

IN THE HIGH COURT OF SINDH, AT KARACHI

C.P. No.D-4233 of 2024

(Abdul Monem [Ex. Chief Technician] versus
Vice Chief of Air Staff [Pakistan Air Force] and others)

PRESENT:
MR. JUSTICE MUHAMMAD FAISAL KAMAL ALAM
MR. JUSTICE JAWAD AKBAR SARWANA

Date of hearings : 28.04.2025 and
21.05.2025

Petitioner
(Abdul Monem (Ex. Chief
Technician)) : Through M/s. Umar
Farooq and Sumaera
Noreen, Advocates.

Respondents No.1 to 5
(1. Vice Chief of Air Staff
[Pakistan Air Force], 2. Ministry of
Defence, 3. ACAS [PA] Sect [Ad
Discipline], 4. Officer Commanding
[Base Commander] and 5. WG CDR
Zahid Hussain Memon) : Through Ms. Shazia
Hanjra, DAG along with
Mr. Adnan Hanif, Law
Officer of PAF

- Law under discussion:**
- (1). The Constitution of the Islamic Republic of Pakistan, 1973.
 - (2) The Pakistan Air Force Act, 1953, (**the Act**)
 - (3) The Pakistan Air Force Rules, 1957 (**PAF Rules**).

Case Law cited by the Petitioner’s Counsel.

- 1) **PLD 1989 Supreme Court 6**
[Pakistan through Secretary, Ministry of Defence vs. the General Public]-MOD Case

- 2) **PLD 2007 Supreme Court 498**
[Federation of Pakistan and others vs. Raja Muhammad Ishaque Qamar and another]-Raja Case
- 3) **2014 SCMR 1530**
[Federal Government M/o Defence, Rawalpindi vs. Lt. Col. Munir Ahmed Gill]-Gill Case
- 4) **2012 SCMR 1229**
[Federation of Pakistan through Secretary Defence and others vs. Abdul Basit]-Abdul Basit Case
- 5) **PLD 2020 Supreme Court 1**
[Jurists Foundation through Chairman vs. Federal Government through Secretary, Ministry of Defence and others]-Jurists Case
- 6) **PLD 2017 Supreme Court 173**
[Khushdil Khan Malik vs. Secretary, Ministry of Defence Rawalpindi Cantt and others]-Malik Case
- 7) **1999 SCMR 2744**
[Federation of Pakistan through Secretary, Establishment Division Government of Pakistan, Islamabad vs. Muhammad Tariq Pirzada and 2 others]-Tariq Pirzada Case
- 8) **Judgment of Supreme Court of Pakistan in Civil Appeal Nos.106 to 109 and 141 of 2010**
[Ex-Chief Warrant officer Ali Gohar and others vs. Federation Of Pakistan]

Case Law relied upon by Respondents' Counsel.

- 1) **1994 SCMR 2286**
[Muhammad Mushtaq vs. Federation of Pakistan]- Mushtaq case
- 2) **2018 PLC (C.S) Note 85**
[Muhammad Asif vs. Federation of Pakistan through Secretary and 3 others]
- 3) **2005 PLC (C.S) 64**
[Havaladar Mian Ramzan vs. Federal Government, Ministry of Defence, through Chief of the Army Staff, General Headquarters, Rawalpindi]
- 4) **1979 SCMR 555**
[Sabir Din vs. Government of Pakistan through Secretary, Ministry of Defence and others]-Sabir Din case
- 5) **2024 SCMR 1258**
[Abdullah Jumani and others vs. Province of Sindh and others]

Other Precedents

1. **I.C.J. Reports 2019, Page-418**
[India versus Pakistan]-Kulbhushan Jadav Case
2. **2019 PLD Sindh 697**
[Gulzar Ahmed versus Province of Sindh and others]-Gulzar Ahmed Case
3. **2013 SCMR 1880**
[Hamid Mir versus Federation of Pakistan]-Hamid Mir Case
4. **PLD 2009 SC 879**
[Sindh High Court Bar Association versus Federation of Pakistan]-SHCBA Case
5. **PLD 2021 SC 770**
[Asad Ali Khan and others versus Province of Punjab and others]-Asad Case
6. **PLD 2021 SC 812**
[Ghulam Qasim and others versus Mst. Razia Begum and others]-Razia Begum Case.
7. **2021 PLC (C.S.) 92 (PHC)**
[Umar Islam versus Federation of Pakistan through Secretary Defence]-Umar Islam Case
8. **PLD 2020 Islamabad 428**
[Sarfaraz Khan versus Chief of Air Staff (Pakistan Air Force), Islamabad]-Sarfaraz Case
9. **PLD 2012 Supreme Court 774**
[Muhammad Azhar Siddiqui versus Federation of Pakistan]-Azhar Case
10. **PLD 2025 Supreme Court 440**
[Senior Joint Director Foreign exchange operations division SBP versus Federation of Pakistan]-SBP Case
11. **PLD 1957 Supreme Court 9**
[Jibendra Kishore Achharyya Chowdhury versus Province of East Pakistan, Secretary Finance and Revenue]-Jibendra Case
12. **PLD 2018 Sindh 360**

[Mohammad Sarwar versus Government of Sindh (Karachi High Court)]-Sarwar Case

Research Material / Books

- 1) Book Rooh Al Maarif { a summary and compilation done by Shah Maqsood Ahmad Arafī of Eight Volumes of Maarif ul Quran, a Tafseer (Exegesis) of the Holy Quran (by Shaykh Mufti Muhammad Shafi) }.
- 2) Constitutional Limitations, authored by Khalid M. Ishaque.
- 3) The Fundamental Law of Pakistan { 1st Edition } By A. K. Brohi.
- 4) The Politics of the US Supreme Court {Richard Hodder-Williams}
- 5) The Due Process of Law
By Lord Alfred Denning
- 6) Towering Judges: A Comparative Study of
Constitutional Judges
Edited by Rehan Abeyratne and Iddo Porat

JUDGMENT

MUHAMMAD FAISAL KAMAL ALAM, J: The Petitioner has challenged the dismissal from service vide Correspondence dated 14.06.2024 (*the ‘Impugned Dismissal Order’*), issued under Section 20(1) of the Pakistan Air Force Act, 1953, (**the Act**) Read with Rule 31-A of Pakistan Air Force Rules, 1957 (**PAF Rules**).

