Yahya Afridi, J.- On the 9th of May 2023, Imran Ahmad Khan Niazi, the Chairman of a political party, Pakistan Tehreek-e-Insaaf, and the former Prime Minister of Pakistan, was arrested in a criminal case involving the allegation of corruption and corrupt practices under the National Accountability Ordinance, 1999. His arrest sparked political protests, which culminated in attacks on public buildings in various parts of Pakistan, including the Corps Commander House, Lahore, and Peshawar Radio Station, Peshawar Cantonment. Criminal cases were registered, and arrests of the protesting perpetrators were made under the relevant criminal laws of the country. In addition, thereto, the provisions of the military laws were also put into motion, and some of the arrested protesting perpetrators were sought to be tried under the enabling provisions of the Pakistan Army Act, 1952 **("the Army Act")** before the military courts, which led to handing over their custody to the military authorities. After the dust settled, a total of 2892 persons, including some females, were put to undergo criminal prosecution before the ordinary criminal courts, while 103 persons, all males, were sought to be proceeded against before the military courts under the Army Act. These impending trials of 103 civilians before the military courts have been challenged in the present petitions, invoking the original jurisdiction of this Court under Article 184(3) of the Constitution of the Islamic Republic of Pakistan **("the Constitution")**.

Constitution and Reconstitution of Benches

2. A Bench comprising nine Judges of this Court headed by the then Hon'ble Chief Justice, Mr. Justice Umar Ata Bandial, was constituted to hear these petitions. On the very first date of the hearing, two Hon'ble Judges, while expressing certain reservations *inter alia* as to the procedure of constituting the Bench disassociated themselves from the Bench. Thereafter, a Bench of the remaining seven Judges was

reconstituted to hear the petitions. Later, during the proceedings, another Hon'ble Judge recused himself from hearing these petitions, on an objection of the learned Attorney-General made on behalf of the Government of Pakistan. Whereupon, the Bench of the remaining six Judges was reconstituted, which proceeded with hearing the petitions. However, with the retirement of the then Hon'ble Chief Justice, the Bench had to be reconstituted once again - the present Bench, this time comprising the remaining five Judges. Thus, a case that was initially thought appropriate to be heard by a Bench of nine Judges ultimately came for a decision before a Bench of five Judges. I would explain, why it was appropriate, rather necessary, that only a Bench of not less than nine Judges, as initially constituted, should have decided the questions of law raised in the present petitions.

3. Before this Bench of five Judges, the petitions came up for hearing on the 23rd of October 2023. The learned Attorney-General advanced his arguments, opposing these petitions on the point of maintainability as well as on merits. The learned counsel for the Ministry of Defence, Government of Pakistan, and the Ministry of Interior, Government of Pakistan opted not to make their submissions. The decision was reserved and after some deliberation, the Bench reconvened the same day and announced its short order in the following terms:

Order

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

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

ii. Without prejudice to the generality of the foregoing the trials of civilians and accused persons, being around 103 persons who were identified in the list provided to the Court by the learned Attorney General for Pakistan by way of CMA No.5327 of 2023 in Constitution Petition No.24 of 2023 and all other persons who are now or may at any time be similarly placed in relation to the events arising

from and out of 9th and 10th May, 2023 shall be tried by Criminal Courts of competent jurisdiction established under the ordinary and / or special law of the land in relation to such offences of which they may stand accused.

iii. It is further declared that any action or proceedings under the Army Act in respect of the aforesaid persons or any other persons so similarly placed (including but not limited Constitution Petition Nos.24, 25, 26, 27 & 28 and 30 & 35 of 2023 6 to trial by Court Martial) are and would be of no legal effect.

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

I had reserved my decision, as stated in para (i) of the above-cited short order, to give the question of law enumerated therein my due consideration. Having considered the question of *vires* of the provisions of sections 2(1)(d) and 59(4) of the Army Act, in light of the existing judicial precedents of this Court, I regret that I could not make myself agree to the decision of my learned colleagues. I would explain herein, the reasons for my dissent on this point, as well as, for my concurrence on the points narrated in paras (ii) and (iii) of the short order cited above. However, before going on to those reasons, I want to briefly address the preliminary objection of the learned Attorney-General, as to the maintainability of the present petitions.

Preliminary Objection to the Maintainability of Petitions

4. The learned Attorney-General raised a preliminary objection regarding the maintainability of the present petitions, urging that the petitioners ought to have first challenged the impugned actions of the respondents in the constitutional jurisdiction of the High Courts under Article 199 of the Constitution, and not in the original jurisdiction of this Court under Article 184(3) of the Constitution.

