case titled "*Ghani ur Rehman v. National Accountability Bureau and others*" [PLD 2011 S.C. 1144], relating to the onus which is required to be discharged by the prosecution before it is shifted to the accused. It is thus obvious that, despite the reverse onus of proof contemplated under section 14, the presumption of innocence of an accused remains unaffected till he or she, as the case may be, has been handed down conviction by a learned court after the conclusion of a trial. We will discuss next the relevance of the principle of presumption of innocence in the context of the legitimate exercise of power to arrest an

accused and the adequacy of justifications in making intrusions in other constitutionally guaranteed rights. It is thus settled law that an accused under the Ordinance of 1999 is presumed to be innocent till the guilt is proved at the end of a fair trial. An accused has a right to be treated accordingly.

b) Right to be treated in accordance with Article 14 by recognizing inviolability of Dignity

24. Life is the most elevated thing amongst the creations while humans have been bestowed with qualities which make them superior to all those who possess the gift of 'life'. A human is distinct from other creations because of its ability to reason. The status of a human in every religion is that of the most exalted amongst the creations. A human has been declared as a vicegerent of the Creator on earth. The Quran has several references which recognises the elevated status of a human. It says 'We have conferred dignity on the children of Adam ---' (Al. Isra; 70). It has declared the human as a creation in the 'best of forms' (At Taghabun;3). This distinct status as a human highlights its value and thus the meaning of the expression 'human dignity'. The preciousness and sacredness of 'life' essentially is the premise for the inviolability of dignity. 'Dignity' thus refers to recognition of the worthiness or excellence of a human who has been created with superior attributes such as intellect and the ability to reason. The Universal Declaration of Human Rights acknowledges that all humans have been born with equality in dignity and rights. The preamble of the International Covenant on Civil and Political Rights explicitly recognizes that the rights described therein

derive from the inherent dignity of the human person. In a nutshell, a human possesses rights because he or she has been born as a human and its worthiness or value has a nexus with humanity. A human is distinct from other creations because of the ability to organize, manage, regulate and control his or her actions and life. The expression 'Dignity' inevitably has its origins in humanity or the status of being a human. According to the influential German philosopher Immanuel Kant, humans must not be used as a means to an end but only as means in him/her self. A human, therefore, deserves respect and to be treated as a human. Dignity, which stems from humanity, is the foundational principle for the autonomy which a human is entitled to enjoy. Dignity is abused and undermined when the treatment is contrary to the recognition of a human's respect and worthiness. This is the essence and meaning of the constitutional right guaranteed under Article 14 of the Constitution which has declared dignity to be inviolable and recognises it as a right in itself. The inherent dignity which stems from humanity is the foundation for the necessity to protect all other rights regardless of sex, status in society, race, religious beliefs or other conditions. It guarantees to every human the right to enjoy autonomy, respect, self determination and liberty so long it does not come in conflict with the rights of others. The inviolability of dignity, even of a convicted person, is breached when the latter is subjected to intolerable conditions of detention in a State prison. Slavery, bonded labour, exploitation of an employee or labourer, or humiliation in any other form are examples of the violation of human dignity. Parading suspects or convicted criminals publicly in handcuffs amounts to a breach of their dignity. Likewise, imposing illegal, unreasonable and unnecessary limits and restraints on the autonomy, self determination and freedom of

a human would be inconsistent with the right guaranteed under Article 14. The right to life guaranteed under Article 9 would also become meaningless if the inviolability of dignity is breached. The august Supreme Court in the case titled "*Juris Foundation through Chairman v. Federation of Pakistan through Secretary, Ministry of Defence*" [PLD 2020 SC 1] has held that in a living Constitution fundamental rights were to be liberally interpreted so that they continued to embolden freedom, equality, tolerance and social justice. In "*Mst. Laila Qayyum v. Fawad Qayyum*" [PLD 2019 SC 449] it was held that compelling a lady to give a sample for DNA testing was an infringement of dignity. In the case titled "*President Balochistan High Court Bar Association v. Federation of Pakistan and others*" [2012 SCMR 1958] the apex Court held forced disappearances, kidnapping of citizens by the law enforcing agencies and sectarian killings as violations of dignity enshrined in Article 14. In the case titled "*Government of N.W.F.P v. Dr. Hussain Ahmed Haroon and others*" [2003 SCMR 104] incarceration of medical practitioners who were peacefully protesting for their rights was held to have breached the inviolability of dignity. Extra judicial killings, custodial deaths, arbitrary arrests and torture were declared as violative of Article 14. In the case titled "*Suo Motu Constitution Petition No.9/1991*" [1994 SCMR 1028] it was observed by the august Supreme Court that public hangings of even the worst criminal appeared to violate the dignity of man. All these examples explicitly show that human dignity stems from the sacredness and value of life and is pervasive. Any treatment which is degrading or is incompatible with the value or worthiness of a human is an affront to the inherent dignity acknowledged by the framers of the Constitution under Article 14. As a corollary, an arbitrary, indiscriminate and reckless