The Petition contains the following Prayer Clause_

“In the light of above said conspectus of facts and law, it is therefore respectfully prayed that this Honourable High Court be graciously pleased to pass the following orders:-

- i. *That Honourable court may please set aside order of dismissal of the Petitioner as informed vide letter dated 14 June, 2024 passed by the Respondent # 1, by declaring the administrative action is **illegal, unconstitutional, malafide, without jurisdiction, Coram non Judice** and Petitioner be reinstated in service with all his past, present and future benefits.*

Or/And

Petitioner may please be retired honourably from his service, with full service benefits and his period of service may please be considered till date of final decision / order of this Honourable Court or Apex Court.

- ii. *That Honourable court may please declare Section 20 (1) of the PAF Act 1953 and rule 31-A of the PAF Act Rules 1957 are ultra vires to the Section 52, 53, 65, 73, 74, 76, 81, 82, 86, 87, 88 162(B) of the PAF Act, 1953 and repugnant to the Constitution of the Islamic Republic of Pakistan, 1973 as there should be an opportunity of fair trial and right of appeal for individual at independent forum.*
- iii. *To declare that dismissal of the petitioner as per **Section 20(1) PAF Act 1953 read with rule 31-A of the PAF Act***

Rules 1957 without adopting any court martial trial procedure is contrary to Pakistan Air Force Act of 1953 and ultra vires/repugnant to the Constitution of the Islamic Republic of Pakistan, 1973.

- iv. *To declare that Show Cause Notice issued to the petitioner is illegal and all proceedings conducted thereafter on the basis of said Show Cause Notice are null and void as well as without any force of law.*
- v. *Any other relief, which this Honourable Court deem thinks fit, proper and appropriate, may also be awarded to the petitioner, in the greater interest of justice.”*

2. Mr. Umar Farooq, Petitioner’s learned Counsel assisted by Ms. Sumaera Noreen (Advocate), argued on the basis of the averments mentioned in the Petition. Contends that due to health issues, Petitioner was posted at PAF Base Masroor (Karachi) from PAF Base (Sargodha), on medical compassionate grounds with effect from 15.01.2024, as at his former Base, no Spinal Surgeon was available.

3. Averred that on 22.06.2020, an Inquiry was ordered against the Petitioner in respect of embezzlement of service medicines, vide, Base Routine Orders [BRO] No.118, dated 22nd June 2020. The Board of Inquiry [BOI], as per Air Force Order [AFO] No.111-56, Para 6(a), is to be completed within (15) fifteen days, which was not done; rather, Respondent No.1 took four years to give the above impugned Order against the Petitioner.

4. Argued that the Petitioner cross-examined the Witnesses [in terms of Rule 191 (15) (a and b)], and none of the Witnesses testified against the Petitioner that the latter is involved in claiming medicines by misusing the names of other employees [of Respondent] and is responsible for financial

embezzlement. One Squadron Leader-Irfan Lashari, who was a Member of the Board of Inquiry, was biased towards the Petitioner and during proceedings he passed insolent remarks, which violated Paragraph 18(e) of AFO [Air Force Order] No.111-57; that evidence of the Officers attached with the Pakistan Air Force Hospital Faisal, did not testify against the Petitioner; referred to Paragraph-17 of his Petition, that even the Investigation Officer of the Board of Inquiry, Squadron Leader-Ahsan Safoor, was dismissed from service being involved in immoral activity, and thus, the entire Investigation Report has become questionable. Contends that while the Board of Inquiry proceeding was *sub judice*, through an illegal Order dated 11.09.2021, another ‘Additional Board of Inquiry’ [ABOI] was formed, in which the Petitioner was never called, but the witnesses were re-examined, without giving the Petitioner the opportunity to cross/re-examine them, which is a glaring violation of Air Force Order [AFO] No.111-57, Paragraph-18 (b and c), providing the procedure for evidence recording and gives the accused persons / affected persons the right to call and cross-examine the Witnesses. Contends that in month of September 2022, a Summary of Evidence was ordered by DCAS (Admit) AHQ Islamabad. Petitioner attended the proceeding and he was confronted with six charges [mentioned in *Annexure “G”*; *page-113* of the Petition], *inter alia*, about receiving illegal financial gain from fake medicine prescription by misusing the name of other employees of Respondent-PAF, who are although the prosecution witnesses, but did not implicate the Petitioner in the Offence complained of, yet the Petitioner has been given punishment. Petitioner submitted his Statement of Defence before the Summary Recording Officer on 28.02.2023 in response to all the Charges. Purportedly, another illegality was committed, when, after the lapse of

more than one year, Petitioner was issued the Show Cause Notice dated 15.03.2024 by the Respondent No.5 (Officer Commanding), which too was replied to, but, it was not considered, and consequently, followed by the impugned Order.

5. Learned Counsel has stated that Section 20 is violative of the PAF Act and the Constitution, in particular Articles 9 and 10-A (*relating to life and fair trial*), because this Section 20 is usually misused to dismiss the employees, who cannot be punished or dismissed from service otherwise, in accordance with the Act and Rules; it violates the due process of law, because it can be invoked, without following the prescribed procedure of the Board of Inquiry in the PAF Act and Rules. That no higher forum is provided against the dismissal under Section 20, as against other similar provisions mentioned in PAF Act, such as Sections 73, 74, 76, 81 and 82, in respect of which a Review can be filed invoking Section 88 of the PAF Act. Contends that the entire second proceeding, that is, ABOI violates Section 120 of the PAF Act, which provides a limitation period of three years, from the date of the offence committed, for initiating a trial. Similarly, has invited our attention to Sections 160 and 162-B, providing an Appellate Forum, for punishment awarded in offences other than Hudood Cases, including dismissal from service; besides Section 177, which is a general pardon; while elaborating that even this pardon and remission is only available for those who have been convicted by the Court Martial and since the Petitioner was not, therefore, even this provision, he is unable to invoke to seek departmental remedy; that the Impugned Dismissal Order should have been issued under Rule 31-A by the Vice Chief of Air Staff (VCAS), but the same is issued by the Squadron Leader; under Rule 31-A the authority cannot be further delegated **[in view of Note (e) of Section**

20], and thus, the Impugned Order is unauthorizedly issued. Referred to Note (c) of Sub-Section [1] and (a) of Sub-Section [2] of Section 20 [of the Act], and argued that the above provision can be invoked if either the Petitioner would have been sentenced to imprisonment, or, in case of an offence, be tried by a Court Martial; but, neither has been done and thus, the impugned Order under Section 20 is an illegality; in furtherance of his submission, referred to Sections 65 and 73 [of the Act], regarding short imprisonment and dismissal; the latter can be used only after a court-martial.

