IN THE SUPREME COURT OF PAKISTAN

(Original Jurisdiction)

Present:

Mr. Justice Iftikhar Muhammad Chaudhry, CJ
Mr. Justice Gulzar Ahmed
Mr. Justice Sh. Azmat Saeed

Constitution Petition No.1 of 2012

[Under Article 184(3) of the Constitution]

AND

Crl. Org. Petitions No.8 & 12 of 2012

[Proceedings U/A 204 of the Constitution for non-compliance of the orders of this Court dated 30.01.2012 and 13.02.2012]

IN

Constitution Petition No.1 of 2012

Mst. Rohaifa (dec.) through her sons	(in Const.P.No.1 & Crl.O.P.No.8)
M. Tariq Asad, ASC	(in Crl.O.P.No.12)

……Petitioner (s)

VERSUS

Federation of Pakistan through Secretary, Ministry of Defence, etc	(in Const.P.No.1)
DG, ISI, Islamabad & another	(in Crl.O.P.No.8)
Athar Abbas, DG, ISPR, Islamabad	(in Crl.O.P.No.12)

……Respondent (s)

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For the Petitioner(s)

(in Const.P.No.1/12 & Crl.O.Ps.No.8 & 12 of 2012) : Mr. Tariq Asad, ASC.

For Respondent No.1

(in Const.P.No.1/12) : Nemo.

For Respondents No.2-4

(in Const.P.No.1/12 & Crl.O.Ps.No.8 & 12/12) : Raja Muhammad Irshad, Sr. ASC.

On Court's Notice	:	Mr. Muneer A. Malik, Attorney General for Pakistan.
For Govt. of KPK	:	Mr. Zahid Yousaf Qureshi, Addl.A.G. Mr. Shafirullah, Acting Secretary Law & Order, FATA. Mr. Mohammad Aslam, Political Agent, Orakzai Agency. Mr. Nawaz Khan, Assistant P.A., Orakzai Agency. Mr. Iqbal Durrani, Legal Advisor. Mr. Abdul Qayyum, S.O., (Litigation), FATA Secretariat. Mr. Khanzad Gul, S.O.(Courts), Home Department, KPK.
Date of Hearing	:	03.12.2013

JUDGMENT

Constitution Petition No.1 of 2012

GULZAR AHMED, J.— Under Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973, it is a Fundamental Right of every citizen of Pakistan that he shall not be deprived of life and liberty save in accordance with law. State of Pakistan being guardian of its citizen is bound to implement the Constitution provisions in letter and spirit particularly the Fundamental Rights, which are guaranteed by the Constitution. It is also inalienable right of all the citizens that they should be dealt with in accordance with law following the mandate of due process of law as enshrined in Article 10 (A) of the Constitution. It may further be elucidated that Article 4 provides *"to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan and in particular no action detrimental to the life, liberty, body,*

reputation or property of any person shall be taken except in accordance with law. No person shall be prevented from or be hindered in doing that which is not prohibited by law; and no person shall be compelled to do that which the law does not require him to do". In respect of the safeguard as to arrest and detention Article 10 of the Constitution makes the provision that *"no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and be defended by a legal practitioner of his choice and every person, who is arrested and detained in custody shall be produced before a Magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the nearest magistrate, and no such person shall be detained in custody beyond the said period with out the authority of a magistrate"*. Further in the case of preventive detention this Article provided complete guideline as to the manner and how a detainee is to be dealt with by the authority detaining him. While Article 13 provides that no person shall be prosecuted or punished for the same offence more than once.

2. In the light of the above constitutional guarantees and mandate of the law, we proceed to examine the case in hand.

3. Mst. Rohaifa a widow of Syed Zain ul Abideen, a resident of Lahore has filed this Constitution Petition under Article 184 (3) of the Constitution of the Islamic Republic of Pakistan, 1973 with the following prayers: -

> *"It is, therefore, humbly prayed that in the circumstances given herein above this Hon. Court may very graciously be pleased to call for the whole record of the proceedings conducted so far and:*
>
> *a) direct the respondents to file a complete report before this Hon. Court about the deaths of the three detenues, namely Muhammad Aamir, Tehsin Ullah and Said Arab and the proceedings of trial so far conducted against them and the other surviving detainees;*
>
> *b) call for the whole record of proceedings and determine, in view of the laws of the land whether the detenues, namely Syed Abdus Saboor, Syed Abdul Basit, Syed Abdul Majid and all the deceased and the surviving detenues were/are subject to Army Act;*
>
> *c) if the detenues are subject to Army Act, declare that the arrest and detention and the proceedings of trial are not in a lawful manner and direct the Respondents to set the detenues at liberty in the interest of justice and fair play, in case, after probe, it is found that the arrest and proceedings have not been conducted in accordance with law;*
>
> *d) declare that the detenues were in illegal confinement and subjected to torture;*
>
> *e) Any other relief this Hon. Court deems proper may also be granted."*

4. During the pendency of this petition Mst. Rohaifa expired and in her place the detainees were impleaded as petitioners and the petitioners also sought to be added another prayer, which is as follows:

> "e) *declare 'Section 2(1)(d)' of Army Act, 1952' and 'Action in Aid of Civil Power Regulation, 2011' ultra vires of the Constitution;*

5. The petitioner has alleged that her three sons, namely Syed Abdus Saboor, Syed Abdul Basit and Syed Abdul Majid were picked up on 25.11.2007 by Hasnain Haider, SHO, Police Station Shafiqabad, whereafter they became missing and on filing of *habeas corpus* petition, it was informed that the petitioner's said sons are implicated in the FIR bearing Nos.670/07, 786/07 and 384/08 and they are being proceeded under the Anti Terrorist Act. Vide judgments dated 26.11.2009 and 08.04.2010, the petitioner's sons were acquitted by the Anti

Terrorist Court with direction that they be released forthwith if not required in any other case. It however; transpired that the petitioner's sons before their release were detained under the West Pakistan Maintenance of Public Order Ordinance, (MPO) 1960 for a period of 30 days vide order dated 08.04.2010 and again on 06.05.2010 by the order of the Secretary, Home Department, Govt. of Punjab, they were detained for another period of 90 days under Section 11-EEE of the Anti Terrorist Act, 1997. The petitioner assailed both the orders of the detention by way of Writ Petition in the Rawalpindi Bench of the Lahore High Court, who vide order dated 28.05.2010 set aside both the detention orders and directed the detainees to be released forthwith from jail, if not required to be detained in any other offence. At this stage, the petitioner has alleged that on 29.05.2010, the Superintendent Jail, Rawalpindi handed over the custody of the petitioner's said sons along with 8 other persons to respondents No.2 and 3, who took them to an unknown place. However one Ateequr Rehman, brother of another detainees filed Writ Petitions No.2355, 2366, 2367, 2368 and 2376 of 2010 in the Lahore High Court, Rawalpindi Bench. All these Writ Petitions were disposed of with observation that the petitioners may approach the proper forum constituted by this Court for recovery of missing persons. Ateequr Rehman filed C.P.No.1973 of 2010 in this Court against the order of the Lahore High Court, Rawalpindi Bench, which came up for hearing on 06.01.2011 when this Court passed the following order: -

> *"This petition has been filed against the order dated 09.08.2010 passed by Lahore High Court, Rawalpindi Bench, Rawalpindi in Writ Petition No.2355 of 2010.*

2. Raja Muhammad Irshad, learned counsel for respondent Nos.2 & 4 states that in response to the order dated 05.01.2011 concerned authorities have instructed him to make statement that arrangements shall be made for arranging meeting between father, mother, daughters and sons of the detainees namely Dr. Niaz Ahmad, Muhammad Aamir, Mazharul Haq, Shafiqur Rehman, Abdus Saboor, Abdul Majid, Abdul Basit, Muhammad Shafiq, Said Arab, Gulroze Khan and Tehseenullah as and when it is so required by them. Learned counsel for petitioner supplied a list of the relatives of the detainees which has been handed over to Raja Muhammad Irshad. However, at the request of Mr. Tariq Asad, learned ASC who pleaded that in some of the cases, brothers and sisters may also be allowed to meet them. Raja Muhammad Irshad, learned counsel states that they would be accommodated accordingly. As per the background of this case, detailed order in respect whereof was passed on 09.12.2010 which is reproduced herein below for the sake of convenience. The persons named hereinbefore have been traced by the concerned authorities and they are in their custody for the purpose of holding their trials under the Army Act, 1952.