exercise of the executive power to arrest during an inquiry or investigation under the Ordinance of 1999 would be in violation of the constitutionally guaranteed right and the explicit recognition that human dignity is inviolable. Arresting a person in an alleged white collar crime by exercising the executive power in a mechanical and arbitrary manner, or unnecessarily, has serious consequences. It can cause irreversible damage to the reputation of a person. The social stigma attached with being arrested for an offence under the Ordinance of 1999 can have devastating implications and massive human impact, not only for that person but for the latter's family members as well. The publicity given to the arrest of an accused through press releases issued by the Bureau and any irresponsible reporting in the print or electronic media could ruin lives, including those who at the end of a fair trial are declared innocent. Moreover, presenting suspects as though they are guilty exacerbates the humiliation which is already suffered because of the arrest. Such treatment and interference with liberty definitely amounts to infringement of the inherent dignity of a human and thus is a serious violation of inviolability of dignity guaranteed under Article 14 of the Constitution. A suspect cannot be exposed to humiliation unnecessarily as a result of exercising powers excessively or arbitrarily. Sub Article 2 of Article 14 is a constitutional assurance to every person not to be subjected to torture for the purposes of extracting evidence. This is most relevant in the context of the expansive powers vested in the Bureau and its Chairman under the Ordinance of 1999, particularly its distinct features relating to the acceptance of plea bargain or the power to allow an accused to become a witness against others. Abuse of the intrusive

power of arrest or the threat thereof can have serious implications regarding the right under Article 14.

c) Right to Liberty and freedom of movement

25. The other crucial fundamental rights which become relevant while exercising the executive power of arrest under the Ordinance of 1999 are 'liberty' of a person and 'freedom of movement'. Both these rights, despite being distinct, are inextricably linked to human dignity. To enjoy liberty and freedom of movement has a nexus with the status of a person as a human. Article 9 of the Constitution guarantees to every person that he or she shall not be deprived of liberty save in accordance with law. Deprivation of liberty in any form, unless adequately justified, becomes a tort and amounts to a violation of the fundamental right guaranteed under Article 9. The right to liberty, besides being a constitutionally guaranteed right, is a foundational element of the rule of law. The Universal Declaration of Human Rights has declared that everyone has the right to liberty and it explicitly recognises that no one can be subjected to arbitrary arrest, detention or exile. This recognition was later embedded and further elaborated in the International Covenant on Civil and Political Rights. As is obvious from the unambiguous language of Article 9, the right to liberty is subject to law. It is thus not an absolute right but a guarantee against illegal or arbitrary deprivation of liberty. In fact it is a guaranteed shield against the abuse of the executive power to arrest which is vested in the State authorities. It would only be lawful to deprive a person from enjoying the right to liberty if it can demonstrably be shown that the exercise of the power to arrest

was authorized by law and had been actually exercised in order to achieve the object for which it has been provided by the legislature. In addition, it would also be required that the deprivation of liberty was justified and was not excessive or unnecessary. A statute, such as the Ordinance of 1999, may provide for the grounds upon which a person can be lawfully deprived of the right to liberty. It becomes the duty of the authority directing the deprivation of liberty to adequately justify the intrusion thereof. The significance of protecting liberty has been consistently highlighted by the august Supreme Court. In the case titled "*Federation of Pakistan and others v. Shaukat Ali Mian and others*" [PLD 1999 S.C 1026], it was observed and held.-

"The perusal of the above quoted Article indicates that every citizen and every other person for the time being in Pakistan is guaranteed as his inalienable right to enjoy the protection of law and to be treated in accordance with law wherever he may be and in particular no action detrimental to the life, liberty, body, reputation or property of any person can be taken except in accordance with law."

