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Syed Mansoor Ali Shah, J.- I have read the judgment authored by Hon'ble the Chief Justice and agree with the same. There are, however, some points argued by the learned counsel for the parties that I want to address. Hence, this note.

Introduction

2. In the realm of public institutions, particularly within the hallowed halls of the Supreme Court, the principle of collegial working stands as a cornerstone for ensuring justice, fairness, and the larger good of the people who seek its intervention. The concentration of ultimate administrative powers in the hands of a single individual, such as the Chief Justice, runs counter to the ideals of democratic governance and judicial fairness. It is imperative that such powers, including crucial decisions on case allocations, be exercised collectively, harnessing the diverse perspectives and wisdom of all justices. This approach not only democratizes the decision-making process but also reinforces the integrity and impartiality of the court. Embracing collegiality in administrative decisions ensures that the court's functioning transcends the outdated notion of a 'one-man show,' reflecting a more inclusive, transparent, and equitable judiciary that truly serves the public interest. It would be hard to overestimate how important civility and collegiality are to the proper functioning of our legal system, and more specifically of our courts. Nothing can be resolved in society without the ability to be civil and collegial. The stakes are high, and our ability to listen carefully, to express our ideas respectfully, and to collaborate for the greater good are more important than ever.[1]

3. The pivotal question involved in the present case as to the legislative competence of Parliament to enact the Supreme Court (Practice and Procedure) Act 2023 **("Act")** revolves around the interpretation of the phrase "subject to law" as used in Article 191 of the Constitution of the Islamic Republic of Pakistan **("Constitution")** and the scope of entries 55 and 58 of the Federal Legislative List as provided in the Fourth Schedule to the Constitution.

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[1] Richard Wagner, Chief Justice of Canada.

Interpretation of the phrase "subject to law" as used in Article 191

4. Let me first take up and discuss the meaning of the phrase "subject to law" as used in Article 191 and then the scope of entries 55 and 58. Article 191 is cited here for ease of reference:

> **191. Rules of Procedure.**
> Subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court.
> (Emhasis added)

A bare reading of Article 191 shows that it confers the power on the Supreme Court to make rules of its practice and procedure and makes that power “subject to the Constitution” as well as “subject to law”. No one can say that the phrase "subject to law" just happened to be there in Article 191 accidentally without any meaning; though opinions may differ, as they are, on what it actually means. On its meaning, the learned counsel who argued before us took divergent positions and advanced extensive arguments to convince the Court, of their respective viewpoints. To those who argued for the validity of the Act, it means the law enacted by Parliament on the matter of practice and procedure of the Supreme Court, as the Act is; while those who argued against the validity of the Act understand it as being some “substantive law” which operates as a limitation on the power of the Supreme Court to make rules, in that if the Supreme Court makes a rule of its practice and procedure which conflicts with a statute enacting substantive law, in such an event the rule would fall because it conflicts with a substantive law.

5. Some of the learned counsel also argued, though half-heartedly, that the “law” referred to in Article 191 includes the common law, i.e., the case law. I would say, the term “law” has, no doubt, been used in its generic and wider sense in some of the Articles of the Constitution,[2] where it includes the common law; but when used along with the term “Constitution”,[3] as in Article 191, it means as per my understanding the “statutory law” only. So, we can say that in Article 191 the phrase “subject to law” means subject to statutory law, i.e., the law made by the legislature. This point, however, does not need any detailed discussion, for all agree that the term “law” wherever used in the Constitution does include the statutory law. So, one thing is clear

[2] Such as, in Articles 4, 9 ad 24(1), etc.
[3] Such as, in Articles 175(2), 191, 202 and 275(5), etc.

and certain: the phrase “subject to law” in Article 191 of the Constitution at least means that the court in making rules of its practice and procedure acts subject to statutory law.

6. Once it is conceded that the word “law” as used in Article 191 of the Constitution means, or at least includes, "statutory law", the bars are down; because if it means statutory law in any sense it means statutory law in all senses, substantive and procedural. The Constitution, in this regard, makes no limitation either expressly or by necessary implication by adding some adjectival distinction. If our effort is to find the actual meaning which the words, as written in the Constitution, were intended to convey, and not any preconceived meaning, any implicit limitation with the word "law" in the phrase "subject to law" cannot be justified. I, therefore, do not subscribe to the view that the phrase "subject to law" as used in Article 191 means subject to "substantive law” only. The word “law” includes law in all senses - procedural and substantive; enacted directly on the matter of practice and procedure of the Supreme Court or containing only incidental or ancillary provisions.[4]

