P L D 1975 Supreme Court 506

Present: Hamoodur Rahman, C. J., Muhammad Yaqub Ali, Salahuddin Ahmed, Anwarul Haq and Muhammad Gul, JJ

BRIG. (RETD.) F. B. ALI AND ANOTHER-Appellant

versus

THE STATE-Respondent

Criminal Appeal No. 8 of 1975, decided on 12th September 1975.

(On appeal from the judgment and order of the Lahore High Court, dated 20-5-74 in Writ Petition No. 1398 of 1973).

(a) Pakistan Army Act (XXXIX of 1952)-

--S. 2(1)(d) read with Defence Services Laws (Amendment) Ordinance (III of 1967) and Defence Services Laws (Second Amendment) Ordinance (1V of 1967) -Effect.

The appellants were sought to be brought within the ambit of the Pakistan Army Act, 1952 by reason of amendments made in the Act by Ordinance III of 1967 and Ordinance IV of 1967 on the accusation made against them of attempting to seduce certain named officers and others in the military forces of Pakistan from their allegiance to the Government. The appellants claimed that since they had been retired from the Army they were no longer subject to the Pakistan Army Act and they could not be tried by a General Court Martial. The contention was that the provisions of clause (d) of subsection (1) of section 2 of the Pakistan Army Act as introduced by Ordinance III of 1967 should be read in a restricted manner and unless some nexus or connection with Army is established persons not normally subject to the Army Act should not be made liable to be dealt in accordance therewith. It has asserted that notwithstanding the amendment introduced in the Army Act by Ordinance III of 1967 the provisions of the Army Act could not be extended to persons who have at the relevant time no connection whatsoever with the Army. Even persons who are normally subject to the Army discipline remain subject only till retirement, release, discharge, removal or dismissal from service.

Held: The words of clause (d) introduced into section 2 of the Army Act by Ordinance No. III of 19.67, are clear enough. The words "persons not otherwise subject to this Act" clearly embrace all others who are not subject to the said Act by reason of the provisions of clauses (a), (b), (bb) and (c). The intention

of the framers of clause (d) is clearly that even civilians or persons who have never been, in any way, connected with the Army should be made subject to it in certain circumstances gravely affecting the maintenance of discipline in the Army. The nexus required is that they should be persons who are accused of seducing or attempting to seduce any person subject to the Army Act from his duty or allegiance to Government. In this case, the appellants were so accused, and, therefore, came within the ambit of clause. (d). The nexus, if any required, was provided by the accusation. No other nexus or connection was necessary.

(b) Defence Services Laws (Amendment) Ordinance (III of 1967)-

And Defence Services Laws (Second Amendment) Ordinance (IV of 1967)-Valid legislation falling within item I of Third Schedule to Constitution of Pakistan (1962) "Ordinances not violative of Fundamental Rights Nos. 1 & 15-Constitution of Pakistan (1962), Art. 6, Fundamental Rights Nos. 1 & 15 and Third Schedule, item 1.

The vires of Ordinance III of 1967 and Ordinance IV of 1967 was challenged on the ground that at the relevant time the President had no power to promulgate these Ordinances which he could do only during an emergency. It was contended that the subject-matter of the legislation did not fall within any one of the items mentioned in the Third Schedule to the Constitution of Pakistan (1962). The contention was that the subject of legislation of these Ordinances was not the defence of Pakistan or the control of the defence forces of Pakistan. The Ordinances neither make any provision for maintaining discipline among the armed forces nor do they provide for regulating the terms and conditions of their service nor are the persons to whom they seek to reach either directly or indirectly connected with the defence of Pakistan. Indeed, the essential purpose sought to be achieved was to make provision for a separate machinery for the enforcement of the ordinary criminal law of the land in field which was already occupied by the Penal Code and the Criminal Procedure Code. In pith and substance, therefore, what the Ordinances sought to do was to amend the Penal Code and the Criminal Procedure Code. It was indeed a cloak to delete the provisions of section 131 of the Penal Code and, if this is held to be valid, it will amount also to amending the provisions of sections 2 and 3 of the Criminal Procedure Code, so as to take away the right to trial under the ordinary law, which is the right of every ordinary citizen. In, order to bring the law within the ambit of item No. 1 of the Third Schedule, the law must be addressed to the members of the armed services and not outsiders. Even otherwise, it was urged, Military Court's

jurisdiction over civilians who might remotely have some contract or relationship with Army is to be decried.

Held: In accordance with the American Constitutional provision no statute could be framed by which a civilian could lawfully be tried by a Military Court in time of Peace. The position in our country is, however, different. It seems that if the Army Act is a valid piece of legislation, then it does permit the trial of civilians, in certain circumstances, by a military Court even in times of Peace.

Commentaries on the Constitution of the United States by Antieau, p. 288; Bill of Rights Reader by Milton R. Knovitz; Lloyd C. Duncan v. Duke Paca Kahanamoku 327 U S R 304 and Curtix Reid v. Clarice B. Covert 354 U S R I considered.

The Constitution of Pakistan (1962), had only one legislative list of subjects within the exclusive field of the Central Legislature. All other subjects were within the legislative field of a Province under the provisions of Article 131 of the said Constitution. Even so, the Central Legislature had power to make laws for the whole or any part of Pakistan with respect to any matter not enumerated in the list given in the Third Schedule where the national interest of Pakistan in relation to the security of Pakistan (including its economic and financial stability) planning or coordination for the achievement of uniformity in different parts of Pakistan (if required) or if any Provincial Assembly considered it desirable that a matter, not enumerated in the Third Schedule, should be regulated in the Province by an Act of the Central Legislature and passed a resolution to that effect, the Central Legislature could make a law with respect thereto. Again by reason of the provisions of Article 134, if a Provincial Law was inconsistent with a Central law, it was the latter which prevailed and not the former to the extent of suci3 inconsistency.

Be that as it may, the pith and substance rule still holds good and we have to consider as to what in reality is the true nature and character of the impugned legislation if any controversy arises as to the competency of the Federal Legislature to legislate with regard to a subject not directly covered by any specific item in the list. It will be convenient at this stage to examine the provisions of Ordinances III and IV of 1967 together. Both these Ordinances were promulgated on the 3rd October 1967, by the President in exercise of his powers under clause (i) of Article 29 of the Constitution of 1962 and the avowed object of the legislation was the expediency of further amending the Pakistan Army Act, 1952; the Pakistan Air Force Act, 1953 and the Pakistan Navy Ordinance, 1961. All these were existing Central Laws which could not have been amended by the Provincial Legislatures. By the amendment, introduced by Ordinance No.

III of 1967, the -Army Act was sought to be extended to a new category of persons who were not otherwise subject to the said Act, namely:-

(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

(li) 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.

Now it has been contended that since the offence of seducing or attempting to seduce a person subject to the Army Act from his duty or allegiance to Government is already an offence under section 131 of the Penal Code, triable by the ordinary criminal Courts, this is in substance and iii reality an amendment of the Criminal Procedure Code.

This may well be, incidentally the consequence of the amendment introduced, in so far as the persons falling within the new category are concerned, but it cannot be said that this is in pith and substance the object of the amending legislation. 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 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 influences. The legislation, therefore, came directly within item I of the Third Schedule of the 1967, Constitution. It did not amend either section 131 or section 131) of the Penal Code.

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.

Ordinance No. IV of 1967 also amends section 59 of the Army Act by adding thereto a subsection (4) which reads:

"(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 Mien such person was subject to this Act; and the provisions of this section shall have effect accordingly.

The main purpose of this addition 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. This became necessary because otherwise such persons would have been liable for trial under the Army Act only in respect of an offence of the said type committed after they became subject to the Act as a result of the accusation, which would necessarily be made after the commission of the offence.

The fact that it incidentally entrenches upon the provisions of the Criminal Procedure Code does not make it in substance a legislation for amending the Criminal Procedure Code and, therefore, under the pith and substance rule, this too was, a valid legislation within item 1 of the Third Schedule.

Both these Ordinances, it may further be -pointed out, were subsequently, on the 2nd December 1967, approved by the National Assembly under clause (iii) of Article 29 of the Constitution of 1962.

The impugned Ordinances are within the exclusive legislative competence of the Central Legislature and fall directly within items 1, 48 and 49 of the Third Schedule.

Subrahmanyan Chettiar v. Muttuswami Goundan .1940 F C R 188; United Provinces v. Attiqa Begum 1940 F C R 110; Haider Automobile Ltd. v. Pakistan P L D 1969 SIC 623; Syed Ghulam Ali Shah v. State P L D 1970 S C 253; Pir Rashid-ud-Daula v. Chief Administrator of Auqaf P L D 1971 S C 401, Muhammad Yousaf v. The Crown P L D 1956 F C 395; Prafulla Kumar v. Bank of Commerce, Khulna P L D 1947 P C 1; Bank o, Commerce Ltd., Kh ulna v. Amulya Krishna Basu Roy Ch. and others P L D 1947 P C 12; and Gul Akbar v. Chief of Air Staff P L D 1968 Pesh. 114 ref.

(c) Constitution of Pakistan (1962)-

---Art. 133--Provisions do not debar superior Courts from pronouncing upon constitutionality of laws-Provisions do not

operate as a general ouster of jurisdiction of Courts from examining constitutionality of law on any other ground.

Fazlul Quader Chaudhry v. Muhammad Abdul Haque P L D 1963 S C 486 and East Pakistan v. Sirajul Haq P L D 1966 S C 854 ref.

(d) Constitution of Pakistan (1962)-

--Art. 6, Fundamental Right No. 1 - "Law" - Connotation - Law means positive law; a formal pronouncement of will of competent law-giver-"Law" in order to qualify as law need not be based on reason or morality [Anwarul Haq, J. dissenting]-Defence Services Laws Amendment Ordinance (III of 1967)-Defence Services Laws (Second Amendment) Ordinance (IV of 1967) --- Constitution of Pakistan (1973h Art. 9.

Where the contention was that the Ordinances III of 1967 and IV of 1967 were not law at all, because, they purported to unreasonably deprive a citizen of even the norms of a judicial trial it was held that this, generalization could not 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.

It could not therefore be said that .the impugned Ordinances are not law and, therefore, violative of Fundamental Right No. 1 of Constitution of Pakistan (1962).

Asma Jllani's case P L D 1972 S C 139; Lee v. Bunde & Torrington Junction Railway Co. L R 1871 C P 570/582 and Dr. C. K. Allen's Law in the Making 7th Edn, p. 450 ref.

M. Munir's Constitution of the Islamic Republic of Pakistan, 1962 p. 197. rel.

Per Anwarul Haq, J. (dissenting)-

It is difficult to accept the contention that the term `law' as used in Fundamental Right No. 1 of the 1962 Constitution, should be interpreted as meaning only positive law. On the contrary, the term `law', as used in this Fundamental Right, must be construed as also including the judicial principles laid down from time to time by the superior Courts, and the accepted forms of legal process and juridical norms obtaining in Pakistan. These

accepted judicial principles, forms of legal process and juridical norms are so well established and specific that they cannot be brushed aside as being mere abstract or vague considerations of ethics and morality, or philosophical concepts of law. They are not mere theories advanced for the purpose of invalidating competently enacted laws; on the contrary, they are established rules and concepts which give substance and meaning to all laws by promoting the ends of a just legal order.

M. Munir's Constitution of the Islamic Republic of Pakistan, 1962, p. 197 ref.

(e) Constitution of Pakistan (1962)-

-- Art. 6, Fundamental Right No. 15 and Constitution of Pakistan (1973), Art. 25-`Equal protection of law'-Meaning-Guarantee does not forbid discrimination with respect to things different nor does it prohibit reasonable classification-Clause guarantees equality and not identity of rights-Mere fact that legislation is made to apply only to certain group of persons does not invalidate legislation if, all persons subject to its terms, are treated alike under similar circumstances - Equal protection clause does not demand uniformity of procedure. .

Equal protection of the laws does not mean that every citizen, no matter what his condition, must be treated in the same manner. The phrase 'equal protection" of the laws means that no person or class of persons shall be denied the same protection of laws which is enjoyed by other persons or other class of persons in like circumstances in respect of their life, liberty, property or pursuits of happiness. This only means that persons, similarly situated or in similar circumstances, will be treated in the same manner. Besides this, all law implies classification, for, when it applies to a set of circumstances, it creates thereby a class and equal protection means that this classification should be reasonable. To justify the validity of a classification, it must be shown that it is based on reasonable distinctions or that it is on reasonable basis and rests on a real or substantial difference or distinction. Thus different laws can validly be made for different sexes, for persons in different age groups, e.g., minors or very old people; different taxes may be levied from different classes of persons on the basis of their ability to pay. Similarly, compensation for properties acquired may be paid at different rates to different categories of owners. Such differentiation may also be made on the basis of occupations or privileges or the special needs of a particular locality or a particular community. Indeed, the bulk of the special laws made to meet special situations come within this category. Thus, in the field of criminal justice, a classification may well be made on the basis of the heinousness of the crime committed or the necessity of

preventing certain anti-social effects of a particular crime. Changes in procedure may equally well be effected on the ground of the security of the State, maintenance of public order, removal of corruption from amongst public servants or for meeting an emergency.

Where, however, the law itself makes no classification but leaves the selection to an outside agency or an administrative body without laying down any guidelines, thus enabling the body or authority to pick and choose, a legitimate complaint may be made on the ground that the law itself permits discriminatory application.

Warris Meah v. The State P L D 1957 S C (Pak.) 157 and Jibendra Kishore Achharyya v. Province of East Pakistan P L D 1957 S C (Pak.) 9 ref.

The concept of the `equal protection of laws', which is derived from the American Constitution is not susceptible of any exact definition. "In other words", as stated by the editors of American Jurisprudence. Vol. 12, page 409, "no rule as to protection of laws that will cover every case can be formulated and no test of the type of cases involving such a clause of the Constitution can be infallible or all inclusive. Moreover, it would be impracticable and unwise to attempt to lay down any generalization covering the subject; each case must be decided as it arises." Be that as it may, the only generalization that is possible is that it means "subjection to equal laws applying to all in the same circumstances" but this does not mean that laws must affect every man, woman and child alike. This guarantee does not forbid discrimination with respect to things that are different nor does it prohibit classification which is reasonable and is basted upon substantial differences having a relation to the objects or persons dealt with and to the public purpose sought to be achieved. It guarantees equality and not identity of rights.

American Jurisprudence, Vol. XII, p. 409 ref.

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. In fact almost all legislation involves some lord of classification whereby some people acquire rights or suffer 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 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.

Tinsley v. Anderson 171 U S 312; Graham v. West Virginia 224 U S 616; Willis' treatise on the Constitutional Law of the United States, p. 580s Ch. Ata Elahi v. Mst. Parveen Zohra P L D 1958 S C (Pak.) 298; Jibendra Kishore Achharyya v. Province of East Pakistan P L D 1957 S C (Pak.) 9; Zain Noorani v. Secretary, National Assembly P L D 1957 S C (Pak). 46 and Waris Meah v. State P L D 1957 S C (Pak.) 157 ref.

(f) Pakistan Army Act (XXXIX of 1952)-

Ss. 2(1)(d) & 59 and Penal Code (XLV of 1860), S. 121-A.- Words "any person subject to this Act" in S. 59 of Army Act- Conditions necessary for making the deeming clause to be operative-Offence under S. 121-A, P. P. C. could not be tried by Court Martial when offence committed by a person not subject to Army Act at time of commission of offence.