26. In the case titled "Watan Party v. Federation of Pakistan" [PLD 2011 S.C 997] the august Supreme Court reiterated the observations made in the earlier judgment reported as *Commissioner of Income Tax v. Eli Lilly Pakistan*' [2009 SCMR 1279] and a portion therefrom was quoted;

"It is the duty and obligation of the State on account of the various provisions of the Constitution to provide the atmosphere based on honesty by providing equal protection of law. Every citizen must be treated equally, dignity of human being life should be maintained, and liberty of life and

honour must be guaranteed as envisaged in the Articles 9, 14 and 25 of the "Constitution."

27. In the case titled "*Ismail v. The State*" [2010 SCMR 27] it was observed by one of the Honourable Judges. -

"I would also like to add that the 'interest of the country' is best served when the executive and the judicial machinery of the State while administering penal statutes, adhere to the law. This is particularly so where the fundamental rights of a citizen such as his liberty, are involved. The right of personal liberty of a citizen is enshrined in Article 9 of the Constitution and has been jealously guarded by the Courts in Pakistan. If the petitioner is 'to be deprived of his liberty, this should only happen in accordance with law. It may well be that in a particular case, a procedural rule may be violated."

28. In a judgment of the House of Lords titled "*Liversidge v. Anderson*" reported as [1941] 3 All E.R. 338, Lord Atkin, in the context of an action for false imprisonment, has highlighted the importance of liberty as follows. -

"The plaintiff's right to particulars, however, is based upon a much broader ground, and on a principle which again is one of the pillars of liberty, in that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act. The only exception is in respect of imprisonment ordered by a judge, who from the nature of his office cannot be sued, and the validity of whose judicial decisions cannot, in such proceedings as the present, be questioned."

29. The House of Lords, in another judgment titled "*Christie v. Leachinsky*" reported as [1947] 1 All E.R 567 has highlighted as follows;

"Such a situation may be tolerated under other systems of law, as, for instance, in the time of letters de cachet in the eighteenth century in France, or in more recent days when the Gestapo swept people off to confinement under an overriding authority which the executive in this country happily does not in ordinary times possess. This would be quite contrary to our conceptions of individual liberty. If I may introduce a reference to the well known book, Dalton's Country Justice, that author, dealing with arrest and imprisonment, says: "The liberty of a man is a thing specially favoured by the common law." "There are practical considerations, as well as theory, to support the view I take. If the charge on suspicion of which the man is arrested is then and there made known to him, he has the opportunity of giving an explanation of any misunderstanding or of calling attention to other persons for whom he may have been mistaken, with the result that further enquiries may save him from the consequences of false accusation. It must be remembered that in former days arrest was practiced not only in certain cases of suspected crime, but as a preliminary in civil suits also."

30. Lord Denning MR, authoring the judgment of the Court of Appeal in the case titled "*Ghani and others v. Jones*" reported as [1969] 3 All E.R 1700, has observed.-

"A man's liberty of movement is regarded so highly by the law of England that it is not to be hindered or prevented except on the surest grounds. It must not be taken away on a suspicion which is not grave enough to warrant his arrest".

31. It is obvious from the above discussion that liberty and freedom of movement are regarded as the most crucial human rights and their protection as one of the foundational pillars for upholding the rule of law. But these rights are not absolute. Restrictions on its enjoyment can be imposed by law. Such limitations can be lawfully imposed and authorized by the legislature and one such example is the power of arrest provided under the Ordinance of 1999. The grounds upon which such authorization would be justified may also be set out in the statute itself. Keeping in view the value and importance of the fundamental rights of liberty and freedom of movement, the exercise of the executive power to arrest must be strictly circumscribed by the object which is intended to be achieved and not excessive or disproportionate. In a nutshell, the right to liberty, being a sacred shield against abuse of statutory power vested in an executive authority, must be jealously guarded as the duty of a Constitutional Court. Abuse, excess or unlawful exercise of authority or power vested in an authority under the law and having the effect of depriving a person from enjoying the right to liberty amounts to a serious violation of the constitutional right guaranteed under Article 9. The exercise of the power to arrest provided under section 18(e) read with section 24 of the Ordinance of 1999 would be lawful if the intrusions into the conflicting fundamental rights guaranteed under Articles 9 and 14 of the Constitution could be adequately justified.

