Yahya Afridi, J.- A Full Court was constituted by the worthy Chief Justice of the Supreme Court of Pakistan (**"the Chief Justice"**) to decide the petitions filed in the original jurisdiction of this Court, challenging the *vires* of the Supreme Court (Practice and Procedure) Act, 2023 (**"the Act"**). After considering the submissions of the learned counsel for the parties and the major political parties put on notice, this Court announced its short order on 11 October, 2023. The order reads:

"**ORDER OF THE COURT**

For reasons to be recorded later these petitions are decided as under:

1. Subject to paras 2 and 3 below, by a majority of 10 to 5 (Justice Ijaz ul Ahsan, Justice Munib Akhtar, Justice Sayyed Mazahar Ali Akbar Naqvi, Justice Ayesha A. Malik and Justice Shahid Waheed dissenting) the Supreme Court (Practice and Procedure) Act, 2023 ('**the Act'**) is sustained as being in accordance with the Constitution of the Islamic Republic of Pakistan ('**the Constitution**') and to this extent the petitions are dismissed.

2. By a majority of 9 to 6 (Justice Ijaz ul Ahsan, Justice Munib Akhtar, Justice Yahya Afridi, Justice Sayyed Mazahar Ali Akbar Naqvi, Justice Ayesha A. Malik and Justice Shahid Waheed dissenting) sub-section (1) of section 5 of the Act (granting a right of appeal prospectively) is declared to be in accordance with the Constitution and to this extent the petitions are dismissed.

3. By a majority of 8 to 7 (Chief Justice Qazi Faez Isa, Justice Sardar Tariq Masood, Justice Syed Mansoor Ali Shah, Justice Amin-ud-Din Khan, Justice Jamal Khan Mandokhail, Justice Athar Minallah and Justice Musarrat Hilali dissenting) sub-section (2) of section 5 of the Act (granting a right of appeal retrospectively) is declared to be ultra vires the Constitution and to this extent the petitions are allowed.".

As stated above, except for section 5 of the Act, I was part of the majority that upheld the constitutional validity of the Act. Herein, I propose to record the reasons for upholding the constitutional validity of the Act, except section 5 thereof, which provides for a right of appeal.

Scope of a Full Court

2. To my mind, the members of a Full Court are not to be shackled by precedents. No doubt, we are to draw wisdom from the decisions already rendered, but in no way are we bound by the principle of *stare-decisis.* And to do so, would defeat the very purpose of convening a Full Court to hear and decide a matter.

Preliminary Objection

3. To start with, I would address the preliminary objection raised by the learned Attorney General of Pakistan regarding the maintainability of the present petitions. The thrust of the objection was that the conditions precedent for invoking the original jurisdiction of this Court under Article 184(3) of the Constitution of the Islamic Republic of Pakistan (**"the Constitution"**), were not met, and in particular that, neither was there any violation of the fundamental rights nor was there any issue of public importance raised in the petitions challenging the *vires* of the Act.

4. To appreciate the preliminary objection raised, it would be useful to carefully read Article 184(3) of the Constitution, which reads:

> **"(3) 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."**
>
> (emphasis provided)

5. As the above Article clearly provides, the two essential conditions precedent required for invoking the original jurisdiction of this Court under Article 184(3) of the Constitution are that: Firstly, the matter raised in the petition should relate to a matter of public importance; and secondly, that the said matter relates to the enforcement of any of the fundamental rights provided under the Constitution.

6. I find that, in essence, the petitioners through these petitions seek to preserve and protect the independence of the judiciary, which undoubtedly, is beyond the realm of their private or individual concerns, and most certainly covers a more general or wider sphere, spanning the entire society and affecting the public at large. Thus, the present petitions do relate to an issue of 'public importance', and the objection to the maintainability to the extent of the first limb is repelled.

7. The second limb of the objection to the maintainability of the petitions was that the Act had not violated any of the fundamental rights provided under the Constitution. I am afraid, this objection of the learned Attorney General is rather miscued. To start with, one must appreciate, the use of the words ‘with reference to’, widens the scope of justiciability, and then to follow it with the word ‘enforcement’, the legislative intent is clear to further expand the extent of jurisdiction. To my mind, the word ‘enforcement’ is not synonymous to the word ‘infringement’, in fact, both words are distinct, each having its own meaning and connotation; the word ‘enforcement’ is more inclusive, and includes both, the acts or omissions that would actually infringe, or that would bolster fundamental rights.

