IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:
MR. JUSTICE UMAR ATA BANDIAL, CJ
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR

CONSTITUTION PETITIONS NO.21, 22 & 23 OF 2023
[CHALLENGING THE VIRES OF THE SUPREME COURT (REVIEW OF JUDGEMENTS AND ORDERS) ACT, 2023]

Ghulam Mohiuddin **in Const. P. 21/2023**

Zaman Khan Vardag **in Const. P. 22/2023**

The Jurist Foundation (Regd.) thr. its Chairperson/CEO **in Const. P. 23/2023**

...Petitioner(s)

VERSUS

Federation of Pakistan thr. M/o Law & Justice and another **in Const. P. 21/2023**

The Federation of Pakistan etc. **in Const. P. 22/2023**

Federation of Pakistan thr. Secretary M/o Law & Justice and another **in Const. P. 23/2023**

...Respondent(s)

For the Petitioners : In Person (in Const.P.21/2023)
(via video link from Karachi)

In Person (in Const.P.22/2023)
(via video link from Lahore)

In Person (in Const.P.23/2023)

For the Federation : Mr. Mansoor Usman Awan, AGP
Ch. Aamir Rehman, Addl. AGP
Malik Javed Iqbal Wains, Addl. AGP
Barrister Maryam Ali Abbasi, Consultant
Adv. Maryam Rashid, Consultant
Mr. Saad Javaid Satti, Adv.

In CMA 4420/2023 : Syed Ali Zafar, ASC
Mr. Zahid Nawaz Cheema, ASC
Assisted by:
Syed Haider Ali Zafar, Adv.
(via video link from Lahore)

For Secretary Senate : Mr. Javaid Iqbal, Dy. Director
Mr. M. Irfan Ch. AD

Dates of hearing: 07.06.2023, 13.06.2023, 14.06.2023, 15.06.2023, 16.06.2023 & 19.06.2023

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JUDGMENT

Through the instant Petitions under Article 184(3) of the Constitution of Pakistan, 1973 (the "**1973 Constitution**") the Petitioners have challenged the vires of the Supreme Court (Review of Judgements and Orders) Act, 2023 (Act No.XXIII of 2023) (the "**2023 Act**"). The 2023 Act is attached as an Annex to this judgment.

2. In Constitutional Petition No.21/2023, Mr. Ghulam Mohiuddin, ASC has contended that review jurisdiction under Article 188 of the 1973 Constitution is substantially and materially different than the appellate jurisdiction of this Court exercised under Article 185. The 2023 Act attempts to amalgamate two inherently different jurisdictions of this Court. He further contends that Section 2 of the 2023 Act is hit by the doctrine of "indirect legal effect" and cannot be enforced since the objective behind it cannot be achieved without amendment of various Articles of the 1973 Constitution. The Supreme Court has the power to promulgate rules regulating its practice and procedure under Article 191 which power was exercised in 2010 and that the legislature does not have the competence to amend the said rules and thereby indirectly amend the 1973 Constitution through an Act of Parliament.

3. In Constitutional Petition No.22/2023, Mr. Zaman Khan Vardag, ASC has contended that in the garb of "enlargement" of the review jurisdiction of this Court, as the stated purpose of the 2023 Act suggests, the legislature has in fact created an appeal against judgements/orders of this Court passed in exercise of powers under Article 184(3) which it could not have done under the current scheme and structure of the 1973 Constitution. He

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maintains that the 2023 Act, in its present form, envisages that the Supreme Court may sit in appeal over its own judgements since the distinction between review and appellate jurisdiction has been done away with. He further contends that the 2023 Act is a colourable exercise of legislative power for collateral purposes to do indirectly what cannot be done directly under the 1973 Constitution. There is a clear, explicit and obvious distinction between a review and an appeal in the 1973 Constitution as well as the law, with each jurisdiction having its own parameters, limits and boundaries developed over centuries of jurisprudential evolution, and constitute parts of a clear and unambiguous legal and constitutional framework. Treating the power of review akin to the powers available to the Supreme Court of Pakistan under Article 185 would lead to judicial chaos. Lastly, he contends that finality is attached to the judgements of this Court and the same cannot be reviewed in a manner that is being sought to be done by way of the 2023 Act. It amounts to providing a right of appeal to the Supreme Court against a final judgement of the Supreme Court which would destroy the concept of finality which is the hallmark of judgments of the Supreme Court, to bring an end to litigation between the parties.

4. In Constitutional Petition No.23/2023, the Jurist Foundation through its Chairperson/CEO Mr. Riaz Hanif Rahi, ASC has contended that it is by now a settled doctrine of constitutional law that the judicial branch of the State must be independent of the executive and the legislative branches. The 2023 Act constitutes an intrusion in the independence of the judiciary in a manner that cannot be countenanced. He has also submitted that Section 2 of the 2023 Act has the effect of treating a review petition filed under Article 188 of the 1973 Constitution as

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if it were an appeal under Article 185 and that the two jurisdictions cannot be mixed in a manner that would seek to remove all distinguishing features between the two.

5. All three Constitutional Petitions seek a declaration that the 2023 Act is ultra vires the 1973 Constitution and pray that the same be struck down.