c) Right not to be treated differently

32. Besides the fundamental rights guaranteed under Articles 9, 14 and 15, the constitutional right under Article 25 also becomes relevant

in the context of ordering the arrest of an accused under the Ordinance of 1999. It is the duty of authorities vested with powers under the Ordinance of 1999 to treat an accused fairly during the course of the inquiry or investigation because the latter is presumed to be innocent. No accused must feel that the powers are being exercised indiscriminately. Equal treatment of all similarly placed accused should be demonstrably reflected from the manner in which statutory powers are being exercised. The power to order the arrest of an accused must not be exercised in an indiscriminate and arbitrary manner giving rise to complaints that some are treated less favourably than others. The actions ought to show, unambiguously, that the executive discretion of ordering the arrest is exercised in each case uniformly and without discrimination. The foundational principle of structuring of the discretion must be obvious from the actions of the executive authorities which adversely affect fundamental rights. If the authority vested with the power to arrest provided under a statute fails to adequately explain its exercise in a way that is manifestly uniform and similar in all cases then it would be an infringement of the right guaranteed under Article 25 of the Constitution. No power or discretion vested in an authority under the law can be exercised indiscriminately and without being structured. Needless to mention that Article 4 of the Constitution declares that to enjoy the protection of law and to be treated in accordance with law is an inalienable right of every citizen and, in particular, no action detrimental to life, liberty and reputation shall be taken except in accordance with law. The test is public perception and confidence. Across the board accountability can only be achieved if there is no perception that accused

are treated differently. The Bureau must be able to demonstrably justify why some accused are arrested while others are treated differently.

33. Having discussed the rights which are at stake when an accused is arrested, the next question that needs to be examined is how to strike a balance between the conflicting interests. On the one hand is the public interest for which the Ordinance of 1999 has been enacted and on the other the rights guaranteed by the Constitution. How does a Constitutional Court ensure, while exercising jurisdiction to ascertain whether or not the executive power has been abused? This question brings us to examining of the tools or principles developed in this regard

Safeguards against excessive and arbitrary exercise of power to detain a person and to avoid miscarriages of justice.

34. As noted above, the power to arrest a person under the Ordinance of 1999 has an unambiguous purpose and if its exercise becomes necessary in the facts and circumstances of the case, deprivation of liberty and restrictions on enjoyment of other rights would be justified. In order to protect the most crucial and fundamental rights, such as the right to liberty and not to be subjected to degrading and humiliating treatment, courts have developed and applied the principles of proportionality, reasonableness and the need to use the least intrusive alternatives as tools for judicially reviewing the exercise of executive power which results in detention or arrest.

35. Proportionality in simple words is the principle that an action must not be more than what is necessary in the given facts and circumstances. Cracking a nut or killing an ant with a sledgehammer could be appropriate illustrations which highlight the essence of the principle of proportionality. An act or action that is extreme, excessive or is more than what is necessary for achieving an intended purpose or goal would be negation of the principle of proportionality. The scope of constitutional rights and justifications for its restriction on the basis of the principle of proportionality has been elaborately discussed by Aharon Barak in the celebrated book titled 'Proportionality, Constitutional Rights and their limitations'. He has described the existence of four core factors to justify limiting constitutional rights; i) proper purpose, ii) rational connection, iii) necessary means and iv) proper relation between the benefit gained by realizing the proper purpose and the harm caused to the constitutional right. According to the author, proportionality is a principle applied so as to achieve a balance between the benefit gained and the resultant prejudice that is caused to the rights. The means adopted should be rational and necessary and the harm to rights proportional to the benefit gained from imposing the restrictions.

36. The above components of the principle of proportionality have been applied by courts in almost all jurisdictions. Lord Bingham of Cornhill, in the case titled '*A and other v. Secretary of State for the Home Department*' [(2005) 3 All ER 169], has cited a judgment of the Privy Council which describes the elements as.-

"Privy Council in De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69

at 80, [1998 3 WLR 675 at 684. In determining whether a limitation is arbitrary or excessive, the court must ask itself—

'whether: (i) the legislative object is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

37. The Supreme Court of Canada in the case titled '*R. v. Oakes*' [(1986) 1 S.C.R. 103] has elucidated the principle as follows;

"To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd., supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances,

in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

38. The august Supreme Court of Pakistan has recognized proportionality as a valid principle for examining and judicially reviewing the executive powers and exercise of discretion. In the case titled '*Sabir Iqbal v. Cantonment Board, Peshawar through Executive Officer and others*' [PLD 2019 SC 189] it has been observed and held as follows.-

