Ayesha A. Malik, J.

> [I]f we demand that our courts do things, we must give them the power to do things – we must set them free to do things. … We must cease to prescribe the details of procedure by legislation.[1]
>
> - Roscoe Pound (1926)

The Petitioners challenge the *vires* of the Supreme Court (Practice and Procedure) Act, 2023 (**Act**) and these Petitions in terms of the short order dated 11.10.2023 of this Court were dismissed by holding the Act to be constitutionally valid; however, to the extent of Section 5(2) of the Act, which granted right of an intra-court appeal against an order under Article 184(3) of the Constitution retrospectively, this was held to be *ultra vires* the Constitution as per the opinion of the majority.[2] We have read the opinion of the majority as contained in the judgment authored by Qazi Faez Isa, C.J., the concurring opinion authored by Syed Mansoor Ali Shah, J. and the separate opinions authored by Yahya Afridi, J., Muhammad Ali Mazhar, J. and Syed Hasan Azhar Rizvi, J. However, we find the Act in its entirety to be *ultra vires* the Constitution.

2. The dispute relates to the competence of Parliament to legislate on the subject of *practice and procedure of the Supreme Court* in the terms prescribed under the Act. The Petitioners contend that Parliament is not competent to legislate on the subject of practice and procedure of the Supreme Court as this falls within the domain of Article 191 of the Constitution, which specifically requires the Supreme Court to make rules as to the same. The Petitioners contend that the Act undermines the independence of the judiciary as the practice and procedure of the Supreme Court is regulated by the Supreme Court Rules, 1980 (**1980 Rules**) which were formed by the Supreme Court itself, and the practice of this Court, in terms of Article 191 of the Constitution and the said Article does not give legislative competence to Parliament to make law on this subject. Specifically, with reference to the creation of an intra-court appeal against the orders under Article 184(3) of the Constitution, they argue that the original constitutional jurisdiction of this Court cannot be changed by way of ordinary legislation. Essentially, the argument is, if at all, an intra-court appeal is to be created, it must be by way of a constitutional amendment.

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[1] Roscoe Pound, *The Rule-Making Power of the Courts*, 12 ABA J., 599–603, 603 (1926) <http://www.jstor.org/stable/25709618>.
[2] The Constitution of the Islamic Republic of Pakistan, 1973 (**Constitution**).

3. The Attorney General for Pakistan (**AGP**) along with counsel for the Respondents supported the competence of Parliament to make law on the subject of practice and procedure of the Supreme Court stating that Article 191 of the Constitution expressly allows Parliament to legislate with respect to the practice and procedure of this Court. They further submitted that Article 142 read with Entry 55 in Part I (Fourth Schedule) of the Federal Legislative List (**FLL**) allows Parliament to enlarge the jurisdiction of this Court. They argued that the impugned Act does not in any manner infringe upon the independence of the judiciary nor any fundamental right of the Petitioners as the intent of the law is to ease procedures of this Court which are onerous and give arbitrary powers to the Chief Justice of Pakistan (**CJP**) and also to create a right of appeal, which is a basic requirement to ensure due process.

4. As per its preamble, the Act provides for certain practices and procedures of the Supreme Court based on the principles of fair trial, due process and also prescribes a right of appeal. Section 2 of the Act specifically allows a three-member Committee to determine the constitution of benches for every cause, appeal or matter before the Supreme Court.[3] With respect to the exercise of original jurisdiction of the Supreme Court, Section 3 of the Act provides that any matter invoking the original jurisdiction of this Court, under Article 184(3) of the Constitution, should be first placed before the Committee to determine whether a question of public importance with reference to the enforcement of any fundamental right is involved, and if so, then a bench comprising of at least three Judges of this Court to adjudicate upon the matter, which may include the Committee members. As far as matters related to the interpretation of the Constitution are involved, Section 4 of the Act requires a bench of not less than five Judges of this Court who must hear the case. Section 5 of the Act creates a right of appeal against any order on a petition under Article 184(3) of the Constitution and further allows this right of appeal to be exercised by an aggrieved person against whom an order has been made under Article 184(3) of the Constitution prior to the commencement of the Act. Effectively, this right of intra-court appeal is prospective and retrospective in nature. For the purposes of filing a review under Article 188 of the Constitution, a party

[3] As per Section 2 of the Act, the Committee comprises of the CJP and two next most senior Judges of the Supreme Court of Pakistan in the order of seniority (**Committee**). The decision of the Committee shall be by majority under Section 2(3) of the Act.

can appoint a counsel of its choice as per Section 6 of the Act. An application pleading urgency or interim relief can be filed, in any cause, appeal or matter before this Court under Section 7 of the Act, which shall be fixed within fourteen days from the date of its filing. Lastly, Section 8 of the Act allows the provisions of the Act to override any law, rules, or regulations for the time being in force or judgment of any court.

5. In terms of the arguments made, there are three main issues that need to be addressed: firstly, whether Parliament is competent to legislate on the subject of practice and procedure of the Supreme Court in view of Article 191 of the Constitution, which specifically authorizes the Supreme Court to make rules, regulating its practice and procedure? Secondly, whether the right of appeal to the original jurisdiction of this Court can be established under Section 5 of the Act by way of ordinary legislation or whether a constitutional amendment is required as to the same? Lastly, whether these Petitions are maintainable being that no questions of public importance are involved with reference to the enforcement of any of the fundamental rights?

6. For ease of reference the relevant provisions of the Constitution are reproduced hereunder:

> [**191**]. Subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court.
>
> Federal Legislative List:
>
> **55**. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List and, to such extent as is expressly authorized by or under the Constitution, the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers.
>
> **58**. Matters which under the Constitution are within the legislative competence of [Majlis-e-Shoora (Parliament)] or relate to the Federation.

Understanding Article 191 of the Constitution

7. The distribution of legislative powers between the federal and provincial governments is provided in Article 142 of the Constitution. Parliament is competent to make laws with respect to any matter contained in the FLL and the entries contained in the FLL indicate the subject on which the legislature is competent to make law. Parliament can legislate on the subject matters given in the FLL, but this power is

subject to the limitations prescribed in the Constitution.[4] Hence, the first source of Parliament's legislative competence is the FLL.

8. The case of the AGP and counsel for the Respondents is that competence, in this case, is derived from the Constitution itself, being Article 191, which expressly provides that the Supreme Court's power to make rules regulating practice and procedure is subservient to the law. They argued that the use of the word *law* in Article 191 clearly indicates Parliament's ability to make law on the subject of practice and procedure as the rule-making power of this Court is not just subject to the Constitution but also subject to legislation by Parliament. Their basic case is that the Supreme Court is the rule-making authority under Article 191 of the Constitution but that Parliament, being the supreme law-making authority under the Constitution, is competent to legislate on the subject of practice and procedure primarily because the term *subject to law* includes statutory law, which Parliament can make.

9. There is no cavil with the fact that the source of legislative competence under the Constitution is Article 142 read with the FLL. However, the only exception to this source of legislative competence, conferred by Article 142, is where the Constitution itself expressly and specifically confers legislative competence. These exceptions can be witnessed throughout the text of the Constitution. For example, under Article 225 of the Constitution, an election dispute can only be questioned by an election petition presented to such tribunal *in such manner as may be determined by Act of [Majlis-e-Shoora (Parliament)]*. The second example is Article 6(3) of the Constitution which allows the Parliament *by law provide for the punishment of persons found guilty of high treason*. In the same way, Article 212(1) of the Constitution specifically authorizes the relevant legislature (federal or provincial) to establish administrative courts or tribunals to exercise exclusive jurisdiction with reference to the subject matters contained in sub-articles (a), (b) and (c) of Article 212(1) of the Constitution. Another example is Article 87(2) of the Constitution which provides that Parliament can make laws regulating the recruitment and the conditions of service of persons appointed to the secretarial staff of either House. It is critical to note that as per the aforementioned examples, there is no

[4] Elahi Cotton Mills Ltd. v. Federation of Pakistan (PLD 1997 SC 582).

corresponding Entry contained in the FLL that confers legislative power on Parliament on these subject matters. It is the Constitution itself that authorizes the competent legislature to enact law on the said subjects.

10. The problematic aspect of the AGP's arguments is that Article 191 of the Constitution is a direct source of legislative competence by the Constitution for Parliament as the terminology *subject to the Constitution and law* is to be read as enabling, meaning thereby that it grants Parliament competence to make law regulating practice and procedure, and any such legislation shall be limited to the statutory law enacted by Parliament. Although, not part of his basic argument, the AGP and counsel for the Respondents alluded to the fact that Entry 58 of the FLL is also relevant as it relates to matters under the Constitution that are within the legislative competence of Parliament. Hence, they argue that legislative competence is derived from reading Article 191 with Entry 58 of the FLL. They support this argument with the contention that Parliament is the supreme law-making body, and therefore, it enjoys sovereignty on the said subject matter based on the understanding that *subject to law* confers legislative competence with reference to making law on the subject of *practice and procedure of the Supreme Court*.

11. Article 191 of the Constitution starts with the words *subject to the Constitution and law*. We first have to examine what the words *subject to* mean and then, what the word *law* means. In terms of Article 191, the Supreme Court is authorized to make rules governing its practice and procedure, which is an exclusive and inherent power but has been made *subject to the Constitution and law*. This means that the only restriction or constraint on the rule-making power of this Court is either contained in the Constitution itself or the law. The expression *subject to* is generally read as a limitation or condition, being restrictive in context and not as a source of legislative competence. According to Corpus Juris Secundum, the expression *subject to* is a term of qualification, employed usually to qualify something substantially already created.[5] It has been defined as being conditional upon or dependent upon, as a limitation or controlled or restrained by. So, the words *subject to* essentially mean that it is affected by or dependent on something. In this case, it is the Constitution and the law. The purpose and meaning these words of limitation serve is

[5] FRANCIS J. LUDES & HAROLD J. GILBERT, 83 CORPUS JURIS SECUNDUM (The American Law Book Company, 1953).

that whilst the Supreme Court can make rules governing its practice and procedure, the rules cannot be in conflict with the Constitution or existing law. Hence, the Constitution gives the Supreme Court the power to make its own rules while at the same time requiring the rules to be in conformity with the Constitution and the existing law. This Court in the *Imrana Tiwana* case interpreted the phrase *subject to the Constitution* as expressed in Articles 137 and 142 of the Constitution, to mean, that where the Constitution itself places a bar on the exercise of legislative or executive authority of the province, such authority cannot be exercised.[6] This means that the legislative or executive authority of the province shall extend to matters with respect to which the provincial assembly has the power to make law except where the Constitution itself creates any limitation or restriction. This Court also clarified that the terminology *subject to the Constitution* does not make the given Articles subservient to the remaining provisions of the Constitution, it merely requires the given authority to be exercised as per the Constitution.[7] So, the phrase *subject to* was read as an expression of limitation or restriction on the exercise of authority in the *Imrana Tiwana* case. In the *Muhammad Khan* case, this Court held that *subject to the Constitution,* as expressed in Article 98(2) of the Constitution of the Republic of Pakistan, 1962 (**1962 Constitution**),[8] means except where the Constitution itself creates a bar.[9] Article 98 of the 1962 Constitution was with reference to the exercise of writ jurisdiction by the High Court which was made subject to the Constitution, meaning that the High Court could exercise this jurisdiction subject to any limitation in the 1962 Constitution and where the High Court was satisfied that there was no other adequate remedy provided. The *Muhammad Khan* case concluded that the phrase *subject to the Constitution* will be read as a limitation on the jurisdiction exercised under Article 98(2) of the 1962 Constitution, as the said Constitution specifically creates this limitation. Again, the words *subject to* were read as a *restriction* on the exercise of power and not as *enabling* or *granting* power. In the *Mustafa Impex* case, this Court stated that the phrase *subject to the Constitution* in Article 97 of the Constitution indicates that the executive authority of the Federation has to be exercised within the constitutional scheme in relation to the conferment of constitutional

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[6] Lahore Development Authority v. Imrana Tiwana (2015 SCMR 1739) (**Imrana Tiwana**).
[7] *Id*.
[8] Article 98 of the 1962 Constitution confers jurisdiction to the High Courts.
[9] Muhammad Khan v. The Border Allotment Committee (PLD 1965 SC 623) (**Muhammad Khan**).

powers and responsibilities between the three organs of the State.[10] In the *Balakrishna Chetty* case, the Supreme Court of India (**SCI**) held that the word *subject* means liable to the rules and the provisions of the act and is to be read as being conditional.[11] Once again the context of the words *subject to* is limiting or restrictive and not as enabling. More recently, this Court in the *Ghulam Mohiuddin* case examined Article 188 of the Constitution[12] and interpreted the words *subject to the provisions of any Act of [Majlis-e-Shoora (Parliament)]* to be restricted and not a constitutional authorization to change the provisions of the Constitution by way of ordinary legislation.[13] This Court held that if *subject to* were to mean that a constitutional provision can be changed or modified by ordinary law then it would mean that even a fundamental right can be denied and other articles of the Constitution can be amended through ordinary legislation. In the opinion of Munib Akhtar, J. the words *subject to* are conventionally understood to be words of limitation as they are regarded as circumscribing or controlling whatever it is that follows them.[14] Therefore, on the basis of the settled understanding of the word *subject to*, these words are neither enabling nor facilitated rather they are limiting and restrictive to the power that follows.