> *"Mr. Raja Muhammad Irshad, learned Senior ASC, has appeared on behalf of Federation of Pakistan and respondents No.2 & 4. He makes a loud and clear statement that impression given to this Court that the Pakistan Army or any one of its functionaries including I.S.I. etc. are not amenable to the jurisdiction of this Court, is absolutely wrong impression. According to him some elements who have vested interest, in order to create misunderstanding, have given the impression that Pakistan Army or I.S.I. and any other agency are above the law and have no respect for the courts. He explains that the Pakistan Army, I.S.I. and any other agency are subject to the Constitution and in pursuance whereof hold this Court in highest esteem and that the attempt to create wrong impression may not be adhered to at all as these functionaries always consider themselves bound to follow the orders and the judgments of this Court.*
>
> *2. Learned counsel states that eleven persons detained in Adyala Jail, after release, were taken into custody by the persons who disguised themselves as officials of the agency and led them to the operational areas of terrorists to make use of their expertise/skill in order to further cause damage by involving them in the*

terrorist activities. Learned counsel further states that no sooner the notice was issued by this Court, all the responsible machinery of law was moved and a massive operation was carried out and ultimately more than twenty persons including these eleven persons were recovered and taken into custody from the operational areas. Now they are in the custody of Law Enforcing Agencies and are being interrogated as they have got close/deep links with the terrorists operating in different areas of the country. He avers that they are involved in serious terrorists activities like attack on ISI Hamza Camp, GHQ, Defence Installations, explosions and various sites, killing of 3 Star General, causing day in and day out, damage to state properties and that of common man beside killing many of common citizens as well as Army personnel. According to learned counsel they are no longer missing persons and are in custody of Administration/Law Enforcing Agencies and they shall be subjected to law and dealt with in accordance with Army Act.

3. Learned counsel is required to put up his statement in writing in this behalf, for which he requests for adjournment till tomorrow i.e., ***10th December, 2010.*** *Order accordingly.* ***To be taken up Sr.No.1.***

3. There had been a controversy in respect of non-availability of persons, as such, the petition was filed before the High Court under Article 199 of the Constitution which was dismissed. Since the detainees named above were traced out and a statement to that effect was made by Raja Muhammad Irshad on 09.12.2010 as reproduced hereinabove, that the Pakistan Army or anyone of its functionaries including I.S.I., are amenable to the jurisdiction of this Court and the impression so created earlier to it was dispelled which according to him was made for certain vested interests, therefore, we are of the opinion that the actions of the Pakistan Army or any of their functionaries including I.S.I., are subject to Constitution and law. There was no need of creating such expression because these authorities had also been offering explanation before the various forums in respect of different cases. Be that as it may, as now the expression has been dispelled and all these authorities are subject to Constitution and law, the detainees have also been traced and according to the learned counsel they are subject to law, we are of the opinion that they are no longer in the illegal custody inasmuch as now their relatives shall also be having meeting with them

> *which shows that law has taken its course, no further action is called for, for the time being. Therefore, petition stands disposed off. Before parting, however, we appreciate the efforts made by Raja Muhammad Irshad for providing assistance to this Court as being a lawyer it is the part of his professional commitment."*

6. Further writ petitions were filed and also proceedings in this Court but ultimately in CPLA No.99 of 2010, on 02.06.2011 the following order was passed: -

> *"Pursuant to order dated 18.05.2011 learned Attorney General along with Brig. Naubahar, Judge Advocate General are present and pointed out that the detainees were formally arrested in the 1st weed of April, 2011 and a case has been registered under Section 2(1)(d) of the Pakistan Army Act, 1952 and presently summary evidence is being recorded. It has been assured that no action in deviation of law would be taken and they are fully aware about the provisions as enumerated in Articles 10-A and 13 of the Constitution of Islamic Republic of Pakistan. It is further submitted that if sufficient evidence is lacking they have a good chance of acquittal as well. In view of the categoric statement as made hereinabove at least one thing becomes clear that their detention is under Pakistan Military Act, 1952 as a case has been registered and all the proceedings made so far are in accordance with the provisions as enumerated in above mentioned statute.*
>
> *2. At this juncture Mr. Tariq Asad, learned ASC for petitioner has submitted that he intends to file a Constitution Petition for seeking appropriate remedy as the ground of Habeas Corpus is no more available because at the moment it cannot be declared that it is an unlawful detention. Be as it may, Mr. Tariq Asad, learned ASC may file Constitution Petition in accordance with law for the redressal of his grievance before appropriate forum which would be decided in accordance with law and on its own merits expeditiously. In the light of what has been discussed hereinabove, this petition is disposed of in above terms."*

7. A further Writ Petition No.2432/2011, filed by Mufti Abdul Baais another son of petitioner in the Islamabad High Court, Islamabad, wherein the Director General, Military Intelligence Detachment, Islamabad filed a short para-wise comments, which as follows: -

> *"It is intimated that all the three detainees with reference to captioned writ petition are held at FATA and are being interned under "Acton in Aid of Civil Power Regulations, 2011 for FATA"*

Pursuant to this statement, the Writ Petition was dismissed so also the CPLA No.1795/2011 by this Court.

8. As no access was being provided to the petitioner's counsel and to the relatives to meet the petitioner's said sons on the order of the learned Islamabad High Court, a meeting was arranged, where the petitioner found that her sons were brutally tortured. It was further learnt that three of the alleged detainees i.e. Muhammad Aamir, Tehseenullah and Said Arab have died and such death have taken place on account of brutal torture and symptoms of acute renal failure. The petitioner again desired to meet her sons along with her counsel but it was not responded whereupon this constitution petition was filed with the prayer as already noted above.

9. The Respondent No.1 that is Federation of Pakistan has not submitted any reply or concise statement. Respondents No.2 to 4 have filed their reply vide CMA No.487/12, while pursuant to the Court orders, the Chief Secretary, Khyber Pakhtunkhwa (KPK) has also submitted his replies/reports regarding the health condition of the detainees and the medical facility, which are being extended to them and the record pertaining to their detention in the Internment Centre under Actions (in Aid of Civil Powers) Regulation, 2011.