8. Thus, the challenge made to the maintainability of the present petitions on the ground that there was no infringement of a fundamental right is misplaced. The scope of taking cognizance of matter by the Supreme Court in its original jurisdiction under Article 184(3) is much wider and can also be invoked, even if there is no infringement of any fundamental right, but what is essential is that the matter raised in the challenge before the Court relates to ensuring that the fundamental rights of the citizens and/or persons, provided under the Constitution, are effectively exercised.

9. Given this aspect of the jurisdiction that can be invoked under Article 184(3) of the Constitution, the present petitions, to my understanding, fulfill both the conditions precedent for invoking the original jurisdiction of the Supreme Court. Accordingly, the preliminary objection raised by the learned Attorney General of Pakistan is repelled,

and the petitions are in my opinion maintainable under Article 184(3) of the Constitution.

Issues for determination

10. For the convenience of discussion, I have divided my opinion into three parts: firstly, the constitutional validity of the Act, in general; secondly, my comments on section 2 of the Act; and finally, the legislative competence of the Parliament to provide a right of appeal under section 5 of the Act.

Issue No. I - Constitutional validity of the Act

11. The challenge to the constitutional validity of the Act was essentially premised on two contentions: firstly, that the subject matter dealt with in the Act does not fall within the ordinary legislative competence of the Parliament, and secondly, that the provisions of the Act violate the fundamental right of access to justice through an independent judiciary. I would take up and decide these contentions in *seriatim*.

Legislative competence of Parliament

12. The Act generally relates to the practice and procedure of this Court, as its name suggests. To give an overview of the Act, it is noted that: The Act comprises eight sections. Section 1 prescribes the Act and declares it to have a prospective effect. Section 2 relates to the constitution of Benches and that every cause, appeal or matter before the Supreme Court is to be heard and disposed of by a Bench to be decided by a Committee comprising of the Chief Justice and the two next most senior Judges. Subsections 2 & 3 of Section 2 provide for the framing procedure of the said Committee and its decisions. Section 3 provides for the manner and mode of how the Supreme Court is to exercise its

original jurisdiction provided under clause 3 of Article 184 of the Constitution. It mandates the Committee to view the petition on the touchstone of the conditions precedent required under clause (3) of Article 184 of the Constitution and for the same to be placed before a Bench comprising of not less than three Judges of the Supreme Court. Section 4 mandates that in cases where the interpretation of the Constitution is involved, the Committee is to constitute a Bench of not less than five Judges of the Supreme Court. Section 5 creates an appeal against an order passed by a Bench exercising jurisdiction under clause (3) of Article 184 of the Constitution. It further mandates that the appeal is to be heard by a Larger Bench of the Supreme Court. Further, subsection (2) of Section 5 vests a right of appeal to any aggrieved person against whom an order has been passed under clause (3) of Article 184 of the Constitution prior to the commencement of the Act, providing retrospective effect to such exercise of right. Section 6 provides the right to appoint a counsel of choice in filing a review application under Article 188 of the Constitution. Section 7 stipulates fourteen days for fixation of any application for urgency or interim relief, filed in a cause, appeal or matter. Finally, Section 8 provides for the provisions of the Act to have an overriding effect on any other law, rules or regulations for the time being in force or judgment of any court including the Supreme Court and the High Court.

13. To establish the legislative competence of Parliament on this matter, the learned Attorney General and other learned counsel, supporting the constitutional validity of the Act, placed reliance on Article 191 and Article 142(a) read with Entries 55 and 58 of the Federal Legislative List provided in the 4th Schedule to the Constitution.

14. Our constitutional history bears witness to special attention being rendered by providing express provisions vesting authority to frame rules relating to the practice and procedure of the Supreme Court. Reviewing the legislative evolution of the said authority to frame rules relating to the practice and procedure of the Supreme Court, one finds the following:

Government of India Act, 1935	**1956 Constitution**	**1962 Constitution**	**1973 Constitution**
Section 214(1) of the Government of India Act, 1935 provided that: "The Federal Court may from time to time, with the approval of the Governor-General in his discretion, make rules of court for regulating generally the practice and procedure of the court…"	Clause 3(1) of the 3rd Schedule to the Constitution provided that: "The Supreme Court may, with the previous approval of the President, make rules for regulating the practice and practice of the court…"	Article 65 of the Constitution provided that: "Subject to this Constitution and the law, the Supreme Court may, with the approval of the President, make Rules regulating the practice and procedure of the Court."	Article 191 of the Constitution provides that: "Subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court."

