

P L D 2020 Supreme Court 1**Present: Asif Saeed Khan Khosa, C J, Mazhar Alam Khan Miankhel and****Syed Mansoor Ali Shah, JJ****JURISTS FOUNDATION through Chairman---Petitioner****Versus****FEDERAL GOVERNMENT through Secretary, Ministry of Defence and others---
Respondents**

Constitutional Petition No.39 of 2019, decided on 28th November, 2019

(In the matter of the Tenure and Extension of the Chief of the Army Staff).

Per Syed Mansoor Ali Shah, J; Asif Saeed Khan Khosa, CJ and Mazhar Alam Khan Miankhel, J agreeing.

(a) Constitution of Pakistan---

---Art. 184(3)---Public interest litigation before the Supreme Court---Withdrawal of petition with permission of Court---Scope and principles---Public interest litigation could only be withdrawn with the permission of the Court, because it did not raise a personal issue limited to the petitioner; it was not a dominis litis (the person to whom a suit belongs) that would give a right to the petitioner to withdraw it as a matter of choice---In granting the permission (to withdraw) the Court would be guided by considerations of public interest and would also ensure that it did not result in the abuse of the process of law---Courts must guard against possibilities of such litigants settling the matters out of Court to their advantage and then seeking withdrawal of the case---Sometimes withdrawal of a public interest litigation, for oblique ends, could be used to the detriment of the public interest agitated therein---Court had to be cautious not to fall prey to such oblique motives---Proceedings in public interest litigation were inquisitorial in nature and, therefore, the request for withdrawal of such litigation must always be weighed in the light of the question of public importance raised in it---Petitioner initiating public interest litigation was, therefore, not entitled to withdraw the petition at his sweet will---Court, however, may permit withdrawal of such litigation on considering the nature of the matter agitated therein and ensuring that it did not involve abuse of the process of law.

AIR 1997 SC 272; PLD 2017 Lah. 588; PLD 2014 Bal. 1 and AIR 1988 SC 2211 ref.

(b) Constitution of Pakistan---

---Arts. 9, 19A, 27, 243(4)(b) & 245---Pakistan Army Act (XXXIX of 1952), S.8(2)---Army Regulations (Rules), 1998, Regln. 19---Constitutional petition before the Supreme Court relating to the tenure and extension of the Chief of the Army Staff---Maintainability---Armed Forces were to defend the country against external aggression and threat of war, under the Constitution---Chief of the Army Staff (COAS) was an officer commanding the Army and was responsible for the command, discipline, training, administration, organization and preparedness for war of the Army; he was also the Chief Executive in the General Headquarters and an adviser to the Government on military matters --- Appointment of the COAS of the Army was, thus, inextricably linked with the life, security and liberty of every citizen and was undoubtedly a question of grave and vital public importance---Army was perceived to play an intrinsic role in upholding constitutional values of sovereignty, freedom, democracy and the fundamental rights relating to life, liberty and dignity---Hence, the questions relating to its structure, command, governance and organization were of public

importance with reference to the enforcement of the fundamental rights---In today's age of information, the issues raised in the present petition also attracted fundamental right to information under Art.19A, as well as, the right to non-discrimination in services under Article 27 of the Constitution---Present petition was held to be maintainable accordingly.

(c) Constitution of Pakistan---

----Pt. II, Chapt. 1 [Arts. 8 to 28]---Fundamental rights---Interpretation---Fundamental rights in a living Constitution were to be liberally interpreted so that they continued to embolden freedom,equality, tolerance and social justice.

(d) Constitution of Pakistan---

----Art. 243(4)(b)---Pakistan Army Act (XXXIX of 1952), S. 8(2)---Army Regulations (Rules), 1998, Reglns. 19 & 255---Pakistan Army Act Rules, 1954---Constitutional petition before the Supreme Court relating to the tenure and extension of the Chief of the Army Staff--Incumbent Chief of the Army Staff (COAS) was provided an extension/re-appointment for a fresh term of three years in such office after expiry of his first term---Constitutionality and legality---No provision existed in the Army laws for the tenure and age of retirement of a General and as a consequence of the Chief of the Army Staff, as well as, for the extension of tenure or fresh appointment for another tenure---Summaries initiated by the Ministry of Defence and approved by the President, the Prime Minister and the Cabinet, for the reappointment, extension and fresh appointment of the incumbent COAS, were, therefore, meaningless and of no consequence---Exercising judicial restraint the Supreme Court gave an opportunity to the Federal Government in the light of the assurance of the Attorney-General to carry out appropriate legislation through an Act of Parliament within a period of six months---In order to preserve smooth functioning of the Army, the Supreme Court directed that the current status of the incumbent Chief of the Army Staff shall continue for a period of six months, whereafter the new legislation (Act of the Parliament) shall determine his tenure and other terms of his service; that in case the Federal Government remained unable to regulate the tenure and terms of service of a General and as a consequence of the COAS through an appropriate legislation by the Parliament, within a period of six months, the institutional practice of retirement of a General on completion of the tenure of three years shall stand enforced to regulate the tenure of incumbent COAS, from the date of his promotion to the rank of General and appointment as COAS, i.e. 29.11.2016, and the President shall, on advice of the Prime Minister, appoint a serving General officer as the new Chief of the Army Staff---Constitutional and legal flaws in the exercise of jurisdiction by the President, the Prime Minister, the Cabinet and the Ministry of Defence, in the extension, reappointment and appointment of the incumbent COAS highlighted.

Following are some of the constitutional and legal flaws in the exercise of jurisdiction by the President, the Prime Minister, the Cabinet and the Ministry of Defence, in the

extension, reappointment and appointment of the incumbent Chief of the Army Staff (COAS):

(i) The Prime Minister appointed the incumbent COAS as the Chief of the Army Staff for another term of three years from the date of completion of the current tenure vide his "order" dated 19.08.2019, while the Prime Minister had no such power under the Constitution.

(ii) The tenure of 3 years mentioned in the above order of the Prime Minister had no legal basis.

(iii) The extension of the tenure of COAS for a further period of three years vide notification dated 19-08-2019 was not supported by law as there was no provision of tenure or extension of tenure prescribed under the Constitution or the law.

(iv) The summary initiated by the Ministry of Defence dated 19.08.2019 stated that the incumbent COAS was due for retirement from 29.11.2019 by tenure but did not state the law providing for such tenure for retirement.

(v) The said summary mentioned that the General Officer may be granted extension of one further tenure of three years under Regulation 255 of the Army Regulations (Rules), despite the fact that there was no tenure prescribed for a General and that there was no provision for extension for another tenure in the Pakistan Army Act, 1952, Pakistan Army Act Rules, 1954 or the Army Regulations (Rules).

(vi) The President under Article 243(4)(b) of the Constitution granted extension to the incumbent COAS for three years on 19-08-2019, while the President had no power to grant extension under the Constitution or the law.

(vii) The Government, the very next day, i.e. 20-08-2019, retracted from the earlier position and without withdrawing the notification regarding grant of extension to the incumbent COAS, issued under the approval/authority of the President a day before, took up the matter of extension of the tenure of the COAS with the Cabinet relying on Army Regulation 255 in the absence of any tenure or age of retirement prescribed for a General.

(viii) Only 11 members of the Cabinet out of 25 approved the above summary through circulation. However, no notification was issued under the authority or approval of the Federal Government regarding extension of the tenure of the incumbent COAS. Thus, this exercise served no purpose.

(ix) This approval through circulation failed to comply with Rule 19 of the Rules of Business, 1973 which required that the Cabinet Secretary was to specify the time by which the opinions of the Ministers should be communicated to him. No such timeframe was specified.

(x) The Ministry of Defence issued notification dated 26.11.2019 stating that retirement of incumbent COAS, as a General Officer had been limited and he had been granted extension for further three years. This exercise conducted under the freshly amended Army Regulations (Rules) 255 (including the word "extension") could only be useful if there had been tenure or retirement age of a General provided under the law.

(xi) Finally on 28-11-2019, a fresh summary was put up before the Prime Minister for appointment of incumbent COAS as the Chief of the Army Staff w.e.f. 28-11-2019 under Article 243(4)(b) of the Constitution which was approved by the President, leading to notification dated 28-11-2019. This Notification stated that the notification dated 26.11.2019 regarding limiting retirement and granting extension of service to incumbent COAS stood withdrawn. This shows that there remained no notification in the field regarding limiting retirement and granting extension of service to the incumbent COAS. The appointment of the

incumbent COAS on 28.11.2019 was again based on the assumption that his tenure had expired. [p. 21] D

Detailed examination of the laws relating to the Army revealed that there was no provision providing for the tenure and age of retirement of a General and as a consequence of the Chief of the Army Staff, as well as, for the extension of tenure or fresh appointment for another tenure; nor was there any consistent and continuous institutional practice of granting such extension, which could be enforced in absence of the law on the subject. The summaries initiated by the Ministry of Defence and approved by the President, the Prime Minister and the Cabinet, for the re-appointment, extension and fresh appointment of the incumbent COAS seemed to be meaningless and of no consequence in the absence of the law prescribing tenure of a General and providing extension for another tenure. Attorney General had assured the Court that the Federal Government would carry out legislation through the Parliament in the shape of an Act within six months to provide for the terms of service of a General (and as a consequence of COAS) so that effect could be given to Article 243 of the Constitution in letter and spirit and functionality of the constitutional provisions be realized at the earliest.

Supreme Court observed that exercising judicial restraint it was appropriate to leave the matter to the Parliament and the Federal Government to clearly specify the terms and conditions of service of the COAS through an Act of Parliament within a period of six months, and to clarify the scope of Article 243 of the Constitution in such regard; that the Federal Government may also, if deemed appropriate, specifically provide for extension of the tenure of an army officer of the rank of a General in the Act with grounds for granting such an extension, so that the discretion of the Federal Government in granting extension to a General was structured.

Sindh High Court Bar Association v. Federation of Pakistan PLD 2009 SC 879; Government of Sindh v. Sharaf Faridi, 1990 SCMR 91, PLD 1994 SC 105 and Nadeem Ahmad v. Federation of Pakistan PLD 2010 SC 1165 ref.

In the present state of legal vacuum regarding the tenure of a COAS and in the light of the assurance given by the Federal Government to address these issues through fresh legislation within six months, and considering that the COAS was the commanding officer of the Army and was responsible for the command, discipline, training, administration, organization and preparedness for war of the Army and in order to preserve smooth functioning of the Army, the Supreme Court directed that the current status of the incumbent COAS shall continue for a period of six months, where after the new legislation (Act of the Parliament) shall determine his tenure and other terms of his service; that in case the Federal Government remained unable to regulate the tenure and terms of service of a General and as a consequence of the COAS through an appropriate legislation by the Parliament, within a period of six months, the tenure of the constitutional post of COAS could not be left totally unregulated and to continue forever; that in case of such failure of the Federal Government the institutional practice of retirement of a General on completion of the tenure of three years as borne out from the record, shall stand enforced to regulate the tenure of incumbent COAS consequentially his tenure as COAS, from the date of his promotion to the rank of General and appointment as COAS, i.e.29.11.2016, and the President shall, on advice of the Prime Minister, appoint a serving General officer as the new COAS.

Supreme Court observed that its exercise of judicial restraint in the present matter may not be mixed up or confused with the application of the doctrine of necessity, which amounted to going against the law of the land to attend to some political or other goal; that this was not so

in the present case where there was no law, in fact, there was a total legal vacuum regarding the tenure of a General.