6. During pendency of these petitions, CMA No.4420/2023 was filed by the Secretary General of Pakistan Tehreek-e-Insaf ("**PTI**") Mr. Omer Ayub, for his impleadment as a Respondent in Constitutional Petition No.21/2023. This application was allowed on 14.06.2023. It is the case of Mr. Ali Zafar, learned ASC for the Applicant that while Article 188 makes the power of review of judgements or orders of this Court "... subject to the provisions Act of Majlis-e-Shoora (Parliament) ...". The competence of the Parliament to legislate on the review jurisdiction of this Court has to be seen in light of Article 191 of the 1973 Constitution read with Entry 55 of the Federal Legislative List. He maintains that the 2023 Act provides that a review petition under Article 188 is to be treated as an appeal under Article 185. He maintains that a review cannot disturb the finality attached to judgements of this Court but is only meant to correct errors floating on the surface of the record. The 2023 Act purports to amend Article 188 by converting the review jurisdiction under Article 188 into an appellate jurisdiction under Article 185. Since the Constitution cannot be amended by ordinary law, therefore, the 2023 Act is liable to be struck down. He argues that Sections 2 and 3 of the Act violate Article 188 of the Constitution and in case of conflict between the Constitution and ordinary law, the Constitution is to prevail. He further submits that the 2023 Act in

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fact curtails the jurisdiction of the Supreme Court under Article 184(3) instead of "enlarging it" in as much as Article 184(3) entails that the judgements and orders passed thereunder by the Supreme Court are final. The only exception to this finality is that such judgements or orders may be reviewed in the exceptional circumstances on grounds similar to those available under Order LXVII Rule 1 of the Code of Civil Procedure and as mentioned in Rule 26(1) of the Supreme Court Rules, 1980. By providing for an appeal before a larger bench on facts and law, the finality of judgements and orders passed in pursuance of exercise of jurisdiction under Article 184(3) by the Supreme Court is being curtailed which the Constitution does not envisage. The jurisdiction and powers of the Supreme Court under Article 184(3) have, in this respect, substantially and negatively been affected/reduced, which is not permitted under the Constitution. He adds that since the main Sections namely Sections 2 and 3 of the Act are void being violative of the 1973 Constitution, the miscellaneous provisions contained in Sections 4 to 6 which are anchored in Sections 2 and 3 are also liable to be struck down. In support of his contentions, the learned counsel has placed reliance on the judgements of this Court reported as Muhammad Amir Khan v. Controller of Estate Duty (**PLD 1962 SC 335**), Rashid Ahmed v. Irshad Ahmed **(1968 SCMR 12),** Nawab Bibi v. Hamida Begum **(1968 SCMR 104)**, Yousaf Ali Khan v. State **(PLD 1971 SC 508)**, Muhammad Saifullah Khan v. Federation of Pakistan **(PLD 1990 SC 79),** Javed Nawaz v. State **(1995 SCMR 1151)**, Rafiq Saigol v. Bank of Credit & Commerce International (Ovs) Ltd. **(PLD 1997 SC 865),** Tahir Hussain v. State **(2005 SCMR 330)**, Mehdi Hassan v. Province of Punjab **(2007 SCMR 755)**, Majid Mehmood v. Muhammad Shafi **(2008 SCMR 554)**, Ghulam Murtaza v. Abdul

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Salam Shah **(2010 SCMR 1883),** Justice Khurshid Anwar Bhinder v. Federation of Pakistan **(PLD 2010 SC 483),** Zakaria Ghani v. Muhammad Ikhlaq Memon **(2016 CLD 480)**, Rashid Ali Channa v. Muhammad Junaid Farooqui **(2017 SCMR 1519),** Mukarram Hussain v. Federal Government, M/o Defence **(2017 SCMR 580)**, Iqbal Parvez v. Harsan **(2018 SCMR 359)**, M. Moosa v. Muhammad **(1975 SCMR 115)**, Justice Qazi Faez Isa v. President of Pakistan **(PLD 2022 SC 119)** and Shahjehan Haider Gorgani v. Chairman, Federal Land Commission **(2008 SCMR 575)**.

7. Mr. Mansoor Usman Awan, learned Attorney General for Pakistan appearing on behalf of the Federation has raised preliminary objections qua the maintainability of the instant Petitions and also made submissions on the merits. Insofar as maintainability of the petitions is concerned, he has argued that the Petitions do not raise questions of public importance with reference to the enforcement of fundamental rights enshrined in the 1973 Constitution. On merits, the learned Attorney General has argued that the mischief that was sought to be addressed by the 2023 Act was the lack of any meaningful review regarding judgments and orders passed by this Court in exercise of its original jurisdiction under Article 184(3). It is the Attorney General's case that as opposed to the availability of an appellate forum if the matter were first decided by the High Court in exercise of any of its jurisdictions including Article 199 of the 1973 Constitution (first by a Single Judge and then, depending on the circumstances, a Division Bench of the High Court), there was no substantive ground for review available to an aggrieved party against a judgement or order if the matter was heard and decided by the Supreme Court in exercise of its original jurisdiction under Article 184(3) of the Constitution. This lack of a supervisory forum,