12. Now turning to the understanding advanced by the AGP to the term *law* used in Article 191 of the Constitution. The term *law* used in this phrase is what captures the essence of the AGP's and Respondents' argument. They understand the *law* to be this all-inclusive word that will include an Act of Parliament, rules, regulations, and other statutory instruments and argue that the inclusion of an Act of Parliament in the word *law* means that the Constitution grants Parliament legislative competence to make law. So by saying *subject to law*, the Constitution recognizes the word *law* to be an all-enabling term, which contains the implicit authorization to make law. For starters, if we were to accept the AGP's argument that the word *law* means and includes Acts of Parliament, which in turn will mean that Parliament is competent to legislate on the subject of practice and procedure, this understanding would be applicable to the numerous provisions where the words *subject*

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[10] Mustafa Impex v. Government of Pakistan (PLD 2016 SC 808) (**Mustafa Impex**).
[11] K.R.C.S. Balakrishna Chetty & Sons & Co. v. The State of Madras [(1961) 2 S.C.R. 736] (**Balakrishna Chetty**).
[12] Article 188 of the Constitution relates to the review jurisdiction of the Supreme Court of Pakistan whereby this Court can review its judgments or orders.
[13] Ghulam Mohiuddin v. Federation of Pakistan (PLD 2023 SC 825) (**Ghulam Mohiuddin**).
[14] *Id.*

to law is provided for in the Constitution.[15] In our view, this is a very perilous and serious conclusion because it will adversely impact the entire constitutional scheme as it suggests, wherever the word *law* has been used, it infers statutory law, which surmises legislative competence. In the same way, since the word *law* can include rules, regulations and other statutory instruments including those issued by the executive, then the executive could also by means of the word *law* affect upon and determine the practice and procedure of the Supreme Court. Secondly, if the word *law* were to mean competence of Parliament, it would by necessary implication follow that the legislative competence of Parliament, on the subject of practice and procedure, is over and above the rule-making authority granted to the Supreme Court. Consequently, Parliament could make law in conflict with any existing rule which would render the rule-making authority of the Supreme Court useless. This in fact is the problem in the present case as the Act has legislated on matters already covered by the 1980 Rules, rendering the affected rules redundant. Basically, Parliament has modified and changed the 1980 Rules making the rule-making authority of the Supreme Court non-existent because once Parliament has legislated on a matter related to practice and procedure, the rule-making power of this Court becomes redundant. Therefore, we cannot subscribe to this view, as no provision of the Constitution can be interpreted as being superfluous.[16] An effort must be made to give meaning to all the words of the Constitution ensuring that no word is attributed redundancy.[17] While interpreting Article 191, the entire phrase *subject to the Constitution and law* has to be considered. The term *subject to law* used in Article 191 of the Constitution does not suggest legislative competence rather it means the rule-making power of the Supreme Court is subject to the existing law, meaning thereby the Supreme Court cannot make rules contrary to substantive or statutory law which are already in the field. The Constitution mandates that the Supreme Court can make its rules on practice and procedure but in doing so, it cannot encroach upon established legislative domain being that, under the garb of its rule-making power, it cannot replace or override statutory law. The reason for this constitutional command is very simple, the Constitution grants rule-

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[15] Articles 204, 243 and 245 of the Constitution.
[16] Shaukat Aziz Siddiqui v. Federation of Pakistan (PLD 2018 SC 538), Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61) (**Iftikhar Muhammad Chaudhry**) and Muhammad Raz Khan v. Govt. of N.W.F.P. (PLD 1997 SC 397).
[17] Iftikhar Muhammad Chaudhry, *supra* note 16.

making authority on practice and procedure exclusively to the Supreme Court without giving Parliament any overriding power by way of legislation and restricts the authority of the Supreme Court to rule-making and nothing more. When seen in the context of the constitutional scheme, the principle of separation of powers (discussed in detail below) requires a balance between the executive, the law-maker and the judiciary, which is maintained when each branch of the state enjoys rule-making under Articles 67(1), 72, 88(3) and 99(3) of the Constitution.[18] These provisions mandate that each organ of the State makes its own rules for its internal working and does not require legislative intervention in their respective area.

13. During the course of the arguments, although a lot of emphasis was placed on Article 191 and its grant of legislative competence to Parliament to legislate on the subject of practice and procedure; reliance was also placed on Entry 58 of the FLL to support the contention that Article 191 of the Constitution read with Entry 58 of the FLL gives Parliament legislative competence on the subject of practice and procedure. This argument is also inherently flawed as the basic contention is that by way of Article 191, the Constitution itself prescribes legislative competence for Parliament to legislate on the subject of practice and procedure yet, at the same time, the argument is that Entry 58 of the FLL read with Article 191 of the Constitution prescribes for the legislative competence on the subject of practice and procedure of the Supreme Court. We understand as per the constitutional requirement that the FLL read with Article 142 of the Constitution prescribes for the subject matter over which the federal and provincial legislature is competent to make law. Hence, the source of legislative competence is either the FLL or the Constitution. So, if the Constitution in itself directly authorizes Parliament on a subject, it does not require a corresponding Entry from the FLL. Therefore, either competence is derived from Article 191 of the Constitution itself or from Entry 58 of the FLL. This issue was

[18] **67. Rules of procedure, etc.** (1) Subject to the Constitution, a House may make rules for regulating its procedure and the conduct of its business, and shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the House shall not be invalid on the ground that some persons who were not entitled to do so sat, voted or otherwise took part in the proceedings.
72. Procedure at joint sittings. (1) The President, after consultation with the Speaker of the National Assembly and the Chairman, may make rules as to the procedure with respect to the joint sittings of, and communications between, the two Houses.
88. Finance Committee. (3) The Finance Committee may make rules for regulating its procedure.
99. Conduct of business of Federal Government. (3) The Federal Government shall also make rules for the allocation and transaction of its business.

examined at great length in the *Nadim Rizvi*[19] case while relying on the *MQM*[20] case in the following terms:

> [62]. Since Article 222(b) does not exclude the delimitation of constituencies for local government, and as the body of the Constitution specifies the appropriate legislature which should pass the law, any reference to the provisions of the legislative entries contained in Item 4 of the Fourth Schedule are of no consequence. There are similar provisions in the Constitution qua which there is no corresponding entry in the Federal Legislative List. For example, Article 6 clearly provides that the Majlis-e-Shoora (Parliament) will pass the law for high treason. But there is no corresponding entry in the 4th Schedule prescribing the subject of high treason in the Federal Legislative List. Article 142(c) could not be pressed into service to say that since the 4th Schedule is silent, in terms of Article 142(c), the Provincial Legislature would legislate in respect of high treason. **When the main body of the Constitution provides for the competent legislature it is not necessary to look into the legislative list.** Under Article 87(2), the Majlis-e-Shoora (Parliament) may enact law for conditions of service of secretarial staff, whereas in this regard there is no corresponding entry in the Federal Legislative List; that Article 237 empowers the Majlis-e-Shoora (Parliament) to make laws for indemnity; again there is no entry to that effect in the Federal Legislative List; that under Article 253 the Majlis-e-Shoora (Parliament) may make laws pertaining to maximum limits as to property etc; however there is no corresponding entry in the Federal Legislative List; Article 146(2) states that the Majlis-e-Shoora (Parliament) may enact laws to confer powers on Provinces or their officers, but there is no entry in this regard in the Federal Legislative List; that under proviso to clause (2) of Article 212, the Majlis-e-Shoora (Parliament) may make laws in relation to administrative tribunals, however, there is no corresponding entry in the Federal Legislative List; that even though "electricity" falls under entry 4 of the Part II of the Federal Legislative List, under Article 157(2)(b) the Provincial Government is empowered to levy tax on consumption of electricity within the Province and that Entry 58 of the Part I of the Federal Legislative List, clearly provides that the matters which under the Constitution are within the legislative competence of Majlis-e-Shoora (Parliament) or relate to the Federation, would fall under the domain of the Federal Legislature. In the instant case, as explained above, under the relevant Articles of the Constitution, the subject matters of delimitation and conduct of Local Government Elections fall under the domain of Parliament/Federal legislature.[21]
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> (**Emphasis Added**)

Reliance on Entry 58 of the FLL

14. However, if we are to examine the argument on Entry 58 of the FLL, we find that the same is misplaced. The subject matter over which the question of Parliament's competence is that of practice and procedure of the Supreme Court. There is no direct entry on this subject matter and rightly so since it is explicitly mandated by the Constitution under Article 191 of the Constitution that the Supreme Court shall make its rules on practice and procedure. The argument that Entry 58 of the FLL gives legislative competence to Parliament on the subject of practice and procedure is totally without basis as this is a residuary and independent

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[19] Government of Sindh v. Nadeem Rizvi (2020 SCMR 1) (**Nadeem Rizvi**).
[20] Province of Sindh v. M.Q.M. (PLD 2014 SC 531) (**MQM**).
[21] *Id.*

Entry dealing with matters which are, as per the Constitution, under the legislative competence of Parliament and relate to the Federation. If this is taken to mean that it is a general Entry granting legislative competence to Parliament to legislate on any subject matter which is not specifically covered under the FLL, it would in fact become an all-encompassing Entry giving Parliament competence on just about any subject matter. Effectively, the FLL would become redundant as Parliament could legislate on any subject matter and take cover under Entry 58 of the FLL. The assigned fields with reference to subject matters are specifically provided in the FLL that in terms of Article 142 of the Constitution grants Parliament the ability to make law on the listed subject matters, which are subject to the Constitution. Hence, Entry 58 of the FLL has to be read in the context that prescribes a field to legislate upon, whose subject matter must be related to the Federation. In this case, the issue at hand is the subject matter of practice and procedure of the Supreme Court which has no nexus with the given subject in the context of Entry 58 of the FLL. The rule-making power of the Supreme Court cannot be prescribed as a matter relating to the Federation as the matter relates specifically to the Supreme Court and its rule-making authority. Therefore, on its own, Entry 58 of the FLL cannot grant competence to Parliament to legislate on practice and procedure which as per Article 191 of the Constitution is the power of the Supreme Court.

Rule-Making Power and its Significance

15. The constitutional mandate granting the Supreme Court the power, to regulate its own practice and procedure, is a power that is inherently entrenched in the functioning and administration of this Court. It is an explicit constitutional grant that requires this Court to make its own rules for its effective administration. To this effect, Roscoe Pound, a renowned legal scholar and former Dean of Harvard Law School, argues, in truth, the procedure of courts is something that belongs to the courts rather than to the legislature, whether we look at the subject analytically or historically.[22] He believed that courts should have the authority to make their own rules of procedure and practice so that it remains flexible, can be adjusted as per the requirements and needs and, therefore, can easily serve the interest of justice. The Supreme Court of New Jersey in the *Winberry* case interpreted its rule-making power in a

[22] Pound, *supra* note 1, at 621.

similar situation to the instant case.[23] The basic issue in the said case was in relation to the limitation period for filing of appeal, wherein the supreme court's rule provided a lesser limitation period than the statute. Hence, there was a conflict between the rules of the supreme court and the statute. Interestingly, the Constitution of New Jersey provided a similar provision as Article 191 of the Constitution that allows the supreme court to make rules, which is reproduced below:

> [T]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts.[24]

16. The Supreme Court of New Jersey in *Winberry* extensively and elaborately interpreted the phrase *subject to law* as follows:

> [T]he phrase "subject to law" is not only ambiguous, but elliptical. No word in the law has more varied meanings than the term "law" itself. Nor is the phrase "subject to" crystal clear, **for the phrase implies a limitation rather than a grant of power**. It is argued by the plaintiff that "subject to law" means subject to statute law or legislation. If this is what the Constitutional Convention intended, it would have been easy for it to say so. We must take the phrase as we find it and endeavor to ascertain its meaning in the light of the entire Constitution and of the intent of the people in adopting it. There can be no doubt in the mind of anyone familiar with the work of the Constitutional Convention or with the ensuing election at which the Constitution was adopted by the people that, along with the desire to strengthen the powers of the Governor and to amplify the powers of the Legislature, *there was a clear intent to establish a simple but fully integrated system of courts and to give to the judiciary the power and thus to impose on them the responsibility for seeing that the judicial system functioned effectively in the public interest.* Indeed, in the minds of many, if not a majority, of our citizens this was the primary reason for their desire for a new constitution.
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> If "subject to law" were to be interpreted to mean subject to legislation, it would necessarily follow that once the Legislature had passed a statute in conflict with a rule of court, the rule-making power of the Supreme Court would be *functus officio*, for it would be intolerable to hold, as has been suggested to us, that after the Legislature has passed an act modifying a rule of court, the Supreme Court might in turn adopt a new rule overriding the statute, and so on *ad nauseam*. Such an unseemly and possibly continuous conflict between these two departments of the State Government could never have been contemplated by the people. And yet if "subject to law" means subject to legislation, any other construction of the rule-making power would be in conflict with the fundamental rule of constitutional construction that unless the context clearly requires otherwise, a constitutional grant of authority is to be interpreted as a continuing power. As one studies the Judicial Article of the Constitution and its carefully designed provisions for an efficient judicial organization with unusual powers of effective administration, it is evident that the people of this State thought of the rule-making power in the Supreme Court as a continuous process. In this connection it is significant to note that neither the Constitution of 1776 nor that of 1844 contained any provisions whatsoever as to rule-making, admission to the practice of law, the discipline of the bar, an administrative head of the courts, or the assignment of judges. All of these powers are necessarily of a

[23] Winberry v. Salisbury [5 N.J. 240 (1950)] (**Winberry**).
[24] Article VI, Section II, Paragraph No. [3] of the Constitution of New Jersey.