7. Nonetheless, as per the provisions of Article 191 of the Constitution, the initial and primary power or function, whatever may it be called, to make rules of its *practice* and *procedure* is vested in the Supreme Court. But it is one thing to say that the Supreme Court has the primary authority to make rules of its *practice* and *procedure*, and to assert that this authority is exclusive to the Supreme Court and the Legislature has no authority to do so is quite another. Unless we ignore the phrase “Subject to the Constitution and law” in Article 191, or say it to be redundant, the assertion of exclusive authority of the Supreme Court in this regard is not sustainable. The power to deal with the subject of rules regulating its practice and procedure, no doubt, primarily vests in the Supreme Court but this is not exclusive to it. This rule-making power of the Supreme Court is subservient to the superior constituent power and ordinary legislative power of the Legislature. The rules made by the Supreme Court are to hold the field unless changed

[4] On this point, I am fortified by the opinion of Justice Case in Winberry v. Salisbury 5 N.J. 240 (1950) who interpreted in the same way, the phrase “subject to law” in a similar provisions of Article VI, Section II, paragraph 3 of the Constitution of the State of New Jersey (USA) which provides that "The 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."

by the Legislature in the exercise of its constituent power under Article 238 or its legislative power under Article 142 of the Constitution. This is my understanding of the phrase "Subject to the Constitution and law" as used in Article 191 of the Constitution.

8. In this regard, I am supported by the same understanding of the learned Judges of this Court who had made the Supreme Court Rules 1980 **("Rules")** in the exercise of rule-making power conferred by Article 191 of the Constitution. In several provisions of the Rules, they specifically mentioned the Rules to be subservient to law made by the Legislature. Some of the such provisions of the Rules are cited here for reference:

> **Rule 1 of Order VI:**
> Save as otherwise provided by law or these Rules, all applications shall be made before the Court on motion after notice to the parties affected thereby.
>
> **Rule 1 of Order XI:**
> 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.
>
> **Rule 6 of Order VII:**
> Except as otherwise provided in these Rules or by any law for the time being in force, the Court fees set out in the Third Schedule to these Rules shall be payable on all documents mentioned therein.
>
> **Rule 4 (1) of order XXXV:**
> Save as otherwise provided by law or by these Rules, the Chief Justice shall from time to time nominate Members from the Shariat Appellate Bench for hearing and disposal of cases...
>
> *(Emphasis added)*

In the above rules, the phrases "save as otherwise provided by law" and "except as otherwise provided by any law for the time being in force" undoubtedly mean statutory law, i.e., the law made by the Legislature. The Rules made by the Supreme Court itself, on the administrative side, recognized that the Supreme Court's rule-making power is subject to legislative enactment. Thus, from the very beginning after the promulgation of the Constitution, the Judges of the Supreme Court understood that their rule-making power is susceptible to being superseded by legislative enactment, i.e., law. With respect, I am not able to understand how can the phrase "subject to law" be interpreted as meaning anything other than what the plain meaning of these words state.

Scope of entry 58 of the Federal Legislative List

9. Now, I take up for discussion entry 58 of the Federal Legislative List which, in my opinion, further establishes the legislative competence of Parliament to make law on the subject of *practice* and *procedure* of the Supreme Court. However, before going on to that, I want to briefly state my understanding, in general, of the scope of the powers of the legislative organ of the State.

10. The preamble of the Constitution in unequivocal terms proclaims that the sovereignty over the entire Universe belongs to Almighty Allah alone and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust, and that the State shall exercise its powers and authority through the chosen representatives of the people. The people of Pakistan, as per this proclamation, are the trustees of the sovereign powers and authority of the State and they are to exercise those powers and authority through their chosen representatives. The Legislature is that organ of the State which consists of the chosen representatives of the people of Pakistan and is thus competent to exercise the sovereign powers and authority of the State on behalf of the people of Pakistan. It is through the legislature that the people enact laws of their choice to regulate all matters in the State; therefore, in enacting laws the legislature speaks for the people. The legislative power which emanates from the people is plenary and embraces all law-making on every subject not prohibited by the Constitution either expressly[5] or by necessary implication.[6] In a Federation like ours, the legislative powers are divided into two legislatures, i.e., the federal legislature (National Assembly and Senate) and the legislatures of the federating units (provincial assemblies). Because of this distribution of legislative powers, the questions may arise, as they often do, as to which legislature's domain a particular matter falls in; but it cannot be said without showing any express or implied prohibition in the Constitution that neither the federal nor the concerned provincial legislature have the legislative power on a particular subject. In a constitutional democracy, the scope of the

[5] Such as, Article 8 of the Constitution that prohibits making of any law which takes away or abridges any of the fundamental rights guaranteed by the Constitution.

[6] Such as, Article 208 of the Constitution that confers the power, without making it subject to the Constitution or law, on the Supreme Court, the Federal Shariat Court and the High Courts to make rules for the appointment of officers and servants of those Courts and for their terms and conditions.

powers of the legislative organ of the State, consisting of the chosen representatives of the people, unless prohibited or circumscribed by the Constitution itself, is very wide and they (Parliament or the concerned provincial assembly are competent to enact laws on all subjects.

