Muhammad Ali Mazhar-J.

Concurring judgment in support of Short Order

Area under discussion

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I. Preamble

The above-mentioned Intra Court Appeals (ICA) were brought under Section 5 of the Supreme Court (Practice and Procedure) Act, 2023 to challenge the judgment dated 23.10.2023 passed by the learned Bench of this Court in the Constitution Petition Nos.24, 25, 26, 27, 28 & 30 of 2023, filed under Article 184 (3) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), whereby the Court, by majority (4 to 1), declared that clause (d) of subsection (1) of Section 2 of the Pakistan Army Act, 1952 (in both of its sub clauses (i) & (ii)) and subsection (4) of Section 59 of the said Act are *ultra vires* the Constitution. It was further declared that the trials of civilians/accused (around 103 persons) and all other persons who are now, or may at any time be, similarly placed in relation to the incidents arising from and out of 9th and 10th May, 2023, shall be tried by Criminal Courts of competent jurisdiction established under the ordinary and or special law of the land. However, Mr. Justice Yahya Afridi (present CJP) recorded his dissent to the majority judgment and abstained from declaring clause (d) of subsection (1) of Section 2 of the Pakistan Army Act, 1952 (in both of its sub clauses (i) & (ii)) and subsection (4) of Section 59 of the said Act, *ultra vires* the Constitution. On the other hand, he concurred and joined with the other members of the Bench that the accused persons, in relation to the events arising from and out of 9th and 10th May, 2023 shall be tried by Criminal Courts of competent jurisdiction established under the ordinary and/or special laws.

II. Salient Characteristics of the Short Order is as under:-

2. After providing extensive opportunity of hearing to all concerned and for reasons to be recorded later, subject to augmentation and explication in detail, the aforesaid ICA(s) were allowed by means of short order dated 7th May, 2025.

- While setting aside the impugned judgment, we restored sub-clauses (i) & (ii) of Clause (d) of subsection (1) of Section 2 of the Pakistan Army Act, 1952 and subsection (4) of Section 59 of the Pakistan Army Act, 1952.

- Peaceful assembly, association, or public demonstration or protest within the bounds and precincts of reasonable restrictions imposed by the law is not prohibited but without violating or breaking the law, or taking the law in one's hands;

- The learned counsel for the appellant maintained that due to the striking down of the law in question, no action can be taken against the hardcore criminals and terrorists involved in the attacks on army installations and/or against the martyrdom of innocent civilians and personnel of the armed forces and even in the present situation, no action can be taken in the national security and interest against the persons accused of espionage or spies of enemy countries for the offences mentioned in sub-clause (ii) of clause (d) of subsection (1) of Section 2 of the Pakistan Army Act, 1952.

- The provisions merely accentuating the right to a fair trial and due process in any statute and its actual application and proper implementation during the trial are two distinct features and situations.

- An independent right of appeal before an independent forum is also a basic limb of the doctrine of due process and the right to a fair trial, as enshrined and envisioned under Article 10-A of the Constitution.

- If an independent right of appeal is provided in the High Court for challenging the original order or internal departmental appellate order of conviction, then obviously, the High Court in exercise of its appellate jurisdiction as conferred under the provisions of the Code of Criminal Procedure, 1898, may examine whether an equal and fair opportunity to defend the charges was afforded to the convict, whether sufficient evidence was available to substantiate the charges, and whether proper procedure in the trial was followed in letter and spirit.

- The limitation period for filing an appeal by the convicts against their conviction before the High Courts shall be reckoned and applied from the date of notifying the amendments under the Pakistan Army Act, 1952, and their conviction shall be subject to the final outcome/decision in appeal by the High Court.

- We further clarified that the individual cases/writ petitions, if pending or filed in the High Courts for challenging the *vires* of orders passed by the Anti-Terrorism Courts, allowing the transfer of case/custody of any accused to the Military Court for trial, shall be decided by such Courts on its own merits.

III. Résumé of the impugned judgment

3. The compendium of impugned judgment deduces that the majority judgment was authored by Mr. Justice Munib Akhtar and Mrs. Justice Ayesha Malik also authored a concurring judgment. Whereas, Mr. Justice Yahya Afridi (present CJP) authored a partly dissenting and partly concurring note. The bottom line of the majority judgment, concurring judgment and dissenting note are as follows:

Justice Munib Akhtar

In the main/majority judgment, his lordship focused on whether civilians can constitutionally be tried under the Army Act by military courts, particularly in light of Articles 8(3) (a) and 8(5) of the Constitution. According to his lordship, Article 8(3) (a) provides a constitutional exception for laws relating only to members of the Armed Forces, police, or other disciplined forces for ensuring their discipline and the proper discharge of their duty. Article 8(5) acts as a safeguard and a constitutional check against any attempt to indirectly deny fundamental rights. It prohibits any suspension of fundamental rights unless expressly permitted by the Constitution, therefore, the Section 2(1) (d) and Section 59(4) of the Pakistan Army Act, 1952, must pass through the sieve of Article 8(5) of the Constitution. The argument of the learned Attorney General was also rejected by the impugned majority judgment that if a civilian's actions interfered with the duties of the armed forces, it created a "nexus" that justified their trial under Article 8(3) (a) and it was held that Article 8(5) prevents indirect inclusion of civilians by any law that attempts to sidestep the express limitations of Article 8(3) (a). It was further avowed that Article 8(5) was absent in earlier constitutions but now as a crucial innovation in the 1973 Constitution, it prevents even existing laws like the Army Act from overriding fundamental rights of those not within the military sphere, unless expressly provided by the Constitution, and on the basis of the aforesaid reasoning and observations, the provisions authorizing military trials of civilians were declared unconstitutional. As far as the constitutional challenge to military courts under Article 175 of the Constitution is concerned, it was held that the composition of courts martial under the Army Act accords with the historical origins and it would be incorrect to test courts martial on the anvil of clause (3) of Article 175. The separation thereby seeks to disentangle a prior amalgam between the judiciary and executive of an entirely separate and different nature. It has nothing to do with courts martial, which function, in the present time, on an entirely different historical arc. The majority judgment held that courts martial are not courts within the meaning of Article 175; they

exist within the military justice system, with a separate historical and constitutional lineage; the power to legislate for such tribunals is traceable to Entry No. 1 of the Federal Legislative List, covering the Armed Forces; Article 175(3), which requires separation of judiciary from the executive, is not violated because courts martial have never been part of the civil judiciary and they exist outside the framework of Article 175, and; their constitution and operation cannot be invalidated by reference to it. As far as the right to fair trial envisioned under the niceties of Article 10A of the Constitution is concerned, it was held that Military courts (courts martial) are structurally incompatible with the requirements of Article 10A which enshrines judicial independence, impartiality, and procedural guarantees, which are not met in the military justice system as it applies to civilians. It was further averred that although courts martial may meet minimum fairness requirements for members of the armed forces; they fail to satisfy the constitutional standard required for civilians under Article 10A of the Constitution. The ouster clause in Article 8(3) (a) cannot justify these violations when it comes to civilians, and Article 8(5) acts as a barrier to extending military jurisdiction over civilians.

Concurring judgment by Justice Ayesha Malik

In the concurring judgment her lordship, primarily emphasized the centrality of Article 10A of the Constitution. According to her Lordship, any attempt to try civilians through military courts must be measured against the standards of fair trial and due process, not as abstract ideals, but as constitutional mandates that override all inconsistent sub-constitutional laws, including the Pakistan Army Act. It was further avowed that Military courts are executive forums, not independent judicial bodies under Article 175; they lack core safeguards like open hearings, independent judges, access to legal counsel of choice, and a meaningful right of appeal; the civilians, unlike armed forces personnel, are entitled to full constitutional protections, which cannot be ousted through Article 8(3)(a), and; past precedents like F.B. Ali are no longer controlling because Article 10A did not exist at that time and fair trial was not raised as a constitutional challenge.

Justice Yahya Afridi-- dissenting and concurring note

His lordship authored a partly dissenting and partly concurring note. Though he dissented from the majority's decision to strike down Sections 2(1)(d)(i) & (ii) and 59(4) of the Pakistan Army Act as unconstitutional; he concurred with the conclusion that civilians involved in the May 9–10, 2023, incidents cannot be tried under these provisions and must be tried by ordinary criminal courts. He based his dissent on the principle of judicial precedent and judicial discipline. Specifically, he held that the 1975 judgment in F.B. Ali v. The State, which upheld the constitutionality of the challenged Army Act provisions, was still binding because it was delivered by a bench of equal strength (five judges). According to him, the proper and constitutionally appropriate course would have been to refer the matter to a larger bench, especially since the bench originally constituted to hear the case had nine judges, which was reduced to five over time due to recusals and retirement. His Lordship further expressed concern that the Attorney General was not adequately heard on the specific question of the vires (constitutional validity) of Sections 2(1) (d) and 59(4). He emphasized that this deprived the

Federation of Pakistan of a fair opportunity to argue its case, particularly in relation to provisions potentially affecting foreigners or national security threats beyond the May 9–10 incidents. While upholding the constitutionality of the provisions, he held that the civilians involved in the May 2023 events cannot be tried by the military court because it lacks close and direct nexus to the defense of Pakistan. It was further held by his Lordship that originally the *lis* was allocated to a nine-member bench, which should not have been decided by a five-member bench, particularly because it dealt with significant constitutional issues and the possible overruling of a co-equal bench's judgment (F.B. Ali). Citing principles of judicial hierarchy and precedent, he emphasized that a larger bench should have been constituted to reconsider or depart from F.B. Ali. It was further observed that the Court had explicitly directed the AGP not to argue on the broader constitutional validity of the Army Act provisions and focus solely on the May 9–10 perpetrators. He viewed this as procedural unfairness and a form of prejudice against the Federation, since the AGP was deprived of a chance to defend the provisions in broader contexts, such as cases involving foreign spies or national security.

IV. Scope of Intra Court Appeal

4. According to Section 5 of the Supreme Court (Practice and Procedure) Act, 2023 ("**the Act**"), a right of appeal has been conferred within thirty days from an order of a Bench exercising jurisdiction under clause (3) of Article 184 of the Constitution of Islamic Republic of Pakistan 1973 (**Constitution**) to a larger Bench of the Supreme Court and such appeal shall, within a period not exceeding fourteen days, be fixed for hearing. In fact, this newly created right of Intra Court Appeal (**ICA**) is to some extent analogous to a letters patent appeal which originated from the Latin word "litterae patentes" or "open letters" but this right of appeal has been created by means of a Special Act, though the idea may have been derived or conceived from Section 3 of the Law Reforms Ordinance 1972. No doubt, in the present context, it is an internal functioning or course of action of this Court for correction of errors if any in the judgments/orders for proper adjudication of question of law in exercise of the same jurisdiction as was vested in the Bench which rendered the impugned judgment or order but it cannot be treated an appeal against the judgment and order of a Subordinate Court. To maintain judicial propriety, the working arrangement split up or separated into different benches but the court remains one and same.