"The court can examine and judicially review of the executive discretion exercised by the authorized officer on the ground of proportionality. Alongside reasonableness, proportionality is now a central standard directing the action of the executive branch. The point of departure is that a disproportionate act that infringes upon a human right is an illegal act. The court, which guards the legality of the acts of the executive branch, performs judicial review over these acts and examines whether they fulfill the tests of proportionality. Proportionality is a standard that examines the relationship between the objective the executive branch wishes to achieve, which has the potential of infringing upon a human

right, and the means it has chosen in order to achieve that infringing objective. The fiduciary duty, from which the administrative duty of fairness and administrative reasonableness are derived, demands administrative proportionality as well. "The courts will quash exercises of discretionary powers in which there is not a reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. An administrative measure must not be more drastic than necessary or to sum up in a phrase - not taking a sledgehammer to crack a nut. According to De Smith's Judicial Review, the standards of proportionality and unreasonableness are inextricably intertwined. Unreasonableness contains two elements of proportionality when it requires the weight of relevant considerations to be fairly balanced and when it forbids unduly oppressive decisions. Under the first element, proportionality is a test requiring the decision-maker to maintain a fair balance. Under this category the courts evaluate whether manifestly disproportionate weight has been attached to one or other considerations relevant to the decision. The second element is that the courts consider whether there has been a disproportionate interference with the claimants rights or interests. A more sophisticated version of proportionality provides for a structured test. Here the courts ask first whether the measure, which is being challenged, is suitable to attaining the identified ends (the test of suitability). Suitability here includes the notion of "rational connection" between the means and ends. The next step asks whether the measure is necessary and whether a less restrictive or onerous method could have been adopted (the test of necessity - requiring minimum impairment of the rights or interest in question)".

39. In an earlier case titled '*Messr MFMY Industries Limited and others v. Federation of Pakistan through Ministry of Commerce and others*' [2015 SCMR 1550] the august Supreme Court had acknowledged the relevance of the principle of proportionality. Reference may also be made to "*D.G. Khan Cement Company Ltd. through Chief Financial Officer v. Federation of Pakistan through Secretary, Ministry of Law and 03 others*" [PLD 2013 Lahore 693].

40. The principle of reasonableness or unreasonableness has also been acknowledged and applied by the courts to examine the validity of executive actions and as a shield against abuse of executive powers which limit the enjoyment of rights guaranteed by the constitution. In the context of the power of arrest, the House of Lords has observed and held in the case titled "*Holgate-Mohammad V Duke*" reported as [1984] 1 ALL ER 1054 as follows.-

"Since this is an executive discretion expressly conferred by statute on a public officer, the constable making the arrest, the lawfulness of the way in which he has exercised it in a particular case cannot be questioned in any court of law except on those principles laid down by Lord Greene MR in Associated Provincial Picture House Ltd. V. Wednesbury Cop [1947] 2 All ER 680, [1948] 1 KB 223, that have become too familiar to call for repetitious citation. The Wednesbury principles as they are usually referred to, are applicable to determining the lawfulness of the exercise of the statutory discretion of a constable under S. 2(4) of the 1967 Act, not only in proceedings for judicial review but also for the purpose of founding a cause of action at common law for damages for that species of trespass to the person known as

false imprisonment, for which the action in the instant case is brought.”

41. The principles of Wednesbury unreasonableness has been explained in the case titled "*Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation*" reported as [1947] 2 All E.R 680 as follows.-

"In the present case we have heard a great deal about the meaning of the word "unreasonable". It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretion often use the word "unreasonable" in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington, L.J, I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head."

42. The above principles of Wednesbury unreasonableness were explicitly cited with approval as a ground for judicial review by the august Supreme Court of Pakistan in the case titled "*Hyder Ali Bhimji v. Vith*

Additional District Judge Karachi (South) and another” [2012 SCMR 254].

It has been recognised as one of the crucial parameters for examining the validity of executive actions and discretion. The august Supreme Court later reaffirmed irrationality or unreasonableness as an important ground for judicial review of administrative actions and exercise of executive discretion in the case titled '*Asaf Fasihuddin Khan Vardag v. Government of Pakistan and others*' [2014 SCMR 676].