Filed a Review dated 26.02.2024 [Annexure- L], before the Chief of the Air Staff, but no Decision was given. Cited the Case Law mentioned in the opening part of this Judgment.

6. Ms. Shazia Hanjra, the learned Deputy Attorney General, along with Mr. Adnan Hanif, the Law Officer of Pakistan Air Force, have controverted the above arguments and questioned the maintainability of the Petition. Justified the dismissal of Petitioner under Section 20, Read with Rule 31(A) of the Act and Rules (respectively). Contends that a Show Cause Notice of 15.03.2024 was issued to the Petitioner, which was replied by him, providing that he was giving ample opportunity and due process was completed in proceeding against him on number of Charges (*supra*).

Averred that the Board of Inquiry was held under Rule 191 of the Rules, in which seven personnel, including Petitioner, were found responsible for the embezzlement of service medicines. Denied the contention of Petitioner's Counsel, the Board of Inquiry should be completed within fifteen (15) days, in terms of AFO 11-56 [*ibid*], and states that it is a mere guideline and not mandatory. Has categorically disputed the assertion of Petitioner's plea, that the Board of Inquiry consisted of

Members, who was / were biased. Due to certain intricate questions involved in the subject dispute, the Additional Board of Inquiry was convened in accordance with Rule 191 (17) of the said Rules.

Stated that the impugned dismissal Order is issued by the Authority at Islamabad and thus this Court lacks territorial jurisdiction; argued the non-maintainability of this Petition on the strength of Case Law cited by her, so also Sub-Article (3) of Article-8 and Sub-Article (3) of Article 199 of the Constitution, and stated that the constitutional command is, that the jurisdiction of this Court is barred in such nature of cases. Has referred to her Written Arguments and in particular Paragraph-5 [*reproduced below*], that Article 8(3)(a) of the Constitution, recognizes that the Armed Forces be governed by special laws, which means, that Constitutional guarantee under Clause (1) of Article 8, that a law [custom or usage] which is inconsistent with the fundamental rights is/are void, does not apply to the Petitioner, or for that matter to the members of the Armed Forces.

“5. Military discipline forms the backbone of the Armed Forces and is indispensable for ensuring collective national defense. In this context, Article 8(3)(a) of the Constitution of the Islamic Republic of Pakistan, 1973, recognizes and affirms that the Armed Forces may be governed by special laws enacted for ensuring the proper discharge of duties and the maintenance of discipline within the ranks.”

Legal Team of the Respondents argue that a Constitution Petition, if at all lies, is only against factum of *mala fide*, which is hardly alleged by the Petitioner, except in Paragraph-11 of the Petition, which is a general allegation and not a specific one, and is to be discarded. By referring to the averments of Petition, it is argued that the Petitioner himself admitted that he was given an ample and fair opportunity to present his Case, and even

evidence is recorded. Thus, no illegality exists in the entire Proceeding before the Respondent.

7. In Paragraph-8 [Written Arguments], it is averred, that keeping with the spirit of the Pakistan Air Force legal framework, it is the prerogative of the Commanding Officer to determine the applicability of statutory provisions and Rules, having due regard to operational exigencies, disciplinary considerations, and the morale of personnel under his command. In this context, Rule 41 and AFO-111-58 are relevant. In their submissions, the Legal Team of Respondent-PAF, has argued that Section 20 [1], (*ibid*), is appropriately invoked.

8. To augment the arguments, learned DAG has cited the Decisions, which have already been reproduced in the opening paragraph of this Judgment.

Arguments heard and Record Perused.

9. On a question, learned DAG clarified that no Additional Board of Inquiry was held, as stated by the Petitioner's side, but a second chance was given to Petitioner to appear before the competent Authority to present his case.

In response to the objection of the Petitioner's Counsel that the Original impugned Order (information Order) is neither filed nor attached, the learned DAG referred to Rule 191 (19) of the Rules and states that the Proceeding of the Board of Inquiry is privileged and is not subject to disclosure, except as provided in the said Rule.

Whether the present Constitution Petition is maintainable

10. Summary of the Case Law cited by the Petitioner's Counsel_

the Judgment in the case of Ministry of Defence (*supra*) has held that non-provision of the right of Appeal generally and in the Defence Laws, viz. the Pakistan Army Act, Pakistan Air Force Act, and the Pakistan Navy Ordinance, is repugnant to the injunctions of Islam. The bar contained in sub-Article (3) of Article 199 of the Constitution, in respect of cases of Military Personnel, is not attracted where the impugned action is found to be without jurisdiction, *coram non judice* or *mala fide*.

In *Gill Case* (a serving Officer of the Pakistan Army) was tried by a Field General Court Martial (FGCM) on the charges relating to money matters and improperly filing of Tax Return, found guilty on all four counts and awarded a sentence of dismissal from service coupled with one year rigorous imprisonment, which upon sending the matter for confirmation to the Chief of Army Staff, sentence was remitted while maintaining the Order of dismissal from service. The Appeal filed before the Army Court of Appeal was dismissed, which was challenged before the learned Lahore High Court and the Writ Petition was allowed; which was challenged by the Federal Government before the Apex Court. The Hon'ble Supreme Court has reiterated the legal principle that in such matters where the action of Military Authorities regarding a serving officer, is tainted with *mala fide*, *coram non judice* or without jurisdiction, then it is assailable in the writ jurisdiction under Article 199 of the Constitution of Pakistan. Sections 52 and 55 of the Army Act are omnibus provisions relating to the general behavior and conduct of an Army Officer, which could cover a wide variety of conduct of a person concerning his day to day behavior with others, his / her integrity and good conduct, and can include the allegations of falsifying the Income Tax Return (*ibid*); however, when the said Income Tax Return was accepted by the Income Tax Authorities without any objection, on this

ground he could not have been prosecuted by the Army Authorities; *secondly*, had he proceeded against by the Income Tax Authority (theoretically) he would have also exhausted the hierarchy of Appeal. The impugned Judgment of Lahore High Court was maintained, and since the Respondent attained superannuation, it was held that ***“he shall be deemed to have honorably retired from the Pakistan Army as a Lieutenant Colonel, with all consequence benefits, including pension etc.”***.