> continuing nature if the judges are to be held responsible for the functioning of the courts. It is inconceivable that the people granted continuing power to the courts in all these respects but withheld it with reference to rule-making, which is quite as essential to the operation of an integrated judicial establishment as are any of the other powers.
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> Article VI, Section II, paragraph 3 of the new Constitution not only gives the Supreme Court the rulemaking power, but *it imposes on the Supreme Court an active responsibility for making such rules – "The Supreme Court shall make rules."* If there were any doubt as to the continuous nature of the rule-making power, such doubt would be resolved by this imposition of the positive obligation on the Supreme Court to make rules for all the courts.
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> ***An analysis of all of the pertinent provisions of the Constitution serves to convince us that the phrase "subject to law" cannot be taken to mean subject to legislation***. In the first place, by Article XI, Section IV, paragraph 5 of the Constitution "The Supreme Court shall make rules governing the administration and practice and procedure of the County Courts" this provision is clear and unambiguous; the rule-making power of the Supreme Court with respect to the county courts is *absolute and unrestricted.* It does not require an active imagination to anticipate the chaotic situation which would prevail in every court house in the State with the Supreme Court promulgating the rules for the county courts and the Legislature dictating the practice and procedure of the Superior Court. One of the objectives of the people in adopting the Constitution was to provide for uniformity as well as simplification and flexibility in the work of the courts. This objective would be frustrated by any such dual exercise of rule-making power. Manifestly no such construction of the phrase "subject to law" should be accepted because of the unfortunate results which would inevitably flow therefrom unless no other rational meaning can be found for the phrase. Nor can it be said that the grant to the Supreme Court of the rule-making power with respect to the county courts was a constitutional accident.[25]
>
> (**Emphasis Added**)

17. It was held in *Winberry* that it is constitutionally impermissible that legislation enacted by parliament can prevail over the supreme court rules. In terms of *Winberry*, the phrase *subject to law* cannot be construed as a power-granting provision (i.e. allowing Parliament to make law) rather it is a limitation on the supreme court to ensure that its rules of practice and procedure are within the terms of existing law. Similarly, Article 191 of the Constitution commands a positive obligation over the Supreme Court, not Parliament, to make rules for its practice and procedure. The *Winberry* case also holds that if a statute is allowed to prevail over the domain of the court's rules of practice and procedure, it would totally disturb the constitutional powers granted to the court and the principle of separation of powers. *Winberry* was upheld by a 6-1 majority.

18. While interpreting the aforementioned rule-making power of the supreme court in the Constitution of New Jersey, Justice Case in his

[25] Winberry, *supra* note 23.

opinion in the *Winberry* case was of a different view in that the supreme court has exclusive power over the administration of all courts, whereas the matter of practice and procedure was subject to legislative statute. He explains that in his opinion there is a difference between the administration of the court on the one hand and the practice and procedure of the court on the other. Based on this reasoning, Justice Case's emphasis is on the fact that the administration of the courts lies specifically with the courts, whereas the subject of practice and procedure can be legislated upon. Interestingly, Justice Case considers matters related to the constitution of benches and fixation of cases as matters falling within the administration of the court, which he exemplifies in the following manner:

> [...] The number of parts of each division of the Superior Court, the number of judges in each part, the causes that each part shall hear -- ***these are all matters of court administration*** and *therefore are within the* ***express constitutional provision that the Supreme Court*** *shall make rules governing the administration of all courts* -- note that, all courts -- in the State **without being "subject to law."**[26]
>
> (**Emphasis Added**)

19. In a similar manner, the Supreme Court of Colorado in *Kolkman* interpreted its power of rule-making under the Rules of the Supreme Court of the State of Colorado, 1929 and held that this was a constitutional function in line with the principles of separation of powers wherein, within the scheme of government, the duties and responsibilities are equally divided and each department must perform its own tasks and accept its own responsibilities.[27] While upholding the rule-making power of the trial court, the Michigan Supreme Court in the *Brown* case held that the court has an inherent right to function and to function efficiently such that the rule-making power enables it to put into practice the required process and procedures for the effective administration of justice.[28] In another case, the Michigan Supreme Court held that the power to regulate its procedure inherently rests in the supreme court because it is a constitutional rule-making power for the efficient administration of justice.[29] Finally, in the *Epstein* case, the Indiana Supreme Court held that only the court can make its rules and this rule-making power cannot be taken away by legislative action.[30] The purpose of the rules is not for the benefit of the parties but to aid the

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[26] *Id.*
[27] Kolkman v. People [89 Colo. 8 (1931)] (**Kolkman**).
[28] People v. Brown [238 Mich. 298 (1927)] (**Brown**).
[29] Tomlinson v. Tomlinson [338 Mich. 274 (1953)] (**Tomlinson**).
[30] Epstein v. State [190 Ind. 693 (1920)] (**Epstein**).

court in expediting the business before it.[31] The commonality of these cases with the issues before us is that with respect to the rule-making power of the court, each of these judgments demonstrates that courts have guarded their rule-making power carefully and cautiously and ensured that it is protected from legislative interference. The general understanding which flows from these cases is also that the rule-making power is an inherent power within the court for its efficient and effective functioning as it allows the court to deal with matters of practice and procedure, which includes fixation of cases and constitution of benches, etc. and these matters cannot be subject to legislative intrusion.

20. This brings us to another argument raised with respect to the supremacy of Parliament to make law. The argument stresses Parliament's ability and constitutional right to make law. However, seen from any angle, this argument is misplaced as under the existing constitutional structure, the Constitution is supreme and not Parliament.[32] This means that the provisions of the Constitution must be given effect and the interpretation of the Constitution is one where its objective must be achieved. Some of the significant features of the Constitution are separation of powers and independence of the judiciary which have been central to the arguments made before us. In the context of the AGP's and Respondents' arguments, Article 191 of the Constitution grants legislative competence to Parliament to make law on practice and procedure, and at the same time, allows the Supreme Court to make rules on practice and procedure. This suggests competing domains, where Parliament would reign superior over the rule-making authority of the Supreme Court in the event of a conflict. To give meaning and effect to the constitutional objective of authorizing the Supreme Court to make its rules for practice and procedure, this rule-making authority must be understood as a function of the judiciary and not a legislative function. There appears to be no other constitutional reason to give this authority to the Supreme Court, hence, as a matter of constitutional compulsion, the rule-making power falls exclusively within the domain of the Supreme Court. Any understanding that it is shared space would also suggest superintending control by the legislature over the judiciary in its internal

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[31] *Id.*
[32] JUSTICE (R) FAZAL KARIM, 1 JUDICIAL REVIEW OF PUBLIC ACTIONS (2nd ed. 2018), 28.

functions which negates the principles of separation of powers and independence of the judiciary.

Historical Perspective

21. When seen in the historical context, which is relevant for understanding and interpreting constitutional provisions,[33] from the Government of India Act, 1935 as adapted for Pakistan (**GOIA**) until the present, the subject of practice and procedure of the Supreme Court has been one of judicial rule-making and not legislation. At the time of independence in 1947, Pakistan continued its institutional and structural operation under the GOIA. Section 200 of the GOIA established the Federal Court. Section 203 of the GOIA states that the seat of the Federal Court shall be in Karachi and at such other place or places, as the Chief Justice of Pakistan may appoint after prior sanction by the Governor-General. Pertinently, Section 214 of the GOIA was about the rule-making power of the Federal Court, which is reproduced below:

> [**214**]. (1) The Federal Court may from time to time, with the approval of the Governor-General make rules of court for regulating generally the practice and procedure of the court, including rules as to the persons practising before the court, as to the time within which appeals to the court are to be entered, as to the costs of and incidental to any proceedings in the court, and as to the fees to be charged in respect of proceedings therein, and in particular may make rules providing for the summary determination of any appeal which appears to the court to be frivolous or vexatious or brought for the purpose of delay.
>
> [(1A) Subject to the provisions of the Code of Civil Procedure, 1908, or any law made by the Federal Legislature, the Federal Court may also from time to time, with the approval of the Governor-General, make rules of court for regulating the manner in which any decree passed or order made by it in the exercise of its appellate jurisdiction may be enforced.]
>
> [(2) Rules made under this section may fix the minimum number of judges who are to sit for any purpose and may provide for the powers of judges sitting singly and in any division of the court.]
>
> (3) Subject to the provisions of any rules of court, **the Chief Justice of [Pakistan] shall determine what judges are to constitute any division of the court and what judges are to sit for any purpose**.
>
> (4) No judgment shall be delivered by the Federal Court save in open court and with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dissenting judgment.
>
> (5) All proceedings in the Federal Court shall be in the English language.
>
> (**Emphasis Added**)

[33] Gadoon Textile Mills v. WAPDA (1997 SCMR 641).

22. It may be noted that sub-section (1) of Section 214 of the GOIA allowed the Federal Court to make rules as to the practice and procedure, subject to the approval of the Governor-General. Sub-section (2) of Section 214 empowered the Federal Court to make rules for fixing minimum number of judges who are to sit for any purpose and for providing powers of judges sitting singly and in any division of the said court. Sub-section (3) of Section 214 gives exclusive administrative powers to the Chief Justice of Pakistan as to the constitution of benches on the judicial side and to decide what Judges are to sit for any of the said purposes.

23. The first constitution being the Constitution of the Islamic Republic of Pakistan, 1956 (**1956 Constitution**), established the Supreme Court of Pakistan.[34] The seat of the Supreme Court was in Karachi and at such other place or places as the CJP may appoint after prior approval by the President.[35] The right to appeal was provided to the Supreme Court in civil matters if the Act of Parliament was allowed under Article 158 of the 1956 Constitution.[36] Article 177 of the 1956 Constitution specifically provided that until provisions are made by an Act of Parliament, the provisions of the Third Schedule shall apply in relation to the Supreme Court and High Courts in respect of matters specified therein. The rule-making power of the Supreme Court was provided under Entry 3 of Part I of the Third Schedule, which was similar to Section 214 of the GOIA. Under Clause (3) of Entry 3, the administrative powers of the CJP were in *pari materia* to Section 214(3) of the GOIA.

24. In the same year, the Supreme Court made the Supreme Court Rules, 1956 (**1956 Rules**) with the approval of the President, whereby the Federal Court Rules, 1950 were revoked.[37] The 1956 Rules comprehensively covered everything related to the internal affairs of the Supreme Court from the sitting of the Court, its vacation to business in chambers, constitution of benches and rules related to the filing of appeals and petitions for leave to appeal amongst others. Order XI of the 1956 Rules allowed the CJP to constitute the benches.

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[34] Article 148 of the 1956 Constitution.
[35] Article 155 of the 1956 Constitution.
[36] **158. Appellate jurisdiction of the Supreme Court in civil matters.** (1) An Appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in civil proceedings …
(2) Notwithstanding anything in this Article, *no appeal shall, unless an Act of Parliament otherwise provides,* lie to the Supreme Court from the judgment, decree or final order of a Judge of a High Court sitting alone.
[37] Published in the Gazette of Pakistan Extraordinary dated 22.01.1957.

25. Under the 1962 Constitution, the rule-making authority of the Supreme Court was contained in Article 65 of the 1962 Constitution. The rule-making power, as seen in the GOIA and the 1956 Constitution, was changed under the 1962 Constitution such that it became subject to the Constitution and the law and now required the approval of the President. Hence, similar to the existing Constitution except that now the approval of the President is no longer required. Article 65 of the 1962 Constitution reads as follows:

> [**65**]. Subject to this Constitution and the law, the Supreme Court may, with the approval of the President, make Rules regulating the practice and procedure of the Court.
>
> (**Emphasis Added**)

26. Then came Article 193 of the Interim Constitution of the Islamic Republic of Pakistan, 1972 (**1972 Interim Constitution**) which was the same as Article 65 of the 1962 Constitution as to rules of procedure for the Supreme Court. In the exercise of powers conferred under Article 191 of the Constitution, the full court of the Supreme Court in 1980 made its Rules by repealing the 1956 Rules. Once again, in light of the constitutional history and conventions, the CJP was empowered to constitute benches under the 1980 Rules.[38]

27. Historically, the rule-making powers of the Supreme Court were within the exclusive domain of the Supreme Court (or Federal Court, as the case may be), which were protected legislatively (GOIA) and constitutionally (1956, 1962, 1972 Interim and 1973 Constitutions). The Supreme Court exercised its constitutional power by making these rules and the same were in the field throughout the making and remaking of the constitutional order. Our constitutional history does not demonstrate that Parliament was ever competent to make law on the subject of practice and procedure. The rule-making power was also never subjected to legislative control where Parliament was seen as being competent to make law on the practice and procedure of the Supreme Court. Although earlier all rule-making authority was subject to approval by the executive,

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[38] **Order XI. Constitution of Benches.** Save as otherwise provided by law or by these Rules every cause, appeal or matter shall be heard and disposed of by a Bench consisting of not less than three Judges to be nominated by the Chief Justice:
[Provided that
(i) all petitions for leave to appeal,
(ii) appeals from appellate and revisional judgments, and orders made by a Single Judge in the High Court, [and]
(iii) appeals from judgments/orders of the Service Tribunals or Administrative Courts, and appeals involving grant of bail/cancellation of bail,
may be heard and disposed of by a bench of two Judges, but the Chief Justice may, in a fit case, refer any cause or appeal as aforesaid to a larger Bench.]
Provided further that if the Judges hearing a petition or an appeal are equally divided in opinion, the petition or appeal, as the case may be, shall, in the discretion of the Chief Justice, be placed for hearing and disposal either before another Judge or before a larger Bench to be nominated by the Chief Justice.

there has been a clear and definite shift from this process moving towards a complete separation of powers.