10. It may be noted that pursuant to the various orders passed by this Court the petitioner, her counsel and the relatives were allowed regular meetings with the detainees and the detainees were also admitted in the Lady Reading Hospital, where they were provided medical treatment, food and clothing on account of which as reported by the Chief Secretary, KPK and

also admitted by the counsel for the petitioner their health and general conditions of their life has improved. Before we deal with the case as per submissions of the learned counsel for the parties, it is considered appropriate to reproduce in extenso the reply of Respondent Nos.2-4 (CMA No.487/12), which is as follows: -

> *" 1. That on 06.01.2011, a statement submitted in writing before this Honourable Court in Civil Petition No.1973 of 2010 is reproduced here under: -*
>
> *a. I have the instructions to make this statement on behalf of above respondents that they totally submit to the constitutional authority of the apex Court of the country. They have highest regard and respect for the Honourable Supreme Court of Pakistan. They highly appreciate the efforts being made by the Court to ensure constitutional governance in the Islamic Republic of Pakistan. Let this impression being created by the vested interests that the Army and the ISI have no respect for the orders of the Supreme Court, be dispelled once for all through this categorical statement that the Agencies are accountable and answerable to the Supreme Court of Pakistan.*
>
> *b. That these eleven persons after their release from Adyala, Jail, handed themselves over to the disguised persons as men from agencies, who took them to the terrorists, hideouts in the tribal area, where Army is conducting operations against internal and external militants and terrorists.*
>
> *c. That entire governmental machinery was in full swing after the orders passed by this Honourable Court in respect of these eleven persons. The Agencies penetrated the entire operational area and carried out the arrests of more than twenty persons including these eleven missing persons from different places of the terrorists' hideouts. All of them are involved in high profile acts of terrorism and militancy. Arrests have been made with the help of local administration. These terrorists are subject to Army Act, 1952, who will be tried by FGCM after proper investigation. They are no longer missing persons and their custody is with the agencies in order to complete the investigation.*
>
> *The above noted statement stands reflected in the order dated 06.01.2011, passed by this Honourable Court in Civil Petition No.1973 of 2010.*
>
> *2. That the said 11 terrorists joined the militants/terrorists in the operational area of FATA. On 25.11.2010, a group of militants ambushed the convoy of law enforcement agencies and inflicted heavy loss in terms of human lives. The intelligence agencies with the support of law enforcement agencies carried out the arrests of more than 20 militants. The said 11 persons were found to be the same who had joined the militants in their hideouts after they were whisked away from Adyala Jail.*

3. *That the factum of the arrest of the said terrorists was brought to the notice of this Honourable Court, which led to the passing of the order, dated 06.01.2011. The respondent No.4 in order to hold the trial under Army Act, 1952, ordered the investigation but the summary of evidence remained inconclusive due to militants' ferocious and deadly attacks on the Army and other law enforcement agencies in the operational area. These attacks resulted into the loss of thousands of lives that include innocent civilians as well as personnel from the law enforcement agencies. The record of casualties and destruction of properties maintained by the concerned law enforcement agencies for the year 2011 is attached herewith.*

4. *That after the promulgation of Actions (In Aid of Civil Power) Regulations, 2011, orders for the internment of many militants including the said 11 terrorists were passed by the Competent Authority under the relevant provisions of the said Regulation. Since the FATA administration had no infrastructure available in the form of Internment Centers, therefore, the custody of all the said internees remained with the law enforcement agencies. The entire operational area presents the picture of a war like situation. The living conditions afford no proper shelter or subsistence in such inhospitable and hostile atmosphere. Some of the said internees in view of their earlier poor health conditions fell sick and were shifted to the Lady Reading hospital, Peshawar for their treatment. Despite best medical treatment and regular care by the doctors, four persons died in the hospital on different dates. The medical documents including death certificates issued by the hospital authorities show the treatment rendered to the sick cause of death of the deceased are being placed on the record of this Honourable Court. The relatives of the deceased were duly informed and choice was given to them to have the postmortem reports to determine the cause of death, but the offer was declined by the relatives. In two of the four death cases, the relatives, have given in writing, declining to have postmortem done. Other two blatantly refused to have any postmortem done or sign any documents. The allegation of poison and torture, contained in the petition is without any shred of evidence. These are wild, diabolic and vicious allegations against a superior Agency of this country whose members are on oath that they will uphold the constitution of Islamic Republic of Pakistan. The oath contained in 3rd schedule of the Constitution is reproduced here under: -*

MEMBERS OF THE ARMED FORCES

(Article 244)

(In the name of Allah, the most Beneficent, the most Merciful)

I, _____, do solemnly swear that I will bear the true faith and allegiance to Pakistan and uphold the Constitution of the Islamic Republic of Pakistan which embodies the will of the people, that I will not engage myself in any political activities whatsoever and that I will honestly and faithfully serve Pakistan in the Pakistan Army (or Navy or Air Force) as required by and under the law.

[(May Allah Almighty help and guide me (A'meen)]."

The sacrifices made by the Superior Agency of our country in defending the geographical and ideological frontiers of this country are worth writing in golden words.

5. That regarding the production of the internees before this Honourable Court, the letter sent by the Superintendent Lady Reading Hospital, Peshawar, containing the reasons for non-production of admitted internees is attached herewith. The three internees who are interned at Parachinar in FATA will be produced after the contents of the letter forwarded by the interning authority have been gone through by this Honourable Court. The said letter being highly confidential will be produced before the Court at the time of hearing.

6. That terrorism, militancy and suicide attacks on defence installations have bled the country and the dead and the injured run into thousands. The widows and the orphans having been deprived of their husbands and fathers by acts of terrorism and suicide attacks, are leading their lives in heartrending conditions. There is no one to translate into words their mental agonies and bleeding hearts. The snow-clad mountains of Northern Areas and FATA and the sizzling deserts of Sindh can only find the valiant soldiers of our Army.

7. It will not be out of place to mention that a segment of the people in the media as well as in the "Civil Society" spit venom to damage the reputation and prestige of one of the best armies in the world. They are doing so to promote the agenda of the enemies of our country.

In view of the above, this Honourable Court may be pleased to dispose of the petition with direction to the petitioner to approach the Competent Authority for appropriate legal remedies as provided under the provisions of said Regulation.

11. On 15.04.2013, Brig. Naubahar, Judge Advocate General filed a statement, which reads as follows: -

"The eleven high profile terrorists/militants amongst others were involved in an armed attack on Army convoy at Lawara Mela in Orakzai Agency, on 25th Nov 2010. In the said attack a soldier had embraced Shahadat and five others were seriously injured. After their apprehension they were subjected to serious investigation for the purpose of establishing their linkages with other militant groups, fighting with the Army in the operational area as well as across the country. The discrete and in-depth investigation led to the startling revelations made by the said militants. On the basis of their statements, arrests of high profile terrorists were carried out.

Their trial under the provision of PAA, 1952 could not take place due to lack of jurisdiction as relevant provisions relating to trial of civilians are contained in PAA Section 2(1)(d), i.e. seducing and espionage. Further, after the passage of 18th Constitutional Amendment, the jurisdiction to try civilians, allegedly involved in attacking Armed Forces installations and assets as was enacted through an Ordinance to amend PAA Sec 2(1)(d)(iia) stood elapsed.

Therefore, the militants were interned as per the law. The prosecuting agency had collected sufficient reliable evidence for their trial under FCR.

12. From the perusal of the record, it is apparent that the initial arrests of the detainees was in respect of the three FIRs registered against them, in which they were also tried and were ultimately acquitted by the judgments of the Anti Terrorist Court. The detainees were put under preventive detention under MPO for 30 days and then under Section 11-EEE of the Anti Terrorist Act for another 90 days and both these orders were quashed by the learned Lahore High Court, Rawalpindi Bench with direction that they be released forthwith from the jail. It is the case of the petitioner that the Superintendent Jail, Rawalpindi on 29.05.2010 gave custody of the detainees to Respondents No.2 to 3, while the case of the Respondents No.2 to 4 is that after their release from Adyala Jail, the detainees handed themselves to the disguised persons as men of agency, who took them to the terrorist hideouts in tribal area.

