Muhammad Ali Mazhar, J.— By means of our short order dated 11.10.2023, and for reasons to be recorded later, by a majority of 10 to 5 the Supreme Court (Practice and Procedure) Act, 2023 ("**the Act**") was sustained as being in accordance with the Constitution of the Islamic Republic of Pakistan, 1973 ("**the Constitution**"), and to this extent the petitions were dismissed. In unison, by a majority of 8 to 7, granting a right of appeal with retrospective effect was declared to be *ultra vires* the Constitution, while the conferral of a prospective right of appeal was held to be *intra vires* the Constitution by a majority of 9 to 6.

2. Though I have advocated and reinforced the majority view with regard to the legitimacy and constitutionality of the Act, but in tandem I have declared the retrospective/retroactive right of appeal conferred under sub-section (2) of Section 5 of the Act *ultra vires* the Constitution to the extent of the retrospective application thereof. In order to explicate the aforementioned position, I am adding separate reasons in aid of the short order and the same are segregated into two limbs, i.e. (i) concurring analysis for judicial comity pertaining to the declaration of a segment of the Act as *intra vires*, and (ii) dissenting analysis with regard to declaring the right of filing appeal with retrospective effect *ultra vires*. For convenience, my reasons are categorized into the following headings:

1. Legislative Competence

3. According to the mandate and command of Article 141 of the Constitution, the *Majlis-e-Shoora* (Parliament) may, subject to the Constitution, make laws for the whole or any part of Pakistan and a Provincial Assembly may make laws for the Province or any part thereof; whereas under Article 142 of the Constitution, the *Majlis-e-Shoora* (Parliament) has exclusive powers to make

laws with respect to any matter in the Federal Legislative List. Article 175 of the Constitution accentuates the establishment and jurisdiction of courts, including the Supreme Court of Pakistan, the High Court for each Province, the High Court of Islamabad, and such other courts as may be established by law, with the rider and qualification 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. Last but not least, Article 191 of the Constitution elucidates that, again subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court. While construing and analyzing Article 142 of the Constitution in this interrelated context, Entries No.55 and 58 of the Federal Legislative List provided in the Fourth Schedule to the Constitution ("**Federal Legislative List**") cannot be disregarded or marginalized as they have direct nexus with the controversy emanating and stemming from the aforesaid petitions.

> "**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 authorised 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".

4. While interpreting the Constitution, it is to be read as a whole without obliterating or annihilating the other provisions to ensure the rule of harmony. To understand its primordial and elemental commandments, and the language used in various Articles, it is necessary to consider the historical background and the textual and structural substratum for its literal interpretation with liberal enforcement. It is a well settled exposition of law that a written constitution is, in essence, a form of statute which needs to be interpreted liberally and read holistically as an organic document which contemplates the trichotomy of powers between the three organs of the State, namely, the Legislature, the Executive, and the Judiciary. The doctrine of pith and substance places considerable emphasis on figuring out the distinct attributes of constitutional provisions, and the doctrine of purposive interpretation lays down a duty upon the courts to interpret the statute or the Constitution keeping in mind the purposefulness for which the provision in question was legislated while adopting a result-oriented approach, rather than construing it in a restrictive or stringent sense. According to *Salmond on Jurisprudence* (12th ed.) by P. J. Fitzgerald, M.A., at page 132, interpretation or construction is the

process by which the courts seek to ascertain the meaning or intention of the legislature through the medium of the authoritative forms in which it is expressed.

5. The litmus test for gauging legislative competence is unambiguously stated under Article 141 of the Constitution, i.e. that the Parliament, subject to the Constitution, is authorized to promulgate the laws for the whole or any part of Pakistan, and also possesses powers under Article 142 of the Constitution to make laws with respect to any matter enumerated in the Federal Legislative List. The Constitution plainly lays down under Article 175 that no Court shall have any jurisdiction unless conferred on it by the Constitution or by or under any law. So far as Article 191 is concerned, it is quite visible that, subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court. A glimpse at the statement of objects and reasons for the Act in question depicts that the exercise of original jurisdiction by the Supreme Court under clause (3) of Article 184 of the Constitution, invocation of *suo motu* jurisdiction, constitution of benches, and the absence of a right of appeal remained under discussion at different strata and echelons and certain reservations were expressed in this regard. Therefore, in order to streamline and restructure some procedural intricacies, and to ensure the right to a fair trial and due process of law as enshrined under Article 10A of the Constitution, as well as provide the remedy of an Intra Court Appeal, the Parliament promulgated the Act pursuant to Article 175(2) read with Article 191 of the Constitution. For all intents and purposes, I have no hesitation or reluctance in holding that the Parliament can make laws in relation to the Federal Legislative List. As earlier observed, Entry No.55 of the Federal Legislative List is germane to the Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in the List and, to such extent as is expressly authorised by or under the Constitution, the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers. In contrast, Article 175 explicates that no Court shall have any jurisdiction unless conferred on it by the Constitution or by or under any law. The simple dictionary meaning of the word 'enlargement' used in Entry No.55 is to make larger or wider, increase the size or extend in scope, intensify, make more comprehensive, expand, amplify or broaden [Ref: *Shorter Oxford Dictionary* (6th ed.), Vol. I, page 836]. Whereas, in juxtaposition, according to *Words and Phrases* (Permanent ed.), Vol. 23A, (pages 181 & 211), (1) "Jurisdiction" refers to court's power to adjudicate any issue or cause submitted to it; "practice" or "procedure" refers to manner in which power to

adjudicate is exercised [Sheldon v. Powell, 125 So. 258, 263, 10 Fla. 782]; (2) "Jurisdiction" is power to hear and determine a cause while "procedure" is the mode of proceeding by which a legal right is enforced [Snow v. Cincinnati St. Ry. Co., 75 N.E.2d 220, 222, 80 Ohio App. 369]; (3) "Jurisdiction of court" means power or authority, conferred upon a court by constitution and laws, to hear and determine causes between parties and to carry its judgments into effect, and this character of Jurisdiction cannot be conferred upon a court by consent of the parties [McBride v. McBride, Tex.Civ. App., 256 S.W.2d 250, 254]; and (4) "Jurisdiction of a court" is that power which is conferred upon it by law and by which it is authorized to hear, determine, and render final judgment in an action and to enforce its judgment by legal process [Jacubenta v. Dunbar, 198 N.E.2d 674, 675, 120 Ohio App. 249].

6. It is a well-known principle that the entries in the legislative lists represent fields of legislation which must receive the broadest and most expansive interpretation, and are construed to encompass all ancillary or subsidiary matters which can reasonably be said to be comprehended in them. In case of discord or overlap with other entries, the rule of harmonious construction is applied to reconcile the conflict for giving effect to each of the entries. The items mentioned in the list cannot be read in a narrow or restricted sense but rather should be given a wide and liberal interpretation without constricting it with technical considerations, and each general word should be held to extend to all ancillary or subsidiary matters which can reasonably be said to be comprehended in it. In the case of M/s Elahi Cotton Mills Ltd. and others v. Federation of Pakistan thr. Secretary M/o Finance, Islamabad and 6 others (**PLD 1997 SC 582**) it was held that the entries in the Legislative List of the Constitution are not powers of legislation but only fields of legislative heads. The allocation of the subjects to the lists is not by way of scientific or logical definition but by way of mere simple enumeration of broad catalogue. An entry in the Legislative List must be given a very wide and liberal interpretation. Similarly, in the case of Government of Sindh thr. Secretary, Health Department and others v. Dr. Nadeem Rizvi and others (**2020 SCMR 1**), this Court held that the legislative lists must be liberally construed and given the widest possible meaning and amplitude. In this regard, reference may be made to the judgment reported as M/s Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others (2018 SCMR 802) in which this Court, while declaring the Industrial Relations Act, 2012 to be *intra vires* the Constitution, extensively considered case law from the Indian and Pakistani jurisdictions

regarding interpretation of legislative lists in a constitution and laid down the following principles of interpretation:-

> i. The entries in the Legislative Lists of the Constitution are not powers of legislation but only fields of legislative heads;
>
> ii. In construing the words in an Entry conferring legislative power on a legislative authority, the most liberal construction should be put upon the words;
>
> iii. While interpreting an Entry in a Legislative List it should be given widest possible meaning and should not be read in a narrow or restricted sense;
>
> iv. Each general word in an entry should be considered to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it;
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> v. If there appears to be apparent overlapping in respect of the subject-matter of a legislation, an effort has to be made to reconcile the Entries to give proper and pertinent meaning to them;
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> vi. A general power ought not to be so construed so as to make a particular power conferred by the same legislation and operating in the same field a nullity;
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> vii. Legislation under attack must be scrutinized in its entirety to determine its true character in pith and substance; and
>
> viii. After considering the legislation as a whole in pith and substance, it has to be seen as to with respect to which topic or category of legislation in the various fields, it deals substantially and directly and not whether it would in actual operation affect an item in the forbidden field in an indirect way.