In *Abdul Basit Case (supra)*, the Respondent was a technician (Radio Fitter) in Pakistan Air Force, who was removed from Service under Section 20(1) of the above Act Read with Rule 31-A ***[both these provisions are challenged by the present Petitioner in this Petition, with a prayer that same be declared as ultra vires the Act as well as Constitution of Pakistan because no Appeal is provided]***, that the said respondent (of the reported case) was acquitted from the Criminal Case but he was neither reinstated nor discharged in terms of Circular dated 13.12.1992 (issued by PAF Authorities). The Hon’ble Supreme Court has taken into account the Circular dated 13.12.1992, by converting the dismissal of Respondent to discharge from service, while awarding the applicable dues. It is held that the PAF could not have removed the Respondent from Service if he was acquitted from the Court of competent jurisdiction and his case shall within Paragraph-5 of the above Circular Read with Section 20, Note (1)(b).

In a somewhat identical situation [like the present Constitution Petition], when Section 20 was invoked to dismiss the petitioner, the learned Division Bench of the Hon’ble Peshawar High Court in **Umar Islam Case, [2021 PLS (C.S) 92]**, observed that since no appeal forum is provided for a person dismissed under Section 20 *[ibid]*, thus, where the action is challenged on the basis of *mala fide* and *coram non judice*, the

Writ Petition is maintainable, while placing reliance on a Judgment handed down by the Hon'ble Supreme Court and subsequently reported as **2014 SCMR 1530** [*MOD citation, supra*].

11. Précis of the Case Law relied upon by the Legal Team of Respondent is that_

the Hon'ble Supreme Court has ruled in the case of **Mushtaq** (*ibid*) that the High Court has no jurisdiction under Article 199, even for enforcement of fundamental rights, as the same is included in the barring provision of Sub-Article (3) of Article 199 of the Constitution.

In **Sabir Din Case**, The Apex Court has touched upon the issue of territorial jurisdiction; wherein, the dismissal Order was challenged in a Writ Jurisdiction before the learned Peshawar High Court, whereas it was issued from Rawalpindi, and it was held that although the Military Estate Office is established throughout Pakistan, but cause of action accrued within the territorial jurisdiction of that High Court from where the actual Order under challenge in the Writ Petition was issued; consequently, maintaining the dismissal order of Peshawar High Court on lack of territorial jurisdiction.

Learned Division Bench and Single Bench of this Court and Lahore High Court disallowed the Petitions of petitioner-Muhammad Asif and Ramzan, respectively, (*supra*), who were dismissed from Pakistan Navy and the Army, seeking setting aside of the dismissal Orders. **Held**, that in view of the constitutional bar in Sub-Article (3) of Article 199 [of the Constitution], as the petitioner (of the reported cases) was Members of the Armed Forces, therefore, their grievances cannot be entertained in a Constitutional Petition, and lawful view formed by the Authorities cannot

be substituted in writ jurisdiction; except, *inter alia*, where question of jurisdictional defect, and mala fide exist.

With regard to the rule of interpretation and questions arising out of various statutes, the Hon'ble Supreme Court in a recent Judgment of **Abdullah Jumani** has held that_

“12. No doubt, if the constitutionality of any law is challenged in the High Court, the Court can scrutinize and survey such law and also strike it down if it is found to be offending the Constitution of absenteeism of law-making and jurisdictional competence or is in violation of fundamental rights. In unison, it also a well-settled exposition that the law should be saved, rather than be destroyed...”

“13. That function of judiciary is not to legislate or question the wisdom of the legislature in making a particular law, nor can the judiciary refuse to enforce a law. The intention of the legislature is primarily to be gathered from the language used...”

The above **Jumani Case** is relied upon by the Legal Team of Respondent, to controvert the stance of the Petitioner's Counsel, for declaring Section 20 and Rule 31-A [*supra*], *ultra vires* the PAF Act so also the Constitution.

12. The celebrated Book on the Constitution, 'The Fundamental Law of Pakistan' [mentioned in the opening part of this Judgment], the issue of constitutional jurisdiction vis-à-vis Court Martial cases are discussed through a comparative study of the United Kingdom and Pakistan. The conclusion is that **Courts-Martial themselves being creatures of the statute is under a statutory obligation to work within the prescribed legal framework**, “.....the High Court will vigilantly guarding against any

transgression of their jurisdictional powers.....” [Pages 653 to 656].

13. The judicial review jurisdiction of this Court under Article 199 [of the Constitution], is recognized internationally. In **Kulbhushan Jadav** Case [*supra*], the International Court of Justice [ICJ] observed that **Kulbhushan** [*who was in custody of Pakistani Authorities, on the charges of espionage and terrorism and for his release the Indian Government approached the ICJ*] can invoke the jurisdiction of High Court under Article 199, against death sentence handed down against him by the Field General Court martial, and Appeal against it, was rejected by the Appellate Court. Relevant Paragraphs of the Judgment are 141 to 144_

“141. The Court notes that, according to Pakistan, the High Courts of Pakistan can exercise review jurisdiction. The Court observes, however, that Article 199, paragraph 3, of the Constitution of Pakistan has been interpreted by the Supreme Court of Pakistan as limiting the availability of such review for a person who is subject to any law relating to the Armed Forces of Pakistan, including the Pakistan Army Act of 1952. The Supreme Court has stated that the High Courts and the Supreme Court may exercise judicial review over a decision of the Field General Court Martial on “the grounds of coram non judice, without jurisdiction or suffering from mala fides, including malice in law only” (Said Zaman Khan et al. v. Federation of Pakistan, Supreme Court of Pakistan, Civil Petition No. 842 of 2016, 29 August 2016, para. 73). Article 8, paragraph 1, of the Constitution provides that any law which is inconsistent with fundamental rights guaranteed under the Constitution is void, but this provision does not apply to the Pakistan Army Act of 1952 by virtue of a constitutional amendment (ibid., para. 125). Thus, it is not clear whether judicial review of a decision of a military court is available on the ground that there has been a violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention.