(e) Constitution of Pakistan---

----Art. 243---Command of Armed Forces---History and evolution of Art.243 of the Constitution traced.

(f) Interpretation of statutes---

----Words in a provision could not be read and interpreted in isolation---Meaning and scope of a provision was determined by looking not to the isolated words used therein but by reading its text in context.

(g) Constitution of Pakistan---

----Art. 243(4)(b)---Army Regulations (Rules), 1998, Regln. 125---Pakistan Army Act (XXXIX of 1952), Preamble---Chief of the Army Staff, appointment of---Qualifications---Only a serving General could be appointed as the Chief of the Army Staff, because only a serving army officer was subject to the Pakistan Army Act, 1952---Retired army officer had no terms of service and was not regulated under the said Act.

(h) Army Regulations (Rules), 1998---

----Regln. 262-A---Pakistan Army Act, (XXXIX of 1952), S. 18---Pakistan Army Act Rules, 1954, R. 12---Constitution of Pakistan, Arts.240 & 243(3) & 243(4)(b)---Constitutional petition before the Supreme Court relating to the tenure and extension of the Chief of the Army Staff---Chief of the Army Staff (COAS) or an Army General (commissioned after the year 1970)---Retirement age and extension of tenure---Regulation 262-A of the Army Regulations (Rules), 1998, which dealt with officers commissioned after 1970, did not provide the retirement age of an officer of the rank of a General---Pakistan Army Act, 1952 fell deficient of the structural requirements for raising and maintaining an Army under clause (3) of Art.243 of the Constitution, as it did not provide for essential elements required to raise and maintain an Army, particularly the grant of Commissions in the Army and the terms of service of the Commissioned Officers including tenure and extension of a General---At present the tenure of a General and consequentially of a COAS was three years as per institutional convention and practice---Supreme Court observed that such an institutional practice could not be a valid substitute of the law required to be made in pursuance of the constitutional mandate under Art.243(3) of the Constitution; that this was a serious legislative omission, yet in the absence of such law the institutional convention and practice could be enforced to remove uncertainty as to the tenure of a General and to make the constitutional post of Chief of the Army Staff functional; that service in the Armed Forces being "Service of Pakistan" must be regulated by or under the law in accordance with the provisions of Art.240 of the Constitution read with Art.243(3), otherwise, it was inconceivable that the highest rank in the Army, would have no tenure or age of retirement or other terms of service; that in the first instance, the matter should be allowed to be regulated by law, made by the legislature, as mandated by the Constitution.

(i) Army Regulations (Rules), 1998---

----Regln. 255---Army officer---Delaying or suspending retirement or extending date of retirement---Scope---Regulation 255 of the Army Regulations (Rules), 1998, could only be invoked for an officer who had retired or was about to retire---Emphasis was to delay the retirement either by limiting the retirement or by extending the date of retirement or suspending retirement after retirement---Such an act was a temporary arrangement and could only be availed if the exigencies of service and public interest so required---Essence of Regln. 255 was that if an officer was on the way out (about to retire) and urgent or pressing circumstances required that he be retained in service, said Regulation came into play---

Exercise of discretion by the Federal Government under Regln. 255 had to be structured on parameters of exigency of service with a corresponding temporary period in mind---Words suspension, limiting retirement and extension did not connote permanency and could not be equated with grant of new tenure or a fresh appointment, therefore, a new tenure or fresh appointment or extension of another full tenure could not be given or granted to an army officer, including a General, under Army Regulation (Rules) 255.

(j) Legislation---

----Delegated legislation---Rules and Regulations---Delegatee must have legislative guidelines to formulate Rules and Regulations, and such guidelines, contours or boundaries must come from the Legislature (Parliament) itself---Legislature could confer upon any person or body the power to make subordinate/delegated legislation (Rules, Regulations or byelaws, etc.) in order to give effect to the law enacted by it yet it must perform itself the essential legislative function, i.e. to exercise its own judgment on vital matters of policy and enact the general principles providing guidance for making the delegated legislation.

(k) Separation of powers, doctrine of---

----Delegation of an "essential legislative function" by the Legislature to the Executive was not permissible under the Constitution---Foundation of such embargo owed its genesis to the concept of trichotomy of powers between the Legislature, the Executive and the Judicature, which was a fundamental principle of the constitutional construct.

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

----S. 176A---Army Regulations (Rules), 1998---Power to make Regulations---Section 176A of the Pakistan Army Act, 1952, vires of---In order to provide a legal cover to the Army Regulations (Rules), S.176A was inserted in the Pakistan Army Act, 1952, which empowered the Federal Government to make Regulations---Army Regulations (Rules) once brought within the statutory fold must flow from the Pakistan Army Act, 1952---Regulations which did not meet such requirement would be ultra vires the said Act---Scope of the Pakistan Army Act, 1952 or the vires of the Army Regulations (Rules) could not be determined by the words inserted in S.176A like governance, command, discipline, recruitment, terms and conditions of service, rank, precedence and administration of the Pakistan Army---Said words were mere words when there was no essential or core legislation on these subjects---Section 176-A after its insertion provided a shortcut and authorized the Federal Government to regulate areas like governance, command, discipline, recruitment, terms and conditions of service, rank, precedence and administration of the Pakistan Army through the Army Regulations (Rules)---Power of the Parliament under the Constitution could not be delegated to the Federal Government without the Parliament performing the basic essential legislative function, i.e. providing policy guidelines on these areas---Through S.176A, the Parliament appeared to have divested itself of the essential legislative function which amounted to excessive delegation, as neither said section nor any other section of the Pakistan Army Act, 1952 provided the essential legislative policy guidelines for making the delegated legislation, viz. the Regulations, on the subjects mentioned therein---Army Regulations (Rules) would be rendered ultra vires if they did not draw their power from the parent Act, i.e. the Pakistan Army Act, 1952 and would suffer from excessive delegation if they drew their strength only from S.176A of the Act---Army Regulations (Rules) appeared to be without any legal cover and fell outside the scope of the Pakistan Army Act, 1952---Said Regulations had to be fully examined in the light of said principles---Supreme Court observed that it was for the Federal

Government to bring about appropriate legislation to remove such defects so that the Army Regulations (Rules) had a proper legal cover and were fully enforceable under the law.

(m) Right of Access to Information Act (XXXIV of 2017)---

---Ss. 3 & 7(e)---Army Regulations (Rules), 1998---Inaccessible for public---Acts of the Parliament or subordinate legislation were public documents and must be readily available to the citizen of the country subject to the exceptions provided under the Right of Access to Information Act, 2017---Said exceptions extended only to record relating to defence forces, defence installations or connected therewith and ancillary to defence and national security and not to the Army laws---Every legislative instrument must be made accessible to public.

(n) Administration of justice---

---Institutional practice, reliance upon---Scope---Institutional practice followed continuously and consistently by an institution for a considerable period of time may be used to resolve a controversy, in the absence of the law.

2011 SCMR 408 and PLD 1990 SC 612 ref.

(o) Judicial restraint, doctrine of---

---Scope---Constitutional questions---Judicial restraint in its substantial approach urged Judges considering constitutional questions to give deference to the views of the elected branches and invalidate their actions only when constitutional limits had clearly been violated---While the principle, "if it is not necessary to decide more, it is necessary not to decide more" well stated the procedural aspect of judicial restraint---Judicial restraint (exercised so as not to intrude in other branches of Government) was essential to the continuance of rule of law, and for the continued public confidence in the political impartiality of the judiciary and the voluntary respect for the law as laid down and applied by the Courts.

Judicial Restraint, definition by Kermit Roosevelt, available online at <https://www.britannica.com/topic/judicial-restraint>; PDK Labs., Inc. v. Drug Enforcement Admin., 362 F. 3d 786 (CADC 2004), per John Roberts, J. and Imtiaz Ahmad v. Government of Pakistan 1994 SCMR 2142 ref.

(p) Constitution of Pakistan---

---Arts. 184(3) & 199---Judicial review, power of---Scope---Power of judicial review was a great weapon in the hands of Judges, but the Judges must observe the Constitutional limits set by the parliamentary system on their exercise of this beneficial power, namely, the separation of powers between the Parliament, the Executive and the Courts---Judicial review must, therefore, remain strictly judicial and in its exercise Judges must take care not to intrude upon the domain of the other branches of Government.

Per Asif Saeed Khan Khosa, CJ; agreeing with Syed Mansoor Ali Shah, J.

(q) Constitution of Pakistan---

---Arts. 243(3) & 243(4)(b)---Pakistan Army Act (XXXIX of 1952), S.8(2)---Army Regulations (Rules), 1998, Regln. 255---Constitutional petition before the Supreme Court relating to the tenure and extension of the Chief of the Army Staff---Terms and conditions of service of Chief of the Army Staff, the tenure of his office, extension in the tenure of his office or his reappointment to that office had remained unregulated by any law so far---Clause (3) of Art.243 of the Constitution mandated that the President's power to raise and maintain the armed forces was to be "subject to law" and, thus, leaving some vital aspects relevant to the office of Chief of the Army Staff without being regulated by any law militated against the said express provision of the Constitution---His Lordship observed with hope and

optimism that framing of a law by the Parliament regulating the terms and conditions of the office of Chief of the Army Staff may go a long way in rectifying multiple historical wrongs and in asserting sovereign authority of the chosen representatives of the people besides making exercise of judicial power of the Courts all pervasive, and that the democratic maturity of the nation had reached a stage where the Supreme Court could proclaim that "Howsoever high you may be; the law is above you".

Petitioner in person.

For the Respondents:

Anwar Mansoor Khan, Attorney-General for Pakistan with Sajid Ilyas Bhatti, Addl. Attorney-General Amir-ur-Rehman, Addl. Attorney-General Ch. Ishtiaq Ahmed, Addl. Attorney-General.

Sohail Mehmood, Dy. Attorney-General.

Mian Asghar Ali, Dy. Attorney-General Assisted by Ms. Faryal Shah Afridi, Advocate.

Syed Iqbal Hashmi, Advocate Supreme Court.

Brig. Falak Naz, Director (Law), Ministry of Defence.

Flt. Lt. Khalid Abbas, Asst. Director (Law), Ministry of Defence.

Brig. Muhammad Khalid Khan, JAG Department, GHQ.

Lt. Col Rai Tanveer Ahmed Kharral, OIC, JAG Department, GHQ.

Dr. Farogh Nasim, Advocate Supreme Court for Respondent No.4, along with Abid S. Zuberi, Advocate Supreme Court, assisted by Ayan Memon, Shahid

Naseem Gondal and Barrister Maleeka Ali Bukhari.

Mehmood A. Sheikh, Advocate-on-Record.

Supreme Court Research Centre (SCRC) for Research Assistance.

Dates of hearing: 26th, 27th and 28th November, 2019.

JUDGEMENT

SYED MANSOOR ALI SHAH, J.---At the heart of this case lies the fundamental question of rule of law: Is our government of laws or of men?¹ The case before us questions whether the top military post in the country, that of the Chief of the Army Staff ("COAS"), the commanding officer of the Pakistan Army, is regulated by the Constitution and the law; whether the COAS has a tenure or can seek an extension or has any terms of service under the law.

2. The proceedings of the case brought to fore more questions: Whether the constitutional mandate since 1956 of raising and maintaining an Army under the law, has been fulfilled by the Pakistan Army Act, 1952; whether Regulation 255 of the Army Regulations (Rules) is designed to grant extension to a COAS for another term; whether at all, the Army Regulations (Rules), inherited from the British India, enjoy the protection of the Pakistan Army Act, 1952? This judgment addresses these questions.