Parliamentary Debates

28. On 28.03.2023, the Minister for Law and Justice introduced the *Supreme Court (Practice and Procedure) Bill, 2023* (**Bill**) before the National Assembly. The fundamental purpose of the Bill, as stated in the Statement of Objects and Reasons, was as:

> [W]hereas, the exercise of original jurisdiction by the Supreme Court under clause (3) of Article 184 of the Constitution has been a subject of discussion by various forums with respect to invoking of *Suo Motu* powers, constitution of benches and the absence of right of appeal.

29. The National Assembly passed the Bill on 29.03.2023 and transmitted it to the Senate. The Senate passed the Bill as is on 30.03.2023. The Bill was sent to the President for his assent, who returned the same to the National Assembly with a note stating therein his objections, namely, with reference to the legislative competence of Parliament and given that the Supreme Court has already made its Rules in 1980 and the same are being followed, hence, the Bill amounts to interference with the internal working of the Court, its autonomy and independence.

30. In a joint-sitting of *Majlis-e-Shoora* (Parliament) on 10.04.2023, the President's objections were reconsidered.[39] In response to the President's objections, the Law Minister explained to the House that the phrase *subject to law* in Article 191 of the Constitution along with Entry 55 of the FLL allows Parliament to legislate on the subject of the practice and procedure as well as enlarging the appellate jurisdiction of the Supreme Court. The gist of the parliamentary debates revolves around two issues: curtailing the sole and discretionary powers of the CJP in *suo motu* cases and providing the right of intra-court appeal to the original jurisdiction of the Supreme Court under Article 184(3) of the Constitution, that too, as a remedy against *suo motu* cases. The parliamentary debates repeatedly refer to how the Chief Justices have arbitrarily exercised *suo motu* powers, which must be regulated, and how the right of appeal is not provided to a person who is aggrieved by the decision of this Court under Article 184(3) of the Constitution. So, as per debates, the Act primarily

[39] Debates available at the website of National Assembly of Pakistan as: <na.gov.pk/uploads/documents/644baf484f292_493.pdf>.

addressed the aforesaid concerns. It may also be noted neither the Act nor its Statement of Objects and Reasons contains any reference to Article 142 of the Constitution or any Entry of the FLL.

31. Thereafter, in the same joint-sitting, with some amendments, the Bill was passed by the majority members, which was followed by the President's assent on 21.04.2023, and hence, the Bill became the *Supreme Court (Practice and Procedure) Act, 2023*.

Constitutional Scheme

32. Having looked at the constitutional history and the parliamentary debates, it is necessary to also understand the reasons behind the constitutional authority granted to the Supreme Court to make rules. The objective and purpose of granting rule-making authority on practice and procedure to the Supreme Court is in recognition of the fact that this is a continuous authority, which gives liberty and autonomy to the Supreme Court to change its rules as per the requirement of the time and also, allows the Court flexibility so as to ensure that the procedures are effective and efficient. If the rule-making scheme has to be reshaped it must be done by the Supreme Court itself, which is constitutionally responsible for its practice and procedure. This is why the 1980 Rules have been placed on a *higher pedestal*[40] and cannot be changed or modified or amended or altogether displaced by ordinary legislation.[41] This Court has held that acting under the 1980 Rules framed pursuant to Article 191 of the Constitution, the Supreme Court is not bound to follow any other statutory dispensation that comes in conflict with the independence of the judiciary.[42] As a consequence of the 1980 Rules, the Supreme Court is not required to follow the Code of Civil Procedure, 1908 or the Code of Criminal Procedure, 1898 to the extent that it relates to the practice and procedure of this Court.[43] In the *Khurshid Anwar Khan* case, this Court again emphasized that the constitutional objective with reference to the rule-making authority was in furtherance of the principle of independence of the judiciary. The 1980 Rules were made vide S.R.O.1159(I)/80 published in the Gazette of Pakistan on 23.11.1980 in the exercise of powers under Article 191 of the Constitution and since then have been recognized as being within the domain of the Supreme

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[40] Justice Khurshid Anwar Bhinder v. Federation of Pakistan (PLD 2010 SC 483) (**Bhinder**).
[41] Ghulam Mohiuddin, *supra* note 13.
[42] Chairman N.W.F.P. v. Khurshid Anwar Khan (1992 SCMR 1202) (**Khurshid Anwar Khan**).
[43] *Id*.

Court. So, what changed this understanding to bring about the Act? A lot was argued on the point that the Supreme Court had failed to amend its Rules since 1980 and that certain practices and powers are now deemed arbitrary and against the public interest. Reference was made to the concept of *master of the roster* and the powers of the CJP. Arguments were made on the exercise of *suo motu* jurisdiction by this Court and there not being an effective remedy against any order passed under Article 184(3) of the Constitution. As argued by the AGP, the Act aims to structure the unbridled discretion vested in the CJP thereby enhancing the independence of the judiciary. More importantly, Parliament stepped into the affairs of the judiciary because the Supreme Court failed to address these issues by amending the 1980 Rules. This leads to the conclusion that Parliament legislated on practice and procedure on account of expediency or necessity as it felt that the *suo motu* jurisdiction as exercised by the Supreme Court needed to be regulated. The parliamentary debates testify to this fact that Parliament legislated to satisfy demands of regulating *suo motu* jurisdiction and arbitrary exercise of authority by the CJP when it comes to the constitution of benches and fixation of cases.

33. However, while Parliament's debates merely reflect the concern of Parliament on the issue, neither expediency nor necessity confers legislative competence. The rule-making power of the Supreme Court relates to its internal administration and management with matters concerning the practice and procedure to be followed with respect to the exercise of jurisdiction by the Supreme Court. The question that arises is that if Parliament is competent to make law on the subject of practice and procedure of this Court, who is to enforce this law? Can Parliament enforce its law over the Supreme Court? What is the consequence of non-implementation of the Act? This issue has been addressed in the *Baz Muhammad Kakar* case wherein this Court has held that the 1980 Rules have been framed under Article 191 of the Constitution having constitutional backing which means that the legislature cannot take over the duties and functions of the Chief Justice and other Judges of this Court, because if it did, then in such eventuality, the Executive would be issuing orders for the constitution of benches that would be a violation of principles of independence of the judiciary and denial of access to

justice.[44] *Baz Muhammad Kakar* also concluded that the legislature can only make a law that is within its legislative competence and the same has to be prescribed by the legislative field, circumscribed by specific legislative Entry in the Constitution. This means that Parliament can only make law on the subject matters prescribed in the FLL or else explicitly prescribed by the Constitution.

34. While the parliamentary debates reflect on the concern with respect to *suo motu* jurisdiction and the CJP's power as master of the roster, two basic principles of the constitutional scheme, that is independence of the judiciary and separation of powers, have not been considered. The significance of the independence of the judiciary is such that the Preamble to the Constitution, which is now a substantive part of the Constitution under Article 2A, clearly mandates that the independence of the judiciary shall be fully secured. This Court has time and again held that independence of the judiciary is one of the foundational values of the Constitution,[45] and that judicial independence and access to justice are now regarded as fundamental rights in and of themselves.[46] This Court has referred to the independence of the judiciary as a pivotal constitutional value,[47] where the rule of law and the independence of the judiciary are conceptually interwoven: without an independent judiciary, expecting the rule of law is a sheer farce.[48] The independence of the judiciary should be guaranteed by the State as enshrined in the Constitution and respected and observed by the State.[49] As per Saleem Akhtar, J. in the *Sharaf Faridi* case, the independent judiciary is part of a fundamental right that guarantees a fair and proper trial.[50] In the *Asad Ali* case, this Court has held that constitutional fundamental rights will become meaningless if there is no independent judiciary available in the country.[51] Hence, the independence of the judiciary is the prerequisite for the protection and enforcement of the rule of law and fundamental rights. In the *Iftikhar Muhammad Chaudhry* case, it was held that to commit an offense upon judicial independence means

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[44] Baz Muhammad Kakar v. Federation of Pakistan (PLD 2012 SC 923) (**Baz Muhammad Kakar**).
[45] Muhammad Aslam Awan v. Federation of Pakistan (2014 SCMR 1289).
[46] Suo Motu No. 4 of 2021: In the matter of (PLD 2022 SC 306).
[47] Justice Qazi Faez Isa v. President of Pakistan (PLD 2022 SC 119).
[48] *Id*.
[49] 'Basic Principles on the Independence of the Judiciary' adopted on 06.09.1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan.
[50] Sharaf Faridi v. Fed. of Islamic Repub. of Pakistan (PLD 1989 Karachi 404) (**Sharaf Faridi**). It may be noted, view of Saleem Akhtar, J. was relied by this Court in Asad Ali v. Federation of Pakistan (PLD 1998 SC 161) (**Asad Ali**).
[51] Asad Ali, *supra* note 50.

to encroach on the right of the people to access justice.[52] Independence of the judiciary is considered to be a basic and salient feature of the Constitution.[53] This Court has also held that Parliament was not free even to amend the Constitution in a manner that could undermine the independence of the judiciary.[54] Hence, the independence of the judiciary is a core value that the Constitution protects and enforces.

35. It is within the ambit of such independence that the judiciary must be totally separated from the executive and the legislature. Since the rise of nation-states in the 17th century, it became essential to delineate the power among the state's institutional structure. Montesquieu apprehended *tyrannical* order if the legislative, executive and judicial powers are exercised by the same person or body.[55] Based on this apprehension, the principle of separation of powers emerged. This principle was subject to extensive deliberation by the Framers of the Constitution of the United States of America (**USA**), who considered the separated powers as *more sacred* than other constitutional principles.[56] Justice Scalia in his dissent in *Morrison* was of the view that the principle of separation of powers *preserves the equilibrium* so that the *concentration of several powers in the same department* has to be resisted effectively.[57] In *Kesavananda Bharati* and *Indira Nehru Gandhi*, the SCI declared the doctrine of separation of powers as the basic structure of the Indian Constitution.[58]

36. Like the USA and the Indian Constitutions, the phrase *separation of powers* is not mentioned in the Constitution. The only reference made in the Constitution is in the Preamble regarding judicial independence or separating the judiciary from the executive within a period of fourteen years in terms of Article 175(3). Yet beyond a shadow of a doubt, the principle of separation of powers is fundamental to the organization of any state and the same is fundamental to the systems of government adopted by these Constitutions.[59] It is a basic principle of our

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[52] Iftikhar Muhammad Chaudhry, *supra* note 16.
[53] Iftikhar Muhammad Chaudhry, *supra* note 16 relies upon Mahmood Khan Achakzai v. Federation of Pakistan (PLD 1997 SC 426).
[54] Iftikhar Muhammad Chaudhry, *supra* note 16 relies upon Zafar Ali Shah v. Pervez Musharaf, Chief Executive of Pakistan (PLD 2000 SC 869).
[55] Montesquieu Charles-Louis de Secondat, *The Spirit of Laws* (1748), translated by Thomas Nugent (Batoche Books ed. 2001), 173-4.
[56] Chief Justice Taft quotes James Madison in Myers v. US [(1926) 272 US 52].
[57] Morrison v. Olson [(1988) 487 US 654] (**Morrison**).
[58] Kesavananda Bharati v. State of Kerala (AIR 1973 SC 1461) (**Kesavananda Bharati**) and Indira Nehru Gandhi v. Raj Narain (AIR 1975 Supreme Court 2299) (**Indira Nehru Gandhi**).
[59] Fazal Karim, *supra* note 32, at 98-99.

