Judgment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20. First comes section 2, which provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge

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

"Approved for reporting"