IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE YAHYA AFRIDI
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI
MRS. JUSTICE AYESHA A. MALIK

Constitution Petition Nos.24, 25, 26, 27 & 28 and 30 of 2023
(Petitions to declare the trials of civilians under the Army Act, 1952 as violative of Constitution)

Jawwad S.Khawaja — *In Const.P.24/2023*

Aitzaz Ahsan — *In Const.P.25/2023*

Karamat Ali and others — *In Const.P.26/2023*

Zaman Khan Vardag — *In Const.P.27/2023*

Junaid Razzaq — *In Const.P.28/2023*

Supreme Court Bar Association of Pakistan, through its Secretary, Islamabad — *In Const.P.30/2023*

vs

Federation of Pakistan and others — Respondents

For Petitioners : Ch. Aitzaz Ahsan, Sr. ASC
Sardar Muhammad Latif Khan Khosa, Sr. ASC
Mr. Abid S. Zubairi, ASC
Khawaja Ahmad Hosain, ASC
Assisted by Ms. Rida Hossain, Adv.
Mr. Faisal Siddiqui, ASC
Sardar Shahbaz Ali Khosa, ASC
Mr. Muhammad Vawda, ASC

Zaman Khan Vardag (In person)
(Via video link, Lahore)

Mr. Salman Akram Raja, ASC
a/w Mr. Asad Rahim Khan, Adv.
Syed Rifaqat Hussain Shah, AOR

Ms. Bushra Qamar, ASC
Mr. Muqtedir Akhtar Shabbir,
(Members, Supreme Court Bar Association)

For the Federation	:	Mr. Mansoor Usman Awan, Attorney General for Pakistan Ch. Aamer Rehman, Addl. Attorney General *Assisted by* Ibrahim Khan, Mr. Umair Ahmad, Adv. M.r Ahmed ur Rehman, Mr. Yasir Shah, And Mr. Saad Javid Sattil, Associates
For Govt. of Punjab	:	Mr. Sana Ullah Zahid, Addl. AG, Pb.
For Govt. of KP	:	Mr. Amir Javed, Advocate General, KP *(Via video link, Peshawar)* Mr. Sultan Mazhar Sher Khan, Addl. AG, KP
For Govt. of Sindh		Mr. Akbar Hussain, AG. Sindh Mr. Saifullah, Addl. A.G. Sindh
For Govt. of Balochistan	:	Mr. Muhammad Ayaz Khan Swati, Addl. AG, Balochistan
For Respondent No.9 in CP#25/23:		Mr. Uzair Karamat Bhandari, ASC
For (then) Interior Minister:		Mr. Shah Khawar, ASC
For respondent No.12 in CP#25:		Mr. Ashtar Ausaf Ali, ASC *(via video link, Lahore)*
For (then) Defence Minister:		Mr. Irfan Qadir, ASC *(via video link, Lahore)*
Dates of hearing	:	22.06, 23.06, 26.06, 27.06, 18.07, 19.07, 21.07, 01.08, 02.08, 03.08 and 23.10.2023

JUDGMENT

Munib Akhtar, J.: Lord Atkin, in one of his most well-known speeches (a famous dissent instantly recognizable), said that in England, even amid the clash of arms, the laws were not silent, that they spoke the same language in peace and in war. Delivered in 1941, the opinion has resounded through the decades and is set to echo down the ages. It was the direst of times, the darkest of hours. Great Britain and her Allies were engaged upon a titanic, globe-spanning struggle against the Axis Powers. Though (the

utterances of some to the contrary notwithstanding) things in this country at the present time are, by the Grace of the Almighty, not at all comparable to the perilous times in which Lord Atkin protested ("even though I do it alone"), in their own way the issues raised are nonetheless stark and compelling. For the question put to the Court is this: in respect of fundamental rights, in relation to the trial of civilians by courts martial whatever the circumstances may be, what is the language of the Constitution? What language should—nay, must—the Constitution speak? Very respectfully, the petitioners ask: what says the Court? On 23.10.2023, the following answer was given ("short order"):

2. "For detailed reasons to be recorded later, and subject to such amplification and/or explanation therein as is considered appropriate, these petitions are decided in the following terms:

i. It is hereby declared by Mr. Justice Ijaz ul Ahsan, Mr. Justice Munib Akhtar, Mr. Justice Sayyed Mazahar Ali Akbar Naqvi and Mrs. Justice Ayesha A. Malik that clause (d) of subsection (1) of Section 2 of the Pakistan Army Act, 1952 (in both of its sub clauses (i) & (ii)) and subsection (4) of Section 59 of the said Act are ultra vires the Constitution and of no legal effect.

ii. Without prejudice to the generality of the foregoing the trials of civilians and accused persons, being around 103 persons who were identified in the list provided to the Court by the learned Attorney General for Pakistan by way of CMA No.5327 of 2023 in Constitution Petition No.24 of 2023 and all other persons who are now or may at any time be similarly placed in relation to the events arising from and out of 9th and 10th May, 2023 shall be tried by Criminal Courts of competent jurisdiction established under the ordinary and / or special law of the land in relation to such offences of which they may stand accused.

iii. It is further declared that any action or proceedings under the Army Act in respect of the aforesaid persons or any other persons so similarly placed (including but not limited to trial by Court Martial) are and would be of no legal effect.

iv. Mr. Justice Yahya Afridi reserves judgment as to para (i) above, but joins the other members of the Bench as regards paras (ii) and (iii)."

Set out below are our reasons for this answer.

3. For present purposes the Constitution may be regarded as existing and operating in either one of two primary "modes" or states. The first is its operation in the ordinary course, which may

be regarded as the "default" mode. (This may be likened, echoing Lord Atkin, to its "peacetime" operation). The other is when it operates in a time when there is in force a Proclamation in terms of Part X, the Emergency Provisions. Of particular relevance here is the Proclamation of Emergency that can be issued in terms of Article 232, when there is a threat to the security of the country, in whole or in part, by war or external aggression or internal disturbance beyond the power of a Provincial Government to control. (A Proclamation under Article 232 may be likened, again echoing Lord Atkin but subject to strong caveats and heavy qualifications, to its "wartime" operation.) It may be stated at the outset that in the present context it is, strictly speaking, constitutionally not relevant whether the country is in a state of peace or war. What matters is whether the Constitution is operating in the normal course, or a Proclamation under Part X (and in particular, of Emergency) is in the field. There is also a third, though secondary, state or "mode" in which the Constitution may operate. That is when the Federal Government, in lawful exercise of its powers under Article 245, has called upon the Armed Forces to act in aid of civil power, or the Armed Forces are, under the directions of said Government, defending Pakistan against external aggression or threat of war. This secondary state may exist and operate in either of the two principal "modes".

4. During the course of submissions, our attention was invited to a number of authorities. Of these, three in particular require mention: *F.B. Ali v State* PLD 1975 SC 506 (hereinafter "*F.B. Ali*"), *Liaquat Hussain and others v Federation of Pakistan and others* PLD 1999 SC 504 (hereinafter "*Liaquat Hussain*") and *District Bar Association, Rawalpindi and others v Federation of Pakistan and others* PLD 2015 SC 401 ("*District Bar Association*"). The first case involved consideration of the relevant provisions of the 1962 Constitution. The provisions referred to in para (i) of the short order were inserted in the Pakistan Army Act, 1952 ("Army Act") in 1967. These were enacted at a time when the country was under a Proclamation of Emergency, under Article 30 of the late Constitution which was in *pari materia* Article 232 of the present Constitution. The acts by reason of which Lt. Col (R) F.B. Ali and his co-accused stood charged and tried by court martial under the Army Act were said to have been done during the period from

August 1972 to 30th March 1973. At that time the country was governed by the Interim Constitution, and under a (deemed) Proclamation of Emergency under Article 139 thereof. Again, that provision was in *pari materia* the present Article 232. In the second of the cases noted above, the country was under a Proclamation of Emergency under Article 232 and the Armed Forces had also been called in aid of civil power under Article 245. At issue was the constitutionality of an Ordinance of 1998, which did not amend or as such directly apply the Army Act but set up military courts outside the military justice system. The third case had to consider certain amendments made to the Constitution itself, which made possible the trial of civilians by courts martial under the Army Act, the statute being amended along with the Constitution for such purpose. Those amendments, both constitutional and statutory, were subject to successive sunset clauses which expired in 2019.

5. It will be seen from the foregoing that the present challenge is the first time (other than, perhaps, *Shahida Zahir Abbasi and others v President of Pakistan and others* PLD 1996 SC 632, where however the matter proceeded on markedly different lines) that this Court has been called upon to directly consider, in the light of fundamental rights, the very basis of the trial of civilians by courts martial at a time when the Constitution is operating in the normal course. The vision of the Court is therefore unobstructed and untroubled by any constitutional occlusions. We will certainly also have to consider the effect of the Emergency provisions. But the pivot on which these petitions turn is the “default” mode of the Constitution.

6. First however, the facts. These will be stated with brevity and at a somewhat heightened level of generality. This is for two reasons. Firstly, as directed in terms of the second and third paras of the short order, there are a large number of persons (and not just the around 103 referred to therein) who will face trials in criminal Courts of competent jurisdiction established under the ordinary and/or special law for the offences of which they stand accused. While those trials will lead to verdicts dependent solely on the evidence led and other material/record as is relevant for criminal trials, the less said here of the factual matrix the better. Secondly, these petitions have, as is clear from the short order and

is elaborated below, been decided essentially on the constitutional plane because that was primarily (and in some cases solely) the ground taken before the Court. (There was one petition in which only non-constitutional grounds were taken.) The facts need therefore be stated only to the extent as is required to anchor the considerations relevant for this judgment, and no further.

7. Over two days, the 9th and 10th of May, 2023, a series of events unfolded across the country (though primarily in two Provinces) that saw an unprecedented assault on many military and defense installations, and which included the desecration of monuments commemorating the martyrs of the nation and even the ruination of the official residence of a Corps Commander. The condemnation of these acts was immediate and thunderous. The reaction of the Army High Command was severe as was that of the then Federal Government (comprising of elected representatives), according to the material and record placed before the Court. What is of importance is the statements made, and resolve declared, at the highest levels that the persons who stood accused of these offences were to be tried by courts martial under the Army Act. The petitioners placed reliance on news reports regarding a Special Corp Commanders meeting held at the General Headquarters (GHQ) on 15.05.2023, the 81st Formation Commanders conference held there on 07.06.2023, the approval granted by the Federal Cabinet on 19.05.2023 to decisions taken in the National Security Committee (which were along the same lines) and a resolution moved in the National Assembly and passed by that House on 12.06.2023.

8. We pause to note that all of the petitioners before us were as one in denouncing these acts and events, which none found defensible. All were united in unequivocally stating that those who had committed criminal offences were liable to face in full the awesome majesty of the law.

9. In the immediate aftermath of the events of 9th and 10th May, several FIRs were registered in various police stations across the country. These FIRs were primarily (though not exclusively) in terms of offences committed under the Anti-Terrorism Act, 1997. Some of those FIRs were placed on the record, both with reference

to the persons therein implicated but also as a sampling of the factual basis that led to the filing of the present petitions. These FIRs involved initially dozens and then hundreds of persons as the investigations proceeded. These persons were almost entirely civilians who had no, and it appears had never had any, connection with the Armed Forces, though a very few were possibly retired personnel. The criminal courts under whose jurisdiction the offences, and hence the accused, came were the Anti-Terrorism Courts (ATCs) created under the aforementioned Act. However, it appears that thereafter, and starting as early as 20.05.2023, the concerned Army authorities made a series of applications before the ATCs, under s. 549 of the CrPC, seeking the transfer and delivery of the accused named therein to the said authorities for their trial, under ss. 2(1)(d) and 59(4) of the Army Act, for offences committed against the Official Secrets Act, 1923. In other words, the Army authorities claimed jurisdiction over the said persons for their trial by court martial. All of these applications were allowed and the named accused, eventually numbering around 103, were delivered to the custody of the Army authorities. This then was the situation that set the stage for, and triggered the filing of, the present petitions. The principal question raised is that it is constitutionally impermissible for civilians to be tried by courts martial under the Army Act. Some of the petitions framed the relief sought with specific reference to the provisions set out in para (i) of the short order, while others stated their claim in broader terms. But, however viewed, the point in issue boiled down to what has just been stated. There was, as noted, one petition that did not raise any constitutional ground for challenging the trial of the civilians by courts martial.

10. With the factual matrix set and the constitutional challenge established, we turn to the submissions by learned counsel for the parties. In Const.P 24/2023 Mr. Ahmed Hosain, ASC submitted contended that s. 2(1)(d), in both its sub-clauses (i) and (ii), was in conflict with the legislative intent of the Army Act, i.e., regulating and maintaining discipline of the members of the Armed Forces in exercise of their duties, and thus directly affected the guaranteed fundamental rights under Articles 9, 10A, and 25 of the civilians brought to trial by courts martial. The provisions did not fall within the scope of the ouster clause under Article 8(3)(a). It was argued

that the jurisprudential foundation to strip civilians of their fundamental rights, otherwise not voluntarily regulated by the military laws, did not exist. Learned counsel contended that the courts martial did not comply with the requirements of Article 10A on account of fact that they were manned by Army officers who thereby assuming judicial functions, a substantial right of appeal outside the Army chain of command was non-existent, and the said forums did not fall within the scope of Article 175. Learned counsel challenged the applicability of *F.B. Ali* and sought to distinguish it on the ground that the 1962 Constitution, in relation to which the matter was decided, did not recognize the fundamental right to a fair trial. More fundamentally, learned counsel sought a declaration that *F.B. Ali* was wrongly decided. *District Bar Association* was distinguished on multiple counts, namely: (a) the civilians were there made subject to the Army Act through a constitutional amendment; (b) said amendments had a sunset clause; and (c) the amendments which subjected civilians to courts martial were specifically included in the Part I of the First Schedule to the Constitution.

11. In Const.P 25/2023, Sardar Muhammad Latif Khan Khosa, Sr. ASC contended that trials of civilians by courts martial by virtue of the noted provisions of the Army Act were violative of Articles 4, 9, 10A, 25 and 175 of the Constitution. It was argued that s. 94 of the Army Act, read with Criminal Procedure (Military Offenders) Rules, 1970 (framed under s. 549, CrPC) and in terms of which orders were obtained by the Army authorities for delivery to their custody of persons accused of offences committed on the 9th/10th of May, were discriminatory and violative of Articles 10A, 25 and 175 of the Constitution. Learned counsel argued that the transfer of the custody was illegal as s. 549 was exclusively meant for members of the Armed Forces being handed over to their commanding officers. It was submitted that in the facts and circumstances of the case the 1997 Act was applicable and the accused persons were triable under that law and by the ATCs established in terms thereof.

12. In Const.P 26/2023, Mr. Faisal Siddiqui ASC, at the very outset submitted that he did not challenge the vires of the noted provisions of the Army Act. The stance of learned counsel was that

the charging of civilians under the Army Act read with the Official Secrets Act, 1923, in the facts and circumstances before the Court was mala fide and discriminatory. Learned counsel argued that the presence of a dual jurisdiction, i.e., criminal courts under the general and ordinary law of the land and courts martial, presented a situation where in the former case the accused retained all rights intact while in the latter they did not. This exercise of unregulated discretion was arbitrary and discriminatory. Reference was made by learned counsel to *F.B. Ali* and *District Bar Association*. It was argued that the principle of reasonable classification was a distinguishing feature and civilians should only be subjected to military laws in exceedingly rare circumstances. The present situation was manifestly not one such.

13. In Const.P 28/2023, Mr. Salman Akram Raja ASC made submissions on how, since the judgment in *F.B. Ali*, the legal landscape had evolved and changed radically. It was argued that in light of Article 175(3) and how this provision had been interpreted and understood by various judgments of this Court, there remained no justification for trial of civilians before courts martial, presided over and manned by Army officers and thus by the Executive branch. In this regard learned counsel submitted that a distinction had to be drawn between the trial of members of the Armed Forces and civilians by courts martial. For purposes of Article 175, he did not challenge the trial of the former; it was only that of the latter that was objectionable. A line was sought to be drawn between the two categories. Learned counsel contended that the instant deprivation of fundamental rights of the accused who stood transferred to Army custody on merely an accusation was contrary to the constitutional scheme and ex-facie discriminatory. In support of his contentions, the learned counsel inter alia placed reliance on *Liaquat Hussain, District Bar Association* and *Mushtaq Ahmed and others v Secretary Ministry of Defence and others* PLD 2007 SC 405.

14. Mr. Uzair Karamat Bhandari ASC, representing the respondent No. 9 in Const.P 25/2023, supported the arguments of learned counsel for the petitioners and contended that under the current constitutional dispensation civilians could not be tried by courts martial. Learned counsel relied on *Liaquat Hussain* and also

referred to *F.B. Ali*. It was argued that the latter judgment was premised on a constitutional context without Articles 175(3) and 10A, and at a time when the period of five years provided under Article 175(3) had not lapsed. He argued that the right of trial and appeal before an impartial forum was a recognized fundamental right well established by, and attested in, the case law and cited various decisions of the Court in this regard. Learned counsel submitted out that if Article 8(3)(a) were not exclusive to members of the Armed Forces and the other disciplined forces therein specifically mentioned, Article 8(3)(b) would become redundant. It was submitted that if at all civilians could be tried by court martial that would require a constitutional amendment and even then would be permissible only in highly exceptional and well-defined circumstances involving matters of national security.

15. Mr. Abid S. Zuberi ASC, appearing on behalf of the Supreme Court Bar Association in Const.P 30/2023 contended that the noted provisions of the Army Act were violative of Article 175, as it thereby led to the creation of a parallel judicial system not under the administrative control of any High Court. It was argued that a civilian's trial by court martial was unconstitutional unless there was a clear nexus between that civilian's actions and the discipline of the Armed Forces. He emphasized even such a nexus was not enough in and of itself. Any such trial had to be under the aegis of a constitutional amendment. Seeking to distinguish *F.B. Ali*, learned counsel contended that it could not serve as a precedent in this case as the right to enforce fundamental rights were suspended under Article 30 of the 1962 Constitution at the relevant time. Learned counsel asserted that a mere allegation did not automatically make a person an "accused" under criminal law jurisprudence, and thus the application of s. 2(1)(d) could not be triggered merely on such basis. It was argued that until a civilian was formally charged the transferring of custody to the Army authorities under s. 549 CrPC was illegal.

16. The learned Attorney General for Pakistan, Mr. Mansoor Awan ASC, began his submissions by referring to the voluminous material placed on record, both documentary and pictorial, whereby a detailed account was presented of the events and incidents that took place across the country on 9th and 10th May

2023. The learned Attorney General submitted that the offenses under consideration had a direct nexus with the discharge of duties of the members of the Armed Forces and their functioning. Contesting the submission by learned counsel for the petitioners, the learned Attorney General maintained that no constitutional amendment was required and that the noted provisions of the Army Act were within the scope of Article 8(3)(a). In this regard, the learned Attorney General submitted that ss. 2(1)(d) and 59(4) were directly relatable to the "proper discharge of duties" by the members of the Armed Forces within the meaning of the cited constitutional provision. The events of the 9th and 10th of May were, even on a prima facie basis, an interference with such discharge of duty and thus the accused, though civilians, could be properly made subject to the Army Act and tried by courts martial. The noted provisions, falling as they did within the scope of Article 8(3)(a), were constitutionally protected and immunized from the applicability of fundamental rights. Reliance was placed on *Said Muhammad Zaman and others v Federation of Pakistan and others* 2017 SCMR 1249. The subjecting of civilians to courts martial, the learned Attorney General argued, was well within the constitutional scheme and in this regard reliance was placed also on clause (3) of Article 199. The learned Attorney General placed strong reliance on *F.B Ali*, *Liaquat Hussain* and the *District Bar Association* and read out lengthy extracts from these decisions. Relying in particular on one of judgments in *F.B. Ali* (which was not, however, the judgment of the Court), the learned Attorney General submitted that the courts martial had the indicia and ingredients of, and met all the requirements for, a fair trial. In this context, the Attorney General read through, and explained in detail, the working of the various stages of trial before a court martial as set out in the Army Act and the Pakistan Army Act Rules, 1954 ("1954 Rules"). On instructions, the learned Attorney General more than once made a categorical statement at the bar that in addition to safeguards already built into the system which ensured a fair trial, the evidence to be recorded in the trials of the around 103 persons would have two additional measures. Firstly, the evidence would be recorded in full compliance of the requirements of the Qanun e Shahadat Order, 1984 and secondly, full reasons would also be given for any verdict of guilt handed down by a court martial. Thus, the learned Attorney General

emphasized, there could not possibly be any danger to any rights of the said civilians for purposes of ensuring a fair trial. The learned Attorney General further submitted that the courts martial established under the Army Act were not courts within the meaning of Article 175(1). They were, rather, special tribunals constitutionally sanctioned. Reliance was placed on various cases in this regard. It was contended that the challenges to the trial by courts martial of civilians on both constitutional and other grounds were without merit and failed. The petitions ought therefore to be dismissed.

17. Having heard learned counsel for the respective parties and after consideration of the case law and the material placed on record, we concluded that the petitions ought to be disposed of in the manner as set out in the short order.

18. We begin by taking a look at the provisions noted in para (i) of the short order. Both were added to the Army Act in 1967, by two Ordinances (respectively III and IV of 1967) each of which was purely amending in nature. By reason of clauses (3) and (4) of Article 29 of the 1962 Constitution, these Ordinances, having secured the approval of the National Assembly, were deemed to have become Acts of the Central Legislature. Both clause (d) of s. 2(1) and s. 59(4) have remained unamended since then. Subsection (1) of s. 2 lists the persons who shall be subject to the Army Act, and clause (d) provides as follows:

> "(d) persons not otherwise subject to this Act who are accused of—
>
> (i) seducing or attempting to seduce any person subject to this Act from his duty or allegiance to Government, or
>
> (ii) having committed, in relation to any work of defence, arsenal, naval, military or air force establishment or station, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Pakistan, an offence under the Official Secrets Act, 1923;"

19. As the word "accused" indicates, a person not otherwise subject to the Army Act becomes so subject only if he (or, to say it once and for all, she) commits a criminal offence that falls in either of the sub-clauses. Offences in this country are statutory in nature. Therefore, for clause (d) to at all become applicable, anyone

seeking to subject a person (hereinafter for convenience referred to as a "civilian") to the Army Act in terms thereof, has to show some statute and some provision of such statute creating a criminal offence, as complies with either of the sub-clauses. However, the path to subjection in terms of each sub-clause is different. Sub-clause (i) does not identify any statute as such. It only gives a description of the offence. Therefore in principle any statute which creates an offence the ingredients or elements of which match the description could result in the civilian becoming subject to the Army Act. The importance of this lies in the fact that the same offence (i.e., having the same ingredients or elements) can be created by more than one statute. This is in fact true of the description contained in sub-clause (i). There are at least two such statutes (which were both referred to and considered in *F.B. Ali*). One of these is the Army Act itself, which has an offence fitting the description in its s. 31(d). The other is s. 131 of the Pakistan Penal Code. In material respects each of these offences matches the other, and the description given in sub-clause (i).

20. Sub-clause (ii) takes a different approach. It identifies the statute where the offence must be created and located. This is the Official Secrets Act, 1923 ("1923 Act"). But the sub-clause has two requirements, which result in two consequences. Firstly, not only must the offence be under the 1923 Act, its ingredients or elements must also fit the description given in the sub-clause. In other words, it is not every offence under the 1923 Act that can make a civilian subject to the Army Act. It is only that offence which fits the stated description. Any other offence, if committed by a civilian, would not make him subject to the Army Act. Secondly, if there is any other statute (including, though that is not in fact the case, the Army Act itself) that creates an offence the ingredients or elements of which match the description, such offence, if committed by a civilian, would not make him subject to the Army Act. The other provision, s. 59(4), will be treated later; clause (d) of s. 2(1) is by far the more important of the provisions insofar as concerns the issues that require determination. The effect of any civilian becoming subject to the Army Act by reason of either sub-clause of clause (d) is of course that he becomes subject to the whole of the statute. In practice, the principal consequence

ensuing from such subjection is that he becomes liable to be tried for the relevant offence by court martial under the Army Act.

21. With this initial look at clause (d) and its sub-clauses, we turn to take up the first constitutional challenge thrown to the trial of civilians by courts martial. This was in terms of Article 175 of the Constitution, the contention being that such trials were ultra vires by reason of being before forums that were alien thereto, or which were fundamentally inconsistent therewith. There were three strands to the argument. One was that courts martial were not courts at all, and hence no jurisdiction (or at least none relevant for present purposes) could be conferred on them by reason of the embargo contained in Article 175(2). The second was that even if they were courts, they violated the requirement of clause (3) inasmuch as they were manned by military officers, i.e., the executive branch. In this context it was contended that all remedies by way of review or appeal, as provided under the Army Act, lay wholly within the military chain of command or under its control and therefore courts martial were constitutionally invalid. The third facet was that a line ought to be drawn for purposes of Article 175 between civilians on the one hand and members of the armed forces on the other. Whatever may be the constitutional status of courts martial vis-à-vis the latter, it was argued that at least for the former, trial before such a forum ought to be regarded as unconstitutional.

22. We may note at the outset that the third strand of the argument is unattractive and unpersuasive. Courts martial can, and do, impose punishments of all sorts, including the death sentence. The members of the Armed Forces are as much citizens of Pakistan as are civilians. If at all courts martial are unconstitutional forums by reason of, or with reference to, Article 175, then simply to draw an artificial line through this provision which puts members of the Armed Forces on one side and civilians on the other is unseemly. If civilians are beyond the reach of courts martial, then the argument must be placed on a constitutional footing firmer and surer than a separation essentially arbitrary. In our view, the challenge under Article 175 requires consideration of the following question: what is the legislative competence in respect of the military justice system, which is firmly grounded in,

and anchored by, the courts martial? Here, a distinction must be drawn between courts martial themselves and remedies that may lie or be made available against verdicts thereof, e.g., by way of review or appeal. We are concerned only with the former. To answer this question we will have to do an historical analysis. However, we begin by taking up another point, even though at first sight it may seem somewhat of a digression.

23. On Partition, the Government of India Act, 1935 ("1935 Act"), as adapted in each case under the Indian Independence Act, 1947, was the first constitution for both the Dominions of Pakistan and India. In India the post-freedom constitution came into effect in 1950; in our case, we had to wait till 1956. It will be recalled that the 1935 Act conceived a federal structure for the governance of (British) India, which was maintained by both Dominions on Independence. Legislative competences were there divided into three lists, one each excusive to the Federation and the Provinces, and the third concurrent between them. This scheme was carried over into the Indian Constitution and indeed the 1956 Constitution as well, with many entries being incorporated as they stood in the 1935 Act.

24. On 13.02.1948, entry No. 1 of the Concurrent Legislative List of the 1935 Act as applicable in Pakistan was amended, such that the existing entry became clause (a), and a new clause (b) was inserted. As so amended, the entry was as under:

> "1.—(a) Criminal law, including all matters included in the Indian Penal Code at the date of the passing of this Act, but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of His Majesty's naval, military and air forces in aid of the civil power.
>
> (b) Measures to combat certain offences committed in connection with matters concerning the Federal and Provincial Governments and the establishment of a police force for that purpose."

We may note that entry No. 1(a) eventually became entry No. 1 of the erstwhile Concurrent Legislative List ("Concurrent List") of the present Constitution, while entry No. 1(b) was entry No. 16. "Criminal law" is of course still a concurrent matter, notwithstanding the omission of the Concurrent List by the 18th

Amendment (2010). Also on 13.02.1948, in exercise of the newly conferred legislative competence in terms of clause (b), the Pakistan Special Police Establishment Ordinance, 1948 was promulgated, establishing an eponymously named new federal police force. (This Ordinance was ultimately repealed by the Federal Investigation Agency Act, 1974, whereby the eponymous agency was created, which still continues to exist and act.) Finally, on 11.06.1948 the Pakistan Criminal Law Amendment Act, 1948 ("1948 Act") was enacted. This created new federal Courts—known as Special Judges—of criminal jurisdiction to try offences as specified therein, which had, inter alia, been investigated and sent up for trial by the aforementioned police force.

25. In 1953, one Muhammad Yusuf, a Magistrate first class, was tried before, and convicted by, a Special Judge under the 1948 Act (as amended) for having taken a bribe of the then undoubtedly outrageous sum of Rs. 700/-. In his appeal to the Dacca High Court, reported as *Muhammad Yusuf v Crown* (1955) 7 DLR 302, the appellant took a constitutional objection to the constitution of the Special Judge, i.e., a Court of law exercising criminal jurisdiction created by the Federation. It was contended that entry No. 1 of the Provincial List, inter alia, placed the legislative competence in respect of "the administration of justice; [and] constitution and organisation of all courts, except the Federal Court" exclusively in the Provincial domain. Hence, the 1948 Act whereby a federal law constituted a court was *ultra vires* the 1935 Act.