Constitution.[60] The separation of powers is inferred from the Constitution's organizational principles, hence, it is implicit in the Constitution.[61]

37. This Court in the *Jurists Foundation* case has held that the separation of powers is not only a fundamental principle of our constitutional construct but also the cornerstone of a constitutional democracy.[62] The principle of trichotomy of power is the basis of the Constitution where the executive, legislature and judiciary have their own functions independent from each other.[63] There is neither dependency nor superiority among the three organs of the state.[64] This division ensures that each branch can function independently without undue interference from the others.[65] In the *Zia-ur-Rehman* case, this Court has held that the delineation of powers is a constitutionally inherent principle so that one organ or sub-organ may not encroach upon the legitimate field of the other.[66] In the *Yousaf Raza Gillani* case, this Court holds that the Constitution conceives of order among co-equals organs of the state, each manifesting the will of the people and giving effect to such through adjudication, executive action or legislation.[67] There is constitutional recognition that the judiciary does not have the resources or power which the legislature or the executive enjoy, therefore, the *Al-Jehad* case holds that the constitutional provisions need to be construed in a manner so that the independence of the judiciary is secured.[68] In the *Azizullah Memon* case, this Court has held that the separation of the judiciary is the cornerstone of independence of the judiciary and unless the judiciary is independent, the fundamental right of access to justice cannot be guaranteed.[69] Therefore, it can be said that the separation of the judiciary from the executive and legislature is part and parcel of judicial independence.

38. A full bench of this Court in the *Mobashir Hassan* case held that the constitution commands exclusive power and responsibility of the judiciary by ensuring the sustenance of a system of separation of powers

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[60] JUSTICE (R) FAZAL KARIM, 1 ACCESS TO JUSTICE IN PAKISTAN (1st ed. 2003), 11.
[61] *Id*.
[62] Jurists Foundation v. Federal Government (PLD 2020 SC 1) (**Jurists Foundation**).
[63] Govt. of Balochistan v. Azizullah Memon (PLD 1993 SC 341).
[64] *Id*.
[65] Imran Ahmad Khan Niazi v. Federation of Pakistan (PLD 2024 SC 102).
[66] State v. Zia-ur-Rehman (PLD 1973 SC 49) (**Zia-ur-Rehman**).
[67] Yousaf Raza Gillani v. Assistant Registrar, Supreme Court (PLD 2012 SC 466) (**Yousaf Raza Gillani**).
[68] Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324) (**Al-Jehad**).
[69] Azizullah Memon, *supra* note 63, was also relied in Mehram Ali v. Federation of Pakistan (PLD 1998 SC 1445).

based on checks and balances. This is a legal obligation assigned to the judiciary.[70] The Constitution mandates the judiciary, and no other organ, to solely and completely determine its institutional affairs in terms of constitutional balance of power. So much so, the Supreme Judicial Council (**SJC**) under Article 209 of the Constitution requires the judiciary to hold Judges accountable, as no other institution is authorized to do so. Hence, reading legislative competence in the word *law* does not protect or endorse the constitutional scheme rather creates something which negates the principle of separation of powers.

39. Although emphasis on the issues of master of the roster and exercise of *suo motu* powers were more a means to an end argument, they do not lend support to the question of legislative competence. However, we find it necessary to clarify the concerns raised. On the issue of master of the roster, which terminology refers to the prerogative of the CJP to make and provide for the roster. It flows from the understanding that while the Chief Justice is first amongst equals on the judicial side; so far as the administrative function of constituting benches and allocating cases that lies with the Chief Justice.[71] This function is prescribed for in the 1980 Rules and it is deeply rooted in the constitutional convention and ruled by various pronouncements of this Court.[72] In the *Baz Muhammad Kakar* case, this Court declared the provision of Contempt of Court Act, 2012 unconstitutional for being a clog on the power of the Chief Justice to constitute benches is violative of the principle of independence of the judiciary and right of access to justice.[73] The judgment holds as under:

> [72]. … It was further held that under the Constitution and the law *regulating the practice* of the Supreme Court, it is not only the privilege but the duty and obligation of the Chief Justice to personally preside over all important cases and to nominate Judges for hearing cases which come up before the Court. No person has the right to ask the Chief Justice to abdicate this responsibility, nor does anyone have the right to demand a Bench of his own choice. This would be contrary to the well established norms regulating the functioning of the superior Courts. It is the ***undisputed privilege and duty of the Chief Justice to constitute Benches*** for the hearing and disposal of cases coming before Supreme Court and no litigant or lawyer can be permitted to ask that his case be heard by a Bench of his choice. The above principle was reiterated in *Supreme Court Bar Association v. Federation of Pakistan* (PLD 2002 SC 939).

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[70] Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265) (**Mobashir Hassan**).
[71] State of Maharashtra v. Narayan Shamrao Puranik (AIR 1983 SC 46), Campaign of Judicial Accountability and Reforms v. Union of India [(2018) 1 SCC 196] and State of Rajasthan v. Prakash Chand (AIR 1983 SC 1344).
[72] Order XI, *supra* note 38.
[73] Baz Muhammad Kakar, *supra* note 44.

> 73. It is to be noted that the Supreme Court Rules, 1980 having been framed under Article 191 of the Constitution have a *constitutional backing*. **Therefore, the Legislature cannot take over the duty/function of the Chief Justice and other Judges to hear cases** because in such eventuality, the Executive would be issuing orders for constitution of Benches of their choice for hearing of particular cases, which would be interference in the jurisdiction of the Court as well as violation of the principles of independence of judiciary and denial of access to justice enshrined in Articles 2A, 9 and 175 of the Constitution.[74]

40. In the *Shanti Bhushan* case, the SCI recognizes the power and prerogative of framing the roster as the power of the Chief Justice which has constitutional backing that includes constitutional convention.[75] This Court also recognizes constitutional convention and has held that once the constitutional convention is established, it has the same effect as a constitutional provision.[76] In another case, the SCI in the *Asok Pande* case has held that there cannot be a presumption of mistrust in the administrative functions of the Chief Justice.[77] So essentially master of the roster is a terminology used to describe the powers of the Chief Justice with reference to matters related to the practice and procedure of the Court.

41. Now the question is if there is a concern with the working of the CJP, as master of the roster, who is competent to address this issue? In terms of Article 191 of the Constitution, it is for the full court of the Supreme Court to rethink and reshape its 1980 Rules by making them more effective and dispel the notion of arbitrariness and unreasonableness. While the Act has formed a Committee under Section 2, the fact remains that the relevant provisions in the 1980 Rules and the rule-making authority of the Supreme Court have become redundant as this function of practice and procedure has been legislated upon. Similar consequences flow from Sections 3, 4 and 6 of the Act which are in direct conflict with the 1980 Rules.[78] The Act has, therefore, made the referred Rules redundant meaning thereby that the legislature has prevailed over the rule-making power of this Court. A lot was also said regarding the exercise of *suo motu* jurisdiction and again the arbitrariness of the Chief Justices' discretion in this regard. By virtue of Suo Motu Case No.4 of 2021, the discretion and prerogative of the CJP invoking this jurisdiction was regulated and any further concerns or

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[74] *Id.*
[75] Shanti Bhushan v. Supreme Court of India (AIR 2018 SC 3287) (**Shanti Bhushan**).
[76] Asad Ali, *supra* note 50.
[77] Asok Pande v. Supreme Court of India [(2018) 5 SCC 341] (**Asok Pande**).
[78] Order XI, *supra* note 38.

issues requiring rule-making were a matter for the full court of the Supreme Court to decide. The thrust of the argument that the Supreme Court failed to address these issues is based on the fact that the competent authority failed to do the needful, hence, the legislature had to step in. The question is can the legislature step in with the intent to rectify a practice that it considers to be wrong? As is to be expected the answer is in the negative.[79] Rationalizing legislative interference on the basis of need, desire and advantage does not satisfy the fundamental requirement that Parliament can only legislate on subject matters given in the FLL (read with Article 142 of the Constitution) or where the Constitution explicitly states so. Improving the practice and procedure of the Supreme Court, in response to the needs of the times, is for the Supreme Court to reflect upon. Accordingly, the power to make law must be located either in the FLL or in the Constitution but does not flow from the words *subject to the Constitution and law*.

Understanding Entry 55 of the FLL

42. The next argument is with reference to the enlargement of jurisdiction where the Act creates a right to appeal from an order under Article 184(3) of the Constitution. The said Article provides for the original jurisdiction of the Supreme Court wherein its sub-article (3), without prejudice to the provisions of Article 199 of the Constitution, allows a petition to be filed directly before the Supreme Court on a question of public importance with reference to the enforcement of fundamental rights. Article 185 of the Constitution provides for the appellate jurisdiction of the Supreme Court listing therein the judgment, decree, final order, or sentence of a High Court from which an appeal lies to the Supreme Court.

43. The dispute is whether the Act can in the form of ordinary legislation enlarge the jurisdiction of the Supreme Court. The AGP argued that the legislature in its wisdom considered the limited jurisdiction of review to be the only remedy given to litigants against orders under Article 184(3) of the Constitution and found it to be insufficient, hence, Section 5 of the Act creates a right of appeal against orders under Article 184(3) of the Constitution. He explained that Entry 55 of Part I of the FLL gives competence to Parliament to legislate with respect to the

[79] Sabir Shah v. Shad Muhammad Khan (PLD 1995 SC 66).

jurisdiction of this Court. As per his contention, Entry 55 has to be read disjunctively such that the *jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List* is one part of Entry 55 and *the enlargement of the jurisdiction of the Supreme Court* is its second part. Consequently, the Supreme Court's jurisdiction as provided by the Constitution cannot be curtailed through ordinary legislation, however, its jurisdiction can be enlarged from such legislation.

44. We have considered this argument at great length and do not find any merit in the same. Article 175(2) of the Constitution provides that no court shall have any jurisdiction save as it may be conferred by the Constitution or by or under any law. The said Article when read with Entry 55 of the FLL gives competence to Parliament to make law in relation to the jurisdiction and powers of all courts except for the Supreme Court concerning any matter contained in the FLL. Entry 55 of the FLL simply provides that legislative competence with respect to jurisdiction and powers of all courts except the Supreme Court lies with Parliament. It further provides that Parliament is competent to legislate to the extent expressly authorized by or under the Constitution on the enlargement of the jurisdiction of the Supreme Court and the conferring of its supplemental powers. Meaning thereby that there can be no ordinary legislation with respect to the jurisdiction and powers of this Court or the enlargement of its jurisdiction unless it has been authorized expressly by or under the Constitution. This Court in the *Baz Muhammad Kakar* has interpreted Entry 55 as follows:

> [34]. At this juncture, it may also be noticed that Entry 55 of the Federal Legislative List (Fourth Schedule to the Constitution) authorizes the Parliament to make law on jurisdiction and powers of all courts with respect to any of the matters in the said List to such extent as is expressly authorized by or under the Constitution. Thus, the said Entry on the one hand *limits* the legislative power of the Parliament to the making of any law on the jurisdiction and powers of the Supreme Court, and on the other hand *empowers* the Parliament to make law for enlargement of the jurisdiction of the Supreme Court and the conferring of supplemental powers.
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> 36. … Entry No.55 of the Fourth Schedule, in terms of Article 70(4), prescribes that laws can be promulgated pertaining to jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List and, to such extent as is expressly authorized by or under the Constitution, the enlargement of the jurisdiction (emphasis provided) of the Supreme Court, and the conferring thereon of supplemental powers. Under this Entry, the Constitution maker consciously separated the Supreme Court from all other courts. A plain reading of the words of this Entry, particularly, the portion, where emphasis has been provided, not only creates distinction

> between the Supreme Court and other courts, but also speaks in respect of enlargement of the jurisdiction of the Supreme Court and conferring of supplemental powers. The literal rule of interpretation of the Constitution and statutes, also known as the golden rule of interpretation, is that the words and phrases used therein should be read keeping in view their plain meaning.[80]
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> (**Emphasis Added**)

45. In *NICCC*,[81] this Court has interpreted Entry 55 read with Articles 175(2) and 142(a) as:

> [17]. … In our view there is *no ambiguity* in interpreting Entry No.55 of Part I of the Federal Legislative List (Fourth Schedule) of the 1973 Constitution. Such Entry read with Articles 175(2) and 142(a) of the Constitution confers exclusive powers on the Parliament to make laws for enlargement of jurisdiction of the Supreme Court or conferring on supplemental powers.
>
> If Entry No.55 was not there in the Federal Legislative List, it could be argued that under Article 175(2) of the Constitution, in respect of matters relating to Cooperative Societies exclusively falling under the competence of the Provincial Legislature, a law can validly be made by a Provincial Legislature enlarging jurisdiction of the Supreme Court and conferring on its supplemental powers but Article 175(2) is not to be interpreted in isolation. It has to be read and interpreted alongwith Article 142(a) and the Entries in the Legislative Lists. Under Entry No.55 of the Federal List, Federal Legislature is competent to make laws regarding jurisdiction and powers of all Courts (except the Supreme Court) with respect to any of the matters in such list. The other part of this entry makes the Federal Legislature competent to make laws enlargement of the Supreme Court and the conferring thereon the supplemental powers with the proviso that this is to such extent as is expressly authorised by or under the Constitution. Powers and jurisdiction conferred on the Supreme Court by the Constitution can neither be interfered with or varied nor taken away by Legislature. However, jurisdiction of the Supreme Court can be enlarged and supplementary powers can be conferred on the Supreme Court by "law" in view of the Article 175(2) of the Constitution, and Entry No.55 read with Article 142(a) of the Constitution leave no doubt that such enlargement of the jurisdiction and conferment of supplementary powers can only be done through law made by Federal Legislature.[82]
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> (**Emphasis Added**)

46. This court's ruling on Entry 55 in *Baz Muhammad Kakar* and *NICCC* is very clear that Parliament is competent to enact ordinary legislation by which the jurisdiction of the Supreme Court can be enlarged and conferred supplemental powers, only when it is provided by or under the Constitution. In the instant case, the Act establishes the appellate jurisdiction of this Court against an order passed under Article 184(3) of the Constitution being an order of this Court. So the issue is that a right of appeal is created *against an order of the Supreme Court* to its larger bench. Effectively, it has enlarged the jurisdiction of this Court given in Article 185 of the Constitution. However, the issue is that the original jurisdiction of this Court as well as the appellate jurisdiction has

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[80] Baz Muhammad Kakar, *supra* note 44.
[81] The Province of Punjab v. National Industrial Cooperative Credit Corporation (2000 SCMR 567) (**NICCC**).
[82] *Id*.

been already set out by the Constitution. This means that if an appeal is to be created, thereby expanding on the appellate jurisdiction of this Court under Article 185 of the Constitution, it can only be done through a constitutional amendment. An Act of Parliament cannot override or amend any provision of the Constitution. Furthermore, the intent of the Constitution-makers is clear as they did not provide any appeal against an order under Article 184(3) of the Constitution. If there is a desire to change this thinking, then it can only be done through a constitutional amendment. Consequently, if the constitutional jurisdiction of this Court is to be enlarged, whether original, appellate, advisory or review, it must be through a constitutional amendment. To suggest that Parliament can enlarge the constitutional jurisdiction of this Court under Entry 55 would also suggest that Parliament can amend the Constitution by way of ordinary legislation, which would be in total conflict with the constitutional mandate.