11. In the present case, it is axiomatic that the provincial assemblies lack legislative competence to enact a law concerning the Supreme Court; for they cannot enact a law for the whole of Pakistan[7] while the Supreme Court exercises jurisdiction over entire contry. Parliament alone may legislate through which the people of Pakistan can enact laws on subjects that relate to the whole of Pakistan, i.e., the Federation, and the entry that covers generally all those matters which relate to the Federation is entry 58 of the Federal Legislative List. The provisions whereof are reproduced here for ease of reference:

> **58.** Matters which under the Constitution are within the legislative competence of [Majlis-e-Shoora (Parliament)] or relate to the Federation.
>
> *(Emphasis added)*

This is a residuary and general entry on the legislative power of Parliament, and its scope extends to and covers all those subjects which are not specifically mentioned in any other entry in the List but relate to the Federation and are thus beyond the domain of provincial assemblies' legislative power.[8]

12. No provision in the Constitution has been pointed out to us that prohibits either expressly or by necessary implication the exercise of legislative power of Parliament on the subject of practice and procedure of the Supreme Court, but rather the specific mention of the phrase "subject to law" in Article 191 of the Constitution suggests otherwise and repels the argument of any implied prohibition that could have possibly been raised if this phrase had not been there. When instead of any such prohibition there is a clear permissibility expressed by using the phrase "subject to law" in Article 191, the subject of the practice and procedure of the Supreme Court squarely falls within the scope of entry 58 of the Federal Legislative List and with respect to it, Parliament is fully competent to make law in the exercise of its

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[7] See The Constitution, Article 141.
[8] Sui Southern Gas Company v. Federation of Pakistan 2018 SCMR 802.

legislative power under Article 142(a) of the Constitution. Therefore, I find that Parliament has competently enacted the Act on the subject of practice and procedure of the Supreme Court.[9]

Intra-court appeal – a matter of practice and procedure

13. One matter in the Act, however, requires further discussion. This is Section 5 of the Act that has provided for an intra-court appeal from an order of a bench of the Supreme Court, exercising original jurisdiction under Article 184(3) of the Constitution, to a larger bench. All learned counsel conceded before us that the provisions of the Act generally relate to the practice and procedure of the Supreme Court; opinions are, however, divided on the nature of Section 5 of the Act. Most of the learned counsel took it as a substantive provision that does not, according to them, fall within the scope of the practice and procedure of the Supreme Court. With respect, I hold a contrary view.

14. I must concede that the right of appeal is generally not a matter of mere procedure. Nonetheless, in the cases[10] this principle was enunciated, the courts were dealing with a right of appeal against a judgment or order of a lower court to a higher court, not with an intra-court appeal. During the hearing of arguments, I invited the attention of the learned counsel to the two judgments of the Lahore High Court that had dealt with the question as to the nature of an intra-court appeal and held that an intra-court appeal is not an appeal in the strict sense but an internal arrangement of the court for reviewing its own decision. The purpose was that they might further assist on this point and bring in notice of the Court any contrary view, if any, so that after examining the reasoning of divergent views, the Court could reach a better judgment. No case pronouncing the contrary view was, however, cited before the Court nor did any learned counsel advance arguments to establish that the reasoning of the Lahore High Court in holding the said view is in any manner flawed. The relevant extracts from the judgments of the Lahore High Court are reproduced here for reference:

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[9] On this point, I am fortified by the opinion of Justice Hawkins in Hall v. State, 539 So. 2d 1338 (Miss. 1989), who has taken a similar view on the subject of enacting law by the Legislature on the subject of procedure of courts by holding *inter alia* that the power of the legislative organ of the State, being the voice of the people, extends to all subjects not prohibited by the Federal or State Constitution.

[10] The principle was enunciated by the Privacy Council in Colonial Sugar Refining Co. v. Irving (1905) AC 369, and adopted by this Court in Sutlej Cotton Mills v. Industrial Court PLD 1966 SC 472 (5MB).

> **Muzaffar Din v. Allah Wasai PLD 1953 Lah 284 (DB)**
> A Letters Patent Appeal is not really an appeal in the strict sense. It may be more aptly described as an internal arrangement of the Court for reviewing its own decision given in the first instance by one member of the Court. The first as well as the second decision remains a decision of the Court.
>
> **Abdul Haq v. Saif-Ur-Rehman PLD 1968 Lah 478 (DB)**
> Even otherwise, in our opinion there is no question of any vested right of appeal in the appellant which was retrospectively taken away. In essence the Letters Patent Appeal under clause 10 is more in the nature of an intra Court arrangement designed to exercise control over its own affairs in the High Court. The appeal to the Division Bench against a judgment by the Single Bench is internal with the High Court and strictly speaking it is not in the nature of an appeal, to the superior Court against the decision of an inferior Court. ..... Therefore, it would not be correct to construe the provisions contained in clause 10 of the Letters Patent of the High Court of West Pakistan from the point of view of a right of appeal vested in the litigants.