A careful review of the above provisions shows that the evolution of the constitutional sources for framing rules regulating the practice and procedure of the Supreme Court, as provided in the successive constitutions of our country, reveals two marked trends: first, the inclusion of check of the Legislature on the rule-making authority of the Supreme Court; and second, the removal of the Executive to have any check on the formulation of rules of practice and procedure of the Supreme Court.

15. Having considered the legislative trend in the evolution of the rule making authority of the Supreme Court to frame rules relating to its practice and procedure, it would now be expedient to carefully read

Article 191 of the Constitution to understand the true purport thereof. For ease of reference, the said provision reads:

> Subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court.
>
> (Underlining added)

A watchful reading of the above provision indicates three legislative sources for framing and regulating the practice and procedure of the Supreme Court: firstly, the Constitution, secondly, the law, and finally, the rules framed by the Supreme Court. No one has, before us, contested the above stated first and the third legislative source – the Constitution and the rules made by the Supreme Court – for framing and regulating the practice and procedure of the Court. All before us agree that, by a constitutional amendment, the legislature may incorporate in the Constitution, any provision on the matter of the practice and procedure of the Supreme Court, and similarly, that the Supreme Court may make rules on the matter of its practice and procedure. The contest between the parties was essentially focused on the above stated second source – the law.

16. No doubt, opinion of the parties may differ on the scope of the term 'law' as used in Article 191 of the Constitution. Some may argue that, it includes the principles of law enunciated by the Court in terms of Article 189 of the Constitution or any custom or usage having the force of law. Whether or not it is so, is not a matter in dispute before this Court in the present case. However, the insertion of the word 'law' employed in Article 191 of the Constitution, could by no stretch of legal interpretation, exclude a validly enacted piece of legislation.

17. Saying that a law enacted by a competent legislature cannot regulate the practice and procedure of the Supreme Court would amount to shutting our eyes on the plain language of Article 191 of the

Constitution, and thereby offends the settled cardinal principles of interpretation of constitutional provisions. However, it is a matter for judicial examination and determination, as to whether the term 'law' used in Article 191 by itself confers the legislative power on Parliament or the legislative competence of Parliament is to be culled from other provisions of the Constitution.

18. In this regard, the learned Attorney General contended that, Article 191 of the Constitution by itself is an enabling provision that confers the legislative competence on Parliament to make 'law' on the subject of 'practice and procedure' of this Court. His reliance was on *"[m]atters which under the Constitution are within the legislative competence of Majlis- e-Shoora (Parliament)*", as provided in the first part of Entry 58 of the 4th Schedule to the Constitution.

19. One cannot legally consider the word 'law' in isolation to the expression 'subject to law' employed in Article 191 of the Constitution. One must acknowledge that, the use of the expression 'subject to law' is not unique in Article 191, as it has been used in several other provisions of the Constitution. In my opinion, the said expression ordinarily makes the right or power, in respect of which it is used, subordinate and subservient to the law enacted by a competent legislature. This expression, to my mind, does not by itself confer any legislative power on a particular legislature. It only envisages that the right or power may be regulated, controlled, or curtailed by law enacted by a competent legislature. This, in my opinion, was the intent of the framers to employ the expression 'subject to law' in Article 191 of the Constitution.

20. Given the above intent, when we read Article 191 (*supra*), it becomes clear that by using the said expression therein, the legislature wanted to convey by implication that, there was or may be law on the matter of practice and procedure of the Supreme Court other than the one framed by the Supreme Court, and when there is such a law or is to be competently enacted, the power of the Supreme Court to make rules on this matter or the rules already framed shall stand eclipsed. In other words, the provisions of a law regarding matter of practice and procedure of the Supreme Court enacted by the competent legislature shall prevail over the provisions of a rule also made thereon by the Supreme Court.

21. In fact, the Full Court that framed the Supreme Court Rules, 1980 (**"the Rules"**), carried through the above explained intent of the makers of the Constitution, in subjecting the rule-making authority of the Supreme Court to competently enacted law. This is but evident from the provisions of Order XI of the Rules, wherein, the authority of fixation of the cases before the Benches of the Supreme Court was bound to an appropriately enacted 'law'. The said rule reads:

> "[s]ave 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".
>
> (emphasis provided)

22. The legal significance of the check of 'law' on the rule-making authority of the Supreme Court is magnified manifold, when we note that the framers of the Constitution did not prescribe any such check of 'law' on the rule-making authority of the Parliament[1] to regulate its

---

[1] **Article 67 (Parliament)**

67. (1) Subject to the Constitution, a House may make rules for regulating its procedure and the conduct of its business, and shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the House shall not be invalid on the

proceedings or for that matter, the Executive[2] to govern its affairs of governance. Thus, the intent of the framers of the Constitution is but very obvious.