13. During the course of these proceedings, it was brought to the notice of this Court that on 19.03.2013, Internment Orders in respect of the detainees were withdrawn and the custody of the detainees was handed over to the Political Administration of Orakzai Agency for dealing with their cases under the FCR and that the detainees were arrested and tried under Sections 365, 400, 401 PPC, 11/40 FCR and under Sections 121, 122 (B) PPC/3,4,5,6 Exclusive Substance Act/11 FCR and ultimately vide order dated 02.05.2013 of the Assistant Political Agent, Lower Orakzai Agency, the detainees were convicted and sentences against them were passed. Detainees Syed Abdul Majid, Syed Abdul Basit were sentenced to 5 years while other detainees were sentenced to 14 years imprisonment

and through warrants of commitment issued by the Assistant Political Agent, Lower Orakzai Agency, the custody of the detainees was handed over to the Superintendent, Central Prison, Kohat for undergoing sentences.

14. We have heard the learned counsel for the parties and have also perused the record.

15. Learned Attorney General has taken an objection to the maintainability of this petition on the ground that this Court has no jurisdiction in terms of Article 247(7) of the Constitution in respect of the detainees, who have committed crime in tribal area and were arrested from Tribal Area and after due trial were convicted and sentenced by Competent Authority in the tribal area. Article 247 (7) reads as follows:

> *"Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless [Majlis-e-Shoora (Parliament)] by law otherwise provides:*
>
> *Provided that nothing in this clause shall affect the jurisdiction which the Supreme Court or a High Court exercised in relation to a Tribal Area immediately before the commencing day."*

16. It may be noted that this very jurisdictional question has come up before this Court successively and this Court has been giving its judgments and it will be useful to examine such judgments at this stage. In the case of *Qaum Bangash and others* **vs.** *Qaum Turi and others* (1991 SCMR 2400), a learned four Member Bench has observed as follows:

> *"The constitutional question considered in the said Civil Appeal No.144 of 1980 was whether in the facts and circumstances of that case the jurisdiction of the Balochistan High Court extended to the tribal areas where the disputed land was situated, namely, District Zhob of the Province of Balochistan, which is incidentally included in the Provincially Administered Tribal Areas. In the said appeal which was decided on 8th August, 1991 Shafiur Rehman, J., who wrote the judgment for the Court, has traced the history of Constitutional provisions with regard to the extension of the jurisdiction of the Superior Courts in respect of the tribal areas from 1955 untill*

10th April, 1964. In this behalf, reference was made to section 7 of the Establishment of West Pakistan Act, 1955, whereby the newly constituted High Court was conferred jurisdiction in respect of the entire province of West Pakistan; including the tribal areas of the former Provinces of Balochistan, the Punjab and the N.W.F.P. and certain States which were merged into the new Province of West Pakistan; the Establishment of West Pakistan (Amendment) Act, 1955 effecting amendment in subsection (1) of section 7 of the main Act, with the result that the jurisdiction of the High Court was excluded from the tribal areas, Presidential Order No.11 of 1961 the effect of which was to restore the jurisdiction of the High Court in the special areas and the 1962 Constitution which again took away the jurisdiction of the High Court in respect of the tribal areas. Reference was then made to the Constitution (First Amendment) Act, 1963 whereby clause (5) was added to Article 223 of the 1962 Constitution, which is in pari material with the main enacting part of clause (7) of Article 247 of the Permanent Constitution of 1973. The effect of this amendment was that neither the Supreme Court nor a High Court could exercise any jurisdiction under the Constitution relating to tribal areas, unless the Central Legislature by law otherwise provides. With reference to Act II of 1964 called the Tribal Areas (Restoration of Jurisdiction) Act, 1964, which was enforced on 10th April, 1964 it was pointed out that the jurisdiction of the superior Courts was restored in relation to tribal areas of the Quetta Division.

It was in this background that this Court held in the said appeal that in 1960 when the jurisdiction of the Balochistan High Court was invoked there was no constitutional jurisdiction available to the said High Court in respect of the territories where the land in dispute in that case was situate. From the aforesaid constitutional instruments to which reference has been made, it would appear that the Peshawar High Court with which we are presently concerned was denuded of jurisdiction under clause (5) of Article 223 of the 1962 Constitution as from 27th January, 1964. Act II of 1964 only restored the jurisdiction of the Supreme Court and the High Court of West Pakistan in regard to the tribal areas of Quetta Division, so that the said Court did not possess jurisdiction under the Constitution in relation to the tribal areas of Province of N.W.F.P. and the former States of Amb, Chitral, Dir and Swat. It appears that the next Constitutional instrument, in this behalf, to be noted is President's Order 29 of 1970 called the Supreme Court and the High Court (Extension of Jurisdiction to Tribal Areas) Order, 1970, Article 2 whereof provided that the Supreme Court of Pakistan shall have, in relation to tribal areas of Chitral, Dir, Kalam, Swat and Malakand Protected area (all forming part of Provincially Administered Tribal Area), the same jurisdiction to hear and determine appeals from orders or sentences of the Peshawar High Court in criminal cases as it has in relation to the other areas of North-West Frontier Province. Article 3 of the Order extended that jurisdiction of the Peshawar High in relation to the same tribal areas so as to confer appellate jurisdiction and the power to confirm death sentences passed by Court of Session as it has in relation to other areas of N.W.F.P. under the Criminal Procedure Code. The said P.O. No.29 of 1970 was repealed and reenacted on 9th February, 1973 as Act No.XXVII of 1973 with the title Supreme Court and High Court (Extension of Jurisdiction to certain Tribal Areas) Act, 1973. Clause (7) of Article 261 of Interim Constitution of 1972 provided as under: -

"(7) Neither the Supreme Court nor a High Court shall exercise any jurisdiction under this Constitution in relation to a Tribal Area, unless the Federal Legislature by law otherwise provides;

> *Provided that nothing in this clause shall affect the jurisdiction which the Supreme Court or a High Court exercised in relation to a Tribal Area immediately before the commencing day."*
>
> *It would therefore, be seen that the Peshawar High Court did not possess jurisdiction over any of the Federally Administered Tribal Areas even after the promulgation of P.O. No.28 of 1970 or Act No.XXVII of 1973. Kurram Agency comes within the "Federally Administered Tribal Areas" according to the definition of the term in Article 260 of Interim Constitution and Article 246 of 1973 Constitution jurisdiction with regard to which continued to be excluded by virtue of clause (7) of Article 261 and Article 247 of the two Constitutions respectively which are identical provisions.*

17. In the case of *Shaukat Khan* **vs.** *Assistant Political Agent, Landi Kotal, Khyber Agency and others* (PLD 2002 Supreme Court 526), referring to the case of Qaum Bangash (supra), a learned two Member Bench of this Court observed as follows: -

> *"As a larger Bench of this Court in the above judgment has observed that jurisdiction of Peshawar High Court has not been extended in the Tribal Areas, therefore, Constitution petition filed by the petitioner was rightly dismissed by the High Court vide impugned judgment."*

18. In the case of *Abdul Rahim and others* **vs.** *Home Secretary, Government of West Pakistan and another* (PLD 1974 Supreme Court 109), a learned three Member Bench of this Court has observed as follows: -

> *"The facts of the instant case on the other hand are closely similar to those of Umar Gul v. The State (1). In that case the dispute related to the share of produce of land situated in Dir State between two tribes. It came up for decision before the Political Agency whose decision was challenged by a writ petition in the High Court under Article 98 of the 1962 Constitution. The petition was dismissed in limine by the High Court on the short ground that the Court had no jurisdiction to entertain it in view of the prohibitory provision of clause (5) of Article 223 of the 1962 Constitution. This view was upheld by this Court. A similar view was taken in Jamil Ahmad vs. State (2) in which the principle laid down in Piao Gul's case was also explained and it was observed that if a cause of action has arisen within the territorial jurisdiction of the High Court, as for instance any person is arrested or detained within those territories without lawful authority, the High Court will certainly have the jurisdiction to interfere in writ jurisdiction to examine the legality and lawful authority of that action. That broad distinction between two sets of cases, is the situs or the location of corpus of the dispute.*