3. The history of our Army has seen successive appointments, retirements and extensions of several Chiefs of the Army Staff since Independence. However, for the first time the

matter has come to the highest Court of the land questioning the legal framework under which these appointments, retirements and extensions take place.

Facts

4. The Prime Minister appointed the current COAS for another term of three years through his "order" dated 19.08.2019. Thereafter, the President on the advice of the Prime Minister granted "extension" for one further tenure of three years to the COAS w.e.f. 29.11.2019. This public interest litigation (PIL) has challenged the extension of the COAS on the ground that it is offensive to Article 243(4)(b) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), thereby urging the Court to strike it down.

5. The petitioner did not appear on the first date of hearing. The Court Associate placed an undated handwritten application before the Court, which prayed that the petitioner be allowed to withdraw the petition. This application was not entertained by the Court for the following reasons recorded in the order dated 26.11.2019:

"The Court-Associate has produced before us a handwritten application statedly submitted by the petitioner seeking permission to withdraw this petition. The petitioner has failed to appear in person nor anybody else has appeared on his behalf. The application received does not carry any date and the same is not accompanied by any affidavit. There is nothing before us to accept or to presume that the said application has actually been submitted by the petitioner himself or that he has submitted the same voluntarily. Be that as it may the petition in hand invokes Article 184(3) of the Constitution and the subject matter of the petition involves a question of public importance with reference to enforcement of fundamental rights and, thus, the individual capacity of the petitioner pales into insignificance even if he decides not to pursue the present petition. The application attributed to the petitioner is, therefore, not entertained."

The Petitioner appeared in person, on the next date of hearing and made an oral request seeking permission to withdraw the petition. He was apprised of the above quoted observation of the Court, and his request was turned down.

Public Interest Litigation (PIL) - Withdrawal

6. A public interest litigation (PIL) can only be withdrawn with the permission of the Court. This is because it does not raise a personal issue limited to the petitioner; it is not a *dominis litis* (the person to whom a suit belongs) that would give a right to the petitioner to withdraw it as a matter of choice. "In granting the permission (to withdraw) the Court would be guided by considerations of public interest and would also ensure that it does not result in the abuse of the process of law. Courts must guard against possibilities of such litigants settling the matters out of Court to their advantage and then seeking withdrawal of the case."² Sometimes withdrawal of a public interest litigation, for oblique ends, can be used to the detriment of the public interest agitated therein. The Court has to be cautious not to fall prey to such oblique motives. The proceedings in public interest litigation are inquisitorial in nature and, therefore, the request for withdrawal of such litigation must always be weighed in the light of the question of public importance raised in it. A petitioner initiating public interest litigation is, therefore, not entitled to withdraw the petition at his sweet will.³ The Court, however, may permit withdrawal of such litigation on considering the nature of the matter agitated therein and ensuring that it does not involve abuse of the process of law.

Maintainability and Jurisdiction under Article 184(3)

7. The Armed Forces are to defend Pakistan against external aggression and threat of war, under our Constitution.⁴ The COAS is an officer commanding the Pakistan Army⁵ and is

responsible for the command, discipline, training, administration, organization and preparedness for war of the Army. He is also the Chief Executive in the General Headquarters and an adviser to the Government on military matters.⁶ The appointment of the COAS of the Pakistan Army is, thus, inextricably linked with the life, security and liberty of every citizen and is undoubtedly a question of grave and vital public importance. The Army is perceived to play an intrinsic role in upholding constitutional values of sovereignty, freedom, democracy and the fundamental rights relating to life, liberty and dignity. Hence, the questions relating to its structure, command, governance and organization are of public importance with reference to the enforcement of the fundamental rights. In this age of information, the issues raised also attract fundamental right to information under Article 19A, as well as, the right to non-discrimination in services under Article 27 of the Constitution. Fundamental rights in a living Constitution are to be liberally interpreted so that they continue to embolden freedom, equality, tolerance and social justice.

8. Even the learned Attorney-General appearing for the Federal Government and the learned counsel for the COAS thought it appropriate, in this case, not to raise any objection to the assumption of jurisdiction by this Court or to the maintainability of this petition. They, during the hearing, rather tried to satisfy and convince the Court about the legality of the extension granted to the COAS and practically demonstrated that "it is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law."⁷ They in the course of arguments beseeched the Court to provide guidance to the Federation in this important matter.

9. The case proceeded as the Attorney-General for Pakistan ("Attorney-General") was already in attendance on his own, on the first date of hearing, and took us through the Summaries, approvals and orders passed regarding the extension of the COAS. The Court in its order dated 26.11.2019 identified some prima facie constitutional and legal flaws in the process of granting extension to the COAS and issued notices to all the respondents after impleading General Qamar Javed Bajwa, the COAS, as a respondent in the petition. The Court also suspended the operation of the notification of his extension dated 19.08.2019. The case was fixed for hearing the next day, on the request of the Attorney General. Relevant extract of the order dated 26.11.2019 is given as follows for ready reference:

- "i) A summary had initially been moved by the Ministry of Defence for extension of the term of office of the Chief of the Army Staff and subsequently he was appointed as Chief of the Army Staff for a second term of three years after completion of his first term in that office but the learned Attorney-General for Pakistan has not been able to refer to any provision in any legal instrument regarding extension in service of a Chief of the Army Staff upon completion of his first term in that office or for his re-appointment to that office after completion of his first term.
- ii) In the case in hand the Prime Minister had himself passed an order appointing the current Chief of the Army Staff for a second term in that office on 19.08.2019 whereas under Article 243 of the Constitution it is the President who is the appointing authority for that office. Apparently that mistake came to notice straightaway and on the same day, i.e. 19.08.2019 a summary was moved from the Prime Minister's office to the President for extension/re appointment of the incumbent Chief of the Army Staff and on that very day, i.e. 19.08.2019 the President was pleased to approve the summary in that regard and, hence, the advice of the Prime Minister was apparently accepted and acted upon. It appears that even that process was found to be flawed and on that very day it was realized that the Prime Minister or the President could not take the above mentioned actions without the approval of the Cabinet and, thus, on the next day, i.e. 20.08.2019 a summary was moved in the relevant regard for approval of the Cabinet and on 21.08.2019 the Cabinet was said to have approved the said proposal

through circulation. The opinion of the Cabinet recorded in this regard, photocopies whereof have been produced before us, shows that there are 25 members of the Cabinet and out of those 25 members only 11 had agreed to the proposal which shows that the majority of the Cabinet had not approved the said proposal. Yet another peculiar aspect is that after the purported or so-called approval of the Cabinet regarding extension/re-appointment of the incumbent Chief of the Army Staff the matter was never sent to the Prime Minister or the President again for the purposes of a fresh advice or a fresh order of the Prime Minister and the President respectively.

- iii) After our repeated queries the learned Attorney-General for Pakistan has referred to Regulation No. 255 of the Army Regulations (Rules) according to which a retirement of an Army officer can temporarily be suspended or limited. By placing reliance upon the said Regulation the learned Attorney-General for Pakistan has maintained that the Federal Government has the requisite authority to re-appoint or extend the services of an incumbent Chief of the Army Staff prior to his retirement if the exigencies of the service so require or the public interest so demands. A bare perusal of Regulation No. 255, however, prima facie shows that the said provision can be invoked after an officer has already retired from service and that is why the said Regulation speaks of suspension of retirement or limiting of retirement. Suspending a retirement or limiting a retirement before the retirement has actually taken effect may amount to putting the cart before the horse. The learned Attorney-General for Pakistan has, however, very candidly submitted before us that in the entire body of laws pertaining to the Pakistan Army there is no express provision available regarding re-appointment or extension in the service of a Chief of the Army Staff.
- iv) The stated purpose for the proposed re-appointment/extension in the term of office of the incumbent Chief of the Army Staff is "regional security environment". The said words are quite vague and if at all there is any regional security threat then it is the gallant armed forces of the country as an institution which are to meet the said threat and an individual's role in that regard may be minimal. If the said reason is held to be correct and valid then every person serving in the armed forces would claim re-appointment/extension in his service on the basis of the said reason."

Submissions of Attorney-General

10. The Attorney-General defended the Federal Government by arguing that the fresh appointment/ extension of the COAS is fully within the constitutional and legal fold. He submitted that the tenure of a General/COAS is three years as per unwritten convention and practice; that the tenure of a General/COAS can be extended under Regulation 255 of the Army Regulations (Rules); that the said Regulations have been framed under section 176-A of the Pakistan Army Act, 1952 and, therefore, have statutory force; and that even a retired Army General can be appointed as COAS under Article 243(4) of the Constitution, as the said clause of Article 243 is not subject to law. The Attorney-General took us through a series of documents, prepared prior to the filing of the instant petition and also those prepared during the course of hearing of the case, comprising the Summaries put up before the President, Prime Minister and the Cabinet; the subsequent approvals; and the relevant notifications

regarding "reappointment", "extension", "limit-in-retirement" and "appointment" of General Qamar Javed Bajwa. A brief summary of the said documents is given as follows:

Initial appointment of General Bajwa as COAS

- a. On 15.11.2016, the Ministry of Defence moved a Summary for the Prime Minister seeking approval of the Prime Minister under Rule 12 of the Pakistan Army Act Rules, 1954 for the retirement of General Raheel Sharif, COAS w.e.f. 29.11.2016.
- b. On 28.11.2016, the Ministry of Defence notified the approval granted by the Federal Government for the retirement of General Raheel Sharif, COAS w.e.f. 29.11.2016.
- c. On 26.11.2016, the Prime Minister gave advice to the President to promote General Qamar Javed Bajwa to the rank of General and to appoint him as COAS under Article 243(4)(b) of the Constitution. The President approved the advice on the same date.
- d. On 26.11.2016, the Ministry of Defence notified the promotion of General Bajwa to the rank of General and his appointment as COAS w.e.f. 29.11.2016.

Extension of General Bajwa as COAS

First Proceedings dated 19.08.2019

- e. The Prime Minister of Pakistan made an "order" appointing General Bajwa, as the COAS for another term of three years from the date of completion of current tenure. He stated "the regional security environment" as a reason of his said order.
- f. The Prime Minister's office addressed a letter to the Defence Secretary stating that the Prime Minister had desired the extension of service of General Bajwa as COAS for another term of three years from the date of completion of the current tenure, and directed the Ministry of Defence to initiate a Summary to that effect.
- g. The Ministry of Defence initiated a Summary for the Prime Minister stating therein that General Bajwa was due for retirement from 29.11.2019 by tenure and the Prime Minister was desirous for the extension of tenure of the General Officer for another term of three years from the date of completion of current tenure. The Ministry recommended that the General Officer may be granted extension under the Army Regulations (Rules) 255 for one further tenure (3 years) w.e.f. 29.11.2019 and beyond superannuation. The Ministry proposed the Prime Minister to advise the President to approve the recommendation regarding extension of the General Officer under Article 243(4)(b) of the Constitution. The Prime Minister advised accordingly and the President approved the Summary on the same day.
- h. The Ministry of Defence notified that General Bajwa, COAS, had been granted extension for one further tenure (03 years) w.e.f. 29.11.2019 to 29.11.2022.