Section 59(1) of the Pakistan Army Act seems to provide that if any person who is or has become subject to the Army Act, commits any civil offence, he shall be deemed to be guilty of an offence against the said Act and, if charged therewith, shall be liable to be tried by a Court Martial subject to the limitations mentioned in subsection (2) and will be punishable t as prescribed in clauses (a) and (b).

By using the words "shall be deemed to be guilty of an offence against this Act", the Legislature has clearly roped in such persons fictionally even in respect of civil offences committed at any place in or beyond Pakistan The object clearly is to prevent a double trial in two different forums of such persons who are subject to the provisions or have become subject to the provisions of the Army Act. This subsection (1) does not, of course, indicate that such civil offences should be cognate offences with those triable under the Army Act but it is quite possible that this section was brought in to make a joint trial possible of an offence punishable under the Act and a civil offence committed by a person who is or has become subject to the provisions of the Army Act in the same transaction.

The key words in subsection (1) of section 59 of the Pakistan Army Act, 1952 are "any person subject to this Act who . . . . . commits any civil offence shall be deemed to be guilty of au offence against this Act". It will be noticed that according to the above-quoted words two conditions are necessary to be fulfilled before the deeming clause can become operative. The first condition is that the person concerned must be a person who is

subject to the Army Act and the next condition is that be "commits" the civil offence when he is so subject. The Legislature has not said "has committed". The use of the verb "commits" in the present tense makes it abundantly clear that the civil offence to be so deemed to be an offence under the Army Act must be one which is committed after the person concerned has become subject to the said Act and not before.

But for these words even the offences mentioned in clause (d) of section 2(1) of the Act would not have been triable under the Army Act in the case of the appellants because they became subject to the Army Act only from the point of time of the accusation which was made considerably after the commission of the offence. According to the charge, the offence under section L' 1-A is alleged to have been committal between August 1972 and 30th March 1973, but the accusation was made on the 4th July 1973, if the dote on the charge-sleet is treated as the date of accusation, or the 9th July 1973, if the date of reading out the charges is the relevant date. The appellants became subject to the Army Act only from this date.

The offence under section 121-A, P. P. C. could not in the facts of the present case have been tried by a Court Martial in so far as the present appellants were concerned because they were not subject to the Army Act when the offence was alleged to have been committed by them.

(d) Armed Person--- Mere lodging of information against a person does not make him an accused nor can a person be called accused against whom investigation is conducted by police.

Nur Mohammad v. Commissioner, Sargodha Division P L D 1968 Lah. 1441; Karam Ilahi v. Emperor A I R 1947 Lah. 929; Empress v. Mona Puna I L R 16 Bom. 661; Jhoja Singh v. Empress I L R 23 Cal. 493; Empress v. Mutasaddi Lal I L R 21 All. 107; Amduniyan Guljar Patel v. Emperor A I R 1937 Nag. 17; Aiyer's Manual of Law Terms and Allah Rakha v. District Magistrate, Sialkot P L D 1968 Lah. 1061 ref.

(h) Interpretation of statutes-

Penal statutes-Language to be strictly construed--Question of "carrying forward any legal fiction" does not arise.

(i) Criminal Procedure Code (V of 1898)-

--S. 537-Misjoinder of charges-Mare irregularity, curable under S. 537.

Asiruddin Chaudhry v. Crown P L D 1953 F C 125; Mohammad Ayub Khuhto v. Pakistan P L D 1960 S C 237, Qadar Dad v. Sultan Bibi etc, P L D 1950 F C 129; Subrarnania lyer v. King-Emperor 28 I A 257; Haji Mohammad Abdullah v. Imdad Ali Shah 1972 S C M R 173; Mohammad Z7far Shah v. State 1972 S C M R 216; Commissioner, Rawalpindi Division v. Pervez Iqbal P L D 1968 S C 259; Commissioner, Sargodha Division v. Khizar Hayat P L D 1966 S C 793; Shahadat Khan v. Home Secretary, Government of West Pakistan P L D 1969 S C 158 and Syed Raunaq Ali v. Chief Settlement Commissioner P L D 1973 S C 236 ref.

(j) Jurisdiction--

-- Tribunal or Court acting without jurisdiction-Action nullity, nevertheless, what it does with jurisdiction at same time will not be rendered void.

There can be no doubt that if a Tribunal or a Court acts wholly without jurisdiction, its action would be a nullity but it does not necessarily follow from this that even what it does with jurisdiction will also be rendered void, because, the Tribunal or Court has at the same time done something which was without jurisdiction. If it is possible to separate what has been done with jurisdiction from that which has been done without jurisdiction without any prejudice to anyone, then what is done with jurisdiction cannot be invalidated or declared null and void, at least, in the writ jurisdiction.

Khizar Hayat's case P L D 1966 S C 793 ref.

(k) Writ--

-- Question of jurisdiction-Court Martial trying particular case with jurisdiction-Ordinary Courts of superior jurisdiction will not interfere ire exercise of their power of judicial review merely on ground that some rule of procedure not followed.

Mohammad Yaqoob Khan v. Emperor P L D 1947 P C 39; Mohammad Nawaz v. Crown 1951 F C R 135; The King v. The Army Council Ex parte Ravenscroft (1917) 2 K B .504; Halsbury's Laws of England, p. 825; Hood Philh0s' Constitutional and Administrative Law, Stir Edn., p. 305 arid Rex v. Secretary of State for War (1949) 1 A E R 242 rel.

(l) Constitution of Pakistan (1973)-

----- Art. 199(3) [as amended]-Bar contained in-Action without jurisdiction, coram non judice or mala fide-Bar not operative.

Mohammad Akram Khan v. Islamic Republic of Pakistan P L D 1969 S C 174 and State v. Ziaur Rahman P L D 1973 S C 49 ref.

(m) Writ-

Petition to be decided in accordance with law prevailing on date of filing petition.

Sutlej Cotton Mills Ltd., Okara v. Industrial Court, West Pakistan P L D 1966 S C 472 rel.

M. Anwar, Senior Advocate (M. Bilal, Advocate with him) instructed by M. A. Rahman, Advocate-on-Record for Petitioners.

Yahya Bakhtiar, Attorney-General for Pakistan for the State.

M. Anwar Raja, Deputy Attorney-General instructed by Kh. Mushtaq Ahmad; Riaz Ahmad, Asstt. Advocate-General, Punjab and Ijaz Ali, Advocate-on-Record (under Order XLV, Supreme Court Rules, 1958).

Dates of hearing: 2nd, 3rd, 4th, 7th, 8th, 9th and 10th of April 1975.

JUDGMENT

HAMOODUR RAHMAN, C. J.-This appeal, by special leave arises out of a judgment of a Division Bench of the Lahore High Court in Constitutional Petition No. 1398 of 1973.

The said petition was filed on the 19th July 1973, under Article 201 of the. Interim Constitution of the Islamic Republic of Pakistan to call in question the jurisdiction of the Court Martial convened on the 9th July, 1973 to try the said appellants alongwith a number of other army officers on, Inter alia, the following charges:-

"1st Charge.--PAA section 59 against all the accused.

The accused PA-2480, Brigadier (Retd.) F. B. Ali, being a person subject to PAA under the provisions of section 2(1)(d) of the said Act (accused No. 1), PA-31196, Col. (Retd.) Abdul Aleem Afridi, being a person subject to PAA under the provisions of section 2(1)(d) of the said Act (accused No. 2). . . . . all attached to Special Detention Camp, Attock Fort, are charged with :-

Committing a civil offence, that is to say, conspired to wage war against Pakistan, and thereby committed an offence punishable under section 121-A of the P. P. C.

In that they together, between the period August 1972 and 30th March 1973, at Rawalpindi, Jhelum, Lahore and elsewhere formed a plot to overthrow the Government established by law in Pakistan by putting under arrest with the help of troops at their disposal, the President, the Governor of Punjab, the Ministers, all the Generals assembled in a conference and other officials holding key positions in the Administration, and thereby to assume power in the country for themselves, by means of criminal force.

2nd Charge.-PAA Section 31(d) (against Brig. (Retd.) F. B. Ali, accused No. 1 only).

Attempting to seduce any person in the Military Forces of Pakistan from his allegiance to the Government of Pakistan.

In that he, during the period mentioned it the first charge, at various places in Pakistan, attempted to seduce Maj. Shahid M. Ataullah and other persons in the Military Forces of Pakistan from their allegiance to the Government, in order to enlist their support for furthering the design of the conspiracy mentioned in the first charge.

3rd Charge.-PAA Section 31(d) (against Col. (Retd.) Abdul Aleem Afridi, accused No. 2 only).

Attempting to seduce any person in the Military Forces of Pakistan from his allegiance to the Government of Pakistan.

In that he, during the period mentioned in the first charge, at various places an Pakistan, attempted to seduce Lt.-Col. Naseer Ahmad, Major Sardar Ali and other persons in the Military Forces of Pakistan from their allegiance to the Government, in order to enlist their support for furthering the design of the conspiracy mentioned in the first charge.

Place: Attock Fort

Date 4th July 1973.

(Sd.) Brig.
Commanding Officer
(Ghaus Mohammad Khan)

To be tried by General Court Martial.

Place: Rawalpindi
Dated: 4th July 1973.

(Sd.) Maj.-Gen.

Adjutant General
for Chief of the Army Staff
(A. A. Qureshi)."

The two appellants now before us claim that since they had been retired from the Army on the 10th of August 1972, they were no longer subject to the Pakistan Army Act, and they could not be tried by a General Court Martial.

It appears that as soon as the General Court Martial was convened anti the question was put to the accused to enquire as to whether any one had any objection to be tried by the President, named in the convening order, the appellant No. 1, followed by all other accused persons, objected to the President as well as the other members of the Court on legal grounds which they stated could only be put forth by their learned counsel who were not present on that day.

This objection was not interpreted as an objection to tire jurisdiction of the Court but as an objection on the ground of general prejudice, Later however, when the charge-sheet was read out, the appellants Nos. 1 and 2 again objected to both the charges under rule 39 of the Pakistan Army Act Rules that the charges made out no offence as also specifically claimed that under rule 41 of the said Rules, the Court did not have any jurisdiction to them, at any rate, on the first charge. They also claimed that they ought to be tried separately on each charge. Both the appellants claimed that their joint-trial on both charges would result in grave prejudice to them. The prosecution, however, replied that separate trials could not be held, as both the charges were such that they made out a single story as a coherent whole and the facts of the case could not be separated. The prosecution also maintained that the Court had jurisdiction.

The objections of the accused were overruled by the Court Martial and, therefore, the writ petition, from which this appeal arises, was moved in the High Court for seeking an order declaring that the trial of the two appellants by a Court Martial was without lawful authority and of no legal effect and further praying that proceedings before the Court Martial be stayed.

Unfortunately, this petition was not pressed for hearing for one reason or the other, even though as averred in the petition itself the next date of hearing before the Court Martial was fixed for the 23rd July 1973. In fact, the appellants contested the

proceedings before the Court Martial, leaving the writ proceedings pending in the High Court, and, on the 25th July 1973, the late Mr. Manzoor Qadir, defending the appellant No. 1, again raised an objection to the jurisdiction of the Court but also made it clear that since the objection was of a constitutional nature, the Court Martial would not be it) a position to decide the same. Indeed, the objection was being taken merely to have it placed on record that it had been raised at the earliest opportunity before the Tribunal concerned, least the writ petition already filed by his clients in the High Court is thrown out on any technical ground.

The objection of Mr. Manzoor Qadir was again overruled and the trial then proceeded resulting in the convictions of the appellants on the 2nd March 1974, on both charges. Only a single sentence of transportation for life was, however, imposed, because, under Rule 54 of the Rules framed under the; Pakistan Army Act, separate sentences cannot be imposed. This rule reads thus:-

"The Court shall award one sentence in respect of all the offences of which the accused is found guilty, and such sentence shall be deemed to be awarded in respect of the offence in each charge in respect of which it can be legally given, and not to be awarded in respect of any offence in a charge in respect of which it cannot be legally given."

Thereafter, on the 25th April 1971, an application was filed for amending the writ petition so as to seek a declaration that the trial of the appellants by the Court Martial and their convictions and sentences were all without lawful authority and of no legal effect and further that their detention, as a result of the aforesaid convictions and sentences recorded by the Court Martial, was illegal and, therefore; they should be ordered to be set at liberty forthwith.

In this petition for amendment, it was again reiterated that the Pakistan Army Act applied only to persons who are subject to the discipline of the Army and that the inclusion of the categories of persons to whore the ways sought to be made applicable by the Law Ordinance promulgated in 1967, was of no effect, as the Ordinance themselves were, firstly, Ultra hires the powers of the President under the Constitution of 1962 and, secondly, in any event, were discriminatory and violative of the Fundamental Right No. 15 of the Constitution of 1962, relating to the equality of citizens before law. Hence, they were ab initio void and of no legal effect by reason of the provisions of Article 6 of the said Constitution.

By another petition filed on the 17th May 1974, a further additional ground was sought to be added in the writ petition to the effect that the order made by the President under Article 233, clause (2) of the present Constitution, had also ceased to have any validity, since the state of emergency, continued by Article 280 of the Constitution of 1973, had itself come to an end on the 14th February 1974. The joint resolution of the two Houses, passed on the 5th March 1974, purporting to extend the emergency was, therefore, au exercise in futility.

The writ petition was argued in the High Court for four days but it was ultimately dismissed in limine oil the 20th May 1974 by an elaborate order running into some 20 pages The High Court held that the Ordinances of 1967 were competently made by the President, as the subject was expressly covered by items Nos. 1, 48 and 49 of the Third Schedule to the Constitution of 1,62. The contention that the Ordinances were violative of Fundamental Right No. 15 of the 1962 Constitution, pertaining to the equality of citizens before the law, was also repelled on the ground that a challenge of a law on account of its being in conflict with a fundamental right was in reality an attempt to enforce a fundamental right, which could not be done during the subsistence of a proclamation of emergency. The contention that the joint resolution of both Houses of the Legislature, passed on the 5th of March 1974, was an exercise. In futility, as the proclamation of emergency had already expired on the 14th February 1971, was held by the High Court to be fallacious, because, upon a true construction of Article 232, clause 171(b), the calculation was to be nude after excluding the period of two months during match the proclamation was to last.

In any event, the High Court took the view that the latest amendment made in the 1973 Constitution by the Constitution (First Amendment) Act XXXIV of 1974, amending Article 199, had ousted the writ jurisdiction of the High Court in relation to any order made in respect of a person who is member of the armed forces of Pakistan or who is, for the time being, subject to any lave, relating to any of those forces in respect of his terms and conditions of service or in respect of any action taken in relation to him as a member of the armed forces or as a person subject to such law.

Lastly, the High Court also repelled the contention that the offence under section 121-A, P. P. C., was not, in any event, covered by the Ordinances. According to the High Court, subsection (1) of section 59 of the Army Act was wide enough to give jurisdiction to the Court Martial to try any person to whom the Army Act had been extended by clause (d) of section 2 even in respect of civil offences.

Leave was granted to the present appellants on the 18th March 1975, because, it was felt that the petition raised several questions of law of general public importance involving the interpretation of the provisions of the Constitution of 1962, the Interim Constitution and the latest Constitution of 1973 also the amendments introduced in the Army Act by Ordinances Nos. III and IV of 1967, even though the High Court had refused to grant a certificate under Article 185, clause (ii)(f) of the Constitution of 1973, certifying that the case involved a substantial question of law as to the interpretation of the Constitution.