7. There was much debate regarding the right of an Intra Court Appeal, and it was repeatedly argued that the same cannot be conferred through an act of Parliament, but requires a constitutional amendment. As a comparative study, I pored over the Constitution of India to survey their legislative process and through this exercise I found that the subject-matter of laws made by Parliament and by the Legislatures of States is provided under Article 246 whereby the Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (Union List), while for the matters enumerated in List II (State List), the Legislature of any State has exclusive power to make laws for such State or any part thereof; and for the maters enumerated in List III (Concurrent List), both the Parliament and the Legislature of any State have powers to make laws. Entry No.77 of List I

(Union List) of the Seventh Schedule to the Constitution of India pertains to the *"Constitution, organization, jurisdiction and powers of the Supreme Court (including contempt of such Court); and the fees taken therein; persons entitled to practise before the Supreme Court"*. Under the aforesaid law-making powers, the Parliament of India promulgated the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 on 9th August, 1970. In the matter presently before us, the Parliament has, by virtue of the Act, made some procedural and substantive provisions which the Parliament was competent to legislate within the purview and premise of Articles 141, 142 and 175 of the Constitution, read with Entries No.55 and 58 of the Federal Legislative List. Entry No.55 of Federal Legislative List was discussed and deliberated in the following dicta laid down by this Court as under:-

1. Baz Muhammad Kakar and others v. Federation of Pakistan thr. Ministry of Law and Justice and others (**PLD 2012 SC 923**)

> "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.
>
> (…)
>
> 36. Under Article 70 of the Constitution, the Parliament is authorized to make laws with respect to any matter in the Federal Legislative List by adopting procedure laid down in the Constitution. 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. Reference in this

behalf may be made to the case of Syed Mukhtar Hussain Shah v. Mst. Saba Imtiaz (PLD 2011 SC 260), Mumtaz Hussain v. Dr. Nasir Khan (2010 SCMR 1254), Kamaluddin Qureshi v. Ali International Co. (PLD 2009 SC 367), Pakistan through Secretary Finance v. M/s Lucky Cement (2007 SCMR 1367), Federation of Pakistan through Secretary Ministry of Finance v. Haji Muhammad Sadiq (PLD 2007 SC 67), Mushtaq Ahmed v. Secretary, Ministry of Defence (PLD 2007 SC 405), Syed Masroor Shah v. State (PLD 2005 SC 173), Federation of Pakistan v. Annnar Textile Mills (Pvt.) Ltd. (2002 SCMR 510), World Trade Corporation v. Excise and Sales Tax .4 Appellate Tribunal (1999 SCMR 632) and State Cement Corporation of Pakistan Ltd. v. Collector of Customs, Karachi (1998 SCMR 2207).

37. We believe that there could not be any other view except that the Constitution· favours enlargement of the jurisdiction of the Supreme Court and conferment of supplemental powers. The 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.(…)"

2. Wukala Mahaz Barai Tahafaz Dastoor and another v. Federation of Pakistan and others (**PLD 1998 SC 1263**)

Per Irshad Hasan Khan, J., in his concurring note:

"43. 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. Clause (2) of Article 175 of the Constitution itself provides that no Court shall have jurisdiction save as is or may be conferred on it by the Constitution or by or under any law. Nevertheless independence of Judiciary which is guaranteed by the Objectives Resolution which is now the substantive part of the Constitution cannot be abridged or abrogated."

3. The Province of Punjab and another v. National Industrial Cooperative Credit Corporation and another (**2000 SCMR 567**)

"16. Coming now to the present Constitution of 1973, it may be observed that, according to Mr. Abid Hassan Minto, learned counsel for the Government of Punjab, in view of Article 175(2) of the Constitution, under which jurisdiction can be conferred on any Court including the Supreme Court by or under any law, in relation to matters in respect of which Provincial Legislatures have power to make laws (including Cooperative Societies), additional/supplemental jurisdiction or powers can be conferred on the

Supreme Court by the Provincial Legislatures as the "law" mentioned in Article 175(2) includes a Provincial law and additional/supplemental jurisdiction or powers in the form of an appeal to the Supreme Court under section 22 of the impugned legislation was being conferred on the Supreme Court in respect of a matter on which Provincial Legislatures have exclusive jurisdiction under the Constitution to enact laws. Learned counsel also relied on the observation made by the Sindh High Court in the case of Inamur Rehman v. Federation of Pakistan (PLD 1977 Karachi 524). Passage relied upon appears at page 532 of the report and it reads as follows:--

Item 55 of the Federal Legislative List in the Interim Constitution brings within the scope of the Federal Legislature the jurisdiction and powers of the Courts, except the Supreme Court, in respect of matter within its legislative field, and even in respect of the Supreme Court, it conferred powers upon the Central Legislature to enlarge its jurisdiction and confer supplemental powers therein. So far the Permanent Constitution is concerned, Article 175(2) thereof expressly provides that 'no Court shall have jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.' It is, thus, permissible for the appropriate Legislature, acting within the scope of its Constitutional powers, to take away or enlarge the jurisdiction of any Court or enact that a particular matter shall not be determined by normal Courts, except that the Legislature cannot, abridge the Constitutional jurisdiction and powers of the superior Courts save by way of amendment of the Constitution.

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 it 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 along with 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."

8. It is pertinent to mention that the provision of a right of appeal to the Supreme Court through an ordinary act of Parliament is not a unique or novel idea and has, in the past, been supported by various pieces of legislation, as listed below, and such rights of appeal, or leave to appeal, are in addition to the jurisdiction conferred by Article 185 of the Constitution:

Sr. No.	Law	Section Conferring Appeal
1.	**Competition Act, 2010**	**44. Appeal to Supreme Court.—** Any person aggrieved by an order of the Competition Appellate Tribunal may prefer an appeal to Supreme Court within sixty days.
2.	**Newspaper Employees (Conditions of Service) Act, 1973**	**13A. Appeal from sentence of Tribunal. —** Any person convicted and sentenced by the Tribunal under section 55 of the Ordinance to imprisonment for any period not less than six months may, with the leave of the Supreme Court, prefer an appeal to that Court.
3.	**Contempt of Court Ordinance, 2003** **(See: Article 204 (3) of the Constitution)**	**19. Appeal.---**(1) Notwithstanding anything contained in any other law or other rules for the time being in force, orders passed by a superior Court in cases of contempt shall be appealable in the following manner:--- (i) (…) (ii) in a case in which the original order has been passed by a Division or larger Bench of a High Court an appeal shall lie to the Supreme Court; and (iii) in the case of an original order passed by a Single Judge or a bench of two Judges of the Supreme Court an intra-Court appeal shall lie to a Bench of three Judges and in case the original order was passed by a Bench of three or more Judges an intra-Court appeal shall lie to a Bench of five or more Judges.
4.	**Legal Practitioners and Bar Councils Act, 1973**	**48. Appeal to the Supreme Court.**__ Any person aggrieved by an order made by the disciplinary committee of the Pakistan Bar Council under subsection (3) of section 46 or subsection (2) of section 47 or a final order of a Tribunal of the Pakistan Bar Council, may, within sixty days from the date on which the order is communicated to him, prefer an appeal to the Supreme Court which may pass such order thereon as it may deem fit.