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in essence, breached the fundamental right to due process and fair trial enshrined in Article 10-A of the 1973 Constitution. He contended that by way of the 2023 Act, the said mischief had been redressed by the Parliament. Referring to the dicta of this Court laid down in Muhammad Amir Khan v. Controller of Estate Duty (**PLD 1962 SC 335**) he argued that while there is no cavil with the proposition that this Court has the constitutional authority to set precedent in terms of Article 189 of the 1973 Constitution, since Article 188 stipulates that the exercise of review jurisdiction would be "... subject to the provisions Act of Majlis-e-Shoora (Parliament) ..." any constitutional interpretation prior to the 2023 Act insofar as Article 188 is concerned would be subject to the wisdom of Parliament which has exclusive powers insofar as legislation is concerned. Therefore, and as a natural corollary, the wisdom of the legislature is to take precedence over any law enunciated by this Court since the framers of the Constitution had expressly envisaged that review jurisdiction under Article 188 would be "... subject to the provisions Act of Majlis-e-Shoora (Parliament) ...". In support of his contentions, the learned Attorney General has relied on judgements of the Indian Supreme Court reported as Kantaru Rajeevaru (Right to religion in RE-9 J.) vs. Indian Young Lawyers Association ((**2020) 9 SCC 121 @ paras 15-17, 22-22)**) and Rupa Ashok Hurra vs. Ashok Hurra (**(2002) 4 SCC 388 @ paras 42, 51**).

8. Mr. Sajeel Shehryar Swati, ASC, as an officer of this Court was, on his own request, granted permission to file a written brief/amicus brief pursuant to this Court's order dated 19.06.2023. He has, in his brief, gone over the interplay between Parliament's legislative competence with respect to Article 188 and Entry 55 of the Federal Legislative List. He has maintained that there is no constitutional fetter on Parliament to legislate on the

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subject since it derives its legislative authority on the subject from Article 188 read with Article 191 and not from the Federal Legislative List. He has also pointed out that the Article 188 subjects review jurisdiction to "... the provisions of any Act of Majlis-e-Shoora (Parliament) and any rules made by the Supreme Court ..." and therefore both Parliament and the Supreme Court have the authority to regulate the review jurisdiction exercised by this Court under Article 188. In the alternate, he has argued that this Court ought to, where possible, interpret statutes in a manner that save them from being struck down. However, where there is no option but to strike down a statute, it ought to be done in a manner where the offending part of the statute is read down or struck down and the non-offending part of the statute is saved.

9. We have heard the Petitioners appearing in person, the learned counsel for the Applicant in CMA No.4420/2023, the learned Attorney General for Pakistan and have gone through written submissions of Mr. Swati.

MAINTAINABILITY OF THE PETITIONS:

10. Before we discuss the merits of the case, it is necessary to advert to the preliminary objections raised by the learned Attorney General for Pakistan regarding maintainability of these petitions.

11. Article 184 of the 1973 Constitution confers original jurisdiction on the Supreme Court. For the purposes of these petitions, the relevant sub-Article i.e. 184(3) is reproduced hereunder for ease of reference:

> "(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 1 of Part II

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> is involved, have the power to make an order of the nature mentioned in the said Article."

A bare reading of the sub Article reproduced above shows, as has correctly been pointed out by the learned Attorney General, that the requirements of: (i) a question of public importance; (ii) with reference to enforcement of fundamental rights need to be met before this Court can assume and exercise its jurisdiction under the said sub-Article.

QUESTION OF PUBLIC IMPORTANCE:

12. In essence, all the Petitioners before this Court have argued that it is a salient feature of the 1973 Constitution and constitutes a part of its basic structure that the judiciary is to be independent of other branches of the Government. The said feature has been recognized by this Court in the case of Dr. Mobashir Hassan vs. Pakistan (**PLD 2010 SC 1 @ para 14**). Moreover, in the case of Muhammad Azhar Siddiqui vs. Pakistan (**PLD 2012 SC 774**), while placing reliance on this Court's judgement rendered in Al-Jehad Trust vs. Pakistan (**PLD 1996 SC 324 @ para 13**) it has been noted that a category of cases which require the meeting of the question of public importance with reference to enforcement of fundamental rights test, for the purposes of invocation of jurisdiction under Article 184(3) include: "... cases that raise questions concerning the independent functioning, appointment and accountability of the superior judiciary ...".

13. Keeping in view the dicta of this Court in Dr. Mobashir Hassan vs. Pakistan (**PLD 2010 SC 1 @ para 14**) and Al-Jehad Trust vs. Pakistan (**PLD 1996 SC 324**) and Muhammad Azhar Siddiqui *ibid*, we are clear in our minds that since the independence of the judiciary is a recognized salient feature of the

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1973 Constitution and provisions of the 2023 Act *prima facie* appears to affect such independence, the instant Petitions raise questions of public importance within the contemplation of Article 184(3)of the Constitution. Further, any intrusion by any organ of the State in the independence of judiciary affects every citizen of the country and is therefore a question of great public importance.

14. An argument was also raised to the effect that if the Petitioners wished to seek a declaration of incompatibility of the 2023 Act with the Constitution, they ought to have approached the High Court under Article 199. This argument is, with all due respect, misconceived. Unlike Article 199 of the 1973 Constitution, this Court has the unique constitutional mandate under Article 184(3) to directly entertain matters related to enforcement of fundamental rights which raise questions of public importance. This jurisdiction is also to be exercised "Without prejudice to the provisions of in Article 199 ...". Therefore, while the power of this Court to issue writs in terms of Article 199 is concurrent with that of the High Courts, it is only before this Court that questions of public importance with reference to enforcement of fundamental rights can directly be raised and entertained without being hampered by the trappings of Article 199 of the 1973 Constitution.