26. We pause to note that a similar question had already arisen under the Indian Constitution. The first entry of the exclusive State (i.e., Provincial) List was, in terms as presently relevant, identical to entry No. 1 of the Provincial List of the 1935 Act. In *State of Bombay v Narottamdas Jetha Bhai* AIR 1951 SC 69, a judgment noted and considered by the Dacca High Court, it was held that the competence to constitute courts was indeed exclusive with the States. In India, the matter was finally resolved in 1977 when, by a constitutional amendment, the relevant portion was removed from entry No. 1 and shifted to a newly created entry No. 11A of the Concurrent List.

27. The Dacca High Court rejected the constitutional challenge by taking an innovative and interesting approach. In upholding the legislative competence of the Federation to constitute a court of criminal jurisdiction, it relied on entry No. 2 of the Concurrent List. This provided as follows: “Criminal Procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act”. This entry eventually became entry No. 2 of the erstwhile Concurrent List of the present Constitution; “criminal procedure” continues to be a concurrent subject. The learned High Court reasoned that this entry included not only matters relating to criminal procedure *stricto sensu* but also all matters included in the CrPC (as on the relevant date) even if they were not matters of procedure. Now, the CrPC then provided for the constitution of courts of criminal jurisdiction (and indeed, continues to do so). According to the learned High Court this was, in constitutional terms and by reason of entry No. 2, the grant of a (concurrent) legislative competence. Entry No. 1 of the Provincial List related to courts of general jurisdiction. Entry No. 2 of the Concurrent List conferred a competence in relation to courts under a special law. In other words, in respect of the constitution of courts exercising specific (i.e., special) criminal jurisdiction, the competence was not exclusive but concurrent. The 1948 Act was therefore a valid piece of legislation inasmuch as it created criminal courts of special jurisdiction. The constitutional challenge accordingly failed. The appeal was also otherwise found to be without merit.

28. Undeterred, Muhammad Yusuf took the matter to the Federal Court where he renewed his constitutional ground. His appeal was dismissed: *Muhammad Yusuf v Crown* PLD 1956 FC 395 (“*Muhammad Yusuf*”). The Federal Court declined to determine the correctness or otherwise of the reasoning of the High Court (pg. 400) and instead found the legislative competence for the 1948 Act, and the constitution of a court of criminal jurisdiction, i.e., the Special Judge, in clause (b) of entry No. 1 of the Concurrent List (pg. 400-401). In addition, when presented with the decision of the Indian Supreme Court noted above, the Federal Court went on to hold that entry No. 15 of the Concurrent List (“Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list”, which corresponded to entry No. 46 of

the erstwhile Concurrent List of the present Constitution) gave "to the Federal Legislature the power to constitute special Courts *because the constitution of such Courts is itself a measure of the kind mentioned in entry 1 (b)*" (pg. 402; emphasis supplied).

29. In our view, the litigation referred to above, and in particular the decision of the Federal Court, establishes that the legislative competence regarding the constitution of courts is not exclusively confined to entries in the legislative lists as refer specifically to such matters. Though such a conclusion would be rare, depending on the subject matter and context, even an entry (such as No. 1(b)) that ostensibly had nothing at all to do with courts and their constitution and jurisdiction could yet enfold precisely a competence of this nature. With this precedent in mind, we turn to look at the genesis of, and legislative competence in relation to, the military justice system.

30. The history of the armed forces employed and deployed by the British in India, from their origin in the time of the East India Company and, on eventual displacement of that entity by direct rule by the British Government by the Proclamation of 1858, and the creation and coming into being of the (British) Indian Army provides the necessary backdrop to understanding how the military justice system came to be. The East India Company was subject to (some, and increasing) legislative control even before the events of 1857. In respect of the (British) Indian Army the historical background is set out in Chapter I of Part I of the *Manual of Indian Military Law*, first published in 1937. This manual in fact appears to be the precursor of the *Manual of Pakistan Military Law*, which was first published in 1958 and now, in two volumes, continues (through various editions) to remain in service. Indeed, a comparison of the arrangement of the chapters into which the two manuals are divided shows a remarkable similarity, and indicates that the latter is but the lineal descendant of the former. However, the present manual does not set out the historical background in any detail. We have therefore annexed to this judgment a better copy of Chapter I of Part I of the earlier manual, as corrected up to March 1951 and printed in this country, i.e., up to the very eve of the enactment of the Army Act, and reference may be made to the same ("Annexure").

31. As is clear from the Annexure, matters relating to the discipline of troops were regulated by law from very early on, the first such statute going back to 1754. What are of particular interest are the laws known as the "Articles of War" which were first enacted in India itself by the Governor General in Council under the Government of India Act, 1833. The first such law (and the Articles were, notwithstanding the nomenclature, statutes) was enacted in 1845. Successive such enactments were eventually replaced by a law of 1869, known by its short title, the Indian Articles of War. This law, which is the earliest such statute that we have been able to access, is available at: https://www.indiacode.nic.in/repealedact/repealed_act_documents/A1869-5.pdf. It is however, pertinent to note that the Articles of War were already referred to in the Indian Penal Code (enacted in 1860) in s. 139, a section to which we will return later in the judgment. The Indian Articles of War ("War Articles") were eventually repealed and replaced by the Indian Army Act, 1911, which was in turn repealed and replaced by the Army Act in 1952 (coming into force in 1955).

32. An examination of the War Articles shows that it substantively contained, in a recognizable form corresponding to the relevant provisions of the Army Act, matters relating to the military justice system. Thus, Title II of Part II of the War Articles created criminal offences many of which continue to find place in the Army Act. Title III, comprising of Articles 72 to 163 and divided into seven chapters, constituted fully one-half of the War Articles and is of particular importance as it related to courts martial. When Title III is compared with the relevant provisions of the Army Act and the 1954 Rules, the present court martial system is recognizably relatable to that set in place thereby.

33. When the matter is looked at from the historical perspective, it is clear that from the earliest of what might for present purposes be called modern times (i.e., the commencement of indirect and then direct British rule in the sub-continent) the legislative competence relating to the armed forces has included, as an integral aspect thereof, the power to legislate in respect of the military justice system, and in particular the courts martial that

are one of its key and defining features. Traceable as such competence is to periods now centuries past it cannot be unraveled and detached, and treated separately and differently from the constitutional and legislative power "to raise and maintain the Military, Naval and Air Forces of Pakistan". At first sight, and especially if viewed from an ahistorical perspective, this legislative competence, articulated in entry No. 1 of the Federal Legislative List (and found also in Article 243(3)), may appear to have nothing at all to do with courts or tribunals or any sort of justice system. But it takes on a different color and meaning when history is taken into account. This is in line with the approach that led the Federal Court to conclude in *Muhammad Yusuf* that a legislative competence seemingly wholly unconnected with the constitution of courts and their jurisdiction could yet, on a closer and deeper analysis, reveal a reality otherwise not apparent on a superficial and bare reading. Here of course the analysis has necessarily to be grounded in history, and cannot be confined to a mere clinical consideration of a legislative entry and the statute in question. But the result is the same: the legislative competence may have a layer that relates to matters judicial. In *Muhammad Yusuf*, the analysis revealed the competence to include the power to constitute a court of law properly so called. Therefore, even if courts martial are, as observed by the learned Chief Justice (Sir Abdur Rashid, CJ) in *Muhammad Nawaz v Crown* PLD 1951 FC 73 at p. 86, to be regarded in some way as courts and that proceedings before them relate to criminal matters, that does not, in our view, alter the legislative competence from which these forums spring. Ensconced as they are in the military justice system (being, indeed, the sheet-anchor thereof) and as irretrievably intertwined that system historically is with the Armed Forces themselves, it cannot be gainsaid that it is to entry No. 1 of the Federal Legislative List ("Federal List") that one must look in order to discover the competence in relation to courts martial.

34. The legislative competence having been identified and located, certain consequences relevant for the present discussion inevitably follow. It has historically been a defining feature of courts martial that they are manned by military officers. Thus, to look at, e.g., the War Articles, they provided (in Article 72) for eight different types of court martial. The composition of each type of

court martial was then specifically provided for in succeeding Articles. In each case, they comprised of commissioned officers. This was itself a defined term. Part I(e), which contained definitions, provided that the term (using the now antique language of the time, which reflected sensibilities long since discarded) included "all Officers holding Commissions in the Native ranks of the Army, whether they be of purely Native or of a mixed European and Native extraction". The composition of courts martial under the Army Act (ss. 85 to 88) thus accords with the historical origins of such forums. For reasons already stated, this direct-line descent ought to inform any conclusions as to their constitutionality. In our view therefore it would be incorrect to test courts martial on the anvil of clause (3) of Article 175. The separation thereby required seeks to disentangle a prior amalgam between the judiciary and executive of an entirely separate and different nature. It has nothing to do with courts martial, which have swept to present times on an entirely different historical arc. The second strand of the challenge to courts martial, as set out in para 21 above, cannot therefore, with respect, be sustained.

35. This brings us to a consideration of the first strand of the challenge, that courts martial are not at all courts within the meaning of Article 175. Again, and at the risk of some repetition, the context must be kept clearly in mind. We are here concerned with courts martial constituted and acting within the ambit of the military justice system, which is itself created by and operates within the four corners of the Army Act. As now firmly established by *Liaquat Hussain*, this is the key point. For courts martial to as it were stand outside of Article 175 they must be constituted, exist and operate in the manner as just stated. Courts martial cannot be created outside of, or be allowed to exist and operate independently from, the military justice system created by and under a statute of the nature of the Army Act. This is so even if such "courts martial" are purported to be created with reference to the Army Act. Any such "courts martial" would fall foul of the test laid down in *Mehram Ali and others v Federation of Pakistan and others* PLD 1998 SC 1445. They would be nothing more than military courts and that would be the creation of a parallel judicial system, which is proscribed and prohibited by *Liaquat Hussain*. The importance, indeed necessity, of the historical analysis undertaken above,

which places courts martial within the legislative competence of entry No. 1 of the Federal List, is thus highlighted. That analysis is aligned with this decision. Of course, the question whether the legislative competence extends even to trials of civilians, in the context of how fundamental rights are enshrined in the present Constitution, remains to be addressed. Here, we are only concerned with the argument founded on Article 175. In this immediate context even *F.B. Ali* itself points in the same direction, and corroborates the historical nature of the legislative competence. The competence for the insertion of clause (d) in s. 2(1), whereby civilians could be tried by courts martial, was found to exist in entry No. 1 of the Third Schedule to the 1962 Constitution. This corresponded to entry No. 1 of the present Federal List. Now, the trial of civilians by court martial is very much an ancillary or subsidiary function of such forums. Existing as they do within the military justice system, and confined as they are to the four corners of the Army Act, the principal function (indeed, their raison d'être) is to deal with the members of the Armed Forces. Even if there were no legislative competence in relation to civilians that would leave the functioning and operation of the military justice system, and of the courts martial, wholly unaffected. The subsidiary nature of the legislative competence with regard to civilians is further indicated by the fact that in *F.B. Ali* the Court also pressed entry Nos. 48 and 49 into service (which related respectively, to matters within the legislative competence of the Federation or relating thereto, and matters incidental and ancillary to others provided in the Schedule). These entries corresponded to the present entry Nos. 58 and 59 of the Federal List. Thus, a necessary implication of *F.B. Ali* is that courts martial, and the military justice system, are within the scope of the legislative competence of entry No. 1; and that conclusion is in line with *Muhammad Yusuf*, as revealed by the historical analysis.

36. It follows from the foregoing that in our view, in the present context, the challenge in terms of Article 175 to courts martial is of no avail. However, a word of caution may be sounded. This does not at all mean that there cannot be rights of appeal or other remedies to courts within the meaning of Article 175, from decisions of courts martial or other authorities and forums within the military justice system, or that such system cannot at some

stage itself be directly connected with such courts. Far from it. All that is meant is that courts martial as presently conceived and understood, with which alone we are here concerned, for historical reasons stand outside the framework of Article 175 and cannot be constitutionally attacked or challenged with reference thereto. But, it is wholly within the legislative competence of Parliament to restructure or even recreate the military justice system, including courts martial, in such manner—howsoever fundamentally or even radically different it may be from the present one—as it deems appropriate. History certainly informs the legislative competence but, constitutionally speaking, neither shackles nor controls it.

37. The challenge on the anvil of Article 175 having been dealt with, we move on to consider the mainstay of the constitutional attack to trial of civilians by courts martial: fundamental rights.

38. Learned counsel for the petitioners challenged the vires of the provisions set out in para (i) of the short order (hereinafter, for convenience, respectively referred to as the "clause (d) provision" and the "s. 59(4) provision", and together the "para (i) provisions") as being in conflict with specific fundamental rights. The primary right invoked in this regard was Article 10A, the right to a fair trial. Reliance was also placed on Article 9 and certain other rights. It was argued that by reason of Article 8(3)(a), civilians brought before courts martial were denied these fundamental rights and the para (i) provisions were therefore ultra vires the Constitution. The learned Attorney General argued strongly to the contrary. More than once, it was submitted with particular reference to one judgment from *F.B. Ali* and also by a detailed referral to the relevant provisions of the Army Act and the 1954 Rules that courts martial operated within a system that provided for a fair trial in every meaningful sense. An assurance was held out that there would be a further refinement of the system with respect to the trials of the 103 persons referred to in the short order. The learned Attorney General also submitted that Article 8(3)(a) was being incorrectly interpreted by learned counsel for the petitioners. The rights of civilians made subject to the Army Act were fully protected.

39. The approach taken by learned counsel for the petitioners, and accordingly, the response thereto by the learned Attorney General, are understandable. However, in our view, and with respect, a challenge that is essentially piecemeal in nature (i.e., which seeks to condemn the para (i) provisions with reference to specific and particular fundamental rights) may miss the forest for the trees. Important as each fundamental right undoubtedly is, perhaps the better answer lies in considering the collectivity of the fundamental rights and the manner in which this aggregate is, for the first time in our constitutional history, protected by the present Constitution. In the end, for present purposes it is not this or that particular fundamental right that matters. That may not be what clinches the point, even though undoubtedly a consideration of the para (i) provisions on the anvil of individual fundamental rights is also meaningful and may even be decisive. Rather, what is important is how fundamental rights in their plurality are guarded by the Constitution. For, as we shall see, ultimately it is the undifferentiated fullness of the aggregate that is breached and denied by the para (i) provisions.

40. Regardless however, of the approach taken the denial is the result of Article 8(3)(a). Accordingly, we will first examine this provision and then consider the constitutional provision that protects fundamental rights in the collective sense just noted. Finally, we will show that in the conflicting tugs of these two provisions it is the latter that must prevail.

41. Chapter 1 of Part II of the Constitution lays out the rights declared to be fundamental. Article 8, which opens the Chapter, deals with laws inconsistent with or in derogation of such rights. Clause (1) inter alia declares that any law that is so inconsistent shall, to the extent of the inconsistency, be void. Clause (2) prohibits the State (as defined in Article 7) from making any law which takes away or abridges fundamental rights, and a law so made is void to that extent. The third clause may, to begin with, be described as an exception to the first two clauses. It provides that nothing in Article 8 shall apply to a law that falls within either of its two paragraphs, and that “no such law *nor any provision thereof* shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter”

(emphasis supplied). We are here concerned with the first paragraph of clause (3).

42. The genesis of Article 8(3)(a) lies in the well recognized fact that given the peculiar nature of the tasks that must be performed, in particular and especially, by members of the Armed Forces but also by certain other agencies (which are usually referred to as the "disciplined forces"), it is infeasible to allow them, in the context of the performance of their duties, to enjoy the benefit of fundamental rights. Members of the Armed Forces and the disciplined forces are of course citizens and, in the ordinary and normal course, as much entitled to fundamental rights as any other citizen. That is the general rule. However, in relation to certain set and limited circumstances a differentiation ought to be made between them and the general citizenry. (Of course, it goes without saying that while some fundamental rights are for citizens, others apply to persons in general. This point is not directly of relevance here, but ought not to be forgotten either.) Undoubtedly, the members of the Armed Forces and the disciplined forces come from and return to the citizenry. But, while they are in service (and also, exceptionally, when they may by law be recalled to such service) the peculiarities of that service require derogation from what is otherwise their birthright, as a fundamental and constituent aspect of the Constitution. Hence, Article 8(3)(a).

43. The provision now under consideration is as follows:

> "**8**. ... (3) The provisions of this Article shall not apply to—
>
> (a) any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them;..."

It will be seen that for this provision to apply two conditions must be met. Firstly, it applies to a law made in respect of three categories of State employees: (i) members of the Armed Forces; (ii) the police; and (iii) any other force that is charged with the maintenance of public order. Secondly, even in relation to such categories, the purpose of the law must be to either (x) ensure the proper discharge of their duties, or (y) maintain discipline among

them. There is no doubt that the Army Act meets both these conditions and is therefore a law within the contemplation of Article 8(3)(a). In order to properly appreciate its scope and effect, it will be instructive to undertake the analysis in both historical and comparative terms. For Article 8(3)(a) is by no means the first time that such an exception has been carved out, to allow a law of the nature of the Army Act to exist in derogation of fundamental rights.

44. Turning first to constitutional history, each of the Constitutions enacted and adopted post-Independence had a provision similar to Article 8(3)(a). These are set out in the table below (emphasis supplied):

1956 Constitution	1962 Constitution	Interim (1972) Constitution
Article 4: ... (3) Nothing in this Article shall apply to any law relating to the members of the Armed Forces, or the Forces charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them.	**Article 6**: ... (3) The provisions of this Article shall not apply to— (i) any law relating to the members of the Defence Services, or the forces charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them; ... and no such law *nor any provision thereof* shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter.	**Article 7**: ... (3) The provisions of this Article shall not apply to— (i) any law relating to the members of the Defence Forces, or of the Police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them; ... and no such law *nor any provision thereof* shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter.

It will be seen that the provision has essentially remained unaltered throughout. Apart from the specific reference to the police in the Interim Constitution and the present Constitution, the words used are virtually identical. This is certainly true for the purpose of the law, i.e., the proper discharge of duties and the maintenance of discipline. Furthermore, in both the 1962 and Interim Constitutions, the provision is rounded off in exactly the same terms as is clause (3) of Article 8: notwithstanding any repugnancy or inconsistency with fundamental rights no law within the contemplation of the clause, nor any provision thereof, shall be void. Before proceeding further, we may note that since we

are here concerned with the Army Act, i.e., members of the Armed Forces, references will be only to this category of State employees.

45. The approach taken in our country is not however the only manner for tackling the question of how, if at all, fundamental rights as would otherwise be enjoyed by members of the Armed Forces can be derogated from. For comparative purposes, we have an example readily at hand: the Indian Constitution. The relevant provision there is Article 33. This was substituted in its entirety in 1984. However, for our purposes that is not material. As it stands at present the provision is in the following terms (emphasis supplied):

> "**33. Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc**.— Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,—
>
> (a) the members of the Armed Forces; or
>
> (b) the members of the Forces charged with the maintenance of public order; or
>
> (c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or
>
> (d) person employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organization referred to in clauses (a) to (c),
>
> be restricted or abrogated *so as to ensure the proper discharge of their duties and the maintenance of discipline among them*."

It will be seen from the last part of Article 33 that the purpose of a law within its contemplation is exactly the same as in our country: the proper discharge of duties and the maintenance of discipline. However, the approach otherwise taken is wholly—indeed dramatically—different. The starting point is that members of the Armed Forces enjoy in full fundamental rights in the same manner and extent as does any other citizen of India. But, Parliament is empowered (exclusively: see Article 35) to provide by law for derogations from this position, i.e., determine which fundamental rights, and to what extent, are to be restricted or abrogated in relation to the members of the Armed Forces for the stated purpose. In other words, the Indian Constitution (leaving

aside for the moment existing laws for which it makes provision in Article 372 and which are, in the present context, also dealt with in Article 35) provides for maximum flexibility. Article 33 starts from a position of full availability and applicability of fundamental rights, and then allows Parliament to mould or sculpt the position by the restriction or abrogation (a word that, at least in our constitutional history, has rather dark, unpleasant and even sinister connotations) of any one or more of the rights, to such extent as Parliament deems appropriate. This allows Parliament to take an approach that may be as broad brushed or narrowly focused as is considered expedient. The whole panoply of fundamental rights may be denied, or the derogation may be confined as specifically as a single such right and even there tailored to as refined a point as desired.

46. Article 33 has been considered a number of times by the Indian Supreme Court. In *Union of India v L.D. Balam Singh* (2002) 9 SCC 73, the following observations were made (pp. 76-77; emphasis supplied):

> "While it is true that army personnel ought to be subjected to strictest form of discipline and Article 33 of the Constitution has conferred powers on to the Parliament to abridge the rights conferred under Part III of the Constitution in respect of the members of the armed forces, but does that mean and imply that the army personnel would be denuded of the Constitutional privileges as guaranteed under the Constitution? Can it be said that the army personnel form a class of citizens not entitled to the Constitution's benefits and are outside the purview of the Constitution? To answer above in the affirmative would be a violent departure to the basic tenets of the Constitution. An army personnel is as much a citizen as any other individual citizen of this country. *Incidentally, the provision as contained in Article 33 does not by itself abrogate any rights and its applicability is dependent on parliamentary legislation*. The language used by the framers is unambiguous and categorical and it is in this perspective Article 33 may be noticed at this juncture. [After reproducing the Article the judgment then goes on to say:]
>
> 2. *A plain reading thus would reveal that the extent of restrictions necessary to be imposed on any of the fundamental rights in their application to the armed forces and the forces charged with the maintenance of public order for the purpose of ensuring proper discharge of their duties and maintenance of discipline among them would necessarily depend upon the prevailing situation at a given point of time and it would be inadvisable to encase it in a rigid statutory formula*. The Constitution-makers were obviously anxious

> that no more restrictions should be placed than are absolutely necessary for ensuring proper discharge of duties and the maintenance of discipline amongst the armed force personnel and therefore Article 33 empowered the Parliament to restrict or abridge within permissible extent, the rights conferred under Part III of the Constitution in so far as the armed force personnel are concerned....
>
> 3. This Court in the case of *Prithi Pal Singh vs. The Union of India* (AIR 1982 SC 1413) observed [at pg. 1437]:
>
> "It is one of the cardinal features of our Constitution that a person by enlisting in or entering armed forces does not cease to be a citizen so as to wholly deprive him of his rights under the Constitution. [...] In the larger interest of national security and military discipline Parliament in its wisdom may restrict or abrogate such rights in their application to the armed forces but this process should not be carried so far as to create a class of citizen not entitled to the benefits of liberal spirit of the Constitution. Persons subject to Army Act are citizens of this ancient land having feeling of belonging to the civilized community governed by the liberty-oriented Constitution.""

47. The approach taken by the Indian Constitution was obviously available for consideration when the 1956 Constitution was being enacted and adopted. But, as is clear from the above, in complete contrast an entirely different position was taken, which has prevailed ever since. Far from allowing for any flexibility, in our country the provision is maximally rigid. Once it is shown that a law comes within the ambit of Article 8(3)(a) the denial of and derogation from fundamental rights, in their totality, is immediate and absolute. The provision is therefore not simply an “exception”; it is in fact exclusionary. Unlike the Indian provision, it does create a separate class of citizens who are, if only for the duration, wholly bereft of fundamental rights. It may be that in the Indian jurisdiction Parliament “dials down” fundamental rights to “zero” (as it were) for a particular class of State employees. But even so the *principle* of the *entitlement* to fundamental rights would always remain, no matter how extensive or “deep” the restriction or abrogation. In our country, even if Parliament were to “dial up” the position (as it were), so that the rights available even in relation to a law within the scope of Article 8(3)(a) were to be no different from those available under Chapter I of Part II, in *principle* there would always be a *denial* of *fundamental* rights. The rights would, no matter how indistinguishable they may appear to be from fundamental rights, be no more than those conferred by statute, granted or taken away as the legislature wills. This is of course the

exact antithesis of fundamental rights. It is true that in relation to some fundamental rights the State may impose "reasonable restrictions". But this power, in the context of the present discussion, approximates to the position under Article 33 of the Indian Constitution, though it is of course far more restricted than that. It has no bearing on, or relevance for, the position created by Article 8(3)(a).

48. It follows, given the drastic consequences that flow from it, Article 8(3)(a) must be given a narrow and restricted meaning and application. This conclusion is firmly based on settled principles of constitutional interpretation. Indeed, in *F.B. Ali* itself, in the judgment of the Court (delivered by the learned Chief Justice, Hamood ur Rehman, CJ) the equivalent provision of the 1962 Constitution was (though *obiter*) likened to an ouster clause that had to be interpreted strictly (pg. 531). However, the present Constitution does not rest its approach to the provision, and its application, only on principles of interpretation howsoever deeply engraved they may be in constitutional law. It provides, for the first time in our constitutional history, a provision that, as one of its different functions, stands in clear and sharp counterpoise to Article 8(3)(a). This is the provision referred to in para 40 above. It is clause (5) of Article 8, to consider which we now turn.

49. The first two clauses of Article 8 have been touched upon above. All the post-Independence Constitutions had similar provisions, which in like manner preceded the provisions equivalent to clause (3): see, in each case, the first two clauses of the Articles referred to in the table above. But none of them had the equivalent to clause (5). This provides as follows:

> "The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution."

We begin with the most obvious question: if clauses (1) and (2) were already, and always, there, what purpose does clause (5) serve? What, if one may put it so, "value" does it add? Looked at textually, the difference in emphasis and of perspective becomes immediately apparent. Clauses (1) and (2) approach fundamental rights from the aspect of a law said to be in collision with such rights. Clause (5) on the other hand looks at fundamental rights

themselves. Now, it is trite law that fundamental rights inhere in persons, which is a term broadly defined in Article 260(1) as including "any body politic or corporate". Some rights refer only to citizens, a term also defined in Article 260(1) but which has through the interpretive process that is the hallmark of common law jurisdictions, taken on a broader meaning and shape. Other rights inhere in persons. But, in the end fundamental rights inhere in *someone* (and of course, the sense here is of a plurality that encompasses a very broad class that, more often that not, comprises the whole of the citizenry or the entirety of persons within the country, as the case may be). Clauses (1) and (2) protect that someone by voiding a specific law that breaches fundamental rights. *Clause (5) protects that someone by protecting fundamental rights themselves*. The first two clauses are engaged when the assault on fundamental rights is indirect; the fifth when the rights are directly under attack. The denial of or derogation from fundamental rights is indirect in the former case inasmuch as the impugned law seeks to encroach upon an "area" denied the State. It is direct in the latter case because the impugned action would displace or deny the very "area" itself.

50. This leads to the second point. In an important sense clause (5) underpins clauses (1) and (2). If fundamental rights are in a state of suspension (or worse) then clearly the protection afforded by clauses (1) and (2) is, at the very least, put in jeopardy or may even disappear altogether. Clause (5) makes the constitutional position absolutely clear. Unless the Constitution itself *expressly* so provides (and then only to that extent) there cannot be any temporal or spatial displacement of fundamental rights. Clause (5) requires that at every instant and over every inch of the territory fundamental rights must be, and remain, in existence and in force. This then ensures that at all times and in all places (unless expressly otherwise so provided by the Constitution) clauses (1) and (2) are effectively in force and operation. If these clauses are the guardians and guarantors of fundamental rights, then clause (5) is the guardian and guarantor of the clauses themselves. *Quis custodiet ipsos custodes*—who will guard the guards themselves, asked the Romans though in quite another sense and context. If we may appropriate the words of the maxim for present purposes

and put them to a rather different use, it is clause (5) that guards the guards themselves (clauses (1) and (2)).

51. This brings us to the third point. The role of clause (5) is both situational and positional. It protects fundamental rights, and thus those in whom the rights inhere, by standing sentinel over the whole of the legal landscape. No citizen in whom fundamental rights inhere can be placed in a situation, either actually or potentially, that results in a suspension (or worse) of fundamental rights. It follows that the protection afforded by clause (5) is not just when a breach has actually occurred. It is also anticipatory, i.e., it acts to prevent a breach occurring at all in the first place. In an appropriate context, even before the situation has reached the point where the claimant has to show a denial of or derogation from this or that fundamental right, clause (5) is there. That context includes the situation where it can be shown that either the purpose or effect of the impugned action (whether a law or otherwise) would be to displace fundamental rights. In this sense it can even be regarded as preceding clauses (1) and (2). This leads to the final point. Clause (5) approaches, and protects, fundamental rights in a collective sense. While it would certainly be engaged even if a single fundamental right is, in effect, placed in a state of suspension (or worse) contrary to what is permissible, its real substance and power is revealed when one takes a step back and looks at fundamental rights as a whole. The reason is that when the clause is so engaged, it is not necessary to identify a specific fundamental right that is being affected. If it can be shown that the whole panoply of rights is being, or would be, placed, either actually or potentially, in a state of suspension (or worse) that suffices. Indeed, on such analysis even if it is shown that one or more fundamental rights are *not* suspended or denied or derogated from, that would not matter. Clause (5) locks in its embrace the aggregate of fundamental rights, without any need for differentiating between individual rights, an exercise that is invariably necessary when a law is being tested on the touchstone of clauses (1) and (2).