		9. Power of the Commission to declare a poll void.— (5) Any person aggrieved by a declaration of the Commission under this section may, within thirty days of the declaration, prefer an appeal to the Supreme Court.
		155. Appeal against decision of Election Tribunal.— (1) Any person aggrieved by the final decision of the Election Tribunal in respect of an election petition challenging election to an Assembly or Senate may, within thirty days of the date of the decision, appeal to the Supreme Court.
5.	**Elections Act, 2017**	**202. Enlistment of political parties.**— (6) A political party which has been refused enlistment or whose enlistment has been cancelled under this section may, within thirty days of the refusal or cancellation of enlistment, file an appeal before the Supreme Court. (7) Where the Government declares that a political party has been formed or is operating in a manner prejudicial to the sovereignty, or integrity of Pakistan, it shall within fifteen days of such declaration refer the matter to the Supreme Court.

9. The minutiae of Article 191 of the Constitution enunciate that subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court. The interpretation of the phrase *"subject to"* was a source of heated debate during the course of the proceedings in this case and the learned counsel articulated a plethora of diverse interpretations thereof. The indispensable and imperative duty of the Court in interpreting a law is to discover the intention of the legislature in enacting the law and then endeavor to interpret the statute in order to promote or advance the object and purpose of the enactment. In the case of Dada Soap Factory Limited v. Commissioner of Income Tax, Central Zone B, Karachi (**1987 PTD 420**), the Court held that the words 'subject to' are not descriptive words but impose conditions and obligations, whereas in the case of Islamic Republic of Pakistan thr. Secretary, M/o Interior and Kashmir Affairs, Islamabad v. Abdul Wali Khan, MNA (**PLD 1976 SC 57**), this Court held that the expression 'subject to' has also been defined as "conditional upon or dependent upon" or exposed to (some contingent action), being under the contingency. In the case of Gram Panchayat, Gorakhpur vs. Khushali Dindayal Sahu (**AIR 1973 MP 19**), the learned court held that the words "subject to rules made in this behalf" or similar words are commonly employed in enactments where the legislature contemplates framing of rules in exercise of delegated powers, and this expression has to be interpreted according to the context in which it is

employed. In each case the scheme and the provisions of the Act have to be examined. Where power is conferred and machinery for its exercise already exists, it can be said that the expression "subject to rules made in this behalf" has merely an overriding effect so that if any such rules are made, the exercise of the power shall be subject to such rules, but where a special power is conferred and there is nothing to regulate its exercise, then that expression connotes that the power can be exercised only when the rules are framed and in accordance with them. To put it differently, in the former case the rules will be considered to supplement the section, whereas in the latter case they will complement the section. In the former case, the law is complete even without the rules such that the rules, if any framed, would have overriding effect and, in that case, the power will be exercised only in accordance with them, but in the latter case the law is incomplete and was deliberately left so by the legislature to be completed by delegated legislation pursuant to the relevant rule-making powers. The phrase "subject to" signifies both these meanings i.e. (1) liable or exposed to: likely to have; and (2) dependent or conditional on.

10. Procedural law sets out to activate the process and course of action through which the lawsuit moves on and the way in which court proceedings are undertaken and it also regulates and oversees the procedures employed. Substantive law, on the other hand, denotes the statutory obligations which relate to the subject matter, proclaims the relevant rights and obligations, and regulates the demeanor of an individual or government. Jeremy Bentham, an English philosopher, jurist, and social reformer first coined the terms 'substantive laws' and 'adjective laws' (i.e. procedural laws) in his book *The Works of Jeremy Bentham* while describing the procedure and course taken for the execution of laws in 1843. However, he stated that in jurisprudence both procedural and substantive laws should co-exist, and neither can exist without the help of the other. Similarly, Thomas Holland, the British jurist, in his book *The Elements of Jurisprudence* defined 'substantive law' as the laws which specify the way the laws will aid to protect rights, whereas 'adjective laws' or 'procedural laws' are the laws which provide the methods of aiding and protecting the rights. According to Salmond, as stated in *Introduction to Jurisprudence* (3rd ed. Reprint, 2011) by Dr. Avtar Singh & Dr. Harpreet Kaur, the law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions, *jus quod ad actiones pertinet*, which includes all legal proceedings, civil or criminal. Salmond has drawn the following distinctions between substantive law and procedural law: (i) Substantive law determines the conduct and relations of the parties *inter se* in

respect of the matter litigated, whereas the procedural law regulates the conduct and relations of Courts and litigants in respect of the litigation; (ii) Substantive law deals with the ends which the administration of justice contemplates while the procedural law deals with the means and instruments by which the ends of administration of justice are to be attained; (iii) The question as to what facts constitute a wrong is determined by the substantive law, while what facts constitute proof of a wrong is a question of procedure; (iv) Substantive law defines the rights whereas the law of procedure defines the modes and conditions of the application of one to the other; and (v) Substantive law relates to the matter outside the Courts, whereas the procedural law regulates affairs inside the Courts [Ref: Judgment authored by me, Meeru Khan v. Mst. Naheed Aziz Siddiqui and others (**PLD 2023 SC 912**)].

2. Doctrine of *Intra Vires* and *Ultra Vires*

11. The learned counsel for the petitioners collectively argued that the whole of the Act is *ultra vires* the Constitution. The terms '*intra vires*' and '*ultra vires*', both Latin phrases, are diametrical opposites. *Ultra vires* is an expression which means "beyond the powers". If an act entails legal authority and it is done with such authority, it is symbolized as "*intra vires*", that is, within the precincts of powers, but if it is carried out shorn of authority, it is "*ultra vires*". It is well settled that the constitutionality of any law can be scrutinized and surveyed and the law can be struck down if it is found to be offending the Constitution due to an absence of law-making and jurisdictive competence, or found in violation of the fundamental rights enshrined therein. At the same time, it is an established precept of the interpretation of laws, one backed by judicial sagacity and prudence in the form of numerous precedents of the superior Courts, that the law should be saved rather than be destroyed and the court must lean in favour of upholding the constitutionality of legislation unless it is *ex facie* violative of a constitutional provision. An action of an authority is "*intra vires*" when it falls within the limits of the power conferred on it but "*ultra vires*" if it goes outside this limit. The function of judiciary is not to legislate or question the wisdom of the legislature in making a particular law, nor can it refuse to enforce a law. However, where practicable, the doctrine of severability may be used to preserve those parts of the statute that are constitutional, as discussed hereinbelow. The following principles can be deduced from the aforementioned dicta for striking down or declaring a legislative enactment void or unconstitutional:

1. Baz Muhammad Kakar and others v. Federation of Pakistan and others (**PLD 2012 SC 923**), it was held that the doctrine of severability permitted a court to sever the unconstitutional portion of a partially unconstitutional statute in order to preserve the operation of any uncontested or valid remainder, but if the valid portion was so closely mixed up with the invalid portion that it could not be separated without leaving an incomplete or more or less mixed remainder, the court would declare the entire Act void. The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. The words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary. The superior courts time and again pronounced that any law which is inconsistent and in contravention of fundamental rights or which took away or abridged such rights, is void, to the extent of such contravention. Paramountcy of fundamental right is recognized by the Constitution limiting the powers of State organs to the extent that what had been conferred by the Constitution as fundamental rights could not be taken away or abridged by the State. What had been guaranteed by the Constitution as a fundamental right could not be annihilated or taken away in the garb of reasonable restrictions. The infringement of fundamental rights can be in many ways.

2. Federation of Pakistan and others v. Shaukat Ali Mian and others (**PLD 1999 Supreme Court 1026**), it was held that a colourable legislation is that which is enacted by a legislature which lacks the legislative power or is subject to Constitutional prohibition.