It would be useful to refer to the provisions of clause (5) of Article 223 of the 1962 Constitution it read:

> *"(5) Notwithstanding anything in this Constitution, neither the Supreme Court nor a High Court shall, unless the Central Legislature by law otherwise provides, exercise any jurisdiction under this Constitution in relation to a Tribal Area.*

This clause was inserted by First Amendment, 1963 (Act I of 1964). The first thing to be noticed is the non-obstante clause in the beginning of the above Constitutional provisions, which gives it an overriding effect over other provisions of the Constitution including that relating to the writ jurisdiction of the High Court. The prohibition is against the exercise of jurisdiction "in relation to a Tribal Area". This is not an expression of art like the expression "cause of action", which has a well defined meaning and therefore, has a limited import. The words "in relation to" on the other hand are of wide import and postulate of a connection of one thing with another: a nexus. The question therefore, is whether there is such a connection of nexus between the subject-matter of the dispute and the former State of Chitral. In this context the situs of the land and the residence of the two sets of claimants become decisive. The location of the land in dispute and the residence of the parties plainly establishes this nexus or relationship for the relevant purpose.

Besides, in the instant case, all material actions were taken in the tribal territory on the basis of the local custom having the force of law where the land in dispute is also situate. The mere fact that the final order sought to be challenged in this case was that of the Home Secretary, West Pakistan dated the 23rd July, 1964 would not snap the relationship of the dispute with the former State of Chitral, and bring the matter within writ jurisdiction of the High Court. On this aspect of the question, the law was laid down by the Privy Council as far back as 1943 in Ryots of Garabandino and others v. Zamindar of Parlakimedi and another (1) wherein it was held that the Madras High Court which exercised its local jurisdiction within the Presidency town of Madras, had no power to issue writ of certiorari in respect of proceedings for settling fair and equitable rent under a local law, by the special officer of District of Ganjam, although the final order sought to be challenged was made in revision by the Collective Board of Revenue, sitting in Madras. This case is an authority for the view that the seat of the authority at the apex cannot be a decisive for the relevant purpose. The matter has to be looked into from the point of view of its substance and not its mere form. Any other view will be a circumvention of an express prohibition in the Constitution.

19. In the case of *Malik Taj Muhammad and another* **vs.** *Bibi Jano and 25 others* (1992 SCMR 1431), a four Member Bench of this Court has observed as follows: -

> *"7. By Section 2(1)(iv) of the Establishment of West Pakistan Act, 1955, the territories of West Pakistan were to comprise amongst others 'the Tribal Areas of Balochistan, the Punjab and the North-West Frontier and the States of Amb, Chitral, Dir and Swat" (referred to as the 'specified territories'). Section 7 of the same Act, while constituting the High Courts provided that the High Court shall exercise jurisdiction in relation to the whole of the Province of West Pakistan, and the*

power and authority excerisable by the High Court in the Lahore and the Judges therefore, immediately before the date on which the order under this subsection comes into force shall be exersisable by the High Court of West Pakistan and the judges thereof in the whole of West Pakistan, and section 223 of the Government of India Act, 1935, shall be construed accordingly.

8. Then followed the Establishment of West Pakistan (Amendment) Act, 1955 which was deemed to have come into force on and from the fourteenth day of October, 1955, i.e. from the very day that the Province of West Pakistan came into existence, and subsection (1) of section 7 of the Establishment of West Pakistan Act, 1955, was amended so as to exclude from the jurisdiction of the High Court the special areas.

The Presidential Order No.11 of 1961 was termed as Special Areas (Restoration of Jurisdiction) Order, 1961. Clause 2 of Article 2 provided in the following manner:--

> *"The High Court of West Pakistan shall exercise in relation to the territories comprised in the Special Areas or any part thereof the same jurisdiction as would have been exercisable by the High Court of West Pakistan on the 14th day of October, 1955, if sub-clause (i) of clause (a) of section 2 of the Establishment of West Pakistan (Amendment) Act, 1955, and Article 178 of the Constitution of 23rd March, 1956, had not been enacted."*

9. This provision indeed restored the jurisdiction of the High Court in the special area. Nevertheless, its jurisdiction was again taken away by the Constitution of 1962. The contention of the learned counsel for the appellants that as existing law under Article 225 of the 1962 Constitution the Presidential Order No.11 of 1961 continued to be operative and holds good only to the extent as approved in Manzoor Ilahi's case PLD 1975 SC 66. When the Fundamental Rights were introduced in the Constitution by Act I of 1964 Constitution (First Amendment) Act, 1963 clause (5) was added in Article 223 of the Constitution of 1962 on 27th January, 1964, as hereunder:--

> *"Notwithstanding anything in this Constitution, neither the Supreme Court nor a High Court shall, unless the Central Legislature by law otherwise provides, exercise any jurisdiction under this Constitution in relation to a Tribal Area."*

The Act II of 1964 Tribal Areas (Restoration of Jurisdiction) Act, 1964 enforced on 10th of April, 1964, made the following provision with regard to restoration of jurisdiction:--

> 2. *<u>Restoration of jurisdiction of the Supreme Court and the High Court.</u>---The Supreme Court and the High Court of West Pakistan shall exercise in relation to the Tribal Areas of the Quetta Division the same jurisdiction as was exercisable by them in relation to those areas before the commencement of the Constitution (First Amendment) Act, 1963 (I of 1964).*
>
> 3. *<u>Extension of Limitation.</u>---Notwithstanding anything contained in any other law for the time being in force, if a period of limitation had begun to run from before the commencement of the Constitution (First Amendment) Act, 1963 (I of 1964), in respect of any matter concerning which the jurisdiction of the Supreme Court*

and the High Court of West Pakistan is created or restored by this Act then in computing such period of limitation the period between the tenth day of January, 1964, and the date of the coming into force of this Act shall be excluded:

Provided that no period of such limitation shall expire on a day earlier than the thirtieth day from such date."

10. In this background of the constitutional instruments, it cannot be said that at the relevant time in 1960, when the jurisdiction was invoked and the impugned order passed by the Additional Commissioner, there was at all constitutional jurisdiction available to the Balochistan High Court in respect of the territories where the land was situate.

11. As regards the contention that the Additional Commissioner while passing the order was located in settled area where the jurisdiction of the High Court extended, the matter stands concluded by one of the later decision of the Supreme Court Muhammad Sadiq and others v. Government of Pakistan and others 1981 SCMR 1022 which provides that the jurisdiction of the Supreme Court and the High Court stands excluded in only those matter which are exclusively concerned with the Tribal Areas, and that the ouster clause cannot be interpreted so as to exclude the jurisdiction of a superior Court in matters in which any part of the cause of action accrues, or any effective action or step is taken or performed in, or at, a place outside the tribal area, affecting the life, liberty or property and the jurisdiction of the High Court remains. In this case, the subject-matter of the dispute was immovable property and rights therein. These were located in the tribal area. The authorities which dealt with the matter were empowered to deal with such matters as pertaining to tribal areas. In the circumstances, the substantial cause of action and the subject-matter of dispute would be located in the tribal area and not in the settled area merely because such an order was passed".