142. The Court takes note of the decision of the Peshawar High Court in 2018. The High Court held that it had the legal mandate positively to interfere with decisions of military courts

“[i]f the case of the prosecution was based, firstly, on no evidence, secondly, insufficient evidence, thirdly, absence of jurisdiction, finally malice of facts and law” (Abdur Rashid et al. v. Federation of Pakistan, High Court of Peshawar, Writ Petition 536-P of 2018, 18 October 2018, pp. 147-148). The Government of Pakistan has appealed the decision and the case was still pending at the close of the oral proceedings in the present case.

143. The Court confirms that the clemency process is not sufficient in itself to serve as an appropriate means of review and reconsideration but that “appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention” (Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I), p. 66, para. 143). The evidence before the Court suggests that two clemency procedures are available to Mr. Jadhav: a mercy petition to the Chief of Army Staff within 60 days of the decision by the Appellate Court and a mercy petition to the President of Pakistan within 90 days of the decision of the Chief of Army Staff on the mercy petition (see paragraph 29 above). The outcome of the petition submitted by Mr. Jadhav to the Chief of Army Staff (see paragraph 140 above) has not, however, been made known to the Court. No evidence has been submitted to the Court regarding the presidential clemency procedure.

144. In light of these circumstances, the Court considers it imperative to re-emphasize that the review and reconsideration of the conviction and sentence of Mr. Jadhav must be effective.”

14. We agree with the argument of the Legal Team of Respondent that Military discipline forms the backbone of the Armed Forces and is indispensable for ensuring collective national defense. Undoubtedly, Pakistan Air Force has proven its mettle whenever called upon to do. To maintain that high standard of discipline and professionalism, it is equally necessary to have processes of accountability which ensure that no

one is condemned without due process. If any action or decision under the Act can go unchecked, without there being a curative forum, then, it would only promote arbitrariness within institutions. It is discussed in the Judgment of **Gulzar Ahmed Case** [PLD 2019 Sindh 697] that accountability is directly linked with good governance, and non-adherence results in disaster.

Relevant paragraph(s) of the above reported Decision is reproduced herein under_

*“19. The object of the scheme of trichotomy of power as envisaged in our Constitution like other well-known constitutions of other countries, is to keep in place the system of checks and balances, for the simple reason that an unbridled authority and discretion either in the hands of an individual or a state institution would be disastrous. A respected English Jurist R. W. M Dias in his Book “Dias Jurisprudence” {5th Edition} has quoted **Lord Acton that “power tends to corrupt, and absolute power corrupts absolutely.”***

20. In a Muslim Polity like ours, it is unimaginable that the State Institutions are not subject to accountability. Various renowned Muslim Scholars of different eras have richly contributed through their voluminous writings on the rules of governance and administering the affairs of a state....

21. Consultation Process (a part of the Shoora System) is mandatory for rulers of a Muslim State and if a Ruler or Head of State acts without the consultative process then he is required to be removed from the Office; reference is from the Book Rooh Al Maarif which is a summary and compilation of Eight Volumes of Maarif ul Quran, a Tafseer (Exegesis) of the Holy Quran (by Shaykh Mufti Muhammad Shafi).

22. Good governance is directly related to accountability, and the foundation of which has been laid many centuries back during the Caliphate. This has been explained in many decisions of superior courts of our Country and recently in a judgment handed down by the Hon'ble Supreme Court in the case of Hamid Mir (2013 S C M R 1880); ”

15. Adverting to the objection of the Legal Team of Respondent, about non-maintainability of this Petition on the ground of territorial jurisdiction [as mentioned in the foregoing paragraphs]. **Undisputedly**, the Petitioner was performing his duties at PAF Base Faisal, at Karachi; the alleged complaint about the embezzlement in service medicines, relates to PAF Hospital [at Karachi]; the Board of Inquiry was initiated by the Correspondence [**supra**]-Base Routine Orders dated 22nd June 2020 [Annexure 'C' of the Petition] issued from Karachi, that is, PAF Base [Faisal]; since these crucial set of facts necessary for determining the present dispute have previously occurred at Karachi, **therefore**, we are of the view that this Court has territorial jurisdiction to scrutinize the controversy.

16. Since, undisputedly there is a gap of four years from the initiation of BOI and the impugned dismissal order [as highlighted in the foregoing paragraphs], hence, rival submissions for violating the prescribed procedure and due process require a detailed discussion, in view of the above facts and Case Law discussed. Conclusion of the above undisputed facts is, that the Case Law relied upon by the Legal Team of Respondent is distinguishable; conversely, the *Umar Islam* and *Gill Cases* [Judgments handed down by the Hon'ble Peshawar High Court and Supreme Court,

respectively], are applicable to the facts of present **LIS**, and we hold that the present Petition is maintainable.

WHETHER DUE PROCESS WAS FOLLOWED [IS DISMISSAL IN ACCORDANCE WITH THE ACT AND RULES]?

The significance of ‘due process’ in any inquiry or trial is very aptly explained by the famous English Jurist Lord Denning in his Book “The Due Process of Law” in the following words_

“so by due process of law I mean the measures authorized by the law so as to keep the streams of justice pure: to see their trials and inquiries are fairly conducted; that arrest and searches are properly made; that lawful remedies are readily available; And that unnecessary delays are eliminated.”

The relevant and undisputed facts of the controversy are, that the Board of Inquiry [**BOI**] in respect of the alleged misappropriation done by the Petitioner in Service Medicines, **was initiated on 22.06.2020 and the Petitioner was dismissed from Service vide the impugned Order [ibid] on 14th June 2024, that is, after four years.** (Paragraphs- 10 onwards of the Petition and 25 of the Written Arguments of Respondents).

16-A. On 21.09.2021, the Additional Board of Inquiry (**ABOI**) was initiated, which is not disputed by the Respondents in their Counter-Affidavit as well as Written Arguments; rather it is justified by placing reliance on Rule 191(17) of the said Rules, thus, the argument of the Legal Team of Respondent PAF [**ibid**], that it was only a second chance to appear, is incorrect and misconceived in nature.