Power to arrest vested under the Ordinance of 1999 is not absolute, unfettered and its exercise is subject to the principles and law highlighted herein.-

43. It is obvious, therefore, from the above discussion that the executive power to order the arrest of an accused under sections 18(e) read with section 24 of the Ordinance of 1999 is subject to judicial review under Article 199 of the Constitution on the grounds of proportionality, unreasonableness and necessity. As held by the august Supreme Court in the case titled "*Asif Faseehuddin Khan Vardag v. Government of Pakistan*" [2014 SCMR 676] no unfettered power existed under public law and that a public authority possessed powers only to use them for public good, which imposed the duty to act fairly. Any deprivation of liberty or curtailment of rights guaranteed by the Constitution inevitably has to be adequately justified on the touchstone of the principles of proportionality, unreasonableness and necessity. The limitation must be for proper purposes, rational and necessary and the prejudice caused to the constitutional rights must be proportional to the benefit achieved from imposing restrictions thereon. In the context of arresting an accused

under the Ordinance of 1999, it is the duty of the authority directing such an action to adequately justify and show that there were no other less restrictive means of achieving the object i.e. for effectively conducting and concluding inquiry or investigation or that there were other compelling reasons justifying deprivation of liberty as a last resort. The other compelling reasons could be the likelihood of abscondence of the accused, or that the latter may repeat the offences, or if not restrained could cause harm to others. The said reasons are not exhaustive and would depend on the facts and circumstances of each case. However, instead of depriving a person of liberty, appropriate measures are required to be taken such as placing the name of the accused on the Exit Control List, prescribing a schedule for appearance, securing the entire record at the first instance, most of which is official etc. The principles, law and preconditions for ordering an arrest under the Ordinance of 1999 have been highlighted in paragraph 22 above and they need not be repeated again. The fundamental rights guaranteed by the Constitution, which are affected when an arrest is made at the inquiry or investigation stage, have also been discussed in great detail. The intrusions into the fundamental rights must be adequately and demonstrably justified on the touchstone of the principles of proportionality and unreasonableness. The executive power to arrest a person under the Ordinance of 1999 cannot be exercised unnecessarily or for conducting roving inquiries. If an accused is cooperating in the inquiry or investigation and appropriate measures have been taken to ensure the latter's attendance then in such an eventuality restrictions on constitutional rights would be an abuse of the executive power. The august Supreme Court has consistently observed and desired the need for promoting the law of tort and reference

in this regard may be made to "*Punjab Road Transport Corporation v. Zahida Afzal, etc.*" [2006 SCMR 207] and "*Islamic Republic of Pakistan through Secretary, Ministry of Railways, etc. v. Abdul Wahid, etc.*" [2011 SCMR 1836]. Recognizing the applicability of the law of tort, it was held in "*Abdul Majeed Khan v. Tawseen Abdul Haleem*" [PLD 2012 SC 80], that the law is applicable and administered in Pakistan as rules of justice, equity and good conscience. In the absence of lawful authority, to justify intrusions into constitutionally guaranteed rights, the detention or incarceration would become 'false imprisonment', which has evolved in the law of tort for the protection of liberty and against abuse of executive power. It is thus an obligation of the person directing the arrest to discharge the onus by demonstrably justifying that there were no other less restrictive means for the purposes of conducting effective inquiry or investigation. Deprivation of liberty must be exercised as an exceptional option for the purposes of inquiry or investigation in relation to white collar crimes. The principles and law highlighted in this judgment are confined to the Ordinance of 1999, which is a special law and exclusively deals with white collar crimes. As noted above, white collar crimes are committed by skilled professionals, most of whom are experts in covering up and erasing the traces when the crime is committed. It, therefore, poses enormous challenges for the investigators. The detection and investigation of offences dealt with under the Ordinance of 1999 requires highly trained professionals having expertise in forensic accounting, money laundering, data mining and data analysis etc. If the investigator of a white collar crime is unable to conduct effective inquiry and investigation without arresting an accused then it raises serious questions regarding competence and professionalism. This important aspect cannot