23. Reverting back to the issue of tracing the legislative source to enact the law envisaged under Article 191 of the Constitution, we have to first address the two inter-connected issues: first, whether Federal or Provincial or both, legislatures can legislate on the matter of practice and procedure of the Supreme Court; and secondly, to identify the enabling provision of the Constitution.

24. As per Article 142 of the Constitution, Parliament has exclusive power to make laws with respect to any matter in the Federal Legislative List of the 4th Schedule to the Constitution, and all other matters (except criminal law, criminal procedure, and evidence) fall within the legislative competence of Provincial Assemblies. On the matters of criminal law, criminal procedure, and evidence, Parliament and Provincial Assemblies have concurrent legislative power. The matter of practice and procedure of the Supreme Court is not covered by the matters of criminal law,

---

ground that some persons who were not entitled to do so sat, voted or otherwise took part in the proceedings.

2) Until rules are made under clause (1), the procedure and conduct of business in a House shall be regulated by the rules of procedure made by the President.

[2] **Article 90 and 99 (Executive)**

90. (1) Subject to the Constitution, the executive authority of the Federation shall be exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the Federal Ministers, which shall act through the Prime Minister, who shall be the chief executive of the Federation.

(2) In the performance of his functions under the Constitution, the Prime Minister may act either directly or through the Federal Ministers.

99. (1) All executive actions of the Federal Government shall be expressed to be taken in the name of the President.

(2) The [Federal Government] shall be rules specify the manner in which orders and other instruments made and executed [in the name of the President] shall be authenticated, and the validity of any order or instrument so authenticated shall not be questioned in any court on the ground that it was not made or executed by the President.

(3) The Federal Government shall also make rules for the allocation and transaction of its business.

criminal procedure, and evidence over which Parliament and Provincial Assembly have concurrent legislative power. Thus, with the issue of practice and procedure of the Supreme Court being outside the pale of the concurrent legislative power of the Parliament and Provincial Assemblies, the moot question is, therefore, further restricted to: whether it is Parliament or Provincial Assemblies that have the legislative competence on the matter of practice and procedure of the Supreme Court.

25. As per Article 141 of the Constitution, a Provincial Assembly can make laws for the Province or any part thereof; it cannot make laws that can have extra-territorial operation beyond the territorial limits of the Province. As Supreme Court exercises its jurisdiction and judicial powers for the whole of Pakistan, the Provincial Assemblies, thus, lack the legislative power to enact a law relating to the Supreme Court, including a law that regulates its practice and procedure. This would leave us now to focus on the issue: whether Parliament has the legislative competence to legislate thereon or otherwise.

26. When we read the Federal Legislative List of the 4th Schedule to the Constitution, we do not find the matter of practice and procedure of the Supreme Court, expressly mentioned therein. The reliance on Entry 55 of the Federal Legislative List by some of the learned counsel supporting the validity of the Act, in my opinion, is not well placed. Though the scope of this Entry shall be discussed in detail later, suffice here to state that, this Entry relates to ‘jurisdiction’ and ‘powers’, and not the ‘practice and procedure’ of the Supreme Court.

27. In order to establish legislative competence of the Parliament, one must carefully read Entry 58 of the Federal Legislative List of the 4th

Schedule to the Constitution. This entry along with Entry 59 are, in fact, independent sources of legislative competence for Parliament with respect to matters which under the Constitution are within the legislative competence of Parliament or relate to the Federation. For ease of reference, Entries 58 and 59, are reproduced herein below for better understanding. The provisions read as follows:

Entry 58

"Matters which under the Constitution are within the legislative competence of Majlis- e-Shoora (Parliament) or relate to the Federation."

Entry 59

"Matters incidental or ancillary to any matter enumerated in this Part."