16-B. The **Show Cause Notice was issued on 15.03.2024** in terms of Section 20 of the Act Read with Rule 31-A of the said Rules (on the allegations of misappropriation / embezzlement of the Service Medicines),

causing a financial loss of Rs.24,188,000/- (*rupees twenty-four million one hundred eighty-eight thousand only*) (approximately). It is important to note that this Show Cause Notice was issued *after four years from the date of initiation of the Board of Inquiry (supra)*, that is, 20.06.2020 and after two and a half years from the issuance of **ABOI (ibid)**, that is, 21.09.2021.

16-C. The Tentative Charge Sheet appended with the Written Arguments of Respondents, have enumerated six Charges against Petitioner, invoking Sections 52(a), (d), (f) and 65 [of the Act], for receiving different amounts illegally in respect of the medicines, from 2013 to 2020, that is, over a period **of seven years**. Last page of this Document states that summary of evidence is to be recorded.

16-D. On 17.03.2024, a detailed Reply to the said Show Cause Notice was given by the Petitioner, *inter alia*, raising objections to the entire proceeding, in view of Section 120 of the Act, providing limitation period of three years, for punishing an employee of PAF, from the date of offence complained of. For a ready reference, Section 120 of the Act, is reproduced as under_

“120. Period of limitation for trial. (1) Except as provided by subsection (2), no trial by court-martial of any person subject to this Act for any offence shall be commenced after the expiration of a period of three years from the date of such offence.

(2) The provisions of sub-section (1) shall not apply to a trial for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in section 37 ¹[or section 52] ²[or section 71].

(3) In the computation of the period of time mentioned in sub-section (1), any time spent by such person as a prisoner of war, or in any enemy territory, or in evading arrest after the commission of the offence, shall be excluded.

(4) No trial for an offence of desertion (other than desertion on active service) or of fraudulent enrolment shall be commenced if the person in question (not being an

officer) has, subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of the Pakistan regular forces.”

Provisions of Sub-Rule 17 of Rule 191, as invoked by the Respondents are also reproduced herein under_

“(17) The board may be re-assembled as often as the assembling authority may direct, for the purpose of recording additional evidence or for reconsideration of their funding.”

17. For a ready reference, the provisions mentioned in the Charge Sheet are reproduced as under_

**“Section 52:
Offences in respect of property.**

Any person subject to this Act who commits any of the following offences, that is to say:

- (a) commits theft of any property belonging to the Government, or to any Military, Naval or Air Force mess, band, or institution, or to any person subject to Military, Naval or Air Force law; or serving with, or attached to, the Air Force;
- (b) dishonestly misappropriates or converts to his own use any such property; or
- (c) commits criminal breach of trust in respect of any such property; or
- (d) dishonestly receives or retains any such property in respect of which any of the offences under clauses (a), (b), and (c) has been committed, knowing or having reason to believe the commission of such offences; or
- (e) willfully destroys or injures any property of the Government entrusted to him; or
- (f) does any other thing with intent to defraud, or to cause wrongful gain to one person or wrongful loss to another person; shall, on conviction by court-martial, be liable to suffer long imprisonment.

65. Violation of good order and Air Force discipline. *Any person subject to this Act who is guilty of any act or omission which though not specified in this Act, is prejudicial to good order and Air Force discipline shall, on conviction by court-martial, be liable to suffer short imprisonment.”*

18. Even from the Record relied upon by the Respondents themselves, the undisputed situation that emerged is that charges against the Petitioner falls within Section 52 and 65 *[ibid]*, regarding which the punishment is to be awarded after court martial, which admittedly is not done, as no Document / Record is filed by the Respondent, to show that Section 20 of the Act is invoked after culmination of Court Martial Proceeding; this illegality is not curable and it goes to the root of the Case; to this extent the stance of the Legal Team of Respondent is incorrect. Since Section 52 is invoked by the Respondent, thus, in terms of Sub-Section (2) of Section 120, the time period of three years has been expressly excluded; thus, the argument of the Petitioner's Counsel in this regard is not tenable.

19. General guidelines and procedure for recording summary of evidence is stated in Air Force Order [AFO] No.111-58 [dated 23rd July 2007] is appended with the written arguments of Respondent PAF. Perusal of this Document shows that there is a two-stage proceeding for summary of evidence, viz. before and after a court martial. The record available in the present *LIS* only suggests that after initiation of BOI, which is a pre-requisite to Court Marshal, summary of evidence was recorded and after a silence of more than three years, the Show Cause Notice and the impugned dismissal Order [as highlighted in the preceding paragraphs] were issued. The time frame mentioned in AFO for completing the proceeding is also violated, although the stance of the Respondent is, that those are mere guidelines and not mandatory; this argument at best can be accepted when there is some minor lapses, but, is untenable [in the present case], when the AFO *[ibid]* is violated with such an impunity, that a proceeding under dispute could not be completed even after Four years [as no court martial was done].

20. Section 20 and Rule 31-A, mentioned in the impugned Dismissal Order, can be invoked, subject to the other provisions of the Act; that is, these above provisions cannot be used in isolation, but in conjunction with the other provisions. Punishment of dismissal from the service is enumerated under Section 73 [of the Act], in addition to those in which a court martial is necessary.