4/1. The right of appeal has been created in the Act for invoking aid and interposition to check errors in the original judgment which is essentially continuation of the original proceedings for appraisal and testing the soundness of a decision. It is somewhat conspicuous and luminescent, that the right of ICA is not a mere matter of procedure but it is a substantive right created in the Act whereby the appellate bench may affirm, modify, reverse or vacate the decision. The right to ICA has now become an independent statutory right and if any attempt is made to impede or confine this statutory right to the detriment of technicalities, then it will tantamount to render this remedy ineffectual, feigned or cosmetic. On the contrary, this newly conferred jurisdiction predominantly encompasses the vetting of the impugned decision to reach the conclusion whether it is in accordance with the law and Constitution or not. The remit of ICA and its sphere of activity is not only focused on legal and procedural errors, but also to interpret and develop the law for establishing legal precedents and clarifying law for the future.

4/2. The word "appeal" itself has etymological roots in Latin, with "appellare" meaning "to address.” The right of appeal existed for many millennia as a key element of due process of law. The legislature extended this right of appeal by virtue of the aforesaid Act against the Orders passed by the Bench of this Court under clause (3) of Article 184 of the Constitution. It is a ground reality and an incontrovertible fact that, at times, due to judicial overreach and judicial adventurism, the exercise of original jurisdiction under Article 184(3) of the Constitution in the past was misemployed, misused and extended beyond the sphere and domain of original jurisdiction but no vested right of appeal was provided or available to an aggrieved person except a remedy of filing a review petition. Now, the right of filing an ICA has been provided as a vested right with an utmost circumspection in the larger public interest sanguine to the rigors of Article 10A of the Constitution as a paramount feature of the due process of law. It was also expedient and pragmatic against the frequent use or misuse of original jurisdiction in the past so

that an aggrieved person must have at least one independent right of appeal for redress and rescue.

4/3. In the present time, while exercising this jurisdiction, the Bench seized of ICA may examine the legality, soundness and correctness of the judgment and Order. It may affirm or modify judgment and Order and can also reverse or vacate, if it is found in violation of law and Constitution. Therefore, while scanning the legality and judiciousness of the judgments and orders passed by this Court under the original jurisdiction vested in Article 184 (3) of the Constitution, the scope of ICA in my view cannot deemed to be so limited or restricted, but it is extensive and possesses all-encompassing jurisdiction for curing the defects and correction of errors.

V. Relevant Sections of different enactments

5. The Pakistan Army Act 1952 (**Army Act**) is in field since 1952. At the first sight, it is compos mentis that the provisions contained in the Army Act are somewhat blended and intermingled with various provisions of the Pakistan Penal Code 1860, the Criminal Procedure Code 1898 and the Official Secret Act 1923. The relevant legal provisions/Sections are accentuated as under:-

A. The Pakistan Army Act, 1952

2. Persons subject to the Act. – (1) The following persons shall be subject to this Act, namely:-

.....

(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 applied]

59. Civil offences. (1) Subject to the provisions of subsection (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 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-bilJabr 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 subsection (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 applied]

76. Arrest by Civil Authorities. Whenever any person subject to this Act, who is accused of any offence under this Act, is within the jurisdiction of any magistrate or police officer, such magistrate or public officer shall aid in the apprehension and delivery to military custody of such person upon receipt of a written application to that effect signed by that person's commanding officer.

90. Prohibition of second trial. Where any person subject to this Act has been acquitted or convicted of an offence by a Court martial or by a criminal Court or has been summarily dealt with for an offence under section 23, he shall not be liable to be tried again for the same offence by a Court martial or be dealt with summarily in respect of it under the said section. Provided that this section shall not apply in a case in which the finding or sentence of the court martial has not been confirmed or the proceedings have been annulled under section 132.

94. Order in case of concurrent jurisdiction of Court martial and Criminal Court. When a Criminal Court and a Court martial have each jurisdiction in respect of a civil offence, it shall be in the discretion of the prescribed officer to decide before which Court the proceedings shall be instituted and, if that officer decides that they shall be instituted before a Court martial, to direct that the accused person shall be detained in military custody.

95. Power of Criminal Court to require delivery of offender. (1) When a Criminal Court having jurisdiction is of the opinion that proceedings ought to be instituted before itself in respect of any civil offence, it may, by written notice, require the prescribed officer, at his option, either to deliver over the offender to the nearest Magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Federal Government.

(2) In every such case, the said officer shall either deliver over the offender in compliance with the requisition or shall forthwith refer the question as to the Court before which the proceedings are to be instituted for the determination of the Federal Government, whose order upon such reference shall be final.

96. Trial by Court martial, bar to subsequent trial by Criminal Court. Where a person subject to this Act is acquitted or convicted of an offence by a court martial, a criminal court shall be debarred from trying him subsequently for the same offence or on the same facts.

112. Rules of evidence to be the same as in Criminal Courts. Subject to the provisions of this Act, the rules of evidence in proceedings before Courts martial shall be the same as those which are followed in criminal Courts.

133B. Court of Appeals for other cases. (1) Any person to whom a court-martial has awarded a sentence of death, imprisonment for life, imprisonment exceeding three months, or dismissal from the service after the commencement of the Pakistan Army (Amendment) Act, 1992, may, within forty days from the date of announcement of finding or sentence or promulgation thereof, whichever is earlier, prefer an appeal against the finding or sentence to a Court of Appeals consisting of the Chief of the Army Staff or one or more officers designated by him in this behalf, presided by an officer not below the rank of Brigadier in the case of General Court-Martial or Field General Court Martial or District Court-Martial or Summary Court-Martial convened or confirmed or countersigned by an officer of the rank of Brigadier or below as the case may be, and one or more officers, presided by an officer not below the rank of Major General in other cases, hereinafter referred to as the Court of Appeals:

Provided that where the sentence is awarded by the court-martial under an Islamic law, the officer or officers so designated shall be Muslims: Provided further that every Court of Appeals may be attended by a judge advocate who shall be an officer belonging to the Judge Advocate General's Department, Pakistan Army, or, if no such officer is available, a person appointed by the Chief of the Army Staff.

(2) A Court of Appeals shall have power to:

(a) accept or reject the appeal in whole or in part; or

(b) substitute a valid finding or sentence for an invalid finding or sentence; or

(c) call any witness, in its discretion for the purpose of recording additional evidence in the presence of the parties, who shall be afforded an opportunity to put any question to the witness; or

(d) annul the proceedings of the court-martial on the ground that they are illegal or unjust; or

(e) order retrial of the accused by a fresh court; or

(f) remit the whole or any part of the punishment or reduce or enhance the punishment or commute the punishment for any less punishment or punishments mentioned in this Act.

(3) The decision of a Court of Appeals shall be final and shall not be called in question before any court or other authority whatsoever.

B. The Code of Criminal Procedure, 1898

549. Delivery to military authorities of persons liable to be tried by Court-martial:

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

(2) Apprehension of such persons: Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours, to apprehend and secure any person accused of such offence.

(3) Notwithstanding anything contained in this Code if the person arrested by the police is a person subject to the Pakistan Army Act, 1952, (XXXIX of 1952) and the offence for which he is accused is triable by a Court-martial, the custody of such person and the investigation of the offence of which he is accused may be taken over by the commanding officer of such person under the said Act. **[Emphasis applied]**

C. Pakistan Penal Code 1860
Chapter- VII-- Of Offences relating to the Army, Navy & Air Force

131. Abetting mutiny, or attempting to seduce a soldier, sailor or airman from his duty: Whoever abets the committing of mutiny by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Pakistan, or attempts to seduce any such officer, soldier, sailor, or airman from his allegiance of his duty, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[Explanation: In this section, the words "officer", "soldier", "sailor" or "airman" include any person subject to the Pakistan Army Act, 1952 (XXXIX of 1952), or the Pakistan Navy Ordinance, 1961 (XXXV of 1961), or the Pakistan Air Force Act. 1953 (VI of 1953), as the case may be.

132. Abetment of mutiny, if mutiny is committed in consequence thereof: Whoever abets committing of mutiny by an officer, soldier, sailor or airman in the Army, Navy or Air Force of Pakistan, shall, if mutiny be committed in consequence of that abetment, be punished with death or with imprisonment for life or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

133. Abetment of assault by soldier, sailor or airman on his superior officer, when in execution of his office: Whoever abets an assault by an officer, soldier,

sailor or airman, in the Army, Navy or Air Force of Pakistan, on any superior officer being in the execution of his office, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

134. Abetment of such assault, if the assault is committed: Whoever abets an assault by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Pakistan, on any superior officer being in the execution of his office, shall, if such assault be committed in consequence of that abetment be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

135. Abetment of desertion of soldier, sailor or airman: Whoever abets the desertion of any officer, soldier, sailor or airman, in the Army, Navy or Air Force of Pakistan, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

136. Harbouring deserter: Whoever, except as hereinafter excepted, knowing or having reason to believe that an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Pakistan, has deserted, harbours such officer, soldier, sailor or airman, shall be punished with imprisonment' of either description for a term which may extend to two years, or with fine, or with both. Exception: This provision does not extend to the case in which the harbour is given by a wife to her husband.

137. Deserter concealed on board merchant vessel through negligence of master: The master or person incharge of a merchant vessel, on board of which any deserter from the Army, Navy or Air Force of Pakistan is concealed, shall, though ignorant of such concealment, be liable to a penalty not exceeding one thousand five hundred rupees, if he might have known of such concealment but for some neglect of his duty as such master or person in charge, or but for some want of discipline on board of the vessel.

138. Abetment of act of insubordination by soldier, sailor or airman: Whoever abets what he knows to be an act of insubordination by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Pakistan, shall, if such act of insubordination be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

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

140. Wearing garb or carrying token used by soldier, sailor or airman: Whoever, not being a soldier, sailor or airman in the Military, Navel or Air Service of Pakistan, wear, any garb or carries any token resembling any garb or token used by such a soldier, sailor or airman with the intention that it may be believed that he is such a soldier, sailor or airman shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to 38[one thousand five hundred rupees] 38, or with both.