WITH REFERENCE TO ENFORCEMENT OF FUNDAMENTAL RIGHTS:

15. All the Petitioners before us have argued that through the 2023 Act, their fundamental rights enshrined in Part-II, Chapter-I generally and more specifically in Articles 8, 10-A and 25 stand to be breached. It has been submitted that a judiciary which is not independent cannot protect, preserve and enforce fundamental rights. The relevant portions of the said Articles are reproduced below:

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> **"8. Laws inconsistent with or in derogation of Fundamental Rights to be void.**
>
> (1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.
>
> **10A. Right to fair trial.**
> For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.
>
> **25. Equality of citizens**
> (1) All citizens are equal before law and are entitled to equal protection of law."

16. As will be evident in the later parts of this judgement, the 2023 Act is an intrusion in the basic and fundamental feature of the Constitution namely the independence of the judiciary directly and undisputedly affects fundamental rights of citizens. The protection, preservation and enforcement of fundamental rights are the primary duty of this Court in its constitutional mandate as the guardian of fundamental rights of the citizens. In Baz Muhammad Kakar vs. Pakistan (**PLD 2012 SC 923**), this Court held that:

> "Right of access to justice and independent judiciary is also one of the important rights of the citizens and if there is any threat to the independence of judiciary, it would be tantamount to denial of access to justice, which undoubtedly is a fundamental right under Article 9 of the Constitution. Whenever there is a violation of Articles 9 and 25 of the Constitution, it will involve a question of public importance with reference to enforcement of the Fundamental Rights of the citizens, who may approach the Court for the enforcement of these rights under Article 184(3) of the Constitution without having to discharge the burden of *locus standi*."

In Riaz ul Haq vs. Pakistan (**PLD 2013 SC 501**), this Court held that:

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> "29. ... It is to be noted that the right of "access to justice to all" is a well recognized inviolable right enshrined in Article 9 of the Constitution and is equally found in the doctrine of "due process of law". It includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial court or tribunal.
>
> 30. It is to be noted that the independence of judiciary is one of the salient features of our Constitution. The preamble to the Constitution provides that whereas 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 whereas it is the will of the people of Pakistan to establish an order wherein the independence of the judiciary shall be fully secured. The Objectives Resolution, which is now a substantive part of the Constitution by means of Article 2A of the Constitution, also commands that independence of judiciary has to be fully secured ..."

In Muhammad Aslam Awan vs. Pakistan (**2014 SCMR 1289**), this Court held that:

> "2. ... Judicial independence is one of the foundational values of the Constitution of Islamic Republic of Pakistan which is based on trichotomy of powers in which the functions of each organ of the State have been constitutionally delineated. The very Preamble of the Constitution pledges "wherein the independence of judiciary shall be fully secured". The Constitution makers conferred this independence because they wanted the Judges to "do right to all manner of people, according to law, without fear or favour, affection or ill-will" (Oath of office of Judges). The fundamental rights guaranteed under the Constitution cannot be secured unless Judiciary is independent because the enforcement of these rights has been left to Judiciary in terms of Articles 184(3) and 199 of the Constitution and the relevant law ..."

In District Bar Association Rawalpindi vs. Pakistan (**PLD 2015 SC 401**), it was noted that:

> "40. If the independence of Judiciary is curtailed in the present manner by the Executive in concert with Legislature, the fundamental rights guaranteed by the Constitution would be rendered mere textual promises of ordinary text books. The supreme law of the land (Constitution) would be brought down to the level of ordinary law, the people would be deprived of the right to enforce the guaranteed fundamental rights ..."

In Justice Shaukat Aziz Siddiqui vs. Pakistan (**PLD 2018 SC 538**), this Court held that:

> "46. Historically, the Fundamental Rights of the people require protection from the excess of the Executive and the Vested Interest, both commercial and political. In order to safeguard the Fundamental Rights of the people guaranteed under the Constitution, the Independence of Judiciary obviously must be insulated from the onslaught of the Executive and such vested Interests, who are past masters at Institutional Capture ..."

Lastly, in the case of Justice Qazi Faez Isa vs. Pakistan (**PLD 2021 SC 1**), this Court, in categoric terms, held that:

> "2. In fact, an impartial and independent judiciary is universally recognised as a core value of any civilised democracy. This is evidenced by the international conventions that protect this value

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> as a fundamental right of the people (ref: United Nations Basic Principles on the Independence of Judiciary and The (Montreal) Universal Declaration on the Independence of Justice). The significance of an independent judiciary is also deeply embedded in Pakistan with the Constitution itself guaranteeing in its Preamble that:
>
> "...the independence of the judiciary shall be fully secured."

17. Before proceeding further, we consider it appropriate to deal with the argument of the learned Attorney General to the effect that since no appeal or substantive and meaningful review is available against a judgment or order passed by this Court under Article 184(3), the due process rights of an aggrieved party under Article 10-A stand to be breached. And the 2023 Act addressed such "mischief". With all due respect, we have found the argument to be flawed. Firstly, for the reason that it assumes that judgments/orders passed under Article 184(3) somehow violate Article 10-A. Nothing could be farther from the truth considering the process followed by this Court in passing such orders, which includes notices to parties, granting full opportunity to file pleadings and hearing them, in person or through counsel. Further, a right to seek review under Article 188 is available if a party affected by any such judgment or order was not heard and shows an error in the judgment/order which is floating on the surface of the record. Secondly, if the framers of the Constitution did not provide an appeal or an "expanded" review against such judgments/orders, such remedy cannot be inserted in the Constitution through ordinary legislation. Thirdly, absence of an appeal in a statute *(in this case in the Constitution itself)* does not *ipso facto* violate due process.