For ease of reference Section 73 is reproduced as under_

“[73. Punishments awardable by courts-martial. Punishments may be inflicted in respect of offences committed by persons subject to this Act and convicted by courts-martial according to the following scale, that is to say:—

- (a) stoning to death;*
- (b) death;*
- (c) amputation of hand, foot or both;*
- (d) imprisonment for life, which shall be rigorous imprisonment for term not exceeding twenty-five years;*
- (e) long imprisonment, which may be rigorous or simple for any term not exceeding fourteen years;*
- (f) whipping not exceeding one hundred stripes;*
- (g) short imprisonment, which may be rigorous or simple for any term not exceeding two years;*
- (h) dismissal from the service;*
- (i) detention for a period not exceeding two years, in case of persons other than officers, junior commissioned officers or warrant officers;*
- j) reduction to the ranks or to a lower rank or to a lower grade, in the case of non-commissioned officers;*
- (k) forfeiture of seniority of rank, in the case of officers, warrant officers and non-commissioned officers, and forfeiture of all or any part of their service for the purpose of promotion, in the case of any of them whose promotion depends upon length of service;*
- (l) forfeiture of service for the purpose of increased pay or any other prescribed purpose;*
- (m) severe reprimand or reprimand, in the case of officers, warrant officers and non-commissioned officers;*

- (n) *fine;*
- (o) *forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active service;*
- (p) *forfeiture, in the case of a person sentenced to dismissal from the service, for the whole or any part of arrears of pay and allowances and other public money due to him at the time of such dismissal;*
- (q) *stoppages of pay and allowances to make good the whole or any part of the proved loss or damage occasioned by the offence of which he is convicted;*
- (r) *any other punishment provided for in any Islamic law:*
Provided that-
 - (a) *a person shall not be sentenced to imprisonment for life or fine except in respect of an offence of which he is convicted under section 71; and*
 - (b) *a person shall not be sentenced to stoning to death, amputation of hand, foot or whipping except in respect of an offence of which he is convicted under any Islamic law.*

Explanation:-While computing a sentence under an Islamic law, "imprisonment for life" shall have the same meaning as in such law]."

21. In terms of Sections 81 and 82 of the Act, penalty and punishments enumerated therein can be awarded to a person in the employment of Respondent, without a court martial proceeding. However, all those punishments do not include dismissal from service. For convenience, Sections 81 and 82 are reproduced herein under_

**“Section 81:
Punishments otherwise than by court-martial.**

Punishments may also be inflicted in respect of offences committed by persons subject to this Act without the intervention of a court-martial and in the manner stated in sections 82 and 86.*

**Section 82:
Punishment of persons other than officers and warrant officers.**

Subject to the provisions of sections 83 and 84, a commanding officer or such other officer as is, with the consent of the Federal

Government specified by the Chief of the Air Staff, may, in the prescribed manner, proceed against a person subject to this Act other than an officer or warrant officer who is charged with an offence under this Act and award such person, to the extent prescribed, one or more of the following punishments, that is to say:

- (a) detention up to forty-five days;
- (b) confinement to the camp up to fourteen days;
- (c) extra guard or duties not exceeding seven in number;
- (d) deprivation of acting rank;
- (dd) relinquishment of substantive rank;
- (e) forfeiture of badge pay;
- (f) severe reprimand or reprimand;
- (g) fine up to fourteen days' pay in any one month;
- (h) penal deductions under clause (g) of section 91;
- (i) admonition;
- (j) any prescribed field punishment up to twenty-eight days, in the case of a person on active service.”

*[Above referred Section 86 is not reproduced because it does not provide for a major punishment of dismissal].

22. Once the Respondent has elected to prosecute the Petitioner by initiating a Board of Inquiry, then halfway through, and that too after nearly four years, it cannot abruptly dismiss the Petitioner by mis-conceivably invoking Section 20 *[ibid]*, without first completing the prescribed procedure. This non-convening of court martial was the main ground for allowing the Intra Court Appeal by the Hon'ble Islamabad High Court, in the Case of **Sarfaraz Khan** *[supra]*, whereby decision of present Respondent to dismiss the appellants from service was set-aside.

23. Conclusion of the above discussion is that the dismissal of Petitioner from the service is done in a gross violation of the prescribed procedure, due process and the Act itself.

The violation of due process of law is, in fact, a violation of the fundamental rights as protected under Article 10-A of the Constitution.

24. When the legal process is unnecessarily delayed, inaccessible, or obstructed by undue complexities, it becomes a barrier to justice itself.

Access to justice is a human and fundamental right of a person and citizen. In the SHCBA Case [*supra*, PLD 2009 Supreme Court 879], the concept of justice being *sine qua non* of a civil order in the society has been highlighted in the words **“Society cannot exist without justice and justice cannot prosper without independent judges”**.

Article 37 [d] of the Constitution enjoins that State shall ensure inexpensive and expeditious justice. Although the Principles set out in Chapter 2-**Principles of Policy**, are not enforceable through Courts, but at the same time they have been termed as the **conscience of the Constitution** [PLD 2021 SC 770 and PLD 2021 SC 812 *Asad and Razia Begum Cases, ibid*].

25. Therefore, the Governments [Provincial and Federal] and the State Institutions must ensure continuous improvement in the justice delivery system, **whether it is the administrative justice through the executive or justice dispense by Courts, in order to strengthen the public trust in the State and its Institutions**. Any negligence or lacking towards this constitutional obligation would have disastrous and long-lasting repercussions, because no society can flourish without an independent justice delivery system in place.

26. Courts which have propounded public interest litigation and safeguarded fundamental rights in their respective jurisdictions have on occasions faced challenging times. Frequently, this stems from the other Organs [Limbs] of the State perceiving such judicial safeguards as a threat

or an intervention in executive matters, rather than an opportunity to improve governance.

27. One example is of the United States of America [USA]-President Franklin Roosevelt [FDR] proposed to change the composition of the Supreme Court of the United States by enacting a law to increase its strength, and then appoint new justices, which came to be known as ‘**Court Packing**’ or ‘*Packing of the Courts*’. The executive justified it on the pretext that the Supreme Court of the United States had unfairly struck down laws which had been promulgated to alleviate the economic downturn in the USA. However, eventually the proposed legislation which would have enabled such Court Packing was not enacted.

28. The other example is of Nepal and its former Chief Justice Kalyan Shrestha, discussed in the book ‘TOWERING JUDGES’ [*supra*], which is a comparative study of constitutional judges from various jurisdictions who contributed towards the development of constitutional law and “*acted in crucial moments in their country’s constitutional history or led their court in a new direction.*” [Page 1]. Chapter 8 is about Justice Kalyan Shrestha, who was interviewed for the book and while being mindful of its caption, he encapsulated the essential traits of a judge in the following quote:

“A judge should not be ‘towering’-that reminds me of the ivory tower. A judge should meet the expectations of the commoners. The tower is a way of separating the judge from living realities. As a judge, I wanted to be in the foundations, not in the tower.” Justice Shrestha tenure in the Supreme Court between 2005 to 2016 is illustrated with numerous judgments on key constitutional issues, protection of fundamental rights, and

promotion of socio-economic rights. His tenure also corresponded to Nepal's seventh constitution-making moment, which provided the opportunity to rethink and redesign the institutional role of the Judiciary. Justice Shrestha fought to preserve judicial independence. After years of lobbying by the legal fraternity, eventually a compromise was reached – the proposal for a separate constitutional court was replaced with a constitutional bench. [Pages 162 to 173].