D. Official Secrets Act, 1923

(Original – before Subs and Ins. by Act LXIII of 2023, s.3.)

Section 2 (8) Definition Clause:

(8) prohibited place means:

(a) any work of Defence, arsenal, naval, military or air force establishment or station, mine, minefield, camp, ship or aircraft belonging to, or occupied by or on behalf of Government, any military telegraph or telephone so belonging or occupied, any wireless or signal station or office so belonging or occupied and any factory, dockyard or other place so belonging or occupied and used for the purpose of building, repairing, making or storing any munitions of war, or any sketches, plans, models or documents relating thereto; **[emphasis applied]**

(b) any place not belonging to Government where any munitions of war or any sketches, models, plans or documents relating thereto, are being made, repaired, gotten or stored under contract with, or with any person on behalf of Government, or otherwise on behalf of Government;

(c) any place belonging to or used for the purpose of Government which is for the time being declared by the appropriate government, by notification in the official Gazette, to be a prohibited place for the purposes of this Act on the ground that information with respect thereto, or damage thereto, would be useful to an enemy and to which a copy of the notification in respect thereof has been affixed in English and in the vernacular of the locality;

(d) any railway, road, way or cannel, or other means of communication by land or water (including any works or structures being part thereof connected therewith, or any for purposes of a public character, or any place where any munitions of war or any sketches, models, plans, or documents relating thereto, are being made, repaired or stored otherwise than on behalf of Government, which his for the time being declared by the appropriate Government by notification in the official Gazette, to be a Central Government

3. Penalties for spying. – (1) If any person for any purpose prejudicial to the safety or interests of the State

(a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or

(b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy; or

(c) obtains, collects, records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy;

He shall be guilty of an offence under this section.

(2) On a prosecution for an offence punishable under this section with imprisonment for a term which may extend to fourteen years, it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place, or relating to anything in such a place, or any secret official code or password is made, obtained, collected, recorded, published or communicated by any

> person other than a person acting under lawful authority, and from the circumstances of the case or his conduct or his known character as proved it appears that his purpose was a purpose prejudicial to the safety or interests of the State, such sketch, plan, model, article, note, document or information shall be presumed to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of the State.
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> (3) A person guilty of an offence under this section shall be punishable, —
>
> (a) where the offence committed is intended or calculated to be, directly or indirectly, in the interest or for the benefit of, or is in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Pakistan or in relation to any secret official code, with death or with imprisonment for a term which may extend to fourteen years; and
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> (b) in any other case, with imprisonment for a term which may extend to three years.

VI. Vires of law

6. The vires of Section 2 (d) (i) and (ii) and sub-section (4) of Section 59 of the Pakistan Army Act, 1952 were under challenge before this Court by dint of aforesaid Constitution Petitions moved under Article 184 (3) of the Constitution. The niceties of Section 2 of the Pakistan Army Act, 1952 divulges that it is germane to two categories i.e., persons subject to the Act and persons not otherwise subject to the Act but who are accused of seducing or attempting to seduce any person subject to this Act from his duty or allegiance to Government, or 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. Whereas Section 59 of the same Act pertains to the Civil offences which accentuates that subject to the provisions of subsection (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. Sub-section (4) of Section 59 has an austere correlation to the present controversy which sets in motion with a non obstante clause that 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.

6/1. It is translucent from the aforesaid provisions of law that the powers and jurisdiction to try persons not otherwise subject to this Act are very limited and particularly in the present case, the persons accused of 9th May 2023 incidents were tried who committed offenses under the provisions of Official Secrets Act, 1923. Rather it is a wrong perception or lack of insight that the persons not otherwise subject to this Act will be tried by military courts for every offence mentioned in the Pakistan Penal Code (PPC) or any other offence under any special law. But in the case in hand, the trial was confined to an offence under the Official Secrets Act, 1923 and nothing else. Clause 2 (d) was inserted into the Army Act *vide* Section 2 of the Defence Services Laws Amendment Ordinance, 1967 which is protected under Article 268 of the Constitution. Due to the striking down of the law, no action can be taken against the hardcore criminals and terrorists involved in the attacks on army installations and/or against the martyrdom of innocent civilians and personnel of the armed forces who are devoting and sacrificing their precious lives to combating the menace of terrorism and even in the present situation, no action can be taken against the persons accused of espionage.

6/2. So far as the delivery/handing over the custody of accused to military authorities as encapsulated under Section 549 Cr.P.C in relation to the offenses under the Pakistan Army Act, 1952, Pakistan Air Force Act, 1953, and Pakistan Navy Ordinance, 1961 and any similar law for the time being in force is concerned, let me clarify that these powers are not *ipsi dixit*. While exercising these powers, the Magistrate/Court in proper cases ought to deliver the custody of accused with a statement of the offence to the commanding officer of the regiment/corps, ship or detachment, to which he belongs, or to the commanding officer but before ordering this, the Magistrate/Court in all conscience should be satisfied without any reasonable doubt that the case is liable to be tried

by the Military Court and pass a speaking order. Indeed, this was the reason that in the short order, we already observed that the individual cases/writ petitions, if pending or filed in the High Courts for challenging the *vires* of orders passed by the Anti-Terrorism Courts allowing the transfer of case/custody of any accused to the Military Court for trial, shall be decided by such Courts on its own merits.

6/3. Let me take up the constitutional provisions involved in the case. To start with, Article 8 of the Constitution is reproduced as under:-

> "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
>
> (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 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". **[Emphasis added]**

6/4. It is clear from plain reading that the provisions embedded in the above Article shall apply to any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them. A glimpse of Article 268 depicts that all existing laws shall, subject to the Constitution, continue in force, so far as applicable and with the necessary adaptations, until altered, repealed or amended by the appropriate Legislature. Moreover, for the purpose of bringing the provisions of any existing law into accord with the provisions of the Constitution (other than Part II of the Constitution), the President may by Order, within a period of two years from the commencing day, make such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient, and any such Order may be made so as to have effect from such day, not being a day earlier than the commencing day, as may be specified in the Order. It is further provided within the same Article that any court, tribunal or authority required or empowered to enforce an existing law shall, notwithstanding that no adaptations have been made in such law by an Order made under clause (3) or clause (4), construe the law with all such adaptations as are necessary to bring it into accord with the provisions of the Constitution. While "existing laws" by virtue of this Article means all laws (including Ordinances, Orders-in-Council, Orders, rules, bye-laws, regulations and Letters Patent constituting a High Court, and any notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extra-territorial validity, immediately before the commencing day. According to attached explanation, "in force", in relation to any law, means having effect as law whether or not the law has been brought into operation.

6/5. The phrase “any law relating to members of the Armed Forces” cannot be given so strict or stern meaning or interpretation. The word “relating to” or “related to” means consisting of, reflecting, referring to, regarding, concerning, involving, evidencing, constituting, or having any legal, logical, evidential, or factual connection with (whether to support or to rebut) the subject matter designated in any paragraph. A request for documents “relating to” a specified subject matter always shall include notes and memoranda (whenever prepared) relating to the subject matter of the request. Ref: https://www.lawinsider.com/dictionary/relating-to. In law, the phrase "relating to" is frequently used to indicate a connection or relevance between different legal elements or concepts. It means that something is concerned with, or connected to, a particular subject matter or legal rule. Ref: https://capitalizemytitle.com/words-related-to-law/.

6/6. The pith and substance of main/majority impugned judgment demonstrates that it paved the way to strike down the provision of Army Act on the strength of Article 8 (5) which only explicates that the rights conferred by this Chapter (Chapter-1-fundamental rights) shall not be suspended except as expressly provided by the Constitution which according to the impugned majority judgment subverts any attempt to deny the fundamental rights and also proscribes suspension of fundamental rights unless expressly permitted by the Constitution, therefore, the Section 2(1) (d) and Section 59(4) of the Pakistan Army Act, 1952, should traverse the barricade Article 8(5) of the Constitution which was absent in earlier constitutions but now as a critical transformation in the 1973 Constitution, it counteracts even existing laws from overriding the fundamental rights. The rationale of plugging Article 8 (5) is meant to ensure non-suspension of fundamental rights unless expressly permitted by the Constitution. This situation is only related and confined during emergency period which signposts the Article 232 of the Constitution that relates to the Proclamation of Emergency by the President and according to the Article 233, it is *inter alia* provided that nothing contained in Articles 15, 16, 17, 18, 19, and 24 shall, while a Proclamation of Emergency is in force, restrict the power of the State as

defined in Article 7 to make any law or to take any executive action which it would, but for the provisions in the said Articles, be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect, and shall be deemed to have been repealed, at the time when the Proclamation is revoked or has ceased to be in force. Even if I read all sub-articles of Article 8 in juxtaposition, Article 8 (5) encapsulates the suspension of fundamental rights during emergency period. Neither it could rescue nor on its bedrock could the provisions of Army Act be declared ultra vires the Constitution. So far as the challenge to military courts under Article 175 of the Constitution is concerned, it was rightly held that the composition of courts martial under the Army Act accords with the historical origins and it would be incorrect to test courts martial on the anvil of clause (3) of Article 175. While according to the concurring note, the trial of civilians through military courts has been declared against the standards of fair trial and due process with further declaration that F.B. Ali case is no longer controlling because Article 10A did not exist at that time and fair trial was not raised as a constitutional challenge.