3. Benazir Bhutto v. Federation of Pakistan and another (**PLD 1988 Supreme Court 416**), it was held that vires of an Act can be challenged if its provisions are ex facie discriminatory in which case actual proof of discriminatory treatment is not required to be shown. Where the Act is not ex facie discriminatory but is capable of being administered discriminately then the party challenging it has to show that it has actually been administered in a partial, unjust and oppressive manner.

4. Dr. Mobashir Hassan and others v. Federation of Pakistan and others (**PLD 2010 SC 265**), it was held that a duty is cast upon the Supreme Court that it should normally lean in favour of constitutionality of a statute and efforts should be made to save the same instead of destroying it. Principle is that law should be saved rather than be destroyed and the court must lean in favour of upholding the constitutionality of legislation, keeping in view that the rule of constitutional interpretation is that there is a presumption in favour of the constitutionality of the legislative enactments, unless ex facie, it is violative of a constitutional provision. Where a statute is ex facie discriminatory but is also capable of being administered in a discriminatory manner and it appears that it is actually being administered to the detriments of a particular class in particular, unjust and oppressive manner then it has been void ab-initio since its inception.

5. Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others, (**2018 SCMR 802**), the Court held that when a law was enacted by the parliament, the presumption was that parliament had competently enacted it and if the vires of the same are challenged, the burden is always laid upon the person making such challenge to show that the same was violative of any of the fundamental rights or the provisions of the Constitution. Court should lean in favour of upholding the constitutionality of a legislation and it was thus incumbent upon the Court to be extremely reluctant to strike down laws as unconstitutional.

6. Lahore Development Authority thr. DG and others v. Ms. Imrana Tiwana and others (**2015 SCMR 1739**), this Court summarized the rules applicable while determining the constitutionality of a statute as follows:

(i) There was a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute was placed next to the Constitution and no way could be found in reconciling the two;

(ii) Where more than one interpretation was possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favoured validity;

(iii) A statute must never be declared unconstitutional unless its invalidity was beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;

(iv) Court should abstain from deciding a Constitutional question, if a case could be decided on other or narrower grounds;

(v) Court should not decide a larger Constitutional question than was necessary for the determination of the case;

(vi) Court should not declare a statute unconstitutional on the ground that it violated the spirit of the Constitution unless it also violated the letter of the Constitution;

(vii) Court was not concerned with the wisdom or prudence of the legislation but only with its Constitutionality;

(viii) Court should not strike down statutes on principles of republican or democratic government unless those principles were placed beyond legislative encroachment by the Constitution; and

(ix) Mala fides should not be attributed to the Legislature.

[Ref: Province of East Pakistan v. Siraj ul Haq Patwari (PLD 1966 SC 854); Mehreen Zaibun Nisa v. Land Commissioner (PLD 1975 SC 397); Kaneez Fatima v. Wali Muhammad (PLD 1993 SC 901); Multiline Associates v. Ardeshir Cowasjee (1995 SCMR 362); Ellahi Cotton Mills Limited v. Federation of Pakistan (PLD 1997 SC 582); Dr. Tariq Nawaz v. Government of Pakistan (2000 SCMR 1956); Mian Asif Aslam v. Mian Muhammad Asif (PLD 2001 SC 499); Pakistan Muslim League (Q) v. Chief Executive of Pakistan (PLD 2002 SC 994); Pakistan

Lawyers Forum v. Federation of Pakistan (PLD 2005 SC 719); Messrs Master Foam (Pvt.) Ltd. v. Government of Pakistan (2005 PTD 1537); Watan Party v. Federation of Pakistan (PLD 2006 SC 697); Federation of Pakistan v. Haji Muhammad Sadiq (PLD 2007 SC 133); and Iqbal Zafar Jhagra v. Federation of Pakistan (2013 SCMR 1337)]

12. The contextual substratum of the Act is characterized by both procedural and substantive provisions. For example, Section 2 provides that 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, and the decisions of the Committee shall be by majority. Whereas Section 3 postulates that any matter invoking 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 1 of Part II of the Constitution is involved, it shall constitute a Bench comprising not less than three Judges of the Supreme Court which may also include the members of the Committee, for adjudication of the matter. While Section 4 provides that where interpretation of the constitutional provision is involved; the Committee shall constitute a Bench comprising not less than five Judges of the Supreme Court. In addition thereto, Section 6 creates a right to appoint a counsel of choice for filing a review application under Article 188 of the Constitution, and Section 7 enumerates that urgent applications or applications filed for seeking interim relief shall be fixed for hearing within fourteen days from the date of its filing. Besides dealing with the aforesaid procedural matters, a substantive right of filing an Intra Court Appeal has also been created under Section 5 of the Act.

13. The learned counsel for the petitioners remained unsuccessful in persuading me as to how the Act infringes or contravenes the fundamental rights of any person, or how the same is against the public interest. In order to complement and substantiate the plea of *ultra vires*, it was argued that the Act is against the independence of judiciary; poses an obstacle in the access to justice; constitutes dictation to the Supreme Court; clips off the powers and authority of the Chief Justice of Pakistan and is an intrusion into the internal affairs/management of the Apex Court. In my view such apprehensions are misconceived. The petitioners' counsel had further argued that once the Parliament is allowed to regulate the Supreme Court's internal working, powers

and functions, then there is a strong possibility and likelihood that amendments of the same variety will be made to further intrude and encroach upon the independence and jurisdiction of this Court. In my approximation and farsightedness, if any such amendment is made, or attempted to be made, in order to compromise or impair the independence of the judiciary, or to disrupt or disturb the fair and free stream of administration of justice, or cause any hindrance in the access to justice, the Supreme Court, being the custodian of the law and the Constitution, is here to deal with the same and there is no cause for concern in this regard. At this moment, the entirety of judicial and administrative powers remains vested in the Supreme Court, and the advent of the Act neither involves any outside entity or any external element capable of disturbing or interfering with the internal working of this Court, nor does it affect any of the procedural matters or committee decisions of the Supreme Court. The superior Courts have time and again pronounced that any law which is inconsistent with and in contravention of fundamental rights, or which takes away or abridges such rights, is void to the extent of such inconsistency or contravention. In my perception (except to the extent of the right of Intra Court Appeal with retrospective effect, which aspect I will deal in the succeeding portion of my reasoning), the Act is neither hit by the doctrine of colourable legislation, nor is it *ex facie* discriminatory or violative of any constitutional provision, and it is well-settled that *mala fides* cannot be attributed to the legislature. In my view, the procedural stipulations and the conferral of a right of appeal with prospective effect do not violate any fundamental right, nor do they offend any provision of the Constitution. The Parliament has not curtailed the jurisdiction of this Court by dint of colourable legislation, rather the jurisdiction of this Court has been enlarged in the larger public interest by means of the Act. As stated previously, it is the duty of the Court to normally lean in favour of the constitutionality of a statute rather than destroying it. In the case of LDA v. Ms. Imrana Tiwana (*supra*) this Court further held that the power to strike down or declare a legislative enactment void has to be exercised with a great deal of care and caution. The courts are one of the three coordinate institutions of the State and can only perform this solemn obligation in the exercise of their duty to uphold the Constitution. This power is exercised not because the judiciary is an institution superior to the legislature or the executive, but because it is bound by its oath to uphold, preserve, and protect the Constitution. It must enforce the Constitution as the supreme law, but this duty must be performed with due care and caution and only when there is no other alternative.

3. Retroactive or *Ex Post Facto* Right of Appeal

14. Now I would like to address Section 5 of the Act which provides a right of filing an Intra Court Appeal with retrospective effect. As aforementioned, the doctrine of severability permits the Court to sever the unconstitutional portion of a partially unconstitutional statute in order to preserve the operation of any uncontested or valid remainder, save for where the valid portion is so closely mixed up with the invalid portion that it cannot be separated without leaving an incomplete or motley remainder, in which case the Court can declare the entire act void. For the ease of reference, Section 5 of the Act is reproduced as under:

> 5. Appeal--. (1) An appeal shall lie within thirty days from an order of a Bench exercising jurisdiction under clause (3) of Article 184 of the Constitution to a larger Bench of the Supreme Court and such appeal shall, within a period not exceeding fourteen days, be fixed for hearing.
>
> (2) The right of appeal under sub-section (1) shall also be available to an aggrieved person against whom an order has been made under clause (3) of Article 184 of the Constitution, prior to the commencement of this Act:
>
> Provided that the appeal under this sub-section shall be filed within thirty days of the commencement of this Act.