20. In the case of Muhammad Siddiq and others vs. Government of Pakistan and others (1981 SCMR 1022), a learned four Member Bench of this Court has observed as follows: -

"We have now heard Mr. Shaukat Ali, learned counsel appearing for the appellants, and Maulvi Sirajul Haq for the Government of Pakistan and we find that this Court has consistently taken the view, as summed up in the most recent case on the subject, namely, Manzoor Elahi v. Federation of Pakistan (5), that the ouster of jurisdiction of the superior Courts is not to be lightly assumed, and the plain meaning and intention of the ouster clause appears to be to exclude the jurisdiction of the Supreme Court and High Courts only in those matters, which are exclusively concerned with Tribal Areas, and that the ouster in clause cannot be interpreted so as to exclude the jurisdiction of a superior Courts in matters in which any part of the cause of action accrues, or any effective action or step is taken or performed in, or at, a place outside the Tribal area, affecting the life, liberty or property of a citizen of Pakistan, or any other person for the time being in Pakistan, and having the right to be governed by the

> *ordinary law of the land and in accordance with the procedures obtaining there under.*
>
> *Viewed in the light of these principles, it is clear that if the warrants and summons against the appellants were issued by an officer dealing with the Tribal areas, and presumably at a place in the Tribal area, the Peshawar High Court would have no jurisdiction to deal with the matter, as the execution of the warrants and summons was to be carried out in the district of Faisalabad, which place is within the jurisdiction of the Lahore High Court. No material has been brought to our notice to show that the warrants or summons were issued at Peshawar, even though the officer issuing the same also has another functions as Magistrate of the First Class at Peshawar. It is, however, clear that in the present proceedings he was acting as an Assistant Political Agent of Khyber Agency and not as a Magistrate of the First Class within the territorial district of Peshawar.*
>
> *On this view of the matter, we consider that the learned Judges in the High Court were right in thinking that their jurisdiction stood excluded at the time the matter was brought to them. It transpired that subsequently the writ jurisdiction of the High Court was extended to certain Tribal areas, but that extension took place after the events with which we are dealing in the present case.*
>
> *As a result of the legal position explained above, we consider that it was only the Lahore High Court, which could have jurisdiction in the matter as the execution of the process was to be carried out at Faisalabad.*

21. In the case of Ch. Manzoor Elahi vs. Federation of Pakistan etc. (PLD 1975 Supreme Court 66), which was heard by learned four Member Bench of this Court, three of whom passed a majority judgment. Reference is made to the judgment of his lordship Yaqub Ali, J. a Member of majority, which is as follows:-

> "*Lastly it remains to deal with the plea raised on behalf of the State that clause (7) of Article 247 bars this Court from exercising any jurisdiction in relation to the prisoner who was detained in a Tribal Area when this application was made. Having given careful consideration to the arguments raised by the learned Attorney-General and the Advocates-General, Baluchistan and Punjab, I am unable to accept the plea that the bar contained in clause (7) of Article 247 of the Constitution is attracted. As seen the prisoner was arrested in Lahore on November 12, 1973, any person could thereupon approach this Court with an application under Article 184 (3) for a writ in accordance with the provisions of Article 199 so as to satisfy the Court that the custody of the prisoner was in accordance with law or otherwise. The place of arrest being outside a Tribal Area there was jurisdiction in this Court to entertain the application. Under Article 187 this Court has power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter and any such*

> *direction, order or decree shall be enforceable throughout Pakistan. Under Article 190 all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court. Assuming that this Court finds that the arrest and custody of the prisoner at Kohlu are not in accordance with law and directs his release, it cannot be postulated that the Additional District Magistrate, Kohlu, or the officer incharge of the Jail in which the prisoner was under detention (he has since been released under the order of this Court) will fail to obey the direction given by this Court. Indeed, it is their constitutional duty to implement the directions given or orders passed by this Court.*
>
> *What then is the effect of conveying the prisoner to a Tribal Area. Does, he thereby forfeit the Fundamental Rights so firmly vested by the Constitution in every citizen? As observed during the hearing of these matters, the Fundamental Rights are not so unreal or fragile that the ingenuity of a police officer and a fast moving conveyance can defeat them and render this Court helpless to give redress though it may be satisfied that the arrest and the custody of the prisoner are not in accordance with law. The essence of the issue in my opinion is that if a person is arrested in violation of any provision of law at a place where he has a right to move a High Court or this Court for his release under Article 199 or this Court under Article 184 as the case may be that right will not be defeated by his removal to a Tribal Area. My reason for reaching this conclusion is that the inquiry, which the Court will undertake, will, in point of time, be in relation to arrest and custody at a place which is not a Tribal Area. His detention in a Tribal Area when an application under Article 184 or Article 199 is made would be relevant only if it could be shown that a writ issued by a High Court or this Court will not be obeyed by the authority who is holding the prisoner in custody. As brought out above, such a situation is not visualized by the Constitution. The removal of the prisoner from Lahore to Kohlu and his detention there have, therefore, no effect whatever on the exercise of jurisdiction by this Court in relation to the prisoner. The case of The King v. Secretary of State for Home Affairs-Ex Parte O'Brien cited earlier fully supports this view.*
>
> *It was contended on behalf of the State that if a person commits an offence in a Tribal Area he renders himself liable to be treated in accordance with the law, which prevails in that part of the country. There is force in the contention, but there are more than one answers to it. Firstly, that the Criminal Procedure Code is as much applicable to Tribal Areas as to the other parts of the country. It will, therefore, be apt that such a person be tried in a Court constituted under the Code and not by a Council of Elders under the Frontier Crimes Regulation. Secondly, that if a person voluntarily goes to a Tribal Area and commits an offence there he is, on a general principle of law, liable to be tried and punished according to the law, custom or usage which prevails there. I would not, however, express any final opinion on this point as the prisoner in this case is said to have committed the offences with which he is charged outside the Tribal Area and was taken there involuntarily by the agents of the State".*

22. From the above law, as laid down by this Court, *inter-alia*, the following are the circumstances under which the jurisdiction of this Court and that of the High Court will not be barred under Article 247(7) of the Constitution rather the same

will be available to be exercised under Article 184 and Article 199 of the Constitution:-

i) Where location of the corpus in dispute is situated in the territory outside the Tribal Area;

ii) Where parties to the dispute have their residence outside the Tribal Area;

iii) Where cause of action has arisen outside the Tribal Area;

iv) Where the offence has taken place outside the Tribal Area;

v) Where the arrest is made or sought to be made which is outside the Tribal Area;

vi) Where effective action or step is taken or performed outside the Tribal Area;

23. The fact that the detainees being arrested from Adyala Jail, Rawalpindi, is a question which on perusal of record seems to be controversial in that the petitioner has alleged that they were taken away by respondents No.2 and 3 while respondents No.2 to 4, in their reply have submitted that they were taken away by disguised persons as men of agencies who brought them to the tribal territory for terrorist activities from where they were arrested by the Army Personnel. Such controversial question cannot be determined in the absence of positive evidence on the record and nor we can pass/decide on the basis of mere word against word. In the order of this Court dated 06.11.2011, in C.P.No.1973 of 2010 in which also Mr. Tariq Asad, ASC appeared as a counsel for Ateeq-ur-Rehman, one of the brother of the detainees, in which the fact of the arrest of the detainees from Adyala Jail was taken into consideration and their subsequent arrest by the Army Personnel from the Tribal Areas and on the statement of Raja Muhammad Irshad, ASC, made on 09.12.2010 that the detainees will be

subjected to law and dealt with in accordance with the Army Act, the Court has given its opinion that they are no longer in illegal custody and the petition was disposed of accordingly.

24. Mufti Abdul Baais had filed Civil Petition No.99 of 2011, in this Court in which the statement of Brig. Naubahar, Judge Advocate General, was recorded and ultimately counsel for the petitioners submitted that he intends to file a Constitution Petition for seeking appropriate remedy as the ground of habeas corpus is no more available because at the moment it cannot be declared that it is an unlawful detention and accordingly the said Civil Petition was disposed of. Another Civil Petition No.1793 of 2011 was also dismissed by this Court. Thus, so far as the question of illegal detention of the detainees is concerned, the same stood already determined and decided by this Court, as per the above orders.