Second Proceedings dated 20.08.2019 and 21.08.2019

- i. The Ministry of Defence, on 20.08.2019, initiated a Summary stating that the President has been pleased to approve the extension of the term of the General Officer for another 3 years from 29 Nov. 2019 to 29 Nov. 2022; that Rule 255 of the Army Regulations (Rules) stipulates that the retirement of officers will always be subject to the exigencies of service. Full power is reserved to Federal Government to "limit retirement in general or in individual cases whenever it may be necessary to do so in the public interest". With the said statements of fact and of law, the Ministry of Defence recommended that approval of the Federal Government was solicited for extension of the term of the General Officer for another 3 years from 29 Nov. 2019 to

29 Nov. 2022 and proposed obtaining approval of the Summary from the Cabinet through circulation.

- j. The Cabinet Division, on 21.08.2019, circulated the said Summary amongst the members of the Cabinet with the approval of the Prime Minister. 11 (eleven) members of the Cabinet endorsed the Summary, while approval of 11 (eleven) members remained "awaited", while 03 (three) members were stated to be out of city or country. The Cabinet Division, however, considered the Summary to have been endorsed by the available members of the Cabinet by circulation. But the extension purportedly granted by the Federal Government was not notified.

Third Proceedings dated 26.11.2019

- k. The Ministry of Defence moved the following three Summaries for the consideration of the Cabinet:-
- i. Summary for withdrawal of the earlier Summary dated 20.08.2019 which was got approved by circulation on 21.08.2019;
 - ii. Summary for amendment/ substitution of Rule 255 of the Army Regulations (Rules); and
 - iii. Summary for limiting the retirement of and grant of extension in service to General Qamar Javed Bajwa.

The Cabinet approved all the said three Summaries in its meeting held on 26.11.2019.

Fourth Proceedings dated 26.11.2019

- l. The Ministry of Defence notified the amendment/ substitution of Rule 255 of the Army Regulations (Rules), and also moved the following two Summaries for the Prime Minister:-
- i. Summary for proposing withdrawal of the advice dated 19.08.2019 given to the President so that the President may withdraw the appointment of the COAS dated 19.08.2019 and any subsequent order or notification; and
 - ii. Summary for proposing the Prime Minister to advise the President to re-appoint General Bajwa for another term of three years as COAS under Article 243(4)(b) of the Constitution.

The Prime Minister advised accordingly, and the President approved the said Summaries.

- m. The Ministry of Defence issued Notification No.3 / 11 / D-2 (A-II)/2019 dated 26.11.2019 stating thus:

"This Ministry's Notification of even No. dated 19 August, 2019 regarding extension in service in respect of PA-19617 General Qamar Javed Bajwa, NI(M), HI(M), Chief of the Army Staff (CAOS) is hereby withdrawn."

The Ministry of Defence, on the same day, issued another Notification No. F.3/11/D-2 (A-II)/2019 stating that:

"PA-19617 General Qamar Javed Bajwa, NI(M), HI(M), Chief of the Army Staff's (CAOS) retirement has been limited and he has been granted extension for one further tenure (03 years) with effect from 29 November 2019 to 29 November 2022."

Fifth Proceedings dated 28.11.2019

- n. The Ministry of Defence initiated yet another Summary stating that the earlier Summaries and subsequent orders and notifications are liable to be withdrawn, and

proposed the Prime Minister to advise the President:-

- i. to approve the appointment of General Qamar Javed Bajwa, Chief of the Army Staff (CAOS) with effect from 28.1.2019, in view of the exigencies and highest public interest, in terms of Article 243 (4) (b) of the Constitution of the Islamic Republic of Pakistan, 1973;
- ii. to determine that General Qamar Javed Bajwa, Chief of the Army Staff, shall be entitled to salary and allowances as prescribed under the Pay and Allowances Regulations (Army) as amended from time to time; and
- iii. to supersede the earlier approval of the President on the advice of the Prime Minister dated 26.11.2019.

The PM advised accordingly and the President approved the Summaries.

- o. The Ministry of Defence, on the same day, finally issued Notification No.F.3/11/D-2(A-II)/2019 stating thus:

"In exercise of the powers conferred under Article 243 (4) (b) of the Constitution of the Islamic Republic of Pakistan, 1973, the President, on advice of the Prime Minister, is pleased to appoint PA-19617 General Qamar Javed Bajwa, NI(M), HI(M), Chief of the Army Staff (CAOS) with effect from 28th November 2019, on salary and allowances prescribed under the Pay and Allowances Regulations (Army) as amended from time to time.

2. This Ministry's Notification No.3/11/D-2(A-II)/2019 dated 26 Nov, 2019 regarding limiting retirement and granting extension in service to the above named General Officer and Notification No.3/ 11 /D-2(A-II)/2019 dated 27 November 2019 are hereby withdrawn."

Flaws in the above process

11. In addition to the flaws noted in the process in our order dated 26.11.2019, the exercise of jurisdiction by the President, the Prime Minister, the Cabinet and the Ministry of Defence, Government of Pakistan in the extension, reappointment and appointment of the COAS highlights some further constitutional and legal flaws which are stated as follows:

- a. The Prime Minister appointed General Bajwa as the COAS for another term of three years from the date of completion of the current tenure vide his "order" dated 18.09.2019, while the Prime Minister has no such power under the Constitution.
- b. The tenure of 3 years mentioned in the above order of the Prime Minister has no legal basis.
- c. The extension of the tenure of COAS for a further period of three years vide Notification dated 19.08.2019 is not supported by law as there is no provision of tenure or extension of tenure prescribed under the Constitution or the law.
- d. The Summary initiated by the Ministry of Defence dated 19.08.2019 stated that General Qamar Javed Bajwa was due for retirement from 29.11.2019 by tenure but did not state the law providing for such tenure for retirement.
- e. The said Summary mentioned that the General Officer may be granted extension of one further tenure of three years under the Army Regulations 255, despite the fact that there is no tenure prescribed for a General and that there is no provision for extension

for another tenure in the Pakistan Army Act, 1952, Pakistan Army Act Rules, 1954 or the Army Regulations (Rules).

- f. The President under Article 243(4) (b) of the Constitution granted extension to General Bajwa for three years on 19.08.2019, while the President has no power to grant extension under the Constitution or the law.
- g. The Government, the very next day, i.e. 20.08.2019, retracted from the earlier position and without withdrawing the notification regarding grant of extension to General Bajwa, issued under the approval/ authority of the President a day before, took up the matter of extension of the tenure of General Bajwa with the Cabinet relying on Army Regulation 255 in the absence of any tenure or age of retirement prescribed for a General.
- h. Only 11 members of the Cabinet out of 25 approved the above Summary through circulation. However, no notification was issued under the authority or approval of the Federal Government regarding extension of the tenure of General Bajwa. Thus, this exercise served no purpose.
- i. This approval through circulation failed to comply with Rule 19 of the Rules of Business, 1973 which requires that the Cabinet Secretary is to specify the time by which the opinions of the Ministers should be communicated to him. No such timeframe was specified.
- j. The Ministry of Defence issued notification dated 26.11.2019 stating that retirement of General Bajwa, as a General Officer has been limited and he has been granted extension for further three years. This exercise conducted under the freshly amended Army Regulations (Rules) 255 (including the word "extension") could only be useful if there had been tenure or retirement age of a General provided under the law.
- k. Finally on 28.11.2019, a fresh Summary was put up before the Prime Minister for appointment of General Bajwa as COAS w.e.f. 28.11.2019 under Article 243(4)(b) of the Constitution which was approved by the President, leading to notification dated 28.11.2019. This Notification stated that the notification dated 26.11.2019 regarding limiting retirement and granting extension of service to General Bajwa stands withdrawn. This shows that there remains no notification in the field regarding limiting retirement and granting extension of service to General Bajwa. The appointment of General Bajwa on 28.11.2019 is again based on the assumption that his tenure has expired.

12. Some Summaries mention that the same have been prepared in due deference to observations of the Supreme Court of Pakistan. This generates an impression that the same have been made on the orders or directions of this Court. This is totally incorrect. In fact the Court simply highlighted steps taken by the President, the Prime Minister and the Cabinet, without any supporting law and as a consequence they on its own tried to rectify the same. The impression generated that the said steps were taken on the desire, orders or directions of the Court is dispelled.

Scope of Article 243 of the Constitution

13. The questions highlighted above require us to understand the legal structure of the Pakistan Army and the terms of service of its Commander, i.e. the Chief of the Army Staff. Therefore, it is most appropriate to begin with the understanding of the scope of Article 243

of the Constitution, which relates to raising and maintaining the Armed Forces and the appointment of their Chiefs.

14. "It is a constitution we are expounding⁸." As Chief Justice Dickson of the Supreme Court of Canada noted that "the task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind."⁹ "Any interpretation of the Constitution must be grounded in its own language." It is a language written in invisible ink, between the lines, and derived from the structure of the Constitution.¹⁰

15. The history of Article 243 of the Constitution begins with Article 40 of the Constitution of the Islamic Republic of Pakistan, 1956 ("1956 Constitution") and travels through 54 years to take its present shape in the year 2010 through the Constitution (Eighteenth Amendment) Act, 2010. Evolution of Article 243 through time has been traced and is reproduced hereunder for better understanding of the Article.

Comparative History of Article 243

1956 Constitution	1962 Constitution	1973 Constitution (Original Provision)	1973 Constitution (Present Provision)
40. Supreme Command of the Armed Forces.-	17. President to have Supreme Command of the Defence Services.-	243. Command of Armed Forces.	243. Command of Armed Forces.
(1) The Supreme Command of the Armed Forces shall vest in the President, and the exercise thereof shall be regulated by law.	(1) The Supreme Command of the Defence Services of Pakistan is vested in the President, to be exercised by him subject to law.	(1) The Federal Government shall have control and command of the Armed forces.	(1) The Federal Government shall have control and command of the Armed Forces. (2) Without prejudice to the generality of the foregoing provision, the Supreme Command of the Armed Forces shall vest in the President.
(2) Until Parliament makes provision by law in that behalf the President shall have the power- (a) to raise and maintain the Naval Military and Air Forces of Pakistan and the Reserves of such Forces; (b) to grant	(2) Without limiting the generality of clauses (1) of this Article, the President has power, subject to law; (a) to raise and maintain the Defence Services of Pakistan and the Reserves of those Services; (b) to grant Commissions in	(2) The President shall subject to law, have power-- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; (b) to grant	(3) The President shall subject to law have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan and the Reserves of such Forces; and (b) to grant Commissions in such Forces. (4) The President shall,

Commissions in such Forces; and (c) to appoint Commanders-in-Chief of the Army, Navy and Air Forces and determine their salaries and allowances.	those Services; and (c) to appoint chief commanders of those Services and determine their salaries and allowances.	Commissions in such Forces; and (c) to appoint the Chief of the Army Staff, the Chief of the Naval Staff and the Chief of the Air Staff, and determine their salaries and allowances.	on advice the Prime Minister, appoint- (a) the Chairman, Joint Chiefs of Staff Committee; (b) the Chief of the Army Staff; (c) The Chief of the Naval Staff; and (d) the Chief of the Air Staff, and shall also determine their salaries and allowances.
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16. Article 40 of the 1956 Constitution shows that the President was made the Supreme Commander of the Armed Forces and the said command was to be exercised by him under the law. The Article further provided that until the Parliament made law, the President would raise and maintain an Army and grant Commissions in Forces and appoint, inter alia, Commander-in-Chief of the Army. The underlying constitutional spirit gathered from the said Article is that the President was to raise and maintain an Army, to command it, to grant Commissions in it and to appoint its Commander-in-Chief under the law. It is important to note that the Pakistan Army Act, 1952 ("Act") was in force at the time of promulgation of the 1956 Constitution and despite its existence the framers of the Constitution required the Parliament to make provision by law to regulate the above matters. Article 40, thus, underlined that the Act had to provide the necessary structural underpinning that would constitute raising and maintaining of an Army, granting Commissions in the Forces and appointing its Commander-in-Chief.