6/7. It is a matter of record that except the father of two accused persons, no other accused challenged the law, trial or proceedings on any ground. Even the fathers of two accused also did not point out any flaw or violation of due process during the trial but the whole focus was on the vires of law even in the present ICAs on the anvil of Article 10-A. The right to fair trial or compliance of due process of law is not an invention of Article 10A of the Constitution but it exists from time immemorial in the civil and criminal administration of justice. The procedure for trial of civil suits is provided in the Civil Procedure Code (CPC) since 1908 and for trial of criminal cases in the Criminal Procedure Code 1898 (Cr.PC). Both fortify, sustain and contain a number of substantial and procedural stipulations in order to ensure the right to fair trial and due process from the very beginning even in the period when Article 10A was alien and not incorporated in our Constitution. It is generally known by legal fraternity that in many special enactments the procedure of both above stated laws are adapted by reference according to the genre of law to effectively deal

and decide the matters. As I already perceived, the provisions struck down could not be read in insolation which have intense ramifications with different corollaries. Striking down certain provisions of Army Act is meant to nullify various other provisions of the same Act and some other intertwined laws indirectly which may not be sustained or remained in field for the persons not otherwise subject to this Act but accused of seducing or attempting to seduce any person subject to this Act from his duty or allegiance to Government, and or 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. In this scenario, the delinquent is liable to be tried by Military Court as a person subject to the Army Act and he shall be tried according to Sub-section 4 of Section 59 of the Army Act. According to Article 260 of the Constitution, “members of the Armed Forces do not include persons who are not, for the time being, subject to any law relating to the members of the Armed Forces”. Much sanctity was proffered to the provisions of the Army Act including Section 76, pertaining to the arrest by Civil Authorities and delivery to military custody of such person; prohibition of second trial is prohibited under 90; concurrent jurisdiction of Court martial and Criminal Court under section 94; power of Criminal Court to require delivery of offender under section 95; section 96 imposes bar to subsequent trial by Criminal under section 96 for the same offence or on the same facts; section 112 emphasizes that the rules of evidence in proceedings before Courts martial shall be the same as those which are followed in criminal Courts and in case of conviction, a right to appeal is provided under Section 133B, wherein the Court of Appeals has powers to (a) accept or reject the appeal in whole or in part; or (b) substitute a valid finding or sentence for an invalid finding or sentence; or (c) call any witness, in its discretion for the purpose of recording additional evidence in the presence of the parties, who shall be afforded an opportunity to put any question to the witness; or (d) annul the proceedings of the court-martial on the ground that they are illegal or unjust; or (e) order retrial of the accused by a fresh court; or (f) remit the whole or any part of the punishment or

reduce or enhance the punishment or commute the punishment for any less punishment or punishments mentioned in this Act.

6/8. At the same time, Section 549 of the Code of Criminal Procedure, 1898 (**Cr.P.C**) is germane to the delivery to military authorities of persons liable to be tried by Court martial and in such situation, notwithstanding anything contained in this Code if the person arrested by the police is a person subject to the Pakistan Army Act, 1952, and the offence for which he is accused is triable by a Court-martial, the custody of such person and the investigation of the offence of which he is accused may be taken over by the commanding officer of such person under the said Act. A meticulous survey of Pakistan Penal Code 1860 (**PPC**) divulges that its Chapter-VII, delineates the offences relating to the Army, Navy & Air Force. It is quite translucent that Section 131 relates to the offence of abetting mutiny, or attempting to seduce a soldier, sailor or airman from his duty and whoever abets the committing of mutiny by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Pakistan, or attempts to seduce any such officer, soldier, sailor, or airman from his allegiance of his duty, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. According to the attached Explanation in this section, the words "officer", "soldier", "sailor" or "airman" include any person subject to the Pakistan Army Act, 1952, or the Pakistan Navy Ordinance, 1961, or the Pakistan Air Force Act 1953 as the case may be. Though other sections of this chapter embodied some more offences such as abetment of mutiny; abetment of assault by soldier, sailor or airman on his superior officer, when in execution of his office; abetment of such assault, if the assault is committed by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Pakistan, on any superior officer being in the execution of his office; abetment of desertion of soldier, sailor or airman; harbouring deserter; deserter concealed on board merchant vessel through negligence of master; abetment of act of insubordination by soldier, sailor or airman. The most important Section is 139, which clearly provides that “No person subject to the Pakistan Army Act, 1952 (XXXIX of 1952), the Pakistan Air Force

Act, 1953 (VI of 1953), or the Pakistan Navy Ordinance. 1961 (XXXV of 1961), is subject to punishment under this Code for any of the offences defined in this Chapter". Why does this section have much significance in my discernment? Because, it imposes a stringent condition that no person subject to the Pakistan Army Act is subject to punishment under this Code for any of the offences defined in this Chapter, which unequivocally reckons that after striking down the offence mentioned in Section 2 (d) (i), the offense of seducing or attempting to seduce any person subject to this Act from his duty or allegiance to Government or even the offense of abetment had gone with the wind which means irrevocably lost or ceased to exist. So, the aforesaid offences for all intents and purposes remained neither here nor there and striking down such provisions not only disturbed the corpus of P.P.C but also created uncertainty in the process, forum and jurisdiction of trial without adverting any resolution in the impugned judgment to deal with such sections and offenses in future.

6/9. As far as the provisions of the Official Secret Act 1923 is concerned, Section 2 (8) defines the prohibited place which includes work of defence, arsenal, naval, military or air force establishment or stations etc. while Section 3 provides the penalties for spying. According to Section 2 (d) of the Army Act, the persons not otherwise are subject to this if accused of seducing or attempting to seduce any person subject to this Act from his duty or allegiance to Government, or 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. What does it mean that the power to try civilians is kept in a very tight rein and in a limited sense? It is not meant by the aforesaid provisions that every offence under the Army Act, P.P.C, Official Secret Act or any other related laws, the civilians shall be tried by Military Courts come what may which is not the correct interpretation of laws. Even under the Official Secret Act, the power of trial is limited to the prohibited places relating to or having nexus with the Army/military and not for all prohibited places mentioned in the definition. Due to the striking down of

the law in question, no action can be taken against the hardcore criminals and terrorists involved in the attacks on army installations and/or against the martyrdom of innocent civilians and personnel of the armed forces and even in the present situation, no action can be taken in the national security and interest against the persons accused of espionage or spies of enemy countries for the offences

6/10. The expression *ultra vires* means “beyond the powers”. If an act is carried out shorn of authority, it is “*ultra vires*”. No doubt the constitutionality of any law and competence of legislation can be tested and flicked through and if it is found to be absent of law-making and jurisdictive competence, or found in violation of the fundamental rights, the law may be struck down. In the present case, according to the respondents, the threshold is Article 10-A, of the Constitution but at the same time, the Court has to also examine the rigors of Article 8 (3) of the Constitution whether the provisions of the Army Act could be struck down or not or could it be struck down with the aid of Article 8 (5) as articulated in impugned main judgment and concurring note of one of the learned members of the bench. It is an established precept of the interpretation of laws, one backed by judicial sagacity and prudence in the form of numerous precedents of the superior Courts, that the law should be saved rather than be destroyed and the court must lean in favour of upholding the constitutionality of legislation unless it is *ex facie* violative of a constitutional provision. The function of judiciary is not to legislate or question the wisdom of the legislature in making a particular law, nor can it refuse to enforce a law. The primary aim of the Courts must be to pay attention to the objectives of the statute, and then proceed with an interpretation that lends support thereto; in essence adopting the purposive rule of interpretation. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman’s unskillfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. The rules of interpretation come into play only where clarity or precision in the provisions of the statute are found missing. The legislature enacts and the Judges interpret. It is the duty of the

court to endeavor as far as possible to construe a statute in such a manner that the construction results in validity rather than its invalidity and gives effect to the manifest intention of the Legislature enacting that statute.

6/11. Even while reading down the statute, two principles had to be kept in view; first that the object of 'reading down' was primarily to save the statute and in doing so the paramount question would be whether in the event of reading down, could the statute remain functional; second, would the legislature have enacted the law, if that issue had been brought to its notice which was being agitated before the court. (Ref: Province of Sindh and others vs. M.Q.M. and others. **(PLD 2014 Supreme Court 531).** In the case of Delhi Transport Corporation vs. D.T.C. Mazdoor Congress **(AIR 1991 SC 101 = 1990 Supp. 1 SCR 142)**, the court held that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible, one rendering it constitutional and the other making it unconstitutional, the former should be preferred. Lord Reid in Federal Steam Navigation Co. v. Department of Trade and Industry, (as also extracted by Cross-Statutory Interpretation, Butterworths' Edition, 1976 at page 43 in preposition 3) has stated thus: "the judge may read in words which he considers to be necessarily implied by words which are already in the statute and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute". Lord Denning expressed on exercise of discretionary authority in his book 'The Closing Chapter' when relying on a judgment of Court of Appeals of England & Wales **(1948 1 KB 223, 234)** authored by Lord Greene (Master of the Rolls) that if a public authority is entrusted, as part of its public law function with the exercise of discretion, it must take into account all relevant considerations. It must not be influenced by any irrelevant consideration. And its discretion must be exercised reasonable in this sense that it

must not be so unreasonable that no reasonable authority could have reached it.

6/12. In the case of Baz Muhammad Kakar and others v. Federation of Pakistan and others (**PLD 2012 SC 923**), it was held that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. The words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary. The superior courts time and again pronounced that any law which is inconsistent and in contravention of fundamental rights or which take away or abridge such rights, is void, to the extent of such contravention. In the case of Benazir Bhutto v. Federation of Pakistan and another (**PLD 1988 Supreme Court 416**), it was held that vires of an Act can be challenged if its provisions are ex facie discriminatory in which case actual proof of discriminatory treatment is not required to be shown. Where the Act is not ex facie discriminatory but is capable of being administered discriminately then the party challenging it has to show that it has actually been administered in a partial, unjust and oppressive manner. While in the case of Dr. Mobashir Hassan and others v. Federation of Pakistan and others (**PLD 2010 SC 265**), it was held that a duty is cast upon the Supreme Court that it should normally lean in favour of constitutionality of a statute and efforts should be made to save the same instead of destroying it. Principle is that law should be saved rather than be destroyed and the court must lean in favour of upholding the constitutionality of legislation, keeping in view that the rule of constitutional interpretation is that there is a presumption in favour of the constitutionality of the legislative enactments, unless ex facie, it is violative of a constitutional provision. Where a statute is ex facie discriminatory but is also capable of being administered in a discriminatory manner and it appears that it is actually being administered to the detriments of a particular class in particular, unjust

and oppressive manner then it is void ab-initio since its inception. In the case of Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others, (**2018 SCMR 802**), the Court held that when a law was enacted by the Parliament, the presumption was that Parliament had competently enacted it and if the vires of the same are challenged, the burden is always laid upon the person making such challenge to show that the same was violative of any of the fundamental rights or the provisions of the Constitution. The Court should lean in favor of upholding the constitutionality of a legislation and it was thus incumbent upon the Court to be extremely reluctant to strike down laws as unconstitutional. Last but not least, this Court in the case of Lahore Development Authority thr. DG and others v. Ms. Imrana Tiwana and others (**2015 SCMR 1739**), summarized the rules applicable while determining the constitutionality of a statute such as (i) there was a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute was placed next to the Constitution and no way could be found in reconciling the two; (ii) where more than one interpretation was possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favored validity; (iii) a statute must never be declared unconstitutional unless its invalidity was beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid; (iv) Court should abstain from deciding a Constitutional question, if a case could be decided on other or narrower grounds; (v) court should not decide a larger Constitutional question than was necessary for the determination of the case; (vi) court should not declare a statute unconstitutional on the ground that it violated the spirit of the Constitution unless it also violated the letter of the Constitution; (vii) Court was not concerned with the wisdom or prudence of the legislation but only with its Constitutionality; (viii) court should not strike down statutes on principles of republican or democratic government unless those principles were placed beyond legislative encroachment by the Constitution; and (ix) mala fides should not be attributed to the Legislature.