18. A contemporary article with similar characteristics as Article 10-A of our Constitution can be found in Article 6 of the European Convention on Human Rights ("**ECHR**"). For ease of

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reference, the relevant portion of the said Article for the purpose of these petitions i.e. Article 6(1) is reproduced hereunder:

> "**Article 6 Right to fair trial**
> (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

In this context, the High Court of England & Wales in Dorairaj vs. Bar Standards Board (**[2018] EWHC 2762 (Admin)**) was petitioned to declare certain sections of the Crime and Courts Act of 2013 incompatible with Article 6 of the ECHR on the ground that an independent appellate forum was not available. While dismissing the application seeking a declaration of incompatibility, the High Court held that:

> "44. ... Whilst article 6 guarantees an individual a right to a fair trial, where an article 6-compliant decision is made by a court, it is trite law that article 6 does not guarantee a right of appeal (see, e.g., Porter v United Kingdom [1987] Application No 12972/87) .."

Similarly, in Sablon vs. Belgium (**Application No.36445/97 @ para 86**), the European Court of Human Rights held that Article 6 did not apply to the examination of an application to reopen civil proceedings.

19. It is clear and obvious from a plain reading of the 1973 Constitution that the framers did not envisage or provide a right of appeal against orders/judgements of this Court passed in exercise of jurisdiction under Article 184(3) which are final except for a right to seek review under Article 188 read with the 1980 Rules. It has neither been argued nor is it anybody's case that the orders/judgments passed by this Court do not meet the requirements of procedural fairness or due process. Any attempt to insert a right of appeal through ordinary legislation, couched in whatever language, in whatever manner and through whatever device used, amounts to introducing an amendment in the

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Constitution and is clearly ultra vires the Constitution. Contemporary jurisprudence with respect to similarly-drafted Articles also reveals that while the right to a fair trial and due process is available, such right does not necessarily envisage a right of appeal, least of all an appeal against a judgement or order of the highest constitutional Court of the country meeting the requirements of procedural fairness and due process. Such judgments and orders are to be accepted as final.

20. The fundamental question before us is whether the Parliament can through ordinary legislation change the very essence of review under Article 188 of the 1973 Constitution (as consistently understood by framers of all three Constitutions of our country) to the extent that it would for all intents and purposes stand converted into an appeal under Article 185 and thereby virtually obliterate the fundamental difference between the two. Such course of action, if permitted, would open the door for interference in the independence of judiciary through statutory instruments that the Constitution prohibits.

21. We therefore find that these petitions raise questions of public importance with reference to the enforcement of fundamental rights guaranteed to the people of Pakistan under Part II, Chapter I of the 1973 Constitution.

THE CONSTITUIONAL HISTORY OF THE REVIEW ARTICLE:

22. At this stage, we consider it appropriate to trace and map out the various iterations of the Constitutional articles that vested the highest constitutional Court of Pakistan with the jurisdiction to review its judgements. This is necessary to understand what is review and why this jurisdiction has been

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conferred on this Court by the framers of all Constitutions of Pakistan.

23. After independence, Pakistan was governed by the Government of India Act, 1935 (the "**1935 Act**"). The judicature was governed by Part IX of the Act with Chapter I dealing with the Federal Court (constituted in terms of Section 200 of the 1935 Act). Finality was attached to the Federal Court's judgements in terms of Section 212 of the 1935 Act. The 1935 Act was silent with respect to the review jurisdiction of the Federal Court. The Federal Court (of India) in 1940 had, prior to independence, dilated upon the proposition as to whether the Federal Court could review its own judgements in the case reported as Raja Prithwi Chand v. Sukhraj Rai (**AIR 1941 FC 1**). In the said case, the Federal Court held that:

> "These are two ex parte applications for a review of judgements delivered by this Court on 18th March last. They are the first applications of the kind which have come before us, and it is desirable that we should state the principles which the Court will take for its guidance in deciding them. This Court will not sit as a Court of appeal from its own decisions, nor will it entertain applications to review on the ground only that one of the parties in the case conceives himself aggrieved by the decision. It would in our opinion be intolerable and most prejudicial to the public interest if cases once decided by this Court could be re-opened and re-heard:
>
> There is a salutary maxim which ought to be observed by all Courts of last resort – interest reipublicae ut sit finis litium. Its strict observance occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this: (1886) 13 AC 660 at p.664.
>
> This Court is not, it is true, a Court of last resort in the sense in which the Judicial Committee or the House of Lords may be so described in the United Kingdom; but it is the highest tribunal sitting in this country and no appeal lies without leave from any decision given by it in the exercise of its appellate jurisdiction ... This Court has power under s.214(1), Constitution Act to make rules of Court for regulating generally the practice and procedure of the Court; but it has made no rules for regulating applications for a review of its judgements and in these circumstances it is unnecessary to consider whether its rule-making power is wide enough to enable it to assume a general jurisdiction for that purpose, in the absence of express statutory provisions ... If at the present moment it has power to review its own judgements, that power should not, in our opinion, be regarded as more extensive than the power exercised for the same purpose by the Judicial Committee and should be subject to similar restrictions; and we conceive that the rules which govern the practice of the Judicial Committee and of the House of Lords in these matters may rightly be taken as a guide to the practice of this Court also.

