Repugnancy to Islamic Injunctions: Analysis & Legitimacy of National Accountability Ordinance 1999

Abstract: This article encompasses an analysis of provisions of NAB 1999 on the touchstone of their conformity with the injunctions of the Quran and Sunnah. The argument advanced in this respect is based on Article 203(d) of the Constitution of the Islamic Republic of Pakistan, under which FSC is vested with the power of examining and deciding questions of law tainted to be contrary to the injunctions of the Quran and Sunnah. Arguments made in this paper challenge Section 9(a)(iv) and Section 14(c) and (d) which are not in consonance with the injunctions of Islam, as appeared in the Quran and Sunnah. Pakistan's Islamic identity necessitates such questions pertaining to un-Islamic provisions in the laws of Pakistan always yielded debates and different opinions of scholars. Analysis of the NAB ordinance and its provisions discussed in the paper, which does not conform to the injunctions of Islam would inform and invoke legislators to reform legislation in Pakistan.

Introduction
The National Accountability Bureau was formed in the era of General Pervaiz Musharraf as a result of the NAB ordinance. The Ordinance empowered this agency with absolute powers of arrest, investigation and prosecution. Arbitrary powers and absolutism in other legal procedures were criticized by academics and law makers from time to time. This paper looks into the validity of provisions of the Ordinance which are contrary to the injunctions of Islam. The impugned provisions can be summarized in the way that: A trial which will be conducted under these above mentioned impugned provisions of the Ordinance, the person who is accused of accumulating assets and other resources and cannot convince or give an account of those and the same properties do not match with his known sources, the court in such case would be of opinion to hold the said person guilty of the offence of illegally obtaining such properties. Here also the presumption of innocence shall not be attracted, rendering the conviction invalid merely because it was based on conjecture.

This is the point which shifts the burden of proof on the defendants which is against Islamic injunctions and also against any norms and principles of the legal system. In order to question the validity of provisions of NAB Ordinance which have been claimed in this article to be repugnant to Islamic Injunctions are mainly two. First, the point of shifting the burden of proof which originally and principally should lie on the shoulders of the party alleging it but these impugned provisions shift this burden otherwise and require the defendant to establish his innocence and account for his assets and properties alleged to be obtained by illegal means. This is against all norms of proving an accusation. Secondly, a basic principle on which a judicial system functions is of giving sanctity and deference to the principle of presumption of innocence unless proven otherwise. On this point, both

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Muslim and Western jurists are unanimous on the view that a person accused of wrong should be treated as per the principle of; 'innocent until facts prove otherwise' This principle is also accepted and recognized by the fundamental rights granted by the UN's declaration on human rights.

**Literature Review**

**Objections on Impugned Provisions of NAB Ordinance**

It is important to mention here the articles of the constitution of Pakistan wherein it has been provided that there is no room for the enactment of laws which are contradictory to Islamic injunctions. In this respect, Objective resolution has been made a substantive part of the Constitution through Article 2-A of the Constitution, wherein it has been laid down that "The sovereignty over the entire universe belongs to Allah alone and the authority to be exercised by the people of Pakistan within limits prescribed by Him is a sacred trust. Under article 2 of the constitution, Islam shall be the State religion.

It is categorically provided under article 227 of the constitution of the Islamic Republic of Pakistan that Pakistani laws which are not in conformity with the Islamic injunctions are required to be made in consonance with the principles laid down in the holy Quran and Sunnah. For this purpose, the government of Pakistan has created two institutions which have been entrusted with the power of examining and deciding upon cases where the existing laws of Pakistan are challengeable on the grounds of being contrary to Islamic injunctions. The first institution which is entrusted with the task of examining the validity of laws in Pakistan on the touchstone of Islamic injunctions is the Council of Islamic ideology, whose observation and recommendation are merely persuasive and educative and not mandatory to be followed and complied with. The second institution formed for this purpose is the Federal Shariat Court which has a significant role to play in the Islamization of Pakistani laws because observations to be made by this court are mandatory and must be complied with where it finds that the law of the land challenged by a citizen or found at its own motion is contrary to the injunctions of Islam.

**The Status of Presumption in Islamic Law in the Light of Quranic verses, Traditions and Principles of Islamic Law**

Islamic jurists have given the degree and threshold required for proving a case in five different types ranging from level of doubt to an acceptance of certainty. The first one is certainty or . It is a complete and definite knowledge about the existence or nonexistence of anything. It is an established principle of the Islamic law that certainty cannot be dispelled with doubt. The second in number is Dominant conjecture or (نَتَاب). The existence or nonexistence of anything with some degree of preference to the other side. The example of نَتَاب is that if a virgin girl becomes pregnant, there is a dominant presumption that she has committed Zina.

Mere presumption نَظِف is the one where no preference is given to either side but it hangs in the balance. The other categories below نَظِف is “Doubt” Shak and wahm, a wrong idea or notion created in the mind of a person about anything. The jurists have allowed relying on the first three categories with certain conditions. Likewise negative presumption has been condemned while نَظِف has been appreciated, as appeared in the tradition that:” ظنّاً الاليم عيّراً “always think positively and attach better expectations with fellow Muslims. The word ظن” appeared in the holy Quran in the sense of baseless thinking, incomplete information mostly directed towards the criticism and objections raised by unbelievers about Islam and Muslims. The Muslims have been enjoined to avoid relying on and applying conjecture mostly because it ultimately leads towards a sin. Few verses of the holy Quran are reproduced in the following lines: Allah almighty says that:

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\text{أَخْيَارُ الْأَرْضِ أَءَامُهَا وَأَخْيَارُ الْقَرْنِينَ إِنَّ الْقَرْنِينَ إِنَّ الْقَرْنِينَ} \\
\text{لَا يَغْفِرُ اللَّهُ إِلَّا مَّا كَانَ لَهُمْ مِنْ أَمْثَالٍ} \\
\text{يَحْمِدُ اللهُ نَظُّورَهُ وَيَسْتَسْرُرُ وَيَقْتُلُ وَيَقْتُلُ وَيَسْتَسْرُرُ} \\
\text{وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ} \\
\text{يَسْتَسْرُرُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ وَيَقْتُلُ}
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But most of them follow nothing but fancy: truly fancy can be of no avail against truth(Yonos:36)
A review of Quranic Verses and Hadith and traditions from Islamic history shows that the impugned provisions of the NAB ordinance are contrary to the norms of Islamic Injunctions and also to any canon of the legal system.

**Principle of Islam on Presumption made with Error**

In Islam, another important principle is that:

'Conjecturing which is made with error is invalid'.

In Islamic principle, the concept of presumption is allowed in certain cases as a procedural step towards dispensation of justice, however, where the same presumption is rebutted in the judicial process with a certain fact and testimony, such presumption becomes invalid and is laid to rest to be relied on. This is equally applied to the criterion given in ijtihad. For example, if a mujtahid makes mistakes in ijtihad which is established otherwise by certain evidence in subsequent facts, such ijtihad becomes invalid and it has to be based on new evidences. Similarly, this principle is given in Islam for judges to make recourse in cases where they decide cases on wrong perceptions and judgments.

About the impugned law, the viewpoint of the superior courts of Pakistan is cited as:

1. Supreme court of Pakistan has clearly established in its decisions that although the impugned law (NAB ordinance) places the burden of proof on defendants, yet this is primarily the responsibility of the prosecution to establish an initial case against defendants and the accused will be presumed innocent until proven otherwise (PLD, 2008 SC, page 160)(SCMR 2009,790).

2. Presumption against accused. The Supreme court has also established that where distinction regarding civil and criminal liability is not made in the process of prosecution, it amounts to favoring prosecution and is unjust to the interests of defendants (PLD 2001 SC 607), (SCMR 2008,1118).

3. In another judgment, the supreme court declared that the accused would be treated
guilty only in circumstances where the prosecution succeeds in establishing initial charges against the accused. Nonetheless, the burden of proof would lie on the prosecution as an initial step to proceed in the judicial process. (PLD 2004, Quetta, 136)

4. It is also the policy of Islam to protect the privacy of individuals and such crimes should be overlooked, particularly making such erring scandals inappropriate and not advisable in Islam. For example, this is provided in Hadith that:

In this Hadith, it was provided that where there is a way or iota of justification to ward off Hadd, it should be allowed to escape such punishment. This principle further explains that a person who is in authority to dispense justice should be better to err in delivering justice than making a mistake in awarding a sentence to an innocent person (Mubarakfori, 1979, page 688).

Following the above mentioned principle laid down in the Hadith, where there is little chance of doubt, it should go in favor of the accused as in Islam. Doubt invalidates the punishment of Hadd. Similarly, the principle laid down for a judge in Islam to decide cases is that better if he erroneously acquits a person than punishing someone mistakenly.

This principle is evident in the following Hadith; 'that for an imam, it is better to make a mistake in absolving someone than punishing someone erroneously' This shows how is it inappropriate in Islam to punish an innocent person wrongfully. Furthermore, the sanctity of an innocent person to be punished wrongly is also established when doubt in a testimony makes punishment invalid in Islam. This principle is applicable to other kinds of cases in Islam such as Hudud, Qisas and Tazir punishments (‘Awdah ‘Abd al Qadir, nd, section, 183).

Since human lives are the most precious creature on earth, any harm to the lives of humans is judged with the strict criterion of justification and parameters. The right to life is granted to humans by the Holy Quran. Therefore, the criterion for proofing a crime is required to be
beyond a reasonable doubt in order to ensure an innocent person might not suffer at the hands of fallibility.

**Conclusion**

In the light of the above discussion, it is established that the principle which relates to a claim of innocence until proven guilty is a cardinal principle of Shariah law. The impugned provisions of the NAB ordinance on this principle deviate from the injunctions of Islam and also against the norms of western judicial procedures of the dispensation of justice. It has also been discussed in this paper that placing the burden of proof on the shoulders of a defendant, which initially lies on the prosecution, is contrary to the Hadith which states that,

اِلْبِيْنَةُ عَلَى الْمَدِيْنِي وَالْيَمِينِ عَلَى أَنْ كُرُ

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In the above analysis and circumstances, it has been discussed and established that clauses (IV) of Sub-Section (a) to Section 9 and (c) and (D) of Section 14 of the National Accountability Ordinance, 1999 are repugnant to the injunctions of Islam. The national accountability bureau was formed to check corrupt practices in the country but at the same time, the relevant law and its procedure are required to be according to the international standards of a fair trial. It is equally required to be in consonance with injunctions of Islam. It is required by the objective resolution which was made part of constitution through article 2-A wherein it is laid down that sovereignty belongs to Allah and people will exercise authority under the auspices of Allah's trust given to mankind. Thus, this paper concludes that the impugned provisions of NAB ordinance discussed here above are required to be amended in accordance with the requirement of article 227 of the constitution of Pakistan, wherein it is required as a direction of the constitutional obligation to make all laws in the state of Pakistan in consonance with the injunctions of Islam.
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