Needless to clarify, it is an intra-court appeal that has been mentioned as Letters Patent Appeal in the above-cited observations, for it was called so at that time. The Division Benches of the Lahore High Court that held the above view were headed by the distinguished Judges of the time; three of whom later adorned the Bench of this Court as well. The Bench that decided *Muzaffar Din* was headed by S.A. Rehman and Muhammad Jan, JJ., while the Bench in *Abdul Haq* was comprised of Waheeduddin Ahmad, C.J. and Muhammad Akram, J. Having pondered upon the point profoundly, I find myself in agreement with their view.

15. No one can dispute that both the first decision by a bench of the court and the second decision in intra-court appeal by a larger bench of the court are the decisions of the same court rendered in the exercise of the same jurisdiction, i.e., in case of High Courts[11] under the jurisdiction conferred by Article 199 of the Constitution and in case of this Court under the jurisdiction conferred by Article 184(3) of the Constitution. The provisions of law, like Section 5 of the Act or Section 3 of the Law Reforms Ordinance 1972, which provide for an intra-court appeal, do not confer any new jurisdiction. An intra-court appeal is an intra-court arrangement that regulates the practice and procedure of the court in the exercise of a particular jurisdiction. Such an arrangement can be made by a court itself in the exercise of its rule-making power or by the competent legislature in the exercise of its legislative power.

[11] Section 3 of the Law Reforms Ordinance 1972 provides for an intra-court appeal against a decree or a final order of a Single Bench of the High Court, passed in the exercise of original civil jurisdiction.

16. This position may be illustrated by an example: if a High Court, in the exercise of its rule-making power, provides that a petition filed under Article 199 of the Constitution shall be heard by a Bench of three Judges, no one can dispute that such power of the High Court relates to its practice and procedure; likewise if a High Court by its rules provides that such a petition shall be first heard by a Single Bench and then by a Division Bench in intra-court appeal, there can be no justifiable reason to deny that such exercise of its rule-making power also relates to the practice and procedure of the High Court. By the latter procedure, the High Court saves the time and labour of two of its Judges, to be utilised in dealing with other cases; for the Single Bench hears, discusses and decides the matter agitated in the petition and the work of the Division Bench lessens in intra-court appeal to only see whether there is any error in the judgment of the Single Bench and to correct the same, if any.[12]

17. Similar is the position with the rule-making power of the Supreme Court: it may have in the exercise of its rule-making power provided that a petition filed under Article 184(3) of the Constitution would be heard by a Full-Court Bench, as some from among the legal fraternity had so demanded, or by a Bench of seven or more Judges, or that such a petition would be first heard by a Bench of three Judges and then by a larger Bench of four or more Judges. Both such rules would have fallen within the domain of regulating the practice and procedure of the Court in exercising one and the same jurisdiction. Instead of its hearing, in the first instance, by a Full-Court Bench or by a Bench of seven or more Judges, the hearing of a petition filed under Article 184(3) of the Constitution first by a Bench of three Judges and then by a Bench of four or more Judges in intra-court appeal clearly relates to regulating the practice and procedure of the Court in exercising its jurisdiction under Article 184(3) of the Constitution. The latter procedure would rather better serve the public interest as by such procedure the time and labour of many Judges of the Court is saved, to be utilised in dealing with other cases. Therefore, in my considered view, Section 5 of the Act also falls within the scope of the subject of regulating the practice and procedure of the Supreme Court, and

[12] Zafar Yab v. Settlement Commissioner 1985 CLC 2647 (DB).

Parliament has competently enacted it in the exercise of its legislative power under Article 142(a) of the Constitution read with entry 58 of the Federal Legislative List.

Interpretation of entry 55 of the Federal Legislative List

18. Even otherwise, if Section 5 of the Act is taken as the one that has conferred a substantive right of appeal on persons aggrieved of an order passed under Article 184(3) and thus enlarged the appellate jurisdiction of this Court, the same will then fall within the scope of entry 55 of the Federal Legislative List. The provisions of the said entry are reproduced here, for ready reference:

> **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.

A bare reading of this entry shows that the matter of *"enlargement of the jurisdiction of the Supreme Court"* falls within the legislative competence of Parliament. By conferring intra-court appellate jurisdiction, Section 5 of the Act has exactly done this: it has enlarged the appellate jurisdiction of the Supreme Court. The point on which the learned counsel took divergent positions is that whether the phrase *"to such extent as is expressly authorized by or under the Constitution"* used in the entry is to be read with the part preceding thereto, i.e., with respect to the jurisdiction of other courts, or it is to be read with the part that follows it, i.e., with respect to the enlargement of the jurisdiction of the Supreme Court. I find that it is to be read with the preceding part. In this regard, I am fortified by the opinion of Ajmal Mian, CJ., expressed in *Sh. Liaqat Hussain*[13]. His lordship observed:

> The above entry [55] indicates that the Parliament can legislate in respect of jurisdiction and power of all Courts except the Supreme Court with respect to any of the matters in the aforesaid list but to such extent as is expressly authorised by or under the Constitution. It also indicates that the jurisdiction of the Supreme Court can be enlarged but it cannot be curtailed.