The Pakistan Army Act (XXXIX of 1952) was enacted on the 30th May 1952, and originally section 2 thereof read as follows:-

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

(a) officers, junior commissioned officers and warrant officers of the Pakistan Army;

(b) persons enrolled under the Indian Army Act, 1911, before the date notified in pursuance of subsection (2) of section 1, and serving with the Pakistan Army immediately before the date, and persons enrolled under this Act ;

(c) persons not otherwise subject to this Act, who, on active service, in camp, on the march, or at any frontier post specified b ;the Central Government by notification in this behalf, are employed by, or are in the service of or are followers 4, or accompany any portion of the Pakistan Army.

Thereafter, a clause (bb) was incorporated by the Pakistan Army (Amendment) Act, 1958, with effect from the 1st April 1952. This clause reads as follows:--

(bb) persons subject to the Pakistan Navy (Discipline) Act, 1934, or the Pakistan Air Force Act, 1953, when seconded for service with the Pakistan Army, to such extent and subject to such regulations as the Central Government may direct.

In 1965, the Pakistan Navy (Discipline) Act, 1934, was replaced by Pakistan Navy Ordinance, 1961. Then in 1967, by Ordinance No. III of 1967, another clause (d) was added to section 2(1) after clause (c) to the following effect:-

(d) persons not otherwise subject to this Act, who are accused of-

(i) seducing or attempting to seduce any person subject to this Act from his duty or allegiance to Government, or

(ii) having committed, in relation to any work of defence, arsenal, Navy, Military or Air Force established 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, 1952.

The appellants were sought to be brought under the Pakistan Army Act by reason of this amendment of 1967 on the accusations made against them of attempting to seduce certain named officers and other persons in the military forces of Pakistan from their allegiance to the Government.

Learned counsel appearing in support of this appeal has, firstly, sought to contend that notwithstanding this amendment, the provisions of the Army Act cannot be extended to persons who have at the relevant time no connection whatsoever with the Army and. in particular, he has referred to the provisions of subsections (2) and (3) of section 2 of the Pakistan Army Act to show that even persons, who are normally subject to the Army discipline, remain subject only until retired, released or discharged, removed or dismissed from service. Even those seconded from the Air Force or the Navy to the Army, ceased to be subject to the Army Act as soon as the period of secondment expired. It is, therefore, learned counsel urges, clear that the intention of the framers of the Army Act was only to make those people who were subject to the special discipline of the Army liable to be dealt with under the said Act.

The only other category of persons who were not otherwise subject to the said Act, became temporarily subject to it when employed by or following or accompanying any portion of the Pakistan Army either on active service in camp or on the march or at any frontier post. It is submitted that the provisions of the said clause (d) should also be read in this restricted manner and unless some nexus or connection with the Army is established, persons not normally subject to the Army Act should not be made liable to be dealt in accordance therewith.

The words of clause (d), introduced into section 2 of the Army's Act by Ordinance No. III of 1967, are clear enough. The words "persons no otherwise subject to this Act" clearly embrace all others who are not subject to the said Act by reason of the provisions of clauses (a), (b), (bb) and (c). The intention of the framers of clause (d) is clearly that even civilians or persons who have never been, in any way, connected with the Army should be mace subject to it in certain circumstances gravely affecting the maintenance of discipline in the army. The nexus required is that they should be persons who are accused of seducing or attempting to seduce any person subject to the Army Act from

his duty or allegiance to Government in this case, the appellants were so accused and, therefore, came within they ambit of clause (d). The nexus, if any required, was provided by the accusation. No other nexus or connection was necessary.

In this view of the matter, learned counsel had of necessity to attack the vires of Ordinances Nos. III and IV of 1967 themselves on the ground that at the relevant time, the President, who purported to promulgate these Ordinances, had no power to do so except during an emergency. The power to make and promulgate Ordinances under the Constitution of 1962, which prevailed in 1967, was derived from Article 29 of the said Constitution and, by clause (v) thereof, the power extended "only to the making of laws within the legislative competence of the Central Legislature". The power of the Central Legislature to make laws was circumscribed by Article 131 of the paid Constitution to the matters enumerated in the Third Schedule thereof. The Central Legislature could make laws with respect to matters not enumerated in this Third Schedule in certain circumstances only but it is not necessary to refer to these circumstances, because, the preambles to the Ordinances do not show that any such circumstances existed which necessitated the making of the said Ordinances. The Ordinances ex facie purported to have been made in exercise of the power conferred by clause (1) of Article 29 of the Constitution of 1962 in order to amend the Pakistan Army Act, 1952.

Learned counsel has maintained that the subject-matter of the legislation did not fall within any one of the items mentioned in the Third Schedule. The items of the Third Schedule, which can possibly have relevance in this connection, are the following:-

1. Defence of Pakistan and of each part of Pakistan, including-

(a) the Defence Services of Pakistan, any other armed forces (including civilian armed forces) raised or maintained by the Central Government of Pakistan and any other armed forces attached to or operating with any of the armed forces of Pakistan ;

(b) military, naval and air force works ;

(c) industries connected with defences ;

(d) the manufacture of arms, firearms, ammunition and explosives ; and

(e) cantonment areas, including--

(i) the delimitation of such areas ;

(ii) local self-government in such areas, the constitution of local authorities for such areas and the functions and powers of such authorities ; and

(iii) the control of housing accommodation (including control of rents) in such areas.

40. Jurisdiction and powers of Courts with respect of any of the matters enumerated in this Schedule.

47. Offences against laws with respect to any of the matters enumerated in this Schedule.

49. Matters incidental or ancillary to any matter enumerated in this Schedule."

Learned counsel appearing for the appellants contends that the subject of legislation of these Ordinances was not the defence of Pakistan or the control of the defence forces of Pakistan. The Ordinances neither make any provision for maintaining discipline among the armed forces nor do the provide for regulating the terms and conditions of their service nor are the persons to whom they seek to reach either directly or indirectly connected with the defence of Pakistan. Indeed, the essential purpose sought to b achieved was to make provision for a separate machinery for the enforcement of the ordinary criminal law of the land in a field which was already occupied by the Penal Code and the Criminal Procedure Code. In pith and substance, therefore, what the Ordinances sought to do was to amend tae Penal Code and the Criminal Procedure Code. It was indeed a cloak to delete the provisions of section 131 of the Penal Code, and if this is held to be valid, it will amount also to amending the provisions of sections 2 and 3 of the Criminal Procedure Code, so as to take away the right to trial under the ordinary law, which is the right of every ordinary citizen. In order to bring the law within the ambit of item No. 1 of the Third Schedule, the law must be addressed to the members of the Armed services and not outsiders.

Learned counsel has also referred to the "Commentaries on the Constitution of the United States" by Antiaru, p. 288, to point out that in the United States trial of civilians by military Courts has also given rise to grave constitutional problems and the view seems to have prevailed in the United States that the "founders of the State had no intention to permit the trial of civilians in the military Courts, where they would be denied jury trials and other constitutional" protections, merely by giving Congress the power to make rules which were `necessary and proper' for the regulation of the `land and naval forces.' Such a latitudinarian

interpretation of these clauses would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority.

Similarly, it is urged that our own Constitution does .not also say that Parliament can regulate the land and naval forces and "all other persons whose regulation might have some relationship to the maintenance of the land and naval forces". The setting up of a rival system to compete for jurisdiction over the civilians who might remotely have some contact or relationship is to be decried.

The learned counsel has also referred us to the "Bill of Rights Reader" compiled by Milton R. Knovits to show that the American Courts have always tried to uphold the rule that "there is no justification for the subordination of civilians to complete military rule and for subjecting them to military trials that lack many of the safeguards that we associate with normal Court procedure."

Support has also been sought to be drawn from two decisions of the American Supreme Court in the cases of Lloyd C. Duncan v. Duka Paca Kahanamoku (327 U S R 304) and Curtix Reid v. Clarice B. Covert (354 U S R 1). The first was a case in which it was held that the "power to declare Martial Law did not include the power to supplant civilian laws by military orders and to supplant Courts by military tribunals, where conditions are not such as to prevent the enforcement of the laws by the Courts." The decision was based mainly on an interpretation of the Hawaii Organic Act.

Similarly in the second case, the question raised was as to whether civilian dependent members of armed forces accompanying them overseas could constitutionally be tried by a Court Martial in time of peace for capital offences committed abroad.

These decisions are not of much assistance to us, because comparable provisions are not to be found in our Constitutions. The decisions cited appear to be in accordance with the American Constitutional provision under which no statute could be framed by which a civilian could lawfully be tried by a military Court in time of peace. The position in our country is, however, different. It seems that if the Army Act is a valid piece of legislation, then it does permit the trial of civilians, in certain circumstances, by a military Court even in time of peace.

The question before us, however, is as to whether the Ordinances of 1967, were competently made?--While the learned counsel for the appellants contends that these do not

come within the ambit of any of the items of the Third Schedule which limit the legislative powers of the Central Legislature and the President, the learned counsel appearing for the Provincial Government and the learned Attorney-General, on the other hand, maintain that the subject-matter of the legislation is within the purview of items 1, " 46, 47, 48 and 49 of the Third Schedule. It is contended that if any nexus is sought, the nexus is provided by the accusation of seducing or attempting to seduce the members of the armed forces. This is very intimately connected with the defence of Pakistan. In any event, it is maintained that the items in the legislative list should not be construed in any narrow or pedantic manner but should be read in a liberal sense and reading the items in the Schedule in this manner, there should be no difficulty in holding that the subject-matter of the legislation of these Ordinances was well within even the first item of the Third Schedule.

The principles governing the interpretation of legislative lists have now been enunciated in a number of cases so far as this sub-continent is concerned, because, schemes of [such legislative lists have been prevalent since the Government of India Act of 1935. Thus, in the case of Subrahmanyan Chettiar v. Muttuswami Goundan (1940 P C R 188) the Federal Court of India held that the principles laid down by the Judicial Committee in a long series of decisions for the interpretation of the British North America Act should be accepted as a guide for the interpretation of similar provisions of the Government of India Act and, applying these principles, observed as follows:-

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined is to ascertain its 'pith and substance' or its 'true nature and character' for the purpose of determining whether it is legislation with respect to matters m this list or in that."

Gwyer, C. J., after referring to a number of decisions of the Judicial Committee came to the conclusion that "this rule of interpretation is equally applicable to the Indian Constitution Act."

In that case the validity of the Madras Agriculturists Relief Act, 1938, which was a Provincial Act, was being challenged on the ground that it had trenched upon the exclusive powers of the

Federal Legislature by affecting the provisions of the Code of Civil Procedure and the Negotiable Instruments Act, which were both Central laws.

In the same case, Sulaiman, J. observed:-

"Absolutely sharp and distinct lines of demarcation are not always possible. Rigid and inflexible watertight compartments cannot be ensured . . . . . It is quite wrong to assume that the doctrine of pith and substance laid down by their Lordships is some special doctrine exclusively applicable to the Canadian Constitution . . . . . There can, therefore, be no doubt that this doctrine of pith and substance is of a general application, and is in no way restricted to the peculiar language employed in the British North America Act, 1867."

After considering these principles, the learned Judge went on to lay down the rule, which, should be applied in considering the question as to whether the Act entrenched upon the exclusive field of another Legislature, in the following words:-

"We have, therefore, first to see whether the impugned Provincial Act is `with respect to' any of the matters in List II. If this is not so, then the Act must fall to the ground. If it falls within any of the matters enumerated in that list, then we have to see next whether it also falls within any of the matters in List III. If it does and no assent of the Governor-General has been obtained, it must again fall to the ground if it conflicts with an existing Indian law. But if such assent has been obtained, then it will for the time being remain valid. Lastly we have to see whether it falls within any of the subjects mentioned in List I. If it does not, then there is no difficulty, but if it does, then we have to see further whether the Act is really with respect to any of the matters in List I. If it is so, then the Act must fall to the ground."

Applying the same principle, he came to a different conclusion, namely, that the Madras Act was repugnant to the Negotiable Instruments Act in so far as it compelled Courts to reopen decrees passed on the basis of promissory notes before the Act came into force. This was, however, the minority opinion. The other two Judges came to a different conclusion.

In an earlier case of the United Provinces v. Atiqa Begum (1940 F C R 110), Sir Maurice Gwyer, C. J., had, in dealing with the legislative lists of the Government of India Act, 1935, observed:-

"The subjects dealt with in the three legislative lists are not always set out with scientific definition. It would be practically impossible for example to define each item in the Provincial List in such a way as to make it exclusive of every other item in that

List, and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad and general import . . . . I think, however, that none of the items in the lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. I deprecate any attempt to enumerate in advance all the matters which are to be included under any of the more general descriptions; it will be sufficient and much wiser to determine each case as and when it comes before this Court."

In this case, Sulaiman, J. himself had also accepted the principle of pith and substance and enunciated the following rule:-

"When the question is whether any impugned Act is within any one of the three Lists, or in none at all, it is the duty of Courts to consider the Act as a whole and decide whether in pith and substance, the Act is with respect to a particular category or not. This can be inferred only from the design and purport of the Act as disclosed by its language and the effect which it would have in its actual operation."

The principle laid down by Sir Maurice Gwyer, C. J. was also adopted by this Court in the case of Haider Automobile Ltd. v. Pakistan (P L D 1969 S C 623), when it reiterated the principle that the items in the legislative list are not to be read in any narrow or pedantic sense and observed:-

"Each general word therein should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended within it. Those items describe only comprehensive categories of legislation by a word of broad and general meaning."

The same view was adopted in the case of Syed Ghulam Ali Shah v. State (P L D 1970 S C 253) and in the case of Pir Rashid-ud-Daula v. Chief Administrator of Auqaf (P L D 1971 S G 401), I have myself tabulated some five principles, which are deducible from decided case, for the resolution of the controversy as to whether one or the other Legislature is encroaching on the other's field. Such controversy is, in my view, inevitable in any scheme of division of legislative fields, because, "no matter how careful the draftsman or how exhaustive the' legislative lists it is not possible to provide for all conceivable eventualities or to categories each subject of legislation under a specific Label".

The view of Sir Maurice Gwyer, C. J., was also approved by Muhammad Munir, C. J., in the case of Muhammad Yousaf v. The Crown (P L D 1956 F C 395).

The pith and substance rule was also adopted by the Privy Council in the cases of Prafulla Kumar v. Bank of Commerce, Khulna (P L D 1947 P C 1) and Bunk of Commerce Ltd., Khulna v. Amulya Krishna Basu Roy Ch. and others (P L D 1947 P C 12). In the first case, Lord Porter agreed with the principles enunciated by Sir Maurice Gwyer, C. J., in the case of Subrahamanyan Chettiar v. Muttaswami Gaundan and bald that the rule applies to Indian as well as to legislation in other Dominions, although it is possible that in the light of the experience gathered from the Constitutions of the other Dominions, the British Parliament had made the provisions of the Indian Constitution Act more exact in some particulars and introduced the concurrent list so as to make it easier to distinguish between those matters which are essential in determining to which list particular provisions should be attributed and those which are merely incidental. Nevertheless, it was conceded that--

"subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stilled at Birth, and many of the subjects entrusted to Provincial legislation could never effectively be dealt with."

The scheme of the 1962 Constitution was, however, somewhat different. It had only one legislative list of subjects within the exclusive field of the Central Legislature. All other subjects were within the legislative field o a province under the provisions of Article 131 of the said Constitution. Even so, the Central Legislature had power to make laws for the whole o any part of Pakistan with respect to any matter not enumerated in the list given in the Third Schedule, where the national interest of Pakistan in relation to the security of Pakistan (including its economic and financial stability), planning or coordination for the achievement of uniformity in different parts of Pakistan (so required) or if any Provincial Assembly considered it desirable that a matter, not enumerated in the Third Schedule, should be regulated in the Province by an Act of the Central Legislature and passed resolution to that effect, the Central Legislature could mike a law with respect thereto. Again by reason of the provisions of Article 134, if a provincial law, was inconsistent with a Central law, it was the latter which prevailed and not the former to the extent of such inconsistency.