17. Article 17 of the Constitution of the Republic of Pakistan, 1962 ("1962 Constitution") carried the spirit of Article 40 of the erstwhile Constitution; this time without awaiting for the legislation by the Parliament made the exercise of the President in relation to raising and maintaining the Armed Forces and granting Commissions in and appointing Chiefs of, such Forces, subject to law. No changes had been made in the Pakistan Army Act, 1952 since 1956 till 1962, therefore, the Act remained devoid of these constitutional structural requirements, in as much as, no provisions were added therein as to command of the Armed Forces by the President as the Supreme Commander, the powers to be exercised by him to raise and maintain an Army, to grant Commissions in the Forces and to make appointment of the "Chief Commander." This constitutional mandate was not actualized in law by the Legislature and the Government of the time, and remains unrealized even today.

18. This brings us to the present Constitution of 1973. The unrealized constitutional mandate once again is repeated in Article 243 with the same vigour and flair as it was done in the Constitutions of 1956 and 1962. Clauses (1) and (2) of Article 243 of the Constitution provide that the Federal Government shall command and control the Armed Forces and the President shall be its Supreme Commander. Clause (3) Article 243 of the Constitution provides that the President shall subject to law raise and maintain the Military, Naval and Air Forces of Pakistan and the Reserves of such Forces and grant Commissions in the Forces. Integral and intrinsic to raising and maintaining an Army is to first provide for the post of Commander in Chief of the Army, the General Officers and other Commissioned Officers that stand behind him and constitute the body of the valiant Army. No Army can be visualized without its gallant commanders. Once the structure including terms of service and tenure of the General Officers is put in place under the law envisaged by the Constitution, the role of the President to appoint the Chief of the Army Staff, under clause (4) of Article 243, from amongst the General Officers, on the advice of the Prime Minister is then simply a matter of selecting the most appropriate and suitable General officer to act as COAS. The power to

appoint COAS under Article 243(4) is, therefore, not an exercise in isolation but stands rooted and connected to the Army raised and maintained under Article 243(3) of the Constitution.

19. Review of the Military Laws of other countries shows that the law must provide for essential structural areas that would pass for raising and maintaining an Army. A comparative chart of the Laws of the Armed Forces of different countries is given hereunder:

Constituents of raising and maintaining Armed Forces

Structural Areas	United States (10 U.S. Code Title Armed Forces).	Australia (Defence Act 1903)	Canada (National Defence Act 1985)	Singapore (Armed Forces Act 1972)	Malaysia (Armed Forces Act, 1972)	New Zealand (Defence Act, 1990).
Organization Control and Administration	Organization and General Military Powers	Control and administration (Part II)	Canadian Forces Organization (Part II)	Organization of Singapore Armed Forces (Part II)	The Regular Forces of Malaysia (Part II)	New Zealand defence Part II
Appointment, Resignation Termination, Remuneration Superannuation and other Terms and Conditions.	Personnel	Appointment Resignation, Termination Remuneration Superannuation	Enrolment, Promotion, Service, Pay (Part II)	Appointments Pay. Pension, Terms and Conditions, Remuneration (Ss.10-10C, 192-197,202-208).	Appointment of Officers of The Regular Forces and Terms of Service (Parts III, IV and VI).	Appointment of Chiefs, Terms and Conditions of Service in Armed Forces and Superannuation (Part 3-5)
Military Offences	Punitive Matters (Subchapter VIII)	Offences and Offences in relation to service tribunl (Parts VII-VIII)	Service Offences and Punishments infraction (Part III Dv2).	Military Offences (Part III)	Service Offences and Punishments (Part V)	Offence punishable by Civil Courts (Part VII)
Trial by Subordinate Military Courts	Uniform Code of Military Justice (Chapter 47).	Defence Force Discipline Act, 1982.	Trial by Court Martial and Civil Court (Part-III Dv6, Part-VII)	Trial by Subordinate Military Courts (Part V).	Offences relating to the Armed Forces punishable by Civil Courts (Part VII)	Redress of complaints (Sec.49) and Armed Forces Discipline Act, 1971
Punishments of Military Offences	Punitive Articles (Subchapter X) and Sentences (Subchapter VI)	Penalty (Part VII Sec.73-F)	Service Offences and Punishments infraction (Part-III Dv2).	Punishments of Military Offences and Execution of Sentences (Part VI).	Service Offences and Punishments (Part V)	Members may be discharged or released for incompatible behaviour and disciplinary proceedings (57 and 57A).
Court of Appeal	Uniform Code of Military Justice (Chapter 47)	Defence Honors and Awards Appeals Tribunal (Part VIII C)	Grievances (Right of Appeal) (Part -II Dv9).	Military Court of Appeal (Part VII)	Offences relating to the Armed Forces punishable by Civil Courts (Part VII)	Court Martial Appeals Act 1953 and Armed Forces Discipline Act 1971.
Training and Development	Training and Education (\$\$)	Australian Defence Force Cadets (Part V)	The Governor in Council make regulations for the	General Orders of Ministry of Defence (Sec 208 d)	Training and attachment (Sections 191, 201 and 201B).	Cadet Forces (Part VI).

			training and discipline of Armed Forces (Sec 12 (1)).			
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20. The above mentioned laws provide the essential structural areas that constitute raising and maintaining an Army. The key structural areas include Organization; Control; Personnel; Terms and Conditions of services of officers of the Armed Forces including Appointments, Ranks, Remuneration, Promotion, Resignation, Termination, Superannuation, Command, Rank; Discipline, Administration, Training and Development, Education and Offences. The United States Law of Armed Forces also provides for Procurement, Supply and Acquisitions for the Armed Forces. The above laws strongly underline that the officers, who are to command and control the Army, unquestionably form an essential component of the Army and must, therefore, be explicitly recognized under the law.

Review of the Pakistan Army Act, 1952

21. When the Pakistan Army Act, 1952 is reviewed in the context of raising and maintaining an Army, we see that it largely deals with offences, courts martial and punishments. There is no mention of the Chief of the Army Staff, the commanders of the Pakistan Army. There is no mention of the General Officers or the other Commissioned Officers or terms of their service. Only three chapters briefly touch upon definitions, appointment and termination of service. While the Act governs Commissioned Officers there is nothing in the Act that prescribes the terms and conditions of service of the said Officers. Chapter II deals with the Appointment, Enrolment and Attestation of Junior Commissioned Officers and Warrant Officers and not of Commissioned Officers, while section 18 in Chapter III, relating to Termination of Service deals with the retirement, release or discharge of persons subject to the Act. The Act is silent about key structural areas that constitute raising and maintaining an Army especially about the Commissioned Officers and their Commander-in-Chief.

22. In order to meet this structural constitutional requirement of Article 243(3) of the Constitution, it seems that a hurried effort was made and some key structural areas that are necessary for raising and maintaining an Army were inserted in section 176A of the Act in the year 1965¹¹ empowering the Federal Government to make Regulations in respect of "governance, command, discipline, recruitment, terms and conditions of service, precedence, and administration of the Pakistan Army." This slipshod legislative upload, however, does not meet the requirement of Article 243(3) of the Constitution, without providing for core, primary and essential legislation on these structural areas by the Parliament. This aspect is discussed in detail in later part of the judgment while examining the status of the Army Regulations (Rules). For now it would suffice to observe that the Pakistan Army Act, 1952, falls deficient of the Constitutional requirement under Article 243(3) as it does not provide for essential elements required to raise and maintain an Army, in particular, the grant of Commissions in the Army and the terms of service of the Commissioned Officers. Had this been done, the questions raised before the Court today, would not have arisen.

Post of COAS - Whether Unregulated

23. The appointment to the post of COAS is made under Article 243(4)(b) of the Constitution. It would be advantageous to have a look at the history of the successive amendments in the said Article before discussing various aspects surrounding the

appointment of the COAS. The trajectory of constitutional amendments made in Article 243 is given as under:-

Constitutional amendments in Article 243

(Amendments are given in bold for convenience)

1973 Original Position	After 1985 Amendment	After 1997 Amendment	After 2002 Amendment	After 2003 Amendment	After 2010 Amendment/ Substitution
(1) The Federal Government shall have control and command of the Armed Forces	(1) The Federal Government shall have control and command of the Armed Forces	(1) The Federal Government shall have control and command of the Armed Forces	(1) The Federal Government shall have control and command of the Armed Forces	(1) The Federal Government shall have control and command of the Armed Forces	(1) The Federal Government shall have control and command of the Armed Forces
	(1A) Without prejudice to the generality of the foregoing provision, the Supreme Command of the Armed Forces shall vest in the President. (This clause was added).	(1A) Without prejudice to the generality of the foregoing provision, the Supreme Command of the Armed Forces shall vest in the President.	(1A) Without prejudice to the generality of the foregoing provision, the Supreme Command of the Armed Forces shall vest in the President.	(1A) Without prejudice to the generality of the foregoing provision, the Supreme Command of the Armed Forces shall vest in the President.	(2) Without prejudice to the generality of the foregoing provision, the Supreme Command of the Armed Forces shall vest in the President. (This clause was renumbered as clause (2)).
(2) The President shall subject to law, have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; (b) to grant Commissions in such Forces; and (c) to appoint the Chief of	(2) The President shall subject to law, have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; (b) to grant Commissions in such Forces; and (c) to appoint in his	(2) The President shall subject to law, have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; (b) to grant Commissions in such Forces; and (c) to appoint the Chairman	(2) The President shall subject to law, have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; and (b) to grant Commissions in such Forces, Paragraph (c) of clause (2)	(2) The President shall subject to law, have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; and (b) to grant Commissions in such Forces,	(3) The President shall subject to law, have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; (b) to grant Commissions in such Forces. (This clause was

<p>the Army Staff, the Chief of the Naval Staff and the Chief of the Air Staff and determine their salaries and allowances.</p>	<p>discretion the Chairman, Joint Chiefs of Staff Committee, the Chief of the Army Staff, the Chief of the Naval Staff and the Chief of the Air Staff and determine their salaries and allowances. (The highlighted words were added)</p>	<p>Joint Chief of Staff Committee, the Chief of Army Staff, the Chief of the Naval Staff and the Chief of the Air Staff and determine their salaries and allowances (Words "in his discretion" from clause 2(c) were omitted).</p>	<p>was omitted and clause (3) was added.</p>		<p>renumbered as clause (3).</p>
			<p>(3) The President shall, in his discretion, appoint. (a) the Chairman, Joint Chiefs of Staff Committee; (b) the Chief of the Army Staff; (c) the Chief of the Naval Staff; and (d) the Chief of the Air Staff, and shall also determine their salaries and allowances.</p>	<p>(3) The President shall, in consultation with the Prime Minister, appoint- (a) the Chairman, Joint Chiefs of Staff Committee; (b) the Chief of the Army Staff; (c) the Chief of the Naval Staff; and (d) the Chief of the Air Staff and shall also determine their salaries and allowances (In clause (3), for the words "in his discretion" the words "in consultation</p>	<p>(4) The President shall, on advice the Prime Minister, appoint- (a) the Chairman, Joint Chiefs of Staff Committee; (b) the Chief of the Army Staff; (c) the Chief of the Naval Staff; and (d) the Chief of the Air Staff, and shall also determine their salaries and allowances. (In clause (4), for the words "in consultation with the</p>

				with the Prime Minister" were substituted.)	Prime Minister" the words "on advice of the Prime Minister" were substituted.)
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24. Article 243(4), which carries a long constitutional ancestry since 1956, provided in its original form that the President shall "subject to law" appoint and determine salary and allowances of the COAS, alongwith matters of raising and maintaining Armed Forces and granting Commissions in Forces. Under the Legal Framework Order, 2002 the matter of appointment of COAS was separated and provided for under clause (3) of Article 243 which was renumbered as clause (4) in the year 2010. Post 2002, clause (3), now clause (4) of Article 243, does not contain the expression "subject to law." Relying on the current language of clause (4) of Article 243 the learned Attorney-General submitted that the post of the COAS not being "subject to law" allows appointment of even a retired General as the COAS.