52. One conclusion of the foregoing discussion is that if a claim is brought that there is a denial of or derogation from fundamental rights that may warrant, on occasion, a two-step consideration. In

the first instance the Court may have to consider whether there is a breach of clause (5). If the answer is in the affirmative that may well be decisive and conclusive in and of itself. If the answer is in the negative, then the matter would move to the second step, i.e., to consider whether there is a breach of one or more particular and identified fundamental rights, an answer to which question would then be determinative. Two further points may also be made in this context. Firstly, in the overwhelming number of cases the challenge is brought, considered and decided only in terms of the second step, the first not being engaged or even invoked at all. But, in some cases, the challenge has to be considered in light of both, and the matter could stand determined simply at the first stage. Secondly, and obviously, for there to be at all even the possibility of a two-step analysis in the sense here contemplated, a constitutional provision in the nature of clause (5) must exist. If there is no such provision in the constitutional dispensation, then it would be in the nature of things that the challenge is confined only to one stage, i.e., whether is a breach of this or that specific fundamental right.

53. This brings us to the third and final stage of the analysis indicated in para 40 above. For it is clear that clause (3)(a) on the one hand and clause (5) on the other stand not just in contrast but in direct opposition. Clause (3)(a) results in the immediate and absolute denial of fundamental rights in their totality. Clause (5) on the other hand, stands absolutely and robustly in denial of such denial (other than as is expressly provided). The former tugs one way, the latter in exactly the opposite direction. How is this tension to be resolved? In relation to the three categories of State employees identified in clause (3)(a), it is clearly this clause that will have to take precedence over clause (5). The reason is obvious. The raison d'être of the clause is to enfold a law enacted for the stated purposes in relation to such State employees. But the crucial question is of course, what of civilians, who do not fall into any of the stated categories? This is the issue that lies at the heart of the matter.

54. In our view, one way to address this question and explain our answer is to turn to *F.B. Ali* itself. One of the grounds on which the insertion of the para (i) provisions into the Army Act was

challenged was that it violated fundamental right (FR) 15 of the 1962 Constitution. That right was equivalent to Article 25 of the present Constitution, the equality clause. In *F.B. Ali*, the charge against the appellants was in terms of sub-clause (i) of the clause (d) provision. We have already seen that the statute book has two offences that answer to this sub-clause: s. 31(d) of the Army Act and s. 131 of the Penal Code. The latter section is to be found in Chapter VII of the Code, which deals with offences relating to the Army, Navy and Air Force. It was contended that the insertion was discriminatory inasmuch as it subjected the civilians brought within the scope of the Army Act as a result of sub-clause (i) to a different regime even though all the offences under Chapter VII constituted but one class (pg. 528). After a detailed consideration the learned Chief Justice concluded that that there was no discrimination. The challenge founded on the specific fundamental right therefore failed (pg. 531). The learned Chief Justice then observed, though *obiter*, as follows (*ibid.*; emphasis supplied):

> "In this view of the matter, it is not necessary to consider whether clause (3) of Article 6 of the 1962 Constitution is attracted in the circumstances of this case, but since arguments have been advanced on the basis of this clause, *I would like, for the sake of completeness, to say that if the law was violative of any of the fundamental rights then this clause (3) would not protect it from challenge under sub-clause (i)*. This sub-clause (i) of clause (3) of Article 6 reads as follows:- [His Lordship then set out the provision which is already reproduced in the table above, and continued:]
>
> This only protects laws relating to the members of the defence services or of the forces charged with the maintenance of public order which have been made for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them. Such ouster clauses must be interpreted strictly and unless the law comes within the four corners of the exempting clause, it cannot claim to be exempted. *The Ordinances under challenge were not, in my opinion, made for any of these purposes and, therefore, did not qualify for the exemption granted by the said sub-clause*."

55. It will be recalled that both Ordinances III and IV of 1967 whereby the para (i) provisions were inserted were purely amending statutes. Ordinarily, statutes of such nature are regarded as having effaced themselves as soon as they come into force, the amendments made passing immediately into the law(s) being amended and becoming incorporated therein. It is for this

reason that, e.g., s. 6A of the General Clauses Act, 1897 provides that the repeal of an amending statute leaves unaffected the amendments made. However, it is clear from the passage extracted above that the learned Chief Justice, for analytical purposes within the frame of Article 6(3)(i) of the 1962 Constitution, regarded the laws making the amendments (i.e., the Ordinances) as separate and distinct from the law being amended, i.e., the Army Act. When so considered the Ordinances were held not to be promulgated for any of the purposes of the said Article, i.e., for ensuring the proper discharge of duties by, or the maintenance of discipline among, members of the Armed Forces. The Ordinances could then be tested on the anvil of violation of fundamental rights. If found to be inconsistent therewith, or in derogation thereof, they could be struck down. In point of fact the Ordinances were challenged on the ground of being violative of the equality clause. That challenge having failed, they were held validly enacted and thus passed into, and became incorporated in, the Army Act.

56. This analysis was of course within the context of, and in relation to, the 1962 Constitution. That Constitution had no equivalent at all to clause (5) of Article 8 of the present Constitution. Would a different result have obtained if the 1962 Constitution had had an equivalent provision, or the para (i) provisions were inserted under the present Constitution? In our view, the answer would necessarily be in the affirmative. The reason for this is that a consideration, within the framework of a constitutional dispensation containing a provision like Article 8(5), would have entailed the two-step analysis set out in para 52 above. This is so because if, and once, the said provisions passed into the Army Act and were incorporated therein, they would become a "provision" of that law. And as Article 8(3)(a) explicitly states, as did Article 6(3)(i) before it, no law within their contemplation *nor any provision thereof* can or could be challenged as being inconsistent with, or repugnant to, any of the fundamental rights. Put differently, the total, immediate and absolute denial of such rights could result either from the law as a whole, or even any provision thereof. Given this situation, in considering any challenge to a law making insertions into the Army Act of the nature as the para (i) provisions, the first step would not be to consider whether this or that particular fundamental right was

being violated. Rather, it would be whether the effect or result or the purpose of the insertion would be in violation of clause (5) of Article 8. To this question there could be only one answer: yes. By allowing the para (i) insertions to pass into the Army Act there would not just be a suspension of fundamental rights of the persons being subjected thereto; there would be a complete denial thereof. As has been explained above, Article 8(5) operates not just situationally and positionally but also anticipatorily. Thus, in relation to the para (i) insertions what Article 8(5) would require to be considered is, what would be the position of the persons affected by them, and in what situation would they find themselves, vis-à-vis fundamental rights, if the insertions were to be allowed to go through? In other words, the Ordinances could not simply be looked at in isolation, and in relation only to themselves. Such an approach would be contrary to, and a denial of, Article 8(5). This constitutional provision requires also the end result to be taken into account. Where, ultimately, would that someone, in relation to whom the insertions are being made, be placed? In respect of fundamental rights, for the protection of which Article 8(5) exists, there can be only one answer: that someone would be left high and dry. This would be a complete violation of Article 8(5). The insertions would thus fail and be liable to be declared ultra vires the Constitution at the first stage of the analysis, without having to undertake any exercise in terms of the second step, i.e., whether any particular or specific fundamental rights were being violated or not.

57. But of course, the 1962 Constitution did *not* have any equivalent to the present Article 8(5). As explained above, the analysis therefore necessarily had to be confined within a single step frame, i.e., testing the Ordinances on the anvil of a specific and identified fundamental right. This is precisely what happened in *F.B. Ali*; and the challenge failed. In our respectful view, howsoever correct this answer may have been in its given context, it is no answer at all in the context of the present Constitution. The constitutional dispensation having changed in a singularly important manner with the introduction of an entirely new level of protection for fundamental rights, the para (i) insertions cannot continue to be viewed from a perspective that must now be regarded not only as wanting and of historical interest, but

actually constitutionally impermissible. In our view therefore, the correctness of *F.B. Ali* need not be called in question, even though a robust challenge was mounted by learned counsel for the petitioners in this regard. It suffices to note that since the very ground on which its conclusions were erected has altered the judgment is no longer (and we say this with the utmost respect) fit for purpose. It is clearly distinguishable, and is therefore held to be so. So, by way of a first and provisional answer, we hold that the para (i) insertions must be regarded as being ultra vires the present Constitution, with particular reference and regard to clause (5) of Article 8.

58. The reason why the conclusion just reached has been stated to be provisional is because in the situation before the Court in *F.B. Ali*, there were, as noted in the passage extracted above, two separate laws: the Army Act on the one hand and the Ordinances on the other. But what of the situation where there is only one law? Suppose that the Army Act did not have the para (i) insertions, but was now (i.e., under the present Constitution) replaced with fresh legislation (i.e., an entirely new statute) which did have, from inception, provisions equivalent to the said insertions. The reason for considering the matter in this way is that the Army Act was an existing law for the present Constitution in terms of Article 268. In other words, it came to this Constitution on its commencing day as but one statute into which the para (i) insertions stood incorporated. They were already “provisions” of the Army Act. Would that in any way affect the analysis, by placing what were earlier “insertions”, but are now “provisions”, beyond the reach of Article 8(5)? In our view, the answer to this question has to be in the negative. No law, whether existing or one minted under the present Constitution, can defeat the protections provided by clause (5). For persons other than the three categories of State employees specified in Article 8(3)(a), and especially in relation to civilians, any and every law claiming to be within the contemplation of the said provision must pass through the sieve of clause (5) and also, if so required, be tested on the anvil of any violation of a particular and specified fundamental right. In other words, the law must be examined in terms of the two-step analysis set out above. It is only in this way that the provisions that can permissibly be incorporated within the law can be identified, and

those impermissibly planted there excised. Any other approach would result in Article 8(3)(a) ceasing to be an "ouster clause" subject to strict interpretation. Thus, the Army Act as an existing law would be subject to the same analysis as already carried out above. For the reasons given, it matters not whether the para (i) provisions were "insertions" or "provisions". Either way, they are ultra vires the present Constitution, with particular reference and regard to clause (5) of Article 8.

59. It has been noted above that, insofar as specific and identified fundamental rights are concerned learned counsel for the petitioners placed strong reliance on Article 10A. The 1962 Constitution did not have a fundamental right corresponding to this Article, which was added to the present Constitution by the 18th Amendment (2010). One of us (Ayesha A. Malik, J.) in her judgment has concluded that the para (i) insertions are ultra vires the Constitution on account of being inconsistent with, and in derogation of, Article 10A and we are in agreement with this conclusion. Here, something must be said concerning a point repeatedly made by the learned Attorney General with regard to the matter of a fair trial. The learned Attorney General relied strongly on the judgment of Anwarul Haq, J. in *F.B. Ali* and also on the Army Act and the 1954 Rules to contend that a trial before a court martial would meet the requirements of Article 10A. Anwarul Haq, J. listed several criteria for, and indicia of, a fair trial (at pg. 551, taking the same from a treatise on constitutional law written by a former Chief Justice of Pakistan) and observed as follows:

> "The right mentioned at No. 7 is no longer operative in Pakistan as the requirement of a trial by jury or with the aid of assessors was dispensed with long ago. The other rights enumerated by Mr. Munir are clearly available in a trial by a Court Martial. Although there is no appeal to a higher Court, yet the convicted accused has a right of revision to the Commander-in-chief of the Pakistan Army or to the Federal Government under sections 131 and 167 of the Pakistan Army Act. It is true that a Court Martial is not required to write a detailed judgment, as is commonly done by the ordinary criminal Courts of the country, yet this is obviously not one of the essentials of a fair trial, it being intended more for the benefit of the appellate Court rather than for that of the accused.
>
> ... Any criticism or misgivings attaching to the functioning of military Courts under Martial Law cannot be imported into a consideration of the fairness of trial held by Courts Martial

> established under the relevant Acts for the Army, Navy and Air Force. These Courts Martial are intended to regulate the discipline and conduct of the personnel of the respective Forces, and of all other persons who may be made subject to these laws in certain circumstances. They are thus established institutions with well-known procedures, which cannot be described as arbitrary, perverse or lacking in fairness in any manner."

It was then concluded as below (pg. 552):

> "I am, therefore, of the view that there is no merit in the contention that a trial by Court Martial violates the accepted judicial principles governing a fair trial as obtaining in Pakistan...."

The learned Attorney General further submitted, on instructions, that in relation to the 103 persons noticed in the short order and (as we understood it) any other person brought before a court martial in relation to offences committed on May 9th and 10th, evidence would be recorded as required in terms of the Qanun-e-Shahadat Order, 1984 and detailed reasons would also be given for the verdicts. Thus, it was contended, there was no merit to the challenge based on Article 10A.

60. With respect, the stance taken by the learned Attorney General wholly misses the point. The question here is one of *constitutional principle*, i.e., whether *fundamental* rights are being denied or derogated from. As has been explained above, even if in respect of a law within the contemplation of Article 8(3)(a) rights are given which correspond to fundamental rights, that does not and cannot change their nature. They are and remain statutory rights, and because the denial of fundamental rights is total and immediate, subject to the will of the legislature, to grant or withhold as it may please. Indeed, the very "offer" made by the learned Attorney General, that for the specific purpose of trials of persons accused of offences on May 9th and 10th, certain additional rights would be granted underscores their essentially transitory nature. Fundamental rights are, on the other hand, precisely that: fundamental and existing as of constitutional right, engirdled and protected by not just the first two clauses of Article 8 but, in the present constitutional dispensation, also clause (5). To focus only on the operative effect of a right while ignoring its nature and substance is to seriously misread the Constitution and disapply

clause (5). This cannot be. No matter how many rights are granted by the Army Act and the 1954 Rules and howsoever many more rights are piled on top of those, their essence cannot be altered. It cannot be that the people of Pakistan are reduced to a point where, in respect of rights which ought to be fundamental, they are instead required to go (as it were) cap in hand to the State, pleading plaintively: “Please Sir, can we have some more?” That is not what fundamental rights mean. That is not what fundamental rights are. That is not what the Constitution means. That is not what the Constitution is.

61. However, one point may be made clear. Nothing said in this judgment is to be read as meaning or implying that courts martial, operating within their traditional framework, i.e., the military justice system acting upon and in relation to the members of the Armed Forces, produce or result in unfair trials or verdicts. No such conclusion is intended or reached here. How courts martial function within their stated sphere and for their own (historical) purposes is not the question which is before us. The issues raised are different and are being addressed accordingly.

62. Before proceeding further, we may note for completeness that the 1956 Constitution did have a provision that, at first sight, could be regarded as having some similarity with Article 8(5). Article 22 of the late Constitution provided, in clause (1), that the right to move the Supreme Court for the enforcement of fundamental rights was guaranteed. Clause (3) then stated as follows: “The right guaranteed by this Article shall not be suspended except as otherwise provided by the Constitution”. It will be seen that this clause was much more limited than Article 8(5) inasmuch as it related only to Article 22, i.e., to a “remedy” or enforcement provision and not the fundamental rights themselves as such. Furthermore this clause did not use the term “expressly” which is to be found in Article 8(5), the crucial importance of which for present purposes will emerge shortly.

63. We now turn to consider the interpretation sought to be placed by the learned Attorney General on Article 8(3)(a). The submission had two strands. Firstly, it related to the legislative competence to make a law in the nature of the para (i) provisions.

Reliance was placed on the central holding of *F.B. Ali*, which the learned Attorney General described as the “nexus” theory. It was submitted that the decision held that if the offence had a “nexus” with the defense of Pakistan, then there was legislative competence in terms of legislative entry No. 1 of the 1962 Constitution (read with entry Nos. 48 and 49, as already noted above) to try even civilians by court martial. The clause (d) provision was held to be an insertion into the Army Act of precisely this nature. In this regard reference may be made to the following passages from the judgment of the learned Chief Justice:

> “The words of clause (d), introduced into section 2 of the Army's Act by Ordinance No. III of 1967, are clear enough. The words "persons not otherwise subject to this Act" clearly embrace all others who are not subject to the said Act by reason of the provisions of clauses (a), (b), (bb) and (c). The intention of the framers of clause (d) is clearly that even civilians or persons who have never been, in any way, connected with the Army should be made subject to it in certain circumstances gravely affecting the maintenance of discipline in the army. The nexus required is that they should be persons who are accused of seducing or attempting to seduce any person subject to the Army Act from his duty or allegiance to Government. In this case, the appellants were so accused and, therefore, came within the ambit of clause (d). The nexus, if any required, was provided by the accusation. No other nexus or connection was necessary.” (pg. 519)

> “... It seems that if the Army Act is a valid piece of legislation, then it does permit the trial of civilians, in certain circumstances, by a military Court even in time of peace.” (pg. 521)

> “The nexus with the defence of Pakistan was not only close but also direct. It is difficult to conceive of an object more intimately linked therewith. The prevention of the subversion of the loyalty of a member of the Defence Services of Pakistan is as essential as the provision of arms and ammunition to the Defence Services or their training.” (pg. 525)

It is to be noted that throughout his submissions the learned Attorney General placed strong reliance on the “nexus” theory. The second strand of the argument was in relation to the purposes for which a law came within the contemplation of Article 8(3)(a). The learned Attorney General submitted that there were two such purposes, either of which sufficed: (i) the ensuring of proper discharge of duties by members of the Armed Forces, or (ii) the

maintenance of discipline among them. It was submitted that while the latter had only an internal aspect, i.e., was only in relation to the Armed Forces themselves, the former had both an internal and an external aspect. There could be third parties, outside of the Armed Forces, who disrupted or disturbed the duties of such Forces, or acted in a manner that was contrary or detrimental to the discharge thereof. Any such act would have a "nexus" with the defense of Pakistan. Putting the two strands together, it was argued that the para (i) provisions were relatable to the "external" aspect of the discharge of duties and therefore came squarely within the ambit and scope of Article 8(3)(a). The denial of fundamental rights to such persons was therefore constitutionally permissible and no challenge could be mounted thereto on such basis.

64. With respect, these submissions cannot succeed. The first strand is in relation to legislative competence. It must be clearly understood that the existence of a legislative competence and the (constitutional) ability to exercise it are not necessarily co-terminus. Briefly stated, Pakistan is a federal Republic in which legislative competences are divided between the Federation and the Provinces. Some are exclusive to Parliament, others to the Provincial Assemblies and a few are concurrent. Whether a law made by a particular legislature is within its legislative competence is determined by rules of constitutional interpretation that are well settled and established. Their genesis goes back centuries, and is traceable in a direct line to Privy Council judgments in relation to the constitution of Canada, the British North America Act, 1867 (now known as the Constitution Act). If a law is not within the legislative competence of a particular legislature then it is straightaway ultra vires and liable to be declared as such simply for this reason. However, even if a law is found to be within legislative competence, it may yet be constitutionally impermissible for the legislature to enact it. (Contrariwise, in certain situations the Constitution makes it permissible for a legislature to enact a law that would ordinarily be beyond its competence.) Two examples will suffice. In the case of a concurrent competence, if Parliament has made a law in respect thereof, then the Provincial Assemblies cannot, to the extent that the legislative field is so "occupied", make a law in exercise of their own competence (see Article 143).

The existence of the federal law does not denude the Provincial Assemblies of their competence over the concurrent field. Thus, e.g., to the extent that the field remains "unoccupied", they can make their own laws. But, to the extent of the federal law, and as long as it exists, they cannot exercise the competence.

65. The other example is of course in relation to fundamental rights. If a law made by either the Federation or a Province is challenged as being in violation of a fundamental right and as also beyond its legislative competence, then the law, if the second ground succeeds, would be liable to be so declared ultra, without the first having to be considered at all. If it is within competence but in violation of a fundamental right, it would be impermissible for the legislature concerned to make the law. This would not be because the competence does not exist. It does. But it cannot be exercised, the existence of the fundamental right acting as an interdict. If the interdict were, e.g., to be suspended, then the competence can be exercised. Thus (as we will see shortly), when there is a Proclamation of Emergency in the field, certain (but not all) fundamental rights are automatically suspended and the concerned legislature can then make a law in exercise of its legislative competence (see Article 233(1)).

66. Once these settled constitutional principles are kept in mind, the (with respect) error in the first strand of the submission becomes apparent. At the risk of repetition, it must be emphasized that *F.B. Ali* was decided within the frame of a constitutional dispensation that did *not* have any equivalent to Article 8(5). The existence of a legislative competence in terms of the "nexus" theory does not therefore mean that such competence can be exercised in the same manner under the present Constitution as was possible under the 1962 Constitution. Now, the gateway is not just guarded but kept firmly shut, for reasons already set out, by Article 8(5). A law, such as the para (i) provisions, cannot now be made without passing through the sieve of Article 8(5), and that would be equally true for an existing law or one sought to be made under this Constitution. As noted, when tested on this most demanding of anvils, it would be found wanting. The legislative competence may exist; the security provided to fundamental rights by this provision means that it cannot be exercised. This is certainly the case when

the Constitution is operating in its ordinary course, i.e., the "default" mode, when Article 8(5) is in full force and effect. We have, at the beginning of the judgment, likened this to the Constitution's "peacetime" operation. Thus, and with great respect, the observation of the learned Chief Justice in *F.B. Ali*, that civilians can be tried by courts martial "even in time of peace", does not hold true under the present Constitution, whatever may have been the position under the 1962 Constitution. Whether the position would be different under a Proclamation of Emergency is a matter that is dealt with shortly. It is therefore our conclusion that the first strand of the submission is not sustainable.

67. We turn to the second strand. The submission that one of the purposes given in Article 8(3)(a), i.e., the ensuring of proper discharge of duties by the Armed Forces, has an "external" aspect that brings third parties and outsiders (i.e., civilians) within its fold cannot, with respect, be accepted. The reason is that this effectively splits Article 8(3)(a) into standalone portions. That is an incorrect approach to this provision. It is one whole, which has to be interpreted and applied holistically. Any other approach would mean that the provision ceases to be an ouster clause that has to be interpreted and applied strictly. In our view, the correct approach is that the provision applies (as presently relevant) to a law relating to members of the Armed Forces for achieving either (or both) of the stated purposes, *to the extent and in the manner that such purpose(s) cannot be achieved without such a law*. It is only in this way that the rationale for Article 8(3)(a)—the complete and immediate denial of fundamental rights—is understandable and acceptable. For if, and to the extent that, either of the stated purposes can be achieved even *without* a law relating to the Armed Forces, that would mean that the law in question would apply also to persons who are not members of such Forces. And in respect of a law such as last mentioned, Article 8(5) would intervene and deny the denial of fundamental rights. The learned Attorney General skillfully sought to bypass Article 8(5) or, at the very least, achieve a result that had that effect. But what cannot be done directly cannot be done indirectly. As has been seen, civilians cannot directly be dragged into the ambit of Article 8(3)(a) by reason of Article 8(5). That result certainly cannot be achieved indirectly by postulating internal and external "aspects" to the

stated purposes of the former provision, and thereby expand its scope to include classes of persons other than the three listed categories of State employees. That would be in utter disregard of Article 8(5). The second strand therefore is also found wanting. Accordingly, the meaning sought to be put by the learned Attorney General on Article 8(3)(a) cannot be accepted.

68. So far, we have been considering the clause (d) provision. The fate of the s. 59(4) provision is tied to the former, since it is in the nature of a subsidiary provision. It has effect and meaning only if the clause (d) provision has meaning, and has no independent or standalone purpose or existence. The two stand and fall together. Since the clause (d) provision fails, so must the s. 59(4) provision.

69. It follows from the foregoing that our conclusion, arrived at in para 58 above, that the para (i) provisions are ultra vires the Constitution is further confirmed. But this answer should still be regarded as provisional. The reason is that so far we have considered the matter in terms of the operation of the Constitution in the ordinary course, or the "default" mode. It was noted in para 5 that the pivot on which these petitions turned was this mode. But it was also noted there that the Emergency provisions would have to be considered. The reason is that Article 8(5) provides that fundamental rights cannot be suspended except as expressly provided by the Constitution. And the place where the Constitution allows this to happen is of course Part X, the Emergency Provisions. We turn therefore to consider the operation of the Constitution in this second "mode" or state.

70. The Proclamation of Emergency that can be issued under Article 232 has already been mentioned. The issuance of a Proclamation has many consequences. For present purposes, it is those which are set out in Article 233 that matter. The first two clauses are relevant, and are set out below:

> "**233. Power to suspend Fundamental Rights, etc., during emergency period.** (1) Nothing contained in Articles 15, 16, 17, 18, 19, and 24 shall, while a Proclamation of Emergency is in force, restrict the power of the State as defined in Article 7 to make any law or to take any executive action which it would, but for the provisions in the said Articles, be competent to make or to take, but any law so made shall, to

> the extent of the incompetency, cease to have effect, and shall be deemed to have been repealed, at the time when the Proclamation is revoked or has ceased to be in force.
>
> (2) While a Proclamation of Emergency is in force, the President may, by Order, declare that the right to move any court for the enforcement of such of the Fundamental Rights conferred by Chapter 1 of Part II as may be specified in the Order, and any proceeding in any court which is for the enforcement, or involves the determination of any question as to the infringement, of any of the Rights so specified, shall remain suspended for the period during which the Proclamation is in force, and any such Order may be made in respect of the whole or any part of Pakistan."

71. It will be seen that clause (1) provides that while a Proclamation is in force, then the Federation on the one hand and the Provinces on the other may, within their own legislative competences (which directly affect and control the extent of executive authority: see Articles 97 and 137) take action that would otherwise have been impermissible, on account of being in violation of, or in derogation from, the specific fundamental rights set out therein. This point was made earlier, in para 65 above. The legislative competence that existed but could not be exercised because of the stated fundamental rights is now "available" to the State. It will be noted that clause (1) becomes applicable of its own force once a Proclamation is in the field. Of course, as the clause makes clear this is true only for the duration of the Proclamation. As soon as it is revoked, the prohibition at once revives and to that extent the action taken stands repealed. Clause (1) is therefore one instance where it is expressly provided in the Constitution that certain fundamental rights, as specified, may be suspended. To the extent and for the duration that the clause is operative, and within its scope, Article 8(5) therefore ceases to apply.

72. However, as is at once obvious, clause (1) sets out only some, and not all, of the fundamental rights enshrined in Chapter 1 of Part II. What of the others, and in particular, the operation of Article 8(5) in relation thereto? This brings us to clause (2) of Article 233. This empowers the President (obviously, acting on advice in the constitutional sense) to make an Order suspending the right of any person to move such courts for the enforcement of such of the fundamental rights as may be specified therein. The Order also has an effect vis-à-vis any proceedings as may be pending on the date it is made. Finally, the Order may be made for

the whole of Pakistan or any part thereof. As before, the clause itself ceases to apply, and hence the Order automatically comes to end, once the Proclamation of Emergency is revoked. It is to be noted that a Proclamation of Emergency does not, in and of itself, invoke clause (2); a specific Order is required. It can be that a Proclamation is made without an Order under clause (2); the former can exist without the latter but the reverse is not possible. The Order, if made, may be revoked before the Proclamation. These possibilities are exemplified by the leading case of *Sardar Farooq Ahmed Leghari v Federation of Pakistan and others* PLD 1999 SC 57. There a Proclamation was issued on 28.05.1998 (pg. 59) and on the same date an Order was made under clause (2), which was then varied on 13.07.1998 (pg. 60). Both were challenged before this Court and while the issuance of the Proclamation was upheld, the Order was struck down as ultra vires the Constitution, by a short order dated 28.07.1998 (pg. 65).

73. The question for present purposes however is as to the effect on, and in relation to, Article 8(5), of an Order under clause (2). More precisely, suppose an Order is made which places an embargo on the right to move all courts for the enforcement of all of the fundamental rights set out in Chapter 1 of Part II. Does that mean that the said rights are suspended within the meaning, and for the purposes, of Article 8(5)? We are of course here concerned with fundamental rights other than the ones expressly listed in clause (1); as already noted, they are suspended by that clause of its own force. But what is the position as regards the others? To address this question, we turn again to the Indian Constitution.

74. Before going there however, we may briefly take a look at the other post-Independence constitutions in our own country. There were similarities but also interesting differences. In the 1956 Constitution, the emergency provisions were set out in Part XI. Article 191 corresponded to the present Article 232. Article 192 corresponded to Article 233 but with the important difference that it did not have anything corresponding to clause (1) of the latter. It only had a provision similar to clause (2), i.e., that an Order could be made placing an embargo on the right to move any court for the enforcement of such of the fundamental rights as were specified therein. The 1962 Constitution did not have a separate Part

dealing with emergency provisions. The only provision was Article 30. This allowed for a Proclamation to be issued in terms similar to Article 232. Clause (9) of Article 30 corresponded to clause (1) of Article 233 and indeed, the six fundamental rights listed therein corresponded to the six such rights set out in clause (1). Clause (10) of Article 30 corresponded to clause (2) of Article 233. Finally, the Interim Constitution also did not have a separate Part devoted to emergency provisions; Article 139 dealt with such measures. Clauses (2) and (3) of this Article corresponded, respectively, to clauses (1) and (2) of Article 233. As before, the six fundamental rights specified in clause (2) of Article 139 corresponded to those listed in clause (1) of Article 233.

75. This brings us to the Indian Constitution. Part XVIII deals with emergency provisions. This Part has gone through several amendments over the years, and we here consider it as it stands at present. Article 352 corresponds to Article 232 of our Constitution. Article 358 corresponds to clause (1) of Article 233. It provides that while a Proclamation is in the field, the fundamental rights listed in Article 19 of the Indian Constitution shall, in effect, be suspended in the same manner as does clause (1) of Article 233. Article 19 groups, in its clause (1), six specific fundamental rights which, on the whole, correspond to those set out in clause (1) of Article 233. Article 359 of the Indian Constitution corresponds to clause (2) of Article 233. Clause (1) of Article 359 is in the following terms:

> "Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of [the rights conferred by Part III (except articles 20 and 21)] as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order."