5. The question raised in the present petitions, as to the constitutional validity of the military trial of civilians, is definitely one of public importance and with reference to the enforcement of the fundamental right of access to justice enshrined in the right to life and

liberty guaranteed by Article 9 of the Constitution.[1] The present petitions, thus, fulfill the two conditions precedent for invoking the original jurisdiction of this Court under Article 184(3) of the Constitution. This Court, in the case of **Ch. Manzoor Elahi v. Federation of Pakistan (PLD 1975 SC 66)**, while dilating on the jurisdictional contours of the Supreme Court's original jurisdiction under Article 184(3) of the Constitution had, *inter alia,* settled the foundational parameters of authority of the Court in matters, where the High Court under Article 199 of the Constitution, and this Court under Article 184(3) of the Constitution had concurrent jurisdiction, and the Supreme Court was to exercise restraint in positive exercise of its jurisdiction, in case any of the High Courts had already taken cognizance of the matter under Article 199 of the Constitution. The *ratio decidendi* of the above judgment has been followed in the cases of **Farough Ahmed Siddiqi v. The Province of Sindh (1994 SCMR 2111)** and **Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan (PLD 1998 SC 1263).** I am mindful that the positive exercise of the original jurisdiction by an eleven Members Bench of this Court in the case of **Miss Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416)**, where an exception was made to the strict adherence to the practice of this Court, as settled in **Ch. Manzoor Elahi case** (*supra*), on the ground of prolonged delay of over one year and eight months before the High Court. The Court only distinguished the case from the precedent set in **Ch. Manzoor Elahi case** (*supra*) and did not deviate from the principle set therein.

6. Facts of the present case reveal that no case with similar subject matter is pending before any of the High Courts under Article 199 of the Constitution. Hence, both the principles set out in **Ch. Manzoor Elahi case** (*supra*) and the exceptions to the general principle provided in **Benazir Bhutto case** (*supra*) are not attracted. Thus, the Supreme Court can

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[1] Balochistan v. Azizullah Memon (PLD 1993 SC 341); Sh. Riaz-Ul-Haq v. Federation of Pakistan (PLD 2013 SC 501).

entertain the *lis* and proceed with the matter. Additionally, the authority of the Supreme Court to hear the matter could not be stultified only because the petitioner had an alternative remedy before the High Court. Given the above, the preliminary objection raised by the learned Attorney-General is not applicable to the facts of the present case, and thus, is repelled.

Constitutional Questions

7. After carefully considering the submissions of the learned counsel for the parties, I find that there are essentially two issues that require determination by this Court, which are as follows:

(i) Whether section 2(1)(d)(i) & (ii) and section 59(4) of the Army Act are violative of the fundamental rights guaranteed by Articles 9, 10A, and 25 of the Constitution and are, thus, liable to be declared void as per Article 8 of the Constitution; and

(ii) Whether section 2(1)(d)(ii) of the Army Act applies to the civilian protesting perpetrators involved in the incidents of the 9th and 10th of May 2023 and they can, thus, be tried by a military court under the Army Act.

I would take up the above issues for discussion and decision in *seriatim*.

Issue No. I - Vires of sections 2(1)(d)(i) & (ii) and 59(4) of the Army Act

8. It is not for the first time that the constitutional validity of sections 2(1)(d)(i) & (ii)[2] and 59(4)[3] of the Army Act has been agitated and decided before this Court. It was earlier raised, considered, and decided by this Court in the case of **F.B. Ali v. State (PLD 1975 SC 506)**, wherein, the said provisions of the Army Act were challenged on the ground of offending fundamental right No.1 - right to life and liberty[4], and fundamental right No.15 - right to equality before law[5], as provided under the 1962 Constitution, which are essentially the predecessor

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[2] **Section 2(1)(d): (i)** persons who are accused of seducing or attempting to seduce any person subject to the Army Act from his duty or allegiance to Government, or
(ii) persons who have 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 of Pakistan, an offence under the Official Secrets Act, 1923.

[3] **Section 59(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.

[4] **Security of person:** No person shall be deprived of life or liberty save in accordance with law.

[5] **Equality of citizens:** All citizens are equal before law and are entitled to equal protection of law.

provisions of Articles 9 and 25 of the present Constitution, respectively. After testing the provisions of sections 2(1)(d)(i) & (ii) and 59(4) of the Army Act on the touchstone of the said fundamental rights, the Court adjudged the provisions to have been competently made, *intra vires* the Constitution, and not violative of any of the said fundamental rights.