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> The practice in England is well settled and of long standing. In (1836) 1 Moo PC 117, Lord Brougham delivering the judgement of the Judicial Committee said:
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> "It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cases in this Court can be re-heard and that an order once made ... is final and cannot be altered. The same is the case of the judgements of the House of Lords ... Whatever therefore has been determined in these Courts must stand, there being no power of re-hearing for the purpose of changing the judgment pronounced; nevertheless, if by misprision in embodying the judgements, errors have been introduced, these Courts possess, by Common law, the same power which the Courts of record and statute have of rectifying the mistakes which have crept in..."
>
> In (1871) LR 3 PC 664 ... the Lord Chancellor (Lord Hatherley) delivering the judgement of the Committee, said:
>
> Having weighed the arguments, and considering the great public mischief which would arise on any doubt thrown on the finality of the decisions of the Judicial Committee, their Lordships are of opinion that expediency requires that the prayer of the petitions should not be acceded to, and that why should be refused with costs.
>
> The general principle remains as it was enunciated a century ago. It is recognised by the Judicial Committee that in certain exceptional circumstances an application for a re-hearing may be entertained, but the cases in which this will be done have not been substantially enlarged since they were explained by Lord Brougham in the passage already cited ... The power which we are invited to exercise in these two cases is one to be exercised with extreme caution and only in very exceptional cases; and applications for its exercise will not be encouraged by this Court ... Both applications are dismissed; and we think it right to say that future applications of this kind will run the risk of receiving more summary treatment.
>
> (**Underlining is ours**)

24. In 1956, Pakistan's first Constitution (the "**1956 Constitution**") was framed by the Constituent Assembly on the 2nd of March, 1956. The Supreme Court of Pakistan was established by virtue of Article 148. The 1956 Constitution for the first time since Independence expressly empowered the Supreme Court of Pakistan to review its judgements under Article 161. For ease of reference, the said Article is reproduced below:

> "The Supreme Court shall have power, subject to the provisions of any Act of Parliament and of any rules made by the Supreme Court, to review any judgment pronounced, or order made, by it."

In the same year, the Supreme Court, in exercise of its rule-making powers, framed the Supreme Court Rules of 1956 (the "**1956 Rules**"). Order XXVI of the 1956 Rules governed the review

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jurisdiction of the Supreme Court. The said order is reproduced for ease of reference:

> "Application for review shall be filed with the Registrar within 30 days after judgement is delivered in the cause, appeal or matter, and shall distinctly state the grounds for review and be accompanied by a certificate of counsel that the petitioner has reasonable and proper grounds for review"

It was on the basis of Article 161 read with 1956 Rules that a four-member bench of this Court passed its judgement in Muhammad Amir Khan v. Controller of Estate Duty (**PLD 1962 SC 335**). In the said case, Mr. Justice Fazle-Akbar (as he was then) in his note while dilating on the meaning and scope of review jurisdiction took the view that:

> "...It is therefore, necessary first to consider under what circumstances this Court should exercise its review jurisdiction.
>
> There have been several general statements by highest Judicial Authorities, namely, the House of Lords and the Privy Council on the power of the Court of last resort to review its own decision and as to the extent to which exercise of such power should be limited.
>
> Both the House of Lords and the Privy Council took the view that only in exceptional circumstances they will exercise this inherent power. The cases in which that may be done are explained by Lord Brougham in the case of Rajunder Narain Rao v. Bijai Govind Singh (2 MIA 181). His Lordship describes this privilege, when allowed, not as a right, but as an indulgence. He then says:
>
> > "It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where, by some accident, without any blame, the party has not been heard, and an order has been inadvertently made as if the party had been heard."
>
> In the case of R. N. K. R. M. Somasundaram Chetty v. N. R. M.V. L. Subramanian Chetty (AIR 1926 P C 136), Lord Atkinson remarked:-
>
> > "Legal judgments cannot be treated as mere counters in the game of litigation. They are serious pronouncements, for the most part by the judicial officer of the State, touching the rights or disputes of subjects, bringing home to those subjects what the rule of justice required and are enforceable, if need be, by the forces of the State. Moreover, when once pronounced, they cannot be lightly set aside."
>
> In Henry Hebbert v. The Rev. John Purchas (1869 71 Vol. III L R P C 664), Lord Chancellor says :

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> "Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finality of the decisions of the Judicial Committee, their Lordships are of opinion, that expediency requires that the prayer of the petitions should not be acceded to, and that they should be refused with costs."

One very cogent observation which appears to me to have been made by the House of Lords in Venkata Narasimha Appa Row v. The Court of Wards ((1886) 11 A C 660) are these:

> "There is a salutary maxim which ought to be observed by all Courts of last resort Interest reipublicae ut sit finis litium. Its strict observance my occasionally entail hardship upon Individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this."

Before Partition, the Federal Court of India in the case of Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai arid others (AIR1941FC1), following the practice of the House of Lords and Judicial Committee declined to entertain applications for review on the ground that the parties were aggrieved by their decision. Following pertinent observations were made in the above case:

> "It would in our opinion be intolerable and most prejudicial to the public interest if cases once decided by the Court could be re-opened and re-heard."
>
> "....with the nature of review jurisdiction and with due regard to the principle that there must be an end to litigation. When a case has been fully heard and a decision given on all available material the party adversely affected by the decision cannot apply for review on the simple ground that it is not satisfied with the correctness of the decision."