In the same case, Irshad Hasan Khan, J., also in his concurring note read entry 55 in the like manner, thus:

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[13] Sh. Liaqat Hussain v. Federation of Pakistan PLD 1999 SC 504.

> The above Entry [55] indicates that the Parliament can legislate in respect of jurisdiction and power of all Courts except the Supreme Court with respect to any of the matters in the aforesaid List but to such extent as expressly authorised by or under the Constitution. Clearly, the jurisdiction of the Supreme Court can be enlarged but cannot be curtailed in any circumstances whatsoever.

It may, however, be mentioned here that Nasir Aslam Zahid, J., read the said qualifying phrase, in *N.I.C.C. Corporation,*[14] with the latter part of the entry as to the enlargement of the jurisdiction of the Supreme Court. But this view seems to be solitary and does not find support, as in the case of *Baz Muhammad Kakar,*[15] Iftikhar Muhammad Chaudhry, CJ., again read entry 55 in the same sense as was read by Ajmal Mian, CJ., thus:

> 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.

Therefore, it can safely be concluded that the phrase *"to such extent as is expressly authorized by or under the Constitution"* used in entry 55 is to be read with the part preceding thereto, i.e., with respect to the jurisdiction of other courts, and not with the part that follows it, i.e., with respect to the enlargement of the jurisdiction of the Supreme Court. There is no constraint in the said entry as to the enlargement of the jurisdiction of the Supreme Court and the conferring thereon of supplemental powers. The only limitation is that Parliament cannot curtail the jurisdiction of the Supreme Court.

Retrospective effect of right of intra-court appeal

19. Although subsection (2) of Section 5 of the Act has not obtained on its validity the support of the majority of this Bench, I want to say a few words on it before closing my discussion on Section 5.

20. Subsection (2) of Section 5 of the Act provides that the right of intra-court appeal shall also be available to an aggrieved person against whom an order has been made under Article 184(3) of the Constitution prior to the commencement of the Act. We all know that a legislature that is competent to make a law also has the power to legislate it retrospectively and can by legislative fiat even take away

[14] Province of Punjab v. National Industrial Cooperative Credit Corporation 2000 SCMR 567.
[15] Baz Muhammad Kakar v. Federation of Pakistan PLD 2012 SC 923.

vested rights or affect past and closed transactions.[16] When the legislature gives retrospective operation to the law enacted, the party affected thereby cannot plead infringement of his rights as a ground for declaring the law invalid.[17] Our Constitution only bars retrospective legislation on criminal liabilities, not on civil rights and obligations.[18] However, whether or not subsection (2) of Section 5 of the Act has, in fact and in effect, affected vested rights or past and closed transactions is a different question, which I find now unnecessary to decide upon.

Infringement of fundamental rights - a self-contradictory stance

21. The Hon'ble Chief Justice has held in his judgment that the Act does not in any manner compromise the independence of the judiciary but rather it does the very opposite in ensuring the enforcement of fundamental rights and strengthening the independence of the Judiciary. I fully agree with this finding of his lordship and am of the considered view that devolving two[19] of the administrative powers of the office of the Chief Justice to the Committee of three Judges, which also includes the Chief Justice, does not in any manner infringe the independence of the judiciary nor does the provision of a right of intra-court appeal affect the right of access to justice. Further, I want to underline another aspect of the challenge made to the validity of the Act on this ground.

22. Almost all the learned counsel who argued against the constitutional validity of the Act admitted that the provisions of the Act would bring more transparency in the working of this Court and improve the fair and efficient administration of justice by it. Their contention basically was that such provisions should have been made by this Court in the exercise of its rule-making power under Article 191 of the Constitution, not by Parliament through the enactment of the Act. In essence, they objected that a wrong body has made these provisions, not that the provisions are wrong. If it is so as they say, their stance that the provisions of the Act have infringed the fundamental rights becomes self-contradictory and does not survive; for

[16] Haider Automobile v. Pakistan 1969 SC 623 (5MB); Molasses Trading v. Federation of Pakistan 1993 SCMR 1905 (5MB).
[17] Annoor Textile v. Federation of Pakistan PLD 1994 SC 568.
[18] The Constitution, Article 12.
[19] Powers to constitute benches and invoke *suo motu* original jurisdiction.

such provisions would not have infringed any of the fundamental rights if they had been included in the Rules of this Court, then cannot they do so while they are included in the Act. It amounts to blowing hot and cold in the same breath if one says that such provisions added in the Rules of the Court would have been perfectly valid on the touchstone of fundamental rights but are invalid when they have been enacted in the Act.