28. The constitutional architecture necessitates that those matters stated in the legislative list be interpreted not as explicit grants of power, but as frameworks outlining the scope of legislative competence. In this light, these entries demand an interpretation that is not only liberal and broad but also deeply rooted in the constitutional ethos and that bolster respect for the doctrine of separation of powers. In interpreting these entries, particularly in the context of a federal structure, it is imperative to give them the widest possible ambit. However, this does not imply an unfettered expansion of legislative competence into judicial domain. The phrase *'[m]atters which relate to the Federation'* in Entry 58, while broad, must be understood within the bounds of constitutional propriety and the underlying principle that legislative overreach into 'jurisdiction' and 'powers' of the Supreme Court is constitutionally impermissible. This interpretation aligns with the foundational principle of constitutionalism, which mandates a clear demarcation and balance between legislative and judicial powers. Thus, while Entry 58 offer a basis for legislative action in matters of 'practice and procedure' of the Supreme Court, such action

must be exercised with constitutional caution, ensuring that it does not encroach upon the 'jurisdiction' and 'powers' of the judiciary, as explicitly constrained by Entry 55. This delicate balance is essential to uphold the integrity and independence of the judiciary, a cornerstone of democratic governance and the rule of law. In this backdrop, when we read Entry 58, it becomes apparent that, as Supreme Court exercises its jurisdiction and judicial powers for the whole of Pakistan; it is, in this sense, a constitutional establishment, having direct nexus with the Federation. To declare its functions otherwise than *'[m]atters which relate to the Federation'* provided in Entry 58, would be factually and legally incorrect. Therefore, the matter of practice and procedure of the Supreme Court is a matter that relates to the Federation, and thus falls within the scope of Entry 58 of the Federal Legislative List in the 4th Schedule to the Constitution. Parliament, therefore, has the legislative competence to enact the Act on the matter of practice and procedure of the Supreme Court.

Conclusion on Legislative Competence of Parliament

Given the above, though I differ with the reasoning rendered by the learned Attorney General in rendering legal cover to the Act, I concur with his conclusion that, the 'practice and procedure' of the Supreme Court mentioned in Article 191 of the Constitution falls within the scope of Entry 58 of the Federal Legislative List, and thus, the Parliament has the legislative competence to legislate on 'practice and procedure' of the Supreme Court.

Violation of the fundamental rights – provisions of the Act

29. Once the legislative competence of Parliament to legislate on the matter of 'practice and procedure' of the Supreme Court has been settled,

the provisions of the Act are now to be examined on the constitutional touchstone of Article 8 of the Constitution. This constitutional test is, whether a law enacted by a competent legislature can take away or abridge any of the fundamental rights guaranteed by the Constitution.

30. The main thrust of the challenge made by the petitioners to the validity of the Act was that it violates the independence of the judiciary, and thereby offends the fundamental right of access to justice through an independent judiciary, enshrined in the right to life and liberty, as well as, in the right to a fair trial and due process guaranteed by Articles 9 and 10A of the Constitution, respectively.

31. Admittedly, the Act has essentially dealt with the power of constituting Benches and *suo motu* invocation of the original jurisdiction of this Court under Article 184 of the Constitution. Earlier, the constitution of Benches of the Supreme Court was decided by the Chief Justice alone, whereas the enabling provisions of the Act have conferred the said authority on a Committee, comprising of the Chief Justice and two next most senior Judges of this Court**.** What is evident is that these powers have remained in and with the Court, that is, its Judges. No power has been conferred on any outsider to the Court. Despite their lengthy arguments, the learned counsel for the petitioners and other persons opposing the validity of the Act remained unable to explain, how the Act affects the independence of the judiciary in substituting the Chief Justice with the Committee comprising not only the Chief Justice but also the two next most senior Judges to exercise the administrative powers of constituting Benches and invoking *suo motu* under the original jurisdiction of the Court.

32. Undoubtedly, the Chief Justice of the Supreme Court has been expressly vested with special powers in the Constitution, in particular, matters relating to elevations to the bench, administering oath of office, rendering recommendation for appointments to various constitutional positions, and being part of commissions for removal of judges of superior judiciary and other constitutional office holders under the Constitution.[3] But when it came to framing the rules for regulating the 'practice and procedure' of the Supreme Court, the framers of the Constitution vested Supreme Court, and not the Chief Justice, with the authority to regulate the same. And, mind you, the Supreme Court under Article 176 of the Constitution, consists of the Chief Justice and the other judges of the Supreme Court. Thus, the clear intent of the framers of the Constitution was, but obvious.

33. Viewed from another legal perspective, it would be interesting to note that, in essence, the Act makes the process of constituting Benches more democratic, fostering a participatory approach in decision-making.