Be that as it may, the pith and substance rule still holds good and we have to consider as to what in reality is the true nature and character of the impugned legislation if any controversy arises as to the competency of the Federal Legislature to legislate with regard to a subject not directly covered by any specific item in the list. It will be convenient at this stage to examine the provisions of Ordinances III and IV of 1967 together. Both these Ordinances were promulgated on the 3rd October 1967, by the President in exercise of his powers under clause (1) of Article 29 of the Constitution of 1962 and the avowed object of the legislation was the expediency of further amending the Pakistan Army Act, 1952; the Pakistan Air Force Act, 1953 and the Pakistan Navy Ordinance, 1961. All these were existing Central laws which could not have been amended by the Provincial Legislature. By the amendment, introduced by Ordinance No. III of 1967, the Army Act was sought to be extended to a new category of persons who were not otherwise subject to the said Act, namely:

(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.

Now it has been contended that since the offence of seducing or attempting to seduce a person subjectto the Army Act from his duty or allegiance to Government is already an offence under section 131 of the Penal Code, triable by the ordinary Criminal Courts, this is in substance and in reality an amendment of the Criminal Procedure Code.

This may well be incidentally the consequence of the amendment introduced, in so far as the persons falling within the raw category are concerned, but it cannot be said that this is in pith and substance the object of the amending legislation. 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 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. It did not amend either section 131 or section 139 of the Penal Code.

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.

Ordinance No. IV of 1967 also amends section 59 of the Army Act by adding thereto a subsection (4) which reads:

"(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."

The main purpose of tats addition 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. This became necessary because otherwise such persons would have been liable for trial under the Army Act only in respect of an offence of the said type committed after they became subject to the Act as a result of the accusation, which would necessarily be made after the commission of the offence.

The fact that it incidentally entrenches upon the provisions of the Criminal Procedure Code does not make it in substance a legislation for amending the Criminal Procedure Code, and, therefore, under the pith and substance rule, this too was, in my opinion, a valid legislation within item I of the Third Schedule.

Both these Ordinances, it may further be pointed out, were subsequently, on the 2nd December 1967, approved by the National Assembly under clause (iii) of Article 29 of the Constitution of 1962.

The vires of these Ordinances, it appears, was also challenged before the Peshawar Bench of the West Pakistan High Court in the case of Gul Akbar v. Chief of Air Staff (P L D 1968 Pesh. 114). A Division Bench of the said High Court was of the view that the said Ordinances neither created a new offence nor

provided for a penalty greater than, or different from, the penalty prescribed at the time the offence was committed. The Ordinances merely had the cumulative effect of providing a new forum of trial. This was not violative of any of the provisions of the 1962 Constitution.

The specific question now raised before us was not raised before the Peshawar Bench in the above-mentioned case. This decision is not, therefore, of any assistance. I have already given my own reasons for holding that in pith and substance the impugned Ordinances cannot be considered to be legislation outside the field of the Third Schedule to the Constitution of 1962.

In this connection another objection raised by the learned Deputy Attorney-General has, however, to be noticed. He has contended that, in any event, clause (ii) of Article 133 of the Constitution of 1962 debars the Courts from calling in question the validity of a law on the ground that the Legislature, by which it was made, had no power to make it. Learned counsel contends that the responsibility for deciding whether a particular Legislature had power, under the said Constitution, to make a law or not, was of the Legislature itself and since the Legislature had approved the said Ordinances their vires could not now be challenged.

This latter Article came up for consideration before this Court on more than one occasion. Firstly, in the case of Fazlul Quader Chaudhary v. Muhammad Abdul Haque (P L D 1963 S C 486) this Court was unanimously of the view that Article 133 of the 1962 Constitution does not debar the superior Courts from pronouncing upon the constitutionality of laws. If it operated as a bar at all, it only debarred the Courts from enquiring into the question as to whether a matter was within the Third Schedule or outside it or whether the impugned legislation was made in violation of Article 131 or 132.

I myself took the view in above cited case that:-

"Reading the Constitution as a whole the intention seems to be clear that Article 133 is confined to questions relating to the competency of the Central or the Provincial Legislature or the President or the Governor to make laws with respect to matters in the Legislative Lists set out in the Third Schedule to the Constitution and does not extend beyond those matters."

It did not operate, therefore, as a general ouster of jurisdiction of the Courts from examining the constitutionality of a law on any other ground.

This Article again came up for consideration in the case of East Pakistan v. Sirajul Haq Patwari (P L D 1966 S C 584). Cornelius, C. J., there observed:-

"Speaking generally, the view I have formed of the Intention of Articles 131 to 134 of the Constitution is that the validity of laws made by the various Legislatures is not to be tested by reference to power derived from these provisions, as a theoretical proposition."

In this case, it was also pointed out that the scheme of the 1962 Constitution was different from the earlier Constitutions as under this Constitution, a Provincial Legislature had no exclusive power to legislate with regard to any matter. On the other hand, although the Provincial Legislature could not legislate with regard to any matter enumerated in the Third Schedule, which was within the exclusive competence of the Central Legislature, the rest was in the nature of a concurrent field subject to the limitations specified in clauses (ii) and (iii) of Article 131. Thus where a Central law in respect of a matter not enumerated in the Third Schedule had been enacted without fulfilling the conditions prescribed in clauses (ii) and (iii) of Article 131, it could be challenged, but not on the ground of competency of the Legislature. The challenge could only be made on the ground that the conditions specified in the Constitution had not been fulfilled, because, once the conditions are fulfilled, the legislation comes within the normal powers of the Central Legislature and there is no question of either pre-empting to move the subject to the exclusive field of the Central Legislature or removing it from the exclusive field of the Provincial Legislature, because the Provincial Legislature has no exclusive field at all.

It does, therefore, appear from these decisions that the superior Courts are debarred from questioning the validity of a law only on the ground of the lack of competency of the Legislature but it is unnecessary in this case to go into this matter in any greater detail, since the view that I have taken is that the impugned Ordinances are within the exclusive legislative competence of the Central Legislature and fall directly within items 1, 48 and 49 of the Third Schedule.

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.

Learned counsel for the appellants next attacked the validity of the Ordinances on the ground that the Ordinances were violative of Fundamental Rights Nos. 1 and 15, guaranteed by the Constitution of 1962 and, therefore, by reason of the provisions of Article 6 of the said Constitution, void, in so fair as they were inconsistent with the said rights.

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 oh 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 a5 pointed by me in the case of Asma Jilani (P L D 1972 S C 139). This claim was abandoned even in England as long ago as 1871 when Willes, J., in the case of Lee v. Bude & Torrington June Lion Railway Co. (L R 1871 C P 576/582) said:-

"We sit here as servants of the Queen and the Legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, Lords, and Commons? I deny that any such authority exists ……..The proceedings here are judicial, not autocratic, which they would be if eve could make laws instead of administering them."

Dr. C. K. Alien in his book `Law in the Making', An Edition, page 450, has categorically stated that he was unable to find a single example in our books of the Courts rejecting the plain and express provisions of a statute on the ground that it was contrary to any ethical principle". In the circumstances, I too find myself unable to say that the impugned Ordinances are not K law and, therefore, violative of Fundamental Right No. 1.

The next question that arises is as to whether the Ordinances are violative of Fundamental Right No. 15?--The learned counsel for the appellants has argued that because the Ordinances select particular citizens, namely; those accused of seducing or attempting to seduce defence personal for a differential treatment, they are per se discriminatory. All offices under Chapter VII of the Penal Code fall to one class and the selection of only a part of one of such offences for a different treatment, by a procedure which would result in depriving the person

accused of such an offence of all the normal safeguards of a criminal trial, is clearly arbitrary, and unreasonable. There does not appear to be any rational basis for such a discrimination and, therefore, it cannot be paid that the category added by the introduction of clause (d) in subsection (1) of section 2 of the Army Act is on the basis of any valid classification at all.

The learned Attorney-General, on the other hand, has contended that the category mentioned in clause (d) is a general category and extends to all persons who come within the mischief of the said clause and, therefore, it is a valid classification on a rational basis and there is no discrimination at all. It is not a case of picking and choosing of a particular person.

Equal protection of the laws does not mean that every citizen, no matter what his condition, must be treated in the same manner. The phrase `equal protection' of the laws means that no person or class of persons shall be denied the same protection of laws which is enjoyed by other persons or the class of persons in like circumstances in respect of their life, liberty, property or pursuits of happiness. This only means that persons, similarly Gated or in similar circumstances, will be treated in the same manner. Besides this, all law implies classification, for, when it applies to a set of circumstances, it creates thereby a class and equal protection means that this classification should be reasonable. To justify the validity of a classification, it must be shown that it is based on reasonable distinctions or that it is on reasonable basis and rests on a real or substantial difference of distinction. Thus different laws can validly be made for different sexes, for persons in different age groups; e. g., minors or very old people; different taxes may be levied from different classes of persons on the basis of their ability to pay. Similarly, compensation for properties acquired may be paid at different rates to different categories of owners. Such differentiation may also be made on the basis of occupations or privileges or the special needs of a particular locality or a particular community. Indeed, the bulk of the special law made to meet special situations come within this category. Thus, in the field of criminal justice, a classification may well be made on the basis of the heinousness of the crime committed or the necessity of preventing certain anti-social effects of a particular crime. Changes in procedure may equally well be effected on the ground of the security of the Suite, maintenance of public order, removal of corruption from amongst public servants or for meeting an emergency.

Where, however, the law itself makes no classification but leaves the selection to an outside agency or an administrative body without laying down any guidelines, thus enabling the body or authority to pick and choose, a legitimate complaint may be made on the ground that the law itself permits discriminatory

application. Such was the position which came under consideration by this Court in the case of Waris Meah v. The State (P L D 1957 S C (Pak.) 157) where this Court struck down the law on the ground that it was violative of this particular right. Can the other hand, in the case of Jibendra Kishore Achharya v. Province of Last Pakistan (P L D 1957 S C (Pak.) 9), a law which provided for payment of compensation on a sliding scale to proprietors, which decreased in proportion to the income of the estate acquired. The larger the income the lesser the scale of compensation. Nevertheless, this Court held the differentiation to be based upon a valid classification.

The concept of the `equal protection of laws', which is derived from the American Constitution is not susceptible of any exact definition. "In other words", as stated by the editors of American Jurisprudence, Vol. 12, page 409, "no rule as to protection of laws that will cover every case can be formulated and no test of the type of cases involving such a clause of the Constitution can be infallible or all-inclusive. Moreover, it would be impracticable and unwise to attempt to lay down any generalization covering the subject; each case must be decided as it arises." Be that as it may, the only generalization that is possible is that it means "subjection to equal laws applying to all in the same circumstances" but this does not mean that laws must affect every man, woman and child alike. This guarantee does not forbid discrimination with respect to things that are different nor does it prohibit classification which is reasonable and is based upon substantial differences having relation to the objects or persons dealt with and to the public purpose sought to be achieved. It guarantees equality and not identity of rights.

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. In fact almost all legislation involves some kind of classification whereby sortie people acquire rights car surer 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 riot 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.

Under this principle the American Courts have consistently held that the equal protection of the laws is not by a course of procedure which is applied to legal proceedings in which a particular person is affected if such a course also would be

applied to any other person in the State under similar circumstances, vide: Tinsley v. Anderson (171 U S 312). The equal protection clause does not demand uniformity of procedure. The Legislature may well classify litigation and adopt one type of procedure for one class and a different type for another. The American Supreme Court has even held that a State may make different arrangements for trials under different circumstances of even the same class of offences (vide: Graham v. West Virginia) (224 U S 616).

Willist in his treatise on the Constitutional Law of the United States, page 580, opines:-

"There is no rule for determining when classification for the police power is reasonable. It is a matter for judicial determination, but in determining the question of reasonableness the Courts must find some economic, political, or other social interest to be secured, and some relation of the classification to the objects sought to be accomplished. In doing this the Courts may consider matters of common knowledge, chatters of common report, the history of the times, and to sustain it they will assume every state of facts which can be conceived of as existing at the time of legislation. The fact that only one person or one object or one business or one locality is affected is not proof of denial of the equal protection of the laws. For such proof it must be shown that there is no reasonable basis for the classification."

Thus even a "law applying only to one person or one class of persons is constitutional if there is sufficient basis or reason for it."

These principles have been approved by this Court also in the cases of Ch. Ata Elahi v. Mst. Parveen Zohra (P L D 1958 S C (Pak.) 298); Jibendra Kishore Achharyya v. Province of East Pakistan (P L D 1957 S C (Pak.) 9); gain Noorani v. Secretary, National Assembly (P L D 1957 S C (Pak.) 46) and Waris Meah v. State (P L D 1957 S C (Pak.) 157). Indeed in the last case. Munir, C. J., observed at page 169:--

"In the present ease, if the Act had merely set up a Tribunal of exclusive jurisdiction, though with a procedure different from that prescribed by the Criminal Procedure Code for the trial of ordinary offences, no objection could successful have been taken to the constitutionality of the Act because the offenders against the Foreign Exchange Regulation could validly and reasonably be considered to be a class different from the offenders under the ordinary law. Nor, could any objection on the strength of Article 5 of the Constitution succeed of the Act itself had indicated the

classes of cases which were to be tried by the ordinary Courts, the Tribunal and the Adjudication Officers respectively."

The position in the case now under consideration is, in my opinion precisely the same and there is no reason why the same principle should riot apply.

Applying these principles to the facts of the present case, I am inclined to agree with the learned Attorney-General that there is a valid classification in this case. A category has been selected on a rational basis, namely, those who seduce or attempt to seduce a member of the armed services from his allegiance or his duty. There is no possibility of any one picking and choosing a particular person so accused for trial in one manner and leaving others to be tried under the general law by reason of the amendment introduced by clause (d) in subsection (1) of section 2 of the Army Act. All persons accused of an offence of this nature, whether members of the defence services or civilians, are now triable under the Army Act, that is to say, that all persons, similarly situated or similarly accused, will now be liable to be tried under the Army Act in the same manner without any discrimination This is a valid classification which is by no means unreasonable or arbitrary having regard to the object sought to be achieved, i.e. the prevention of subversion of the loyalty of the armed forces.

In this view of the matter, it is not necessary to consider whether clause (3) of Article 6 of the 1962 Constitution is attracted in the circumstances of this case, but since arguments have been advanced on the basis (If this clause, I would like, for the sake of completeness, to say that if the law was violative of any of the fundamental rights then this clause (3) would not protect 4it from challenge under sub-clause (i). This sub-clause (f) of clause (3) of Article 6 reads as follows:-

"(3) The provisions of this Article shall not apply to-

(i) any law relating to members of the Defence Services, or of the forces charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them;".

This only protects laws relating to the members of the defence services or of the forces charged with the maintenance of public order which have beers made for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them.. Such ouster clauses must be interpreted strictly and unless the law comes within the four corners of the exempting clause, it cannot claim to be exempted. The Ordinances under challenge were not, in my opinion, made for

any of these purposes arid, therefore, did not qualify for the exemption granted by the said sub-clause.