be ignored because of the massive human impact involving physical and psychological damage and the social stigma caused due to arrest of a person on allegations of corruption and corrupt practices under the Ordinance of 1999. The Chairman and the investigators are vested with expansive powers under the Ordinance of 1999, without any oversight by an independent body. The nature and expansiveness of executive powers vested in individuals inevitably raises the threshold of judicial review because constitutionally guaranteed rights are at stake. Incompetence, lack of professional expertise and proper training to deal with white collar crime, besides jeopardizing constitutional rights, can have deleterious consequences for the governance system and cause harm to the economy. This makes it an even more onerous task for the Chairman and investigators of the Bureau to take extraordinary care while exercising executive powers, particularly that of arresting a person who is presumed to be innocent at the inquiry or investigation stage. Likewise, a heavy burden falls on a Constitutional Court to jealously guard against abuse of executive power against unjustified deprivation of liberty. It is unacceptable in a society governed under a Constitution guaranteeing fundamental rights to allow abuse of executive power, which cannot be demonstrably and lawfully justified. The power to arrest under section 24 read with section 18(e) of the Ordinance of 1999 is definitely not unfettered, absolute or allowed to be exercised without being adequately justified on the touchstone of the principles and law highlighted above.

The exercise of power to order arrest in the instant case.

44. The facts and circumstances of the case in hand have been discussed in detail above. The petitioners have been working in the Authority as its permanent employees for a considerable period. Nothing has been placed on record which would even remotely indicate that they have blemished service records. It is also not the case of the Bureau that the petitioners had made personal gains. It has been candidly conceded that they were cooperating in the investigation proceedings. The entire case of the Bureau is based on the interpretation of statutory provisions, policies of the Federal Government and, particularly, the expression "Technology Neutral". The said expression has been used in the Cellular Policy of the Federal Government. The policy is binding on the Authority and the Board. The relevant portions of the Federal Government's letter have been reproduced above. It is alarming that the Investigating Officer of the Bureau, without being professionally competent in this regard, has on his own interpreted the Cellular Policy and, that too, in disregard of the letter of the Federal Government, dated 19.07.2018. The representations made by the State of Pakistan to the investors in the cellular sector have been completely disregarded in the instant case. It appears to us from the facts narrated above that the Board at the relevant time was at loggerheads with the statutory regulator i.e. the Authority. The Chairman had ordered the investigation on the basis of some "source report" and it appears that prior inquiry was not conducted. There is also no explanation as to why the Bureau had requested the Ministry of Defence to identify and nominate an expert when, in this case, in terms of clause (fa) of section 2 of the Act of 1996, the competent Ministry on behalf of the Federal Government was the Ministry of Information Technology and Communication. It is also unexplained why the Ministry

of Defence sent a request to the Board for nominating an expert. The Board was itself an interested party, as appears from the above narrated facts. The purported expert was an employee of the Board and his report is also regarding interpretation of statutory provisions, policies of the Federal Government and the expression "Technology Neutral". The Investigating Officer was asked how he calculated the purported loss of US\$ 516 million. He stated that it was based on the amount received as the highest bid for auction of the spectrum. He admitted that there was no auction of spectrum in the instant case and that permission was granted for the use of the technology on the already acquired spectrum of the Cellular Company. It is obvious that the Investigating Officer nor the Bureau has proper appreciation of the difference between auction of spectrum and allowing a licensee to use a new technology on already acquired spectrum on the basis of 'Technology Neutrality' under the Cellular Policy. The most astonishing aspect of the case in hand is that the entire case is based on the interpretation of the Cellular Policy of the Federal Government, while the latter's opinion or stance has been completely ignored or, rather, challenged. The facts of this case present a sorry state of affairs. The Board appears to be challenging the authority of the Federal Government as well as the statutory regulator i.e the Authority while the Bureau and the Investigating Officer are bending over backwards to support the stance of the Board. The Bureau and the Investigating Officer do not recognize the authority of the Ministry explicitly nominated to represent the Federal Government under the Act of 1996 and, instead, they preferred to seek assistance from the Ministry of Defence. For reasons which are shrouded in mystery, the Bureau, the Investigating Officer and the Board insist on interpreting the Cellular

Policy on their own in defiance of the stance of the Federal Government which has formulated the policy. There is no explanation why the license of the Cellular Company was allowed to be renewed in 2019 on the terms and conditions which are alleged as misuse of authority leading to purported loss. There is nothing on record to indicate the existence or involvement of criminal intent, mens rea or any other factor highlighted in paragraph 22 above so as to attract the offences under the Ordinance of 1999.