25. As noted above, the Army did not try the detainees in terms of Section 2(1)(d) of the Army Act, 1952, for the reason given by Brig. Naubahar, Judge Advocate General, in his statement dated 15.04.2013 that *"their trial under the provision of PAA, 1952 could not take place due to lack of jurisdiction as relevant provisions relating to trial of civilians are contained in PAA Sec 2 (1)(d), i.e. seducing and espionage. Further, after the passage of 18th Constitutional Amendment, the jurisdiction to try civilians, allegedly involved in attacking Armed Forces installations and assets as was enacted through an Ordinance to amend PAA Sec 2 (1)(d)(iia) stood elapsed. Therefore, the militants were interned as per the law. The prosecuting agency had collected sufficient reliable evidence for their trial under*

FCR". The detainees were interned in the Internment Centre under Actions (in Aid of Civil Power) Regulation, 2011, promulgated by the President of Pakistan under Article 247(5) of the Constitution. Hence in the petition prayer for challenging the vires of the Actions (in Aid of Civil Power) Regulation, 2011, was sought to be challenged but in the course of his arguments, the learned counsel for the petitioners did not make submission in this respect and even in para 7 of his CMA No.2635 of 2013, he has made the following statement:-

> *"7. That the Applicants' petitioner counsel may not have much importance, but since its arguments had been concluded and the Counsel had submitted that he was not going to argue the vires of Action in Aid of civil Power Regulation, 2011, hence the petition be heard independently."*

This Constitution Petition was delinked from other Constitution Petitions and the Judgments in this case was reserved.

26. Although the petitioner has sought to challenge the vires of Section 2(1)(d) of the Army Act, 1952 but in face of development which has taken place that the Army has not tried the detainees under the Army Act, the counsel for the petitioners apparently did not choose to argue this point also and in our view such was done rightly as the question of trial of the detainees under the Army Act has become mainly of an academic nature rather redundant.

27. Regarding the death of the 4 detainees, the respondents No.2 to 4 with their reply (CMA No.487 of 2012) have attached their death certificates which show that Syed Abdus Saboor expired on 20.01.2011 in LRH due to cardio pulmonary arrest, respiratory distress. Tehseenullah expired on 17.12.2011 in LRH due to cardio pulmonary arrest. Said Arab

expired on 18.12.2011 in LRH due to cardio pulmonary arrest, secondary to anemia and pancyctopaeshia. Muhammad Aamir alias Khalid expired on 13.08.2011 due to acute renal failure and acute gastroenteritis. The respondents No.2 and 3 in their reply have submitted that the internees in view of their earlier poor health conditions fell sick and were shifted to the Lady Reading Hospital, Peshawar, for their treatment and despite best medical treatment and regular care by the Doctors, 4 persons died in the hospital on different dates. The relatives of the deceased were duly informed and choice was give to them to have the post-mortem reports to determine the cause of death, but offer was declined by the relatives and in 2 of the 4 death cases the relatives have given in writing declining to have post-mortem done and the other 2 blatantly refused to have any post-mortem done or sign any document and that the allegation of poison and torture contained in the petition is without any shred of evidence. In view of this reply of respondents No.2 to 4 supported by medical record of the 4 deceased detainees there is nothing on the record which can justifiably substantiate the plea of the petitioner that those detainees were tortured or poisoned more particularly when the post-mortem reports of these deceased detainees is not available on the record. The post-mortem reports of the deceased detainees would have been very relevant to determine their real cause of death without which this Court is unable to come to a conclusion as alleged by the petitioner. Although several medical reports in respect of the surviving detainees have been submitted by the Chief Secretary, KPK, where the medical conditions of each of the

surviving detainees have been elaborately and comprehensively been described and the medical treatment being administered to them but no where the petitioner has disputed any of the medical reports submitted by the Chief Secretary, KPK and it is not even asserted that the medical treatment which is being administered to the surviving detainees is not satisfactory. The Treatment shown in the medical reports being provided to the surviving detainees have not been reported to be that of torture or administering of poison and therefore in the absence of any report to that effect, this Court cannot come to a justifiable conclusion that any of the detainees was tortured or poisoned.

28. As regards the grievance in terms of Article 13 of the Constitution, it may be noted that in case FIR No.670/2007, seven accused were tried u/s 302, 324, 436, 427, 440, 120-B PPC, 4/5 ESA and 7 ATA, Police Station New Town, Rawalpindi, and the prosecution case was that on 24.11.2007 at about 7:40 am when the official Bus carrying officials of ISI reached at the security check barrier Hamza Camp, a Carry Van driven by a young man of 24/25 years also came there. One Ashfaq, who was on duty stopped the Carry Van but the driver of the Van exploded himself inside the Van and due to such explosion the said Bus caught fire as a result of which 15 officials died whereas 35 officials received injuries. The accused were alleged to be involved in the said offence. In case FIR No.786/2007 u/s 302, 324, 120-B, 337-F(v), 440, 427 PPC, 4/5 ESA and 7 ATA, Police Station R.A. Bazar, Rawalpindi, the prosecution case was that on 24.11.2007 at 7:45 am one Soldier namely Arif Nawaz along with Soldier Khalil Ahmed and Khalid Mahmood Naik was on

security duty near Defence Export Promotion Organization, Iftikhar Janjua Road and at that time a silver coloured car driven by a young driver came there and when the security staff stopped that car for checking, it blew up with blast which resulted into complete destruction of the car and the death of its driver. Due to the blast, the said security staff beside other persons passing near for going to their duty in GHQ received injuries including destruction of bullet proof jacket and rifle of the said Khalid Mahmood Naik and the accused were alleged to be connected with the said crime. In case FIR No.384/2008 u/s 120-B PPC, 4/5 ESA and 7 ATA, Police Station New Town, Rawalpindi. The prosecution case was that on 01.07.2008 Asghar Ali Goraya, SHO/Inspector (complainant) received a spy information that some terrorists groups were present behind the Arts Council Building on Murree Road and were planning to target some important installations and building with heavy explosive and if immediately raided they could be apprehended. On this information, the complainant constituted a police party and also informed the Bomb Disposal Squad. The complainant with his raiding party on official vehicle reached the above mentioned place and made raid upon which 6 persons behind the Arts Council were apprehended and on their search 5 bunches of detonators and prima cord wires, suicidal jackets and 4 batteries were recovered. However, nothing incriminating was recovered from Syed Abdul Majid, Syed Abdus Saboor and Syed Abdul Basit. As stated above, all the accused were acquitted of charges against them in the above referred 3 FIR cases by the Anti-Terrorism Court. In the case before the Assistant Political

Agent, Lower Orakzai Agency, the facts of the matter are that 7 accused were handed over by the Incharge Internment Centre, Kurram Agency on 22.03.2013 to the Political Agent, Orakzai Agency for proceeding against the accused for targeting a convoy of 2 Wing Dir Scouts at Sarmalo Kandow Orakzai Agency on 25.11.2010. Explosive device which was planted to destroy the security forces convoy blasted and as a result a Jawan of security forces was killed and 7 of the same convoy were as a result injured. They were arrested on the same day from the Lawara Mela, Orakzai Agency while trying to escape. At the time of arrest weapons, ammunition and suicide jackets were also recovered from the accused. On perusal of this record, it is apparent that there were against the detainees in the Anti-Terrorism Court, Rawalpindi, from which they were acquitted cases in which the offence alleged against them is said to have taken place in various areas of Rawalpindi they were also arrested from there. While case under which the detainees have been tried, convicted and sentenced by the Assistant Political Agent, Lower Orakzai Agency, the offence is said to have taken place at Sarmalo Kandow Orakzai Agency and they were arrested from Lawara Mela Orakzai Agency which are Tribal Areas. These facts amply show that the detainees were tried in respect of different offences which have taken place at different places and they were also arrested from the respective places of crimes and thus theses offences cannot justifiably be considered to be the same offence to attract the provision of Article 13 of the Constitution.