The learned Judge after considering several decisions of the Privy Council and also that of the Federal Court of Pakistan in Akbar Ali v. Iftikhar Ali and others observed:

> "In view of what has been stated above it should be clear that there is no analogy between the powers of review of this Court and that of the Federal Court of Pakistan and no assistance can be derived from cases where the power to review was not exercised by that Court."

The Court then accepted the review petition and granted special leave to appeal to consider whether this Court had not considered a part of the case of the petitioner.

> "... No doubt the learned Judge has stated that "there are no fetters at all on the discretion of this Court to grant a review wherever it deems proper to do so for the ends of justice", but he qualifies the above in the next sentence by the expression that "though of course the discretion will be exercised consistently with the nature of review jurisdiction and with due regard to the principle that there must be an end to litigation." This decision may be more easily understood if proper emphasis is laid on the last sentence, namely, "with due regard to the principle that there must be an end to litigation". From the last

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> sentence it is clear that the Court was fully sensible of the importance of maintaining the absolute finality of its decision. It may then be said that in view of the express provisions in the late Constitution this Court has wider power to exercise powers of review than those enjoyed by the Judicial Committee or the House of Lords. To my mind Art.161 of the late Constitution merely gave recognition to the power which since then was exercised by the Courts of last resort in its inherent jurisdiction. It does not, however, mean that this Court has an unfettered discretion to re hear a case which had been conclusively determined by it.

The precedents referred to in the earlier part of the judgment are of great authority, long standing and uniform. The principles laid down by those Courts are based on sound cogent reasons and I do not think it will be wise to depart from that practice. The warnings contained in those observations must not be lost sight of. A liberal use of this power is bound to cause great mischief by throwing doubt on the finality of the decision of this Court. I do not think this Court would be disposed to interfere with the established current of decisions on the question as to the limit to be placed by the Court of last resort on the power of review. I may further add that I know of no authority for the proposition that the Court has unlimited power to re hear and re open a case which has been finally decided.

For the above reasons I am of opinion that the power of review should be exercised within the limits laid down in the case of Akbar Ali v. Iftikhar Ali. In other words "a decision of this Court should be re opened with very greatest hesitation and only in very exceptional circumstances".

This Court, therefore, may consider the desirability of framing rules prescribing the limits within which it would exercise its power of review."

Mr. Justice B.Z. Kaikus (as he was then), noted that:

"...I have been given to understand that my judgment in Ilam Din v. Muhammad Din was regarded as granting wide powers of review to this Court and that in consequence a large number of review petitions were filed. This comes to me as a surprise did say in that judgment that Article 161 did not contain any limitations but I had made it clear that limitations are implied in the very nature of review jurisdiction. Let me state now that these limitations are a logical result of the inevitable principle of finality of litigation. It appears quite obvious that if there is to be an end to litigation (and an end there has to be) the mere incorrectness of a conclusion reached can never be a ground for review. If it was, the Court would be bound when an application for review was submitted to consider de nevo whether the conclusion reached was correct and against the order which it passed on the review application, whatever the nature of that order, a review petition could be filed and this procedure will continue ad infinitum. Nor can it be said that while mere incorrectness is not a good ground if the judgment appears to the Bench that hears the review petition to be clearly erroneous there is a ground for review. Difference of opinion in the views of different Benches is but natural and different Benches may be quite clear as to the conflicting views which they take. I could, if need be, quote cases where of two eminent Judges sitting side by side one said the matter was quite simple and admitted of no doubt at all and the other who took the contrary view said he was unable to see how any other view could be taken. To permit a review on the ground of incorrectness would amount to granting the Court the jurisdiction to hear appeals against its own judgments or perhaps a jurisdiction to one Bench of the Court to hear appeals against other Benches; and that surely is not the scope of review jurisdiction. No mistake in a considered conclusion, whatever the extent of that mistake, can be a ground for the exercise of review

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> jurisdiction. On a proper consideration it will be found that the principles underlying the limitations mentioned in Order XLVII, rule 1, Civil Procedure Code, are implicit in the nature of review' jurisdiction While I would prefer not to accept those limitation as if they placed any technical obstruction in the exercise of the review jurisdiction of this Court I would accept that they embody the principles on which this Court would act in the exercise of such jurisdiction. It is not because a conclusion is wrong but because something obvious has been overlooked, some important aspect of the matter has not been considered, that a review petition will lie. It is a remedy to be used only in exceptional circumstances.
>
> The Chief Justice has referred to Article 163 in support of a conclusion that for doing complete justice between the parties the Court can review a judgment. As I read Article 163 it is intended to state not the circumstances which will enable this Court to pass any order but the kind of order which can be passed. The provision is similar to Order XLI, rule 33, of the Civil Procedure Code, which grants powers to the Appellate Court...
>
> ...These are ordinary provisions regarding the powers of an Appellate Court. Such provisions do not enable a Court to exercise jurisdiction in cases where otherwise they could not exercise jurisdiction. They only empower Courts to pass appropriate orders in cases in which they have jurisdiction. Similar is the effect of Article 163. It does not grant jurisdiction to the Court to review cases which it could not otherwise have reviewed. In fact as I have stated above there are limitations which are inherent in the exercise of review jurisdiction. They cannot be got rid of as long as we are consistent..."