[Ref: Province of East Pakistan v. Siraj ul Haq Patwari (PLD 1966 SC 854); Mehreen Zaibun Nisa v. Land Commissioner (PLD 1975 SC 397); Kaneez Fatima v. Wali Muhammad (PLD 1993 SC 901); Multiline Associates v. Ardeshir Cowasjee (1995 SCMR 362); Ellahi Cotton Mills Limited v. Federation of Pakistan (PLD 1997 SC 582); Dr. Tariq Nawaz v. Government of Pakistan (2000 SCMR 1956); Mian Asif Aslam v. Mian Muhammad Asif (PLD 2001 SC 499); Pakistan Muslim League (Q) v. Chief Executive of Pakistan (PLD 2002 SC 994); Pakistan Lawyers Forum v. Federation of Pakistan (PLD 2005 SC 719); Messrs Master Foam (Pvt.) Ltd. v. Government of Pakistan (2005 PTD 1537); Watan Party v. Federation of Pakistan (PLD 2006 SC 697); Federation of Pakistan v. Haji Muhammad Sadiq (PLD 2007 SC 133); and Iqbal Zafar Jhagra v. Federation of Pakistan (2013 SCMR 1337)]

VII. Rights with Responsibilities

7. According to the Article 15 of our Constitution, every citizen has a right to remain in, and, subject to any reasonable restriction imposed by law in the public interest, enter and move freely throughout Pakistan and to reside and settle in any part thereof. Whereas under Article 16, every citizen has right to assemble peacefully and without arms, subject to any reasonable restrictions imposed by law in the interest of public order. So far as Article 17 is concerned, it guarantees that every citizen has the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality and every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan etc. In unison, Article 19 gives carte blanche to every citizen the right to freedom of speech and expression, and also freedom of the press but subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence. Furthermore, Article 5 ratifies that loyalty to the State is the basic duty of every citizen and obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan. Even under Article 12 of the Charter of Fundamental Rights of the European Union, everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters,

which implies the right of everyone to form and to join trade unions for the protection of his or her interests. Likewise, Article 11 of the European Convention on Human Rights protects right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests including right to organize and participate in peaceful gatherings, and protests within the reasonable restrictions imposed by the law.

7/1. Without ado, peaceful assembly, association, or public demonstration/protest within the bounds and precincts of reasonable restrictions imposed by the law is not prohibited in our Constitution but these rights should be exercised without violating or breaking the law, or taking the law in one's hands. During the course of arguments, the learned Attorney General shared the statistics with pictorial corroboration that at least 39 military installations, Army works/establishments at various places (23 in Punjab, 08 in KPK, 07 in Sindh and 01 in Baluchistan) including GHQ, Core Commander House, Lahore (which is also a camp office), Mianwali Air Base, and ISI Offices/set up in Sargodha, Faisalabad, and Rawalpindi were targeted/attacked on 09.05.2023 and according to him, all attacks were made by design and occurred on one and the same day, within a span of 4 to 6 hours, across the country and these incidents left an indelible mark and represented the darkest moments in the nation's history. Therefore, several First Information Reports (FIRs) were lodged at various Police Stations. He further argued that on account of dereliction of duty, stern disciplinary actions were also taken against several army officials. Additionally, the attack on the Core Commander House, Lahore, rendered the command dysfunctional for at least 4 to 5 hours, creating a highly dangerous situation.

7/2. The learned counsel representing the respondents never refuted or denied the factum of such incidents but they candidly and forthrightly argued, from beginning to end, that though the accused/convicts have committed offences, they should be tried by Anti-Terrorism Courts and not through Court Martial or by Military Courts, as this violates the right to a fair trial as envisioned under Article 10-A of the Constitution read

with sub-article (3) of Article 175 of the Constitution, hence the Military Courts cannot exercise judicial functions in the cases of civilians. Though the argument with regard to the applicability of sub-article (3) of Article 175 of the Constitution was vehemently raised even in the original proceedings, it was not approved or accepted in the majority impugned judgment.

7/3. No doubt, the fundamental rights are a cornerstone of constitutional democracies, but they do not operate in a vacuum. The jurisprudence of Pakistan, India, and Europe converge on a shared principle. The constitutional rights are subject to reasonable restrictions imposed by the law. These limitations must never extinguish the core of a right, but may channel its exercise in the interest of public order and the rights of others. When guided by structured reasoning, the doctrine of balancing ensures that no right becomes a license for lawlessness. As the Constitution itself envisages, rights are to be enjoyed within a framework of mutual respect, decency, morality, legal order, and public good with conscious mind that the exercise of one's right must not infringe upon the lawful rights of others. The maxim "your right to swing your fist ends where my nose begins" envisages the logic that rights cannot be used to harm others. This also epitomizes a canon that individual freedom is not absolute and is limited by the potential harm it can cause to others. This Court has consistently held that fundamental rights are qualified by the demands of public interest and legal order. In East and West Steamship Co. v. Pakistan (**PLD 1958 SC 41**), it was emphasized that restrictions on rights must be proportionate, not arbitrary or excessive, and should align with legitimate state aims such as national security or public order. In the case of Benazir Bhutto v. Federation of Pakistan (**PLD 1988 SC 416**), this Court stressed that the freedom of movement and assembly may be regulated to protect public order, provided that such regulation is grounded in law. Similarly, in Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan (**PLD 1998 SC 1263**), the Court reiterated that fundamental rights may be reasonably curtailed to ensure the rights of others and preserve social harmony. In Bhasin v. Union of India (**AIR 2020 SC 130**), the Indian

Supreme Court held that even constitutionally protected freedoms such as access to the internet can be curtailed when national security and public order are at stake. However, it articulated that such restrictions must be lawful, necessary, proportionate, and the least restrictive means available. Complete prohibitions must be justified by exceptional circumstances. The Court elaborated a five-part proportionality test: (i) legitimacy of the aim; (ii) necessity of the measure; (iii) adequacy of the nexus between the measure and the aim; (iv) minimal impairment; and (v) judicial review. Even in the case of Modern Dental College v. State of Madhya Pradesh (**(2016) 7 SCC 353**), the Indian Supreme Court stressed the need to harmoniously balance fundamental rights in cases of inter-rights tension.

7/4. The Charter of Fundamental Rights of the European Union (Article 52(1)) stipulates that any limitation on the exercise of fundamental rights must be provided for by law; respect the essence of the right, and; be necessary and proportionate to objectives of general interest or the rights of others. This caution is also echoed in European Court of Human Rights jurisprudence, where the Court affirms that rights such as freedom of expression and assembly are protected only if exercised peacefully and within democratic bounds. Violent or disruptive conduct lies beyond the protection of these rights. The legal tradition affirms that rights are accompanied by responsibilities and must not become instruments of disorder.

7/5. This situation also reminds me of legal maxims such as *Sic utere tuo ut alienum non laedas* (use your right without harming another's); *Salus populi suprema lex esto* (the welfare of the people shall be the supreme law), and *Libertas non est libertas nisi sub lege* (freedom is not freedom unless under the law). These maxims reinforce that the exercise of individual liberty must be tempered by public interest and the rights of others. Most of the fundamental rights enshrined in constitutions are derived from international human rights. Therefore, substantively, they may be similar. Human rights themselves are sourced from natural law, religion, different social and legal theories, etc. though people usually talk about rights but shy away from talking about responsibilities. Linda

McClain, in her paper (Ref: Linda C. McClain, Rights and Irresponsibility. Duke Law Journal (1994). (https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3247&context=dlj)) made remarks that there are "too many rights and too few responsibilities". People demand and insist on a wide range of rights, but when it comes to showing respect for the rights of others, fewer people take responsibility and duty towards society and others. While the fundamental rights are important for any just and democratic society, exercising these rights is also not without its limits. Rights are exercised in a social space shared with other citizens who have their rights too, so the freedom to exercise one's right should not interfere with the rights of others. While exercising fundamental rights, reasonableness and proportionality should be used. As Eleanor Roosevelt, a key figure in drafting the Universal Declaration of Human Rights, aptly noted that "Freedom makes a huge requirement of every human being. With freedom comes responsibility." In the case of Ward v. Rock against Racism (**491 U.S. 781 (1989)**), the US Supreme Court held that there is a right to freedom of expression, but it is not absolute. The right has to be exercised at a reasonable time, place, and manner. The principles of proportionality and reasonableness give effect to fundamental rights in their full essence. The main aim of proportionality is that fundamental rights are practiced by each and every individual without any infringement. Equity follows the law; he who seeks equity must do equity and where there are equal equities, the law prevails as the equity cannot contradict the law.

7/6. The European Court of Human Rights (ECtHR) has also expounded a consistent scaffold of jurisprudence on the permissible limitations of fundamental rights under the European Convention on Human Rights. While the Convention enshrines and shields a wide range of civil and political freedoms, most of these rights are not absolute. Instead, they may be subject to restrictions that satisfy the Court's established three-part test**:** (i) the measure must be prescribed by law; (ii) it must pursue a legitimate aim, and (iii) it must be necessary in a democratic society. Similarly, Article 19 (3) of the International Covenant on Civil and Political Rights (ICCPR) provides that the exercise of freedom of expression may be subject to certain restrictions as provided by law and

necessary, including "...for the protection of national security or of public order, or of public health or morals." Likewise, Article 22 (2) states that no restrictions may be placed on freedom of association "other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others." In the case of Lucas v. The United Kingdom (App No.39013/02 ECtHR, 18 March 2003), the European Court held that the applicant's conduct of sitting in a public road to protest posed prospective dangers to public order and thus his arrest and detention by the local police was both necessary and proportionate. The Court emphasized that obstructing a public road, even absent violence, can seriously disrupt order and justify strict measures by the state. According to the aforesaid cited judgment, even "sitting in a public road to protest posed prospective dangers to public order" while in the 9th May event, large-scale acts of political vandalism, arson, and attacks on public property, including military installations and intelligence agencies, were downplayed whereas ECtHR recognizes that even minor disruptions to public order warrant proportionate state intervention. The learned counsel appearing for the respondents, while defending the impugned judgment during the course of hearing of appeals which continued on numerous dates, never pointed out a single incident of similar nature in any other country or across the globe and even in Pakistan before 9th May event which was only one of its kind where 39 military installations, Army works/establishments at various places in country were targeted/attacked.