9. It is, indeed, pertinent to note that the principles laid down in the judgment rendered in **F.B. Ali case** (supra) by five eminent learned Judges of this Court almost half a century ago, have survived the repeated test of watchful judicial review, and always referred to, whenever any dispute regarding civilian being tried by a court martial or any other forum constituted under sub-constitutional legislation was in question. More profound is the fact that, in each such successive case, the *ratio decidendi* of **F.B. Ali case** (supra) has been relied on by both contesting sides, seeking reliance on the different extracts of the opinion rendered therein. More importantly, the case was decided by a Bench of five Judges, a Bench co-equal in numeric strength to that of the present Bench. It is a well-settled principle that an earlier judgment of a Bench of this Court is binding not only on the Benches of smaller numeric strength but also on the Benches of co-equal strength. A Bench of this Court cannot deviate from the earlier view held by a co-equal Bench of this Court. If a contrary view has to be taken, the proper course is to request[6] for the constitution of a larger Bench to reconsider the earlier view.[7] This being the legal position, while sitting on a Bench of co-equal strength, we are bound by the view taken in **F.B. Ali case (supra)** on the constitutional validity of sections 2(1)(d)(i) & (ii) and 59(4) of the Army Act, or else we have to refer the matter to a larger Bench for reconsideration of the view. Being bound by the decision made in **F.B. Ali case (supra)**, we are to decide the present case, within the scope of the

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[6] Earlier, the Chief Justice under the Supreme Court Rules, 1980, and presently, the Bench-Constitution Committee under the Supreme Court (Practice and Procedure) Act, 2023.

[7] See Qaiser v. State (2022 SCMR 1641); Samrana Nawaz v. M.C.B. (PLD 2021 SC 581); Ardeshir Cowasjee v. Karachi Building Control Authority (1999 SCMR 2883); and Multiline Associates v. Ardeshir Cowasjee (PLD 1995 SC 423).

principle of law enunciated therein, which became the basis for sustaining the constitutional validity of the legislative and executive actions challenged therein. And to deduce that principle, we need to make a closer analysis of the matter before the Court in that case, and how the same was decided.

10. F.B. Ali, a retired Brigadier, and Aslam Afridi, a retired Colonel, were being prosecuted under the Army Act before a military court, for the alleged commission of offences of conspiring to wage war against Pakistan punishable under section 121-A of the Pakistan Penal Code, and attempting to seduce persons in the Armed Forces of Pakistan from their allegiance to the Government of Pakistan punishable under section 2(1)(d)(i) of the Army Act. They challenged before the Lahore High Court, their arrest and trial under the Army Act, as well as the *vires* of the sections 2(1)(d) and 59(4) added in the Army Act by Ordinances III & IV of 1967 **("the impugned legislation")**. Their challenge was mainly based on two grounds: firstly, that the subject matter of the impugned legislation did not fall within any of the items mentioned in the Third Schedule to the 1962 Constitution (Central Legislative List) and was, therefore, *ultra vires* the law-making power conferred on the Centre, and consequently the ordinance-promulgating power of the President of Pakistan; and secondly, that the impugned legislation was violative of the Fundamental Rights No. 1 and 15 guaranteed by the 1962 Constitution and was, therefore, void under Article 6 thereof. The Lahore High Court dismissed the challenge so made, and aggrieved thereof, F.B. Ali and Aslam Afridi filed an appeal in this Court, which was dismissed by upholding the legislative competence of the Central Legislature in enacting sections 2(1)(d) and 59(4) added in the Army Act, with the following observations:

> The Pakistan Army Act was a Central Act which could only be amended by the Central Legislature and the Central Legislature had power to enlarge or restrict its operation by amendment, and if it was intended to extend the operation of the Act [by Section 2(1)(d)] to another specific

category of persons who are accused of certain offences in relation to defence personnel or defence installations, how can it be said that the object of the Act was not in pith and substance to prevent the loyalty of the defence personnel from being subverted by outside influence. The legislation, therefore, in my opinion came directly within item 1 of the Third Schedule of the 1962 Constitution. ..... The nexus with the defence of Pakistan was not only close but also direct. It is difficult to conceive of an object more intimately linked therewith. The prevention of the subversion of the loyalty of a member of the Defence Services of Pakistan is as essential as the provision of arms and ammunition to the Defence Services or their training.

.....

In so far as the subversion of the loyalty of the members of the armed forces is concerned, it is, in my view, a matter substantially and directly, connected with the defence of Pakistan. In any event, the Provincial Legislatures could not have amended the Army Act, which was a Central Law, by reason of the provisions of Article 134 of the Constitution of 1962. In either view of the matter therefore, the impugned Ordinances could only have been made and promulgated by the Central Legislature or the President under Article 29, when the Central Legislature was not in session.

.....