Separation of powers vis-a-vis checks and balances

23. In support of the said stance, some of the learned counsel arguing against the validity of the Act also referred to the doctrine of separation of powers between three organs of the State (legislature, executive and judiciary) and their independence in their respective domains. In so referring, the learned counsel failed to appreciate that the doctrine of separation of powers does not stand alone but is interlinked with the doctrine of checks and balances.

24. The separation of powers, no doubt, serves as a foundational principle in constitutional governance, delineating distinct functions among the three organs of the State: the legislature entrusted with making laws, the executive with implementing laws, and the judiciary with interpreting and applying laws. All three organs of the State play their respective roles to achieve the common goal, i.e., the rule of law. Each organ operates independently within its designated sphere, without undue influence or interference from the others. This separation aims to prevent the concentration of power in any one organ of the State and safeguards against tyranny by ensuring that no organ becomes too powerful. For, '[t]he accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'[20]

25. Concomitant with the doctrine of separation of powers is, however, the doctrine of checks and balances. It acknowledges that while each organ operates independently, there should be some mechanism to restrain each organ within the limits of its power and to counteract whenever such limits are exceeded. It is through checks and

[20] James Madison, The Federalist, ed. Jacob E. Cooke (Wesleyan University Press, 1961).

balances that each organ is empowered to monitor and, if necessary, undo the actions of the others, ensuring that no organ exceeds its constitutional authority. The very strength of the separation of powers is thus dependent on the checks and balances, making no organ absolutely unchecked. Therefore, in essence, the separation of powers and the checks and balances are intertwined concepts that reinforce the stability and integrity of a constitutional democracy; they provide a framework where each organ is both empowered and limited, fostering both cooperation and accountability.

26. It is also important to emphasize that although the three organs of the State are separate, equal and coordinate, they are after all integral parts of one State. Operating as parts of a single entity, these organs cannot function in isolation or within watertight compartments. For the State to effectively serve its people, each organ should find cooperation from the other two. Confrontations arising from clashes in constitutional authority are rarely in the public interest and should be avoided whenever possible. Instead, the guiding principles of good governance, i.e., mutual understanding, respect and self-restraint, should be pursued. These principles serve as the lubricants that facilitate the smooth functioning of the constitutional machinery of governance and foster an environment where the collective welfare of the public takes precedence.[21] In this regard, 'a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.'[22]

Legislative intervention – a check on the rule-making power of the Court

27. As stated above, under Article 191 of the Constitution, the initial and primary power to make rules for regulating its practice and procedure is vested in the Supreme Court. The power vested in the Legislature to enact a law on this subject is, to my understanding, like a check on the rule-making power of the Supreme Court. I find that the constitution-makers intended to give the Court, in the first instance, the authority to make the rules regulating its practice and procedure and leave to the Legislature the authority to intervene only when it is

[21] See my opinions in Hadayat Ullah v. Federation of Pakistan 2022 SCMR 1691 and Imran Khan v. Federation of Pakistan 2023 SCP 326.
[22] Ex parte Randolph, 20 F. Cas. 242 (1833) per Marshall, C. J.

necessary to do so in the public interest, with the belief that such necessity will seldom arise and that the Legislature will exercise its authority with the restraint that is befitting to the relations between the two organs of the State. The final authority on the subject is, thus, allocated to the Legislature, which is directly responsible to the people. So far as arising of the necessity of enacting the provisions that are included in the Act, in the public interest, is concerned, such necessity was voiced by almost all segments of the legal fraternity and is well documented.[23]

Question of maintainability of petition and scope of Section 3 of the Act

28. Next, I want to deal with the contention of some of the learned counsel as to the invalidity of Section 3 of the Act and their reliance in this regard on my two orders[24] passed on chamber appeals filed against the administrative orders of the Registrar of this Court under the Rules. I would reproduce the provisions of Section 3 of the Act here for the convenience of reference:

> Any matter invoking exercise of original jurisdiction under clause (3) of Article 184 of the Constitution shall be first placed before the Committee [comprising the Chief Justice and two most senior Judges] 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.
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> (Emphasis added)

It was argued that in the said orders, I held that the issue as to the maintainability of an appeal or petition cannot be decided by the Registrar in the exercise of its administrative powers under the Rules nor can it be decided by a Judge hearing an administrative appeal against an administrative order of the Registrar. If it is so as held by me, it was argued, then how can an administrative Committee decide the question of maintainability of a petition under Article 184(3) of the

[23] Pakistan Bar Council and Supreme Court Bar Association passed several resolutions on it; many Judges of the Supreme Court emphasized on it in their judgments; and the academia wrote much on it. See Yasser Kureshi, Seeking Supremacy: The Pursuit of Judicial Power in Pakistan (2022); Asher Asif Qazi, A Government of Judges: A Story of The Pakistani Supreme Court's Strategic Expansion (2018); Dr. Osama Siddique, The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers' Movement (2015); Maryam S. Khan, Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward A Dynamic Theory of Judicialization (2015).