VIII. Ratio decidendi of cited precedents

8. The trial of civilians only for specific offenses as provided under Section 2 (d) (i) and (ii) of the Army Act inserted into the Army Act *vide* Defence Services Laws Amendment Ordinance, 1967 is not a new phenomenon but in past also various trials were conducted and completed in due course. It is a ground reality that the provisions of the Pakistan Army Act extending jurisdiction to certain civilians have stood

on the statute book for several decades, receiving the tacit approval of successive legislatures and the silent acquiescence of this Court. If such provisions were truly inconsistent with the Constitution, a legitimate inquiry arises as to why no Bench of this Court pronounced upon their invalidity in the years past? The Constitution is not transformed by the passage of time; what would be repugnant today would have been equally repugnant yesterday. The fact that these provisions remained unchallenged or were not declared ultra vires at an earlier stage, suggests that they were long understood as valid and operative within the constitutional scheme. It is only in the aftermath of the events of 9th May 2023, when prosecutions of civilians under the Army Act acquired public and political prominence and this question was brought into sharp focus. In this backdrop, it is necessary to ask whether it is the law itself that is infirm, or whether the sudden urgency of the present moment has led to a judicial reappraisal that stands at odds with decades of settled acceptance. During the course of arguments, all the learned counsel frequently cited the judgments of this Court in which the provisions of the Army Act have been discussed and dilated upon since F.B Ali case to District Bar Association Rawalpindi case and in no dictum was any provision of the Army Act struck down for any reason including the lack of legislative competence or fair trial. The gist and ratio of judgments is as under:-

> **1. PLD 1975 SC 506 (Brig. (Retd.) F.B. Ali case).** It was held that civilians can be tried by military courts even in peacetime if the offense affects military discipline; the Court confirmed that laws governing the military fall under Article 8(3) (a) and are immune from fundamental rights challenges; the military court proceedings satisfy fair trial standards; rejected the argument that military trials violate fundamental rights or due process guarantees and ruled that Section 2(1) (d) is constitutional and civilians can be tried under it.
>
> **2. PLD 1996 SC 632 (Shahida Zaheer Abbasi case)**. This Court upheld the validity of military trials for civilians accused of offenses connected to military operations. It was further held that the rules of procedure applicable for trial of a person in a criminal case before a Military Court do not violate any accepted judicial principle governing trial of an accused person (...) the procedure prescribed for trial before Military Courts is in no way contrary to the concept of a fair trial in a criminal case.

3. PLD 1999 SC 504 (Liaquat Hussain case). In this case while invalidating special military courts formed under emergency powers, the Court still recognized that military jurisdiction over civilians is constitutional in specific cases.

4. PLD 2007 SC 405 (Mushtaq Ahmed case). This Court ruled that military courts have exclusive jurisdiction over persons subject to military law. It was further held that the civilians subject to military law can be taken into custody by military authorities without prior court approval.

5. PLD 2015 SC 401 (District Bar Association Rawalpindi case). In the plurality decision of 8 out of 17 judges reaffirmed that military courts could try civilians under specific circumstances. It was further held with reference to Article 8 of the Constitution that the "Court Martial are constituted and established under the Pakistan Army Act, 1952, and jurisdiction thereupon is also conferred by the said Act. Their existence and validity is acknowledged and accepted by the Constitution in so far as they deal with the members of the Armed Forces and other persons subject to the said Act. This has not been disputed before us". The plurality judgment also refers to the case of Col. (R) Muhammad Akram v. Federation of Pakistan through Secretary Ministry of Defence, Rawalpindi and another **(PLD 2009 FSC 36)**, where the "provisions of the Pakistan Army Act were scrutinized by the Federal Shariat Court (...) and generally passed muster. Ultimately the amendment in the Constitution was affirmed and approved by the judgment in plurality and not found to be against the basic structure of the Constitution.

IX. Procedure of Trial

9. Albeit, according to the impugned judgment and predominantly in the concurring judgment of Ayesha Malik-J, one of the reasons of striking down the law in question was absenteeism or dearth of right to a fair trial but in my view before declaring any provision of any law unconstitutional, it is the sense of duty of the Court to flick through the nucleus and resilience of the law as a whole whether it affords the right to fair trial or not? While examining the plea of fair trial and due process of law, we called upon the counsel for the appellants to expand on the procedure of trial conducted under the Army Act and the Rules/Regulations framed thereunder. The learned counsel demonstrated through certain rules incorporated under the **Pakistan Army Act Rules, 1954 (Rules)** in order to displace and dislodge the allegations that the procedure in the military court does not propound a right to fair trial/due process of law. The crux of relevant rules is as under:-

1. **Rule 19:** The court martial commences with the framing of charges.

2. **Rules 20 & 21:** Ingredients of the charge sufficient to apprise the accused of facts comprising the precise offence which is asked to face before the trial.

3. **Rule 23**: The accused person shall be afforded full opportunity of preparing his defence and shall be allowed free communication with his witnesses and with any friend, defending officer, or legal advisor whom he may wish to consult. Not less than twenty-four hours before the trial, the accused shall be given a copy of summary of evidence and explain to him his rights under the Rules as to preparing his defence and being assisted or represented at the trial, and shall ask him to state in writing whether or not he wishes to have an officer assigned by the convening officer to represent him at the trial.

4. **Rule 24:** The accused shall be informed by an officer of every charge on which he is to be tried, and that on his giving the names of witnesses, whom he desires to call in his defence, reasonable steps shall be taken for procuring their attendance. He shall be given at least twenty-four hours to consider his defence. He shall also be handed over a copy of the charge-sheet and a vernacular translation of the same, which shall, if necessary, be read out and explained to him. If the accused desires, a list of the numbers, names, ranks and corps (if any) of the officers who are to form the court, and where the officers in waiting are named, also of those officers, will in every court martial other than a summary court martial, be given to the accused. Additionally, sub-rule (4) of Rule 24 stipulates that if it appears to the Court that the accused at his trial is liable to be prejudiced, the court shall take steps to adjourn to avoid the accused being so prejudiced.

5. **Rule 35:** The order convening the court and the names of the president and members of the court shall be read over to the accused and he shall be asked, as required by Section 104 of the Army Act, whether he objects to be tried by any officer sitting before the court, and any objection which shall be raised shall be disposed of. The accused will be required to state the names of all the officers to whom he objects, and he may also call upon any person to give evidence in support of the objection. Where such person is called, he may be questioned by the accused or by the court. If the objection is sustained, another officer as member of the Court will be added.

6. **Rule 36 & 37:** The members of the Court are required to take the oath in the form as specified. The oath so made to duly administer justice, according to the Pakistan Army Act, without partiality, favour or affection. An oath or affirmation is also required to be administered to the judge advocate in the presence of the accused. The oath or affirmation is also administered to the Officer Attending for the Purpose of Instruction, Shorthand writer and Interpreter. (See Sections 106 and 107 of Army Act).

7. **Rule 39:** The accused, when required to plead to the charge, may object that it does not disclose an offence under the Act, or is not in accordance with these rules, whereafter the court shall, after hearing submissions by the prosecutor and by or on behalf of the accused, consider the objections and shall either disallow it and proceed with the trial, or allow it and adjourn to submit a report to the convening authority, or in case of doubt, adjourn to consult convening authority.

8. **Rule 40:** The charge if so, required may accordingly be amended after due notice to the accused.

9. **Rule 41:** The accused, before pleading to charge, has a right to offer a special plea that the court has no jurisdiction.

10. **Rule 42:** If the accused pleads “Guilty”, that plea shall be recorded as the finding of the court, the president or the judge advocate shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of the plea, and in particular the meaning of the charge to which he has pleaded guilty. A plea of guilty shall not be accepted in a case where the accused is liable, if convicted to be sentenced to death, and where such plea is made, the trial shall proceed and the charge shall be dealt with as if the plea made was not guilty.

11. **Rule 43:** At the time of the general plea of “Guilty” or “Not Guilty” to a charge for an offence, the accused may offer a plea in bar of trial on any of the grounds mentioned therein. And such plea shall be disposed of by the court, if necessary, after a thorough probe.

12. **Rule 44:** Deals the procedure after plea of guilty by the accused notwithstanding the advice given to him for withdrawal of such plea.

13. **Rule 47:** It deals with the close of case for prosecution and the procedure for defence where accused does not call witnesses. Thus, in case, after close of case of prosecution, the accused does not intend to call any witnesses as to the facts of the case and if he is not represented by counsel or by an officer subject to the Act, if he wishes, he shall be allowed to call witnesses to his character. If the accused is represented by a counsel or by an officer subject to the Act, the accused will make a statement on oath or affirmation giving his account of charges against him and shall be liable to cross-examination. The accused may, if he wishes, call witnesses to his character, whereafter the prosecutor may make the final address and the counsel or the defending officer may then make a closing address.

14. **Rule 49:** After the evidence of the prosecution and the accused have been recorded and the closing address and reply thereto have been made by or on behalf of the accused and the prosecutor respectively, the judge advocate shall, in open court, sum up the evidence and advise the court on the law relating to the case.

15. **Rule 50:** Relates to the finding and sentence which the court is required to form after the recording of evidence is concluded as aforesaid after the judge advocate has summed up the evidence and advised the court upon the law relating to the case.

16. **Rule 51:** The finding of charge upon which the accused is arraigned shall be recorded as guilty or of not guilty" and if not found guilty then honorable acquittal of the accused.

17. **Rule 52:** Deals the procedure on acquittal.

18. **Rule 53:** Deals the procedure on conviction. Relevant to determining the quantum of sentence, the accused may also address the Court for mitigation of punishment.

19. **Rules 58, 59 & 60:** Deal with recommendation of mercy, mitigation of sentence and the power of the confirming authority to confirm or vary the sentence of a court martial.