Fundamental rights are set out in Part III of the Indian Constitution. The words in square brackets were substituted by the 44th Amendment (1978). Previous to that, an order under this clause could have been made in respect of any of the fundamental rights; those specified in Articles 20 and 21 (which correspond,

respectively, to Articles 12 and 13, and 9 of the present Constitution) are now excluded.

76. In *Makhan Singh Tarsikka v State of Punjab* AIR 1964 SC 381, a distinction was sought to be made, with reference to an order under Article 359(1), between fundamental rights as such on the one hand and the suspension of the right to move a court for their enforcement on the other. On an examination of Articles 358 and 359, the Indian Supreme Court observed as follows (emphasis supplied; pp. 392-3):

> "(8) Let us then revert to the question of construing Art. 359. In doing so, it may be relevant and somewhat useful to compare and contrast the provisions of Articles 358 and 359. Indeed, both Mr. Setalvad and the learned Attorney-General contended that Art. 359 should be interpreted in the light of the background supplied by the comparative examination of the respective provisions contained in Arts. 358 and 359 (1) & (2). The said two Articles read as under:- [The judgment then reproduced the said Articles and continued:]
>
> It would be noticed that as soon as a Proclamation of Emergency has been issued under Art. 352 and so long as it lasts, Art. 19 is suspended and the power of the legislatures as well as the executive is to that extent made wider. The suspension of Art. 19 during the pendency of the proclamation of emergency removes the fetters created on the legislative and executive powers by Art. 19 and if the legislatures make laws or the executive commits acts which are inconsistent with the rights guaranteed by Art. 19, their validity is not open to challenge either during the continuance of the emergency or even thereafter. As soon as the Proclamation ceases to operate, the legislative enactments passed and the executive actions taken during the course of the said emergency shall be inoperative to the extent to which they conflict with the rights guaranteed under Art. 19 because as soon as the emergency is lifted, Art. 19 which was suspended during the emergency is automatically revived and begins to operate. Article 358, however, makes it clear that things done or omitted to be done during the emergency cannot be challenged even after the emergency is over In other words, the suspension of Art. 19 is complete during the period in question and legislative and executive action which contravenes Art. 19 cannot be questioned even after the emergency is over.
>
> (9) *Article 359, on the other hand, does not purport expressly to suspend any of the fundamental rights*. It authorises the President to issue an order declaring that the right to move any court for enforcement of such of the rights in Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be

> specified in the order. *What the Presidential Order purports to do by virtue of the power conferred on 'the President by Art. 359(1) is to bar the remedy of the citizens to move any court for the enforcement of the specified rights. The rights are not expressly suspended, but the citizen is deprived of his right to move any court for their enforcement. That is one important distinction between the provisions of Art. 358 and Art. 359(1).*"

It will be seen from these passages that the difference between Articles 358 and 359 was that the Order under the latter did not expressly suspend the fundamental rights but only the remedy. This was in sharp contrast to Article 358 where the very rights enumerated therein were suspended. This is the position that emerges also in relation to clauses (1) and (2) of Article 233 of our Constitution. The Indian Supreme Court then proceeded to observe further as below (emphasis supplied; *ibid*):

> "(10) Before proceeding further, we may at this stage, in parenthesis, observe that there has been some argument before us on the question as to whether the fundamental rights specified in the Presidential Order issued under Art. 359 are even theoretically alive during the period specified in the said Order. *The learned Attorney-General has contended that the suspension of the citizens' right to move any court for the enforcement of the said rights, in law, amounts to the suspension of the said rights themselves for the said period*. We do not propose to decide this question in the present appeals. We will assume in favour of the appellants that the said rights are, in theory, alive and it is on that assumption that we will deal with the other points raised in the present appeals."

The Attorney General sought to argue that the suspension of the right of enforcement was tantamount to the suspension of the right itself. In other words, if the remedy was not available then for the duration neither was the right. Having noted the distinction in the earlier paras, the Indian Supreme Court decided not to actually determine the point but proceeded on the basis that the rights were "in theory" alive and subsisting. We will see in a moment that this is a crucial point of difference from our constitutional context. The point however, of citing *Makhan Singh* is to highlight the distinction between the actual suspension of fundamental rights on the one hand and the suspension of only the right of enforcement on the other. Subsequent judgments of the Indian Supreme Court were to like effect.

77. Perhaps because of the distinction that had been thus recognized, in 1975, by the 38th Amendment, a new clause (1A) was inserted in Article 359. This was given retrospective effect. This clause was amended (as presently relevant) by the 44th Amendment (1978), which also added a new clause (1B). As they stand today these clauses (other than the proviso to clause (1A) which is not relevant for present purposes) read as follows:

> "(1A) While an order made under clause (1) mentioning any of [the rights conferred by Part III (except articles 20 and 21)] is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect:...
>
> (1B) Nothing in clause (1A) shall apply—
>
> (a) to any law which does not contain a recital to the effect that such law is in relation to the Proclamation of Emergency in operation when it is made; or
>
> (b) to any executive action taken otherwise than under a law containing such a recital."

It will be seen that clause (1A) is, in terms, the same as clause (1) of Article 358. Thus, the position obtaining as a result of both an issuance of a Proclamation of Emergency and the making of an Order regarding enforcement of fundamental rights were sought to be equalized. Commenting on the effect of clause (1A), a leading treatise on Indian constitutional law, relying on *Union of India v Bhanudas Krishna Gawde* AIR 1977 SC 1027, puts the matter as follows (*Durga Das Basu's Shorter Constitution of India* 15th Ed., (2018), Vol. 2, pg. 1888; emphasis in original):

> "This clause, inserted by the 38th Amendment Act 1975, makes explicit what was implicit in Cl. (1) of Art. 359. Though Cl. (1) of Art. 359 did not directly suspend the operation of any fundamental right in the manner of Art. 358(1), but merely suspended its enforcement through a Court of law, *in effect* the result was the same, namely, that the Fundamental Rights specified in the President's Order cannot be used to test the validity of any law or any executive action taken thereunder, during the subsistence of the Order under Art. 359(1)."

78. Now, and this is the first difference between our Constitution and that of India, the latter does not have any provision equivalent to Article 8(5). (Its Article 32 does have a provision similar to that which was to be found in Article 22 of the 1956 Constitution. As already noted, that does not have any relevance for Article 8(5).) In relation to Article 359(1), a distinction was recognized in terms as noted, between the suspension of fundamental rights as such on the one hand and the right to seek their enforcement on the other. This distinction was sought to be removed by the insertion of clause (1A) into Article 359. This clause, and this is the second difference, has no equivalent in our Constitution in relation to the operation or effect of clause (2) of Article 233. It therefore has no relevance in our constitutional context for any consideration of the distinction between the suspension of the rights and their enforcement. Finally, according to at least one leading Indian commentator, the insertion of clause (1A) in Article 359 made explicit what was already implicit in clause (1). This can only mean that on account of the suspension of the right of enforcement in terms of Art. 359(1), by necessary *implication* the right itself got suspended. And herein lies the third difference. Article 8(5) explicitly states that fundamental rights cannot be suspended except as *expressly* provided in the Constitution. In other words, in respect of the application of this provision, there can be no implication, no matter how “necessary” it may be claimed to be. All that counts, and all that can be taken into consideration, is what the Constitution expressly stipulates. Nothing else can be accepted.

79. It follows from this that while the fundamental rights set out in clause (1) of Article 233 are suspended because the clause expressly so provides, the distinction drawn in terms as above continues to exist, and has always existed, in relation to clause (2). Even though the right to move a court for the enforcement of fundamental rights may be suspended, the rights themselves are not, and cannot be so regarded. In the earlier constitutional dispensations, where there was no equivalent to Article 8(5), the distinction perhaps made no difference. Perhaps there it could be said that the suspension of the right of enforcement by implication meant that the fundamental rights themselves got suspended. And it could be that even in the present Constitution, the same position

may, in effect, obtain in the context of Article 233(2) itself. But that is not the point with which we are here concerned. We are concerned, rather, with the interplay of clauses (3)(a) and (5) of Article 8. For the latter to continue to override and deny the denial of fundamental rights brought about by the former, fundamental rights must not be in a state of suspension. It is only then that the protection provided by clause (5) continues to remain available, vis-à-vis clause (3)(a). We have already seen that this is indeed so when the Constitution is operating in its ordinary course. It is now clear from the foregoing discussion that it continues to remain true even if a Proclamation of Emergency is in the field and an Order is made under Article 233(2). Other than the six fundamental rights enumerated in clause (1), the others are *not* suspended even if such Order is made, because the Constitution does *not* so provide *expressly*. There can, in the present context, be no suspension by implication. Furthermore, the fact that some fundamental rights would stand expressly suspended by reason of Article 233(1) is of no moment. Most of the fundamental rights would *not* be suspended. Clause (5) therefore, would continue to stand athwart the gateway even if an Order is in the field in terms of Article 233(2), and continue to deny the denial of fundamental rights that would result from an application of clause (3)(a).

80. It follows from the foregoing that even when the Constitution is operating in the second "mode", i.e., under a Proclamation of Emergency, and even if that Proclamation is "bolstered" by an Order under Article 233(2), the para (i) provisions would be, and remain, ultra vires the Constitution, on account of the continued protection provided by Article 8(5).

81. We now turn to consider the three cases noted in para 4 above, and begin with *F.B. Ali*. This judgment has already been considered at several places above. It formed a central plank of the submissions by the learned Attorney General, and came under sustained challenge by learned counsel for the petitioners. The appellants there were tried by court martial in terms, inter alia, of the clause (d) provision (under its sub-clause (i)), the acts relevant for purposes of the said offence having occurred during the period from August 1972 to 30th March 1973. Now, in 1965, on the eve of the war between Pakistan and India, the President had issued a

Proclamation of Emergency on 06.09.1965 under Article 30(1) of the 1962 Constitution (reported at PLD 1965 Cent. Stat. 261). On the same day, exercising his powers under clause (9) (as it then stood), the President also made an Order (reported at *ibid*.) whereby the right to move a High Court for the enforcement of the ten fundamental rights listed therein was suspended. On 16.09.1965 another Order was made whereby the right to move a High Court for the enforcement of FR 15 (the equality clause) was also suspended (reported at PLD 1965 Cent. Stat. 556). We may note that Article 30 had originally, and up to the dates just mentioned, a rather different shape from that which has been noticed in this judgment, inasmuch as it had not then contained any clause (10), and clause (9) only allowed for the suspension of the right to enforce fundamental rights before a High Court. By the 5th Amendment Act, passed on 30.11.1965, but given retrospective effect to 06.09.1965 (reported at PLD 1966 Cent. Stat. 76) clause (9) was substituted and a new clause (10) inserted, for the position to become as described in this judgment.

82. It appears that when the Ordinances of 1967 were promulgated both the Proclamation and the Orders aforementioned were in the field. Insofar as the period over which the acts of the appellants stood charged, that was when the Interim Constitution was in the field, as it came into effect on 21.04.1972 (see Article 1(2) thereof). The Interim Constitution continued till the commencing day of the present Constitution (which was 14.08.1973). On 23.11.1971, on the eve of the war between Pakistan and India, the President had issued a Proclamation of Emergency (reported at PLD 1972 Cent. Stat. 30). As noted, that was deemed to be a Proclamation under the Interim Constitution in terms of Article 139(8), which then had the consequences noted above. We may note in passing that in fact the Proclamation just noted was also deemed by the present Constitution under Article 280 to be one issued on the commencing day. Thus, at all times material for *F.B. Ali*, the country was under a state of Emergency.

83. The central holding of *F.B. Ali* has already been noted, i.e., that there was a legislative competence in terms of entry No. 1 read with Nos. 48 and 49 of the Third Schedule to the 1962 Constitution to try civilians by courts martial if the offence in

question had a "nexus" with the defense of Pakistan. The reasons for which this holding does not apply under the present Constitution, particularly in the context of Article 8(5) vis-à-vis clause (3)(a), thus making the cited decision distinguishable, have also been set out. Therefore, even if one proceeds on the basis that the same legislative competence is to be found within the corresponding entries of the Federal List of the present Constitution (a position that can be regarded as finding support in observations made in *Liaquat Hussain*) that does not alter the conclusions arrived at in this judgment. The distinction between the existence of a legislative competence and the ability of the legislature to (constitutionally) exercise it must always be kept in mind. The intervening element of Article 8(5)—the great point of difference between the present Constitution, on the one hand, and the 1962 and Interim Constitutions on the other—is decisive and conclusive.

84. While the foregoing is, in a sense, dispositive of all submissions as to the applicability of *F.B. Ali*, we would like to consider the decision from another aspect also. This is entirely separate and distinct from the constitutional position set out above. Here, within the framework provided by *F.B. Ali*, we turn to consider whether the manner in which the around 103 persons referred to in para (ii) of the short order, were (or could at all have been) lawfully handed over to the Army authorities by the Anti Terrorism Courts on the applications made under s. 549, CrPC. It is our view that even in such terms what was done was unlawful and hence a clear violation of Articles 9 and 10A of the Constitution.

85. It will be recalled that the clause (d) provision makes a person subject to the Army Act if he is accused in terms of either of its sub-clauses. In *F.B. Ali*, the question arose as to when would a person so stand accused. This was partly in the context that the appellants had been charged and convicted by the court martial also for an offence under s. 121-A of the Penal Code, which was not an offence that came within the ambit of the clause (d) provision. After a lengthy and detailed consideration, the learned Chief Justice held as follows (pg. 534; emphasis supplied):

> "In my view the mere lodging of an information does not make a person an accused nor does a person against whom an investigation is being conducted by the police can strictly be called an accused. Such person may or may not be sent up for trial. The information may be found to be false. *An accused is, therefore, a person charged in a trial*. The Oxford English Dictionary defines an "accused" as a person "charged with is a crime" and an "accusation" as an "indictment". Aiyer in his Manual of Law Terms also gives the same meaning. *I am of view, therefore, that a person becomes an accused only when charged with an offence*. The Criminal Procedure Code also uses the word "accused" in the same sense, namely; a person over whom a Court is exercising jurisdiction."

A little earlier (at pg. 533), the learned Chief Justice observed that the appellants became subject to the Army Act from 09.07.1973, when the charges were read out to them by the court martial convened to try them. The charge sheet in this regard was prepared by the Army authorities on 04.07.1973 (see at pp. 514-5). As to the s. 59(4) provision, the learned Chief Justice opined as follows (pg. 532; emphasis supplied):

> "The object of adding subsection (4) was to give jurisdiction to try an offence mentioned in clause (d) of subsection (1) of section 2 as if it was an offence under the Army Act and was committed at a time when such person was subject to the said Act, *merely to avoid the objection that if a person to whom clause (d) of section 2(1) applied was to become subject to the Act only from the time of the accusation then the offence which would necessarily have been committed before such accusation, would not be triable under the Act*. The new subsection (4), by using the words 'such offence' necessarily refers to an offence mentioned in clause (d) and no other offence and, therefore, an offence which is not mentioned in clause (d) would not be triable by a Court Martial under the said subsection."

86. These observations raise an interesting question. At all times prior to the charging of a person (i.e., the civilian) for an offence that falls within either of two sub-clauses of clause (d) of s. 2(1), he is obviously not subject to the Army Act. And so the question: if this is so, then any and all acts done by any authority acting under the Army Act in respect of such person (such as, e.g., seeking to arrest him or obtaining his custody from any other authority, the preparation of a charge sheet, the convening of a court martial, his production before that forum, etc.) would prima facie be unlawful. This is so because then the person would not be subject to the said Act. The Army authorities and any court martial

(if one could at all be then convened) would not yet have any jurisdiction. All those acts and proceedings would (and could only) happen within the four corners of the Army Act, which would at that time not be applicable at all.

87. Could s. 59(4) apply and, as it were, save the day? The purpose for the deeming in this provision was explained by the Chief Justice in the passage extracted. It is for a limited (and, in a sense, obvious) reason and purpose. But could the deeming also be extended and stretched to cover the acts done prior to the charging before the court martial, i.e., to make legal what was illegal when done? Now, validating clauses are well known to the law. These clauses are in a sense a special type of deeming clauses. They are enacted when, usually, a Court has given judgment that an act (e.g., the levy of a tax or fee) is unconstitutional or illegal. If at all the defect can be cured, then appropriate legislation is passed, which also has a validating clause making it retrospectively applicable. (We may note in passing that validating clauses have also been subject to challenge before the Courts.) Can s. 59(4) be regarded as a validating clause thereby covering the prior (illegal) acts done in relation to the civilian who is charged for an offence before a court martial? In our view, the answer has to be in the negative. The reason is that it would be contrary to the interpretation of the provision, and the reason for its insertion, as given by the learned Chief Justice. It is only to obviate the objection that could otherwise be taken by an accused that he was not subject to the Army Act when the offence was committed. The narrowness of the applicability is highlighted by the fact that when it was sought to be pressed by the State in respect of the s. 121-A PPC offence, the learned Chief Justice was dismissive of the submission. But there is another reason why s. 59(4) cannot be regarded as a validating clause. The rationale on which such a clause is premised is that the law as subsequently enacted could have been in the field at the time the impugned action was found to be unlawful or unconstitutional, and therefore it could be given retrospective effect to validate what was done. But that can never be true of an offence under the clause (d) provision. A civilian would always *not* be subject to the Army Act when the offence under either of the two sub-clauses was committed. That, of a necessity, had to come later, when he stood charged. The only way

for the two to be combined would be to, in effect, provide that a civilian is always subject to the Army Act, a conclusion that cannot be accepted, and one which was firmly rejected by the Court in *F.B. Ali* itself. Section 59(4) allowed the Army Act to pull itself up by its own bootstraps but only to a limited extent. In any case, it would be highly inappropriate to so construe it as covering, and thereby legitimizing, acts, things and proceedings done prior to the charging for the offence, which would of a necessity be unlawful when done.

88. If all of this is so, it could of course be legitimately asked, how could a civilian ever be brought before, and tried by, a court martial for an offence under the clause (d) provision? If all acts under the Army Act prior to the charging of the offence were illegal and unlawful then, so it could be said, the para (i) provisions would be a dead letter. In our view, this is not so. There is a way out of this apparent conundrum. The reason is that civilians could be charged for an offence under either of the two sub-clauses by and before a forum (being a Court of competent jurisdiction) outside of, and externally to, the Army Act. Once so charged, they would then become subject to the Army Act, and all actions and proceedings against them could then be taken within the said statute. To explain the point, we look at each sub-clause of the clause (d) provision separately.

89. We have already taken, in paras 18 to 20 above, a first look at each sub-clause. Beginning with sub-clause (i) it will be recalled that there are two offences that answer to the description, one under s. 31(d) of the Army Act, and the other s. 131 of the Penal Code. Now, if it is alleged that a civilian has committed an offence under the latter section, then he would be subject to the jurisdiction of a Court of criminal jurisdiction in terms of the ordinary law of the land. He would be investigated, and if a case is made out challaned and be brought before that Court. All of this would of course happen outside of, and without reference to, the Army Act. When so brought before the Court, and on it being satisfied that there was a case to answer, the civilian would then be charged. On such charge the civilian would stand accused of the necessary offence as would, per *F.B. Ali,* make him subject to the Army Act. Then, action and proceedings could be taken against

him in relation thereto, such as his being handed over to the Army authorities, the convening of a court martial and trial before it, etc. Interestingly, s. 139 of the Penal Code (now) provides as follows:

> "**139. Persons subject to certain Acts.–**No person subject to the Pakistan Army Act, 1952, (XXXIX of 1952) the Pakistan Air Force Act, 1953, (VI of 1953) or the Pakistan Navy Ordinance, 1961 (XXXV of 1961) is subject to punishment under this Code for any of the offences defined in this Chapter."

(As originally enacted in 1860, this section had been in the following terms: "No person subject to any Articles of War for the Army or Navy of the Queen, or for any part of such Army or Navy, is subject to punishment under this Code for any of the offences defined in this Chapter".) Thus, the very charging of a civilian under s. 131 would, by making him subject to the Army Act by reason of the clause (d) provision, take him outside the jurisdiction of the Court charging him. But of course the crucial point here would that all acts done and proceedings taken prior to the charge would be lawful and continue to remain so notwithstanding s. 139. He could then be handed over to the Army authorities for proceedings by way of court martial under the Army Act.

90. As sub-clause (i), so sub-clause (ii). It will be recalled that here the offence has to be one under the Official Secrets Act, 1923 ("1923 Act"). Again, as before, the civilian alleged to have committed an offence that fits the description given in sub-clause (ii) would be dealt with in the manner provided for under the ordinary law of the land. Ultimately, he would be brought before the competent Court having jurisdiction in respect of the 1923 Act, which could then charge him for the offence. All acts done and proceedings taken against the civilian prior to the charge would be lawful. Once so charged the civilian would become subject to the Army Act by reason of the clause (d) provision and then the ensuing acts and proceedings required under that Act could be taken. We may note that in the case of this sub-clause there would be the added "complication" of ss. 94 and 95 of the Army Act but that can, for present purposes, be regarded as a matter which, though important, does not require attention here.

91. It is thus clear from the foregoing that in respect of the clause (d) provision, and offences within the scope of either of its sub-clauses, the lawfully correct procedure and manner is for the civilians to be charged for the relevant offence outside of the Army Act and by a Court of competent jurisdiction. It is only then that such civilians, having become subject to the said Act, can lawfully be taken into custody by the Army authorities and proceeded against in terms of that statute, by way of court martial.

92. In the case of the around 103 persons mentioned in para (ii) of the short order, nothing of the sort appears to have happened. Firstly, they were all before the ATCs because the FIRs under which they were arrested listed offences under the Anti Terrorism Act, 1997. Now, this statute does not give any jurisdiction to the ATCs to try offences either under s. 131 PPC or the 1923 Act. No application could at all have therefore been made to the said Courts by the Army authorities under s. 549, CrPC. Furthermore, even if these Courts did have jurisdiction over the offences, the persons before them had not yet been charged for the same. They had therefore not become subject to the Army Act. Therefore not only could the Army authorities not have filed any applications under s. 549 but the same could not even be entertained by the ATCs. There was, in other words, a double lack of jurisdiction. The manner in which the around 103 persons were dealt with was therefore contrary to law and hence a violation of Articles 9 and 10A of the Constitution. Here, we may note s. 549, CrPC. Subsection (1) of this section provides as follows (emphasis supplied):

> "**549. Delivery to military authorities of persons liable to be tried by Court-martial**: (1) The Federal Government may make rules-consistent with this Code and the Pakistan Army Act, 1952 (XXXIX of 1952 the Pakistan Air Force Act, 1953 (VI of 1953) and the Pakistan Navy Ordinance, 1961 (XXXV of 1961) and any similar law for the time being in force as to the cases in which persons subject to military, naval or air force law shall be tried by a Court to which this Code applies, or by Court-Martial, and *when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial*, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps, ship or detachment, to which he belongs, or to the

> commanding officer of the nearest military, naval or air-force station, as the case may be, for the purposes of being tried by Court-martial."

As the words emphasized indicate, for s. 549 to apply at all the civilian must be charged with the offence that can be tried either by the ordinary law or a court martial. What has been said above is wholly consistent with this, subject to the gloss that it is the very charging of the civilian for the offence that alone makes him subject to the Army Act, and hence liable to be handed over to the Army authorities and triable by court martial. The rules referred to in the subsection are the Criminal Procedure (Military Offenders) Rules, 1970. Nothing therein is inconsistent with what has been set out above.

93. In conclusion, the following can be said of *F.B. Ali*. In the first instance, the judgment is distinguishable. On account of the material difference between the present Constitution and the 1962 Constitution (i.e., Article 8(5)) it does not apply. Even otherwise, if the matter were to be treated within the framework provided by the judgment, the manner in which the around 103 persons have been dealt with would be contrary to law, and that in itself would be a violation of Articles 9 and 10A. On any view of the matter therefore, and with great respect, the judgment does not apply at all in the manner pressed for by the learned Attorney General.

94. We turn to consider *Liaquat Hussain*. This judgment has also been touched upon above. As noted, a Proclamation of Emergency was issued on 28.05.1998. (The Orders under Article 233(2) seeking to suspend the right to enforce fundamental rights were, also as noted, found to be unconstitutional in a prior decision.) On 20.11.1998 the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998 was promulgated ("Ordinance"; reported at PLD 1999 Cent. Stat. 156, and described in detail at pg. 683 et. seq.). This was amended in quick succession (amendments at pg. 687 et. seq.). A notification invoking Article 245 was issued on 27.11.1998 (pg. 687). The vires of the 1998 Ordinance (as amended) were challenged in the cited decision, and the law struck down as unconstitutional (a short order was made on 17.02.1999, reproduced at pg. 549). Thus, *Liaquat Hussain* is

also a decision given in the context of the country being under a state of Emergency.

95. The Ordinance initially applied to such areas in Sindh in which the Armed Forces were called upon to act in aid of civil power under Article 245. This was subsequently changed to the whole of Pakistan where the Forces were so acting. In essence, it allowed for the convening of as many courts martial, as directed by the Federal Government, "as may be necessary to try offences triable under this Ordinance..." (s. 3). The said offences were set out in the Schedule, which listed various offences already created under different laws. In addition, s. 6 created a new offence of "civil commotion", which was of course also triable by the courts martial convened under the statute. Section 4 of the Ordinance provided as follows (emphasis supplied):

> "4**. Powers of the Court**.—(1) A Court convened under section 3 shall have the *power to try any person including a person who is not a member of the Armed Forces* who has committed any offence specified in the Schedule to this Ordinance in any area in which the Armed Forces are acting in aid of civil power and pass any sentence authorized by law within three days.
>
> (2) For the trial offences under this Ordinance procedure provide in the Pakistan Army Act, 1952 Pakistan Air Force Act, 1953 and Pakistan Navy Ordinance, 1961, and the rules made thereunder shall apply."

It was the trial of civilians that was the bone of contention. It is important to keep in mind that though these courts martial were formed with reference to the Army Act (and the corresponding laws relating to the Navy and the Air Force), and were required to follow the procedure set out in those laws, they stood outside the framework of the military justice system. That is, they were not courts martial as conventionally understood.

96. The principal ground on which the Ordinance was challenged was that it set up a parallel judicial system, which was impermissible under the Constitution. The case was that the forums set up under the Ordinance were "military courts" and not courts martial, properly so called. A useful classification in this regard was made by Irshad Hasan Khan, J. in his concurring judgment (para 51; pp. 792-3). The scope of the challenge was

explained by Saiduzzaman Siddiqui, J. in his concurring judgment as follows (para 8; pg. 647):

> "It is not disputed by the learned Attorney-General and is also evident from the preamble of the Ordinance that the Armed Forces have been called in aid of the civil power under Article 245 of the Constitution for the purposes of security, maintenance of law and order and restoration of peace. The petitioners have not questioned the authority of the Federal Government to call the Armed Forces in aid of civil power for the purposes of security, maintenance of law and order and restoration of peace under Article 245 of the Constitution by enacting a legislation in this regard. Their objection is confined only to the setting up of the Military Courts by the Armed Forces for trial of civilians in respect of offences not connected with Armed Forces, under the Ordinance. The controversy, therefore, is in a very narrow compass, namely, whether the function assigned to the Armed Forces by the Federal Government to hold trials of civilian population by setting up Military Courts for offences not connected with Armed Forces, under the Ordinance, is legally and constitutionally sustainable."

Delivering the judgment of the Court, the learned Chief Justice (Ajmal Mian, CJ) held as follows (pp. 564-65):

> "15. The above-quoted extract from the above judgment in the case of Mehram Ali and others v. Federation of Pakistan and others (PLD 1995 SC 1445), indicates that it has been inter alia held that our Constitution recognises only such specific Tribunals to share judicial power with the Courts referred to in Articles 175 and 203, which have been specifically provided by the Constitution itself, like Federal Shariat Court (Chapter 3-A of the Constitution), Tribunals under Article 212, Election Tribunals (Article 225) and that any Court or Tribunal which is not founded on any of the Articles of the Constitution cannot lawfully share judicial power with the Courts referred to in Articles 175 and 203 of the Constitution. Admittedly the Military Courts to be convened under section 3 of the impugned Ordinance do not fall within the category of the Courts referred to in the above Articles. This was even so contended by the learned Attorney-General as reflected from his arguments reproduced hereinabove in para. 11. Neither the above Military Courts nor the personnel to man the same qualify the other requirements spelled out in the case of Mehram Ali reproduced hereinabove in para. 14.
>
> The question which needs examination is, as to whether by virtue of invocation of Article 245 of the Constitution for calling the Armed Forces to act in aid of civil power, the impugned Ordinance could have been promulgated for convening Military Courts in terms of section 3 thereof. This will, inter alia, involve the determination as to the meaning and import of the expression "The Armed Forces shall.....and, subject to

law, act in aid of civil power when called upon to do so" used in clause (1) of Article 245 of the Constitution....”