Learned counsel for the appellants has next contended that whatever might be the position with regard to the offences mentioned in clause (d) of subsection (1) of section 2 of the Army Act, these Ordinances do not make an offence under section 121-A, P. P. C., triable under the said Act. The learned Attorney-General and the learned Deputy Attorney-General have, on the other hand, claimed that even such civil offences, if committed by a person who has already become subject to the Army Act under clause (rl) Of subsection (1) of section 2 of the Army Act would be triable under the Army Act by reason of the provision of sub-section (1) of section 59 of the Army Ash which wily there even before Ordinance No. IV of 1967 came in. It is contended by them that section 59(1) deals with civil offences and once a person has become subject to the provisions of the Army Act then he automatically becomes liable to be tried by a Court Martial, even in respect of a civil offence committed by him.

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

I am inclined to agree that subsection (4), which was added to section 5) of the Army Act by, Ordinance No. IV of 1967, has no relevance in this connection. It is limited to an offence mentioned in clause (d) of subsection (1) of section 2 of the said Act and its purpose is to make that offence triable under the Army Act as if it was an offence under the said Act and was committed at the time when such person was subject to the said Act. In the case of other civil offences, the provisions of subsection (1) of section 59 are attracted. This subsection reads as follows:-

(1) Subject to the provisions of subsection (2), any person subject to this Act who at any place in or beyond Pakistan commits any civil offence shall be deemed to be guilty of an offence against this Act and if charged therewith under this

section, shall be liable to be tried by Court Martial, and, on conviction, to be punished as follows, that is to say,-

(a) if the offence is one which would be punishable under any law in force in Pakistan with death or with transportation for life he shall be liable to suffer any punishment other than whipping assigned for the offence by the aforesaid law or such less punishment as in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment other than whipping assigned for the offence by the law in force in Pakistan, or with rigorous imprisonment for a term which may extend to five years or with such less punishment as in this Act mentioned.

This section seems to provide that if any person who is or has become subject to the Army Act, commits any civil offence, he shall be seemed to be guilty of an offence against the said Act and, if charged therewith, shall be liable to be tried by a Court Martial subject to the limitations mentioned in subsection (2) and will be punishable as prescribed in clauses (a) and (b).

By using the words "shall be deemed to be guilty of an offence against this Act", the Legislature has clearly roped in such persons fictionally even in respect of civil offences committed at any place in or beyond Pakistan. The object clearly is to prevent a double trial in two different forums of such persons who are subject to the provisions or have become subject to the provisions of the Army Act. This subsection (1) does not, of course, indicate that such civil offences should be cognate offences with those triable under the Army Act but it is quite possible that this section was brought in to make a joint trial possible of an offence punishable under the Act and a civil offence committed by a person who is or has become subject to the provisions of the Army Act in the same transaction but the question still remains as to in respect of what civil offences he becomes so subject to the Army Act?

The key words in my opinion are "any person subject to this Act' who ……..commits any civil offence shall be deemed to be guilty of an offence against this Act". It will be noticed that according to the above quoted words two conditions are necessary to be fulfilled before the deeming clause can become operative. The first condition is that the person concerned must be a person who is subject to the Army Act and the next condition is that he "commits" the civil offence when he is so subject. The Legislature has not said "has committed". The use of the verb " commits" in the present tense makes it abundantly clear that the civil offence to be so deemed to be an offence under the Army Act must be one which is committed after the

person concerned has become subject to the said Act and not before. If the intention of the Legislature had been otherwise it would have amended subsection (1) of section 59 also in 1967 and added the words "and were committed at a time when such person was subject to this Act" as was done in the new subsection (4) added in 1967. But for these words even the offences mentioned in clause (d) of section 2(1) of the Act would not have been triable under the Army Act in the case of the appellants because they became subject to the Army Act only from the point of time of the accusation which was made considerably after the commission of the offence. According to the charge, the offence under section 121-A is alleged to have been committed between August R 1972 and 30th March 1973, but the accusation was made on the 4th July 1973, if the date on the charge-sheet is treated as the date of accusation or the 9th July 1973, if the date of reading out the charges is the relevant date, The appellants became subject to the Army Act only from this date.

The learned Deputy Attorney-General has contended that in this case a report was made to the Chief of Army Staff oil the 5th. March 1973, and an F. I. R. was lodged on the 29th March 1973, hence the accusation was made on that date. In support of this contention reliance is placed on a Full Bench decision of the Lahore Bench of the former West Pakistan High Court in the case of Nur Muhammad v. Commissioner, Sargodha Division (P L D 1968 Lah. 1441), where the meaning and scope of the words "any person accused of an offence" occurring in subsection (1) of section 3 of the West Pakistan Criminal Law (Amendment) Act, 1963, came up for consideration. The High Court on a comparison of the language of subsections (1) and (2) of the said section came to the conclusion that in subsection (1) the words were of a wider connotation than the words "the accused" in subsection (2) and, therefore were not limited to only persons "who are actually sent up for trial ". I have no cavil with this view if it is confined to the interpretation of the provisions of the Ordinance of 1963, but I cannot agree with the observations contained in the said judgment to the effect that "the framer of the Code (Criminal Procedure) have employed the word "accused" or the words 'person accused of an offence' or the term `offender' more or less as being interchangeable terms."

In my view the word "accused" is used in the Criminal Procedure Code in different senses at different places. In Chapter XIV, (sections 167, 169, 170, 173) it is used to designate supposed offenders who in Chapter V have been called "persons arrested". In sections 344, 496 and 497 also the words are used in the same sense but in sections 342 and 343 it clearly bears a different meaning. It is for this reason, that in the case of Karam Rahi v. Emperor (A I R 1947 Lah. 92), Teja Singh and

Sharif, JJ., held that "according to the provisions of the Criminal Procedure Code a person becomes an accused person immediately after he has been arrested by the police for an offence which formed the subject-matter of investigation by them." In the case of Empress v. Mona Puma (I L R 16 Bom. 661) it was held that an accused is a person over whom the Magistrate or other Court is exercising jurisdiction". This has been followed by the Calcutta High Court in Jhoja Singh v. Empress (I L R 23 Cal. 493), by Allahabad High Court in Empress v. Mutasaddi Lal (I L R 21 All. 107) and by a full Bench of the Nagpur High Court in Amdumiyan Guljar Patel v. Emperor (A I R 1937 Nag. 17).

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

In any event it is unnecessary to pursue this point any further for even if the date of the F. I. R. is taken to be the relevant date the offence was undoubtedly committed before the lodging of the F. I. R. The mention of the date 30th March 1972 (the date of arrest), in the charge is obviously wrong, for, no overt act committed after the lodging of the F. I. R. could have been relevant.

In this view of the matter, I am unable to agree that the appellants became liable for trial under the Army Act even in respect of the civil offence under section 121-A, P. P. C., alleged to have been committed by them before they became subject to the Army Act.

I am unable also to accept the reasons given by the High Court for holding to the contrary. I regret to have to point out, with due respect to the learned Judges, that they have misread the provisions of subsections (1) and (4) of section 59. The deeming provisions of subsection (4) applied only to "such offence" as was mentioned in clause (d) of section 2(1) and not to all other offences. The language of a penal statute has to be construed strictly and no question can possibly arise in such a statute of "carrying forward any legal fiction" which is not attracted by the

plain words of a statute which seriously curtails the rights of a citizen. The reference to Allah Rakha v. District Magistrate, Sialkot (P L D 1968 Lah. 1061), is also not apt, because the offence there was one under the Official Secrets Act, 1923. which is one of the offences mentioned in clause (d)(ii) of section 2(1) and to "such offences" subsection (4) of section 59 was directly attracted.

The offence under section 121-A. P. P. C., is not such an offence and, therefore, it could only have been triable under the Army Act by reason of the provisions of subsection k1) of section 59 if it was committed after the person charged became subject to the Army Act and not otherwise. The High Court's conclusion that subsection (1) of section 59 was attracted in this case was, in my view, based on an inadequate consideration of the provisions thereof and a misreading of the provisions of subsection (4) of section 59. if both the subsections had been placed in juxtaposition and read by giving a meaning to each word therein the error might have been avoided.

The further contention of the learned counsel appearing on behalf of the appellants is that since subsection (1) was in the Army Act before the incorporation of clause (d) in section 2 and subsection (4) in section 59, its operation was limited to the four categories originally mentioned in section 2 of the said Act and did not extend to new categories brought in by the amendment introduced by Ordinance No. III of 1967. I am unable to accede to this contention, because, the effect of the incorporation of clause (d) was to enlarge the category of persons who were to be made subject to the provisions of the Army Act and once the category is so enlarged, they would also come within the mischief of the sub section (1) of section 59 by reason of the deeming clause therein. in respect of civil offences committed after they became so subject.

It is true that the result of this interpretation of the provisions of sub-section (1) would amount to depriving the person, so made liable, of this ordinary right of trial under the Cr. P. C. but since I have already held that the Legislature can validly deprive a category or class of persons of such a right in the larger interests of the State I do not think that any genuine grievance can be made on this account.

So far as persons who are subject to the Army Act, are concerned, it appears that even where a Court Martial and a Criminal Court have concurrent jurisdiction in respect of a civil offence, it is in the discretion of the prescribed officer to decide as to in which Court the proceedings should be instituted under the provisions of section 94 of the Army Act. Again, if a criminal Court having jurisdiction is of the opinion that

proceedings ought to be instituted before itself in respect of any civil offence, it may, by written notice, require the prescribed officer, at his option, either to deliver over the offender to the nearest Magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government. The decision of the Central Government on such a reference is to be final under section 95 of the Army Act. But these provisions will only apply if the civil offence is committed by a person who is or has become subject to the Army Act and not otherwise.

Section 549 of the Criminal Procedure Code may also be referred to in this connection. It seems that the Criminal Procedure Code itself also sanctions such differential treatment of persons subject to the Army Act.

(1) P L D 1961 Kar. 565

Learned counsel has also challenged the validity of the trial of the offence under section 121-A by a Court Martial on the basis of Article 4 of the present Constitution which, according to him, guarantees that civilians shall be dealt with in accordance with civil law for civil offences and only military personnel will be dealt with under the military law. According to the learned counsel the appellants became subject to the Army Act, if at all, only for the purposes of the offence of seduction or attempt to seduce the military personnel and for no other offence Hence subsection (1) of section 59 could not be stretched to rope them in respect of other civil offences, if any, committed by them. The fallacy in this argument is that the appellants always continued to remain entitled to be treated in the same manner as other civilians. They became subject to the provisions of the Army Act by reason of the provisions of clause (d) of subsection (1) of section 2 and subsection (4) of section 59 and, after they became so liable to the Army Act, they also became liable for trial by a Court.

Martial under the Army Act in respect of other civil offences committed by them after becoming so subject as if such offences were also offences under the Army .Act. If, as I have held, it was possible by amendment of the law to validly make a certain category of civilian, also subject to the provisions of the Array Act, then it was also possible to make such persons subject to trial by a Court Martial under the Army Act for other civil offences as well.

Subsection (1) of section 59 was a valid piece oaf legislation and if the amendment adding to the categories of' persons subject to the Army Act was valid then the other existing provisions, of the Act also became applicable to them qua persons subject to the

Army Act ors arid from the (late they became so subject but such sub section cannot ire made to take effect retrospectively in the absence of any specific provision in that behalf in subsection (1) of section 59. It is for this reason and this reason alone that I have come to the conclusion that the offence under section 121-A, P. P. C. could not in the facts of the present case have been tried by a Court Martial in so far as the present appellants were concerned because they were not subject to the Army Act when the offence was alleged to have been committed by them.

This brings me to the consideration of the next contention of the learned counsel, namely; that the joint trial of an offence under section 121-A, P. P. C., along with an offence under section 131, P. P. C. if the offence under 121-A, P. P. C., was not competently "triable by the court Martial, would invalidate the entire trial by reason of the fact that the entire evidence led was interlinked and it was not possible to separate the evidence in respect of the two charges. The evidence admittedly had been led in a sequence and it is not possible to divide it into compartments but this does not mean that the evidence of conspiracy would become pier se wholly irrelevant for establishing the attempt to seduce if that was also one of overt acts of the conspirators. There cannot strictly speaking be any direct evidence of conspiratory unless any of the conspirators themselves choose to speak to the same. The usual practice, therefore, is to prove the illegal acts or omissions because if they are established the inference of the existence of a conspiracy itself may then be legitimately drawn from them. Although the criminality of the conspiracy is independent of the criminality of the overt acts yet the conspiracy is usually so bound up with the overt acts that it is only by means of the over acts that the conspiracy can be expected to be made out. To this extant the evidence is common in respect of both. Indeed in the present case the charge of attempted seduction was made on the basis that the persons sought to be seduced were persons whose support was sought to be enlisted for furthering the design of the conspiracy. Conspiracy to commit an offence or offences and the commission of that offence or offences from one transaction and can be jointly tried. There is no question, therefore, of misjoinder of charges or offences or of any prejudice being caused by reason of the evidence being led as a single coherent story. Evidence adduced to establish attempts to seduce for the purpose of overthrowing the government established by law would also be evidence of attempts to seduce for subverting allegiance to tie Government established by law.

The question, however, still remains to be considered as to whether the fact that the Court Martial had no jurisdiction to try one of the offences, as I have held, made any difference? The learned counsel maintains that this vitiates the entire trial and

has relied on the decisions of the Federal Court and this Court in the cases of Asiruddin Ch. v. Crown (P L D1953 F C 125) Mohammad Ayoob Khuhro v. Pakistan (P L D 1960 S C 237) in support of this contention.

Both these cases are distinguishable. In the case of Maulvi Asiruddln Ch. v. Crown what happened was that the Magistrate framed two charges one under section 218, P. P. C., and the other under section 429; P. P. C. The offence under section 218, P. P. C., was exclusively triable by a Court of Session. Nevertheless, the Magistrate continued to try the case and ultimately convicted the said accused under section 420, P. P. C., only. It was in these circumstances that the Federal Court held that "as soon as the Magistrate had framed a charge against the appellant of an offence under section 218 of the P. P. C., pit was his duty to commit the case to the Sessions Court." He "had no jurisdiction at all to hear the case" thereafter. As soon as a charge under section 218, P. P. C., was framed, the record had to be transferred to the Sessions Court. It was in these circumstances that the whole trial by the Magistrate was declared to be void, because, after framing such a charge he had no jurisdiction left to proceed with the trial of even the charge he could otherwise try. The position here is not the same. The Court Martial could have proceeded to try the offence under section 2(1)(d) of the Army Act for no other Court would be competent to do so.

In the case of Mohammad Ayoob Khuhro, the case was whether the offence charged at all fell under the Hoarding and Black-marketting Order. which the Special Judge could try or under Martial Law Regulation No. 20, which he could not try? --if it was an offence under Martial Law Regulation No. 20, then only a High Court or a Court of Session was competent to try the same and not a Special Judge. The offence changed was under the Regulation. The Trial by the Special Judge was, therefore, void, because, be was neither competent to cognizance of nor to try the offence under Martial Law Regulation No. 20, which, even according to the prosecution, was distinct from an offence under the Hoarding and Black-marketting Order, which he was competent to try. There was no question here of the joinder of an offence which he was competent to try with another offence which he was not competent to try. The offence charged was not triable by him.

Reliance is sought to be placed by the learned counsel on another decision of Federal Court in the case of Qadar Dad v. Sultan Bibi etc. (P L D 1950 P C 129) which relying oil a decision of the Privy Council in the case of Subramania Iyer v. King-Emperor (28 I A 257), held that a mis-joinder of charges was not curable under section 537, Cr. P. C. awl the whole trial

was vitiated, irrespective of any question of prejudice to any one. This view has however, subsequently undergone a change and it is now the view that prejudice is necessary for invalidating a trial in which a misjoinder of charges or offences had taken place contrary to the provisions of the Criminal Procedure Code, since section 537, Cr. P. C. itself has now been amended by the Code of Criminal Procedure (West Pakistan Amendment) Act, 1904, so that even a misjoinder of charges is only an irregularity curable under the amended section 537, Cr. P. C. vide Hafiz Muhammad Abdullah v. Imdad Ali Shah (1972 S C M R 173) and Muhammad Jaffar Shah v. State (1972 S C M R 216).