The main purpose of that addition [of section 59(4)] was to effectuate the purpose sought to be achieved by the addition of clause (d) to subsection (1) of section 2 of the Army Act and to make the offence itself triable under the said Act when committed by persons accused of such offence.

(Underlining added)

The underlined observations of the Court clearly identified the principle, which became the basis for upholding the constitutional validity of the impugned legislation. The Court emphasized that the offences added in the Army Act by Section 2(1)(d) in relation to 'defence personnel' or 'defence installations' has 'not only close but also direct' nexus with the 'defence of Pakistan'. It is the close and direct nexus of the provisions of Section 2(1)d) of the Army Act with the defence of Pakistan that weighed with the Court in upholding the impugned legislation and the trial thereunder of the appellants, F.B. Ali and Aslam Afridi.

11. The principle in essence laid down in **F.B. Ali case (supra)**, was that to be triable before a military court under the Army Act, the offences mentioned in section 2(1)(d) of the Army Act must have a close and direct nexus with the defence of Pakistan, and must have been committed with the intention or object of causing damage to the defence of Pakistan.

12. On the point of alleged violation of Fundamental Right No.1 - right to life and liberty – presently, Article 9 of the Constitution, the Court in **F.B. Ali case (supra)**, observed as under:

> It is first sought to be contended that the Ordinances were not law at all, because, they purported to unreasonably deprive a citizen of even the norms of a judicial trial. But this generalization cannot be accepted. Law has not been defined in the Constitution of 1962 and, therefore, in its generally accepted connotation, it means positive law, that is to say, a formal pronouncement of the will of a competent law-giver. There is no such condition that a law must in order to qualify as a law also be based on reason or morality. The Courts cannot strike down a law on any such higher ethical notions nor can Courts act on the basis of philosophical concepts of law....
>
> (Underling added)

As to the alleged violation of Fundamental Right No.15 - right to equality before law – presently, Article 25 of the Constitution, the Court after making a detailed discussion on the principles that allow reasonable classification with an intelligible differentia of the persons for applicability of a particular law, observed:

> The principle is well recognized that a State may classify persons and, objects for the purpose of legislation and make laws applicable only to persons or objects within a class. Infact, almost all legislation involves some kind of classification whereby some people acquire rights and some disabilities which others do not. What, however, is prohibited under this principle is legislation favouring some within a class and unduly burdening others. Legislation affecting alike all persons similarly situated is not prohibited. The mere fact that legislation is made to apply only to a certain group of persons and do not to others does not invalidate the legislation if it is so made that all persons subject to its terms are treated alike under similar circumstances. This is considered to be permissible classification.
>
> (Underling added)

On the point of alleged violation of the right to 'fair trial', Anwar ul Haq, J., read this right as embedded in Fundamental Right No. I - right to life and liberty – presently, Article 9 of the Constitution, and after making an exhaustive discussion on the basic criteria of a fair trial, concluded:

> I am, therefore, of the view that there is no merit in the contention that a trial by Court Martial violates the accepted judicial principles governing a fair trial as obtaining in Pakistan. The impugned Ordinances cannot accordingly be invalidated with reference to Fundamental Right No. 1 of the 1962 Constitution.

13. The learned counsel for the petitioners, in the present case, have argued that **F.B. Ali case (supra)** has been impliedly overruled by the cases of **Mehram Ali v. Federation of Pakistan (PLD 1998 SC 1445)** and **Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504)**. With respect, I find that the impression is not correct. The **Mehram Ali case (supra)** was decided by a five-member Bench, as was the Bench that decided **F.B. Ali case (supra)**. It could not have, nor has it, overruled **F.B. Ali case (supra)**, on the same

principle stated above that a Bench of this Court cannot deviate from the earlier view held by a co-equal Bench.

14. So far as **Liaquat Hussain case (supra)** is concerned, the Bench that decided the case consisted of nine Judges. Being a larger Bench, it could have overruled **F.B. Ali case (supra)**, if it intended to do so, but it has not done so, despite the fact that **F.B. Ali case (supra)** was brought to its notice. Instead of overruling **F.B. Ali case (supra)**, the nine-member Bench, after making a detailed examination of the facts thereof, and the law declared therein, distinguished it with the following observations:

> There is no doubt that in terms of the Army Act even certain civilians can be tried for the offences covered under the Army Act. In this regard reference may be made to the relevant portion from the opinion of Hamoodur Rahman, C.J. in the case of Brig. (Rtd.) F.B. Ali (supra) quoted hereinabove, wherein Hamoodur Rahman, C.J. observed that "the nexus with the defence of Pakistan was not only close but also direct. It is difficult to conceive of an object more intimately linked therewith. The prevention of the subversion of the loyalty of a member of the Defence Services of Pakistan is as essential as the provision of arms and ammunition to the Defence Services or their training". In the instant case the offences specified in section 6 of the Schedule to the Ordinance have no nexus with the defence services of Pakistan. The judgment in the case of Brig (Rtd.) F.B. Ali (supra) does not advance the case of the respondent, on the contrary it clearly lays down that the Army Act can be made applicable to a person who is not otherwise subject to the Army Act if the offence committed by him has nexus with the defence services of Pakistan.
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> .....
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> .....
>
> It is reiterated that the Military-Courts do not fall under any of the provisions of the Constitution, therefore, the trial by these Courts of civilians for civil offences, which have no nexus with the Armed Forces or Defence of Pakistan would be ultra vires of the Constitution. Thus, visualized, the establishment of the Military Courts cannot be upheld on the basis of reasonable classification as spelt out in the case of Brig. Retd. F.B. Ali (supra), heavily relied upon by the learned Attorney-General. The above decision, is distinguishable and not applicable to the controversy involved in this case.
>
> (Underling added)

In my earnest opinion, **Liaquat Hussain case (supra)** has, instead of overruling **F.B. Ali case (supra)**, as argued by the petitioners, affirmed the principles decided therein by quoting and affirming the reasoning thereof. The doubt as to whether after **Liaquat Hussain case (supra)**, the law declared in **F.B. Ali case (supra)**, still holds the field or otherwise is further clarified by a more recent case of **District Bar Association, Rawalpindi v. Federation of Pakistan (PLD 2015 SC 401)**. Sh. Azmat Saeed J., opining for the plurality judgment of eight Judges, and Umar Ata Bandial, J. echoing

the same view, relied on the findings rendered in **F.B. Ali case (supra)** and declared that the trial before a military court is a fair trial, which I have cited hereinafter.

15. The learned counsel for some of the petitioners referring, firstly to the insertion of a new fundamental right to a fair trial and due process by Article 10A through the Eighteenth (Constitutional Amendment) Act, 2010, and secondly to the changed circumstances arising from the command of Article 175(3) of the Constitution for separating the judiciary from the executive, contended that the present case was distinguishable to the grounds of challenge made to the *vires* of the Army Act in **F.B. Ali case (supra)**. It was, thus, urged that in view of the above constitutional developments, the view expressed in the case of **F.B. Ali case (supra)** has lost its efficacy.

16. With respect, I find that the above contention is miscued. In this regard, we must be mindful that the definite findings on 'fair trial' under the Army Act, expressed in the opinion of Anwar ul Haq, J. in **F.B. Ali case (supra)**, was later referred to and relied upon in several cases that followed, including **Shahida Zahir Abbasi v. President of Pakistan (PLD 1996 SC 632)**, **Muhammad Akram v. Federation of Pakistan (PLD 2009 FSC 36)** and **District Bar Association, Rawalpindi v. Federation of Pakistan (PLD 2015 SC 401)**. In the **Shahida Zahir Abbasi case (supra)**, Saiduzzaman Siddiqui, J., observed:

> From the above quoted passage [from the judgment of Anwarul Haq, J. in of F.B. Ali case], it is quite clear 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. With the assistance of learned Attorney-General and the learned counsel for the petitioners we have gone through various provisions of the Act governing the procedure of trial before a Military Court and after going through the same, I am of the view that the procedure prescribed for trial before Military Courts is in no way contrary to the concept of a fair trial in a criminal case. I may also add here, that unlike the previous position when no appeal was provided against the conviction and sentence awarded by a Military Court, the Act now provides an appeal against the conviction and sentence awarded by a Military Court before an appellate forum.
>
> (Underlining added)

Later, in **District Bar Association, Rawalpindi v. Federation of Pakistan (PLD 2015 SC 401)**, Sh. Azmat Saeed, J., speaking for the plurality of eight Judges, opined:

> 163. During the course of proceedings before this Court some misgivings were expressed with regard to the procedure adopted by a Court Martial. The process and procedure followed by the Forums, established under the Pakistan Army Act, have come up for scrutiny before this Court and found to be satisfactory and consistent with the recognized principles of criminal justice. In Brig. (Retd.) F.B. Ali's case (supra) the procedure to be followed for trials under the Pakistan Army Act was dilated upon in great length specially in the concurring opinion of Yaqoob Ali, J. [sic - Anwarul Haq, J.] (as he then was) and found to be in conformity with the generally accepted and recognized principles of criminal justice. A similar view was also expressed by this Court in the judgment, reported as Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others (PLD 1996 SC 632). The provisions of the Pakistan Army Act were scrutinized by the Federal Shariat Court in the case, reported as Col. (R) Muhammad Akram (supra) and generally passed muster. The procedure which was found acceptable for officers and men of the Pakistan Army can hardly be termed as unacceptable for trial of terrorists, who acts as enemies of the State."
>
> (Underling added)