15. Indeed the finality of judgments ensures the culmination or conclusion of the judicial process, and the importance of this is aptly articulated in the Latin maxim, *interest republicae ut sit finis litium*, meaning thereby that it is in the interest of the state that there should be an end to litigation. Providing for an appeal with retroactive effect would open a flood gate of cases which will have serious repercussions on already decided cases and would amount to a reversion to the *status quo ante* (the previously existing state of affairs), with no end in sight. Though some persons may feel aggrieved by the orders or judgments of this Court rendered prior to the promulgation of the Act, it is equally true that many persons were found to have benefited from the same, and such rights between the litigants or parties, now having been decided one way or the other, cannot be re-agitated at this juncture and the parties cannot now be repositioned in the state of affairs that existed previously or before the effective date of the Act. In Justice G.P. Singh's *Principles of Statutory Interpretation* (7th ed.), at page 372 to 373, a statement of the House of Lords in the case of *L'office Cherifien des Phosphates v. Yamashita Shinnihon Steamship Co. Ltd* is quoted in which it was observed that the question of fairness will have to be answered by taking into account various factors, viz., value of the

rights which the statute affects; extent to which that value is diminished or extinguished by the suggested retrospective effect of the statute; unfairness of adversely affecting the rights; clarity of the language used by the Parliament and the circumstances in which the legislation was created. All these factors must be weighed together to provide a direct answer to the question of whether the consequences of reading the statute with the suggested degree of retrospectivity is so unfair that the words used by the Parliament cannot have been intended to mean what they might appear to say. The present Act does not provide any cut off or predetermined date under Section 5 to trigger the right of appeal, except for a vague and indeterminate statement that the right of appeal shall also be available to an aggrieved person against whom an order has been made under clause (3) of Article 184 of the Constitution, prior to the commencement of this Act. During the proceedings, I repeatedly queried the learned counsel supporting the Act, as well as the learned Attorney General for Pakistan ("**AGP**"), regarding the legitimacy and wisdom of providing the right of Intra Court Appeal with retrospective effect, and that too in such an imprecise and perplexing manner, however they could not satisfy me on this crucial point and failed to persuade me with any convincing argument. To this extent, Section 5 is totally uncertain, inarticulate and unintelligible, and fails to specify whether this right accrues from the coming into force of the 1973 Constitution, or from the date when the first case was decided by this Court under Article 184(3) of the Constitution, or any other specific date. Such a blanket or unbridled right of appeal will not only create chaos, but also necessitate the reopening of past and closed matters. It is a well settled exposition of law that on attainment of finality or conclusiveness, a party aggrieved by any such decision should mull over the remedies available to them to assail the decision within the framework of law and jurisdiction at that relevant time. The doctrine of *res judicata* is an integral limb of the principle of finality as a matter of public policy, and the main strength of this doctrine is that it endorses a fair-minded and open-minded administration of justice and prevents the abuse of process of the Court on issues which have attained finality and are consequently past and closed matters.

16. The moment a decision is final, either for the reason that no appeal was preferred, or an appeal was filed and subsequently dismissed by the Court, or no right of appeal is provided under the relevant legislation, then neither party will be permitted subsequently to challenge such decision in order to relaunch the matter and argue it *de novo*. No doubt prior to this Act, no right of appeal was provided, but all those persons aggrieved in the past must have availed the

right to file a review petition, and if these review petitions have been decided then it is not possible or feasible to provide a right of appeal to them and re-agitate the matter again. The word "retrospective", or an antedated, *ex post facto* or retroactive law, denotes that the law has been made effective since before the date of its passing. *Bennion on Statutory Interpretation* (7th ed.), at page 181 states with regard to the retrospective effect of law that the "principle is sometimes expressed in the maxim *lex prospicit non respicit* (law looks forward not back). As Willes J said in *Phillips v. Eyre* retrospective legislation is "contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law." Whereas in *Crawford's Statutory Construction*, Chapter XXV (at pages 562-566 & 622), which is germane to Prospective and Retrospective Operation, it is stated, in short, that retroactive legislation is looked upon with disfavour, as a general rule, and properly so because of its tendency to be unjust and oppressive. There is a presumption that the legislature intended its enactments to be effective only *in futuro*. This is true because of the basic presumption that the legislature does not intend to enact legislation which operates oppressively and unreasonably. If perchance any reasonable doubt exists, it should be resolved in favour of prospective operation. In other words, before a law will be construed as retrospective, its language must imperatively and clearly require such construction. In the case of *People v Dillard* (298 N.Y.S. 296, 302, 252 Ap. Div.125) the Court held that "[i]t is chiefly where the enactment would prejudicially affect vested rights, or the legal character of past transactions that the rule in question applies. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation." The provision for extending the right of appeal retroactively does not even come within the ambit or dominion of curative statutes which are used by lawmakers to recuperate the prior enactment by rectifying any defect or omission. According to the *Corpus Juris Secundum*, Vol. 16 (Constitutional Law), at pages 1251-1252, a statute which merely creates or enlarges a remedy for an existing right, although retrospective, does not impair vested rights. No vested rights are impaired by a statute which creates a remedy for an existing right for which there has been no remedy. So acts providing a new remedy, or enlarging a remedy already existing, or repealing an exemption from liability in a particular

form of remedy, although made to operate retrospectively, do not, per se, impair vested rights; but the legislature may not, under the guise of a remedial act, provide a particular remedy that will impair property rights vested before the passage of the Act [Ref: judgment authored by me, Controller General of Accounts, Government of Pakistan, Islamabad and others v. Abdul Waheed and others (**2023 SCMR 111**)].

17. In order to determine whether any beneficial, remedial or curative legislation has retrospective effect, the litmus test is to explore whether it is intended to clear up an ambiguity or oversight in the prevailing or standing law, and whether, in its pith and substance, it corrects or modifies an existing law or an error that interferes with the interpretation or application of the statute. Without a doubt, beneficial, remedial or curative legislation is meant to be clarificatory in nature, but if it has no such character or essence it cannot be deemed to be retroactive merely for the reason that it amounts to beneficial legislation. The retroactive application of curative legislation can be gauged and measured from the plain language and intention of legislature. It is by and large passed to supply a conspicuous omission or to elucidate misgivings as to the meaning of the previous law. The legal maxim *nova constitutio futuris formam imponere debet, non praeteritis* means a new law has to be prospective and not retrospective in its operation. The new law may affect the future but not the past. Indeed new laws are interpreted as functional and effective in the matters that arise after the enactment. Every statute which takes hold of or prejudices vested rights assimilated under existing laws, or contrives a new obligation or enforces a new duty, or characterises a new disability in respect of transactions already past and closed is presumed to have no retrospective effect. In other words, a statute is not to be applied retrospectively in the absence of express enactment or necessary intendment, especially where the statute is to affect vested rights, past and closed transactions, or facts or events that have already occurred and, instead of promoting or advancing the cause of justice, is creating consequential impediments or causing any disadvantage to any of the concerned parties. Moreover, the provisions of a statute cannot be interpreted in a way that would lead to the devastation of rights and liabilities that have accrued by means of past and closed transactions, therefore the right of Intra Court Appeal with retrospective effect as provided under Sub-Section (2) of Section 5 of the Act is against public policy, as well as the doctrine of finality and immutability of judgments; hence to such extent it is declared *ultra vires*.