[24] Qausain Faisal v. Federation of Pakistan PLD 2022 SC 675; Ahsan Abid v. Khusru Bakhtiar PLD 2022 SC 712.

Constitution under Section 3 of the Act? At first blush, I must concede, the argument appears attractive but it does not survive closer scrutiny.

29. Section 3 of the Act has used the words "any matter", not "a petition", in relation to invoking original jurisdiction under Article 184(3) of the Constitution nor has it used the words "*suo motu*" or "on its own". Therefore, there is an ambiguity as to the true meaning and scope of those words that calls for a judicial interpretation until the legislature explains it by adding some explanation to Section 3 of the Act or making the language thereof more clear by amendment. The matter of ambiguity is whether the words "any matter" used in Section 3 of the Act include both the petitions filed under Article 184(3) of the Constitution and the *suo motu* invoking of original jurisdiction under Article 184(3) of the Constitution, or they only mean the latter.

30. It is by now well-accepted that in case of doubt or difficulty in ascribing proper meaning to a provision or a word in a provision of law, the Statement of Objects and Reasons in the Bill introduced for the enactment of that law may also be looked into, to ascertain the intention of the Legislature.[25] Given this principle, when we see the Statement of Objects and Reasons in the Bill that was introduced in the National Assembly for the enactment of the Act, we find therein this statement:

> Whereas, 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.
>
> (Emphasis added)

The above statement greatly helps remove the ambiguity and identifies the intention of the Legislature in enacting Section 3 of the Act. It shows in unequivocal terms that it was "invoking of *suo motu* powers" in relation to the exercise of original jurisdiction of the Supreme Court under Article 184(3) of the Constitution that the Legislature intended to deal with. This intention of the Legislature is further evident from the

[25] Paramatha Nath v. Kamir Mondal PLD 1965 SC 434; Aamer Raza v. Minhaj Ahmad 2012 SCMR 6; DBA, Rawalpindi v. Federation of Pakistan PLD 2015 SC 401 per Khosa, J.; Rangaswamy v. Commissioner of Wealth Tax 1998 PTD 421.

matter described next in the above statement, i.e., the constitution of benches. Both the powers of *suo motu* invoking original jurisdiction[26] and constituting benches[27] were earlier being exercised by one person, the Chief Justice; it is these administrative powers that have now been conferred on the Committee comprising three persons, i.e., the Chief Justice and the two most senior Judges - nothing more nothing less. Neither the Chief Justice was earlier competent, or used, to decide the maintainability of the petitions filed under Article 184(3) of the Constitution, nor can the Committee do so under Section 3 of the Act. My orders referred to by the learned counsel, therefore, do not conflict in any manner with such scope of Section 3 of the Act.

31. There is, however, one more thing that I want to underline in this regard. The *ratio* of the judgment passed by a five-member Bench of this Court in SMC No.4/2021[28] as partially modified by Section 3 of the Act is that now the Committee comprising the Chief Justice and two most senior Judges is the sole authority by and through which the jurisdiction of this Court under Article 184(3) of the Constitution can be invoked *suo motu*; no Judge or Bench of this Court can do so. This is the law of the land to date; it must be applied and complied with in letter and spirit. The Benches of this Court hearing the petitions filed under Article 184(3) of the Constitution should, therefore, as a first step in the proceedings ask the petitioner to show how he has an interest in the matter agitated in the petition. If he fails to do so, the petition should be referred to the Committee to decide upon the question of whether or not it finds appropriate to invoke the jurisdiction of the Court *suo motu* in the matter agitated in the petition. The Benches of this Court hearing such petitions must be watchful that a petitioner who has at all no interest in the matter may not be allowed to indirectly frustrate the object of Section 3 of the Act merely by filing a petition under Article 184(3) of the Constitution. It is a well-settled

[26] A five-member Bench of this Court held in SMC No.4/2021 (PLD 2022 SC 306) that the Chief Justice is the sole authority by and through whom the jurisdiction of this Court under Article 184(3) of the Constitution can be invoked *suo motu*.
[27] The Rules, Order XI.
[28] PLD 2022 SC 306.

principle of law that what cannot be done directly *(per directum)* is not permissible to be done indirectly *(per obliquum)*.[29]

Status of benches constituted and decisions made by them during the suspension of the Act

32. Lastly, I want to address another submission of some of the learned counsel who argued against the validity of the Act, i.e., if the validity of the Act is upheld by the Court, the constitution of Benches by the then Hon'ble Chief Justice and the decision made by those Benches during the period of suspension of the operation of the Act may be protected under the doctrine of past and closed transactions.