25. The submission of the learned Attorney-General, if accepted, immediately gives rise to a number of questions: Who can be appointed as a COAS? Can a COAS be a serving or a retired army officer? What will be the rank of such army officer? What will be the tenure of COAS? What will be the age of his retirement? Can he be removed from service? Can he resign or step down due to personal reasons? How will the President, the Supreme Commander of the Armed Forces or the Federal Government having the command and control of the Armed Forces regulate the post of COAS? These questions are of importance for the nation and for the Armed Forces as a premier security institution of the country. It is inconceivable that the constitutional appointment to the post of the COAS in the "service of Pakistan"¹² goes unregulated under a written Constitution.

26. The interpretation put by the learned Attorney General, to the provisions of clause (4) of Article 243 is the result of reading it in isolation from the other clauses of Article 243, particularly the immediately preceding clause, i.e. clause (3), and in oblivion of the overall constitutional scheme of appointment to the constitutional posts and their tenure. It is a settled principle of interpretation that the words in a provision cannot be read and interpreted in isolation. The meaning and scope of a provision is determined by looking not to the isolated words used therein but by reading its text in context. The relevant provision of the Constitution is, therefore, to be read in its immediate context as well as in the overall scheme of the constitutional appointments.¹³

27. Clause (3) of Article 243 as elaborated earlier, contemplates raising and maintaining the Armed Forces and granting Commissions in such Forces under a law enacted by the Parliament. Such a law must provide for a cadre of commanders who will eventually head the Army. Article 243(4) simply deals with selection/ appointment of the COAS by the President on the advice of the Prime Minister. This selection/ appointment is naturally to be made from amongst the General Officers of the Army raised and maintained under Article 243(3) and is solely the prerogative of the President on the advice of the Prime Minister which cannot be curtailed by law. Both clauses (3) and (4) of Article 243 work in tandem, without disturbing each others powers. Therefore, separation by the Legal Framework Order 2002 of clause (4) from that of clause (3) and omission of the expression "subject to law" in clause (4) has only given more autonomy to the Prime Minister, the head of the Executive branch, in selection and appointment of a General Officer as a COAS. The removal of the term "subject to law"

does in no manner lessen the importance of Article 243(3), which envisages that the terms of service of the General Officers should be provided under the law.

28. A look at the scheme of the Constitution shows that the President in whom the Supreme Command of the Armed Forces vests, has a fixed tenure under the Constitution.¹⁴ The Prime Minister, on whose advice the COAS is appointed, being a Member of the National Assembly, has also a fixed term under the Constitution. A survey of the constitutional appointments to be made by the President is given as under:

Constitutional Appointments

Article	Constitutional Office	Article	Tenure or Age of Retirement
92(1)	Federal Ministers and Minister of State	92(3)	May be removed from office at anytime on the advice of the Prime Minister (Not a Service of Pakistan- Article 260)
93(1)	Advisors	93(1)	The terms and conditions of appointment are determined by the President, on the advice of the Prime Minister. (Not a Service of Pakistan- Article 260)
100(1)	Attorney-General for Pakistan	100(2)	Holds office during the pleasure of the President. (Not a Service of Pakistan- Article 260)
92(1)	Federal Ministers and Minister of State	92(3)	May be removed from office at anytime on the advice of the Prime Minister (Not a Service of Pakistan- Article 260)
101(1)	Governors of Provinces	101(3)	Hold offices during the pleasure of the President.
168(1)	Auditor General of	168(3)	4 years tenure, or age of 65 years
177(1)	Chief Justice of Pakistan	179	No tenure or age of retirement Connected with the Judge of the Supreme Court who holds office till age of 65 years.
177(1)	Judges of the Supreme Court	179	Hold offices till age of 65 years
193	Chief Justices of High Courts	195	No tenure or age of retirement Connected with the Judge of the High Court who holds office till the age of 62 years.
193	Judges of High Courts	195	Hold offices till age of 62 years
203C(2)	Chief Justice Federal Shariat Court	203C(4)	Tenure not exceeding 3 years; and may be appointed for further term(s)
203C(2)	Judges of Federal Shariat Court	203C(4)	Tenure not exceeding 3 years; and may be appointed for further term(s)
203F	Judges of Supreme Court Shariat Appellate Bench	203F(4)	Holds office for such period as the President may determine
213(1)	Chief Election Commissioner	215(1)	5 years tenure

218(2)(b)	Members of Election Commission	215(1)	5 years tenure
228(2)	Members of Council of Islamic Ideology	228(5)	3 years tenure
228(4)	Chairman, Council of Islamic Ideology	228(5)	No tenure. But same as that of a Member, i.e., 3 years under Article 228(5).
242(1A)	Chairman of Public Service Commission		No tenure or age of retirement. Terms of service of a Member applicable. Section 4(1) of the FBSC Ordinance, 1977 provides a tenure of three years or an age of 65 years, whichever is earlier of a Member the Commission.
243(4)	Chairman, Joint Chiefs of Staff Committee; and Chiefs of Armed Forces		No tenure prescribed in the Constitution and the law relating to the Armed Forces.

The above provisions of the Constitution provide for the following constitutional positions as to tenure or age of retirement: (i) posts with specific tenure or age of retirement in the Constitution, (ii) posts with no specific tenure or age of retirement but are regulated at the pleasure of the President, and (iii) posts with no specific tenure or age of retirement but are regulated with the tenure or age of retirement of the persons so appointed to the posts. A quick reference can be made to the appointment of Chief Justice of the Supreme Court or of a High Court, which is an appointment without a tenure or age of retirement. This falls in the third category. Chief Justice of the Supreme Court or of a High Court is appointed from amongst the Judges of these Courts and it is the age of retirement of these Judges, under the Constitution, that regulates the age of retirement of the Chief Justices. Therefore, if a Judge of Supreme Court retires at 65 years of age, so does the Chief Justice of Pakistan. Similarly, the Chairman of the Council of Islamic Ideology has no tenure or age of retirement under the Constitution. However, as the Chairman of the Council is appointed from amongst the Members of the Council, it is his tenure as a Member that regulates his tenure in the post of Chairman. Another example is of the tenure of the Chairman of the Public Service Commission, who is not provided under Article 242(1A). However, being a Member¹⁵ of the Public Service Commission his tenure and age of retirement stand regulated under section 4(1) of the Federal Public Service Commission Ordinance, 1997 which determines tenure and age of retirement of a Member.

29. Army Regulations (Rules) 125 read with Annex D shows that an officer of the Army holding the rank of a "General" is appointed as a COAS. This is also an admitted position according to the submissions made by the Attorney-General besides being visible from the appointment notifications of the earlier and the present COAS, placed on the record. The appointment notifications provide that a Lieutenant-General is first promoted to the rank of a General and then appointed to the post of COAS. It is for this reason that the Federal Government in the Summaries and notifications, referred to above, have taken pains to extend the tenure of General Bajwa for a period of three years either through extension in service or limiting his retirement in order to make him available for re-appointment to the post of COAS. Therefore, the substantive rank of the army officer who is posted as a COAS is that of a General, which in turn then regulates the tenure, as well as, the other terms of service of the COAS. This puts to rest the impression that the post of COAS is without any tenure under Article 243(4)(b). Thus, the constitutional appointment of COAS, like similar constitutional appointments, stands regulated and falls in line with the constitutional scheme.

It is important to underline that it is only a serving General who can be appointed as the COAS. This is because only a serving army officer is subject to the Pakistan Army Act, 1952.¹⁶ A retired army officer has no terms of service and is not regulated under the Act. Therefore, the terms of service of the rank of the General appointed as COAS regulates the tenure and terms of service of the COAS, other than his salary and allowances which are to be determined by the President under Article 243(4) of the Constitution.

Tenure or Age of Retirement of a General

30. We have examined the laws relating the Pakistan Army to determine the terms of service of a General, in particular his tenure and age of retirement. The Pakistan Army Act, 1952 and the Pakistan Army Act Rules, 1954 are totally silent about the tenure or age of retirement of a General. Section 18 of the Act states that the prescribed Authority may, in conformity with such rules as may be prescribed in this behalf, retire, release, or discharge from the service any person subject to this Act. While Rule 12 of the Rules provides that the retirement or release of an officer shall be authorized by the Federal Government and notified in the official Gazette. Both these provisions do not provide the age of retirement or tenure of army officers including a General.

31. The Army Regulations, however, contain the provisions regarding the retirement of the army officers. Regulations 262, 262-A and 262-C deal with normal retirement of officers. Regulation 262 deals with normal retirement of officers who were on the Effective List¹⁷ on 1.07.1970 (commissioned prior to 1970) and provides their retirement age and service limit including that of a General as follows:

Rank	Age (yrs)	Service
(a) Major and below	47	23
(b) Lieut-Colonel	50	25
(c) Colonels	53	26
(d) Brigadiers	55	28
(e) Major Generals	57	30
(f) Lieut-Generals	58	32
(g) Generals	60	35

Regulation 262-A deals with officers commissioned after 1970 which includes the incumbent COAS, while Regulation 262-C deals with the officers commissioned after 1988. Regulation 262-A, which is applicable to General Bajwa, does not provide for age of retirement for the officer of the rank of a General as seen from the relevant provision reproduced hereunder:

Rank	Age Limit
(a) Major and below	48
(b) Lieut-Colonel	50
(c) Colonel	52
(d) Brigadier	53
(e) Major General	55
(f) Lieut-General	57 years or on completion of one tenure of four years which ever is earlier. However, an officer may be retained in service as a special case by the Federal Government for an extra year on completion of his tenure of four years.

32. The laws relating to the Army discussed above do not provide for the tenure or age of retirement of a General. The learned Attorney-General has also conceded this legal deficiency and submitted that the tenure of a General, at present, is being regulated by the institutional convention and practice. As per the said practice, he submitted, the tenure of a General and

consequentially of a COAS is three years. This institutional practice pleaded by the Attorney-General is discussed in detail in the later part of the judgment. It would suffice here to observe that such an institutional practice cannot be a valid substitute of the law required to be made in pursuance of the constitutional mandate under Article 243(3) of the Constitution. This is a serious legislative omission. Service in the Armed Forces being "Service of Pakistan" must be regulated by or under the law in accordance with the provisions of Article 240 of the Constitution read with Article 243(3). Otherwise, it is inconceivable that the highest rank in the Army, would have no tenure or age of retirement or other terms of service.

Extension in service and limit in retirement of a General

33. The re-appointment, extension or fresh appointment of General Bajwa as COAS has been structured by the Federal Government by first limiting the retirement of the General under Regulation 255 for three years and then appointing him as COAS for another term under Article 243(4) of the Constitution. During the course of hearing of this case, the said Regulation was amended overnight by the Federal Government on 26.11.2019 to include the expression "extension" in limiting retirement. In the absence of a tenure or age of retirement for the rank of a General under the law, this exercise to amend the Regulation 255 did not serve any purpose.