After a detailed consideration of Article 245 and a large number of cases, it was held as follows (pp. 626-7):

“38. Another submission canvassed at the Bar by the learned Attorney-General was that the convening of the Military Courts depended on the requirement of aid needed by the civil power and, therefore, they are not Courts established under law in terms of Article 175(1) of the Constitution, but in fact, it is an act incidental and ancillary under clause (1) of Article 245 of the Constitution, or to put it differently, it is a step or measure meant to be taken under the above clause of the above Article by the Federal Government to carry out Constitutional duties and obligations envisaged by clause (3) of Article 148, namely, to protect every Province against external aggression and internal disturbances and to ensure that the Government of every Province is carried on in accordance with the provisions of the Constitution and, hence, the impugned Ordinance cannot be tested on the touchstone of Mehram Ali's case (supra). According to him, Military Courts/Tribunals are of the nature, which are exempted from the purview of Articles 175 and 203 of the Constitution like the Courts and Tribunals referred to in Chapter 3-A, Articles 212 and 225.

The above contention is not tenable as convening of Military Courts for trial of civilians for civil offences having no nexus with the Armed Forces or defence of Pakistan cannot be treated as an act incidental and ancillary under clause (1) of Article 245 of the Constitution. It may again be observed that the scope of clause (1) of Article 245 is to call the Armed Forces to act in aid of the. civil power. The scope of the above aid to civil power has been discussed hereinabove in detail. It may again be observed that the above aid to the civil power is to be rendered by the Army as a coercive apparatus to suppress the acts of terrorism inter alia by apprehending offenders and by patrolling on the roads/streets, where there is civil disorder or disturbances of the magnitude which the civil power is unable to control.

In my view the power to legislate the impugned Ordinance for establishing/convening Military Courts cannot be spelt out from clause (1) of Article 245 nor it can be derived from Entry No. 1 read with Entry No. 59 of Part I of the Fourth Schedule contained in the Federal Legislative List relied upon by the learned Attorney-General....”

Thus, the Ordinance was beyond the legislative competence of Parliament and hence ultra vires the Constitution.

97. During the course of the judgment, the learned Chief Justice had occasion to consider *F.B. Ali*. After a detailed

examination of the decision, its *ratio decidendi* was held to be as follows (pg. 608):

> "The ratio of the above judgment seems to be, inter alia, as under:
>
> (i) That even a civilian who is made subject to the Army Act can be tried by the Military Courts under the said Act, provided that the offence of which such person is charged with has nexus with the Armed Forces or Defence of Pakistan.
>
> (ii) That the two accused in the above case were picked up on the basis of valid classification founded on a rational basis namely, those who seduce or attempt to seduce a member of the Armed Forces from his allegiance or his duty, and that there was no possibility of anyone picking and choosing a particular person so accused for trial in one manner and leaving others to be tried under the general laws by reason of amendment introduced by clause (d) of subsection (1) of section 2 of the Army Act; and
>
> (iii) That the trial under the Army Act for the persons liable to be tried is not violative of any of the principles of fair trial."

It is of course pertinent to remember that *Liaquat Hussain* was decided at a time when Article 10A had not yet been added to the Constitution. The learned Chief Justice also, after referring to two decisions cited by the Attorney General (being the minority judgment of Saiduzzaman Siddiqui, J. in *Shahida Zahir Abbasi and others v President of Pakistan and others* PLD 1996 SC 632 and the judgment of Cornelius, J. in *Maulana Abdur Sattar Khan Niazi v Crown* PLD 1954 FC 187) and extracting certain passages from the same, held as follows (pp. 609-10):

> "It is true that, as regards trial by the Military Courts under the Army Act, the above observations have been made, but they are to be understood in the context in which they have been made. The question at issue before us is, as to whether by virtue of the impugned Ordinance the four types of Courts envisaged under the Army Act referred to hereinabove can be substituted for ordinary criminal Courts created under the Constitution for the trial of civilians for civil offences having no nexus with the Armed Forces or defence of the country. There is no doubt that in terms of the Army Act even certain civilians can be tried for the offences covered under the Army Act. In this regard reference may be made to the relevant portion from the opinion of Hamoodur Rahman, C.J. in the case of Brig. (Rtd.) F.B. Ali (supra) quoted hereinabove, wherein Hamoodur Rahman, C.J. observed that "the nexus with the defence of Pakistan was not only close but also

> direct. It is difficult to conceive of an object more intimately linked therewith. The prevention of the subversion of the loyalty of a member of the Defence Services of Pakistan is as essential as the provision of arms and ammunition to the Defence Services or their training". In the instant case the offences specified in section 6 of the Schedule to the Ordinance have no nexus with the defence services of Pakistan. The judgment in the case of Brig (Rtd.) F.B. Ali (supra) does not advance the case of the respondent, on the contrary it clearly lays down that the Army Act can be made applicable to a person who is not otherwise subject to the Army Act if the offence committed by him has nexus with the defence services of Pakistan."

98. It is important to note that the context in which the learned Chief Justice referred to *F.B. Ali* was of legislative competence. Did Parliament have the competence to enact the Ordinance? The affirmative claim in this regard was put forward, and the Ordinance defended, by the Federation on various bases, one of which was that such competence had been recognized in *F.B. Ali*. However, the question was answered in the negative by the Court. The tenor of the judgment of the Court is that, within its own sphere, *F.B. Ali* did confer such a competence, a point already considered in detail above. But for the purposes of the cases now before the Court that is not sufficient. The key issue here is whether that competence could be exercised in light of Article 8(5), which is a different question altogether. This question was not considered in *Liaquat Hussain*, for the reason that it was not before the Court. Indeed, *Liaquat Hussain* is an illustration of the scenario depicted in para 65 above, that once an impugned law is found to be beyond legislative competence, any other question need not even be raised, let alone answered. It was not the vires of the para (i) provisions, as part of the Army Act, that were under challenge. Rather, it was the constitutionality of another statute that was being considered. And indeed, when the Attorney General sought to build an argument for the validity of the Ordinance with reference to Article 8(3)(a), the learned Chief Justice was quick to dismiss it (pp. 632-33):

> "42. It was then submitted by the learned Attorney-General that in view of clause (3) of Article 8 of the Constitution, the other clauses of the above Article are not applicable as the impugned Ordinance is a law relating to members of the Armed Forces for the purpose of ensuring proper discharge of their duties mandated by clause (1) of Article 245 read with clause (3) of Article 148 of the Constitution. In order to examine the above contention in proper perspective, it may

be pertinent to refer to clause (2) and clause (5) of above Article 8 of the Constitution before dilating upon clause (3) relied upon by the learned Attorney-General. It may be observed that clause (2) of the above Article enjoins that the State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void. Whereas clause (5) thereof postulates that the rights conferred by this Chapter (i.e. Chapter relating to the Fundamental Rights) shall not be suspended except as, expressly provided by the Constitution. If clause (3) of above Article 8 is to be viewed with reference to the above two clauses, it becomes evident that paragraph (a) of clause (3) does not empower the Legislature to legislate the impugned Ordinance for providing a parallel judicial system. The above paragraph (a) of clause (3) provides that the provision of the above Article 8 shall not apply to any law relating to members of the Armed Forces, or of the Police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them. The above paragraph refers to any law which may be in existence or which may be enacted in order to enable the Armed Forces or other, forces to discharge their duties and to maintain proper discipline. It has nothing to do with the question, as to whether the Military Courts can try civilians for civil offences which have no nexus with the Armed Forces. The Legislature can legitimately amend the Army Act or even to enact a new law covering the working of the Armed Forces, Police or other forces which may include the taking of disciplinary action against the delinquents including trial within the parameters of such law. In fact the Army Act and the Rules framed thereunder are complete code for regulating the working of the Army including the maintenance of discipline and for punishment for civil and criminal wrongs. Not only clause (3) of Article 8 but clause (3) of Article 199 expressly excludes the jurisdiction of the High Court from passing any order for the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II of the Constitution on the application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law....”

Thus, unlike the case at hand, where the Army Act is undoubtedly a law within the contemplation of Article 8(3)(a), the Ordinance was found to be unrelatable thereto.

99. In our view, *Liaquat Hussain* does not advance or support the submissions made by the learned Attorney General. The consideration by the Court of *F.B. Ali* in *Liaquat Hussain* has to be read and understood contextually. The question there was in

relation to another statute that moved within its own compass, and presented its own issues to the Court. There is an apparent similarity, in that in both *Liaquat Hussain* and here the petitioners question the trial of civilians by courts martial. But in the present petitions (as in *F.B. Ali*) the courts martial are (and were) those convened within the four corners of the Army Act and as part of the military justice system. In *Liaquat Hussain* the courts martial were to be convened outside, and separately from, that system, although procedurally they had to follow the same rules and route. An added difference was that *Liaquat Hussain* also had to resolve the issue of resorting to Article 245 by the Federal Government. The question was of legislative competence. It is for this reason that the judgments (including that of the learned Chief Justice) in *Liaquat Hussain* contrasted the trial of civilians by courts martial, founded on *F.B. Ali*, with that sought to be done in terms of the Ordinance. In this comparison the latter was found to be utterly wanting in legislative competence. Here, the position is different. Although learned counsel for the petitioners have challenged *F.B. Ali* on various grounds (including submissions that the case was simply wrongly decided and/or that its holding is in violation of Article 175), we have reached our conclusion on a rather different basis, i.e., Article 8(5), which is a new "entrant" on the constitutional plane. Although there is a passing reference to this provision in the judgment of the learned Chief Justice (in terms of its para 42 extracted above), it was not considered in the manner as is required, and therefore has been done, here. And the reason is because the Court did not there need to do so. The lack of legislative competence to promulgate the Ordinance was conspicuous otherwise. That was in and of itself sufficient, and conclusive. Here, we have to consider the interplay of clauses 8(3)(a) and 8(5), both when the Constitution is operating in the normal course and when it is in emergency "mode". In our respectful view therefore, despite certain superficial similarities the decision in *Liaquat Hussain* is distinguishable from the present petitions both with regard to the facts and circumstances and also the constitutional and legal issues raised. We conclude accordingly.

100. This brings us to the Full Court decision in *District Bar Association*. A number of judgments were delivered by the

seventeen learned Judges who comprised the Bench. However, no single judgment enjoyed the approval of a clear majority (i.e., nine or more of the learned Judges). The judgment delivered by Azmat Saeed, J. was approved by seven other learned Judges (some of whom gave their own judgments as well). Thus, *District Bar Association* has a plurality *ratio*. Learned counsel for the petitioners as also the learned Attorney General referred, in the main, to the judgment of Azmat Saeed, J. and we will therefore focus our attention there.

101. As has been noted above, *District Bar Association* involved a challenge to certain constitutional and statutory amendments that were made, with a two-year sunset clause, by the 21st Amendment (2015) and certain statutes. Those amendments sought to enable the trial of persons alleged to be terrorists (as defined) by courts martial convened under the Army Act for a large number of offences. Some of those offences had a nexus with the defense of Pakistan but many did not. For this purpose, the Army Act (and those of the other two Services) was amended, making a range of persons subject thereto (by inserting additional sub-clauses in clause (d)). The Army Act and those of the other Services, as so amended, were also inserted into the First Schedule to the Constitution by the 21st Amendment, thereby bringing them within the scope of Article 8(3)(b). The statement of objects and reasons for the enacting of the Amendment was in the following terms:

> "An extraordinary situation and circumstances exist which demand special measures for speedy trial of offences relating to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan. There exists grave and unprecedented threat to the territorial integrity of Pakistan by miscreants, terrorists and foreign funded elements. Since there is an extraordinary situation as stated above it is expedient that an appropriate amendment is made in the Constitution."

102. As is immediately apparent, *District Bar Association* involved questions and issues materially different from those at hand. Under challenge were amendments to the Constitution itself, and to the (amended) statutes that were now placed in the First Schedule thereto. Those amendments were extraordinary in the sense also that they were time bound; once the period (of two years, extended for another two years by the 23rd Amendment

(2017)) expired so did the amendments. Thus, although there was no Proclamation of Emergency in force during this period, the situation was still exceptional. For a certain period, the Constitution itself took on another shape and form, one that was, for present purposes, materially different from its current position.

103. The questions before the Court in *District Bar Association* were set out by Azmat Saeed, J. at the very beginning of the judgment (pg. 652; emphasis supplied):

> "These Constitutional Petitions under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973, have been variously filed to call into question the vires of the Constitution (18th Amendment) Act, 2010, Constitution (21st Amendment) Act, 2015, and the Pakistan Army (Amendment) Act, 2015. After hearing the learned counsel for the parties, the issues requiring adjudication by this Court have concretized. *The elemental questions which have floated to the surface are whether there are any implied limitations on the power of the Parliament to amend the Constitution. If so, whether such limitations can be invoked by this Court to strike down a Constitutional Amendment*. Such limitations, if any, would also need to be identified and in this behalf whether it can be inferred that the amendatory power of the Parliament *qua* the Constitution is circumscribed so as to place certain fundamental provisions of the Constitution beyond the pale of the exercise of such powers by the Parliament."

Given the issues involved, it is not surprising at all that by far the greater part of the judgment was involved in addressing questions relating to the powers of a legislature to make constitutional amendments. Those issues are not raised in these petitions. Although both *F.B. Ali* and *Liaquat Hussain* were considered, the context was that of legislative competence, in the light of the constitutional amendments and, interestingly, Article 245. Clause (1) of this Article provides as follows:

> "The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so."

It will be recalled that in *Liaquat Hussain*, the latter part of this clause ("in aid of civil power") was under consideration, and it was held that it did not provide any legislative competence (read with the relevant entries of the Federal List) to promulgate the Ordinance. In *District Bar Association* the Court drew upon the

specificity of this holding and focused attention on the former part of the clause, i.e., external aggression or the threat of war. It was observed as follows (pg. 726):

> "142. In the context of the law as already laid down by this Court in Brig. (Retd) F.B. Ali's case (supra) and Sh. Liaquat Hussain's case (supra) civilians cannot be tried by Court Martial or other Military Courts, in the eventuality, the Armed Forces are called "in aid of civil power" but where the Armed Forces are directed to deal with "external aggression" or "threat of war" such civilians can be tried where the offence in question has a direct nexus with the Armed Forces or the Defence of Pakistan, as is obvious from the extracts from the above judgments, reproduced herein above."

The Court then considered whether the facts and circumstances that were relied upon by the Federation (encapsulated, in our view, in the statement of reasons and objects) were such that "the gravity of the current situation and the intensity of the armed conflict, warrants its description as a 'threat of war' permitting trial of civilians by Court Martial" (para 143, *ibid*.). After a detailed consideration of the same, it was concluded as follows (pp. 727-8; emphasis supplied):

> "144. The contentions raised by the learned Attorney General for Pakistan appear to be quite compelling. Some of the facts brought to the notice of this Court are already in the public domain. We are not persuaded to hold that the gravity of the situation is such that can be met by merely directing the Armed Forces to "act in aid of civil power". *We appear to be currently confronted with a warlike situation and consequently the Federation is duty bound by the Constitution to Defend Pakistan*. *In the circumstances, the Federation must act in accordance with the first part of Article 245(1), by categorizing the current situation as a threat of war requiring extraordinary measures in terms of use of the Armed Forces in accordance with Article 245*. On the basis of the information available to it, a value judgment has been made in this behalf by the Federal Government i.e. the Executive by directing the Armed Forces in terms of Article 245 to deal with the terrorists. The Parliament (Legislature) too has made a judgment call by enacting the 21st Constitutional Amendment and the Pakistan Army (Amendment) Act, 2015.
>
> 145. We have examined the provisions of the Pakistan Army (Amendment) Act, 2015, in this behalf. There is a specific reference that the offence must be committed by a person known or claiming to be member of a terrorist group or organization, using the name of religion or sect, who in furtherance of his terrorist design wages war against Pakistan or commits any other offence mentioned therein. It is the activities of such terrorists that have created the warlike situation against the State necessitating its defence by the Armed Forces. Thus, the offences committed by said

terrorists appear to have direct nexus with the Defence of Pakistan. Consequently, the Parliament had the legislative competence to take appropriate legislative measure to enable the Federation to fulfill its obligation to act in Defence of the State of Pakistan to provide for the trial and punishment of offences which have a direct nexus with the Defence of Pakistan committed by civilians by Court Martial under the Pakistan Army Act, 1952. Such legislative measure appears to be in accordance with the Constitution in view of the law laid down by this Court in the cases, reported as (1) Brig. (Retd) F.B. Ali's (supra) and (2) Sh. Liaquat Hussain's (supra) in this behalf.

146. *Article 245 creates an exception to a normal situation where the Armed Forces either remain in their barracks or at the national borders. Article 245 can be invoked in an extraordinary situation but only as a temporary measure. Such a measure neither contemplates nor provides a permanent solution*. In the instant case i.e. the 21st Constitutional Amendment as well as Pakistan Army (Amendment) Act, 2015, both contain sunset clauses being only effective for a period of two years."

104. As noted, the constitutional amendments added the laws relating to the Armed Forces (as amended), and another statute, the Protection of Pakistan Act, 2014, to the First Schedule which, per Article 8(3)(b), "immunized" these laws against any challenge in terms of fundamental rights. It is important to keep in mind that the First Schedule can only be altered by constitutional amendment. Hence, the applicability of paragraph (b) of clause (3) is dependent on the Constitution itself being changed. As opposed to this paragraph (a), with which are concerned here, is brought into play by ordinary legislation. But even in the context of paragraph (b), *District Bar Association* went on to observe as follows (pg. 744; emphasis supplied):

"175. However, it may be clarified that if more laws are added to the Schedule to Article 8, each such addition would need to be scrutinized so as to ensure that the Fundamental Rights are not substantively altered. *A quantitative change can always result in qualitative change bringing the matter within the prohibition of the implied restriction upon the power to amend the Constitution*.

176. Similarly, with regard to the proviso to Article 175, it may be noted that the vast expanse of the Judicial Power of the State in terms of Article 175 remains unaffected. As noted above, a small clearly ascertainable class of offences and persons are to be tried by Forums under the Pakistan Army Act. Such Forums are established by Law and pre-exist and their creation has Constitutional recognition. The selection of cases for trial by Court Martial and the eventual decisions passed and sentences awarded therein are subject

> to Judicial Review, as has been held hereinabove. Consequently, the Independence of Judiciary through Separation of Powers as a Salient Feature does not appear to have been significantly affected in respect of its essential nature so as to entail the penalty of invalidation, *especially in view of the temporary nature of the amendment*.
>
> 177. *However, the trials of civilians by Court Martial are an exception and can never be the rule*. Amplification of the jurisdiction of the Forums under the Pakistan Army Act, in this behalf, may step out of the bounds of Constitutionality."

105. In our view, it is clear from the foregoing that *District Bar Association* was decided in relation to issues and questions quite distinct and separate from the ones now before the Court. With utmost respect therefore, it sheds no light on what here falls to be determined and the decision is, for that reason, distinguishable.

106. It will be convenient to dispose of two subsidiary points here. The first one is that some may possibly argue that if the legislative competence that is the central holding of *F.B. Ali* cannot, as held above, be exercised under the present Constitution, neither when it is operating in the normal course nor when it is in Emergency "mode", then the competence has been rendered ineffective, and *F.B. Ali* essentially nullified. Such an argument would be wrong for at least three reasons. Firstly, it has been seen that the existence of a legislative competence does not necessarily mean that it can be exercised to its fullest extent. Fundamental rights are a classic example of the limitations that exist in this context. Now, notwithstanding our rather troubled constitutional history, there can be no doubt that the tenor and spirit of the Constitution is that it is expected to operate in the "default" mode, i.e., in the ordinary course. Thus, years if not decades may pass before there is (if at all) ever a need to issue a Proclamation of Emergency, which has the consequences vis-à-vis fundamental rights noted above. During all this period, the curbs and limitations on the exercise of the relevant legislative competences will continue. Therefore, there is nothing inherently odd with a legislative competence not being exercised in full. Secondly, also as noted above, the legislative competence identified in *F.B. Ali* is actually only its subsidiary aspect, and an ancillary manifestation of what may be described as its core, or principal, nature. That, of course, is for courts martial to operate, as an integral part of the military justice system, on and in relation to the members of the

Armed Forces. This principal feature and function is wholly unaffected and undisturbed by whether the ancillary aspect is exercisable or not (or even exists at all). It must be remembered that the offences encapsulated in the para (i) provisions have existed for a long time. In the case of sub-clause (i) of the clause (d) provision the offence has been around since 1860 and in the other case since 1923. The ancillary aspect of the competence was identified only in 1967. Thirdly, the legislative competence can, in terms of *District Bar Association*, be exercised subject to fulfillment of three conditions: (i) the country must face extreme conditions of the sort noted in the judgment; (ii) the exercise of the competence must be for a short and stated period, i.e., be subject to a sunset clause; and (iii) an appropriate constitutional amendment must provide the necessary support. Thus, the legislative competence is in any case to be regarded as very much a "reserve" power, exercisable if at all only in *extremis*.

107. The second point is in relation to clause (3) of Article 199. The learned Attorney General submitted that the words "a person ... for the time being subject to any law relating to any of [the Armed] Forces" indicated that the Constitution recognized the legislative competence identified in *F.B. Ali*. Here, it must be kept in mind that Article 199(3), as originally enacted and adopted, had contained no such reference. That came about only as a result of the 1st Amendment (1974). But more importantly, even if the para (i) provisions could validly remain on the statute book under the present Constitution (which is of course not the case) there is nothing that would, constitutionally speaking, prevent Parliament from omitting them from the Army Act (and the laws relating to the two other Services) at any time. If that were to happen then there would be nothing to which the afore-noted words would apply. And, in principle, that situation could exist indefinitely. In other words, the mere fact that the para (i) provisions have been around since 1967 absolutely does not require, or even suggest, that they must therefore remain in perpetuity. This example illustrates, again, the error that can be made, in the context of a legislative competence, of conflating existence and exercise.

108. Our attention was also drawn to *Said Zaman Khan and others v Federation of Pakistan and others* 2017 SCMR 1249,

whereby a large number of leave petitions were decided. These matters were decided with reference to *District Bar Association* (see para 71, at pp. 1274-5) and on the touchstone of the three well known bases on which, notwithstanding a constitutional clause seeking to oust the jurisdiction of the Superior Courts, an impugned action can nonetheless be reviewed. Thus it was observed as follows (pg. 1276):

> "73. The grounds on the basis whereof a challenge can be thrown to the proceedings taken, convictions and sentences awarded by the FGCM [i.e., Field General Court Martial] have been specified hereinabove so as to include the grounds of *coram non judice*, without jurisdiction or suffering from *mala fides*, including malice in law only."

The Court proceeded to review the case of each petitioner separately. Each challenge was found wanting. It is interesting to note that the challenge was dismissed in terms of a para worded as below, or some variant thereof (pg. 1288):

> "105. The extraordinary circumstances necessitating the enactment of the 21st Constitutional Amendment Act and the Pakistan Army (Amendment) Act, 2015 are articulated in the Preambles thereof. The nature of the offence, the commission whereof the Convict in the instant case was accused is exactly the "mischief" sought to be suppressed by the aforesaid Enactments. The selection of the instant case for trial by the FGCM reflects the due fulfillment of the mandate and purpose of the law. The learned counsel for the Petitioner was unable to make out even the semblance of a case that the selection process in this behalf was tainted with *mala fides* of facts or law or otherwise was without jurisdiction or *coram non judice*."

At least 16 examples can be found in the judgment where the foregoing para was repeated with more or less identical wording, when concluding that the cases presented by the various petitioners were wanting. All the leave petitions were dismissed. As has been noted above, *District Bar Association* is, with respect, distinguishable. Therefore, the cited decision now being considered also does not, with respect, address, or assist in deciding, the questions and issues before us.

109. Accordingly, final shape can now be given to our answer, which we have so far regarded as provisional. It is our firm view

that for the reasons set out above, the para (i) provisions are ultra vires the Constitution.

110. In this judgment, we have had to consider the Army Act. We may note that the Ordinances of 1967 also amended, in exactly the same manner, the laws relating to the other Services, being the Pakistan Air Force Act, 1953 and the Navy Ordinance, 1961. Needless to say, this judgment applies equally, and in like manner, to those laws as well.

111. As regards the maintainability of the petitions, the matter has been treated in detail by one of us (Ayesha A. Malik, J.) in her judgment. We are in agreement with the same. In addition, briefly stated the determination here is the denial, through Article 8(3)(a), of fundamental rights as protected by Article 8(5). That provision protects all fundamental rights. Therefore, these petitions involve and, in effect, seek the enforcement of all fundamental rights. Of these, two in particular have also been found involved specifically, being Articles 9 and 10A. There can be no doubt whatsoever that the questions raised here are of public importance. Thus, both the conditions required for invoking the jurisdiction of the Court in terms of Article 184(3) are met. Finally, it is well settled that the rules of standing in relation to the jurisdiction of the Court are much more relaxed and liberal as, e.g., compared to corresponding requirements in relation to Article 199. There can be no doubt regarding the standing of the petitioners to file these petitions and bring the very serious questions of fundamental constitutional importance identified by them before the Court.

112. This brings us to the last aspect that requires attention. Although we have made the declaration in para (i) of the short order regarding the vires of the impugned provisions, it must also be recognized that a very great many civilians have been already been convicted and sentenced by courts martial in terms thereof. Some regard must be had to this reality and some arrangements made in this regard. Accordingly, it is directed in relation to certain categories of cases as below.

113. As on the date of the short order, and in relation to and by reason of sub-clauses (i) and (ii) of clause (d) of s. 2(1) of the Army

Act read with s. 59(4) and/or the equivalent provisions of the Pakistan Air Force Act, 1953 or the Navy Ordinance, 1961 (all as inserted by the Ordinances of 1967):

a. Cases of persons convicted by court martial and who have either (i) served out the sentence, or (ii) who are serving the sentence but have exhausted legal remedies and/or whose convictions have otherwise become final, shall be regarded as past and closed and remain unaffected by this judgment;

b. Persons who have been convicted by court martial and who are still pursuing legal remedies (whether statutory or before a Court of law) may apply to the appropriate Court, which shall consider the lawfulness of the conviction without reference to this judgment, but if it concludes that the person is otherwise entitled to any relief (including, but not limited to, with regard to the sentence) may, in the facts and circumstances of the case before it, also take this judgment into consideration:

   For purposes of this sub-para "appropriate Court" means (i) this Court if the remedy is being pursued here; (ii) a High Court if the remedy is being pursued there; and (iii) in all other cases, the High Court exercising jurisdiction over the place where the person is undergoing sentence or otherwise located;

c. For purposes of sub-paras (a) and (b), neither a petition filed under Article 184(3) of the Constitution nor a petition before the President under Article 45 of the Constitution or any provision of law whereby relief equivalent to the latter can be sought (other legal remedies having been exhausted) shall be regarded as a pending, or (as the case may be) the pursuing of a, legal remedy;

d. Any person or class of persons for whom a special remedy has been created by law to a Court outside the Army Act or equivalent laws (whether by way of a right of review or re-consideration or otherwise) shall, whether convicted or still being tried by court martial, seek his remedy accordingly, and his case shall remain unaffected by this judgment.

114. The foregoing are the reasons for the short order dated 23.10.2023.

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

I agree and also give a concurring judgment. Sd/-
Judge

Islamabad, the
9th January, 2024
APPROVED FOR REPORTING

ANNEXURE

MANUAL
OF
Indian Military Law

1937

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MANUAL

OF

INDIAN MILITARY LAW

PART I.

CHAPTER I.

INDIAN MILITARY LAW—ITS ORIGIN AND EXTENT.

(i) Introductory.

1. The Indian Army sprang from very small beginnings. Guards were enrolled for the protection of the factories or trading posts which were established by the Honourable East India Company at Surat, Masulipatam, Armagon, Madras, Hooghly and Balasore in the first half of the seventeenth century. These guards were at first intended to add to the dignity of the chief officials as much as for a defensive purpose, and in some cases special restrictions were even placed by treaty on their strength, so as to prevent their acquiring any military importance. Gradually, however, the organisation of these guards was improved and from them sprang the Honourable East India Company's European and native troops. Both of these steadily increased in numbers, until in 1857, when the native army reached its maximum strength, it numbered (including local forces and contingents, and a body of 38,000 military police) no less than 311,038 officers and men.[a]

2. Statutory provision was first made for the discipline of the Honourable East India Company's troops by an Act[b] passed in 1754 for "punishing Mutiny and Desertion of officers and soldiers in the service of the United Company of Merchants of England trading to the East Indies, and for the punishment of offences committed in the East Indies, or at the Island of Saint Helena". Section 8 of this Act empowered the Crown to make Articles of War for the government of these troops, and such articles were accordingly made and published. The terms of the Act are wide enough to cover both European and native troops, but the language of the articles themselves shows that they were originally intended for Europeans only. In the absence of any other code, however, the Governments of Bengal, Madras, and Bombay

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[a] Imperial Gazetteer of India, 1907, Vol. IV, Ch. XI.
[b] 27 Geo. II, Cap 9.

seem to have applied these articles, with such modifications and omissions as appeared necessary, to the bodies of native troops maintained by them, of which the present Indian Army is the descendant. In 1813, owing to doubts having arisen as to the legal validity of the existing arrangements for the discipline of the native armies, provisions were inserted in the Act[c] which was passed in that year to extend the Company's privileges for a further term, which legalised the existing system and gave power to each of the Governments of Fort William, Fort Saint George and Bombay to make laws, regulations, and Articles of War for the government of all officers and soldiers in their respective services who were "natives of the East Indies or other places within the limits of the Company's Charter". It was further provided in 1824[d] that such legislation should apply to the native troops of each presidency, wherever serving, and whether within or beyond His Majesty's dominions.