---

[3] **Relevant Provisions of Chief Justice of Pakistan under the Constitution**

Article	Title of the Article	Text of the Article
10(4)	Safeguards as to arrest and detention	Appointment of Chairman and two members of the Federal Review Board
146(3)	Power of the Federation to confer Provinces to entrust functions to the Federation.	Appoint arbitrator in respect of any extra costs of administration incurred by the Province in connection with the exercise of those powers or the discharge of transferred functions and duties of the Federation.
152	Acquisition of land for Federal purposes	Appoint arbitrator in relation to the agreement between the Federation and the Province relating to acquiring land on behalf, and at the expense, of the Federation or, if the land belongs to the Province, to transfer it to the Federation.
159(4)	Broadcasting and telecasting	Appoint arbitrator to resolve any question arising whether any conditions imposed on any Provincial Government are lawfully imposed, or whether any refusal by the Federal Government to entrust functions is unreasonable.
168(2)	Auditor General of Pakistan	Administer oath of office to the Auditor-General
175A	Appointment of Judges to the Supreme Court, High Courts and Federal Shariat Courts	For Appointment of Judges to the Supreme Court, High Courts and Federal Shariat Courts, the **Chief Justice of Pakistan shall be the** Chairman Commission.
178	Oath of office	Administer oath of office to the Judge of the Supreme Court
182	Appointment of ad-hoc judges	Appointment of Ad-hoc judges of the Supreme Court
183(2)	Seat of the Supreme Court	The Supreme Court may from time to time sit in such other places as the **Chief Justice of Pakistan**, with the approval of the President, may appoint.
200	Transfer of High Court judges	Consultee for the transfer of Judges from one High Court to another.
209	Supreme Judicial Council	Member of the Supreme Judicial Council of Pakistan
214	Oath of Office of Chief Election Commissioner	Before entering upon office, the Commissioner shall make before the **Chief Justice of Pakistan** and a member of the Election Commission shall make before the Commissioner] oath in the form set-out in the Third Schedule.

No one can dispute that a decision based on mutual consultation of three Judges, instead of the solitary opinion of one Judge, would enhance transparency and responsibility of the process. We must not forget that central to all judicial systems, regardless of their geographic, political, or societal differences, is the responsibility that they must have the public trust and confidence in them. To my mind, public trust in the judiciary does not merely hinge on the legal attributes of the judgments rendered, but is based essentially on the trust and confidence of the public in its impartiality and independence. Given this ultimate objective, which was underscored by the marked protests voiced by the civil-society, political and lawyers community on the process of the constitution of Benches and the excessive exercise of the original jurisdiction of the Supreme Court, the introduction of a process of mutual consultation of three senior Judges of the Supreme Court, and that too, without any interference of any 'alien' authority, person or body, would promote transparency, and thereby, bolster the trust and confidence of the public in the institution and instead of diminishing, strengthen the independence of the judiciary.

Conclusion – whether provisions of the Act violate fundamental rights

In view of the above, I am of the firm opinion that the provisions of the Act do not offend the fundamental rights under the Constitution. Therefore, the challenge of the petitioners to the constitutional validity of the Act fails on both counts: firstly, lack of legislative competence, and secondly, violation of fundamental rights.

Issue No. II - Comments on Section 2 of the Act

34. What irks me is the expansive scope of authority vested in the Committee under section 2 of the Act. As per the Statement of Objects

and Reasons of the Bill introduced in the Parliament, the primary aim was to regulate the practice and procedure of this Court in the exercise of its original jurisdiction under Article 184(3) of the Constitution but the compass of section 2 of the Act goes far beyond it, and covers *"[e]very cause, appeal or matter"* before the Court. This, I earnestly regard to be rather excessive.

35. I have no hesitation in saying that the Statement of Objects and Reasons correctly identified the need for regulating the practice and procedure of the Court in relation to the exercise of its original jurisdiction under Article 184(3) of the Constitution. Not only the Pakistan Bar Council and the Supreme Court Bar Association but also the Justices of this Court have highlighted such need. Thus, none can dispute or deny the need for reforms in the practice and procedure of this Court in the exercise of its original jurisdiction under Article 184(3) of the Constitution.

36. In fact, I may add that not only the original jurisdiction of the Court under Article 184(3) of the Constitution, but in my opinion, the advisory jurisdiction of this Court under Article 186 of the Constitution, warrant to be regulated. To my mind, the framers of the Constitution envisaged the exercise of original jurisdiction under Article 184(3) by the Court in cases relating to such segments of the society that do not have the political, financial, or legal means to agitate their cause with reference to the enforcement of their fundamental rights before any political, administrative, or judicial forum. Similarly, the advisory jurisdiction, under Article 186 of the Constitution, was intended to obtain an 'opinion' of the Court on a question of law of public importance, but over the years, the 'opinion' has been transformed into a

'decision' having the binding effect. Thus, the exercise of these two jurisdictions required introspection by the Court, and in particular, the mode and manner of composition of Benches was of utmost importance. This, I say without imputing any *mala fide* or *bias* on the decisions and opinions that have been rendered by different Benches of this Court, while exercising these jurisdictions.