Scope and Meaning of Army Regulation (Rules) 255

34. The above Regulation has been provided in the Chapter dealing with Termination of Service of Army Regulations (Rules) and bears the heading Retirement and Resignation. This Regulation can only be invoked for an officer who has retired or is about to retire. The emphasis is to delay the retirement either by limiting the retirement or by extending the date of retirement or suspending retirement after retirement. This is a temporary arrangement and can only be availed if the exigencies of service and public interest so require. The essence of the Regulation is that if an officer is on the way out (about to retire) and urgent or pressing circumstances require that he be retained in service, this Regulation comes into play. An example could be that during war, an army officer may not be allowed to leave the war front just because he is about to retire or has retired, in such a situation the retirement can be limited, extended or suspended. This is in line with Regulation 255A. The exercise of discretion by the Federal Government under the said Regulation has to be structured on parameters of exigency of service with a corresponding temporary period in mind. The words suspension, limiting retirement and extension do not connote permanency and cannot be equated with grant of new tenure or a fresh appointment. Therefore, a new tenure or fresh appointment for a full new tenure cannot be given or granted to an army officer under Army Regulation (Rules) 255.

Status of Regulations 255

35. Reading of Regulation 255 in the light of the relevant provisions of the Act and the Rules has given rise to some serious doubts as to the vires of its provisions which we would like to highlight in the public interest so that the Federal Government when initiates a

legislative process on the subject, may take it also into consideration. Section 18 of the Act provides as under:

18. Retirement, release or discharge.-- The prescribed Authority may, in conformity with such rules as may be prescribed in this behalf, retire, release, or discharge from the service any person subject to this Act.

Section 176(2)(a) empowers the Federal Government to make Rules on the subject of "retirement" and as a consequence Rule 12 of the Pakistan Army Act Rules, 1965 provide as follows:

12. Authorities empowered to authorize retirement, release or discharge.--(a) The retirement or release of an officer shall be authorized by the Federal Government and notified in the official Gazette. The Federal Government may at any time terminate the services of an officer.

36. Army Regulation (Rules) 255 appears in Chapter XI of the Regulations dealing with Termination of Service under the head Retirement and Resignation. Regulation 255, prior to the recent amendment, provided as follows:

Retirement and Resignation

255. General Provision:- Retirement of officers will always be

subject to the exigencies of service. Full power is reserved to the Federal Government temporarily or limit retirement, in general or in individual cases wherever it may be necessary to do so in public interest. Officer of the rank of Colonel and above will not be permitted to retire voluntarily unless deemed expedient by the Federal Government.

The above Regulation was amended in one day on 26.11.2019 during the pendency of this case. This was done when the Court asked the Attorney-General to show if there was any provision of the law dealing with "extension" of the tenure of a General or COAS. The amended Regulation is as follows:

Retirement and Resignation

255. General Provision:- Notwithstanding anything contained in the Army Regulations, Volume-I (Rules), 1998, the Federal Government shall have the power to suspend temporarily or limit retirement, the latter including the grant of extension in the service of any officer, in general or in individual cases, during the currency of tenure or upon reaching retirement, wherever it is necessary to do so in any exigency or in the public interest. Officer of the rank of Colonel and above will not be permitted to retire voluntarily unless deemed expedient by the Federal Government

37. Section 176A of the Act clearly provides that the Federal Government shall make Regulations for all or any of the purposes of the Act but other than those in respect of which Rules have been made under section 176. Rule 12 specifically covers the subject of "retirement"; therefore, Regulations could not deal with the subject of retirement. While the Act and the Rules mention simple retirement, the Regulation introduces a totally new concept of suspending, limiting in and extending retirement, which apparently exceeds the mandate of the Act.

Status of Section 176A of the Act and the Army Regulations

38. The examination of Regulation 255 has lead us to examine the history and constitutionality of section 176A of the Act and the vires of the Army Regulations as a whole. Before Independence, Army of the British India was governed by the Indian Army Act, 1911. After 1947, the Pakistan Army continued to be governed by the said Act by virtue of section

18 of the Indian Independence Act, 1947. The Act of 1911 was repealed and replaced by the Pakistan Army Act, 1952. We could not trace the history of Army Regulations (Rules) and their legislative authority before 1960 or 1965 when they are said to have been made under section 176A of the Act. The Regulations were in existence even in 1945 but did not have a legislative cover under the Indian Army Act, 1911 as there was no provision under the said Act to make the Regulations. India resolved this anomaly by adding sections 192, 193 and 193A in the Indian Army Act, 1950; and Pakistan did this in the year 1965 by adding section 176A to the Pakistan Army Act, 1952.

Essential Legislative Function - Excessive Delegation

39. In order to provide a legal cover to the Army Regulations, section 176A was inserted in the Act vide the Pakistan Army (Amendment) Ordinance, 1965 (Act XV of 1965) which empowered the Federal Government to make Regulations in the following manner:

176A. Power to make regulations. The Federal Government may make regulations for the governance, command, discipline, recruitment, terms and conditions of service, rank, precedence, and administration of the Pakistan Army and generally for all or any of the purposes of this Act, other than those in respect of which rules have been made under section 176. (emphasis supplied)

It is useful to refer to the debates¹⁸ in the National Assembly when Section 176-A was introduced through the Pakistan Army (Amendment) Ordinance, 1965. Dr. Aleem Al-Razi, the then Member of the National Assembly pointed out as follows:

"Thirdly, the last clause in section 176 of the Act is absolutely unnecessary. It takes away the entire thing from the purview of this Legislature to the Executive Government alone who will be determining the factors whom to be given precedence and whom to be given a new title or new favour this is absolutely in the hand of the Central Government. Under the previous rules, under section 176 of the Pakistan Army Ordinance, 1952, Mr. Speaker, the wording of that section are not so quiet but unfortunately by adding new section 176-A a comprehensive power we are giving to the Executive Government and we shall not know anything. Even there is no provision of publication of those rules and regulations in the official Gazette of Pakistan. So, Mr. Speaker, Sir, may I ask the Members of the Treasury Benches that they may publish these rules and regulations in the Official Gazette and if necessary produce those rules and regulations on the floor of the House if not for approval may be for our reading, for our understanding so that we may know the fate of our Army, we may know the rules and regulations by which our Armed Forces are governed so that we may also go in the Armed Forces of Pakistan." (emphasis supplied)

Mr. Muhammed Qasim Malik, the then Parliamentary Secretary to the Defence Division, who tabled the Ordinance for approval by the Assembly under clause (3) of Article 29 of the Constitution, 1962 pointed out as under:

"... This is actually to legalize the Pakistan Army Regulations which are already in existence. But unfortunately it was found later on that they had no legal force under the Army Act. Under the Army Act, Army regulations can be made and they already exist and there is a great necessity of these Regulations. Therefore, this Ordinance had to be brought in. The main purpose is to legalize this and to give a certain legal force behind those regulations because they could not be framed unless and until this Ordinance was passed or this Resolution is passed "

40. The debates are self-explanatory and set out the purpose of inserting section 176A in the Act. It can be safely maintained that the said Regulations existing from the time of the British India were promulgated as statutory Regulations by the Federal Government under

section 176A of the Act after 1965. The only problem is that these Regulations once brought within the statutory fold must flow from the Act. Regulations which do not meet this requirement would be ultra vires the Act. The scope of the Act or the vires of the Regulations cannot be determined by the words inserted in section 176A like governance, command, discipline, recruitment, terms and conditions of service, rank, precedence and administration of the Pakistan Army. These words are mere words when there is no essential or core legislation on these subjects. Article 142(a) of the Constitution provides that the Parliament shall have exclusive power to make laws with respect to any matter in the Federal Legislative List. Item No. 1 of the said List provides for Military, Naval and Air Forces raised and maintained by the Federation. However, no such legislation was ever made since it was first clearly mandated under the 1956 Constitution. Section 176-A inserted in 1965 provided a shortcut and authorized the Federal Government to regulate areas like governance, command, discipline, recruitment, terms and conditions of service, rank, precedence and administration of the Pakistan Army through Regulations. The power of the Parliament under the Constitution cannot be delegated to the Federal Government without the Parliament performing the basic essential legislative function, i.e. providing policy guidelines on these areas.

41. This Court has time and again held that the essential legislative function of the Parliament cannot be delegated.¹⁹ The wisdom behind it is that the delegatee must have legislative guidelines to formulate Rules and Regulations, and that guidelines, contours or boundaries must come from the Legislature itself. Delegation of an "essential legislative function" by the Legislature to the Executive is not permissible under the Constitution. The foundation of embargo owes its genesis to the concept of trichotomy of powers between the Legislature, the Executive and the Judicature, which is a fundamental principle of our constitutional construct. Under the Constitution, these three organs of the State have been entrusted with separate and specified functions. The primary function of the Legislature is to legislate laws, of the Executive to execute laws, and of the Judicature to interpret laws.²⁰ The words of Chief Justice Marshall of the US Supreme Court frequently quoted, in explaining the doctrine of separation of powers, by the Courts of various jurisdictions in the last about two centuries still hold: "the Legislature makes, the Executive executes, and the Judiciary construes, the law." The Legislature cannot abdicate performance of the function assigned to it by the Constitution and set up a parallel Legislative authority. Though the Legislature can confer upon any person or body the power to make subordinate/delegated legislation (rules, regulations or byelaws, etc) in order to give effect to the law enacted by it yet it must perform itself the essential legislative function, i.e. to exercise its own judgment on vital matters of policy and enact the general principles providing guidance for making the delegated legislation. Through section 176A, the Parliament appears to have divested itself of the essential legislative function which amounts to excessive delegation.

42. The Army Regulations (Rules) will be rendered ultra vires if they do not draw their power from the parent Act, i.e. the Pakistan Army Act, 1952 and will suffer from excessive delegation if they draw their strength only from section 176A of the Act. The Regulations have to be fully examined in the light of these principles. Once again it is for the Federal Government to bring about appropriate legislation to remove these defects so that the Regulations have a proper legal cover and are fully enforceable under the law.

Accessibility of Regulations

43. The copy of the Army Regulations (Rules) carries a stamp of "Restriction" stating as follows:

RESTRICTED The information given in this document is not to be communicated

either directly or indirectly, to the press or to any person not authorized to receive it.

Acts of the Parliament or subordinate legislation are public documents and must be readily available to the citizen of the country subject to the exceptions provided under the Right of Access to Information Act, 2017. Those exceptions extend only to record relating to defence forces, defence installations or connected therewith and ancillary to defence and national security,²¹ and not to the Army Laws. It is important to remember that when there is information, there is enlightenment and when there is debate, there are solutions.²² Had the Army Regulations been made accessible to public and had these matters been discussed earlier, the omissions pointed out for the first time since 1947 could have been remedied much earlier. Therefore, every legislative instrument must be made accessible to public.