Formation of a Full Court Bench and its Consequences

47. Throughout the proceedings, one of the questions that was repeatedly asked was with reference to the formation of a bench comprising of the full court to hear the instant Petitions under Article 184(3) of the Constitution. The objective of the full court sitting essentially was that since the matter concerns the practice and procedure of this Court, the collective wisdom of all the Judges should be taken with respect to the constitutionality of the Act. While a lot has been said to defend the sitting of the full court, the basic question remains unanswered as to what happens to the right of appeal under Section 5 of the Act as with the sitting of all the Judges in a petition under Article 184(3) of the Constitution, the right of appeal granted under Section 5 of the Act becomes redundant. This in turn means that a party, who can avail the right of appeal under the Act, will no longer be able to avail of that right since the full court heard the matter. It goes without saying that the right of appeal is a substantive right and, in this case, a statutory right granted by the legislature for a very specific purpose which is to provide a remedy to a party in the face of a petition under Article 184(3) of the Constitution, the order of which would attain finality. As per the Parliamentary debates, this was one of the primary concerns voiced and reasoned to legislate the Act, there is no remedy against an order in a petition filed under Article 184(3) of the Constitution. By constituting a

full bench, comprising all the Judges of this Court, the very purpose of Section 5 of the Act is defeated. It also suggests that this right of appeal can be denied by the Committee under Section 2 of the Act by constituting a full bench or even by constituting a larger bench, such that there are not enough Judges to hear the appeal. This goes to the root of the issue of legislative interference in the composition of benches as now due to the Act, in petitions under Article 184(3) of the Constitution, it may not be possible to sit as a full court or even a larger bench because the Committee will always have to be mindful of the right of appeal. To our minds, the fact that this Court does not enjoy the freedom to regulate itself, through the formation of benches, negates the principle of independence of the judiciary which is noticeably illustrated by the fact that the Supreme Court for the purposes of constituting benches is effected by Section 5 of the Act in that the legislature by way of the Act has curtailed the judicial power related to the constitution of benches.

48. Under the circumstances, this Court by way of its practice and procedure will not be able to sit as a full court in a petition under Article 184(3) of the Constitution simply because the right of appeal will be blocked and cannot be availed. It is not for this Court, by way of its practice and procedure, to prevent the exercise of any right granted by the statute to a litigating party, hence, we are fortified in our opinion that the Act interferes in the formation and constitution of benches which is inherently and constitutionally this Court's function. Furthermore, it has become difficult for this Court to sit as a full court or larger bench in matters under Article 184(3) of the Constitution given that by doing so it would deprive a party from exercising their right under Section 5 of the Act. The significance of this, in the simplest of understanding, is that the statute grants a right of appeal which this Court cannot deprive a party from. In doing so the legislature has encroached upon a core function of this Court which is against the principles of independence of the judiciary and the separation of powers.

Maintainability of the Petitions

49. A lot was argued regarding the maintainability of the instant Petitions on the ground that there has been no breach of any fundamental right of any of the Petitioners on the basis of which they have approached the Supreme Court under Article 184(3) of the Constitution. However, it appears that the Petitions have been deemed

as maintainable given the fact that the cases were heard at length on merit and that the opinion of the majority does not address the issue of maintainability. Since the majority and concurring opinions and separate notes have all addressed the issues on merit, the issue of maintainability is now academic. However, notwithstanding the same, this Court has held that the independence of the judiciary in itself is a fundamental right and issues relating to independence, structure and functioning of the judiciary, are a matter of public importance.[83] This Court has also held that questions with respect to the independence of the judiciary, and access to justice will always be a matter that concerns the public at large, hence, issues raised to this extent are maintainable under Article 184(3) of the Constitution.[84] Hence, we find that these Petitions are maintainable.

Conclusion

50. In view of the foregoing, we declare the Act to be *ultra vires* the Constitution as Parliament does not have legislative competence to make law on the subject of practice and procedure. We further declare that the rule-making power under Article 191 of the Constitution exclusively falls within the domain of the Supreme Court and is directly linked with the independence of the judiciary. Therefore, these Petitions are allowed.

51. These are the reasons for our short order dated 11.10.2023, which are reproduced below:

> [F]or reasons to be recorded later these petitions are decided as under:
>
> 1. Subject to paras 2 and 3 below, by a majority of 10 to 5 (Justice Ijaz ul Ahsan, Justice Munib Akhtar, Justice Sayyed Mazahar Ali Akbar Naqvi, Justice Ayesha A. Malik and Justice Shahid Waheed dissenting) the Supreme Court (Practice and Procedure) Act, 2023 ('**the Act**') is sustained as being in accordance with the Constitution of the Islamic Republic of Pakistan ('**the Constitution**') and to this extent the petitions are dismissed.
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> 2. By a majority of 9 to 6 (Justice Ijaz ul Ahsan, Justice Munib Akhtar, Justice Yahya Afridi, Justice Sayyed Mazahar Ali Akbar Naqvi, Justice Ayesha A. Malik and Justice Shahid Waheed dissenting) sub-section (1) of section 5 of the Act (granting a right of appeal prospectively) is declared to be in accordance with the Constitution and to this extent the petitions are dismissed.
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> 3. By a majority of 8 to 7 (Chief Justice Qazi Faez Isa, Justice Sardar Tariq Masood, Justice Syed Mansoor Ali Shah, Justice Amin-ud-Din Khan, Justice Jamal Khan Mandokhail, Justice Athar Minallah and Justice Musarrat Hilali dissenting) sub-section (2) of section 5 of the

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[83] Iftikhar Muhammad Chaudhry, *supra* note 16.
[84] *Id.*

Act (granting a right of appeal retrospectively) is declared to be *ultra vires* the Constitution and to this extent the petitions are allowed.

Munib Akhtar, J.

Ayesha A. Malik, J.

I have added a separate concurring note

Shahid Waheed, J.

Islamabad
'APPROVED FOR REPORTING'
Azmat | Kehar Khan Hyder/-

Judgment

Shahid Waheed, J. I am not in accord with the opinion of the majority of the Court in these cases. Fiat has gone forth, and the law at issue, except for section 5(2) thereof, has been upheld. Although it will not produce any immediate practical results, owing to its great importance, I think it necessary to put my reasons on the record for the intelligence of a future day when their judgment may possibly correct the error into which, I believe, with respect, the majority have misdirected themselves and arrived at a conclusion which does not fit into the scheme of the Constitution.

2. I gratefully adopt Ayesha A. Malik, J.'s account of the arguments presented in these petitions, and agree with her in concluding that the supplications therein are within the law.

3. These petitions mount a challenge to the lawfulness of the newly enacted law, namely, the Supreme Court (Practice and Procedure) Act, 2023 (**PAPA**), primarily on the ground that it is outwith the legislative competence and that it is a devious attempt, first to arrest the free functioning of this Court and then to wrest its independence. On the contrary, the position of the Government is that it has promulgated the PAPA to enforce the right to a fair trial and due process, the right to be dealt with in accordance with the law, and the right to equality of citizens. As such, these petitions are not maintainable as they do not seek to enforce any fundamental right. I think this preliminary objection is not well-founded. These petitions are brought within the original jurisdiction conferred upon this Court under Article 184 of the Constitution, which extends to only two kinds of cases: those involving a dispute between any

two or more Governments and those involving a question of public importance concerning the enforcement of fundamental rights. This jurisdiction is somewhat of an oddity in that the Supreme Court acts as both the Trial Court and the Court of last resort in deciding such matters. Since this jurisdiction flows directly from the Constitution, it is self-executing without further Acts of the Parliament. According to this account, the Constitution vested this Court with original jurisdiction in such cases in order to match the seriousness of the claim to the status of this Court.[1] In light of this, it would not be conducive to the dignity of this Court to allow the issue of its autonomy to be tried in any other Court.

4. That apart, it bears noting that the plain reading of clause (3) of Article 184 of the Constitution makes it clear that there is a three-stage requirement for the Supreme Court to take cognisance of a matter under the said clause: firstly, all that is needed is that there must be a "*question"*; secondly, the question raised needs to be in respect of public importance; and lastly, the question so raised needs to be of public importance about the enforcement of fundamental rights enshrined in the Constitution. The expression '*question'* has to be understood in its ordinary or popular meaning, which, in my opinion, would be a matter requiring resolution or discussion. The '*question'* so raised in this petition relates to the free functioning of this Court, the legislative competence of Parliament to regulate the practice and procedure of this Court and whether the enforcement of PAPA will result as an impediment to the public's access to justice. So, the first stage test is satisfied because the questions thus raised are not vague but clear in their purpose, requiring due deliberation. The purpose of these petitions is to preserve and protect

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[1] *California v. Arizona, The Federalist No.81 at 548 (Alexander Hamilton)* [440 US 59].

the independence and autonomy of this Court, which in turn promotes the welfare of the people; as such, they raise a question of public importance and, therefore, satisfy the second stage test. The third test that needs to be qualified is whether the question in these petitions relates to the enforcement of any fundamental right guaranteed under the Constitution. The word "*enforcement*" draws special attention here. It was emphasised before us that these petitions are not maintainable, as they speak of presumptive violation of rights and do not seek to enforce any fundamental right. In articulating this stance, it was, I think, forgotten that the word "*enforcement*" in the context of Article 184(3) of the Constitution overtones that no law shall take away or abridge the right conferred by the Constitution but it also implies that ensuring compliance with one right must not involve violation of other fundamental rights. So, here we have been called upon to examine whether the PAPA while seeking to enforce Article 4, 10-A and 25, of the Constitution, strikes a balance with other guaranteed rights or vice versa contravenes other rights, such as independence of the judiciary, access to justice and whether the Parliament is competent to regulate the practice and procedure of this Court. As such, it would be in the fitness of things to open and keep open this Court to determine the '*questions'* involved in these cases, and resultantly, the petitions are maintainable.

5. Coming to the competence of the Parliament, it will first be seen under which category the PAPA falls. Although it has the word "*procedure*" in its nomenclature, this is insufficient to ascertain its category. The fundamental nature of any statute cannot be determined by its name and description, but for that, a glance at its actual contents is essential. When we do, we find that it provides procedure for the

constitution of benches, the exercise of original jurisdiction, the fixation of urgent cases, the retention of counsel of choice at the review stage, and the right to appeal. These features suggest that it takes on the colour of procedural as well as substantive law. Appellate remedy falls under the substantive provision, while the rest of the provisions fall under the scope of procedure. This analysis brings me to trace the source of such legislation. It is an old-line that our Parliament can derive its strength of legislation directly from the main body of the Constitution and also from the sphere of entries of its Fourth Schedule.[2] In the present matter, the preamble to the PAPA itself states that it has been enacted pursuant to Articles 175(2) and 191 of the Constitution. This greatly simplifies my investigation, and thus, I consider these two provisions and examine whether they confer any power on the Parliament to enact PAPA.

6. Article 175(2) states that no court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law. By any canon of construction, it cannot be construed as a provision enabling Parliament to enact any law. It only talks about the types of jurisdiction of courts and classifies it into two categories, that is to say, 'constitutional jurisdiction' — a jurisdiction conferred by the Constitution, and 'ordinary jurisdiction' — a jurisdiction conferred by or under any law. In the latter part of this judgment, this Article will be dealt with in detail.

7. The other article, Article 191, circumscribes the power of the Supreme Court to make rules. It says that *"subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court"*. The respondents argued before us that Article 191 is a direct source of legislation; it allows the framing of laws to regulate

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[2] *Province of Sindh v. M.Q.M through Deputy Convener* [PLD 2014 SC 531].

the practice and procedure of this Court, and the phrase *'subject to law'* in essence, has been used in lieu of Act of the legislature to signify that such law regulating procedure may even be provincial in respect to the jurisdiction conferred by Provincial Assembly to this Court. So, what requires due consideration and has to be seen is the scope, meaning and intent of the framers of the Constitution to use the phrase *'subject to law'* in Article 191. This Article has multiple related aspects, and I deem it appropriate to deal with each to explain that this provision could not be invoked to enact the PAPA.