Validity of Section 20 of the Act and Rule 31-A.

29. It is argued by the Petitioner's Counsel [as stated in the foregoing paragraphs in detail], that since no appeal or other remedy is provided in respect of the impugned action purportedly taken under Section 20 and Rule 31-A, therefore, the same should be declared to be ultra vires the Act and the Constitution. In support of this argument the Judgment handed down by the Hon'ble Supreme Court in the Case of MOD [*ibid*, **PLD 1989 SC page-26**] is relied upon. The ratio decidendi of this Decision is that since no appeal was provided [at the relevant time] against the punishment awarded under certain provisions of the Military Laws, including, the then Section 162 of the present Act, thus, it was held to be against the Injunction of Islam, with the direction to make necessary amendments. Consequently, Section 162-B has been inserted through the Act No. XXX of 1992, Gazetted on 26.12.1992, providing an Appellate Forum against the punishments of (a) death, (b) imprisonment for a period exceeding three months, and (c) **dismissal from the service**, awarded by a court-martial.

30. The Hon'ble Supreme Court in **Asad case** [*supra*] has emphasized that in the process of legislation the Principles of Policy “*are duly reflected*”. As discussed above, the Apex Court has declared the Principles of Policy as a **Conscience of the Constitution**. In **Sarwar Case** [*supra*],

significance of Articles 2-A, 27 and the Principle of Policy, is discussed, that has made our Constitution a unique and pragmatic social contract document of a Muslim Polity.

31. From the above Judicial pronouncements about the constitutional principle, it can be deduced that the **Principles of Policy, is the Covenant between the State, Organs of the State, its functionaries and citizens of this Country, and thus, state policies must be structured on this constitutional covenant.**

32. The principle of our Constitution, being a sacrosanct document of an Islamic State is that no Limb / Organ [Pillar] of the State can claim supremacy over the other Limbs [Organ(s) / Institution(s)], but they “*are co-equals, each manifesting the will of the people and giving effect to such through, adjudication, executive action or legislation.*”

[SHCBA and Azhar Siddiqui Cases- PLD 2009 SC 879 and PLD 2012 SC 774, *ibid*].

Foundation of this distinct feature of the Constitution has been laid down by its Framers, by preserving the power of judicial review, which is a basic feature of the Constitution. Therefore, the legislative powers are not unlimited.

33. The principle laid down by the Courts about the legislative authority can be construed from **Jibendra to SBP Cases** [*ibid*, PLD 1957 SC page 9 and PLD 2025 SC 440], which is, that any legislation by the Parliament or Provincial Assembly, either in violation of the prescribed legislative powers in the Constitution, contrary to the Islamic Laws and fundamental rights, are declared as ultra vires the Constitution and illegal. In **Jibendra Case** [*supra*], the significance of a fundamental right vis-à-vis an enactment has been amplified in these words “*The very conception of a fundamental right like that it being a right guaranteed by the constitution cannot be*

taken away by the law, and it is not only technically inartistic but also a fraud on the citizens for the makers of a Constitution to say the right is fundamental but that it may be taken away by the law.”

34. Renowned Jurist [Late] Khalid M. Ishaque, in his book ‘Constitutional Limitations’ has provided an insight on the subject. The theme of the above Book is that the fundamental rights enshrined in our Constitution derive their authority from Islamic teachings as mentioned in the Holy Quran and Sunnah. Thus, the Fundamental rights guaranteed in our Constitution are on a higher pedestal than those set out in other Constitutions, which derive their roots from western tradition, jurisprudence and Magna Carta. Thus, limiting the legislative power in this regard. `

35. Adverting to the arguments about the validity of Section 20(1) and Rule 31-A of the said Act and the PAF Rules. Section 20 came up for consideration in various cases, some of them have been cited in the present Petition as well, as discussed in the foregoing paragraphs, including, Abdul Basit and Umar Islam Cases {2012 SCMR 1229 and 2021 PLC [CS] 92}. None of these Judgments have observed any illegality in Section 20. Conversely, in Abdul Basit case *[ibid]* Note [1] [b] of Section 20 has been relied upon to extend relief to the respondent, who was removed from service under the above two provisions, that is, Section 20 [1] and Rule 31-A. Merely because a provision of law is exercised in a colourable manner, does not justify that the same be declared as illegal or struck down. This is what has happened in the present case. Respondents have misused and has wrongly exercised the authority under Section 20 [1] read with Rule 31-A, *inter alia*, because due process as required under the Act was flagrantly violated. If the Petitioner’s case was dealt with in accordance with the Act, Rules and

the prescribed procedure, then the appellate or other curative forum would have been availed, but abruptly his service was terminated as highlighted in the foregoing paragraphs. We have found no inherent illegality in the above provisions under challenge. Consequently, we hold that Section 20 and Rule 31-A are neither ultra vires the said Act nor violative of any of the provisions of the Constitution. To this extent the present Petition is dismissed.

36. We appreciate the able assistance provided by the Legal Team of both the Petitioner and Respondents. Valuable research work submitted by Mr. Shoaib Elahi of Legal Research Cell of this Court is equally appreciable.

Conclusion

1. The Respondents have violated their laid down statutory procedure, therefore, the impugned Dismissal Order is set-aside. Since Petitioner has retired from service, thus, he is not reinstated, but, he shall be deemed to have been discharged from Respondent PAF, with the entitlement to receive service dues, benefits applicable to his cadre and length of service. **Consequently, the present Constitution Petition is partly allowed.**
2. No illegality is found either in Section 20 or Rule 31-A, as discussed in the foregoing paragraphs. Therefore, to this extent, the Constitution Petition is dismissed.
3. No order as to costs.

JUDGE

JUDGE

Karachi.

Dated: 22.10.2025.

M. Javaid PA