Legal Vacuum and the Assurance by the Federal Government

44. After detailed examination of the laws relating to the Army it is concluded that there is no provision providing for the tenure and age of retirement of a General and as a consequence of the COAS, as well as, for the extension of tenure or fresh appointment for another tenure. The Summaries initiated by the Ministry of Defence and approved by the President, the Prime Minister and the Cabinet, for the reappointment, extension and fresh appointment of the COAS seems to be meaningless and of no consequence in the said legal vacuum. The learned Attorney-General has assured the Court that the Federal Government will carry out legislation through the Parliament in the shape of an Act within six months to provide for the terms of service of a General (and as a consequence of COAS) so that effect can be given to Article 243 in letter and spirit and functionality of the constitutional provisions be realized at the earliest. Even otherwise, this Court could have directed²³ the Federal Government to initiate and process legislation to give effect to a constitutional mandate. The Federal Government may also, if deems appropriate, specifically provide for extension of the tenure of an army officer of the rank of a General in the Act with grounds for granting such an extension, so that the discretion of the Federal Government in granting extension to a General is structured. It may also carry out necessary amendments in the law to protect the Army Regulations (Rules) as discussed above, which appear to be without any legal cover and fall outside the scope of the Pakistan Army Act, 1952.

Institutional Practice

45. When confronted with the legal vacuum regarding the tenure, age of retirement and other terms of service of a General, the learned Attorney-General candidly responded that there is an unwritten institutional practice in vogue since long whereby the tenure of a General is considered to be of three years. He admitted that no tenure or age of retirement of a General has been provided under the law. Perusal of the earlier notifications placed before us relating to the former Chiefs of Army Staff and the process of reappointment, extension and fresh appointment of the incumbent, pre-suppose a fixed tenure of three years for a General/COAS. An institutional practice followed continuously and consistently by an institution for a considerable period of time may be used to resolve a controversy, in the absence of the law.²⁴ We can, therefore, place reliance on the institutional practice in order to ensure realization of the constitutional scheme under which it is inconceivable for a constitutional post in the service of Pakistan to be left totally unregulated and to continue forever. We are, however, of the view that, in the first instance, this matter should be allowed to be regulated by law as mandated by the Constitution, so that the people of Pakistan decide through their chosen representatives the length of tenure of a General, as this will consequentially determine the tenure of the COAS. The people of Pakistan may accept or reject the institutional practice through their chosen representatives in the Parliament.

Besides, the question before us is not only regarding the tenure but also regarding the extension of tenure for another term, which in any case, requires legislation. The Attorney-General has assured us that necessary legislation will be brought into effect within six months to plug this legal vacuum. This assurance has tempted us to exercise judicial restraint in the matter, so that people of Pakistan may decide this question through the Parliament.

Judicial Restraint

46. Judicial restraint in its substantial approach urges Judges considering constitutional questions to give deference to the views of the elected branches and invalidate their actions only when constitutional limits have clearly been violated,²⁵ while the principle, "if it is not necessary to decide more, it is necessary not to decide more"²⁶ well states the procedural aspect of judicial restraint. The power of judicial review is a "great weapon in the hands of Judges", but the Judges must observe the Constitutional limits set by our parliamentary system on their exercise of this beneficial power, namely, the separation of powers between the Parliament, the Executive and the Courts. Judicial review must, therefore, remain strictly judicial and in its exercise Judges must take care not to intrude upon the domain of the other branches of Government. Judicial restraint, in this perspective, is essential to the continuance of rule of law, and for the continued public confidence in the political impartiality of the judiciary and the voluntary respect for the law as laid down and applied by the Courts.²⁷

47. Separation of powers is a cornerstone of a constitutional democracy and we do not wish to encroach upon the domain of the legislature. This Court has, therefore, in many cases, exercised judicial restraint in deference to the principle of trichotomy of powers and given the other branches of Government a fair opportunity to fulfill their constitutional mandate before making a final verdict on the disputed matters. The cases of Sindh High Court Bar Association²⁸, Sharaf Faridi²⁹ and Nadeem Ahmad³⁰ may be cited with advantage. We, therefore, exercise judicial restraint and give an opportunity to the Federal Government in the light of the assurance of the Attorney-General to carry out appropriate legislation through an Act of Parliament within a period of six months.

Continuity of Incumbent COAS for Six Months

48. In this state of legal vacuum regarding the tenure of a COAS and in the light of the assurance given by the Federal Government to address these issues through fresh legislation within six months, we considering that the COAS is the commanding officer of the Pakistan Army³¹ and is responsible for the command, discipline, training, administration, organization and preparedness for war of the Army³² and in order to preserve smooth functioning of the Pakistan Army, find it appropriate to allow the current status of the COAS to continue for a period of six months, whereafter the new legislation (Act of the Parliament) shall determine his tenure and other terms of his service.

49. This exercise of judicial restraint may not be mixed up or confused with the infamous and unpopular application of the doctrine of necessity, which amounts to going against the law of the land to attend to some political or other goal. This is not so in the present case where there is no law; in fact, there is a total legal vacuum regarding the tenure of a General. It is also instructive to refer to the spirit of Article 203D of the Constitution whereunder the

Court can direct the Federal Government to initiate process for making appropriate legislative amendments in the relevant law and can grant reasonable time for doing the needful.

Summary of Findings of the Court

50. In our endeavour to address the legal questions raised in this case, we have explored the scope of Article 243 of the Constitution, reviewed the Pakistan Army Act, 1952, the Pakistan Army Act Rules, 1954, and the Army Regulations (Rules) and have found:

- 1) That the Pakistan Army Act, 1952 falls deficient of the structural requirements for raising and maintaining an Army under clause (3) of Article 243 of the Constitution. It does not provide for essential elements required to raise and maintain an Army, particularly the grant of Commissions in the Army and the terms of service of the Commissioned Officers including tenure and extension of a General.
- 2) That the terms of service of the rank of General regulates the tenure and other terms of service (except salary and allowances) of the post of the COAS. The salary and allowances of the COAS are to be determined by the President under clause (4) of Article 243 of the Constitution.
- 3) That no tenure or age of retirement for the rank of General is provided under the law. As per the institutional practice a General retires on completion of a tenure of three years. Although an institutional practice cannot be a valid substitute of the law required to be made under clause (3) of Article 243 yet in the absence of such law the said practice can be enforced to remove uncertainty as to the tenure of a General and to make the constitutional post of COAS functional. However, in the first instance, the matter should be allowed to be regulated by law, made by the legislature, as mandated by the Constitution.
- 4) That there is no provision in the law for extending service of a General for another tenure; nor is there any consistent and continuous institutional practice of granting such extension, which could be enforced in absence of the law on the subject.
- 5) That the Summaries of the Ministry of Defence approved by the President, the Prime Minister and the Cabinet for the reappointment, extension and fresh appointment of General Bajwa seem to be meaningless and of no consequence, in absence of the law prescribing tenure of a General and providing extension for another tenure.
- 6) That Regulation 255 of the Army Regulations (Rules), in its original as well as amended form, does not confer authority on the Federal Government to grant extension of another full tenure to a General. This Regulation provides for only a temporary arrangement for a short term, if the exigencies of service so requires in the public interest.
- 7) That Regulation 255 and other Regulations of the Army Regulations (Rules) on the subject of "retirement" appear to be ultra vires the Pakistan Army Act, as Section 176 of the Pakistan Army Act has assigned the subject of "retirement" to be regulated under the Rules and not under the Regulations. The Regulations can be made only for the matters other than those which are to be dealt with under the Rules.
- 8) That Section 176A of the Pakistan Army Act and the Regulations made under it appear to suffer from the excessive delegation of the essential legislative function, as neither that section nor any other section of the Pakistan Army Act provides the essential legislative policy guidelines for making the delegated legislation, viz. the Regulations, on the subjects mentioned therein.
- 9) That in view of the assurance of the Attorney-General given on behalf of the Federal Government to process the legislation for meeting the deficiencies in the Pakistan

Army Act, in particular, the tenure, age of retirement and if deemed proper, the extension of tenure of a General, it is appropriate to leave the matter, at the first instance, to be decided by the chosen representative of the people of Pakistan by making an appropriate legislation.

- 10) That in view of the legal vacuum regarding tenure and extension of a General and the assurance given by the Attorney-General to process legislation on the subject within six months, and also considering the importance of the responsibilities of the COAS regarding administration and organization of the Army, it is appropriate that the incumbent COAS may continue for a period of six months, in order to preserve continuity of the institution.

51. These are the detailed reasons of our short order dated 28.11.2019 whereby the instant petition was disposed of in the following terms:

"The learned Attorney-General has categorically assured the Court that this practice being followed is to be codified under the law and undertakes that the Federal Government shall initiate the process to carry out the necessary legislation in this regard and seeks a period of six months for getting the needful done. Considering that the COAS is responsible for the command, discipline, training, administration, organization and preparedness for war of the Army and is the Chief Executive in General Headquarters, we, while exercising judicial restraint, find it appropriate to leave the matter to the Parliament and the Federal Government to clearly specify the terms and conditions of service of the COAS through an Act of Parliament and to clarify the scope of Article 243 of the Constitution in this regard. Therefore, the current appointment of General Qamar Javed Bajwa as COAS shall be subject to the said legislation and shall continue for a period of six months from today, whereafter the new legislation shall determine his tenure and other terms and conditions of service."

52. It is, however, clarified that in case the federal Government remains unable to regulate the tenure and terms of service of a General and as a consequence of the COAS through an appropriate legislation by the Parliament as assured by the Attorney-General, within a period of six months, the tenure of the constitutional post of COAS could not be left totally unregulated and to continue forever. This would be inconceivable and amount to a constitutional absurdity. Therefore, in case of such failure of the Federal Government the institutional practice of retirement of a General on completion of the tenure of three years as pleaded by the Attorney-General and borne out from the record, shall stand enforced to regulate the tenure of General Bajwa and consequentially his tenure as COAS, from the date of his promotion to the rank of General and appointment as COAS, i.e. 29.11.2016. And the President shall, on advice of the Prime Minister, appoint a serving General officer as the new COAS.

53. In the end, we would like to emphasise that this crucial matter of the tenure of COAS and its extension, which has a somewhat chequered history, is before the Parliament, to fix for all times to come. It is now for the people of Pakistan and their chosen representatives in

the Parliament to come up with a law that will provide certainty and predictability to the post of COAS, remembering that in strengthening institutions, nations prosper.

(Sd)

(Syed Mansoor Ali Shah)

Judge

54. I agree.

(Sd)

(Mazhar Alam Khan Miankhel)

Judge

ASIF SAEED KHAN KHOSA, C J.

55. I agree with the judgment authored by my learned brother Syed Mansoor Ali Shah, J., and would like to add that in our peculiar historical context Chief of the Army Staff holds a powerful position in ways more than one. Unbridled power or position, like unstructured discretion, is dangerous. It has been a shocking revelation to us that the terms and conditions of service of Chief of the Army Staff, the tenure of his office, extension in the tenure of his office or his reappointment to that office have remained unregulated by any law so far. Clause (3) of Article 243 of the Constitution of the Islamic Republic of Pakistan, 1973 mandates that the President's power to raise and maintain the armed forces is to be "subject to law" and, thus, leaving some vital aspects relevant to the office of Chief of the Army Staff without being regulated by any law militates against the said express provision of the Constitution. In the backdrop of the last three scores and twelve years of our history I may observe with hope and optimism that framing of a law by the Parliament regulating the terms and conditions of the office of Chief of the Army Staff may go a long way in rectifying multiple historical wrongs and in asserting sovereign authority of the chosen representatives of the people besides making exercise of judicial power of the Courts all pervasive. I understand that democratic maturity of our nation has reached a stage where this Court can proclaim that, as declared by Chief Justice Sir Edward Coke of England in the Commendam case in the year 1616 regarding the powers of King James I, "Howsoever high you may be; the law is above you".

(Sd.)

Asif Saeed Khan Khosa, CJ

MWA/J-6/S Order accordingl

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