4. Distinction between Articles 184 and 199 of the Constitution

18. In the original jurisdiction of the Supreme Court as provided under Article 184, and more particularly under sub-article (3), it is conveyed that, without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article. While under Article 199 of the Constitution, the High Courts may pass an order on the application of any aggrieved person and issue such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II of the Constitution, with the rider that, subject to the Constitution, the right to move a High Court for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II shall not be abridged. There is a vivid distinction between the two aforementioned Articles; it is quite obvious from the plain wording of the Articles, and the interpretation thereof, that the Supreme Court, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II of the Constitution is involved, has the power to make an order, while the High Court may pass an order on the application of any aggrieved person and issue such directions as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II, but the keywords "a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II" are noticeably missing from the jurisdiction of the High Court provided under Article 199 of the Constitution. So in all fairness, direct petitions under Article 184(3) can only be filed if they involve a question of public importance with reference to the enforcement of any of the Fundamental Rights. It has been seen time and again that people, without approaching or invoking the jurisdiction of High Courts under Article 199 of the Constitution, prefer to approach this Court directly under Article 184(3) of the Constitution in the sense of concurrent jurisdiction without doing their due diligence regarding whether any question of public importance is involved with reference to the enforcement of any of the Fundamental Rights or not, and also without being mindful that the aforesaid jurisdiction of this Court is without prejudice to the provisions of Article 199 where such relief might have been granted by the High Courts, and in which scenario the remedy of filing an

appeal before this Court under Article 185 of the Constitution would also remain intact and available for redress. It is a ground reality and indisputable fact that, in the past, the exercise of original jurisdiction under Article 184(3) of the Constitution was at times misemployed or extended beyond the sphere and domain of original jurisdiction. At this juncture, I dwell on the judgment of this Court rendered in the case of Independent Newspapers Corporation (Pvt.) Ltd. and another v. Chairman, Fourth Wage Board and Implementation Tribunal for Newspaper Employees, Government of Pakistan, Islamabad and 2 others (**1993 SCMR 1533**) in which it was held that the excessive use of lawful power is in itself unlawful. In the past, no right of appeal was provided to an aggrieved person except a feeble remedy of filing a review petition, but through the Act, a right of filing an Intra Court Appeal has been provided which provision, in my view, is in the larger public interest and is also expedient keeping in mind the rigors of Article 10A of the Constitution which is a paramount feature of the due process of law.

5. Doctrine of Reading Down

19. In my view, another important aspect which needs to be addressed and read down is the provision contained under Section 3 of the Act which elucidates that any matter invoking the exercise of original jurisdiction under Article 184(3) 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 1 of Part II of the Constitution is involved, it shall constitute a Bench comprising not less than three Judges of the Supreme Court which may also include the members of the Committee, for adjudication of the matter. This is perturbing for the reason that if the Committee administratively decides not to fix a particular matter before the Court because, in their point of view, no question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II of the Constitution is made out, then in that eventuality the matter ends without any further judicial scrutiny or order.

20. The primary aim of the Courts must be to pay attention to the objectives of the statute, and then proceed with an interpretation that lends support thereto; in essence adopting the purposive rule of interpretation. The rule of purposive interpretation of statutes originated in the 16th Century with the decision of the celebrated *Heydon's Case* (**(1584) 76 ER 637**) which laid down the keystone of the purposive rule of interpretation, that is, if the literal

interpretation of any provision of law is not acceptable or leads to absurdity, then such provision may be interpreted in line with the object and purpose which the legislature had in mind while enacting the law. According to *Maxwell on the Interpretation of Statutes* (12th ed.), at page 228, where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftman's unskillfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. While *Bennion on Statutory Interpretation* (4th ed.), at page 810, describes that a purposive construction of an enactment is one which gives effect to the legislative purpose by: (a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose or (b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose.

21. It goes without saying that the law should not be in a limbo or an indeterminate state. The hallmark of a good law is that it ensures the provision of a proper remedy and does not leave litigants stranded with no recourse. Obviously, no appeal lies in Chamber before a single judge in terms of Supreme Court Rules, 1980 ("**1980 Rules**", or the "**Rules**") on the refusal of Committee to entertain a matter. Therefore, in my view, where the Committee refuses to entertain or fix a case, then in such a situation the matter should be fixed before the Court for judicial scrutiny regarding whether any case is made out to exercise the original jurisdiction of this Court under Article 184(3) of the Constitution; and since the matter is taken up by the Committee on the administrative side, therefore, in case of refusal, the matter may be fixed before any available three-member bench, not including the members of the Committee, on the judicial side. The aim and object of the legislature, as gleaned from the provisions of the Act, is to, *inter alia*, ensure and provide for the fixation of cases and constitution of benches through a collegium in order to prevent the individualistic exercise of powers; but at the same time, if the

collegium refuses to entertain any matter under Article 184(3) of the Constitution, there is no further remedy provided to challenge the same. As an ongoing and continuous sequence of events and processes that occur in succession from past through the present, and to the future, judges come and go after playing their innings, but this Court has perpetual seal and succession, therefore the law regulating the practice and procedure of this Court should be compatible with and suitable for all times, unless the Parliament subsequently repeals or modifies the same, or it is struck down by the Court. So in my view, the present 1980 Rules may be amended to harmonize the provisions of the new Act with the pre-existing Rules of this Court. The golden rule of statutory interpretation provides that the words used should be interpreted harmoniously and congenially in line with the intention of the legislature and all the provisions should be read in unison, for the reason that the foremost stratagem of this doctrine is to preserve the effect of the statute within the precincts of law and within the dominion of Constitution, provided that the statute is mute and/or inarticulate and is capable of more than one interpretation.

6. Change of Counsel in Review Petition

22. Under Section 6 of the Act, a right has been accorded to appoint a counsel of choice for filing a review petition, which was not earlier permissible. Indeed, this Court has the power to review its judgment under Article 188 of the Constitution, subject to the provisions of any act of Parliament and any rules made by this Court. In the same parlance, Order XXVI of the 1980 Rules is germane to "Review Jurisdiction" whereby, subject to the law and the practice of the Court, this Court may review its judgment or order on grounds similar to those mentioned in Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 ("**CPC**") and, in a criminal proceeding, on the ground of an error apparent on the face of the record. The prerequisite to filing a review application is that the Advocate signing the application shall specify, in brief, the points upon which the prayer for review is based and shall add a certificate in the form of a reasoned opinion that review would be justifiable in that particular case. Whereas, under Order XLVII, Rule 1, CPC, an aggrieved person may file an application for review of the judgment and order on the ground of discovery of new and important information or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient

reason. Where the judgment under review is found to have directed the doing of something which is in conflict with the Constitution or law, then it will be the duty of the Court to amend such error. If the conclusion is wrong because something manifest has been ignored by the Court or the Court has not considered an important aspect of the matter, a review petition would lie, but a judgment cannot be reviewed merely because a different view could have been taken, rather a review petition would lie only when there is an alleged error in the judgment which is evident and can be established without elaborate arguments and where a glaring omission or patent mistake has crept in earlier by judicial fallibility. The Constitution does not place any restriction on the power of the Supreme Court to review its earlier decisions or even to depart from them, nor does the doctrine of *stare decisis* come in the way, so long as the review is warranted in view of the significant impact on the fundamental rights of citizens or in the interest of public good, however grounds not urged or raised at the time of hearing the case cannot be allowed to be raised in review jurisdiction. No doubt, the Act extends a right to appoint a counsel of choice, but we cannot lose sight of the fact that review may be entreated only in instances or occurrences of errors in the judgment or order, floating on the surface of the record, with a substantial impact on the final outcome of the *lis*. This does not connote or entail a right of rehearing of the decided case where there is a mindful and thoughtful decision on the point(s) of law, as well as of fact. Every judgment articulated by the Courts of law is presumed to be a solemn and conclusive determination on all points arising out of the *lis*. Mere irregularities having no significant effect or impact on the outcome would not be sufficient to warrant the review of a judgment or order, however, if the anomaly or ambiguity is of such a nature so as to transform the course of action from being one in the aid of justice to a process of injustice, then obviously a review petition may be instituted for redressal to demonstrate the error, if found floating conspicuously on the surface of the record, but a desire of rehearing of the matter cannot constitute a sufficient ground for the grant of review which, by its very nature, cannot be equated with the right or remedy of appeal or rehearing merely on the ground that one party or the other conceived himself to be dissatisfied with the decision of the Court, nor can a judgment or order be reviewed merely because a different view could have been taken. So in all fairness, the right of changing or appointing new counsel of choice to file and pursue the review application/petition shall not be construed as allowing a rehearing of the matter, and the counsel so appointed should not attempt to reargue the whole case, or expect to start from scratch as an opportunity of rehearing to cure or supplant the lacunas, mistakes and/or

oversights of the earlier counsel, and a mere repetition of old and overruled arguments through a different counsel would be insufficient and impermissible in this regard.