3. Under the statutory sanction of these two enactments a military code was framed by the government of each presidency and put in force as regards its own troops. These codes still followed to a great extent the Articles of War then applicable to the Company's Europeans, but the only punishments awardable to native officers seem to have been death, dismissal, suspension, and reprimand, and to native soldiers, death and corporal punishment. Transportation and imprisonment were not awardable.

(ii) The Articles of War

4. By section 73 of the Government of India Act, 1833,[e] the power to legislate for the whole native army was restricted to the Governor General in Council, and laws so made were given general application to all "native officers and soldiers" wherever serving. Obviously the native officers and soldiers here referred to are the "natives of East Indies or other places within the limits of the Company's Charter" of the earlier legislation. This is confirmed by the fact that in later legislation[f] the existence in India of three military codes is recognized—i.e., that of the Queen's troops, that of the Company's Europeans, and that of the Company's troops who are "natives of the East Indies or other places within the

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[c] 53 Geo. III, Cap. 155, ss.96 and 97.
[d] 4 Geo. IV, Cap. 81, s.63.
[e] 3 and 4 Will. IV, Cap. 85.
[f] 7 and 8 Vic., Cap. 18; 12 and 13 Vic., Cap.43.

limits of the Company's Charter". Under the powers conferred upon it by the Act of 1833 the Indian Legislature for the first time provided a common code for the native armies of India in 1845, "Articles of War" for those armies being enacted by the Governor General in Council as Act XX of that year. This Act was shortly after repealed and replaced by Act XIX of 1847 which, having been frequently amended[g] in the intervening period, was in its turn repealed by Act XXIX of 1861 (an Act to consolidate and amend the Articles of War for the government of the Native Officers and soldiers in Her Majesty's Indian Army). This was repealed by Act V of 1869 ("the Indian Articles of War") which replaced it. In the preamble to this Act reference is for the first time made to "native officers, soldiers, and other persons in Her Majesty's Indian Army," thus recognizing the existence of what are commonly known as "followers".

5. The amalgamation of the three native armies into one in 1895 necessitated considerable amendments in the "Indian Articles of War". These amendments were effected by Act XII of 1894 and the Indian Articles of War, as altered by this Act, and by various minor amending Acts,[h] furnished the statutory basis of the Indian military code until 1911. As time went on, however, and the Indian Army began to take its share in the imperial responsibilities of the British Army, it was found that an Act originally framed for three separate local forces, each serving as a rule in its own Presidency, failed to provide adequately for the discipline and administration of that army under modern conditions. Owing also to the mass of amendments super-imposed on the original articles, these were often difficult to understand, and sometimes even self-contradictory.

6. The amendment of the Indian Articles of War was therefore again taken up in 1908, but the consideration then given to the subject showed that a new consolidating and amending Act would be necessary, any further amendment of the articles of 1869 being only likely to accentuate the existing confusion. A Bill was accordingly drafted consolidating the existing law as to the Indian Army into one simple and comprehensive enactment and adding such provisions as experience had shown to be necessary. This was passed into law on the 16th March 1911 as the "Indian

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[g] Acts of Governor General in Council— VI of 1850, XXXVI of 1850, III of 1854, X of 1856, VIII of 1857, XXXII of 1857, and VI of 1860.
[h] Acts of Governor General in Council, XII of 1891, I of 1900, I of 1901, IX of 1901, XIII of 1904, and V of 1905.

Army Act" and came into force on the 1st January 1912. All previous Acts dealing with the subject were repealed by section 127 of the Act. Amendments subsequently made by various minor amending Acts[i] have been incorporated in this edition.

7. During the war 1914-18 temporary Acts[j] were passed to provide for the suspension of sentences. These measures were found to be beneficial, and on the 23rd March 1920 a permanent Act to provide for the suspension of sentences of imprisonment or transportation passed by courts-martial on persons subject to the Indian Army Act, which repealed the temporary Acts, came into force. This Act which is known as the "Indian Army (Suspension of Sentences) Act"[k] has to be read as one with the Indian Army Act. The Act is reprinted in full in Part III with notes. For further information see Chapter IV.

(iii) Present Code

8. The present military code of the Indian Army is thus contained in the Indian Army Act, the Indian Army (Suspension of Sentences) Act and certain rules and other matters which latter, being made in pursuance of the Indian Army Act by authorities therein empowered to do so, have the force of law. Examples of this latter class of "subordinate legislation" are the Rules framed by the Central Government under section 113 of the Indian Army Act, and those as to "minor punishments" contained in Regulations for the Army in India, which derive their statutory force from orders issued by the Commander-in-Chief in pursuance of section 20 of the Indian Army Act.

9. We have now to consider what persons are made subject to this code.

The Regular Forces include the Indian Army,[l] and all persons in the Regular Forces are *prima facie* subject to the Army Act,[m] i.e., to the code of the British Army. Such of the Regular Forces, however, as are officers, soldiers or followers in His Majesty's Indian Forces are, if "natives of India", made subject to

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[i] Acts of Governor General in Council, XV of 1914, X of 1917, XI of 1918, XVIII of 1919, II of 1920, XXXVII of 1920, XXXIII of 1923, VIII of 1930, XXXIII of 1934 and VII of 1935.
[j] Acts of Governor General in Council IV of 1917 and XVIII of 1918.
[k] Act of Governor General in Council XX of 1920.
[l] A.A., s.190 (8).
[m] A.A., ss.175 (1), 176 (1).

Indian military law[n] and are to be tried and punished in accordance with that law. “Natives of India are, for the purposes of the Army Act, defined[o] as “persons triable and punishable under Indian military law,”—which is, in its turn, defined[p] as “the Articles of War or other matters made, enacted, or in force, or which may hereafter be made, enacted, or in force under the authority of the Government of India”. The position therefore is that those persons in His Majesty’s Indian Forces for whom the Indian legislature, acting within the extent of its legislative powers, has provided a military code, are subject to that code and are tried and punished in accordance with it instead of in accordance with the Army Act. The Indian legislature had, by section 73 of the Government of India Act, 1833,[q] referred to above, power to make laws for all “native officers and soldiers”—that is for all persons permanently subject to military law and regularly commissioned, appointed, or enrolled into the military service of the Crown in India who are “natives of the East Indies or other places within the limits of the Company’s Charter”—in fact for most Asiatics and some Africans.

Section 73 of the Government of India Act, 1833, has been repealed and by section 65 (1) (d) of the Government of India Act, 1915[r] which replaced it, the Indian legislature is empowered to make laws for the government of officers, soldiers and followers in His Majesty’s Indian Forces in so far as they are not subject to the Army Act, which laws shall, as in the Act of 1833, apply to them at all times and wherever serving. It has, however, been held that the scope of the Indian Army Act, 1911, which was passed in exercise of the powers conferred by section 73 of the Government of India Act of 1833, has not been extended by the subsequent passing of the Government of India Act of 1915. Nevertheless, the Indian Army Act of 1911 permits the enrolment, for instance, of Anglo-Indians of Indian domicile, on the ground that such persons are “natives of India” for the purposes of the Government of India Act of 1833, under which the Indian Army Act of 1911 was enacted. The position is the same under the Government of India Act, 1935.

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[n] A.A., s.180(2) (a).
[o] A.A., s. 190 (22).
[p] A.A., s.180 (2) (b).
[q] 3 and 4 Will. IV, Cap. 85.
[r] 5 and 6 Geo. V Ch. 61 as amended by 6 and 7 Geo. V, Ch. 37 and 9 and 1 Geo., V, Ch. 101.

The Indian Legislature has so far applied its military code to the following classes, wherever serving[s]:--

(1) Indian commissioned officers.[t]
(2) Viceroy's commissioned officers.[u]
(3) Warrant officers.[v]
(4) Persons enrolled under the Indian Army Act.

10. The persons commonly known as "followers" are not ordinarily subject to Indian military law, unless they have been enrolled under the Indian Army Act, but it is obviously necessary that they and other civilians who accompany the army should be subject to military discipline on active service and in certain other circumstances. Accordingly we find that the Indian Army Act is also[w] applied to—

> "Persons not otherwise subject to military law, who, on active service, in camp, on the march, or at any frontier post specified by the Central Government by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of, His Majesty's Forces."

The above provision does not operate so as to subject Europeans, British or foreign to Indian military law when they accompany His Majesty's Forces under the circumstances mentioned. Such persons are however subject to the Army Act (British) when they accompany these forces on active service. Its operation as to non-Europeans who are not native Indian subjects of His Majesty is in some cases doubtful, and may depend on the employment of the person concerned and the locality of the service. Any civilian, however, who is on active service with a British Indian force, and is not subject to the Indian Army Act, will be subject to the Army Act,[x] so that no one will escape entirely from military discipline. Further information regarding civilians temporarily subject to the Indian Army Act will be found in Chapter VIII.

11. The position of other military and semi-military bodies such as the Indian Territorial Force, the Indian State

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[s] I.A.A., s.2 (1)(a) (b).
[t] For definition, see I. A.A., s.7 (2).
[u] For definition, see I. A.A., s.7(2A).
[v] For definition, see I.A.A., s.7(3).
[w] I.A.A., s.2(1)(c). See also Chapter VIII.
[x] A.A., ss.175 (7) (8), 176 (9) (10).

Forces, the Military Police, the Frontier Militia, and Levies, will be considered in another chapter.[y]

[y] See Chapter VIII.

AYESHA A. MALIK, J-. I have read the judgment authored by my learned colleague Munib Akhtar, J. and agree with it, however, I have given additional reasons in a concurring judgment as the emphasis for me, in particular, is the protection provided by Article 10A of the Constitution[1] and the enforcement of the same.

2. The Petitioners challenge the *vires* of Section 2(1)(d) and Section 59(4) (**the impugned sections**) of the Pakistan Army Act, 1952 (**Army Act**) being *ultra vires* the Constitution and also seek a declaration that the decision of the Federal Government dated 19.05.2023 to try civilians with respect to the events of 9th and 10th May, 2023 by military courts under the Army Act read with Official Secrets Act, 1923 (**Official Secrets Act**) as being unconstitutional.

3. The Petitioners contend that these Petitions raise questions of public importance with reference to the enforcement of fundamental rights as conferred by the Constitution essentially being whether civilians can be tried and court martialled under the Army Act. They argue that civilians cannot be tried in military courts as the purpose of military courts and court martial proceedings is to maintain discipline within the armed forces and further that for any offence made out under the ordinary or special law, civilians should be tried by the court of competent jurisdiction and not military courts. The thrust of these Petitions is based on the argument that the fundamental right of fair trial and due process as enshrined in Article 10A of the Constitution ensures fairness and due process in a trial for citizens, which is not possible before a military court bound by the provisions of the Army Act read with the Pakistan Army Act Rules, 1954 (**the Rules**) as the principles of fair trial are missing. Article 10A read with Articles 9 and 175 of the Constitution, in their opinion, guarantees civilians a fair trial with an open hearing by an independent forum, ensuring a substantive right of appeal against any criminal charge, which forum and right of appeal is totally separate from the executive. The emphasis of the argument being that the trial of civilians should be before an independent forum established under Article 175 of the Constitution and that the trial of civilians before a military court violates the principle of separation of power being a salient feature of the Constitution. In the context of this argument, it was also argued that the provisions of the Army Act read with the Rules envisions the trial of a civilian before a military court headed by an officer appointed by the

[1] The Constitution of the Islamic Republic of Pakistan, 1973

Army authorities who is not a judge under the supervision of any High Court rather a member of the Executive. Further that there is no right of appeal before an independent forum which means that a trial by a military court does not guarantee a fair trial or due process as envisioned under Article 10A of the Constitution. They have relied upon Article 8(1)(2) of the Constitution to urge the point that the impugned sections being in derogation of fundamental rights is *void*. They have also relied upon the *Mehram Ali* case[2] to urge the point that the separation of judicial functions from executive and legislative functions is required being the constitutional command of separation of power. As to the events of 9th and 10th May, 2023 they argue that those involved should be tried by the ordinary or special courts of the country, as the case may be, because offences under the Official Secrets Act are triable before such courts which are established pursuant to Article 175 of the Constitution. The Petitioners clarified that they do not condone those responsible for their participation in the 9th and 10th May, 2023 incidents nor do they seek their acquittal they only press for the rights of the detained civilians to be treated fairly, as per law, before courts of competent jurisdiction.

4. The Attorney General for Pakistan (**AGP**) raised objections on the maintainability of the Petitions and defended the impugned sections as well as trial of civilians by military courts on the ground that Article 8(3)(a) of the Constitution makes the provisions of Article 8(1)(2) of the Constitution inapplicable to these trials, meaning thereby, persons who are not members of the armed forces but carry out any act which may prevent members of the armed forces from the proper discharge of their duty fall within the scope of the impugned sections which in turn means that if a close and direct nexus is made between the offence and the armed forces then in such cases the trial of civilians in military courts is permissible as per the *F.B Ali* case[3]. So far as the challenge with reference to fundamental rights especially Article 10A of the Constitution, the AGP argues that in the cases related to 9th and 10th May, 2023, the offences made out have a direct nexus with the proper discharge of duties by the members of the armed forces, hence, Article 8(3)(a) of the Constitution is invoked on the basis of which these civilians fall within the exception to Article 8(1)(2) of the Constitution. With reference to the argument of due process and access to justice, he

[2] Mehram Ali v. Federation of Pakistan (PLD 1998 SC 1445)
[3] Brig. (Rtd.) F.B. Ali v. The State (PLD 1975 SC 506)

argues that the procedure for trial of civilians under the Army Act does guarantee a certain level of due process and right of hearing where the ability to prepare their defence and freely communicate with witnesses and defending officer or legal advisor and that as per his understanding and instructions, reasoned judgments will be given in these cases and possibly a right of appeal may be created so as to ensure that those under custody who are to face military trials are not denied or deprived of their right to a fair trial. The AGP has stressed on the dicta laid down in the *F.B Ali* case stating that this is a binding precedent which stops this Court from granting any relief to the Petitioners especially with respect to the *vires* of the impugned sections. The AGP has also stressed on the fact that no new statutory regime or legal instrument has been created to try such citizens, that the *F.B Ali* case has been in place for decades and further that citizens involved in damaging, destroying, breaking and entering military establishments and military installations have a close nexus with the Army Act, hence, they can be tried by military courts. He has also placed reliance on the *Liaquat Hussain* case[4], *Shahida Zahir* case[5] and District Bar Association, Rawalpindi case[6] (***DBA* case**) in support of his contention that in certain circumstances civilians can be tried by military courts.

5. The facts leading up to the arrest of civilians and their trial before military courts are the incidents of 9th and 10th May, 2023 when in terms of what has been stated by the AGP several military establishments were attacked including the Core Commander House Lahore, PAF Base Mianwali, ISI Establishment Civil Lines, Faisalabad, Sialkot Cantt., Rawalpindi, Gujranwala Cantt., and Bannu Cantt. and the Peshawar Radio Station. As a consequence, FIRs were primarily registered under the Anti-Terrorism Act, 1997 and admittedly, the FIRs do not mention the provisions of the Army Act or the Official Secrets Act. On 15.05.2023, in the Core Commander Conference, it was decided that the perpetrators of 9th and 10th May will be tried in military courts. This was endorsed by the National Security Meeting on 16.05.2023 and then by the federal cabinet on 19.05.2023 and a resolution by the National Assembly on 22.05.2023. During the course of the hearing, the AGP clarified[7] that 103 persons have been detained pursuant to the events of 9th and 10th May, 2023; that no military trial of civilians will

[4] Sh. Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504).
[5] Mrs. Shahida Zahir Abbasi v. President of Pakistan (PLD 1996 SC 632).
[6] District Bar Association, Rawalpindi v. Federation of Pakistan (PLD 2015 SC 401)
[7] Contained in the order dated 23.06.2023 of this Petition

be held during the pendency of the present Petitions;[8] that the cases of the detained civilians are at the investigation stage and that no detained civilian will be charged with the commission of any offence that attracts capital punishment or lengthy sentence under the Official Secrets Act.[9]

Preliminary Objection: Maintainability of the Petitions

6. The argument raised by the AGP is that the instant Petitions are not maintainable given that they do not raise any question of public importance nor any question related to the enforcement of any fundamental right. He also states that if at all any Petitioner is aggrieved their remedy lies under Article 199 of the Constitution as per the dicta of the *DBA* case. His argument is that Article 184(3) confers original jurisdiction on the Supreme Court only if the matter relates to public importance for the enforcement of fundamental rights, which he claims is not the case in these Petitions. So the two objections raised are that these Petitions are not maintainable under Article 184(3) of the Constitution and that their remedy lies before the High Courts under Article 199 of the Constitution.

7. To address these arguments the jurisprudence evolved by the Supreme Court over the years is sufficient. The first question is whether the issues raised are of public importance related to the enforcement of fundamental rights. This Court has interpreted Article 184(3) of the Constitution in the context of public importance and fundamental rights to mean that both are preconditions to the exercise of power under Article 184(3) of the Constitution which should not be interpreted in a limited sense but in the gamut of Constitutional rights and liberties, such that their protection and breach would raise serious questions of public importance related to the enforcement of fundamental rights and it would not be relevant that the issue arises in an individual's case or in a case pertaining to a class or group of persons.[10] It has also been held that matters of public importance raise questions that are of interest to or affect a large body of people or the entire community and must be such to give rise to questions affecting the legal rights and liabilities of the community, particularly where the infringement of such freedom and liberty is concerned which would become a matter of public importance.[11] This Court has also held that while interpreting Article 184(3) of the Constitution, the Court must be

[8] Order dated 26.06.2023 of this Petition
[9] Order dated 27.06.2023 of this Petition
[10] Miss Benzir Bhutto v. Federation of Pakistan (PLD 1988 SC 416)
[11] Ch. Manzoor Elahi v. Federation of Pakistan (PLD 1975 SC 66), Syed Zulfiqar Mehdi v. Pakistan International Airlines Corporation through M.D. Karachi and others (1998 SCMR 793)

conscious of fundamental rights and directive principles of state policy so as to achieve democracy, tolerance, equity and social justice according to Islam and while exercising this power the Supreme Court is neither dependent on an *aggrieved person* nor the traditional rule of *locus standi*.[12] The issue before the court in order to assume the character of public importance must be such that its decision affects the rights and liberties of people at large and concepts such as political rights and political justice also should be duly considered.[13] Before an order is made under Article 184(3) of the Constitution, the court must identify the issue that is of public importance with reference to the enforcement of fundamental rights where public importance is a question that involve the rights of the public.[14] This Court has emphasized that matters of public importance means that citizens are not deprived of their fundamental rights which is the underlying objective of Article 184(3) of the Constitution.[15] The interpretation made to the expression public importance has been repeatedly construed to mean relating to the people at large, the nation, the state or the community as a whole, meaning thereby, that in order to invoke Article 184 (3) of the Constitution it must be shown that the matter is of public importance arising from the breach of a fundamental right which affects the public at large.[16] In the instant case, the Petitioners who include not only affected parties but also notable members of society and concerned citizens have questioned the decision of the Federal Government to try cases pertaining to the events of 9th and 10th May, 2023 before military courts. The issue pertains to the enforcement of fundamental rights of the citizens of Pakistan, particularly the right to be treated in accordance with law[17] and the right to fair trial and due process.[18] The Petitioners also plead that the independence of the judiciary and separation of power being fundamental constitutional principles must be maintained in order to ensure that the mandate of the Constitution is preserved and protected and that people are governed in terms thereof. Hence, they claim that the issues raised are of public importance related to the enforcement of fundamental rights of the citizens of Pakistan.

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[12] Pakistan Muslim League (N) v. Federation of Pakistan (PLD 2007 SC 642)
[13] PLD 2007 SC 642 (supra)
[14] Suo Motu Case No.7 of 2017 (PLD 2019 SC 318)
[15] PLD 2019 318 (supra)
[16] Justice Qazi Faez Isa v. President of Pakistan (PLD 2023 SC 661)
[17] Article 4 of the Constitution
[18] Article 10A of the Constitution

8. The subject matter of these Petitions is the constitutionality and legality of the trial of civilians before a military court under the Army Act with reference to the events of 9th and 10th May, 2023. The main ground of challenge is the enforcement of the fundamental right to fair trial and due process as well as the right to be treated in accordance with law. The *vires* of the impugned sections have to be considered against the requirements of Article 8(1)(2) of the Constitution which requires any law inconsistent with or in derogation of any fundamental right to be *void*. The constitutional values of fair trial, due process, independence of the judiciary and access to justice have to be considered in the context of the trial of civilians before a military court. In the *Liaquat Hussain* case, the constitutionality of the Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance (XII of 1998) was under challenge, a similar preliminary issue arose wherein the petitioners alleged that their right of access to an independent and impartial judicial forum, a right guaranteed under the Constitution has been taken away with the establishment of military courts. The petitioners contended that their right to an independent judiciary and right to access to justice is a fundamental right guaranteed under Article 9 of the Constitution as held in the *Sharaf Faridi* case[19] and the *Azizullah Memon* case[20]. This fundamental right ensures the right to be treated in accordance with law and to have a fair trial before an impartial and independent court. The *Liaquat Hussain* case concluded that the questions which arose before the court being the infringement of fundamental rights with the establishment of military courts was of public importance related to the enforcement of fundamental rights, hence, the petitions were held to be maintainable. In the same context, the issues raised before this Court are of serious concern to the citizens of this country given that they directly relate to the enforcement of their fundamental rights being the right to fair trial and due process by an independent and impartial court as guaranteed under the Constitution. Consequently, the issues raised unequivocally fall within the original jurisdiction of this Court under Article 184(3) of the Constitution.

9. The second objection is whether the Petitioners remedy lies before the High Court under Article 199 of the Constitution. Even this question has been answered by this Court in numerous judgments being that the opening words of Article 184(3) of the Constitution

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[19] Government of Sindh v. Sharaf Faridi (PLD 1994 SC 105)
[20] Govt. of Balochistan v. Azizullah Memon (PLD 1993 SC 341)

without prejudice to the provisions of Article 199 means that it is for the party who is affected to choose which of the two forums it wishes to invoke being either before the High Court or the Supreme Court.[21] In the *Shahida Zahir* case, it was stated that the scope of jurisdiction and exercise of power by this Court under Article 184(3) of the Constitution is not bound by the procedural trappings of Article 199 of the Constitution nor its limitation for the exercise of power by the High Court. The provisions of Article 184(3) of the Constitution are self-contained and they regulate the jurisdiction of this Court on its own terminology such that it is not controlled by the provisions of Article 199 of the Constitution. The *Shahida Zahir* decision also found the petitions filed by military officers challenging their Field General Court Martial under the Army Act to be maintainable under Article 184(3) of the Constitution. Consequently, there is no bar on the Petitioners to first avail the remedy before the High Court given that the only requirement to determine the maintainability of the Petitions before this Court is to consider whether the questions raised are of public importance and with reference to the enforcement of fundamental rights. The plain language of Article 184(3) of the Constitution shows that it is open ended as it does not stipulate who has the right to move the Supreme Court nor does it require that the enforcement of fundamental rights must relate to a large group or class of persons rather the only requirement is that the test of public importance for the enforcement of fundamental rights be met with.[22] The judgments of this Court in fact show that in cases where the life and liberty of citizens are adversely affected this Court has exercised jurisdiction under Article 184(3) of the Constitution. Even otherwise, if the arguments of the AGP were to be accepted it would be mean that this Court would have to construe Article 184(3) of the Constitution in a narrow sense recognizing that in the first instance a petitioner should avail the remedy before the High Court. It will also negate the established jurisdiction of this Court under Article 184(3) of the Constitution which has wide and vast powers when it comes to questions of public importance with reference to the enforcement of fundamental rights as conferred by the Constitution.[23] The Supreme Court is the guardian of the Constitution and the fundamental rights contained therein. In terms of Article 184(3) of the Constitution, this Court enjoys original

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[21] PLD 1988 SC 416 *ibid*
[22] PLD 1988 SC 416 *ibid*
[23] Imran Ahmad Khan Niazi v. Mian Muhammad Nawaz Sharif (PLD 2017 SC 265)

jurisdiction to protect and enforce fundamental rights, where the enforcement is of public importance, meaning that a petitioner can come directly to this Court if the issues raised meet the two conditions set out in Article 184(3) of the Constitution. Consequently as the questions raised in these Petitions are without a doubt matters of public importance related to the enforcement of fundamental rights these Petitions are maintainable.

The Army Act and the Official Secrets Act

10. The Army Act is the law relating to the Pakistan Army and Section 2 thereof prescribes mainly for persons who are subject to the Act. The Act relates to army personnel however Sub-section (d) was added to Section 2 of the Army Act[24], and added persons who are otherwise not subject to the Army Act, making them subject to the Act. The said Sub-Section reads as follows:

> "(d) persons not otherwise subject to this Act, who are accused of-
>
> (i) seducing or attempting to seduce any person subject to this Act from his duty or allegiance to Government, or
>
> (ii) having committed, in relation to any work of defence, arsenal, naval, military or air force establishment or station, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Pakistan, an offence under the Official Secrets Act, 1923."
>
> (**emphasis added**)

At the same time, Section 59(4) of the Army Act was also added[25] to also include persons not otherwise subject to the Army Act making them liable to face military trial for the offences set out in Section 2(d) of the Army Act. Section 59 of the Army Act is reproduced as below:

> "Civil Offences.-- (1) Subject to the provisions of sub-section (2), any person subject to this Act who at any place in or beyond Pakistan commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be [dealt with under this Act], and, on conviction, to be punished as follows, that is to say,--
>
> (a) if the offence is one which would be punishable under any law in force in Pakistan with death or with [imprisonment for life], he shall be liable to suffer any punishment assigned for the offence by the aforesaid law or such less punishment as is in this Act mentioned; and
>
> (b) in any other case, he shall be liable to suffer any punishment assigned for the offence by the law in force

[24] By Section 2 of the Defence Services Laws Amendment Ordinance, 1967 (Ordinance No.III of 1967)
[25] By Section 2 of the Defence Services Laws (Second Amendment) Ordinance, 1967 (IV of 1967)

in Pakistan, or rigorous imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned [Provided that, where the offence of which any such person is found guilty is an offence liable to *hadd* under any Islamic law, the sentence awarded to him shall be that provided for the offence in that law.

(2) A person subject to this Act who commits an offence of murder against a person not subject to this Act [or the Pakistan Air Force Act, 1953 (VI of 1953)], or to the [Pakistan Navy Ordinance, 1961 (XXXV of 1961)], or of culpable homicide not amounting to murder against such a person or of [*Zina or Zina-bil-Jabr*] in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be [dealt with under this Act] unless he commits any of the said offences,--

(a) while on active service, or

(b) at any place outside Pakistan, or

(c) at a frontier post specified by the [Federal Government] by notification in this behalf.

(3) The powers of a court martial [or an officer exercising authority under section 23] to charge and punish any person under this section shall not be affected by reason of the fact that the civil offence with which such person is charged is also an offence against this Act.

[(4) Notwithstanding anything contained in this Act or in any other law for the time being in force a person who becomes subject to this Act by reason of his being accused of an offence mentioned in clause (d) of sub-section (1) of section 2 shall be liable to be tried or otherwise dealt with under this Act for such offence as if the offence were an offence against this Act and were committed at a time when such person was subject to this Act; and the provisions of this section shall have effect accordingly]."