The next case cited is that of the Commissioner, Rawalpindi Division v. Pervez Iqbal (P L D 1968 S C 259). There it was held that under the West Pakistan Criminal Law (Amendment) Act, 1963, a Commissioner was competent to refer one of several offences, which alone is included in the schedule to the said Act, for trial by the Tribunal leaving out the other offences which are not included in the said schedule even where the offences arose out of the same transaction.

This view was consistent with an earlier decision of this Court in the case of the Commissioner, Sargodha Division v. Khizar Hayat (P L D1966 S C 793), where the majority view of a Full Bench of the Lahore High Court was reversed and it was held that even where a Commissioner had referred offence which he was competent to refer, alongwith other offences, which he was trot competent to refer the Commissioner's order "should be held to be good as far as it was within the law", in the writ jurisdiction.

Similar view was also taken in the case of Shahadat Khan v. Home Secretary, Government of West Pakistan (P L D 1969 S C 158), where it was held that splitting up of offences and persons for trial by a Tribunal is not illegal even in the case of a reference to a Tribunal under the West Pakistan Criminal Law (Amendment) Act, 1963.

The reference made by the learned counsel for the appellants to the case of Syed Raunaq Ali v. Chief Settlement Commissioner (P L D 1973 S C 336), does not advance the case any further because all that was said there was that "it is now well-established that where an inferior tribunal or Court has acted wholly with out jurisdiction . . . . . then such action amounts to a usurpation of power unwarranted by law and such an act is a nullity".

There can be no doubt that if a Tribunal or a Court acts wholly without jurisdiction, its action would be a nullity but it does not necessarily to allow from this that even what it does with

jurisdiction will also be rendered void, because, the Tribunal or Court has at the same time done something w which was without jurisdiction. In my view, if it is possible to separate what has been done with jurisdiction from that which has been done without jurisdiction without any prejudice to anyone, then what is done with jurisdiction cannot be invalidated or declared null and void, at least, in the writ jurisdiction as held in the case of Khizar Hayat. '

Learned counsel has, of course, contended that there has been such serious prejudice in the present case, because, the bulk of the evidence related to charge of conspiracy and only one of the overt acts of the conspiracy alleged related to the charge of attempted seduction. He has referred us to the evidence of a number of witnesses horn, the original record of the trial before the Court Martial to show that against the appellant, F. B. Ali, only two witnesses had given evidence of seduction and as against the appellant, Col. Afridi, out of the evidence running into some 649 pages, only three pages relate to the charge of seduction.

The volume of the evidence does not, in my view, furnish the test for determining this question of prejudice, because, even if a mass of inadmissible evidence has been admitted, it is possible to exclude the same from consideration and to consider whether the relevant evidence led on the charge tried with jurisdiction was sufficient to establish the same. Even the Evidence Act, by section 167, provides that the improper admission of evidence shall not be a ground by itself for the reversal of a decision in any case, if it shad appear to the Court, before which such objection is raised, that independently of the evidence objected to and admitted, there was sufficient relevant evidence to justify the decision.

In the present case, as I have already indicated earlier in this judgment, I am not in a position to say that the evidence relating to the charge of conspiracy was wholly irrelevant or inadmissible, because, the seduction or the attempt to seduce was itself an overt act of the conspiracy and, therefore, no serious prejudice had been caused, in my view, by the joint trial of the two offences and I am, therefore, unable to accept the contention that the whole trial is vitiated. In my view, only the conviction in respect of the offence under section 121-A, P. P. C. is vitiated on the ground of want of jurisdiction and not the conviction on the charge of attempt to seduce, because, that was within the jurisdiction of the Court Martial to try and there was relevant evidence on which the decision of the Court could be based.

Learned counsel for the appellants has next contended that because only one sentence has been imposed by the Court Martial, it cannot be said in respect of which offence that sentence has been imposed. If it was in respect of the offence which the Court Martial had no jurisdiction to try then also, even if the conviction stands, there is no proper sentence and the appellants should get the benefit of that.

I am unable to agree, because, under rule 54 of the Pakistan Army Rules, the sentence is to be deemed to have been awarded in respect of the offence in each charge in respect of which it could be legally imposed. Therefore, this single sentence was also a valid sentence in respect of the charge for the offence under clause (d) of subsection (1) of section 2 of the Army Act, which was competently triable by the Court Martial. Thus, if the conviction and sentence in respect of this offence is not vitiated, then even if the offence under section 121-A, P. P. C., was not competently triable, no advantage can accrue to the appellants.

Lastly, learned counsel for the appellants has also referred us to another Ordinance passed by the National Assembly on the 6th June 1968, namely; the Criminal Law Amendment (Special Tribunal) Ordinance, 1968. Subsection (3) of this Ordinance provides that in the case of an offence under section 121-A, P. P. C., if one of the parties to the conspiracy is a person subject to a Service Law, which includes the Pakistan Army Act, then the offence shall be triable by the Special Tribunal set up under the Ordinance. This does not advance the contention of the learned counsel, because, the purpose of this Ordinance was to give the Special Tribunal jurisdiction to try the said offence and not to take away the jurisdiction of the Court Martial, if it had any. But for this Ordinance co-accused who were subject to a Service Law, could not have been tried by the Special Tribunal.

It now remains to consider a plea in bar to the jurisdiction of this Court and the High Courts raised by the learned Attorney General and the learned Deputy Attorney-General. They have contended that Courts Martial are legally constituted Courts, even under the ordinary law of the land, namely; the Army Act, and that if such a Court has acted competently with jurisdiction then it is not open to the High Court or this Court to interfere by reason of the provisions of clauses (3) and (5) of Article 199 of the present Constitution. Even apart from the Constitution, it is said that Courts cannot interfere with the decisions of Courts Martial, once the case is properly drawn within their jurisdiction and in support of this contention, reliance is placed on a decision of the judicial Committee in the case of Muhammad Yaqoob Khan v. Emperor (P L D 1947 P C 39), In this case it was held that the Army Act intended the findings of a Court Martial, as and when confirmed by the proper confirming officer, to be

final, subject only to the power of revision for which that Act itself provides. There is no room for an appeal to His Majesty-in-Council consistently with the subject-matter and scheme of the Act.

The same view is reiterated in the decision of the Federal Court of Pakistan in the case of Muhammad Nawaz v. Crown (1951 F C R 13). In this case too it was held that a Court Martial is a Court within the meaning of section 3 of the Judicial Committee Act, 1837, and as proceedings before a Court Martial are of a criminal character, it is a criminal Court. But it is a Court administering statutory military law. It is, therefore, Court of special jurisdiction, not amenable to supervision or control by any judicial body or Court of justice, administering the general law, except where they may be found to have acted without jurisdiction or in excess of it.

The King's Bench Division in England has also held to a similar effect in the-case of the King v. The Army Council Ex-parts Ravenscroft ((1917) 2 K B 504). Reading, C. J., accepted in this case that civil Courts will not intervene in matters relating to military law and discipline and that Courts could not issue a writ of mandamus against military Courts, because, "to do so would make the military law dependent upon the civil Court".

Reference has, in this connection, also been made to Halsbury's Laws of England, p. 325, to show that the English Army and the Air Force Acts of 1955 and the Naval Discipline Act of 1957, are pats of the ordinary law of the land and must rot be confused with Martial Law when a state of wart' exists, and indicates the suspension of the ordinary law,

Reliance has also been placed on Paragraph 1401 in the same volume to show that the "disciplinary provisions contained in the Naval Discipline Act, the Army Act, and the Air Force Act may, with necessary modifications, apply to civilians who are not otherwise subject to service laws if they accompany or are employed in the Service of any body of the naval forces, regular forces or regular air forces while on active services. "Even passengers", it is said, "on board Her Majesty's ships and aircrafts are subject to the disciplinary provisions of the said Acts."

Thus the extension of the Army Act to civilians, as has been done by the amendment of the Army Act, is nothing unusual. Under the English Law also civil offences committed by persons subject to the Courts of the Army, Navy and Air Force, would be triable by the said Courts except for certain specified offences in the same manner as provided in section 59 of the Pakistan Army Act.

Learned Attorney-General has also referred to Hood Phillips' "Constitutional and Administrative Law", 5th Edition, page 305 to point out that:-

"The objects of military law are disciplinary and administrative. It provides in the first place for the maintenance of discipline and good order among the troops, and secondly, for administrative matters such as terms of service, enlistment, discharge and Billeting . …..Courts Martial have jurisdiction to try and to punish persons subject to military law for two classes of offences; first, military offences created by Part II of the Army Act, as to which their jurisdiction is exclusive and, secondly, under certain conditions, civil offences (i.e., criminal offences under non-military law), as to which their jurisdiction in this country is concurrent with the civil (i.e., non-military) Courts."

Thus the provisions of subsection (1) of section 2 and section 59 of the Army Act are neither startling nor novel. They follow the traditional pattern adopted from the time of the British and since it is plot disputed that the Pakistan Army Act is a valid and competent piece of legislation, it cannot now be said that, even if plainly applicable in a particular case, it should not be given effect to.

The learned Attorney-General has also referred us to a number of decisions from the English jurisdiction to support his contention that if a Court Marti4l has jurisdiction to try and hear a case then the High Court ought not to interfere merely on the ground that the military Court had not complied strictly with the rules of criminal procedure or there has been unusual delay in convening the Court Martial vide Rex v. Secretary of State for War ((1949) 1 A E R 242) and R. v. Jennings ((1956) 3 A E R 429).

It is unnecessary to multiply these cases, because, it seems quite settled that if the Court Martial has tried a particular case with jurisdiction, then the ordinary Courts of superior jurisdiction will not interfere in exercise of their power of judicial review merely on the ground that some rule of procedure has not been followed.

The contention raised on behalf of the State that, in any event clauses (3) and (4) of Article 199 of the present Constitution, constitute a bar to the power of the High Court and this Court to interfere with the decision of this Court Martial has now to be noticed. These clauses as amended by Act XXXIII of 1974 on 8-5-1974 read as follows:-

199.-(3) an order shall not be made under clause (1) on application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law."

199.--(5) In this Article, unless the context otherwise requires,-

"person includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or tribunal, other than the Supreme Court, a High Court or a Court or Tribunal established under a law relating to the Armed Forces of Pakistan."

Somewhat similar provisions contained in Article 98(3)(a) of the 1962 Constitution came up for consideration by this Court in the case of Muhammad Akram Khan v. Islamic Republic of Pakistan (P L D 1969 S C 174) and it was held that the bar operates only in a case where the action has been taken against a member of a defence service in relation to him exclusively as a member of such a service in respect of matters specified in clause (3). Originally clause (3) of Article 199 of the present Constitution was the same as clause (3) of Article 98 of the 1962, but in 1974, it was amended so as to bar an application also in relation to a person "who is for the time being subject to any law relating to any of these forces" even in respect of "any action taken in relation to him . . . . . as a person subject to such law". Under clause (5) a "Court or Tribunal established under a law relating to the Armed Forces" is excluded from the category of "persons" against whom any direction or order can be issued under Article 199.

The learned Attorney-General has contended that the words "relating to" in clause (3) are words of wide connotation and after the amendments made in 1974, they operate as a complete bar as they cover every conceivable action taken in relation to even a person for the time being subject to the Army Act as the appellants were. However wide the connotation of these words may be they cannot possibly act as a bar where the action impugned is itself without jurisdiction or caram-non judice or has been taken mala fide as held by this Court in State v. Ziaur Rahman (P L D 1973 S C 49). On the other hand if the action is with jurisdiction and bona fide then I am prepared to concede that the bar will be operative in respect of almost anything if it is in relation to a person who is even only for the time being subject to a law relating to the Armed Force. The action must, however, be one which is taken while he is so subject and not

before he becomes so subject or after he ceases to be so subject. In this view of the matter the trial of the offence under section 121-A, P. P. C. would not, in my opinion, be protected being without jurisdiction.

Apart from this question also arises as to whether this amended clause at all applies to the cases of the appellants, as the amendment, which received the assent of the President on the 4th May 1972, has not been given retrospective effect. The amended writ petition was filed in the High Court on the 25th April 1972 before the constitutional amendments came into force. The writ petition had, therefore, to be decided according to the law prevailing on 25th April 1972, as held by this Court in the case of Sutlej Cotton Mills Ltd, Okara v. Industrial Court, West Pakistan (P L D 1966 S C 472). For the reason given above I am driven to the conclusion that in these proceedings the conviction of the appellants by the Court Martial in respect of the offences mentioned in clause (d) of section 2 (1) of the Army Act could neither have been interfered with by the High Court in its extraordinary jurisdiction under the unamended Article 199 of the Constitution nor can this Court do so now as the trial and conviction was, in every way, with jurisdiction. The Court, sitting in appeal, cannot claim any higher jurisdiction.

These are all the points raised in this case and since I have come to the conclusion that even if the Court Martial had no jurisdiction to try the appellants on the charge under section 121-A, P. P. C. the trial in respect of the other offences was with jurisdiction and was, therefore, not vitiated. The single sentence is also a valid sentence in re3pect of the offences tried with jurisdiction. This appeal must, as such 9n my opinion, fail. I would, accordingly, dismiss the same.

Before parting with this case I would like to add that even though I have come to the conclusion that the conviction was lawful and the sentence legally imposable the fact that the trial and conviction in respect of the offence under section 121-A, P. P. C. has been found to be without jurisdiction may well be a circumstance to be taken into consideration by the competent authority in considering whether the sentence for the less heinous offence merits reduction.

MUHAMMAD YAQOOB ALI, J.--I had the advantage of reading the judgment which the Hon'ble Chief Justice proposes to deliver in the case and agree with him that the appeal be dismissed.

The principal ground raised in the appeal has found favour with the Court, namely, that the Military Court did not have the jurisdiction to try the appellants for the offence under section

121-A, P. P. C. This, however did not help them as the evidence led by the prosecution is relevant also to the charge under section 3l(d) of the Army Act which was triable exclusively by the Military Court. The two charges read as under:--

"1st Charge.-P P A section 59 (against all the accused).-The accused PA 2480, Brigadier (Retd.), F. B. Ali, being a person subject to PAA under the provisions of section 2(1)(d) of the said Act (accused No. 1), PA 3596, Col. (Retd.) Abdul Aleem Afridi, being a person subject to PAA under the provisions of section 2(l)(d) of the said Act (accused No. 2) . . . . . all attached to Special Detention Camp, Attock Fort, are charged with:-

Committing a civil offence, that is to say, conspired to wage war against Pakistan. and thereby committed an offence punishable under section 121-A of the P. P. C.

In that they together, between the period August 1972, and 30th March 1973, at Rawalpindi, Jhelum, Lahore and elsewhere formed a plot to overthrow the Government established by law in Pakistan by putting under arrest with the help of troops at their disposal, the President, the Governor of Punjab, the Ministers, all the Generals assembled in a conference and other officials holding key positions in the Administration, and thereby to assume power in the country for themselves, by means of criminal force.

2nd Charge.-P P A section 31(d) (Against Brig. (Retd.) F. B. Ali, accused No. I only.-Attempting to seduce any person in the Military Forces of Pakistan from his allegiance to the Government of Pakistan.