> [Ref: M/s Habib and Company and others v. Muslim Commercial Bank and others (**PLD 2020 SC 227**); Engineers Study Forum (Regd.) and another v. Federation of Pakistan and others (**2016 SCMR 1961**); Government of Punjab and others v. Aamir Zahoor-ul-Haq and others (**PLD 2016 SC 421**); Haji Muhammad Boota and others v. Member (Revenue) BOR and others (**2010 SCMR 1049**); Sh. Mehdi Hassan v. Province of Punjab thr. Member, BOR and others (**2007 SCMR 755**); Abdul Rauf and others v. Qutab Khan and others (**2006 SCMR 1574**); Lt-Col. Nawabzada Muhammad Amir Khan v. The Controller of Estate Duty, Government of Pakistan (**PLD 1962 SC 335**); Land Acquisition Officer and Assistant Commissioner, Hyderabad v. Gul Muhammad thr. legal heirs (**PLD 2005 SC 311**); Board of Intermediate and Secondary Education, Lahore through Chairman v. Bashir Ahmad Khan (**PLD 1997 SC 280**); Major (Retd.) Barkat Ali and others v. Qaim Din and others (**2006 SCMR 562**); Abdul Hakeem and others v. Khalid Wazir (**2004 SCMR 1770**); Suba thr. legal heirs v. Fatima Bibi thr. legal heirs and others (**1996 SCMR 158**); S. Sharif Ahmad Hashmi v. Chairman, Screening Committee, Lahore and another (**1978 SCMR 367**); M/s Sajjad Nabi Dar & Co. v. The Commissioner of Income-Tax, Rawalpindi Zone, Rawalpindi (**PLD 1977 SC 437**); M/s M. Y. Malik & Co. and 2 others v. M/s Spendlours International (**1995 SCMR 922**); M. Moosa v. Muhammad and others (**1975 SCMR 115**); Engineers Study Forum (Regd.) and another v. Federation of Pakistan and others (**2016 SCMR 1961**); Mirza Bashir Ahmad v. Abdul Karim (**1976 SCMR 417**); Wahajuddin and another v. Razia Begum etc. (**1979 SCMR 241**); Abdul Ghaffar-Abdul Rehman and others v. Asghar Ali and others (**PLD 1998 SC 363**); Irshad Masih and others v. Emmanuel Masih and others (**2014 SCMR 1481**); Justice Qazi Faez Isa and others v. President of Pakistan and others (**PLD 2022 SC 119**); Mukesh v. State (NCT of Delhi) (**(2018) 8 SCC 149**); Sow Chandra Kante and another v. Sheikh Habib (**(1975) 1 SCC 674**); Kamlesh Verma v. Mayawati and others (**(2013) 8 SCC 320**); Kerala SEB v. Hitech Electrothermics & Hydropower Ltd. (**(2005) 6 SCC 651** at p. 656, para 10), M/s Thungabhadra Industries Ltd. v. Government of Andhra Pradesh thr. Deputy Commissioner, Commercial Taxes, Anantapur (**AIR 1964 SC 1372**); Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi (**(1980) 2 SCR 650**); Sajjan Singh v. State of Rajasthan (**[1965] 1 S.C.R. 933, 948**); G. L. Gupta v. D. N. Mehta (**[1971] 3 S.C.R. 748-760**); O. N. Mahindroo v. Distt. Judge Delhi & Anr (**[1971] 2 S.C.R. 11, 27**); Chandra Kanta v. Sheikh Habib (**[1975] 3 S.C.R. 933**); and Delhi Administration v. Gurdip Singh Uban and others (**AIR 2000 SC 3737**).

7. Master of the Roster

23. It was emphatically argued by the learned counsel for the petitioners that the Chief Justice is the *master of the roster*, hence there is no need for any Committee to constitute benches of the Supreme Court. Undoubtedly the Chief Justice is the first amongst equals, or *primus inter pares*, but by virtue of his office, he has to discharge certain administrative duties and powers. In the statement of objects and reasons it is provided, *inter alia*, that the constitution of benches has been a subject of discussion at various forums. In the past as well some skepticism and reservations were expressed by certain quarters regarding the individualistic administrative powers of the Chief Justice as *master of the roster*. Consequently, the Act was promulgated to create a

collegium system so that every cause, appeal or matter before the Supreme Court 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. Prior to the Act, when there was no collegium system in place, it was obviously the Chief Justice who was the *master of the roster* and who was tasked with constituting benches and now, after the coming into force of the Act, this role has been assigned to the Committee which is now, for all intents and purposes, the *master of the roster*. Had the Chief Justice not been considered the *master of the roster* prior to this Act, there would have been no need to vest these powers in the Committee; it is obviously for this reason that, from now onward, the individual powers vesting in the Chief Justice have been neutralized and conferred to the Committee for settling the roster and managing the constitution of benches. Even in the High Courts, though the Chief Justice may be consulting some senior members of the administration committee, there is no collegium system under any law or rules and, resultantly, the roster of sittings is issued under the directive of the Chief Justice, being the *master of the roster*, and it is the Chief Justice who constitutes the routine benches and, if and when required, special benches as well. To conclude, the term *master of the roster* is not some newfangled or unique turn of phrase, rather it was an administrative assignment existing since time immemorial which has now been supplanted by the Act in favour of a collegium system. The role of the 'Chief Justice' as the *master of the roster* has also been a subject of discussion in the Supreme Court of India. In the case of Shanti Bhushan v. Supreme Court of India and others (**(2018) 8 SCC 396**), the Supreme Court of India held as under:-

> "12. There is no dispute, as mentioned above, that 'Chief Justice' is the Master of Roster and has the authority to allocate the cases to different Benches/Judges of the Supreme Court. The Petitioner has been candid in conceding to this legal position. He himself has gone to the extent of stating in the petition that this principle that 'Chief Justice' is the Master of Roster is essential to maintain judicial discipline and decorum and also for the proper and efficient functioning of the Court. Notwithstanding this concession, it would be imperative to explain this legal position with little elaborations, also by referring to some of the judgments of this Court which spell out the scope and ambit of such a power.
>
> 13. The Petitioner has himself, in the petition, referred to a three-Judge Bench in State of Rajasthan v. Prakash Chand and Ors. [**(1998) 1 SCC 1**] held that the Chief Justice of the High Court is the Master of Roster and he alone has the prerogative to constitute the Benches of the Court and allocate cases to the Benches so constituted. The Court stated thus:
>
> > 59. From the preceding discussion the following broad conclusions emerge. This, of course, is not to be treated as a summary of our judgment and the conclusions should be read with the text of the judgment:
> >
> > (1) That the administrative control of the High Court vests in the Chief Justice alone. On the judicial side, however, he is only the first amongst the equals.

> (2) That the Chief Justice is the master of the roster. He alone has the prerogative to constitute benches of the court and allocate cases to the benches so constituted.
>
> (3) That the puisne Judges can only do that work as is allotted to them by the Chief Justice or under his directions.
>
> (4) That till any determination made by the Chief Justice lasts, no Judge who is to sit singly can sit in a Division Bench and no Division Bench can be split up by the Judges constituting the bench themselves and one or both the Judges constituting such bench sit singly and take up any other kind of judicial business not otherwise assigned to them by or under the directions of the Chief Justice.
>
> (5) That the Chief Justice can take cognizance of an application laid before him under Rule 55 (supra) and refer a case to the larger bench for its disposal and he can exercise this jurisdiction even in relation to a part-heard case.
>
> (6) That the puisne Judges cannot "pick and choose" any case pending in the High Court and assign the same to himself or themselves for disposal without appropriate orders of the Chief Justice.
>
> (7) That no Judge or Judges can give directions to the Registry for listing any case before him or them which runs counter to the directions given by the Chief Justice.