20. **Rules 122, 123, 124 and 125:** Deal with the manner of the recording of statements of witnesses during trial before court martial as followed in the procedure for trial before the criminal courts which means a court of ordinary criminal justice in Pakistan or established elsewhere by the authority of the federal government. (See Section 108, 109, 110 and 112 of the Army Act).

21. **Rule 63:** The president shall be responsible for the proper conduct of trial in proper order, and in accordance with the Act, and shall take care that the trial is conducted in a manner befitting a Court of Justice. It is the duty of the president to see that justice is administered, that the accused has a fair trial, that he does not suffer any disadvantage in consequence of his position as a person under trial or of his ignorance, or his incapacity to examine or cross-examine any witnesses or otherwise.

22. **Rule 64:** It is the duty of the prosecutor to assist the court in the administration of justice, to behave impartially, to bring the whole of the transaction before the court, and not to take any unfair advantage of or to suppress the evidence in favour of the accused. The court shall allow all reasonable latitude to the accused in making his defence.

23. **Rule 81:** If an accused person is not represented by counsel, he may be represented by an officer subject to the Act who shall be called "the defending officer" or assisted by any person whose services he may be able to procure and who shall be called "the friend of the accused".

X. Independent Right of Appeal.

10. The learned counsel for the appellants not only vigorously argued but also highlighted various provisions of the Army Act and the rules made thereunder that the right to fair trial and due process is fully protected and deep-seated for conducting and concluding the trial by the military Courts which are always followed religiously in all trials. The litmus test to my mind is that the provisions merely accentuating the right to a fair trial and due process in any statute and its actual and religious application to ensure proper implementation during the trial are two distinct physiognomies and incidence. No doubt, certain rights to fair trial are incorporated under the Army Act and the rules framed under it but whether the accused has been provided fair right to defence or not in actuality needs to be thrashed out by the appellate forum. We are sanguine that nobody challenged that the trial was defective for the reason that the proper procedure for fair trial, even as provided under the Army Act, was not followed during the trial or that the accused persons were deprived of the right to defense but they robustly focused their attention to the vires of law only. Notwithstanding, if an independent right of appeal is provided in the High Court for challenging the original order or internal departmental appellate order of conviction of civilians, then obviously, the High Court in exercise of its appellate jurisdiction (not writ jurisdiction) as conferred to it under the provisions of the Code of Criminal Procedure, 1898 may hear the appeals as being heard by it likewise against the conviction awarded by the Court of Sessions and under some special laws such as Accountability Court (NAB) and Anti-Terrorism Courts (ATCs) etc. and may examine orders/judgments of military court in the case of civilians, whether an equal and fair opportunity to defend the charges was afforded to the convict, whether sufficient evidence was available to substantiate the charges, and whether proper procedure in the trial was followed in letter and spirit. By and large, neither law imposes any fetters on the powers and jurisdiction of the Appellate Court, nor does it incapacitate it from reconsideration or reappraisal of the evidence on which the order of conviction or acquittal is grounded. In my opinion, independent right of appeal is a basic limb of safe administration of justice both in civil and

criminal cases. In many other special laws, the jurisdiction has been conferred to the executive authorities/departmental authorities despite rigors of Article 175 (3) of the Constitution to pass judicial or quasi-judicial orders but somehow or the other, an independent right and remedy of appeal/reference etc. is provided to assail the decision in the High Court. What is the effect of appeal in all cases of conviction awarded by any Court/authority? Obviously, the grounds of challenge may mostly include the violation of the principle of due process/fair trial and non-appreciation, misreading or non-reading of evidence. When the appeal is heard, the acid test of considering these crucial points is whether the prosecution has proved the guilt of accused without any reasonable doubt or not? And whether there is any defect or lacuna in the trial due to which the conviction awarded cannot be sustained or maintained. Off course, if the original or appellate order or judgment is not found commensurate to the well settled principles delineated for the safe administration of criminal justice, the High Court may set aside or reverse the conviction and even remand the matter for de novo trial. While this Court cannot directly call upon the legislature to enact legislation but in the swing of things, it can interpret the constitution and existing laws to mind out at least one independent right of appeal as safety measure and device to comprehend the right to fair trial.

10/1. It is manifesting from the impugned judgment that the learned AGP, time and time again, requested for time to seek instructions from the government on whether an independent right of appeal may be provided to the convicted civilians not otherwise subject to the Army Act for the offences provided under clause (d) of Section 2 (1) of Army Act. Even in the concluding session on 5th May, 2025, the learned AGP recapitulated that if the Constitutional Bench will refer the matter to the Government/Parliament to amend the law and create a window of an independent right of appeal over and above the provision of appeal already provided under Section 133-B of the Pakistan Army Act, 1952, that will be respected and considered seriously. In support of this contention, he also cited the judgment of this Court rendered in the case of Jurists Foundation versus Federal Government (**PLD 2020 SC 1**).

10/2. It is incontrovertible that the legislative competence for enacting, amending the laws or creating any newest window of appeal rests with the legislature and not with this Court. Nonetheless, this Court by interpretation of law and constitution can guide and recommend the legislature for future legislation under the powers of judicial review including the creation of independent and impartial right of appeal in the specific context for modeling and molding the legal framework. In the Civil Aviation Authority v. Supreme Appellate Court Gilgit-Baltistan & Others **(PLD 2019 SC 357)**, this Court considered the constitutional and legal status of Gilgit-Baltistan (GB), focusing on the rights of its residents and the region's governance framework and explicitly directed the Federal Government to promulgate and implement Constitutional Reforms for Gilgit-Baltistan, including a framework ensuring fundamental rights and also emphasized that legislative action is necessary to remove the constitutional limbo. In the case of Fauji Fertilizer Company Ltd. v. National Industrial Relations Commission & Others **(2013 SCMR 1253)**, though this case is focused on the employment status of contract workers, this Court urged judicial vigilance and acknowledged the need for a more structured legislative framework to protect against misuse of contractual labor. Whereas in the case of Jurists Foundation through Chairman v. Federation of Pakistan through Secretary, Ministry of Defence and others **(PLD 2020 SC 1)**, the matter was pertaining to the legality and constitutionality of the extension and/or reappointment of the Chief of Army Staff (COAS), specifically challenging whether the existing laws permitted such an extension, and if not, what legal recourse existed. To remedy the legislative vacuum, this Court exercised judicial restraint and rather than striking down the extension outright, gave the Federal Government six months to pass appropriate legislation through Parliament to regulate the appointment, tenure, and reappointment or extension of the COAS. Pending this legislation, the Court allowed the COAS to continue for a period of six months. In the case of S. R. Bommai & Others v. Union of India & Others **(1994) 3 SCC 1- AIR 1994 SC 1918)**, yet again, it does not directly call for a new law, but it strongly urges institutional reform and careful legislative parameters and also subtly presses for codified

standards and procedural safeguards, which could best be achieved through legislative clarification or constitutional amendment.

10/3. The perimeter and extensiveness of legislative vision while enacting the International Court of Justice (Review and Re-Consideration) Act 2021 cannot be disregarded without beating about the bush which, if truth be told, is meant to provide a right of review and re-consideration in cases of foreign nationals in relation to orders and judgments passed by the military courts against them. According to bottom line of Section 2 of the Act, if a foreign national is aggrieved in respect of the rights available under Article 36 of the Vienna Convention of Consular Relations of 24 April, 1963, such foreign national, either himself or through his authorized representative, or through a consular officer of a mission of his country, or in default whereof, the Secretary, Ministry of Law and Justice in an appropriate case, may file a petition before a High Court for review and re-consideration and in terms of section 3, with regard to an order of conviction or sentence of a military court operating under the Pakistan Army Act, 1952. Whereas under Section 3, while deciding the petition filed under section 2, the High Court has to examine whether any prejudice has been caused to the foreign national in respect of his right of defence, right to evidence and principles of fair trial, due to denial of consular access according to the Vienna Convention on Consular Relations of 24 April 1963. On the same wavelength, Section 5 provides that the provisions of this Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force including the Pakistan Army Act, 1952. It is shimmering from the provisions of aforesaid Act that the right to review was provided through statutory backing and protection. In unison, if I measure and match up the dictums laid down in our jurisdiction and jurisprudence concerning the provisions of Army Act and trial of civilians by Military Court, it unequivocally reckons including District Bar Association Rawalpindi, (**PLD 2015 SC 401),** Mehram Ali v. Federation **(PLD 1998 SC 1445)** and Liaquat Hussain v. Federation **(PLD 1999 SC 504)**, wherein this Court pronounced that civilian courts may exercise limited review where: (i) military tribunals act coram non judice

or; (ii) without jurisdiction or; (iii) in cases of mala fide. In my view, while saving or enlarging the aforesaid rights to a convict/accused, a fine line of exception created within the exactitudes of sub-article 3 of Article 199 of the Constitution for redress even to a limited extent despite rigidities, yet again, opens a window to move a High Court in writ jurisdiction against conviction awarded to the civilians by the Military Court. This cannot be considered equivalent or commensurate to the full-fledged right of appeal or, to put it another way, it does not amount to conferring the appellate powers to the High Court in writ jurisdiction which is otherwise beyond the leeway and hegemony of Article 199 of the Constitution.

10/4. In spite of the fact that the provisions of the Army Act those were struck down by means of the impugned judgment have been restored by us but at the same time, the short order in majority also sensitized the need of legislative changes, which will also be compliant to the requirements laid down under the International Covenant on Civil and Political Rights (ICCPR) for maintaining and preserving the constitutional and societal norms in the existing legal framework. Therefore, the matter was referred to the Government/Parliament for considering and making necessary amendments/legislation in the Pakistan Army Act, 1952, and allied Rules within a period of 45 days to provide an independent right of appeal in the High Court against the conviction awarded to the persons by the Court Martial/Military Courts under sub-clauses (i) & (ii) of Clause (d) of subsection (1) of Section 2 of the Pakistan Army Act, 1952, read with sub-section (4) of Section 59 of the Pakistan Army Act, 1952.

XI. Doctrine of Coordinate Bench

11. The dissent of Justice Yahya Afridi was structured on the principle of judicial precedent and judicial discipline. His lordship explicitly held that in the F.B. Ali case (supra), this Court has already validated the constitutionality of the Army Act provisions which was binding because it was delivered by a bench of equal strength (five judges) and the proper course would have been to refer the matter to a larger bench, especially since the bench originally constituted to hear the case had nine judges,

which was reduced to five over time due to recusals and retirement. His lordship further expressed concern that the Attorney General was not adequately heard on the specific question of the vires which deprived the Federation of Pakistan of a fair opportunity to argue its case, particularly in relation to provisions potentially affecting foreigners or national security threats beyond the May 9–10 incidents. He further emphasized that a larger bench should have been constituted to reconsider or depart from F.B. Ali. It was further observed that the Court had explicitly directed the AGP not to argue on the broader constitutional validity of the Army Act provisions and focus solely on the May 9–10 perpetrators.