In that he, during the period mentioned in the first charge, at various places in Pakistan, attempted to seduce Maj. Shahid M. Ataullah and other persons in the Military Forces of Pakistan from their allegiance to the Government, in order to enlist their support for furthering the design of the conspiracy mentioned in the first charge."

it will thus be seen that the two charges are intimately connected with each other and evidence led in proof of one is also relevant to the other charge which is exclusively triable by a Military Court.

If the two charges were dissimilar in that they pertained to two different and unconnected transactions, it could not be that the evidence led in support of one was not relevant to the other charge. Evidence led in proof of the offence, not triable by the Military Court, would, in that case, have resulted in prejudice to the accused and rendered their trial on both the charges illegal.

I am thus in agreement that no prejudice has been caused to the appellants by their trial under section 121-A, P. P. C. which is not triable by a Military Court and section 31(d) of the Army Act which is exclusively triable by a Military Court. I have in mind the decision in Khizar Hayat's case (P L D 1966 S C 791) to which I am a party. In that case the Divisional Commissioner had, under the West Pakistan Criminal Law (Amendment) Act, referred to the Tribunal the case of the accused for determination of their guilt or 1 innocence on charges under sections 363, 366, 368 and 376, P. P. C. Of these, only one offence under section 363 is included in the Schedule to the Act which enumerates the offences in respect of which a reference to the Tribunal may be made. The reference was challenged by the accused in the High Court mainly on the ground that three of the offence were not included in the Schedule. A Full Bench of the High Court, by a majority decision, held that the reference, as a whole, was bad in law but on further appeal by the Divisional Commissioner, this-Court held:-

"The proper reply which the Full Bench should have returned to the question referred was that in view of the fact that the writ petition did not raise any question as to the power of the Commissioner to refer a scheduled offence and his power to leave other allied offences to be dealt with by the ordinary courts, but merely sought quashment of the whole order of reference which mentioned a number of unscheduled offences, the proper course and that which was dictated by the law was t` to find that the reference under section 363, P. P. C. was in accordance with law, but the reference of the offences under sections 366, 368 and 376, P. P. C. was in excess of the powers of the Commissioner and to that extent, his order should be quashed."

It will be noticed that the trial in Khizar Hayat's case had not yet commenced and no question of prejudice, therefore, arose in that case. I am, therefore, of the view that if the evidence led in proof of the charge which was not triable by a Military Court was not relevant to the offence under section 31(d) of the Army-Act, serious prejudice would have resulted to the accused and the High Court could, within the limits of its Constitutional Jurisdiction, hold the proceedings taken in the trial as illegal. However, as stated earlier I am clearly of the view that no prejudice has been caused to the appellants by admission of the evidence which is common to the offences under section 221-A, P. P. C. and section 31(d) of the Army Act.

There remains only one more point on which I may express myself briefly. It was contended by the learned counsel for the appellants that Ordinances III and IV of 1967 which amended

the Army Act and made certain non-Military Personnel subject to its provisions, were repugnant to Fundamental Rights Nos. 1 and 15 guaranteed in the Constitution of 1962. Our attention was, in this connection, drawn to the decisions in Asma Jilani v. Government of the Punjab and another (P L D 1972 S C 139) and Manzoor Ilahi v. Federation of Pakistan (P L D 1975 S C 66). In the first named case, dealing with the Martial Law Regulations and Martial Law Orders, promulgated by General Muhammad Yahya as Chief Martial Law Administrator, I observed:-

"To determine whether the Martial Law Orders, Martial Law Regulations. Presidential Orders and Ordinances issued by him may be recognised by Courts, we must first turn to the definition of `law' as Article 2 of the Constitution of 1962, which remained operative either by its own vitality or by virtue of the Provisional Constitution Order dated 30th March 1969, provided in unequivocal terms:-

"2.-(1) To enjoy the protection of law, and to be treated in accordance with law, and only 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.

(2) In particular-

(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law ;

(b) no person shall be prevented from, or be hindered in, doing that which is not prohibited by law ; and

(c) no person shall be compelled to do that which the law does not require him to do."

'Law' was not defined in the Constitution. It is, therefore, for the Courts to lay down what 'law' is, and if any decree, or behest of Yahya Khan expressed as Martial Law Order. Martial Law Regulation or Presidential Order, or Ordinance, does not conform to the meaning of the term 'Law' in Article 2, these Regulations, Orders and Ordinances will be void and of no legal effect."

Then follows the discussion as to the meaning and content of 'Law'. These observations are confined to 'decrees' and 'behests' of a 'usurper' and not laws enacted competently by a Parliament.

Similarly in Ch. Manzoor Ilahi's case, dealing with the legality of the impending trial of Ch. Zahoor Ilahi under the Frontier Crimes Regulation, I observed:-

"In the light of the decisions in Samundar v. The Crown P L D 1954 F C 228; Malik Muhammad Usman v. The State P L D 1965 Lah. 229 and Government of West Pakistan v. Begum 4gha Abdul Karim Shorish Kashmiri P L D 1969 S C 14 it can be safely stated that the trial of the prisoner, who neither resides in the tribal areas of Baluchistan nor has allegedly committed any offence, there, under section 11 of the Frontier Crimes Regulation will not be in accordance with `law' in the sense in which this term has been used in Article 4 and Article 9 of the Constitution. This finding will certainly reflect on the legality of his custody, but it does not preclude the State from placing him before a Magistrate for trial in accordance with the provisions of the Code of Criminal Procedure.

In Sammundar's case, Cornelius, J. as he then was, had observed:-

"On a careful consideration of the statutory provisions, and the procedure actually followed in enquiries of this nature, I am satisfied that, if the ascertainment of the commission of an act, falling within one or more of the definitions of offences contained in the Penal Code, by the mode prescribed in section II, Frontier Crimes Regulation can be regarded as mode of justice at all, it is certainly not such a mode as is operated through the ordinary Courts of justice acting in accordance with the law of procedure and of evidence, but is rather to be assimilated to, and included among, the agencies of the general administration.

Trial by jirga cannot be regarded as a summary trial, of the nature provided by the Criminal Procedure Code. As these cases themselves show, shortening of the duration of a case is not a necessary or even an intended result of reference to jirga. The exact procedure to be followed in summary trials is laid down in the Criminal Procedure Code. Such trials must follow either the summons case procedure or the warrant case procedure even though the record is maintained in a form, different from and much briefer than that prescribed for ordinary trials. In the case of jirgas, no procedure of any kind is laid down. The requirements are that there should be such enquiry 'as may be necessary' and that the accused person should be heard. By the proviso to section 50 of the Regulation the Commissioner is debarred from interfering with a finding of fact recorded by a jirga, which has been accepted by the Deputy Commissioner, 'unless he is of opinion that there has been a material irregularity or defect in the proceedings or that the proceedings have been so

conducted as to occasion a miscarriage of justice'. In the absence of any rule, the ascertainment of material irregularity or defect except perhaps in cases where there has been no inquiry at all, or the accused person has not been heard at all, would vary according to the opinion of the particular Commissioner in relation to each particular case, and consequently there is no scope for imposing any specific measure of regularity upon the proceedings of jirgas, with the aid of section 50. Nor does the second provision furnish any scope for development of a rule in this respect. There being no regular procedure, such as is laid down in the Criminal Procedure Code for the preservation of strict impartiality and fairplay between the prosecutor and the accused, the mere avoidance of a proceeding on the discovery of a procedure which is in itself likely 'to occasion a miscarriage of justice' cannot be said to furnish adequate scope for enforcing the rule of equal opportunity to both sides.

The form of procedure being thus left to be determined arbitrarily by the jirga, it seems clear enough that the intention of the Regulation also is that none of the recognized rules of evidence should be binding upon the jirga. The main principles which underlie the law of evidence are exclusion of irrelevant matter and of hearsay, coupled with insistence upon the production of the best evidence and upon a strict application of these rules depends the safe administration of justice. Administrative agencies are very frequently saved from the application of those rules by statute or otherwise, and that is certainly the case with respect to jirgas. In these very cases, the jirga has declared that it held `open and secret enquiries', which suggests investigations of a nature entirely different from those which are permissible in a Court of law. Thus, in such enquiries, one would expect to receive a good deal of hearsay evidence, and statements based on prejudice or pre-conception and even mere gossip may be introduced. In such circumstances, it is impossible to preserve the rule of the best evidence.

It is likely that some, and it may be considerable portion, of the evidence which satisfied the jirga was received ex parte, and thus without cross-examination. The statement that open and secret enquiries' were made at Lahore clearly suggests the possibility that such questioning was carried on in the absence of the accused persons. Moreover, information gathered by putting questions in open assembly can never have the quality of judicial evidence, nor can information obtained by secret investigation be so regarded.

The language employed in the Order of Reference which had been cited above, may also have led the jirga to take 'official notice' of certain matters which were in fact justifiable issues, by reason of the statements having been made by high

administrative authorities. For an administrative agency, the taking of 'official notice' may be perfectly in order, but is highly prejudicial to the dispensation of justice.

The process of decision provided under the Regulation is also foreign to justice as administered by the Courts. The hearing is before a jirga but the power of decision is vested in the Deputy Commissioner, who does not see or hear the accused or any of the witnesses and is not empowered by law to do so, even if he should so desire. In these circumstances, the jirga is a merely advisory body, and since the Deputy Commissioner does not have the presented before him through counsel, it is obvious that his decision is wholly vicarious. Decisions of this nature are common enough on the administrative side, but they are obnoxious to all recognized modern principles governing the dispensation of justice. In such circumstances, it is impossible to preserve public confidence in the justness of the decision. That may be of secondary importance to an administrative agency, but it is of permanent importance to a Court of justice. The mere fact that a revision is permitted obviously does not remedy the situation in this respect. The present cases provide clear proof that the Commissioner did not feel sound to examine the case of each accused person before him on its merits, for be has disposed of a great number of these cases by means of a standard order of a composite nature, designed to apply to a number of different contingencies, but containing no reference to any accused person by name, much less to the particular offence of which he is found guilty and the evidence upon which that finding was based.

A feature common to administrative agencies is that they are concerned more largely with the vindication of public interest than with the enforcement of private rights. That feature appears vary clearly throughout the proceedings actually taken in the present cases, which, in this respect, cannot be said to have been conducted otherwise than in compliance with the express provisions and the underlying intentions of the Frontier Crimes Regulation."

In Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri, Hon'ble Chief Justice, in construing Article 98(2)(b) of the 1962 Constitution, concluded thus:-

"The words in an unlawful manner' in sub-clause (b) of Article 98(2) have been used deliberately to give meaning and content to the solemn declaration under Article 2 of the Constitution itself that it is the inalienable right of every citizen to be treated in accordance with law and only in accordance with law. Therefore, in determining as to who and in what circumstances a detention would be detention in an unlawful manner one would

inevitably have first to see whether the action is in accordance with law, if not, then it is action in an unlawful manner. Law is here not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time to time by the superior Courts. It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid down by law. It may well be, as has been suggested in some quarters, that in this sense it is a comprehensive as the American 'due process' clause in a new garb. It is in this sense that an action which is mala fide or colourable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not action in accordance with law. Action taken upon no ground at all or without proper application of the mind of the detaining authority would also not qualify for an action as in accordance with law and would, therefore, have to be struck down as being action taken in an unlawful manner."

It thus becomes clear that the observations made by me in the cases of Asma Jilani and Manzoor Ilahi are confined to their own facts and do not enunciate that Courts can strike down a law made competently by a Legislature on the ground of reason or morality. Laws made by a Legislature can be struck down only if they are repugnant to the provisions of the Fundamental Law under which the Legislature is itself created.

To conclude I respectfully agree with the Hon'ble Chief Justice that the appeal be dismissed.

ANWARUL HAQ, J.--I have had the benefit of reading in advance the judgments proposed to be delivered by my Lord the Chief Justice and my learned brother Mohammad Yaqub Ali, J. While I agree that the appeal be dismissed, I would like to state briefly my own views on certain aspects of the case.

The validity of Ordinances 3 and 4 of 1967, by which certain clauses were added respectively to sections 2 and 59 of the Pakistan Army Act, 1952, was challenged, on behalf of the appellants, on two main grounds:

(a) That the subject-matter of these Ordinances did not fall within any of the items mentioned in the Third Schedule to the 1962 Constitution, and, therefore, they were ultra vires of the Law-making power conferred on the President of Pakistan by Article 29 of the said Constitution read with Article 131 thereof; and

(h) That the Ordinances were violative of Fundamental Rights Nos. 1 and 15 guaranteed by the Constitution of 1962, and,

therefore, void under Article 6 thereof to the extent of such inconsistency.

I am in respectful agreement with the view taken by my Lord the Chief Justice on the first point, namely, that the pith and substance rule still holds good, and we have to consider as to what in reality is the true nature and character of the impugned legislation if any controversy arises as to the competency of the Federal Legislature to legislate with regard to a subject not directly covered by any specific item in the list; and that applying this rule it will be found that the two Ordinances fall within the ambit of item No. 1, 46, 47 and 49 of the Third Schedule to the Constitution. I also agree that the Ordinances are not in any manner violative of Fundamental Right No. 15 as guaranteed by the 1962 Constitution, and have nothing to add to the elaborate reasons given in this behalf by my Lord. However, in regard to the contentions raised before us with reference to Fundamental Right No. 1, 1 regret, speaking with respect, that I have not been able to entirely adopt the view which has appealed to my Lord the Chief Justice, and my learned brother Mohammad Yaqub Ali, J.

Fundamental Right No. 1, as guaranteed by the 1962 Constitution, is in the following terms:

"Security of person.-No person shall be deprived of life or liberty save in accordance with law."

It was contended that the two Ordinances could not be regarded as law within the meaning of this Right, as their combined effect was to unreasonably deprive a citizen of the elementary norms of a judicial trial. It was submitted that under the ordinary law a citizen would be entitled, in the case of an offence punishable with death or transportation for life, to the benefit of a preliminary inquiry by a Magistrate followed by a trial by the Court of Session, which Court was under an obligation to record a detailed judgment with reasons as required by the relevant provisions of the Cr. P. C. The judgment of the Sessions Court would be appealabe to the High Court, and a further appeal could also be brought to this Court, by special leave. However, it was argued, the two Ordinances took away these rights from a citizen, who was not otherwise subject to the provisions of the Army Act. It was pointed out that a Court Martial was not required to record its reasons by way of a detailed judgment, nor was it required even to indicate separate punishment for such offence on which it found the accused guilty; and, finally its judgment was not open to appeal or revision before the superior Courts of the country. It was contended, therefore, that the Ordinances were not law at all as they were violative of accepted judicial principles and norms obtaining in Pakistan.

This argument was sought to be met on behalf of the State, by submitting that the term `law' had not been defined in the Constitution of 1962 and therefore, it had to be understood in its generally accepted connotation as meaning positive law, that is to say, a formal pronouncement of the will of a competent law-give, and it was not open to the Courts to strike down a law on considerations of ethics, morality or philosophical concepts of law. It was next submitted that in any case the two Ordinances, read with the Pakistan Army Act, did not in any manner violate the provisions of Fundamental Right No. 1, as trial by a Court Martial fully conformed to the accepted notions of a fair criminal trial; and, there was also a provision for a revision petition to the Federal Government.

As the question of the meaning and content to be given to the Fundamental Right under consideration fell to be examined by this Court at some length in the very recent case of Ch. Manzoor Elahi v. Federation of Pakistan (P L D1975 S C 66) it does not appear to me to be necessary to go over the same ground again.