14. The same principle in Prakash Chand's case was applied as regards the power of the 'Chief Justice' and in the matter of Campaign for Judicial Accountability and Reforms v. Union of India and Anr. **(2018) 1 SCC 196)** five Judge Bench held:

> 6. There can be no doubt that the Chief Justice of India is the first amongst the equals, but definitely, he exercises certain administrative powers and that is why in Prakash Chand [State of Rajasthan v. Prakash Chand, [(1998) 1 SCC 1], it has been clearly stated that the administrative control of the High Court vests in the Chief Justice alone. The same principle must apply *proprio vigore* as regards the power of the Chief Justice of India. On the judicial side, he is only the first amongst the equals. But, as far as the Roster is concerned, as has been stated by the three-Judge Bench in Prakash Chand [State of Rajasthan v. Prakash Chand, [(1998) 1 SCC 1], the Chief Justice is the Master of the Roster and he alone has the prerogative to constitute the Benches of the Court and allocate cases to the Benches so constituted.

Further, the Constitution Bench held:

> 7. The aforesaid position though stated as regards the High Court, we are absolutely certain that the said principle is applicable to the Supreme Court. We are disposed to think so. Unless such a position is clearly stated, there will be utter confusion. Be it noted, this has been also the convention of this Court, and the convention has been so because of the law. We have to make it clear without any kind of hesitation that the convention is followed because of the principles of law and because of judicial discipline and decorum. Once the Chief Justice is stated to be the Master of the Roster, he alone has the prerogative to constitute Benches. Needless to say, neither a two-Judge Bench nor a three-Judge Bench can allocate the matter to themselves or direct the composition for constitution of a Bench. To elaborate, there cannot be any direction to the Chief Justice of India as to who shall be sitting on the Bench or who shall take up the matter as that touches the composition of the Bench. We reiterate such an order cannot be passed. It is not countenanced in law and not permissible.

15. There is a reiteration of this very legal position by another three Judge Bench judgment of this Court in Asok Pande v. Supreme Court of India through its Registrar and Ors.

> 12. Quite apart from the fact that the relief sought is contrary to legal and constitutional principle, there is a fundamental fallacy in the approach of the Petitioner, which must be set at rest. The Petitioner seeks the establishment of a binding precept under which a three judge Bench in the Court of the Chief Justice must consist of the Chief Justice and his two senior-most colleagues alone while the Constitution Bench should consist of five senior-most judges (or, as he suggests, three 'senior-most' and two 'junior-most' judges). There is no constitutional foundation on the basis of which such a suggestion can be accepted. For one thing, as we have noticed earlier, this would intrude into the exclusive duty and authority of the Chief Justice to constitute benches and to allocate cases to them. Moreover, the Petitioner seems to harbour a misconception that certain categories of cases or certain courts must consist only of the senior-most in terms of appointment. Every Judge appointed to this Court Under Article 124 of the Constitution is invested with the equal duty of adjudicating cases which come to the Court and are assigned by the Chief Justice. Seniority in terms of appointment has no bearing on which cases a Judge should hear. It is a settled position that a judgment delivered by a Judge speaks for the court (except in the case of a concurring or dissenting opinion). The Constitution makes a stipulation in Article 124(3) for the appointment of Judges of the Supreme Court from the High Courts, from the Bar and from amongst distinguished jurists. Appointment to the Supreme Court is conditioned upon the fulfilment of the qualifications prescribed for the holding of that office Under Article 124(3). Once appointed, every Judge of the Court is entitled to and in fact, duty bound, to hear such cases as are assigned by the Chief Justice. Judges drawn from the High Courts are appointed to this Court after long years of service. Members of the Bar who are elevated to this Court similarly are possessed of wide and diverse experience gathered during the course of the years of practise at the Bar. To suggest that any Judge would be more capable of deciding particular cases or that certain categories of cases should be assigned only to the senior-most among the Judges of the Supreme Court has no foundation in principle or precedent. To hold otherwise would be to cast a reflection on the competence and ability of other judges to deal with all cases assigned by the Chief Justice notwithstanding the fact that they have fulfilled the qualifications mandated by the Constitution for appointment to the office". (emphasis supplied)

24. I have no reservation in holding that, indeed, prior to the promulgation of the Act, the Chief Justice alone was the *master of the roster*, and without the issuance of the roster of sittings or the constitution of benches by him, no Judge or bench of Judges could embark on or assume any jurisdiction except for the cases assigned by the Chief Justice, however in order to mitigate and clip off the sole discretion of the Chief Justice, the Act was enacted and now, for all intents and purposes, the functions of the *master of the roster* which vested solely in the Chief Justice have now been assigned and shifted to the collegium comprising the Chief Justice and the two next most senior judges of this Court as the *masters of the roster* for issuing the roster of sittings and constituting benches after due deliberation.

8. Effect of Act on Decided Cases

25. The Act was made effective from 21.04.2023, while the aforesaid petitions were decided *vide* our short order dated 11.10.2023. In the intervening period, *ad-interim* orders were in field, therefore, in my view, all cases decided between 21.04.2023 and 11.10.2023 are protected in view of the dicta laid in the case of Malik Asad Ali and others v. Federation of Pakistan thr. Secretary, Law, Justice and Parliament Affairs, Islamabad and others (**PLD 1998 SC 161**) and Sindh High Court Bar Association and others v. Federation of Pakistan thr. Secretary, Ministry of Law and Justice, Islamabad and others (**PLD 2009 SC 879**), and their conclusiveness shall not be vitiated or called into question on the ground that such benches were not constituted by the Committee under Section 2 of the Act.

9. Hearing by Full Court

26. During the midst of the arguments, it was further articulated by the learned counsel for the petitioners that if the case is heard by the Full Court, and the law is declared *intra vires*, then the petitioners would not be able to file an Intra Court Appeal for challenging the judgment. In my view, even at the time when the initial eight-member bench was constituted to hear the aforesaid petitions, the requisite number of at least nine judges was not available in the total strength of this Court to hear the Intra Court Appeal, if any filed, against the judgment rendered by the eight-member bench. However, when the present Chief Justice (Justice Qazi Faez Isa) assumed office, two practical options were available to him: either to reduce the size of the eight-member bench by reconstituting a five-member bench in order to preserve the right of appeal or, alternatively, to constitute the Full Court. Again in my view, the honorable Chief Justice rightly constituted the Full Court to hear the all such petitions on a priority basis. Even at the initial stage of proceedings, the Full Court had been fervently requested by almost all the learned counsel, including the learned AGP. One more important aspect that must be kept in mind is that the matter before the Supreme Court pertained to the examination of the *vires* of the law regulating its own practice and procedure, so, in my view, it was *compos mentis* to constitute a Full Court for drawing on the collective wisdom of all the judges regarding the legislative competence and constitutionality of the Act which provides a right of Intra Court Appeal. Conversely, had the Act been declared *ultra vires* by a majority of the judges, then how could the Intra Court Appeal have been filed by those aggrieved persons supporting the law when the law providing the right of Intra Court Appeal was struck down by the

Court and no longer existed (leaving only the remedy of review); so, in that particular scenario too, the situation would have been the same, therefore, when any particular *lis* has been decided by the Full Court with the collective wisdom of all the judges with various notes of assent and dissent, then the question regarding the deprivation of the right of Intra Court Appeal does not have much significance. Indeed, it was prudent and quite logical to constitute the Full Court to decide the legitimacy and future of the Act in question, rather than constituting the bench first with limited number of judges at the original side and then a larger bench on the appellate side. In my view, propriety demanded that this Court should first resolve the uncertainty regarding the future of the Supreme Court (Practice and Procedure) Act, 2023 as soon as possible, instead of gathering the wisdom and insight of judges in two phases in preference to the collective wisdom rendered by the Full Court.

Islamabad

Judge