8. The first thing that attracts my attention is the prefix of restrictive words *'subject to'.* A similar phrase '*subject to*' was used in *Article VI, Section II, paragraph 3 of the State Constitution of New Jersey, 1947*, which provided that *"the Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts."* The phrase '*subject to law'* and the scope of the above Article came under discussion in the seminal case of *Winberry*[3] where the contention was whether the appeal time frame formulated by a statute would prevail over the time frame formulated under the said Article by the Supreme Court. The Supreme Court of New Jersey held that the phrase *'subject to the law'* implies limitation rather than a grant of power, and the rational interpretation is to construe it as substantive law, as distinguished from pleading and practice. The Court distinguished between substantive law, which defines the rights and duties, and the law of pleading and practice, through which such rights and duties are enforced in courts. A parallel distinction can be seen in our Constitution as well. The Constitution expressly distinguishes between

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[3] *Winberry v. Salisbury* [5 N.J. 240].

substantive and procedural law under Articles 175(2) and 191 respectively. At the cost of repetition, as discussed above, Article 175(2) states that jurisdiction is conferred on the Court, whereas, under Article 191, the Supreme Court may regulate its practice and procedure in line with the jurisdiction conferred upon it, so as not to invade the field of substantive law. Be it noted that where an Act of legislature confers a jurisdiction, the Act may provide for the procedure of the Court to the extent of the jurisdiction so conferred, but in no fashion can it be construed that an Act of the legislature may also regulate the rule-making power conferred by the Constitution on this Court, such as the constitution of benches and fixation of cases etcetera. The above illustration makes it clear that the restrictive phrase '*subject to*' in Article 191 and the subsequent words '*the Constitution and the law*' has been used to limit the power of the Supreme Court to make rules regulating its practice and procedure or I may say that the Supreme Court has been given the power to frame rules in conformity with the Constitution and the law — nothing more and nothing less.

9. For the sake of argument, if Article 191 is deemed to be a source of legislative power, then what has to be determined is whether, concerning the practice and procedure of this Court, an Act of Parliament or the Supreme Court Rules, 1980 (**SCR**), will take precedence? This Court formulated the SCR, as was noted in *Ghulam Mohiuddin*[4] in exercising its power conferred under Article 191. In *Baz Muhammad Kakar*[5] it was held that in the presence of SCR, an Act of Parliament could not frame rules in contravention with SCR as the latter has '*Constitutional backing'* and, thus, declared ultra vires section 12 of the Contempt of Court Act, 2012.

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[4] *Ghulam Mohiuddin v. Federation of Pakistan* [PLD 2023 SC 825].
[5] *Baz Muhammad Kakar v. Federation of Pakistan* [PLD 2012 SC 923].

In *Shaukat Aziz Siddiqui*[6] this Court held that if legislature infiltrates and influences the judiciary in the garb of procedure, constitutionally, such a law would be questionable as to the competence of the legislature and as violative of the fundamental right of independence of the judiciary. Similarly, in *Justice Khurshid Anwar Bhinder*[7] this Court concluded that the SCR hold a higher pedestal to an Act of Parliament for the reasons that the rules are promulgated based on the mandate bestowed upon it by the Constitution itself under Article 191 and not by a statute, the object of which was to preserve the independence of the judiciary and promote separation of powers. This leads me to the conclusion, and as this Court has persistently held throughout our jurisprudential development, that it is the Supreme Court that has the power to regulate its practice and procedure, and the SCR will always supersede ordinary legislation because the rules are, in other words, '*Constitutional Rules*'[8] and can only be overruled or amended by the Parliament through a constitutional amendment or by the Supreme Court itself.

10. Another important aspect to look at the matter and understand the true meaning and scope of the phrase '*subject to'* and the intent with which it is used would be to gauge how it has been used elsewhere in the Constitution. A pattern can be seen as to the restrictive usage of the phrase *'subject to'* in several articles of the Constitution. Such as Articles 17, 142(a) and 204. To comprehend how the phrase '*subject to'* has a limiting and restrictive effect, a good example is Article 142(a), which provides that *'subject to'* the Constitution, Parliament shall have exclusive powers to make laws concerning any matter in the Federal Legislative List.

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[6] *Shaukat Aziz Siddiqui v. Federation of Pakistan* [PLD 2018 SC 538].
[7] *Justice Khurshid Anwar Bhinder v. Federation of Pakistan* [PLD 2010 SC 483].
[8] *Zain Noorani v. Secretary National Assembly of Pakistan* [PLD 1957 SC 46].

This clearly illustrates that under Article 142(a), the Parliament has been given exclusive power to legislate on any matter it thinks fit present in the Federal Legislative List, but subject to the Constitution, meaning that the law cannot be in contradiction with any Constitutional Article nor can it be beyond legislative competence as prescribed by the Constitution, which in turn shows that the phrase *'subject to'* does not enable but restrict the Parliament to constitutional limitations, just as the Constitution has restricted this Court's power to regulate its practice and procedure under Article 191 so to not derogate from a jurisdiction conferred by any law or the Constitution.

11. While elaborating on the competence of Parliament to legislate on the practice and procedure of this Court, the respondents also sought to argue that the right of appeal against the Constitutional jurisdiction of Article 204 was conferred through an ordinary legislation of the Contempt of Court Ordinance, 2003 (**CCO**).[9] This argument implied that the phrase '*subject to law'* used in Article 204(3) had provided the legislature with the competence to enact the Contempt of Court Ordinance. So, the phrase *'subject to law'* used in Article 191 also grants legislative competence to Parliament to regulate the practice and procedure of this Court. This argument is ill-founded. Article 204(3) provides that "the exercise of the power conferred on a Court by this Article may be regulated by law and, subject to law, by rules made by the Court". In my opinion, this argument, in substance, favours the petitioners. There is a clear distinction between Article 204(3) and Article 191. The phrase '*regulated by law*' used in Article 204(3) has not been used in Article 191. It is this phrase that

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[9] *Baz Muhammad Kakar v. Federation of Pakistan* [PLD 2012 SC 923] & *Hasnat Ahmed Khan v. Registrar Supreme Court of Pakistan* [PLD 2010 SC 806].

granted competence to the legislature to enact CCO, whereas the phrase *'subject to law'* in Article 204(3) is a limitation on the Court to frame rules in accordance with the law and the Constitution. In the context of Article 204(3), the framers of the Constitution intended to enable the Parliament to regulate contempt of court, and they did so by adding *'regulated by law',* which they intentionally did not add in Article 191. Needless to say, the power to regulate by law means the power to enact law. Thus, the right of appeal has rightly been provided under CCO, but the analogy that this validates the PAPA is incorrect and without any legal merit.

12. There is still another aspect of the matter that needs to be considered. If Article 191 is construed as a source of legislative power, then the Constitutional requirement to ascertain the independent functioning of the Supreme Court is abridged because the Parliament, by an ordinary Act, will be able to regulate the practice and procedure of the Supreme Court, which in its essence is a violation of the salient feature of trichotomy of powers, embedded in our Constitution. The Parliament cannot enact a law that conflicts with SCR without violating the trichotomy of powers. This was foreseen by this Court and dilated upon in Baz Muhammad Kakar (*supra*) by categorically stating that if the legislature under Article 191 regulates the practice and procedure of the Supreme Court, in such eventuality, the executive would be issuing orders for constitution of benches of their choice for hearing particular cases which would be a violation of principles of independence of judiciary and denial of access to justice enshrined in Article 2A and 9 of the Constitution. A more significant problem this would lead to is that this legislative authority would also be exercisable through Ordinances if construed as a source of legislative power. An Ordinance, despite its

legislative impact,[10] is an act of the executive.[11] This will unequivocally contradict Article 175(3), which stipulates an absolute separation of the executive from the judiciary. Thus, this would disrupt the fundamental structure of our Constitutional framework of trichotomy of powers. Another aspect may be briefly addressed; it was argued before us that the Parliament's intention was good in promulgating the PAPA. And so, can the PAPA be covered under Article 191 if it is based on the good intentions of Parliamentarians? Obviously not. Illegally doing a good thing is wrong, as the illegal morsel begets evil.[12]

13. It has become evident that reference to Article 191 as a legislative source in the preamble of the PAPA was unfit. Is it sufficient to conclude that Parliament had no competence to enact PAPA? Not in the least. Courts have to make their utmost effort to save the law by exploring all angles and lean in favour of an Act of Parliament, as it is a requirement of constitutional interpretation, unless a law violates the Constitution, as was similarly held in *Dr. Mobashir Hassan*.[13] In light of this principle, notwithstanding the inappropriate source citation in the preamble, we need to explore the second source of legislation, as stated above, the Federal Legislative List.[14]

14. Article 142(a) of the Constitution provides exclusive jurisdiction to Parliament to make laws concerning matters in the Federal Legislative List.[15] The above discussion and this Article bring me to examine Entry No.55 and 58. Entry No.55 provides that *"to such extent as is <u>expressly</u>*

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[10] *Article 89(2) of Constitution the Islamic Republic of Pakistan, 1973.*
[11] *Pakistan Medical and Dental Council v. Muhammad Fahad Malik* [2018 SCMR 1956].
[12] *Sabir Shah v. Shad Muhammad Khan* [PLD 1995 SC 66].
[13] *Dr. Mobashir Hassan v. Federation of Pakistan* [PLD 2010 SC 265].
[14] *Province of Sindh v. M.Q.M through Deputy Convener* [PLD 2014 SC 531], & *Baz Muhammad Kakar v. Federation of Pakistan* [PLD 2012 SC 923].
[15] *Article 142(a) of Constitution of the Islamic Republic of Pakistan*, 1973.

authorised by or under the Constitution, the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers." By the plain reading of this Entry, it is clear that for Parliament to derive power from Entry No.55 to enact PAPA, a two-stage requirement needs to be fulfilled. Firstly, PAPA has to be in relation to a '*jurisdiction'* conferred by the Constitution or by or under any law as stipulated by Article 175(2) of the Constitution. Secondly, it needs to have an enlarging effect on the '*jurisdiction*' of the Supreme Court.

15. Regarding the first question, as stated above, the PAPA is a procedural law that does not confer any jurisdiction (substantive right or duty) on the Court, except for section 5 only, which provides the right of intra-court appeal against a judgment of this Court under Article 184(3) of the Constitution which in turn is an original jurisdiction. And so, the two-stage test is only to be seen to the extent of section 5. As I reckon, the word *'jurisdiction'* in Entry No.55 is in reference to the term '*jurisdiction'* used in Article 175(2). Still, an important distinction to note is that a jurisdiction so conferred by the Constitution can only be enlarged by a constitutional amendment and cannot be done by an ordinary Act of Parliament unless such an enlargement is expressly authorised by or under the Constitution. It was held by this Court in *Wukala Mahaz Barai Tahafaz Dastoor*[16] that "*as to the plea that paragraph (6) to Article 63A of the Constitution excludes the judicial review of the Courts and militates against Item No.55 of the Federal Legislative List, which envisages that the jurisdiction of the Supreme Court could not be curtailed, it may be observed that Item No.55 in the Federal Legislative List applies to ordinary legislative powers and not to Constitutional amendment.*" Similarly, in *National*

[16] *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan* [PLD 1998 SC 1263].

Industrial Cooperative Credit Corporation,[17] this Court held that "*powers and jurisdiction conferred on the Supreme Court by the Constitution can neither be interfered with nor varied nor taken away by the Legislature. However, the jurisdiction of the Supreme Court can be enlarged, and supplementary powers can be conferred on the Supreme Court by "law" in view of Article 175(2) of the Constitution, and Entry No.55 read with Article 142(a) of the Constitution leave no doubt that such enlargement of the jurisdiction and conferment of supplementary powers can only be done through law made by Federal Legislature*." This makes it clear that Entry No.55 does not rescue PAPA for the reason that the majority Act is a procedural law and is not covered by Entry No.55. Section 5 provides a jurisdictional right against a constitutional jurisdiction which does not come under the scope of Entry No.55 because a constitutional jurisdiction can only be varied or enlarged if expressly authorised by or under the Constitution, whereas no such authorisation has been provided under Article 184 nor Article 185.