Likewise, Umar Ata Bandial, J., in his concurring note added to the judgment of Sh. Azmat Saeed, J., observed:

> 33. The mandate given, inter alia, to trial under the PAA necessarily raises the question whether a Court Martial trial conforms the judicially recognized principles of fair adjudication by providing requisite due process. The international law aspect of this matter has been discussed above and there can be no dispute that Court Martial procedure under the PAA complies the minimum safeguards expected by the Geneva Conventions, 1949. Be that as it may, the standard and adequacy of due process provided by Courts Martial under the PAA has been considered and approved by this Court as being sufficient and satisfactory in the case of Shahida Zahir Abbasi (ibid).
>
> .....
>
> The said law which has been held to provide sufficient legal safeguards for a fair trial of those citizen who are members of the Armed Forces even in relation to offences falling under the ordinary criminal law of the country, cannot surely be said to be deficient for the trial of offences alleged to have been committed by terrorist militants, who fall in the category of unlawful combatant engaged in armed conflict with the Armed Forces and the law enforcement agencies of Pakistan in their bid to wage war against Pakistan.
>
> (Underling added)

Similarly, the legal implications of Article 175(3) of the Constitution had also ripened at the time the cases of **Liaquat Hussain case (supra)** and **District Bar case (supra)** were being heard and decided, yet none of the learned justices in both cases found that the law declared in the **F.B. Ali case (supra)** was no longer a good law, or for that matter, has lost its efficacy.

17. I am of the considered opinion that, though the view expressed by eight Judges, as voiced by Sh. Azmat Saeed J. in his opinion, being not the view of the majority, cannot be treated as the decision of the seventeen-member Bench that heard and decided **District Bar case (supra)**, the judicial discipline and propriety demand that, any view contrary to the view of eight Judges should only be taken by a Bench of more than eight Judges. That is why, I have stated above that it would have been more appropriate if this case had been heard and decided by a Bench of nine Judges, as originally constituted.

Prejudice to the Federation

18. Apart from the legal position stated above, certain observations made and orders passed by this Court during the proceedings of the present petitions also need to be considered, particularly, as to the *vires* of sections 2(1)(d)(i) & (ii) and 59 of the Army Act. To start with, it must be noted that, on 21st of July 2023, the learned Attorney-General was cautioned by the Court to focus on the case of the perpetrators of the 9th and 10th of May, and not to be distracted in making his submissions to cases of civilians, who had earlier been tried and convicted by military courts under the Army Act, as their cases were not before the Court. Thus, it is not appropriate, in my opinion, to pass a definite finding on the *vires* of sections 2(1)(d) and 59(4) of the Army Act, without giving the Federation a reasonable opportunity to assist the Court on this point, in particular, regarding the applicability of these provisions to foreigners, foreign spies, alien enemies or such civilians, who attack the defence installations and/or defence personnel with the intention or object of causing damage to the defence of Pakistan.

Conclusion – Issue No. I

19. The upshot of my above discussion is that, while sitting on a Bench of five Judges, I am bound by what was decided in **F.B. Ali case**

(supra), wherein, after testing the provisions of sections 2(1)(d)(i) & (ii) and 59(4) of the Army Act on the touchstone of the fundamental rights agitated before us in the present cases, the Court adjudged them to be *intra vires* the Constitution, and not violative of Articles 9, 10A, and 25 of the Constitution.

20. I, therefore, in view of the above, would not pass a definite finding on Issue No.1, and hold that the contentions of the learned counsel for the petitioners, as to reconsidering the law declared in **F.B. Ali case (supra)**, are undoubtedly legally and constitutionally very weighty, and thus, make a *prima facia* case, warranting to be considered and decided by a larger Bench of more than eight Judges of this Court, as was right constituted at the commencement of the proceedings of the present cases.

Issue No. II - Applicability of section 2(1)(d)(ii) to the civilian

21. Now, I proceed to examine the second issue, as to whether section 2(1)(d)(ii) of the Army Act applies to the civilian protesting perpetrators involved in the incidents of the 9th and 10th of May 2023, who are citizens of Pakistan and are not alleged to have any affiliation or conspired with any foreign country or agency, and whether they can be tried by a military court under the Army Act. The provisions of section 2(1)(d)(ii) of the Army Act are cited here for ease of reference:

> **2. Persons subject to the Act**. (1) The following person shall be subject to this Act, namely:-
>
> .....
>
> (d) persons not otherwise subject to this Act who are accused of –
>
> (i) .....
>
> (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; (Underlined)

The offences under the Official Secrets Act, 1923 relevant to the allegations of the Federation, may entail the following penalties:

> **3. Penalties for supplying.-** (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 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.
>
> **7. Interfering with officers of the Police or members of the armed forces of Pakistan–** (1) No person in the vicinity of any prohibited place shall obstruct, knowingly mislead or otherwise interfere with or impede, any police officer, or any member of [the armed forces of Pakistan] engaged on guard, sentry, patrol, or other similar duty in relation to the prohibited place.
>
> (2) If any person acts in contravention of the provisions of this section, he shall be punishable with imprisonment which may extend to two years, or with fine, or with both.