37. I earnestly think that none should doubt the integrity and good intention of the Chief Justices in constituting Benches but in the backdrop of the charged political milieu in the country, the excessive exercise of the original and advisory jurisdiction in matters of political nature led to aspersions, which could have been avoided had there been transparent criteria for constitution of the Benches and fixation of the cases under Articles 184(3) and 186 of the Constitution. We must always remember that since the real strength of any judicial system lies in public confidence, the public perception regarding the composition of Benches and allocation of cases is of prime importance.

38. What, however, is noticeable that the issue related to the exercise of original jurisdiction under Article 184(3) of the Constitution, but section 2 of the Act has expanded the scope of regulating the practice and procedure of the Court to *"[e]very cause, appeal or matter"* before the Court.

39. No doubt, change is good; in certain matters, incremental change is even better. This is to ensure that the system aimed to be reformed is not yoked and choked under the weight and flow of the proposed change itself. Therefore, I urge the Federal Government to move Parliament to reconsider section 2 of the Act. I must clarify that in asking to reconsider

section 2 of the Act, I am in no way questioning the intent, wisdom, or authority of Parliament.

Issue No. III. - Constitutional validity of section 5 of the Act (right of appeal)

40. Section 5 of the Act has created a right of appeal against an order passed by the Court in the exercise of its original jurisdiction under Article 184(3) of the Constitution. And this right of appeal has been made available, with retrospective effect, to an aggrieved person against whom the order has been made even before the commencement of the Act. For the convenience of reference, section 5 of the Act reads:

> **5. Appeal**.- (l) An appeal shall lie within thirty days from an order of a bench of the Supreme Court who exercised jurisdiction under clause (3) of Article 184 of the Constitution to a larger bench of the Supreme Court and such appeal shall, for hearing, be fixed within a period not exceeding fourteen days.
>
> (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.

41. The right of appeal is not a matter of mere procedure but is a substantive right. This is a well-settled principle in our jurisprudence, and no one has before us disputed its correctness. I may add that from a litigant's viewpoint, the right of appeal is no doubt a right but from a court's perspective, it is a matter of jurisdiction, which can only be conferred on a Court by the Constitution or by or under any law as per Article 175(2) of the Constitution. Therefore, to establish the competence of the Parliament to enact a law that confers jurisdiction on this Court, one has to show any provision in the Constitution or any entry in the Federal Legislative List contained in the 4th Schedule to the Constitution that empowers it in this regard.

42. To establish the legislative competence of Parliament in enacting section 5 of the Act, the learned Attorney-General has relied upon Entry 55 of the 4th Schedule to the Constitution. For ease of reference, Entry 55, is cited here:

> **Entry No. 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 Entry 55 shows that as per the first part of this Entry, Parliament, the Federal Legislature, is competent to make laws regarding the jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in the list. However, the second part of the Entry makes Parliament, competent to make law for the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon the supplemental powers with the *proviso* that this is to be done only to such extent, as is expressly authorized by or under the Constitution. The phrase *'to such extent as is expressly authorized by or under the Constitution'* has a qualifying and controlling effect on the provision of which it is a part. The learned Attorney General, however, submitted that this controlling phrase is not part of the provision that relates to the enlargement of the jurisdiction of the Supreme Court, but relates to the other Courts. According to him, the provision relating to the other Courts is to be read as under: -

> Jurisdiction and powers of all courts ... with respect to any of the matters in this List and, to such extent as is expressly authorized by or under the Constitution, ...

His argument, in essence, was that the requirement of *express authorization by or under the Constitution* stated in Entry 55 relates to

the jurisdiction and powers of other Courts, not to the enlargement of the jurisdiction of the Supreme Court.

43. The learned Attorney General has, to my mind, missed to appreciate that the entries in relation to the jurisdiction and powers of Courts, other than the Supreme Court, have had a consistent phraseology throughout the constitutional history of Pakistan. The controlling phrase, '*to such extent as is expressly authorized by or under the Constitution',* has never been used with reference to the jurisdiction and powers of other Courts in the relevant Entries of the legislative lists provided in all the previous Constitutions of Pakistan, as well as in the present Constitution. Such Entries may be cited here, as a ready reference:

The Government of India Act, 1935[4]

Legislative List II - Provincial Legislative List-

Entry No. 2. Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this list; procedure in Rent and Revenue Courts.

Legislative List III - Concurrent Legislative List, Part-1

Entry No. 15. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list.