(**emphasis added**)

11. The Army Act regulates matters concerning the terms of service of army personnel such as appointment, enrolment, termination, retirement and release. It also deals with offences, the mode and manner of arrest and proceedings before the trial, kinds of court martial and punishments, pardons and remissions. There is a range of offences provided under Chapter 5 of the Army Act which regulates the duty and discipline of army personnel and also deals with consequences where civil offences are committed. The Army Act provides the legal framework for a military justice system within which army personnel can be tried and convicted of specific offences including those related to the discharge of their duty and discipline. However, the dispute at hand is that the Army Act includes a category of persons who are otherwise not subject to the Army Act which essentially means

civilians and subjects them to a military trial for certain offences. This Act in its original form[26] did not extend to civilians. In 1967, the law was amended during the tenure of Field Marshal Mohammad Ayub Khan such that purportedly it would include civilians. By inserting Section 2(1)(d), the scope of the Army Act was expanded to include *persons not otherwise subject to the Act*, accused of specific offences contained in the definition itself. The first offence is related to seducing or attempting to seduce any person subject to the Army Act and the second offence is under the Official Secrets Act but limited to offences made out where it is committed in relation to any work of defence, arsenal, navy, military or air force establishment or otherwise in relation to the navy, military or air force. So it's not every offence under the Official Secrets Act that would require a civilian to face military trial but only if it is in terms of the description contained in the definition itself. Here lies the connection between the Army Act, military trial of civilians and the Official Secrets Act. The *vires* of this section was first challenged before this Court in the *F.B Ali* case which declared the section to be valid and legal. The question of civilians being tried by military courts was considered again when in 1998, the Pakistan Armed Forces (Acting in Aid of Civil Powers) Ordinance, 1998 (**1998 Ordinance**) was promulgated which allowed the trial of civilians before military courts charged with certain offences punishable under the Anti-Terrorism Act, 1997, Pakistan Arms Ordinance, 1965 and the Pakistan Penal Code, 1860. Under the 1998 Ordinance, the word "*Court*" was defined to include trials under the Army Act, Pakistan Air Force Act, 1953 and Pakistan Naval Ordinance, 1961. Section 4(1) of the said Ordinance stated that a court convened under Section 3 shall have the power to try any person including *a person who is not a member of the armed forces who has committed an offence specified to the schedule to this Ordinance in any area in which armed forces are acting in aid of civil powers*. The 1998 Ordinance, was challenged for establishing military courts which could try civilians and was declared unconstitutional in the *Liaquat Hussain* case. The next challenge to the trial of civilians by military courts came when the Twenty-First Amendment to the Constitution[27] **(Constitutional Amendment)** was introduced which extended the jurisdiction of military courts over civilians by amending the Army Act where Section 2(1)(d)(iii) was inserted which provided that

[26] Promulgated on 13th May, 1952 and notified in the official gazette dated 14.05.1952
[27] The Constitution (Twenty-First Amendment) Act, 2015

persons not otherwise subject to the Act, accused of being members of terrorist groups or organizations and raising arms or waging war against Pakistan or attacking the armed forces can be tried by military courts. This Constitutional Amendment was challenged and upheld in the *DBA* case.

12. The second statue is the Official Secrets Act which is the law that prescribes the offences for which the detained civilians will be tried. The Official Secrets Act deals with matters related to official secrets and prohibited areas, its protection, offences and punishments thereof. The Act defines prohibited places in Section 2 and specifies penalties for the unauthorized entry in a prohibited place, unauthorized possession, communication or disclosure of an official secret. The punishments extend from two years to death penalty under this Act. The Official Secrets Act is relevant for the purposes of subjecting civilians to the Army Act for committing an offence under the Official Secrets Act in relation to navy, military or air force establishments in relation to any work of defence, arsenal, or station, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Pakistan.

13. The gist of the AGP's argument is that both the Army Act and the Official Secrets Act predate the Constitution; that the impugned sections have been challenged previously and have been upheld by this Court which means that the matter in issue has been settled and as such no ground is available to the Petitioners to challenge the *vires* of the impugned sections. He explained that the reason that these sections have withstood the test of time is because civilians who interfere with the discharge of duties of members of the armed forces and interfere with the security, defence, sovereignty and sanctity of Pakistan must be tried under the Army Act. In such cases, the constitutional protection given to fundamental rights under Article 8(1)(2) of the Constitution is not available, hence, the Petitioners' argument that the impugned sections are in violation of fundamental rights provided in the Constitution is misconceived and contrary to the constitutional mandate. In terms of what has been argued, there are essentially three questions that need to be considered; first whether the *vires* of the impugned sections are unconstitutional as they violate the fundamental right to fair trial and due process, and the right to an independent judiciary for civilians; secondly that the protection of Article 8(1)(2) of the Constitution is not available to civilians if they fall under Article 8(3)(a) of the Constitution as the offences relate to the

discharge of duties by members of the armed forces; and thirdly that the *F.B Ali* case upheld the impugned sections which is a binding precedent and the present bench cannot have a different view from the *F.B Ali* case given that the *F.B Ali* case was delivered by a five member bench and the strength of the existing bench is also five members. Adding to this ground is the emphasis on the fact that the *F.B Ali* case has not been revisited rather has been applied and followed by this Court over the years in several judgments consequently, the impugned sections are constitutional and the trial of civilians does not contravene any fundamental right.

The F.B Ali case

14. In order to address these arguments, it is appropriate to first examine the *F.B Ali* case. A writ petition was filed by two retired army officers, who were court martialled under the provisions of Section 2(1)(d) of the Army Act, challenging the court martial on the ground that they were no longer subject to the Army Act and could not be tried or convicted under the Army Act. Their case was that the Army Act applied to persons who are subject to the discipline of the army and that they were no longer subject to the discipline of the army given their retirement. The argument was that persons who retired or were released or discharged from the army are no longer subject to the Army Act. They also challenged the *vires* of Section 2(1)(d) on the ground that it was violative of fundamental rights No.1[28] and 15[29] guaranteed by the Constitution of 1962[30], therefore, *void* insofar as they were inconsistent with the said fundamental rights. The arguments advanced were that the impugned section was discriminatory as it created a category of citizens who were deprived of their fundamental rights, thereby giving them differential treatment which *per se* was discriminatory. They also stated that citizens are entitled to a judicial trial and that pursuant to the impugned section a particular group of citizens accused of seducing or attempting to seduce members of the armed forces were subjected to differential treatment as they had to face a military trial, hence, discriminatory.

15. A five member bench of this Court concluded that the intent of Section 2(1)(d) of the Army Act is that even retired army personnel being civilians can be made subject to the Army Act and therefore can be tried by military courts for an offence which has nexus with the

[28] Security of Person. No person shall be deprived of life or liberty save in accordance with law.
[29] Equality of citizens. All citizens are equal before law and are entitled to equal protection of law.
[30] Constitution of Republic of Pakistan, 1962

armed forces and the defence of Pakistan. The Court elaborated that the nexus in the *F.B Ali* case was close and direct as the two retired officers were accused of seducing or attempting to seduce persons subject to the Army Act from their duty. On the issue of discrimination, the Court concluded that equal protection of laws does not mean that every citizen must be treated in the same manner. Similarly placed persons should be treated in the same manner and a rational classification within a class of people can be upheld if that classification is justifiable and reasonable. To the extent that a classification was created with reference to retired army officers, the Court concluded that this was a valid classification, having rational basis and further that as there is no possibility of picking and choosing a particular person to be tried under military courts leaving others to be tried under the general law, hence, there is no issue of discrimination. Consequently, the classification was neither unreasonable nor arbitrary, nor discriminatory aimed simply to prevent the subversion of the loyalty of members of the armed forces.

16. The *F.B Ali* case holds that to make a civilian subject to the Army Act there must be a nexus of the offence with the armed forces which nexus must be close and direct. The petitioners before the court were retired army officers, who were accused of conspiring to wage war against Pakistan and seducing army officers into joining this conspiracy, hence, the court held that *the nexus if any was provided by the accusation itself and no other nexus was necessary*. The court clarified that the allegation was intimately linked with the defence of Pakistan making the nexus substantially and directly connected with the offence. The reasoning that prevailed with the court at the time was that the subversion of loyalty of members of the defence services of Pakistan is critical and cannot be condoned as it is essential to the very function of the army. As to the distinction between serving members of the army and retired members that disappeared when it came to facing charges of seducing persons subject to the Army Act from their duty because the retired army personnel were made subject to the Army Act for the time they were in service and on active duty which is why the court declared that the law was not discriminatory in its application as the criminal charge was equally applicable to retired persons for the time they were subject to the Army Act.

17. Accordingly, the *F.B Ali* case established the *nexus test*, which had to be applied when a person *not subject to the Army Act,* which

could be a civilian, is made subject to the Army Act such that the offence for which the civilian was charged must have a close nexus with the armed forces and the defence of Pakistan, and where no nexus was made out there could be no military trial of such persons i.e. civilians. While the nexus test set the standard for its application, the *F.B Ali* case also upheld Section 2(1)(d) of the Army Act as being constitutional and valid law because Parliament was competent to make such law as it came directly within Item 1 of the Third Schedule of the Constitution of 1962. This Court concluded that the impugned section being section 2(1)(d) of the Army Act was valid law as it fell within the legislative competence of Parliament given that the subject matter was listed in Items 1, 48 and 49 of the Third Schedule[31] to the Constitution of 1962. The *F.B Ali* court held that the Army Act was a central act which could be amended by the central legislature which had the power to enlarge or restrict its operation by an amendment and it could introduce a specific category of persons who are accused of certain offences in relation to defence personnel or defence installations for the purposes of military trial because the pith and substance of the Army Act was to maintain loyalty within defence personnel and protect them from being subverted by outside influence. Based on these findings with reference to legislative competence, the AGP states that the present bench, comprising of five judges, cannot hold a different view from the *F.B Ali* case, as that too was delivered by five judges of this Court.

18. When seen in the context of the facts and circumstances before us, the *F.B Ali* case is distinguishable on three important grounds; first with respect to the enforcement of fundamental rights. The *F.B Ali* case challenged the *vires* of Section 2(1)(d) of the Army Act to be violative of fundamental rights 1 and 15 of the Constitution of 1962, which is the right to life and the right that all citizens be treated equally. The challenge today is with respect to the right to fair trial and due process as contained in Article 10A of the Constitution which is a specific and distinctive challenge. At the time when the *F.B Ali* case was decided there was no fundamental right to fair trial under the Constitution of 1962, hence, the question of its enforcement did not arise. Accordingly, the *F.B Ali* case did not consider the *vires* of Section 2(1)(d) or Section 59(4) of the Army Act in the context of fair trial or due process and limited its decision to the extent of Article 15 of the Constitution of

[31] The Third Schedule pertains to matters with respect to which the Central Legislature has exclusive power to make laws; Item 1 relates to Defence of Pakistan, Item 48 relates to matters which fall within the legislative competence of the Central Legislature or relate to the Centre and Item 49 relates to matters incidental or ancillary to any matter enumerated in this Schedule.

1962. The second ground of distinction is that in the *F.B Ali* case Article 6(3) of the Constitution of 1962 (the equivalent to Article 8(3) of the Constitution) was never considered as the Court concluded that it was irrelevant given that no fundamental right was violated. However, interestingly for the sake of completing its own understanding this Court concluded that in fact Article 6(3) of the Constitution of 1962 was not applicable because it only protects laws relating to members of the armed forces charged with the maintenance of public order to ensure proper discharge of their duties and discipline amongst them. The Court went on to hold that such an ouster clause must be interpreted strictly and unless the law comes within the four corners of Article 6(3) of the Constitution of 1962 it cannot be argued that on the basis of the said Article that a person can be deprived of their fundamental rights. Hence, *F.B Ali* ruled that Article 6(3) of the Constitution of 1962 was not applicable because the said Article would only apply to laws relating to the maintenance of discipline or discharge of duties of members of forces. The third distinguishing feature of the *F.B Ali* case is that the petition was filed with reference to retired army officers on the ground of discrimination as a violation of their fundamental right to being treated equally. The *F.B Ali* case clearly states that the provisions of Section 2(1)(d) would apply to retired army officers, for the period when they were serving, meaning that even though they have retired from service, they are still liable and subject to the Army Act for the relevant period when they were serving and were on active duty. The reason clearly being that at the time these retired army officers were *subject to* the Army Act. In this context, the *F.B Ali* decision, upholds the law and does not find any breach of any fundamental right because they were retired army officers who were made responsible for their acts at the time they were serving and were subject to the Army Act. This is probably why it was possible for this Court to conclude that the lack of a reasoned judgment in a court martial was not relevant to the rights of the accused. This is not the case or the challenge before us today. The Constitution specifically guarantees and protects the fundamental right to fair trial as well as the right to an independent judiciary and so the context of the challenge has changed from *F.B Ali* and as have the circumstances in which *F.B. Ali* was decided. At the time it was retired army officers who were being made subject to the Army Act post-retirement whereas today the challenge is specifically of civilians who are to face a military trial.

Fundamental Rights and Article 10A

> "10A. For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."

19. Fundamental Rights as guaranteed under the Constitution safeguard citizens or persons, as the case may be, from government action such that no law, custom or usage can be made in derogation of or in violation of any fundamental right. In the event that a law, custom or usage is violative of a fundamental right a person has the right to challenge the same before a court of competent jurisdiction and seek a declaration that the said law is *void*. This in turn means that fundamental rights guaranteed by the Constitution cannot be taken away by ordinary law. That would in fact defeat the very purpose of a constitutional guarantee. Furthermore, in terms of Article 8(5) of the Constitution, fundamental rights cannot be suspended save as provided by the Constitution. The rigors of Article 8(5) of the Constitution are so hard-hitting that it is only in terms of an express constitutional command that fundamental rights can be suspended which means that fundamental rights are not mere accessories rather they are there for the protection of the people, worn like an armour by the people, being an intrinsic part of their being that remains impervious regardless of the circumstances and challenges. So, this raises the question as to how citizens can be subjected to a military trial when they are protected by fundamental rights at all times.

20. With the incorporation of Article 10A in the Constitution by the Eighteenth Amendment in 2010[32], the right to fair trial and due process has become a fundamental right for *every person* not only in judicial proceedings but also in administrative proceedings. The significance of this fundamental right has been recognized by this Court time and again as echoed in a recent judgment by this Court that no matter how heinous the crime, the constitutional guarantee of fair trial under Article 10A of the Constitution cannot be taken away from the accused. This Court has repeatedly emphasized the importance of Article 10A by stating that it is pertinent to underline that the principles of fair trial are now guaranteed as a fundamental right under Article 10A of the Constitution and are to be read as an integral part of every sub-constitutional legislative instrument that deals with determination of civil rights and obligations of, or criminal charge against, any person.[33]

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[32] The Constitution (Eighteenth Amendment) Act, 2010 promulgated on 20th April, 2010
[33] Naveed Asghar v. The State (PLD 2021 SC 600)

In another case, this Court has held that the right to fair trial is a cardinal requirement of the rule of law and if an accused cannot be tried fairly, he should not be tried at all. This Court has declared that Article 10A of the Constitution is an independent fundamental right which is to receive liberal and progressive interpretation and enforcement.[34] This Court has also held that by way of Article 10A of the Constitution the right to fair trial has been raised to a higher pedestal and any law, custom or usage inconsistent with this right would be *void* by virtue of Article 8 of the Constitution. That the right to fair trial is a basic right recognized over the years as fundamental, well entrenched in our jurisprudence, having constitutional guarantee with the insertion of Article 10A of the Constitution.[35] The basic ingredients for a fair trial in the light of Article 10A of the Constitution as enumerated by this Court are that there should be an independent, impartial court, a fair and public hearing, right of counsel, right to information of the offence charged for with an opportunity to cross-examine witnesses and an opportunity to produce evidence. It also includes the right to a reasoned judgment and finally the remedy of appeal.[36] In fact, even before the insertion of Article 10A of the Constitution the right to fair trial and due process were recognized such that the right to one appeal before an independent forum was declared as a necessary right that must be available to a person.[37] Further under Article 4 of the Constitution being the right to be treated in accordance with law, the right of access to justice, the right of fair trial and the right to due process from an independent forum have been recognized[38] as fundamental rights even prior to the insertion of Article 10A of the Constitution. So for the determination of either civil rights or a criminal charge, the right to a fair trial and due process is imperative and absolutely necessary. By incorporating Article 10A in Part II Chapter I of the Constitution fair trial and due process are indispensable for every person and it cannot be violated, interfered with or breached by any person including the government.

21. There is another aspect of this right to fair trial. One of the most compelling human values recognized as a fundamental principle is the right of human dignity which actually constitutes the basis of all

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[34] Chairman NAB v. Nasrullah (PLD 2022 SC 497)
[35] Suo Motu Case No.4 of 2010 (PLD 2012 SC 553)
[36] Muhammad Bashir v. Rukhsar (PLD 2020 SC 334), Allah Dino Khan v. Election Commission of Pakistan (PLD 2020 SC 591)
[37] Pakistan through Secretary, Ministry of Defence v. The General Public (PLD 1989 SC 6), Muhammad Mubeen-us-Salam and others v. Federation of Pakistan through Secretary, Ministry of Defence and others (PLD 2006 SC 602)
[38] Aftab Shahban Mirani v. President of Pakistan (1998 SCMR 1863) and New Jubilee Insurance Company Ltd. Karachi v. National Bank of Pakistan, Karachi (PLD 1999 SC 1126)

fundamental rights and encapsulates the right to fair trial, justice and equality. When this fundamental principle is declared as a fundamental right its significance increases as it signifies the manner in which rights, norms, state practices and the law should be implemented and prescribes the limits. The State's duty to secure human dignity is the lynchpin as it forms the bedrock upon which all fundamental rights stand. Fundamental right to dignity acts as a compass that orients people and state functionaries in all their actions.[39] Consequently, as a fundamental right it becomes a matter of judicial interpretation to determine whether executive decisions or legislative enactment have encroached upon these rights. It places a positive obligation on the State and requires it at all times that it protects and enforce the rights of the people so as to maintain their dignity. The right to dignity lends real meaning to human rights as it is inherent in every right protected by international human rights law.[40] Therefore, when the right to fair trial and due process is invoked, so is the right to dignity which right under the Constitution is inviolable.[41] Article 10A of the Constitution fortifies this right to fair trial and due process which is an essential requirement of human dignity.

22. The right to fair trial and due process are also important requirements of the rule of law.[42] It ensures that the individual's right to life, liberty and freedom prevails and that everyone enjoys the protection of law such that undue interference by the State is prevented. The Constitution mandates the protection and enforcement of Article 10A of the Constitution which in turn guarantees that the principles of fairness in the process and procedure will be followed for all parties so that they can establish their case. This right safeguards the dignity of a person even if prosecuted for a crime or facing a dispute before a court. In fact, the right to fair trial is *sine qua non* for the right to human dignity which must be preserved. Hence, the ultimate objective is to ensure fairness in the process and proceedings and fairness itself being an evolving concept cannot be confined to any definition or frozen at any moment, with certain fundamentals which operate as constants. The independence of the decision maker and their impartiality is one such constant. A reasoned judgment before a judicial forum is another constant without which the right to fair trial would

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[39] Human Dignity in National Constitution: Functions, Promises and Dangers by Doron Shulztiner and Guy E. Carmi, published in American Journal of Comparative Law, Spring 2014, Vol. 62 No.2

[40] Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, UN document A/HRC/30/18(2015), Para-5

[41] Article 14 of the Constitution

[42] The Rule of Law by Tom Bingham, Published by the Penguin Groups 2011

become meaningless. The right of an independent forum of appeal is another relevant constant which ensures fair trial. These rights were recognized in the *Azizullah Memon* case as being fundamental rights where the legislature cannot frame law which can prevent the right of access to the courts of law and justice for any person. Separation of the judiciary from the executive was held to be a key command of the Constitution where the mandate of Article 175 of the Constitution must be obeyed and implemented and any laxity will amount to violation of a constitutional provision.

23. Fair trial standards have global recognition and acceptability as being the minimum requirement for a person facing a trial. These have now become global truths accepted as being fundamental to human dignity and life. The Universal Declaration of Human Rights[43] prescribes in Article 10 that everyone is entitled to fair and public hearing by an independent and impartial tribunal for the determination of rights and obligations and against any criminal charge. The various elements of fair trial under the ICCPR[44] also found in the UDHR include rights such as access to justice, public hearing, right to representation, to be able communicate privately, freely and confidentially with counsel. The right to call witnesses, cross-examine them and to get a reasoned judgment against which the right of appeal is available are also considered mandatory without which this fundamental guarantee of fair trial, rule of law and due process becomes illusionary. The European Convention on Human Rights (ECHR) also provides that a fair and public hearing in civil and criminal cases by an independent and impartial tribunal is fundamental to the right of fair trial which includes the right to be informed of the charge against him, the right to defence, to legal assistance and to the presumption of innocence in a criminal case.[45] The right to receive a fair trial is also recognized in the First Protocol of the Geneva Convention.[46] So the right to fair trial not only enjoys constitutional safeguards being a fundamental right but it is also embodied in Pakistan's international commitments which must be adhered to.

24. An important feature of fair trial is access to an independent judicial forum, and the separation of powers of the judiciary from the

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[43] Pakistan became a signatory to the UDHR in 1948

[44] The International Covenant on Civil and Political Rights, which Pakistan ratified on 23.06.2010. Article 14 provides that for the determination of any criminal charge the minimum guarantee is that a person be able to defend themself through legal assistance of their own choosing and further that they should have the right to have the conviction reviewed by a higher court according to law.

[45] Article 6 of the ECHR

[46] Protocol 1 is a 1977 Amendment to the Geneva Convention with reference to the protection of civilian victims in international wars and armed conflict.

executive and the legislature. The independence of the judiciary should be guaranteed by the State as enshrined in the Constitution, and respected and observed by the State.[47] Judicial independence is also a pre-requisite to the rule of law, which requires judicial forums to be independent, impartial and maintain integrity. Furthermore, the independence of the judiciary requires that judicial forums have exclusive jurisdiction over issues that require adjudication in courts. In this context, instances of military tribunals hearing cases of civilians have been frowned upon by the Human Rights Committee in general but especially so due to the procedures followed by the military courts.[48]

25. In the context of the aforementioned the fact that Article 10A of the Constitution was not a fundamental right at the time of the *F.B Ali* case is not only relevant but a significant distinguishing factor. This right is categoric and unqualified and fundamental to the existence of any person who is to face trial. In the *F.B Ali* case, this Court held with reference to the concept of fair trial that courts cannot strike down a law on any such *ethical notion* nor can the courts act on the basis of a *philosophical concept* of law. With the inclusion of Article 10A of the Constitution, the concept of fair trial and due process are now neither ethical notions nor philosophical concepts. It is a fundamental right guaranteed by the Constitution which must be adhered to. Hence although at the time, in the context of the challenge raised this Court concluded that civilians can be tried by military courts, the findings were based on the challenge to the *vires* of Section 2(1)(d) of the Army Act on the ground of legislative competence and violation of the equal protection right under Article 15 of the Constitution of 1962. The *F.B Ali* case did not consider the challenge in the context of the fundamental right to fair trial and due process which is a different and distinct challenge.

26. The argument of the AGP that the *F.B Ali* case rejected the argument that trial of civilians was arbitrary and violative of the right to equality or that trials under the Army Act fulfil the criteria of fair trial is misconceived as it was not seen in the context of the fundamental right to fair trial and due process. The standard now is of a fundamental right which in turn confers the right to challenge a law which is in derogation of the fundamental right with the added protection that

[47] Basic Principles on the Independence of the Judiciary, OHCHR adopted at the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders

[48] Report 2017 and 2022 Human Right Practices: Lebanon: A Crisis by Design - Mid-Term UPR Report 2023

fundamental rights cannot be suspended save as provided under the Constitution. Furthermore, although the AGP took us through the Rules to show that some elements of fair trial and due process do exist under the Army Act, this argument cannot sustain as the very concept of a civilian facing military trial is violative of the fundamental right of fair trial and due process. This is evident from the facts of this case as the names of the detained civilians, facing military trial were revealed to the Court for the first time, pursuant to an order of this Court dated 22.06.2023 on 23.06.2023 vide CMA No.5327/2023. The AGP then sought time to see if these names could be made public. In the order of 21.07.2023, the AGP gave certain assurances to the Court with respect to the manner in which civilians were being detained and tried before military courts. This included the fact that evidence shall be recorded at the trial of accused civilians under the law and procedure applicable to the criminal courts of ordinary jurisdiction and that the judgment delivered in the trial shall be supported by reasons. The AGP again sought time to seek instructions of whether the right of appeal could be given before an independent forum.[49] These assurances and statements by the AGP in themselves reflect the fact that the concept of fair trial and due process being a fundamental right is not inherent in the proceedings for the benefit of civilians before a military court. However, notwithstanding the same, the AGP also highlighted some aspects of the Rules to further assure the Court of the fact that elements of due process and fair trial do exist within the military justice system as under the Army Act and the Rules. On examining the Rules, it appears that the presiding officers in a military court are serving members of the military who in terms of Rule 51 of the Rules are not required to give a reasoned judgment rather merely record a finding of “guilty or not guilty” against every charge. There is no independent right of appeal against such a verdict as Section 133 of the Army Act provides that no remedy of appeal shall lie against any decision of a court martial save as provided under the Army Act. Section 133B prescribes for an appeal to the court of appeals consisting of the Chief of Army Staff or one or more officers designated by him or a Judge Advocate who is also a member of the armed forces. Rule 26 permits the suspension of the rules on the grounds of military exigencies or the necessities of discipline which means that where in the opinion of the presiding officer convening a court martial or a senior officer on the spot, that

[49] Order dated 21.07.2023

military exigencies or discipline renders it impossible or inexpedient to observe some of the Rules then the operation of the Rules can be suspended which in turn means that any limited rights under the Rules such as Rule 13(5), being the right to cross-examine any witness, or Rule 23(1) being the right of preparation of a defence by the accused which includes the right to free communication with witness or friend or legal advisor can be suspended. These are but some of the more glaring issues that arise within a military trial, from which it is clear that there is a lack of impartiality and independence within a military trial and the concept of fairness and due process is missing from the procedure. The basic principle of the independence of the judiciary is that everyone is entitled to be tried by the ordinary courts or tribunals established under the law and the trial of a citizen by a military court for an offence which can be tried before the courts established under Article 175 of the Constitution offends the principles of independence of the judiciary and of fair trial. One of the arguments raised by the AGP is that there are special circumstances in which military trials of civilians are necessary and that there are certain offences which should be tried in military courts due to their gravity. He has asserted that this has been the case since 1967 when the impugned sections were inserted in the Army Act and civilians have been tried by military courts. In the context of this argument what has been done in the past is not in issue before the Court. Further, these efforts by the AGP do not establish that civilians trial before a military court meets the constitutional standards of fair trial and due process. The question raised in these Petitions are whether the impugned sections are inconsistent with or in derogation of the fundamental right to fair trial and due process contained in Article 10A of the Constitution, which includes the right to an independent judiciary under Article 175 of the Constitution. In terms of the constitutional guarantee of fair trial and due process, the trial of a civilian before a military court does not meet the requirements of this fundamental right.

27. The military justice system is a distinct system that applies to members of armed forces to preserve discipline and good order. Hence, they are subjected to a different set of laws, rules and procedures which ensures internal discipline and operational effectiveness. The purpose of a separate military justice system is to allow the armed forces to deal with matters pertaining directly to the discipline, efficiency and morale of the military effectively, swiftly and severely so as to ensure control

over military personnel. Military jurisdiction covers members of the armed forces and includes matters related to their service which ensures the proper discharge of their duties and the maintenance of discipline amongst them. This is precisely why the Constitution brings such matters under the exception to Article 8(1)(2) in the form of Article 8(3)(a) of the Constitution which excludes the operation of fundamental rights when it relates to the members of the armed forces who are charged with the maintenance of public order in the discharge of their duties and the maintenance of discipline amongst them. Military trials of civilians on the other hand totally negates the requirement of an independent and impartial judicial forum, hence, it compromises the right to fair trial. Citizens enjoy the protection of fundamental rights under the Constitution and are assured that they will be treated as per law, such that their life and dignity is protected. At the same time, the Constitution commands the legislature to not make law which takes away any fundamental right protected under the Constitution. In this context, the requirement of the Federal Government to try civilians before military courts totally defies the constitutional command and is in derogation to the rights contained in Articles 4, 9, 10A, 14 read with Article 175 of the Constitution.

28. Now to examine the AGP's argument that in exceptional cases citizens will fall in the exception to Article 8(1)(2) of the Constitution being Article 8(3)(a) and can be deprived of their fundamental rights. The basic argument is that persons who prevent members of the armed forces from the discharge of their duty fall within the ambit of Article 8(3)(a) of the Constitution, and the issue of the violation of their fundamental rights does not arise. In order to appreciate the argument of the AGP, it is relevant to consider the applicability of Article 8(3)(a) of the Constitution. Article 8 of the Constitution is reproduced below:

Article 8 of the Constitution

"8. (1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.

(3) The Provisions of this Article shall not apply to —

(a) any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge

> of their duties or the maintenance of discipline among them; or
>
> 2 [(b) any of the —
> (i) laws specified in the First Schedule as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule;
> (ii) other laws specified in Part I of the First Schedule;] and no such law nor any provision thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter.
>
> (4) Notwithstanding anything contained in paragraph (b) of clause (3), within a period of two years from the commencing day, the appropriate Legislature shall bring the laws specified in 1 [Part II of the First Schedule] into conformity with the rights conferred by this Chapter:
>
> Provided that the appropriate Legislature may by resolution extend the said period of two years by a period not exceeding six months.
>
> Explanation.– If in respect of any law [Majlis-e-Shoora (Parliament)] is the appropriate Legislature, such resolution shall be a resolution of the National Assembly.
>
> (5) The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution."