And, as the offences stated above revolve around "prohibited places", it must also be carefully considered. The said term, as defined in the Official Secrets Act, 1923, reads as under:

> **2.(8). "prohibited place"** means—
>
> (a) any work of defence, arsenal naval, military or air force establishment, office, or part of building 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, or for the purpose of getting any metals, oil or minerals of use in time of peace and war ;
>
> (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 any access, intrusion, approach, attack or 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 channel [or any strategic infrastructure], or other means of communication by land or water or air (including any works or structures being part thereof or connected therewith) or any place used for modern communication means, for gas, water or electricity works or other works for purposes of a public character, or any place where any munitions related to defence of war or any sketches, models, plans, or documents relating thereto, are being made, repaired or stored otherwise than on behalf 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 the destruction or obstruction thereof, or interference there with, 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:
>
> Provided that where for declaring a prohibited place under sub-clause (c) or sub-clause (d) a notification in the official Gazette is not considered desirable in the interest of the security of the State, such declaration may be made by an order a copy or notice of which shall be prominently displayed at the point of entry to, or at a conspicuous place near, the prohibited place.

It must be remembered that the constitutional validity of section 2(1)(d)(ii) of the Army Act was upheld in **F.B. Ali case (supra)**, for the reason that it had a close and direct nexus with the defence of Pakistan. Therefore, for determining the applicability of these provisions of section 2(1)(d)(ii) of the Army Act to a particular incident involving civilians, we have to read them in the light of the following principle deduced from **F.B. Ali case (supra)**, which as aforementioned was also affirmed in **Liaquat Hussain case (supra)** in terms that:

> To be triable before a military court under the Army Act, the offences mentioned in section 2(1)(d) of the Army Act must have a close and direct nexus with the defence of Pakistan and must have been committed with the intention or object of causing damage to the defence of Pakistan.

22. Thus, section 2(1)(d)(ii) of the Army Act would apply to an offence under the Official Secrets Act, 1923 which relates to any 'work' of the Armed Forces that has a direct and close nexus with the defence of Pakistan or to any 'affairs' of the Armed Forces that has such a nexus with the defence of Pakistan, and is committed with the intention or object of causing damage to the defence of Pakistan. I tend to agree with the principle so laid down, had the intent of the legislature been otherwise, the said provision would have simply stated that:

> (d) persons not otherwise subject to this Act who are accused of –
>
> (ii) having committed an offence under the Official Secrets Act, 1923;

It is this intent of the legislature that must be respected, more so when the rights of a citizen of Pakistan to be tried by an ordinary criminal court are being impaired by making him liable under the Army Act. Any other interpretation of the said provision of the Army Act would have harsh consequences.

23. One striking case, that highlights the point in issue, is **Allah Rakha v. District Magistrate (PLD 1968 Lah 1061)** wherein a civilian was arrested and detained being accused of an offence under section 3 of the Official Secrets Act, 1923, and tried by a court martial. The basis for the allegation was that he was apprehended by the personnel of the Border Police, while he was talking to an Indian Sentry at the border, which was held to be sufficient for the civilian to be taken into custody by the military authorities and detained in such custody until he is tried by a military Court or otherwise released. I am of the earnest view that such judicial pronouncements should not be repeated.

24. Another case worth mentioning is **Ghulam Abbas Niazi v. Federation of Pakistan (PLD 2009 SC 866)**, where a breach of contract to transport the supply aviation petroleum product by a civilian to Pakistan Air Force, led to the allegation of theft, was proceeded as an offence of 'mutiny', and that too, tried and convicted by the court martial under the Pakistan Air Force Act, 1953. This Court most aptly declared the entire proceedings carried out against the civilian contractor, as *male fide in law*, thereby rendering the trial *coram non judice* and without jurisdiction.