The Constitution of Pakistan, 1956

Federal List, Part II.

Entry No. 29. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List; offence against laws with respect to any of the matters in this list.

Concurrent List, Part II.

Entry No. 19. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List; offence against laws with respect to any of the matters in this list.

Provincial List.

Entry No. 92. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.

The Constitution of Pakistan, 1962

Third Schedule (Central List).

Entry No. 46. Jurisdiction and powers of courts with respect to any of the matters enumerated in this Schedule.

The Interim Constitution of Pakistan, 1972

List II - Provincial Legislative List, Part I

Entry No. 2. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List; procedure in Rent and Revenue Courts.

List III - Concurrent Legislative List, Part I

---

[4] This Act served as the first Constitution of Pakistan till promulgation of the 1956 Constitution.

Entry No. 16. Offence against laws with respect to any of the matters in this List; jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.

The Constitution of Pakistan, 1973

Concurrent Legislative List (Since omitted)

Entry No. 46. Offence against laws with respect to any of the matters in this List; jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.

The controlling phrase, '*to such extent as is expressly authorized by or under the Constitution'*, or a phrase similar to it, has been used in the following Entries of the three Constitutions:

The Government of India Act, 1935 ('Act of 1935')

Legislative List I - Federal Legislative List-

Entry No. 53. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list and, to such extent as is expressly authorized by Part IX of this Act, the enlargement of the appellate jurisdiction of the Federal Court, and the conferring thereon of supplemental powers.

The Interim Constitution of Pakistan, 1972

List I - Federal Legislative List, Part I

Entry No. 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 Federal Court, and the conferring thereon of supplemental powers.

The Constitution of Pakistan, 1973

List I - Federal Legislative List, Part I

Entry No. 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 Federal Court, and the conferring thereon of supplemental powers.

In all the above three Entries, the controlling phrase, '*to such extent as is expressly authorized by or under the Constitution'*, or a similar phrase with a minor change in the Act of 1935, has been used when the Entry provided for the enlargement of the jurisdiction of the Supreme Court, or the Federal Court, the predecessor Court to the Supreme Court. This consistent phrasing of the relevant legislative Entries in the previous Constitutions, as well as in the present Constitution, by itself lends support to principle that under Entry 55 (*supra*), the controlling phrase only relates to the enlargement of the jurisdiction of the Supreme Court, and is not relevant to the jurisdiction and powers of other Courts.

44. Foremost is the point that the reading of Entry 55 suggested by the learned Attorney General would defeat the express exclusion provided in

the first part of the Entry, as to the jurisdiction and powers of the Supreme Court, and that exclusion would become redundant. The exclusion in the first part of the Entry can have a meaning and effect only when we read the latter part of the Entry with the controlling clause.

45. To my mind, by creating the right of appeal against orders passed by the Supreme Court in its existing original jurisdiction under Article 184(3) of the Constitution, Parliament has not 'enlarged' the jurisdiction but has in fact created a separate and new appellate jurisdiction, which was not provided for in the Constitution. By no stretch of the imagination can the word 'enlargement', include the 'creation' of a new jurisdiction.

46. There is another aspect of the matter, that the original jurisdiction under Article 184(3) has been conferred on the Supreme Court by the Constitution, it cannot therefore be interfered with by the legislature through ordinary legislation, such as section 5 of the Act, especially when Article 184(3) of the Constitution does not subject its exercise of original jurisdiction being 'subject to law'.

47. The learned Attorney General and all the other learned counsel, supporting the constitutional validity of section 5 of the Act, were unable to point out any express authorization by or under the Constitution for Parliament to interfere with the original jurisdiction of the Supreme Court under Article 184(3) of the Constitution. Thus, in my considered opinion, Parliament lacks legislative competence to enact section 5 of the Act.

48. I may mention here that providing a right of appeal against an order passed by this Court in its original jurisdiction is, no doubt, a positive thought to better ensure the requirements of fair trial and due

process; but in pursuit of a positive outcome, the law not less than the fundamental and supreme law of the land - the Constitution – cannot be disregarded. If Parliament intends to take the positive step of providing a right of appeal against orders passed by this Court in the exercise of its original jurisdiction under Article 184(3) of the Constitution, it must adopt the “right course” - amend the Constitution.

49. With utmost respect for Parliament, I declare that section 5 of the Act has been enacted by Parliament beyond its ordinary legislative power conferred on it under the Constitution; section 5 of the Act is, therefore, *ultra vires* the Constitution, and thus of no legal effect.

Judge