45. This Court cannot turn a blind eye to another crucial matter in the case in hand. The Cellular Company had admittedly acted pursuant to representations made by the Federal Government through the De-Regulation Policy and the Cellular Policy by participating in the bidding process to acquire spectrum and a "Technology Neutral" licence. The status of the Cellular Company as a foreign investor is also acknowledged. The Bureau and the Investigating Officer in the instant case ought to have exercised extreme caution because any abuse of executive powers or reckless exercise thereof would have implications in the context of investor confidence and, resultantly, the economy. The documents placed on record also suggest the interest of foreign dignitaries in the Cellular Company thus raising concerns regarding foreign policy interests of the country. The manner in which this case has been presented to us and the facts and circumstances narrated above undoubtedly highlights how actions taken by the Bureau could have serious consequences for the economy, investment policies and foreign policy interests of the State.

46. The learned Additional Prosecutor General Accountability and the Investigating Officer, despite their able assistance and affording them several opportunities, were not able to demonstrably and sufficiently justify ordering the arrest of the Petitioners and, pursuant thereto, restricting their fundamental rights guaranteed by the Constitution. The exercise of the executive power to order the arrest of the Petitioners in the instant case was arbitrary, in violation of the principles and law highlighted in this judgment and could not be justified on the touchstone of the principles of proportionality and necessity. It also raises questions regarding professional expertise, proper training and qualification to deal with complex cases relating to white collar crime.

47. For what has been discussed above, we **allow** these petitions. Consequently the Petitioners are admitted to confirmed bail, subject to furnishing bail bonds in the sum of Rs. 500,000/- (Rupees five hundred thousand only) each with one or more sureties in the like amount to the satisfaction of the learned trial Court. The Investigating Officer shall be at liberty to impose such conditions as he may deem necessary for ensuring the attendance of the Petitioners.

48. Before parting we consider it necessary to record our observations based on the manner in which the case in hand has been dealt with. There is no doubt in our minds that corruption is one of the biggest evils that can plague the governance system of a country. Besides affecting economic development it also seriously undermines the rule of law. Although it affects everyone, but the most vulnerable and downtrodden are the real victims. The perception of corruption causes immense harm to the country's image and resultantly discourages investors from investing. Corruption, therefore, cannot be tolerated in any form. The

Ordinance of 1999 has been promulgated with the object to deal with corruption and corrupt practices and, thus, its effective enforcement in order to achieve the intended object is of paramount public interest. In this regard the Bureau has a pivotal role in detecting, investigating and prosecuting cases alleged to involve corruption and corrupt practices. An effective and efficient accountability process or mechanism is an integral part of a democratic system and a precondition for upholding the rule of law. But the foundational principle or requirement for an effective and credible accountability entity, such as the Bureau, is the trust and confidence of the people in its fairness, impartiality, professionalism and, above all, that it is free from discrimination. Arbitrary or indiscriminate exercise of executive powers vested in such entities, instead of achieving the public interest for which it has been established, could greatly harm other public interests. Arbitrary, reckless and unjustified exercise of executive power to arrest under the Ordinance of 1999 can have extremely harmful consequences for the governance system and the economy. The recent amendments made in the Ordinance of 1999, through the exercise of powers vested in the executive under Article 89 of the Constitution, is a manifestation and acknowledgment that the manner in which the powers have been exercised has had an impact on the bureaucracy and the business community. It is, therefore, an acknowledgment that abuse of the powers may be adversely impacting the governance system as well as the economy. This further highlights the importance of exercising the executive power of arrest under the Ordinance of 1999 justly, fairly, equitably and subject to the principles and law highlighted above. Across the board accountability in a transparent manner and free from discrimination and arbitrary exercise of powers is inevitable to meet the challenges faced due to the menace of corruption. Last but not the least is professional training, qualification and expertise of the investigators and prosecutors to deal with white collar crimes. We have no doubts regarding the dedication and integrity of the

investigators of the Bureau but they definitely have to be experts and trained professionals to deal with white collar crimes. We expect that the Federal Government and the Majlis-e-Shoora (Parliament) will consider to take appropriate measures in order to ensure that the accountability process is made effective, transparent and fair and that the Bureau is equipped and strengthened to meet the challenges and achieve the object for which it has been established. We also expect from the Bureau to be mindful of the consequences of excessive and arbitrary exercise of power of arrest relating to the constitutional rights, economy, governance system and foreign affairs interests. The corrupt must fear the Bureau while the innocent and honest repose confidence that they would not be wronged and be dealt with fairly. Arbitrary and indiscriminate exercise of power to arrest is in itself abuse of authority having deleterious consequences as discussed above.

(MIANGUL HASSAN AURANGZEB)
JUDGE

(CHIEF JUSTICE)