25. Viewed in this perspective, clause (d)(ii) of section 2(1) of the Army Act broadly relates to the protection and preservation of the defence installations. The incident that could attract the applicability of these provisions must have been done with the intention or object of causing damage to the defence of Pakistan. Furthermore, it is not the commission of any offence by a civilian under the Official Secrets Act, 1923 relating to any 'work' or 'affair' of the Armed Forces that can make that civilian subject to the Army Act, but the offence must relate to such work or affair of the Armed Forces that is an integral part of their core function of defending Pakistan against external aggression or threat of war, which in

my view is missing in the case of the 103 civilian protesting perpetrators involved in the incidents of the 9th and 10th of May 2023.

26. There is yet another aspect of the case that requires anxious consideration. The glaring fact that 'similarly situated' persons have been discriminated against, and there has been a pick and choose by the authorities, in referring the cases for the trial of 103 civilian protesting perpetrators before the court martial under the Army Act, while others 'similarly situated' persons are being proceeded against under the ordinary criminal dispensation. This was never the legislature's intent for the insertion of sections 2(1)(d)(i) & (ii) and 59(4) in the Army Act *vide* the Ordinances No. III and IV of 1967, as elaborately explained and discussed in **F.B. Ali case**. The principle enunciated therein has been resounded in the cases that followed, in particular, **Government of Balochistan v. Azizullah Memon (PLD 1993 SC 43)**, which was ably attended to in **Ghulam Abbas Niazi case** in the following terms:

> 16. Principles for application of equality clause with reference to Article 25 of the Constitution have exhaustively been laid down and explained by this Court in Government of Balochistan v. Azizullah Memon PLD 1993 SC 43(h). It was laid down, besides others, that people similarly situated and similarly placed shall not be discriminated and treated differently. In case of a crime or to determine as to who are to be treated as accused, the placement of the accused is to be determined by narration of facts of each crime. In this view of the matter, all persons involved in the commission or omission of similar facts are to be considered as similarly situated. Chambers English Dictionary defines similarly "situated" as similarly "circumstanced". In the case in hand, all the civilians accused and all the Air Force Officers accused were similarly circumstanced and hence could not be discriminated. Any such discrimination is a gross violation of Article 25 of the Constitution which, in cases of crimes, becomes pronouncingly magnified.
>
> .....
>
> 24. It is another settled principle of law in every civilized State of the world that people charged of similar offence during same transaction or transactions, are to be jointly tried. This rule of law, practice and procedure is strictly derived from the principles of equality. The wisdom behind is that those who are co-accused in the same transaction and tried for the same offence or cognate offences, as the case may be, should be in a position to defend themselves equally against the same narration of facts as well as charges. Another reason is that if one accused shifts his burden to the other one, the other should be in a position to defend himself and rebut the allegations there and then, in the presence of the other co-accused. In the instant case, though the facts are exactly the same, yet the Air Force Officers were given a separate trial while the appellants were tried separately.....

> Consequent upon what has been discussed above, we are of the view and do hereby observe and declare that the attraction of the provisions of sections 2(dd)(i) and 37(e) of the Pakistan Air Force Act, 1953 against the appellants was an act of mala fide-in-law, thereby rendering the trial coram non judice and without jurisdiction.

27. When we examine the facts of the present case in light of the above principles, we find that the trial of civilian protesting perpetrators involved in the incidents of the 9th and 10th of May 2023 may be proceeded strictly under the relevant criminal laws applicable to civilians; but there is nothing on record to even suggest that they so acted with the intention or object of causing damage to the defence of Pakistan or that their alleged acts relate to such work or affair of the Armed Forces which form an integral part of the core function of defending Pakistan against external aggression or threat of war so as to come within the preview of section 2(1)(d)(ii) of the Army Act.

Conclusion – Issue No. II

28. Thus, in my concerted opinion, section 2(1)(d)(ii) of the Army Act does not appy to the 103 civilian protesting perpetrators involved in the incidents of the 9th and 10th of May 2023 and they cannot, thus, be tried by a military court under the Army Act and are to be tried under the relevant criminal laws.

29. These are the reasons for which I concurred with my learned colleagues in holding:

> (i) that the foregoing the trials of civilians and accused persons, being around 103 persons who were identified in the list provided to the Court by the learned Attorney General for Pakistan by way of CMA No.5327 of 2023 in Constitution Petition No.24 of 2023 and all other persons who are now or may at any time be similarly placed in relation to the events arising from and out of 9th and 10th May, 2023 shall be tried by Criminal Courts of competent jurisdiction established under the ordinary and / or special law of the land in relation to such offences of which they may stand accused; and
>
> (ii) that any action or proceedings under the Army Act in respect of the aforesaid persons or any other persons so similarly placed (including but not limited Constitution Petition Nos.24, 25, 26, 27 & 28 and 30 & 35 of 2023 6 to

trial by Court Martial) are declared void and of no legal effect.