33. To avoid this question, I had earlier expressed my view that until the question of the constitutionality of the Act was decided, the cases invoking the original jurisdiction of this Court under Article 184(3) of the Constitution or that which involved the interpretation of the constitutional provisions should be adjourned or heard by a Full-Court Bench.[30] Nonetheless, I have now thought over the question as it has actually arisen and the ramifications of its answer in either way, in light of the cases where this Court espoused the doctrine of past and closed transactions. The principle that I gathered from reading such cases[31] is that the acts done in accordance with the law prevailing at the time of their doing are generally protected under this doctrine. The operation of the Act having been suspended by an eight-member Bench of this Court, the then Hon'ble Chief Justice constituted the Benches in accordance with the law that was prevailing at that time, i.e., Order XI of the Rules. One may argue that the Court should not have suspended the operation of the Act, but cannot deny the fact that it was indeed suspended. So when applying the said principle to the question under consideration, we find that the act of constituting Benches by the then Hon'ble Chief Justice should be protected unless some exceptional circumstances may justify departure from the principle. No one from among the learned

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[29] Abdul Baqi v. Govt. of Pakistan PLD 1968 SC 313; Nawaz Sharif v. President of Pakistan PLD 1993 SC 473; Hanif Abbasi v. Imran Khan PLD 2018 SC 189.

[30] See my note dated 22.06.2023 in Jawwad S.Khawaja v. Fderation of Pakistan (2023 SCP 190) and my notes dated 18.08.2023 and 29.08.2023 in Imran Khan v. Federation of Pakistan (2023 SCP 228 and 267).

[31] Income-Tax Officer v. Cement Agencies Ltd. PLD 1969 SC 322; Faizur Rehman v. N.W.F.P. Public Service Commission 1996 SCMR 589; Govt. of N.W.F.P. v. Muhammad Irshad PLD 1995 SC 281 (5MB); Mehram Ali v. Federation of Pakistan PLD 1998 SC 1445 (5MB); Liaqat Hussain v. Federation of Pakistan PLD 1999 SC 504 (9MB); Said Muhammad v. State 2000 SCMR 1076; Pakistan Steel Mills v. Azam Katper 2002 SCMR 1023; Mubeen-us-Salam v. Federation of Pakistan PLD 2006 SC 602 (9MB); Muhammad Idrees v. Agricultural Development Bank PLD 2007 SC 681 (9MB); Muhammad Ishaq v. Muhammad Shafiq 2007 SCMR 1773; Muhammad Safdar v. Punjab Land Commission 2012 SCMR 1725 (4MB); Moizuddin v. Mansoor Khalil 2017 SCMR 1787.

counsel who argued this case before us presented or pointed out any of such exceptional circumstances.

34. When the inconvenience or injustice likely to occur due to applying or non-applying the doctrine of past and closed transactions is measured on the principle of proportionality, the scales tilt in favour of following the above principle rather than the exception thereof; for a great amount of public time had been spent in hearing and deciding the cases by the Benches of this Court constituted by the then Hon'ble Chief Justice. I would therefore apply the doctrine of past and closed transactions to the acts of constitution of benches and decisions of the cases by those benches during the period of suspension of the operation of the Act.

35. However, in order to give effect to the provisions of Sections 4 and 5 of the Act to a possible extent, the review petitions filed against orders passed in jurisdiction under Article 184(3) should be treated as appeals, on applications made in this regard, with permission to file additional grounds of challenge and dealt with accordingly under Section 5 of the Act while the review petitions filed in other cases that fall within the category mentioned in Section 4 of the Act may be fixed for hearing before the Benches comprising not less than five Judges of the Court. This course, in my view, would best serve the public interest.

36. Since I have addressed herein some points that are not included in the leading judgment authored by the Hon'ble Chief Justice, let this be circulated among my learned colleagues who joined in para 1 of the short order of the Court in sustaining the constitutional validity of the Act.

Judge

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Judge

Qazi Faez Isa, CJ. I agree with my distinguished colleague and the points determined herein may be considered as part of the decision of this Court.

Sardar Tariq Masood, J. I also agree and endorse the note dealing with main Judgement.

Amin-ud-Din Khan, J. I also agree with the note added by J. Syed Mansoor Ali Shah.

Jamal Khan Mandokhail, J. I endorse this note alongwith the main judgement.

Muhammad Ali Mazhar, J. I agree except Paragraph 20 & 35

Athar Minallah, J. I will be adding a separate note while I agree with the interpretation

Syed Hasan Azhar Rizvi, J. I agree except paragraphs No. 20 & 35.

Musarrat Hilali, J. I agree with the note added by Hon'ble Mansoor Sb.