In that case the Court was examining the question of the validity of section 11 of the Frontier Crimes Regulation with reference to Articles 4 and 9 of the 1973 Constitution, which are in identical terms as Article 2 and Fundamental Right No. 1 of the 1962 Constitution. My learned brothers Mohammad Yaqoob Ali, J., and Salahuddin Ahmed, J., as well as I myself, in separate opinions, reached the conclusion that the said section could not be regarded as law within the meaning of Articles 4 and 9 of the 1973 Constitution, as it conferred as arbitrary power on the Deputy Commissioner to pick and choose cases for trial by a Council of-Elders, which trial did not conform to the accepted notions of a fair trial as obtaining in Pakistan. In reaching this conclusion, all the three of us relied heavily on the weighty observations of my Lord the present Chief Justice in the case of Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri (P L D1969 S C 14) to the effect that while construing the words "in an unlawful manner," as used in Article 98 (2) (b) of the 1962 Constitution, the term law is not to be "confined to statute law alone, but is used in its generic sense as connoting all that is treated as law in this country, including even the judicial principles laid down from time to time by the superior Courts. It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid down by law. It may well be, as has been suggested in some quarters, that in this sense it is as comprehensive as the American due process clause' in a new garb."

It will be seen that section 11 of the Frontier Crimes Regulation was not treated as "law" in spite of the fact that there was no challenge to the competence of the authority which had promulgated the Regulation.

In the light of the views expressed by three of us as recently as the 17th of December 1974 in the case of Ch. Manzoor Elahi, I find it difficult to accept the contention that the term `law' as used in Fundamental Right No. 1 of the 1962 Constitution, should be interpreted as meaning only positive law. On the contrary, the term, 'law', as used in this Fundamental Right, must be construed as also including the judicial principles laid down from time to time by the superior Courts, and the accepted forms of legal process and juridical norms obtaining in Pakistan. These accepted judicial principles, forms of legal process and juridical norms are so well established and specific that they cannot be brushed aside as being mere abstract or vague considerations of ethics and morality, or philosophical concepts of law. They are not mere theories advanced for the purpose of invalidating competently enacted laws; on the contrary, they are established rules and concepts which give substance and meaning to all laws by promoting the ends of a just legal order.

It seems to me, therefore, that, as held in Ch. Manzoor Elahi's case the injunction as embodied in Fundamental Right No. 1 of the 1962 Constitution required the Court to ensure that:-

(a) the deprivation of life and liberty of a person is under, and in accordance with, law; and

(b) That the law in question is a valid law in term of the Constitution as well as the accepted forms of legal process obtaining in the country.

If the law violates accepted legal and juridical norms it would be repugnant to Article 9 of the Constitution even though it may have been enacted by a competent Legislature.

Coming now to the substance of the contention raised on behalf of the appellants with reference to Fundamental Right No. I our attention was drawn by Mr. M. Anwar to the criteria of a fair trial as enumerated on page 197 of the Constitution of the Islamic Republic of Pakistan (1962) by Mr. M. Munir, a former Chief Justice of Pakistan. According to the learned author, in a criminal trial, an accused person has under the general law some important rights.

These are:

(1) The right to know before the trial the charge and the evidence against him;

(2) The right to cross-examine the prosecution witnesses;

(3) The right to produce evidence in defence;

(4) The right to appeal or to apply for revision;

(5) The right to be represented by counsel;

(6) The right to have the case decided by the Judge who heard the evidence;

(7) The right to trial by jury or with the aid of assessors;

(8) The right to certain presumptions and defences; and

(9) The right to apply for transfer of the case to another Court.

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

I may add that, as observed by Halsbury on page 825, the Courts Martial are parts of the ordinary law of the land, and must not be confused with Martial Law Courts which are brought into existence on suspension of the ordinary law. Any criticism or misgivings attaching to the functioning of military Courts under Martial Law cannot be imported into a consideration of the fairness of trial held by Courts Martial established under the relevant Acts for the Army, Navy and Air Force. These Courts Martial are intended to regulate the discipline and conduct of the personnel of the respective Forces, and of all other persons who may be made subject to these laws in certain circumstances. They are thus established institutions with well-known procedures, which cannot be described as arbitrary, perverse or lacking in fairness in any manner.

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.

The next aspect of the case on which I wish to comment is regarding the point of time at which the appellants became subject to the provisions of the Army Act in terms of clause (d) of subsection (i) of section 2 read with subsections (1) and (4) of section 59 thereof. I am in respectful agreement with my Lord the Chief Justice in holding that the offence under section 12 t-A of the Pakistan Penal Code would be triable under the Army Act by reason of the provisions contained in subsection (1) of section 59 only if it was committed after the person charged became subject to the Army Act and not otherwise. The time of subjection is to be ascertained by reference to the words used in the newly added clause (d) to subsection (1) of section 2 of the Act, namely, "persons not otherwise subject to this Act, who are accused of……." The question, therefore, is when is a person accused of an offence.

The first information report was registered in this case against the appellants at 6 p. m. on the 29th of March 1973, at the Cantonment Police Station, Rawalpindi, by an Officer of the Military Intelligence Directorate, and the appellants were arrested the next day. A formal charge was made against them by the Court Martial on the 4th of July 1973, and it was read out to the accused on the 9th of July 1973. My Lord the Chief Justice has been pleased to hold that the mere lodging of an information does not make a person an accused, nor does a person against whom an investigation is being conducted by the Police can strictly be called as accused, as such a person may or may not be sent up for trial. His Lordship has further observed that the information may be found to be false and accordingly a person becomes an accused only when charged with an offence. On this view of the matter, his Lordship has taken the 4th of July 1973 or the 9th of July 1973 as being the relevant date for the purpose of subjecting the appellants to the provisions of the Army Act. Both these dates being subsequent to the alleged commission of the offence under section 121-A of the Pakistan Penal Code, his Lordship has taken the view that the offence falling under section 121-A, P. P. C., as alleged against the appellants, could not be tried by the Court Martial.

The question of the meaning of the word `accused' came up for consideration before a Full Bench of the former High Court of West Pakistan in Nur Mohammad v. Commissioner, Sargodha Division (P L D 1968 Lah. 1441) with reference to the various

subsections of section 3 of the West Pakistan Criminal Law Amendment Act (VII) of 1963. I was a member of that Bench, and it fell to my lot to deliver the opinion of the Court. It was observed that the word `accused' was not defined in the West Pakistan Criminal Law Amendment Act nor in Criminal Procedure, Code, and accordingly the term had to be given its ordinary dictionary meaning, namely "any person against whom a charge or accusation has been brought irrespective of the fact whether such an accusation is brought by way of a first information report, or a report submitted under section 173 of the Criminal Procedure Code, or is contained in a private complaint instituted in a Court." I would prefer to adhere to this view, and hold that in the present case the appellants were accused of the offence mentioned in clause (d) of section 2 (1) of the Act on the 29th of March 1973. Accordingly, they would be liable to be tried by a Court Martial under the provisions of subsection (1) of section 59 of the Act, in respect of a civil offence committed by them after the registration of the first information report against them.

No doubt, in the charge framed against the appellants regarding the offence falling under section 121-A of the Pakistan Penal Code, it was mentioned that they committed this offence between the period August 1972 and 30th of March 1973 (which is the date of their arrest), it is clear that this is an incorrect statement. A perusal of the first information report shown that the allegations disclosed the commission not only of the offence falling under sub-clause (1) of clause (d) of subsection (1) of section 2 of the Pakistan Army Act, but also of offences falling under sections 121-A, 124-A and 131 of the Pakistan Penal Code. Thus all the offences alleged against the appellants had been committed before the registration of the first information report, and no overt act was alleged against them after such registration. It follows; therefore, that the offence falling under section 121-A, P. P. C. had been committed. Before the appellants became subject to the provisions of the Army Act in, terms of clause (d) of subsection (2) of the Pakistan Army Act. This charge under section 121-A. P. P. C., as made against the appellants, did not therefore fall with in the jurisdiction of the Court Martial in terms of subsection (1) of section 59 of the Act.

Once it is found that, the Court Martial had no jurisdiction to the appellants for the offence falling under section 121-A, P. P. C., the question naturally arises whether their conviction on the other charge falling under section 31 (d) of the Pakistan Army Act (equivalent to section, 131, P. P. C.) could be substained. It was submitted by Mr. M. Anwar that the conviction of the appellants under section 31 (d) of the Pakistan Army Act stood vitiated for the reasons that there was obviously a misjoinder of charges, and the serious prejudice had been caused to the

appellants on account of the fact that a large mass of evidence relating to the charge falling under section 121-A. P. P. C. was allowed to be produced before the Court Martial so as to influence its mind on the second charge which was of a much smaller magnitude. Learned counsel referred us to the record of the evidence for the purpose of ,vowing that the evidence relevant to the charge falling within the jurisdiction of the Court Martial consisted only of a few witnesses spread over a small number of pages, whereas rest of the bulky record related to the charge under section 121 .A, P. P. C. He further submitted that grave prejudice to the appellants was also apparent from the fact that only one single sentence was imposed by the Court Martial, and there was accordingly no material to ascertain what the sentence would have been if only the charge under section 31 (d) had been tried by the Court Martial.

The cases cited at the Bar by learned counsel for both sides have been noticed at length in the judgment of his Lordship tile Chief Justice. and accordingly it is not necessary for me to dilate upon them. Suffice it to say that there is hardly any authority in support of the proposition canvassed by Mr. M. Anwar to the effect that if a part of the action taken by a Court or Tribunal is found to be without jurisdiction, then even that part of the action, which is with jurisdiction, must also be set aside and declared unlawful, even if »o prejudice has been caused to the party concerned. It seems to me that if it is possible to separate the two kinds of action, namely, one with jurisdiction and the other without jurisdiction, without prejudice having been caused, then the action with jurisdiction would be saved, If, en the other hand, it is found that the combination of the two kinds of action has seriously vitiated even the action with jurisdiction, then I see no difficulty in the way of the High Court, and consequently the Supreme Court acting in appeal, setting aside the entire action as being without lawful authority and of no legal effect, in the exercise of its powers of judicial review. In such a case, by reason of serious prejudice having been caused to the party concerned, even the action with jurisdiction is rendered without lawful authority owing to violation of an accepted and established principle of the administration of justice, namely, that the; decision of a Court or Tribunal must not be allowed to be influenced by extraneous factors and circumstances not directly related to the subject matter of the dispute, and not falling within the four corners of the law governing the same.

The question whether in any given case serious prejudice has been caused, by a combination of the kind we are considering here, is a question of fact which must be decided with reference to the peculiar circumstances of each case. In the case of the appellants before us. It seems common ground between the parties that the evidence on the two charges framed against them

was inter-linked, and it appears that even if the charge under section 121-A had not been framed and tried by the Court Martial, the evidence led in support of it could still have been led on the other charge under section 3s (d) of the Army Act. In these circumstances, it is difficult to accept the contention that the finding of the Court Martial on the charge within it hid jurisdiction to try stands vitiated merely by reason of the fact that evidence on the charge of conspiracy was allowed to be led before it.

It is true that the Court Martial has awarded only one single sentence on both the charges, but this it was permitted to do under rule 54 of the Pakistan Army Rules, which provides that the sentence is to be deemed to have been awarded in respect of the offence in each charge in respect of which it could he legally imposed. It follows, therefore, that the legality of the single sentence is not affected by our finding that the trial and conviction on the charge falling section 121-A of the Pakistan Penal Code were without jurisdiction. At the same time, it is possible Chit the quantum of the sentence awarded on the second charge might have been different if the Court had not also tried and convicted the appellants under section 121-A, P. P. C. For this reason I am in respectful agreement with the observation contained in the concluding paragraph of the judgment of the learned Chief Justice that this is a circumstance which may well be taken into consideration by the competent authority for determining whether the sentence for the lesser offence under section 31 (r)) of the Pakistan Army Act merit reduction.

With these observations, I agree that the appeal be dismissed.

SALAHUDDIN AHMED, J.--I agree.

MOHAMMAD GUL, J.--I bad the advantage of reading the judgment proposed to be delivered by my Lord the Chief Justice and the concurring notes by my learned brethren Muhammad Yaqoob Ali and S. Anwarul Haq, JJ. I agree entirely with the conclusions reached by my Lord the Chief Justice and the reasons upon which these conclusions are based. However, because of a divergence of opinion between my Lord the Chief Justice and Muhammad Yaqoob Ali. J on the one hand and S. Anwarul Haq. J. on the other as to the true meaning of the term `law" used in Article 2 of the 1962. Constitution and Fundamental Right No. I in Chapter I of Part II (bid ands I deem it necessary to briefly record my views on the point.

In my opinion the controversy stands finally settled by the judgment of the full Court in the case of Asma Jilani (P L D 1972 S C 139) wherein after an elaborate discussion as to the true meaning of term "law" in the above two provisions in the

Constitution of 1962 the learned Chief Justice summed his views in the leading judgment in the following word:

"So far as a Judge is concerned, if a definition is necessary, all that he has to see is that the law which he is called upon to administer is, made by a person of authority legally competent to make laws and the law is capable of being enforced by the legal machinery This in my view, brings in the notion both of legitimacy and efficacy."

'This would exclude from the term "law" "what are mere theories and legal precepts". Being the judgment of tile full Court `under the rule of stare decisis, it will have binding effect, notwithstanding any observation to the contrary in any subsequent case.

Therefore, Ordinances III and IV of 1469, having been found to nave been competently made and duly approved by the Central Legislature, the two appellants became amenable to the jurisdiction of the Court Martial. And so far as the offence under section 31 (d) of the Army Act was concerned, it was validly seized of the mater. The mere fact that accusation against the appellants also disclosed an offence under section 121, P. P. C. with which they were also formally charged, per se, will not vitiate the trial even for the offence un let section 131, P. P. C. or warrant interference by the High Co Art in writ jurisdiction, which needless to say, is not co-extenstive with the ordinary appellate jurisdiction. The High Court was not sitting as Court of appeal over the findings of the Court Martial. The appellants' remedy lay by way of review under the Army Act.

The principle, that law once competently made shall be given full effect regardless of any consideration of equity, morality or wisdom was recently accepted by this Court in Messrs Mamukanjan Cotton Factory v. The Punjab Province and others (P L D 1975 S C 50). The facts of that case are rather remarkable. In that case certain fee purporting to be charged under W. P. Cotton (Contro) Act, 1959 was declared by the High Court to have been illegally recovered because of certain defect in law. Twice writs were issued directing a refund of the illegal exactions. Ultimately, the law was amended retrospectively so as to nullify the effect of wets issued by the High Court and thus to enable the Government to retain the erections which ab initio were illegal. The validating legislation could scarcely be supported on any equitable or moral ground. Nevertheless, the argument seeking to invalidate the validating legislation was rejected in these terms:-

"The argument is without substance and one which if accepted would indeed lead to startling results. It would strike at the very

root of the power of Legislature, otherwise competent to legislate on a particular subject, to undertake any remedial or curative legislation after discovery of defect in an existing law as a result of the judgment of a superior Court in exercise of its constitutional jurisdiction. The argument overlooks the fact, that the remedial or curative legislation is also "the end product" of constitutional jurisdiction in the cognate field. The argument if accepted, would also seek to throw into serious disarray the pivotal arrangement in the Constitution regarding the division of sovereign power of the State among its principal organs, namely, the executive, the Legislature and the judiciary, each being the master in its own assigned field under the Constitution."

Therefore, I agree that the appeal be dismissed.

ORDER OF THE COURT

In accordance with the unanimous opinion of the Court this appeal is dismissed.

Appeal dismissed.