11/1. The overall observations made by his lordship as a part of the bench which rendered the impugned judgment cannot be ignored naively. In addition, the next serious observation that no opportunity was afforded to the Attorney General for defending the provisions rather he was directed not to argue on the broader constitutional validity of the Army Act cannot be disbelieved. Despite inherent defects, the law was declared ultra vires in the end, which alone is sufficient to upset the substratum of the whole impugned judgment and concurring note. It is very strange that without affording equal opportunity to defend the law, the provisions were declared ultra vires by a coordinate bench of the same court without referring the matter for constituting a larger bench.

11/2. In fact, a "coordinate bench" denotes to two or more benches of judges within the one and the same court. The paramount consideration in the wake of this principle or doctrine is to reinforce the doctrine of precedent, which by and large commands that one coordinate bench must follow the decision of another coordinate bench and in case of any cause of disagreement for any reason to follow, the matter may be referred to a larger bench for final resolution and decision on the issue. The general rule is that a coordinate bench is bound by the judgment of another coordinate bench and should not disregard an earlier judgment by another coordinate bench. However, a coordinate bench may only disregard a previous judgment if there is a contradictory or diverging decision of the high court or the Supreme Court on the similar subject

matter. Another rational at the bottom of this principle is not to circumvent the likelihood of interpretation which lacks consistency and not to do away with the principle of precedent, which warrants that similar cases must be treated alike consistently in order to maintain and boost up judicial discipline by precluding the coordinate benches from overruling or upsetting the judgments of coordinate benches without a valid reason- *"prior tempore potior iure/lex posterior"*. (Earlier in time, stronger in law). Besides, doctrine of judicial discipline, the doctrine of stare decisis is equally important which accentuates that Courts should follow their own previous decisions to ensure consistency, predictability, and respect for judicial authority. In the case of Federation of Pakistan versus Fazal-e-Subhan & others **(2023 SCP 293=PLD 2024 SC 515)**, I have discussed the doctrine of "s*tare decisis"* which connotes *"let the decision stand" or "to stand by things decided"*. Another Latin maxim "s*tare decisis et non quieta movere"* means 'to stand by things decided and not to disturb settled points'. This represents an elementary canon of law that Courts and judges should honor the decisions of prior cases on the subject matter which maintains harmony, uniformity and renders the task of interpretation more practicable and reasonable while adhering to it for resolving a *lis* based on analogous facts. The doctrine of *stare decisis* is to be adhered to as long as an authoritative pronouncement holds the field, until and unless the dictates of compelling circumstances fortified by rationale justify the exigency of a fresh look for judicial review by a larger bench and not be coordinate bench.

11/3. At one fell swoop, I cannot ignore the doctrine of precedents *vis-à-vis stare decisis*, since both have fundamental values engrained in our judicial system to ensure an objective of certitude and firmness. Judicial consistency advocates and encourages the confidence in the judicial system and to achieve this consistency, the Courts have evolved the aforesaid rules and principles which are grounded in public policy. According to the "Black's Law Dictionary" (Tenth Edition) (at pages 1626 to 1627), the rule of adherence to judicial precedents finds it expression in the doctrine of stare decisis. This doctrine is simply that, when a point

or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases." William M. Lile et al., *Brief Making and the Use of Law Books* 321 (Roger W. Cooley & Charles Lesley Ames eds., 3d ed. 1914). The general orthodox interpretation of *stare decisis* ... is *stare rationibus decidendis* ('keep to the *rationes decidendi* of past cases'), but a narrower and more literal interpretation is sometimes employed. To appreciate this narrower interpretation, it is necessary to refer to Lord Halsbury's assertion that a case is only an authority for what it actually decides. We saw that situations can arise in which all that is binding is the decision. According to Lord Reid, such a situation arises when the *ratio decidendi* of a previous case is obscure, out of accord with authority or established principle, or too broadly expressed." Rupert Cross & J.W. Harris, *Precedent in English Law* 100-01 (4th ed. 1991). In the case of Pir Bakhsh thr. L.R.s and others v. The Chairman, Allotment Committee and others (**PLD 1987 SC 145**), it was held by this Court that the policy of the Courts to stand by the *ratio decidendi,* that is, the rule of law and not to disturb a settled point. This policy of the Courts is conveniently termed as the doctrine of rule of *stare decisis.* This rationale behind this policy is the need to promote certainty, stability, and predictability of the law. It was further held that the use of precedent as indispensable bedrock upon which this Court renders justice. The use of such precedents, to some extent, creates certainty upon which individuals can rely and conduct their affairs. It also creates a basis for the development of the Rule of law. The Court also quoted the Chief Justice of the Supreme Court of the United States, John Roberts who observed during his Senate confirmation hearing, "It is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and even-handedness". [Congressional Record--Senate, Vol. 156, Pt. 7, 10018 (7-6-2010).]. The function of the Courts includes the superintendence of judicial organization, interpretation of laws and render authoritative precedents, harmonizing decisions and unifying the distinct structure. If

any past judgment is to be reconciled or to part with due to any legal flaw, ambiguity or inconsistency, the better course is to constitute a larger bench rather than upsetting the previous decision by a coordinate bench of the same Court.

11/4. The *raison d'être* of not adhering to the dictum laid down in the F.B.Ali case or impliedly overruling it by the majority impugned judgment and the concurring judgment is predominantly structured on the exactitudes of Article 10A of the Constitution on the notion that in the point in time of the F.B.Ali decision, Article 10A did not exist and fair trial was not raised as a constitutional challenge. Contrarily, the glimpse of dictum laid down in the aforesaid case not only resonates unequivocally that the issue of fair trial was reasonably taken into consideration, but it was unhesitatingly and unwaveringly confirmed that the laws governing the military fall under Article 8(3) (a) are immune from fundamental rights challenges. It was further held that the proceedings before the military court satisfy the fair trial standards, hence the argument that military trials violate fundamental rights or due process was rejected. It is not the case in my view that before the insertion of Article 10-A the right to fair trial was deprived in the civil or criminal cases trials. Indeed, it was already integrated in the intrinsic procedure, therefore, rather than disregarding or sidestepping the decision rendered in the F.B.Ali case by a coordinate bench, the request ought to have been made to the Committee under the Supreme Court (Practice and Procedure) Act 2023 for constituting a larger bench for judicial review. In the case of Mst. Samrana Nawaz and others Vs M.C.B. Bank LTD. and others **(PLD 2021 Supreme Court 581)**, this Court reiterated a well-established principle of practice and procedure of this Court that the earlier judgment of a Bench of this Court is binding not only upon the Benches of smaller numeric strength but also upon the Benches of coequal strength; a Bench of co-equal strength cannot deviate from the view held by an earlier Bench, and if a contrary view has to be taken, then the proper course is to request the Hon'ble Chief Justice for constitution of a larger Bench to reconsider the earlier view. It was further held that the law declared by this Court should be clear, certain

and consistent, as it is binding on all other courts of the country under Article 189 of the Constitution of Pakistan, 1973. The doctrine of binding precedent promotes certainty and consistency in judicial decisions, and ensures an organic and systematic development of the law. In the same breath, this Court in the case of Commissioner Inland Revenue and others Vs Mekotex (PVT.) limited and others **(PLD 2024 Supreme Court 1168)**, yet again while fortifying with the ratio of "Multiline Associates" case held that no doubt, the earlier decision of a bench of a High Court, or of this Court, on a question of law is binding on another bench of equal numeric strength when dealing with the same question, in the sense that the latter bench cannot decide the same question contrary to the first decision. However, the latter bench is not precluded from examining the correctness of the earlier decision or forming a different view. In such a case, the proper course of action is to refer the matter to the Chief Justice of the High Court, or in the case of this Court to the Bench-Constitution Committee, with a request for the constitution of a larger bench to examine the correctness of the earlier decision and, if necessary, to reconsider and redecide the question.

11/5. In the case of State of U.P. v. Ajay Kumar Sharma, **(2016) 15 SCC 289**, the Court held that an exposition of law must be followed and applied by all coordinate benches and smaller benches and noted that this doctrine ensures that similar cases are decided uniformly, fostering a sense of stability and continuity in the law. The Court acknowledged the challenges posed by conflicting precedents from benches of equal strength, noting that such conflicts may arise due to divergent interpretations or evolving societal norms. The Court suggested that one approach to resolving such conflicts is the principle of distinguishing, where meaningful differences between the conflicting precedents are identified and the most applicable precedent is applied to the case at hand while another approach was referring the matter to a larger bench for a more comprehensive review. While in the case of National Insurance Co. Ltd. v. Pranay Sethi, **(2017) 16 SCC 680**, the Court stated that an earlier decision by a coordinate bench binds subsequent benches unless specifically overruled by a larger bench. The Court said that doctrine of

precedent is not without its nuances and complexities, thus an earlier decision, even if considered incorrect by a later Bench, retains its binding effect on subsequent Benches of coordinate jurisdiction. The Court remarked that the principle which emerges is that the earlier decision must be followed until the decision of the larger bench is returned, which serves to promote certainty and predictability in the administration of justice. This principle is rooted in tradition, certainty, and the integrity of precedent itself. The Court said that precedents are not mere legal doctrines; they are the embodiment of centuries of legal wisdom and collective judicial experience. When Courts deviate from established precedents without due consideration, they risk undermining the credibility and legitimacy of the legal system. Therefore, the Bench suggested that it is imperative for Courts to uphold the sanctity of legal precedents and adhere to established principles of judicial discipline, even in the face of conflicting opinions or pressures to depart from precedent. Ref: https:www.scconline.com/blog/post/2024/05/22. (Which judgment is binding when conflicting decisions of coordinate benches?

12. Above are the reasons assigned in support of short order dated 07.05.2025.

Islamabad
Dated: 11.09.2025
Approved for reporting

Judge

We also agree with the concurring judgment authored by Justice Muhammad Ali Mazhar.

Justice Amin-ud-Din Khan

Justice Syed Hasan Azhar Rizvi

Justice Musarrat Hilali

Justice Shahid Bilal Hassan