29. The AGP argued that Article 8(1)(2) of the Constitution prescribes any law, custom or usage having the force of law which violates any fundamental right guaranteed in Chapter 1 of Part II of the Constitution shall be *void*. Article 8(3)(a) is an exception to this rule as it provides that any law relating to the members of the armed forces for the purposes of ensuring the proper discharge of their duties or maintenance of discipline are immune from the applicability of Article 8(1)(2) of the Constitution. He further argues that Article 8(3)(a) of the Constitution is not limited to members of the armed forces in its applicability, but intrinsically envisions persons who are not members of the armed forces to fall within its ambit, if they prevent members of the armed forces from the proper discharge of their duties or maintenance of their discipline. He has placed reliance on the *DBA* case wherein it is held that laws relating to the armed forces are clearly or unequivocally immune from the rigors of Article 8(1) of the Constitution and from their validity being scrutinized against the touchstone of being oppressive to fundamental rights. Pursuant to the Twenty-First

Amendment to the Constitution[50], the Army Act was added to the First Schedule of the Constitution to exclude it from Article 8(1) of the Constitution and protect it under Article 8(3)(b) of the Constitution. As per the *DBA* judgment this was done to protect the amendments in the Army Act from the rigors of Article 8 of the Constitution. This fact in itself negates the arguments of the AGP. He has also placed reliance on the *Shahida Zahir* case wherein it was held that the provision of the Army Act is protected under Article 8(3)(a) of the Constitution from being challenged on the ground of being inconsistent to fundamental rights as contained in the Constitution. Consequently, the offences under Section 2(1)(d) of the Army Act, if committed by persons who are not members of the armed forces, but their actions are closely related to the proper discharge of duties by such members then such persons they fall under the ambit of Section 2(1)(d) of the Army Act and are prevented from any constitutional challenge on the ground of fundamental rights in view of Article 8(3)(a) of the Constitution. As per his argument, the trial of civilians accordingly is possible and in such cases it cannot be argued that civilians enjoy the protection of fundamental rights.

30. Article 8(3)(a) of the Constitution provides that Article 8 shall not apply to any law relating to members of the armed forces or the police or such other forces, which in essence means disciplinary forces, charged with the duty of maintaining public order. The law here is one that relates to ensuring the proper discharge of their duties or maintenance of discipline amongst them. What this means is that laws which relate to members of the armed forces with respect to their discipline and the discharge of their duties shall be exempted from the protection of Article 8(1)(2) of the Constitution, meaning that members of the armed forces when faced with issues related to the discharge of their duties or the maintenance of their discipline cannot seek the protection of fundamental right as given in Chapter II of the Constitution. Importantly, Article 8(3)(a) of the Constitution is applicable when two conditions are met, first it must apply to members of the armed forces and second it must relate to the discharge of their duty and maintenance of their discipline. The AGP argued that the Army Act falls within the purview of Article 8(3)(a) of the Constitution which means that persons who are made subject to the Army Act also fall within the purview of Article 8(3)(a) of the Constitution especially if

[50] The Constitution (Twenty-First Amendment) Act, 2015

they disrupt the discipline or discharge of their duty. A similar argument was first made in the *F.B Ali* case where a similar provision was interpreted being Article 6(3) of the Constitution of 1962 wherein this Court held that the said Article only applies to laws related to members of the armed forces charged with the maintenance of public order, proper discharge of their duties and the maintenance of discipline amongst them. Then again in the *Liaquat Hussain* case, this Court held that Article 8(3)(a) of the Constitution applied to laws that related to the discipline and discharge of duty of members of the armed forces and did not have nothing to do with the question as to whether civilians could be tried by military courts. Yet again, in the *DBA* case the majority view interpreted Article 8(3)(a) of the Constitution to hold that the applicable laws under Article 8(3)(a) of the Constitution are those limited to matters that deal with the discipline amongst the members of armed forces for the proper discharge of their duties and since the *DBA* case dealt with a Constitutional Amendment being a matter other than those pertaining to discipline or discharge of duties by members of the armed forces it was necessary to protect the law and its amendments by placing the Army Act as amended in 2015 in the First Schedule to the Constitution. Hence, in terms of the judgments of this Court, this argument has failed to persuade the court that Article 8(3)(a) of the Constitution can apply to persons other than those who are in the service of the armed forces.

31. In order to understand the context of the argument raised by the AGP a detailed examination of the two cases, *Liaquat Hussain* and the *DBA* case is necessary. In the *Liaquat Hussain* case, petitions were filed challenging the 1998 Ordinance promulgated on 20.11.1998 wherein civilians were to be tried by military courts for civil offences mentioned in the Schedule to the 1998 Ordinance. The justification given by the Federation was that military courts under the 1998 Ordinance are a temporary measure to control the law and order situation in the Province of Sindh in particular and that this did not mean that a parallel judicial system was being introduced so as to replace the established judicial system. At the time, Article 245 of the Constitution[51] was invoked and the question was whether by invoking the said Article and calling for the armed forces to act in aid of civil power the convening of military courts under the 1998 Ordinance was

[51] Relevant portion of Article 245(1) is that the Armed Forces shall, under the directions of the Federal Government defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.

constitutional. A nine member bench of this Court concluded that the armed forces can be called in aid of civil power by the Federation in terms of Article 245 of the Constitution *inter alia* to perform police functions for limited purposes of suppressing rights or preventing disorder or maintaining law and order and security or to help in natural calamities along with civil authorities but the armed forces cannot displace civil power of which the judiciary is an important and integral part. In other words, the armed forces cannot displace the civil and criminal courts while acting in aid of civil power. They can arrest those who threaten peace and tranquillity, they can assist in investigation but the cases of those involved must be tried by the ordinary or special courts established in terms of Article 175 of the Constitution as per the *Mehram Ali* case.[52] As to the duties and functions of the armed forces under Article 245(1) of the Constitution, the court observed that even an act of parliament will not enable the armed forces to perform judicial functions unless it is founded on the power conferred by a constitutional provision. Hence, the Court firmly maintained that if the armed forces are called in aid of civil power under Article 245 of the Constitution, it does not give them the power to try civilians before military courts as this is against the constitutional mandate. With reference to Article 8(3)(a) of the Constitution, this Court concluded that the said Article only applies to laws relating to members of the armed forces with reference to the discharge of their duties and to maintain proper discipline and it does not mean that civilians can be tried for civil offences in military courts. The Court explained in the following terms that:

> "The Legislature can legitimately amend the Army Act or even to enact a new law covering the working of the Armed forces, Police or other forces which may include the taking of disciplinary action against the delinquents including trial within the parameters of such law. In fact the Army Act and the Rules framed thereunder are complete code for regulating the working of the Army including the maintenance of discipline and for punishment for civil and criminal wrongs. Not only clause (3) of Article 8 but clause (3) of Article 199 expressly excludes the jurisdiction of the High Court from passing any order for the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II of the Constitution on the application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his

[52] PLD 1998 SC 1445, *ibid*

> service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law."

32. The *Liaquat Hussain* case while examining *F.B. Ali* holds that a parallel judicial system cannot be established subjecting civilians to military courts. The Court dispelled the contention of the AGP, at the time, that civilians can be tried in military courts on the ground that the functions and duties of the armed forces under Article 245(I) of the Constitution will include judicial functions as that has not been conferred by the Constitution. The reliance on the *F.B Ali* case as well as the *Shahida Zahir* case was also rejected on the ground that the findings contained therein were under a different context and were not applicable to the present case. The Court reasoned that for the trial of criminal offences committed by civilians which does not fit within the scheme of the Constitution that is an independent judiciary cannot be sustained. It is important to note that the *Liaquat Hussain* case while considering the *vires* of the 1998 Ordinance with reference to trial of civilians by military courts was hearing the matter under the Constitution and also while relying on Articles 4, 9 and 25 of the Constitution found that the said Ordinance was in contravention to the given fundamental rights guaranteed under the Constitution. It further clarified that the nexus must be between the offence and the discipline of the armed forces and that a citizen of Pakistan is entitled to a trial by ordinary criminal courts in view of the changes brought about by the Constitution. In the words of Ajmal Mian, CJ, the Court concluded as follows:

> "It will not be out of context to mention that clause (1) of Article 4 provides that to enjoy the protection of law and to be treated in accordance with law is the inalienable right to every citizen, wherever he may be, and of every other person for the time being within Pakistan. Whereas clause (2) thereof lays down that in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. The above Article is to be read with Article 9 of the Constitution which postulates that no person shall be deprived of life or liberty save in accordance with law. If a person is to be deprived of his life on account of execution of death sentence awarded by a Tribunal which does not fit in within the framework of the Constitution, it will be violative of above Fundamental Right contained in Article 9. However, the learned Attorney-General contended that in fact terrorists who kill innocent persons violate the above Article 9 by depriving them of their lives and not the Federal Government which caused the promulgation of the impugned Ordinance with the object to punish terrorists. No patriotic Pakistani can have any sympathy with terrorists who deserve severe punishment, but the only question at issue is, which

> forum is to award punishment, i.e. whether a forum as envisaged by the Constitution or by a Military Court which does not fit in within the framework of the Constitution. No doubt, that when a terrorist takes the life of an innocent person, he is violating Article 9 of the Constitution, but if the terrorist, as a retaliation, is deprived of his life by a mechanism other than through due process of law within the framework of the Constitution, it will also be violative of above Article 9."

Consequently, the Court concluded that military trial of civilians for civil offences is violative of the Constitution as the Constitution does not warrant setting up a system outside of its framework.

33. In the *DBA* case, petitions were filed challenging the *vires* of the Constitution (Eighteenth Amendment) Act, 2010, Constitution (Twenty-First Amendment) Act, 2015 (Constitutional Amendment) and the Pakistan Army (Amendment) Act, 2015 (Army Act Amendment). Relevant to the instant Petitions, the dispute related to the Twenty-First Amendment thereunder and the amendments to the Army Act. The basic ground of challenge was that the Constitutional Amendment envisages that if a person is a threat to the country, involved in a terrorist attack, they are subject to military trials because the offences relate to the defence of the country, hence, military courts can try civilians. In essence the argument was that a parallel judicial system was created such that judicial power was to be exercised by the executive, trying civilians by court martial, which threatens the fundamental rights of citizens as well as the independence of the judiciary. The issues raised in that case were different from the ones raised in these cases as the *DBA* case examined the Constitutional Amendment which was under challenge and the question was whether the Court could strike down the Constitutional Amendment. As the matter at hand was the military trial of civilians the *F.B Ali* case and the *Liaquat Hussain* case were considered as was the nexus test. The Court opined that although the *F.B Ali* judgment found the amendments to the Army Act by way of Section 2(1)(d) valid legislation, the *Liaquat Hussain* case held that military courts cannot try civilians pursuant to the provisions of Article 245(1) "in aid of civil power". For the purposes of the Constitutional Amendment under challenge, the nexus test was applied and the Court concluded that due to rampant terrorist attacks a war like situation emerged, which compelled the Federation to defend the country. This in turn compelled Parliament to make a Constitutional Amendment. The other compelling factor in the *DBA* case was that both the Constitutional Amendment and the Army Act

Amendment contained a sunset clause, for a period of two years which meant that the law was temporary. So far as Article 8(3)(a) of the Constitution is concerned the *DBA* court held that it was applicable to laws relating to the armed forces, for the maintenance of discipline. In this regard, the Court concluded as follows:

> "161. The intention of the Parliament is clearly visible. By virtue of Article 8(3)(a) the Pakistan Army Act, 1952, and for that matter the Pakistan Air Force Act, 1953 and Pakistan Navy Ordinance, 1961, already stood protected and exempted from the application of Article 8 inter alia to the extent that they deal with maintenance of discipline among the members of Armed Forces and for the proper discharge of their duties. As a consequence of the Pakistan Army (Amendment) Act, 2015, matters other than those pertaining to discipline amongst and discharge of duties by the members of the Armed Forces were included in the ambit of the Pakistan Army Act, hence, in order to protect such amendments also from the rigors of Article 8, it was necessary to place Pakistan Army Act, 1952, (as amended) in the Schedule. Such was the clear and obvious intention of the Lawmakers which must be given effect to. It would neither be proper nor lawful to nullify such intention by attributing absurdity to the Parliament and redundancy to the 21st Constitutional Amendment.
>
> 162. Thus, there can be no hesitation in holding that the Pakistan Army Act, 1952, as amended by the Pakistan Army (Amendment) Act, 2015, has been validly and effectively incorporated in the Schedule to the Constitution as was the clear intention of the Legislature."

34. The majority decision in the *DBA* case also accepted that to include mattes other than those pertaining to discipline and discharge of duties by members of the armed forces it would be necessary to protect those amendments by including in the First Schedule of Part I of the Constitution. The clear and obvious intent of the law maker was to protect the amendment from the rigors of Article 8 of the Constitution so as to give effect to the intent of trying terrorists through military courts. Clearly, the legislature was conscious of the fact that a constitutional amendment was required in order to protect the amendments to the Army Act from the enforcement of fundamental rights, by placing the Pakistan Army (Amendment) Act, 2015 in the First Schedule of Part I of the Constitution.

35. Important to note is that this Court allowed and upheld the Constitutional Amendment because its operation was for two years and

because there was a clear defined classification[53] of persons and offences triable for the two years by military courts. In the words of Azmat Saeed, J. speaking for the majority, this was a temporary measure and does not contemplate a permanent solution because the sunset clauses were effective for a period of two years. Further that the trial of civilians by a court martial is the exception and not the rule. Hence, in response to the AGP's argument that the *DBA* case did allow trial of civilians by military courts, it is important to understand that it was a Constitutional Amendment which made such trials possible that to as a temporary measure, to try terrorists accused of offences of waging war against Pakistan. At the cost of repetition, the ability to try civilians in military courts required a constitutional amendment and was not possible through ordinary legislation. Hence, even though at the time Section 2(1)(d) of the Army Act existed, Constitutional Amendment was necessary to ensure that those subjected to military trials pursuant to the Constitutional Amendment cannot invoke any fundamental right especially Article 10A of the Constitution.

36. The AGP has also placed reliance on the *Shahida Zahir* case which was brought to court by five military officers who challenged the validity of their arrest and detention by a Field General Court Martial convened under the Army Act. This Court held that the effect of Article 8(3)(a) of the Constitution is that the law specified therein has been saved from being challenged or attacked on the ground of their inconsistency with fundamental rights. However, since the *Shahida Zahir* case did not challenge the impugned sections for being inconsistent with fundamental rights, hence, the focus of this Court was on the exercise of jurisdiction under Article 184(3) of the Constitution as opposed to under Article 199 of the Constitution wherein the Court held that whether an element of public importance is in issue it is for the court to decide in terms of the dicta laid down in *Manzoor Elahi* case and *Benazir Bhutto* case where public importance should be viewed with reference to freedom and liberties guaranteed under the Constitution such that their protection and breach would give rise to the invoking of Article 184(3) of the Constitution. The Court concluded that the petitions are maintainable and went on to discuss the right to fair trial with reference to the Field General Court Martial of the five military officers. In this regard, the Court concluded that the

[53] In the *DBA* case, Para 165 by Sh. Azmat Saeed, J. provides that cases that can be tried under the Army Act have been clearly identified in terms of offences enumerated therein when committed by a terrorist known or claiming to be a member of a group or organization or in the name of a religion or a sect. This is a clear defined criteria which constitutes a valid classification.

concept of fair trial is available before military courts for the accused who are subject to the Army Act and that with respect to the request for open trial that is a matter to be considered by the military court itself. Then again, this case is specifically with reference to the trial of military personnel who were subject to the Army Act and the Rules, at a time when there was no Article 10A of the Constitution, therefore, it does not in any way answer the question raised in these Petitions which is with reference to the right to fair trial guaranteed under the Constitution for its citizens.

37. When seen in the context of the *Liaquat Hussain* case and the *DBA* case, the interpretation of Article 8 of the Constitution is that there can be no law inconsistent with or in derogation of any fundamental right contained in Part II Chapter I of the Constitution and that the State cannot make any law which takes away or abridges fundamental rights. Where such a law is made, it is in contravention to Article 8, hence, *void*. Further Article 8(5) provides that the rights conferred by this chapter shall not suspended except as expressly provided by the Constitution meaning thereby that fundamental rights cannot be infringed upon nor can any law take away any fundamental right guaranteed to a person or a citizen except if specifically provided for by the Constitution. In this context when seen Article 8(3)(a) of the Constitution applies to laws relating to the members of the armed forces specifically with reference to matters pertaining to the proper discharge of their duties and the maintenance discipline amongst them. Laws relating to the armed forces includes the Army Act to the extent that it relates to persons subject to the Army Act because it is with reference to such persons that discharge of duty and discipline has to be maintained. Furthermore, when such persons are subjected to military courts, they do not enjoy the protection of any fundamental right as contemplated by Article 8(1)(2) and (5) of the Constitution. It does not bring within its scope civilians who are persons not otherwise subject to the Army Act because they are not responsible for the maintenance of public order and the question of discharge of duties and maintenance of discipline does not arise. Article 8(3)(a) of the Constitution specifically applies to members of the Armed Forces and laws related to them and the AGP's argument that a person can be deprived of any of their fundamental rights especially the right to fair trial and due process because they have been made otherwise *subject to* the Army Act would mean that the Constitutional guarantee of

fundamental rights can be taken away by ordinary legislation. This would totally defeat the purpose of Article 8(1)(2) and (5) of the Constitution which goes against the clear and unequivocal intent of the Constitution. This has been the consistent view in terms of the *F.B Ali* case, *Liaquat Hussain* case and the *DBA* case that Article 8(3)(a) of the Constitution is only with reference to laws relating to the members of the armed forces in respect of the discharge of their duties and maintenance of their discipline.

Vires of the impugned sections

38. Having held that civilians cannot be tried before military court because it denies them fundamental right guaranteed under the Constitution, it is but necessary to declare the *vires* of the impugned section *ultra vires* the Constitution. The AGP has argued at great length that the impugned sections of the Army Act till date have been maintained as being legal and Constitutional and trials undertaken over time have been in accordance with law. He has argued that civilians have been tried under the impugned sections and holding the impugned sections as *ultra vires* would complicate pending cases and other categories of persons who have to be tried in military courts. It is his case that the intent of the legislature has always been to ensure that civilians who commit offences that interfere with the proper discharge of duty and discipline of the armed forces should be made subject to trial by military courts which intent has been maintained by the *F.B Ali* case. Therefore, he argues that the *vires* of the impugned sections cannot be challenged. The Supreme Court has held that no law can be made in violation of the Constitution and that a law that violates the command of the Constitution can be declared *ultra vires* the Constitution.[54] This Court has also held that a provision of law can be declared *ultra vires* if it violative of the provisions of the Constitution which guarantee fundamental rights, independence of the judiciary and separation of power.[55] That even though the legislature is competent in matters of legislation every law may not necessarily be tenable on the touchstone of the Constitution. There is always a presumption in favour of the constitutionality of legislation unless *ex facie* it is violative of any constitutional provision.[56] It is the jurisdiction of this Court under the Constitution to consider the constitutionality of enactment and declare it *non est* if it is in conflict with the provisions of the Constitution.

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[54] Lahore Development Authority v. Ms. Imrana Tiwana (2015 SCMR 1739), Pakcom Limited v. Federation of Pakistan (PLD 2011 SC 44)
[55] Younas Abbas v. Additional Sessions Judge Chakwal (PLD 2016 SC 581)
[56] Sui Southern Gas Company v. Federation of Pakistan and others (2018 SCMR 802)

Thus, legislative competence is not enough to make valid law, the law must pass the test of constitutionality for it to be enforceable.[57] Fundamental rights as prescribed in Part II Chapter I of the Constitution are sacred rights which can neither be treated lightly nor in a casual or cursory manner rather while interpreting fundamental rights the court must always keep in mind that no infringement or curtailment of any right can be made unless it is in accordance with the Constitution. These rights can be reasonably restricted, however, they are to be protected by the courts so as to ensure that citizens are protected from arbitrary exercise of power.[58] The Constitution treats fundamental rights as superior to ordinary legislation which is clearly reflected in Article 8(1)(2) and (5) of the Constitution being that fundamental rights exist at a higher pedestal to save their enjoyment from legislation infractions.[59]

39. Although, the *vires* of the impugned sections were previously challenged in the *F.B Ali* case, the grounds for challenge today are totally different and specifically with reference to the fundamental right to fair trial under Article 10A of the Constitution and the right to an independent judiciary. Where a law has been challenged with reference to it being in derogation to fundamental rights or any constitutional command such a law has to be declared unconstitutional and *ultra vires* the Constitution. The trial of civilians before military courts was challenged in the *Liaquat Hussain* case wherein the *vires* of the 1998 Ordinance was under challenge on the ground that it is violative of a constitutional provision. The 1998 Ordinance was struck down as this Court concluded that trial of civilians by military courts would be violative of the Constitution because citizens have the right to access to justice through forums envisioned under Article 175 of the Constitution which ensures and guarantees the enforcement of all fundamental rights especially the right to fair trial and due process. In the opinion of one of the Judges[60] to the *Liaquat Hussain* case, military courts do not fall under any provisions of the Constitution, therefore, trial by military courts of civilians, for civil offences which have no direct nexus with the armed forces or the defence of Pakistan would be *ultra vires* the Constitution. Thus, the establishment of military courts cannot be upheld on the basis of reasonable classification as provided in the *F.B*

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[57] Shahid Pervaiz v. Ejaz Ahmad and others (2017 SCMR 206)
[58] Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A. and others v. Federation of Pakistan through Secretary Ministry of Interior and others (PLD 2007 C 642)
[59] PLD 1988 SC 416 *ibid*
[60] Irshad Hassan Khan, J. (R)

Ali case nor can it be declared as valid law on the touchstone of Article 10A of the Constitution. In the opinion of another Judge[61] to the *Liaquat Hussain* case, there is no scope or power with the federal government to set up military courts in place of ordinary courts to try civilians for offences which are triable in courts established under Article 175 of the Constitution. The establishment of military courts for such offences amounts to a parallel justice system which is contrary to the judicial system established under the Constitution and the law. The *Liaquat Hussain* decision focused on the forum established in terms of Article 175 of the Constitution and concluded that any other forum which seeks to try civilians for offences triable in the ordinary courts of the country will be contrary to Article 175 and is unconstitutional because every citizen enjoys the right to access to justice by an independent judiciary as contemplated under Article 175 of the Constitution.

40. The Constitution mandates a tracheotomy of powers amongst the three organs of the State being the legislature, executive and the judiciary and all three organs must work independent of each other and cannot encroach upon the work and functions of each other. In this context, Article 175 of the Constitution prescribes that there shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for Islamabad Capital Territory and such courts as may be established by law meaning that for the trial of civilians courts established under Article 175, independent of the executive is necessary to ensure fairness and due process. Separation of powers and judicial independence are part of the essence and spirit of fair trial and due process which is why they are recognized as fundamental rights under the Constitution. Independence of the judiciary and access to justice themselves are valuable constitutional rights recognized by this Court time and again emphasizing on the fact that the separation of judiciary is the cornerstone of its independence without which the fundamental right of access to justice cannot be guaranteed.[62] Although, an argument was made in the context of court martial and Article 175 of the Constitution, what is relevant to the issues raised is the fact that on the touchstone of fundamental rights, an independent judiciary is fundamental to the right to fair trial.

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[61] Raja Afrasiab Khan, J. (R)
[62] PLD 1993 SC 341 *ibid*

41. The offences under the Official Secrets Act are triable before the ordinary criminal courts, which guarantees fair trial, due process and independence as mandated by the Constitution. However, none of the 103 persons detained were reported for offences under the said Act. Yet applications were made under Section 549 of the Code of Criminal Procedure, 1898 (**Cr.P.C.**), for their delivery to military authorities. The referral of an accused person to a trial before a military court is in terms of Section 549[63] of the Cr.P.C. read with Sections 59(4), 94 and 95 of the Army Act. The criminal court having jurisdiction over the matter is obligated to form a reasoned opinion as to whether an accused person is to be tried by a military court because the transfer from the ordinary court to the military court for trial amounts to the loss of the right to fair trial and due process as well as the right to independent forum. This places a heavy burden on the Magistrate under Section 549 Cr.P.C. to protect the rights of the accused before it as the Magistrate must satisfy itself that the accused is subject to the Army Act and can only be tried before a military court. From the documents placed before this Court[64] the denial of a reasoned order by the Magistrate is in fact the start of the process which is in contravention to the law as well as denial of the fundamental right of fair trial and due process for the detained citizens.

42. With respect to the AGP's apprehensions on past decisions, the law as settled by this Court in numerous judgments with reference to past and closed transactions provides that cases that have been decided should not be opened as a vested right is created in favour of the litigants. The concept of past and closed transactions was evolved to safeguard accrued and vested rights of parties under a statute which subsequently were found and declared to be *ultra vires* the Constitution.[65] In fact, the *Liaquat Hussain* case itself provides that conviction made and sentences awarded by military courts which have been executed will be treated as past and closed transactions. Therefore, there appears to be no merit in the apprehensions and concerns voiced by the AGP. He has also emphasized on the difficulty that may come about if the impugned sections are struck down quoting examples of cases of Shakil Afridi and Kulbhushan Yadav which are

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[63] In terms of this Section a Magistrate shall in proper cases deliver a person to the military authorities where such person is liable to be tried by court martial.

[64] Order dated 20.05.2023, passed by the Judge, Anti-Terrorism Court, Mardan Division, Mardan, Order dated. 25.05.2023, passed by the Administrative Judge, Anti-Terrorism Courts, Lahore, Order dated 29.05.2023, passed by the Judge, Anti-Terrorism Court-I, Rawalpindi Division, Rawalpindi.

[65] Pakistan Steel Mills v. Muhammad Azam Katper (2002 SCMR 1023), Muhammad Mobeen us Salam v. Federation of Pakistan (PLD 2006 SC 602) and Muhammad Moizuddin and another v. Mansoor Khalil and another (2017 SCMR 1787)

pending before different courts and that cases of similar nature will also be adversely affected. He emphasized that the existing criminal justice system may not be as effective or suitable as the military courts given issues of delay, security and national interest. In the context of both these concerns and emphasis made, it is important to be reminded of the basic fact that the Supreme Court stands as the ultimate guardian and protector of the Constitution and is required to ensure that citizens are able to enjoy the protection of their fundamental rights and are treated in accordance with law. Judges play a critical role in protecting these rights, bound by their oath and the Constitution, they are obligated to enforce fundamental rights. The Constitution does not place any restriction or limitation on the Supreme Court when it comes to examining the constitutionality of any law, especially for the enforcement of fundamental rights. As per the AGP's own statement before this Court the present Petitions raise a different question than those posed before the *Liaquat Hussain* court and the *DBA* court. It goes without saying that the facts in these Petitions are unique and unfortunate, however, they do not justify the trial of civilians before a military court for offences which can be tried before ordinary courts which have the protection of Article 175 of the Constitution. If the ordinary or special courts are unable to meet the challenges of trying the civilians detained in these cases then the solution is to make an effort to strengthen the system. Relying on military courts on the ground that the ordinary courts are neither effective nor efficient reflects poorly on the State and the government whose primary responsibility is to maintain the rule of law and to ensure a strong and effective justice sector for the people. The Federation cannot blame a system it is responsible for and thereafter subject citizens to a system that violates their fundamental rights. The AGP has also attempted to justify military trial of civilians by quoting examples of different countries which allow citizens to be tried in military courts. However, this justification is somewhat surprising given the constitutional guarantees towards fundamental right which are binding on the State. Hence, for the sake of democracy, freedom and the Constitution with emphasis on the right to fair trial, he could have drawn on examples of countries that do not try civilians in military courts, or countries that have abolished the practice of trying civilians in military courts, or even countries which establish special tribunals in extraordinary circumstances (like war) to try civilians for certain crimes. True beacons

for justice and liberty are the nations that champion the rights of its people, steering away from examples where fundamental rights are cast aside in the name of expediency. Fundamental rights cannot be sacrificed simply because it is deemed expedient. Finally, it is significant to note that from the arguments made, the government is clear on the fact that the detained persons are all ordinary citizens given that the AGP has made assurances before this Court that many of the detained citizens are likely to be acquitted or will not be convicted by way of capital punishment or even sentences for more than three years. Yet at the same time it is compelled to try these 103 persons before the military court even though they can be tried before ordinary courts. Interestingly, when it came to dealing with terrorists who were waging war against Pakistan during unprecedented times, it took a Constitutional Amendment to bring that category of persons[66] within the jurisdiction of military courts, yet now the Army Act and its existence since *F.B. Ali* case is being relied upon to try ordinary citizens.

43. Consequently, in view of the aforesaid, these Petitions are decided, in the following terms:

i. It is hereby declared that clause (d) of subsection (1) of Section 2 of the Army Act [in both of its sub clauses (i) & (ii)] and subsection (4) of Section 59 of the Army Act are *ultra vires* the Constitution and of no legal effect.

ii. Without prejudice to the generality of the foregoing the trials of civilians and accused persons, being around 103 persons who were identified in the list provided to this Court by the AGP by way of CMA No.5327 of 2023 in Constitution Petition No.24 of 2023 and all other persons who are now or may at any time be similarly placed in relation to the events arising from and out of 9th and 10 May, 2023 shall be tried by Criminal Courts of competent jurisdiction established under the ordinary and / or special law of the land in relation to such offences of which they may stand accused.

iii. It is further declared that any action or proceedings under the Army Act in respect of the aforesaid persons or any other persons so similarly placed (including but not limited to trial by court martial) are and would be of no legal effect.

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[66] The Schedule to Article 8 of the Constitution was amended and the Army Act, Air Force Act and Navy Ordinance were incorporated in the Schedule because a war like situation had arisen and the Federation was duty bound to defend the country. At the time, a specific reference was given to the person committing the offence who had to be a member of a terrorist group or organization using the name of sect who in furtherance of terrorist designs wages war against Pakistan or commits any of the offences contained in the amendment.

JUDGE

Islamabad
09.01.2024
'APPROVED FOR REPORTING'
*Azmat I**