

**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<sup>1</sup> 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 9<sup>th</sup> and 10<sup>th</sup> 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

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<sup>1</sup> 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<sup>2</sup> 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 9<sup>th</sup> and 10<sup>th</sup> 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 9<sup>th</sup> and 10<sup>th</sup> 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<sup>3</sup>. 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 9<sup>th</sup> and 10<sup>th</sup> 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

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<sup>2</sup> *Mehram Ali v. Federation of Pakistan* (PLD 1998 SC 1445)

<sup>3</sup> *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<sup>4</sup>, *Shahida Zahir* case<sup>5</sup> and District Bar Association, Rawalpindi case<sup>6</sup> (**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 9<sup>th</sup> and 10<sup>th</sup> 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 9<sup>th</sup> and 10<sup>th</sup> 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<sup>7</sup> that 103 persons have been detained pursuant to the events of 9<sup>th</sup> and 10<sup>th</sup> May, 2023; that no military trial of civilians will

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<sup>4</sup> Sh. Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504).

<sup>5</sup> Mrs. Shahida Zahir Abbasi v. President of Pakistan (PLD 1996 SC 632).

<sup>6</sup> District Bar Association, Rawalpindi v. Federation of Pakistan (PLD 2015 SC 401)

<sup>7</sup> Contained in the order dated 23.06.2023 of this Petition

be held during the pendency of the present Petitions;<sup>8</sup> 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.<sup>9</sup>

### **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.<sup>10</sup> 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.<sup>11</sup> This Court has also held that while interpreting Article 184(3) of the Constitution, the Court must be

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<sup>8</sup> Order dated 26.06.2023 of this Petition

<sup>9</sup> Order dated 27.06.2023 of this Petition

<sup>10</sup> *Miss Benzir Bhutto v. Federation of Pakistan* (PLD 1988 SC 416)

<sup>11</sup> *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*.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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 9<sup>th</sup> and 10<sup>th</sup> 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<sup>17</sup> and the right to fair trial and due process.<sup>18</sup> 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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<sup>12</sup> Pakistan Muslim League (N) v. Federation of Pakistan (PLD 2007 SC 642)

<sup>13</sup> PLD 2007 SC 642 (supra)

<sup>14</sup> Suo Motu Case No.7 of 2017 (PLD 2019 SC 318)

<sup>15</sup> PLD 2019 318 (supra)

<sup>16</sup> Justice Qazi Faez Isa v. President of Pakistan (PLD 2023 SC 661)

<sup>17</sup> Article 4 of the Constitution

<sup>18</sup> 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 9<sup>th</sup> and 10<sup>th</sup> 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<sup>19</sup> and the *Azizullah Memon* case<sup>20</sup>. 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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<sup>19</sup> Government of Sindh v. Sharaf Faridi (PLD 1994 SC 105)

<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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 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.<sup>23</sup> 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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<sup>21</sup> PLD 1988 SC 416 *ibid*

<sup>22</sup> PLD 1988 SC 416 *ibid*

<sup>23</sup> *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<sup>24</sup>, 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<sup>25</sup> 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

<sup>24</sup> By Section 2 of the Defence Services Laws Amendment Ordinance, 1967 (Ordinance No.III of 1967)

<sup>25</sup> 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<sup>26</sup> 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<sup>27</sup> (**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

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<sup>26</sup> Promulgated on 13<sup>th</sup> May, 1952 and notified in the official gazette dated 14.05.1952

<sup>27</sup> 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 statute 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<sup>28</sup> and 15<sup>29</sup> guaranteed by the Constitution of 1962<sup>30</sup>, 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

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<sup>28</sup> Security of Person. No person shall be deprived of life or liberty save in accordance with law.

<sup>29</sup> Equality of citizens. All citizens are equal before law and are entitled to equal protection of law.

<sup>30</sup> 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<sup>31</sup> 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

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<sup>31</sup> 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<sup>32</sup>, 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.<sup>33</sup>

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<sup>32</sup> The Constitution (Eighteenth Amendment) Act, 2010 promulgated on 20<sup>th</sup> April, 2010

<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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<sup>38</sup> 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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<sup>34</sup> Chairman NAB v. Nasrullah (PLD 2022 SC 497)

<sup>35</sup> Suo Motu Case No.4 of 2010 (PLD 2012 SC 553)

<sup>36</sup> Muhammad Bashir v. Rukhsar (PLD 2020 SC 334), Allah Dino Khan v. Election Commission of Pakistan (PLD 2020 SC 591)

<sup>37</sup> 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)

<sup>38</sup> 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.<sup>39</sup> 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 enforces 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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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<sup>39</sup> 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

<sup>40</sup> 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

<sup>41</sup> Article 14 of the Constitution

<sup>42</sup> 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<sup>43</sup> 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<sup>44</sup> 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 illusory. 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.<sup>45</sup> The right to receive a fair trial is also recognized in the First Protocol of the Geneva Convention.<sup>46</sup> 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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<sup>43</sup> Pakistan became a signatory to the UDHR in 1948

<sup>44</sup> 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 himself 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.

<sup>45</sup> Article 6 of the ECHR

<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup>

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

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<sup>47</sup> Basic Principles on the Independence of the Judiciary, OHCHR adopted at the 7<sup>th</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders

<sup>48</sup> 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.<sup>49</sup> 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

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<sup>49</sup> 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<sup>50</sup>, 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

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<sup>50</sup> 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<sup>51</sup> 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

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<sup>51</sup> 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.<sup>52</sup> 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

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<sup>52</sup> 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 matters 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<sup>53</sup> 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

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<sup>53</sup> 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 be 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.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> 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.

<sup>54</sup> Lahore Development Authority v. Ms. Imrana Tiwana (2015 SCMR 1739), Pakcom Limited v. Federation of Pakistan (PLD 2011 SC 44)

<sup>55</sup> Younas Abbas v. Additional Sessions Judge Chakwal (PLD 2016 SC 581)

<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

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<sup>60</sup> 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*

<sup>57</sup> Shahid Pervaiz v. Ejaz Ahmad and others (2017 SCMR 206)

<sup>58</sup> 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)

<sup>59</sup> PLD 1988 SC 416 *ibid*

<sup>60</sup> 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<sup>61</sup> 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 trichotomy 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.<sup>62</sup> 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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<sup>61</sup> Raja Afrasiab Khan, J. (R)

<sup>62</sup> 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<sup>63</sup> 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<sup>64</sup> 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.<sup>65</sup> 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

<sup>63</sup> 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.

<sup>64</sup> 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.

<sup>65</sup> *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<sup>66</sup> 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 9<sup>th</sup> 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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<sup>66</sup> 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/\**