29. As the facts further emerged from the record that the Internment Orders of the detainees were withdrawn on 19.03.2013, and their custody was handed over to the Political Administration of Orakzai Agency to be tried under the Frontier Crime Regulation (FCR). Admittedly, the Orakzai Agency is a Tribal Area and it is so mentioned in Article 246 of the Constitution. The detainees were tried by the Assistant Political Agent, Lower Orakzai Agency u/s 121-A, 122 PPC/3,4,5,6 of Explosive Substance Act, 1908/11-FCR read with Section 365, 400, 401 PPC/11 FCR and through an Order dated 02.05.2013 detainees Dr. Niaz Ahmed, Muhammad Mazharul Haq, Muhammad Shafiq, Shafiq-ur-Rehman and Gulroz were convicted u/s 121A, 122 PPC/11 FCR and sentenced to undergo 14 years RI each and a fine of Rs.1 lac and in default whereof to undergo 3 years SI. They were further convicted u/s 3-5 of the Explosive Substance Act, 1908/11 FCR and sentenced to 14 years RI each and fine of Rs.1 lac and in default to undergo 3 years RI and both the sentences were ordered to run concurrently. While Abdul Basit and Abdul Majid were convicted u/s 121A, 122 PPC, 11 FCR and sentenced to undergo 5 years RI and a fine of Rs.1 lac and in default to undergo 1 year SI each. They were further convicted u/s 3-5 of the Explosive Substance Act, 1908/11 FCR and sentenced to undergo 5 years RI each and fine of Rs.1 lac and in default to undergo 1 year SI each. Their sentences were also ordered to run concurrently. All the detainees were, however, acquitted from the charge u/s 365, 400, 401 PPC/11 FCR and Sections 4 and 6 of the Explosive Substance Act, 1908. They were given benefit of Section 382-B

Cr.P.C with order that their sentences shall commence from the date of arrest by the Political Administration, Orakzai Agency i.e. 22.03.2013.

30. On conclusion of the trial and passing of the order of conviction and sentence, by a Warrant of Commitment issued by the Assistant Political Agent, Lower Orakzai Agency, the custody of the detainees for undergoing their sentences was handed over to the Superintendent Central Prison, Kohat. We are informed that 2 of the detainees have filed Revision Application in FATA Tribunal u/s 55-A of the FCR but the remaining 5 detainees have still not filed any Revision.

31. So far as the application of the jurisdiction of this Court in terms of Article 247(7) of the Constitution is concerned, it may be noted that as per the consensus of the Judgments of this Court, the bar of jurisdiction of this Court in terms of Article 247(7) of the Constitution will be applicable where cause of action and subject matter of dispute is in the Tribal Area and the parties to the dispute are also resident of Tribal Area and in terms of the Judgment in the case of *Ch. Manzoor Elahi*, supra, that if a person voluntary goes to a Tribal Area and commits offence there he on general principle of law is liable to be tried and punished according to law, custom and usage which prevails there.

32. In this case the detainees have been tried by the Assistant Political Agent, Lower Orakzai Agency and they have been convicted and awarded sentences for the crime they are said to have committed in the Tribal Area and were arrested too from the Tribal Area. To the extent of the decision made by the

Assistant Political Agent, as per the consensus of law, this Court cannot take cognizance of the same and sit in appeal to decide as to whether the jurisdiction assumed by the Assistant Political Agent, Lower Orakzai Agency was rightly and competently assumed and as to whether the conviction order was justified. This exercise by this Court apparently is not permissible in view of the bar contained in Article 247(7) of the Constitution. However, as the convicts are detained in the Central Prison, Kohat, which admittedly is a settled area, this Court can surely pass order and give direction to the Jail Administration of Kohat to deal with the said convicts as per the applicable law to the Prisoners and to provide them safe and proper lodging in the jail and in case the said Prisoners require medical treatment which is not possible in the Jail Hospital or in the Jail premises, they shall be brought to proper Hospitals preferably the Lady Reading Hospital, Peshawar, where they were already under treatment and the administration of Lady Reading Hospital, Peshawar, will ensure that these Prisoners are given proper care and treatment of ailments suffered by them and all efforts are made to secure their health and life which is their guaranteed right under the Constitution of this country. Proper food and clothing will also be provided to them. The relatives and the counsel of the said Prisoners shall also be allowed to meet the said Prisoners without any let or hindrance but subject to law. The Superintendent Central Prison, Kohat, will submit fortnightly report to the Registrar of this Court for our perusal in Chambers, regarding the implementation of the above directions.

33. The instant Constitution Petition, in the above terms, stands disposed of.

Criminal Original Petition No.8 Of 2012

34. So far as the Criminal Original Petition No.8 of 2012 is concerned, the respondents No.2 to 4 have filed CMA No.798 of 2012, in which they have given reasons for delay in complying with the order of this Court dated 13.01.2012, which is contained in Para 2 of the said CMA and is as follows :-

> *"That adverse weather conditions i.e. snow and poor visibility, in and around Parachinar prevented timely operation by helicopters, hence the production of three detainees detained in the Internment Center by interning authority under the provisions of Actions (in Aid of Civil Power) Regulation, 2011 got delayed. This Court's order was, however, complied with and the seven internees including the four admitted in the Government Lady Reading Hospital, Peshawar, were brought to Islamabad at about 6:00 pm on 10.02.2012, while the Order had already been passed at 5:30 pm by this Hon'able Court for their production on the next date of hearing i.e. 13.02.2012. There was no disobedience of the Order dated 30.01.2012 and the internees from Parachinar were brought despite taking great risk to human lives including those of pilots of the helicopter who undertook the extremely dangerous mission and operated in the hazardous and adverse weather and security environments. The Army leadership including the heads of the agencies have always honoured and implemented the orders passed by this Apex Court of the country. Leaving the orders aside, even the observations made by this Hon'able Court relating to matters falling in the domain of the Army and ISI never go unheeded."*

35. As the detainees were produced in the Court on 13.02.2012 and they also had opportunity of meeting with their relatives and counsel and in view of the explanation given in the CMA and further that the Court very sparingly and in extreme cases invokes its powers to proceed in the Contempt of Court, we find that apparently no case for the Contempt of Court is made out and this Criminal Original Petition is accordingly dismissed.

Criminal Original Petition No.12 Of 2012

36. So far as the Criminal Original Petition No.12 of 2012 is concerned, issuing of a purported press release by the alleged

Contemner apparently did not cause any obstruction or interference to these proceedings and it cannot justifiably be held that there was an attempt by the alleged Contemner to impede the cause of administration of justice. If at all the press release expresses anything the same is the personal view of the person issuing the press release. The press release which is the subject matter of this petition does not show that it has been issued by the alleged Contemner rather it is attributed to a security official who is not named. In this view of the matter and also for the reason that the Court sparingly invokes its power to proceed in Contempt of Court, we find that apparently no case for Contempt of Court is made out and this Criminal Original Petition is also dismissed.

Chief Justice

Judge

Islamabad
03.12.2013 ***Judge***
NOT APPROVED FOR REPORTING
Rabbani

Announced in open Court on _____.

Judge