16. I am not required to ponder and address the second requirement as the first requirement has failed, but for clarity of some aspects connected to the first question, I deem it fit to address it briefly. To me, enlargement is a concept that describes the process of increasing the size or shape of a subject matter without altering its shape or proportions. Let me start by pointing out that the right of appeal under section 5 is not an enlargement of the original jurisdiction of Article 184(3) nor the appellate jurisdiction of Article 185 of the Constitution. Section 5 confers a new right of intra-court appeal, which did not exist prior to the enactment of section 5 of the PAPA, and so, is creating a jurisdiction and

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[17] *The Province of Punjab v. National Industrial Cooperative Credit Corporation* [2000 SCMR 567].

not enlarging it. This certainly cannot be done under Entry No.55, as its scope is limited to the enlargement of pre-existing jurisdiction conferred by law, and not the creation of a new jurisdiction. The same was held in Baz Muhammad Kakar (*supra*), where it was stated in paragraph 37 that "t*he enlargement of jurisdiction is to be understood under the Constitution that the jurisdiction of the Supreme Court may be extended territorially like adhering to Articles 246 and 247 as well as to confer further judicial powers and also conferring supplemental powers to expand the scope of the powers, which it is already exercising*". The last phrase, "*which it is already exercising",* makes it clear that the jurisdiction has to pre-exist the Act if it is to enlarge the scope of jurisdiction. So, the PAPA also fails to qualify the second requirement as it does not deal with any existing jurisdiction conferred by law but has tried to create a new constitutional jurisdiction through an ordinary Act of Parliament, which it has no power to do.

17. Recourse to Entry No.58 would also be incorrect since it is a settled principle of law that if there is a restriction in one legislative entry about a particular subject matter, that restriction extends to all other general applicable entries on the said matter.[18] For regulating the practice and procedure of this Court, the body of the Constitution has limited the power of Parliament under Article 191, as discussed above. It is Entry No.55 that exclusively deals with the jurisdiction of this Court; therefore, no other entry of the Constitution can be relied upon for legislative competence. The same was held by this Court in the case of *Province of Punjab*[19] "*nevertheless, if we read the legislative lists in the manner that they should be read, namely, that if there is a specific provision for a special*

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[18] *Bourke v. State Bank of NSW* [(1990) 170 CLR 276].
[19] *Pakistan v. Province of Punjab* [PLD 1975 SC 37].

subject in a particular item of a particular list, then that subject falls within that item of the said list and not under any general item". Hence, to say that Entry No.58, read with Article 191, provides competence to Parliament to legislate would undermine the fundamental framework of the Constitution by annihilating the objective of Article 191, which is to preserve and promote separation of powers between the judiciary and the executive. Also, in Part I of the Fourth Schedule of the Federal Legislative List, there are 59 entries, and to say that the practice and procedure of this Court will be covered under Entry No.58, which is a general clause on matters that "*relate to the Federation*", will in effect, cover every other entry in the schedule making the other entries redundant and purposeless. This certainly cannot be the intention of the Constitutional drafters. Under the Fourth Schedule, entries where the Court has been expressly mentioned are the only entries applicable. Consequently, this Court's practice and procedure cannot be legislated under Entry No.58.

18. Article 191 of the Constitution clearly states that it is the responsibility of the Supreme Court to make its own rules regarding its practice and procedure. One may wonder why the Constitution has given the Supreme Court the exclusive power to make these rules and why not the Parliament or the Executive. The simple answer is to preserve the trichotomy of powers, but an in-depth reading uncovers further insights. This Court can regulate its practice and procedure under Article 191 for the following reasons: Firstly, the technicality in day-to-day proceedings and administration of the Court. This technical factor will be discussed later in this judgment and will highlight how the PAPA creates more complexities than it resolves. Secondly, the efficiency of this Court. It is apposite to state here that Parliament cannot be permitted to encroach on

the administrative domain of this Court, for such intrusion inevitably will result in unforeseen contingencies. If allowed, only Parliament itself will be able to address these contingencies, as it would effectively assume control of the Court's administration. The process of enacting changes and amending laws within Parliament is time-consuming and does not align with the Court's or the interest of the public at large. This intrusion also undermines the efficiency and seamless operation of this Court, enabling another institution to assume control of its administration, consequently impacting the dispensation of justice to the nation. Thirdly, delegating powers to this Court to regulate its practice and procedure puts this Court in a position to use its discretion for speedy and flexible adjustment to new practical and technical developments without activating the legislative or executive machinery in motion for necessary amendments. Fourthly, urgent emergency powers where the national interest demands rapid and effective action, and thus, it is in democratic interest to equip this Court with extraordinary powers, such as to fix urgent matters before available judges, etcetera. In my view, for the noted reasons, the Constitution exclusively vests in the Supreme Court the power to regulate its practice and procedure so that not only trichotomy of powers can be preserved, but under the regulatory Article 191, this Court can also deal with all matters of administration, as it is most suited to do so. The Constitution ensures that the Court may establish detailed rules consistent with the Constitutional framework established for the smooth functioning of this Court and the perseverance and promotion of democracy. Therefore, the failure or omission to call a full court for the necessary amendment to SCR, as was argued before us and in Parliament, cannot be construed as giving the Parliament the right to intrude into the judicial domain and enact a law such as the PAPA without legislative competence. Such an

eventuality can only occur if the Constitution plainly says so, and since it does not, a constitutional amendment may be required for such an action.

19. I have now reached the stage to evaluate the argument that claims that the PAPA has brought transparency in the day-to-day affairs of the Supreme Court, efficiency in its work, and increased its independence. To assess the soundness of this argument, we must remember that the marrow of the fundamental right of access to justice comprises the independence of the judiciary and speedy and inexpensive justice. If any legislation runs afoul of these aspects, it is deemed null and void. So, let's scrutinise the material provisions of the PAPA and determine whether they bolster or impede the independence and efficiency of the Supreme Court.

20. First comes section 2, which provides:

> ***2. Constitution of Benches.-***
> *(l) Every cause, appeal or matter before the Supreme Court shall be heard and disposed of by a bench constituted by the Committee comprising the Chief Justice of Pakistan and the two next most senior judges, in order of seniority.*
> *(2) Soon after commencement of this Act, the Committee constituted under sub-section (l) shall hold its first meeting to determine its procedure, including for holding meetings and constitution of Benches etc:*
> *Provided that, till such time the procedure is determined under this sub-section, the meeting of the Committee for the purposes of sub-section (1) shall be convened by the Chief Justice or other two members of the Committee, as the case may be.*
> *(3) The decisions of the Committee shall be by majority.*

To assess this section's effect in practice, we must consider the inevitable implications. Before doing so, it is important to briefly note here that the rules regulating the procedure that is to be framed under sub-Section (2) of Section 2 cannot go beyond the scope of the Act, and consequently, the Committee is not authorised to address any shortcomings in the PAPA.

There are several defects in this section which can only be corrected via further legislation since the field which the SCR previously occupied is now sought to be occupied by the PAPA. By the plain reading of this section, the following are the unavoidable corollaries. Firstly, if one of the judges on the committee is not present, who will replace that member? Legally, no judge or other person can replace a member of the committee unless the Parliament amends section 2 in a way that delegates such powers to the committee to appoint a temporary member in the absence of one member. Secondly, what if the two members of the committee decide to send the Chief Justice to another provincial branch registry. As absurd as it sounds, it can very much be done, which will have serious consequences as the Chief Justice is the administrative head of this Court and has a crucial role in the day-to-day affairs. Lastly, what if one member of the committee is out of the country, the other becomes indisposed, and there is a severe national emergency; there is no remedy provided in the PAPA to deal with such a situation, and as a result, chaos would ensue, and the entire system would be disrupted. Again, it is crucial to note that these challenges will only increase over time, and the Court lacks any remedy to address these problems. This will significantly undermine institutional efficacy and render it largely unworkable.

21. There are two things to be noted about sections 3 and 4 of the PAPA, which are as follows:

> ***3. Exercise of original jurisdiction by the Supreme Court.*** *Any matter invoking the exercise of original jurisdiction under clause (3) of Article 184 of the Constitution shall be first placed before the Committee constituted under section 2 for examination and if the Committee is of the view that a question of public importance with reference to enforcement of any of the fundamental rights conferred by Chapter I of Part II of the Constitution is involved, it shall constitute a bench comprising*

> *not less than three judges of the Supreme Court of Pakistan which may also include the members of the Committee, for adjudication of the matter.*
> ***4. Interpretation of the Constitution.-*** *In the matters where interpretation of the constitutional provision is involved, Committee shall constitute a Bench comprising not less than five Judges of the Supreme Court.*

The first is that under section 3, a matter invoking the original jurisdiction of this Court under Article 184(3) shall be first placed before the Committee constituted under section 2, which, in essence, means that the committee will decide whether a petition under Article 184(3) is maintainable or not. The problem with this is that the Constitution under Article 184(3) contemplates that the issue of maintainability has to be decided by this Court in its judicial capacity, whereas the committee of three judges is an administrative function. The question arises whether this judicial function bestowed on this Court by the Constitution itself can be delegated to an administrative body. I am afraid the answer, simply, is no. A judicial function is one where a court decides a matter as per law after hearing arguments for and against a case.[20] This has also been settled in our jurisprudence that the issue of maintainability of a petition can only be decided judicially unless otherwise provided.[21] For the administrative committee to decide on maintainability, a constitutional amendment to Article 184(3) is required and cannot be done through ordinary legislation. Thus, on this point alone, section 3 is ultra vires the Constitution, but the second point must also be addressed to comprehend PAPA's actual effect better. The second part of the section provides that for matters of fundamental rights invoking Article 184(3), not less than a

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[20] *P. Surendran v. State* [2019 SCC Online SC 507].
[21] *All Pakistan Newspaper Society v. Federation of Pakistan* [PLD 2004 SC 600], *Farman Ali v. Muhammad Ishaq* [PLD 2013 SC 392] & *Qausain Faisal v. Federation of Pakistan* [PLD 2022 SC 675].

three-member bench is to be constituted by the committee. Section 4 of the PAPA seeks for the constitution of at least a five-member bench for matters involving interpretation of the Constitution. Matters of fundamental rights, unquestionably, are matters of constitutional interpretation. Under section 3, a three-member bench can interpret these constitutional provisions, but under section 4, a three-member bench cannot. As a direct result, section 3 and section 4 are contradictory and, thus, anomalous. What also must briefly be noted is that thousands of cases each year are filed before this Court, many of which raise questions of constitutional interpretation; if all such cases are to be placed before a five-member larger bench, this will, again, adversely affect the administration of justice by this Court, where already 50,000 and more cases are pending. This demonstrates how the PAPA impedes the speedy administration of justice through its asinine nature.

22. As discussed above, the PAPA is a procedural law that governs the practice and procedure of the Supreme Court. However, section 5 is the only section of the PAPA which provides a substantive right of appeal against an order passed under the original jurisdiction, that is, Article 184(3), which is not a matter of procedure.[22] Thus, it is clear that reference to Article 175(2) in the preamble of the PAPA appears only to the extent of section 5, as that is the only section which deals with the *'jurisdiction'* of this Court. It is reiterated that Article 175(2) stipulates only two types of jurisdictions conferred on the Supreme Court, one by the Constitution itself and the other by or under the statute. The Constitution confers different jurisdictions on the Supreme Court, which includes

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[22] *Pakistan International Airlines Corporation v. Pak Saf Dry Cleaners* [PLD 1981 SC 553] &
Manzoor Ali v. United Bank Limited [2005 SCMR 1785].

original jurisdiction, appellate jurisdiction, and advisory jurisdiction. Here, we are concerned with the original jurisdiction, which cannot be expanded or restricted by an Act of parliament. Two more things are worth noting about this. One, the right of appeal is not provided by the Constitution against an order made under Article 184(3). Second, such a right, as stated above, cannot be granted by making an Act under Entry No.55 of the Federal Legislative List. This is because, under Article 184(3), the Supreme Court only deals with matters of public importance and not individuals. These matters are about fundamental rights and require prompt attention for finality and certainty. If these issues are left unattended or at the mercy of the vicissitude of the ladder of litigation, it can negatively impact public welfare, peace and order in the Country. Therefore, no right of appeal was provided on purpose and knowingly by the drafters of the Constitution. Even so, the Parliament has provided an appeal under Section 5 of the PAPA, which, in my view, violates the Constitution and extinguishes the swiftness of the Supreme Court in redressing wrongs about fundamental rights apart from extending and increasing litigation. Given this situation, I think this Court, through the practice of judicial review, is obliged to hold that the will of the whole people, as expressed in the Constitution, is supreme over the will of the Parliament, whose statute expresses only the temporary will of part of the people.[23]

23. It is taken as read that the justice delivery system is the bedrock of the rule of law, which is a salient feature of our Constitution. It is my view that in the absence of an independent, effective and efficient court system, it would not be possible to sustain the rule of law in the

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[23] *The Federalist papers No.78 (Hamilton).*

Country. It is, therefore, necessary that the courts should be allowed to perform their functions in an atmosphere of independence and should be free from all kinds of interference from within or outside. The autonomy is not a matter of compromise; it is the soul and inner strength of the Supreme Court, which helps it safeguard the fundamental rights and civil liberties of the people against executive actions and encroachment by other powerful groups. Therefore, the Constitution by Article 175(3) mandated that the judiciary be separated from the executive. In contrast, the upshot of the discussion about the effects of the material provisions of the PAPA leads me to an irresistible conclusion that the PAPA is a spanner in the free and efficient functioning of the Supreme Court, which is requisite to guard the Constitution. So, on this count, too, the PAPA cannot sustain.

24. I, therefore, allow these petitions in light of the interpretation adopted by me and declare the PAPA to be ultra vires the Constitution.

25. Hereinabove are my reasons for the short order dated 11th of October, 2023.

Judge

Islamabad,
Sarfraz Ahmad & Agha M. Furqan, L.C/-

"Approved for reporting"