Mr. Justice Hamood-ur-Rehman (as he was then) also noted that:

> ... Having said this, however, I must also point out that, notwithstanding my own personal views in the matter, the question yet remains to be considered as to whether, even assuming that this Court had fallen into error, that would be a sufficient ground for a review in the strict sense. This Court is competent, no doubt, to reconsider a question of law previously decided in a subsequent case but this Court has no jurisdiction to sit on appeal over its own judgments, and although Article 161 of the late Constitution gives it the power to review its decisions in very wide terms that power, as pointed out by this Court in the case of Ilam Din v. Muhammad Din (Civil Petition No. 3 of 1960), will only be exercised "consistently with the nature of review jurisdiction and with due regard to the principle that there must be an end to litigation." I for my part would be inclined to hold that a review is by its very nature not an appeal or a rehearing merely on the ground that one party or another conceives himself to be dissatisfied with the decision of this Court, but that it should only be granted for some sufficient cause akin to those mentioned in Order XLVII, rule 1 of the Code of Civil Procedure, the provisions whereof incorporate the principles upon which a review was usually granted by Courts of law in England. The indulgence by way of review may no doubt be granted to prevent irremediable injustice being done by a Court of last resort, as where by some inadvertence an Important statutory provision has escaped notice which, if it had been noticed, might materially have affected the judgment of the Court, but in no case should a rehearing be allowed upon merits.

25. In 1962, another Constitution was framed (the **"1962 Constitution**"). Chapter 5 of the 1962 Constitution dealt with the Supreme Court of Pakistan. Article 162 conferred review

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jurisdiction on the Court. A bare reading of the Article reveals that (except for a single modification) it was a facsimile of its 1956 counterpart. The said Article is reproduced for ease of reference:

> "The Supreme Court shall have power, subject to the provisions of any Act of the Central Legislature and of any rules made by the Supreme Court, to review any judgment pronounced, or order made, by it."

When the 1962 Constitution was being framed, the framers of the Constitution were well-aware what they meant by "review". In Muhammad Amir Khan *supra* this Court already elaborated what was meant by review and had suggested that the Supreme Court may consider the desirability of framing rules, prescribing the mode, manner and procedure for exercise of such powers.

26. For the purposes of these Petitions, the present iteration of the review Article is Article 188 of the 1973 Constitution which reads as follows:

> "**188. Review of judgements of orders by the Supreme Court**
>
> The Supreme Court shall have power, subject to the provisions of any Act of Majlis-e-Shoora (Parliament) and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it."

The framers of the 1973 Constitution, being aware of the meaning of review, stated that the Supreme Court has the power to review any of its judgements/orders. The framers of the 1973 Constitution were not under any doubt or lack of clarity and knew exactly what review jurisdiction meant i.e. review jurisdiction under Article 188 meant and was clearly intended to mean what is the inherent nature of review jurisdiction as opposed to appeal. They knowingly and deliberately used the word "review" and not "appeal" in Article 188. They were also fully aware of the difference

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between “review” and “appeal”. Where appellate jurisdiction was intended to be conferred on the Supreme Court, it was clearly so mentioned in Article 185. Hence, the framers of the Constitution deliberately and specifically limited Article 188 to review jurisdiction.

27. In reading Article 188, Article 191 which empowers the Supreme Court to frame rules may also be kept in mind. The said Article is reproduced below 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.”

28. The rationale for conferring rule making powers on the Supreme Court is a supplement to the foundational tenet of the 1973 Constitution to protect and preserve the complete independence of the Court from the possibility of any interference by other organs of the State. In 1979/1980, the Supreme Court met as a Full Court, comprising of eminent and illustrious judges. They debated and deliberated upon what was meant by review under Article 188. Thereafter, they unanimously framed the “Supreme Court Rules, 1980” as suggested in Lt. Col. Nawabzada Muhammad Amir Khan’s case *ibid*. While discussing and debating Article 188, and the concept of “review”, they were clear as to what was meant by “review”. Accordingly, when they framed Order 26 Rule 1 of the Supreme Court Rules, 1980, they merely recorded what was meant and all along understood by review in civil and criminal proceedings and for purpose of further clarity made specific reference to Order XLVII, Rule 1 of the Code of Civil Procedure (“CPC”). Order 26(1) of the Supreme Court Rules, 1980 is reproduced below:-

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> "1. Subject to the law and the practice of the Court, the Court may review its judgment or order in a Civil proceeding on grounds similar to those mentioned in Order XLVII, rule I of the Code and in a criminal proceeding on the ground of an error apparent on the face of the record."

29. What is important to note is that Order 26(1) does not in any manner enhance, restrict or curtail the power of review under Article 188. It only explains, elucidates and states what is meant by the jurisdiction of "review" under Article 188 and prescribes limits within which the Court would exercise such power. The judges of the Supreme Court were well-aware that they could not under the Constitution either enhance or curtail the power of review. If the Judges had considered that review jurisdiction under Article 188 could be anything else they would not have relied upon and specifically mentioned Order XLVII Rule 1 CPC. The Supreme Court was aware that there is only one nature, scope, ambit and meaning of review as used in Article 188 i.e. review means review and nothing more or less. Since then, in every judgement of this Court on the question of review, this Court has consistently decided what is meant by its review jurisdiction under Article 188 its scope, parameters and limits in line with the provisions of Order 26(1) of the 1980 Rules. The view has been consistent and unchanged.

30. A brief history of the judgments on review is given in the following paragraphs to substantiate the above view:-

(i) Immediately after the 1962 Constitution, the Supreme Court rendered two judgements namely Rashid Ahmed v. Irshad Ahmed (1968 SCMR 12) and Nawab Bibi v. Hamida Begum (1968 SCMR 104) to the same effect as elaborated in the earlier judgment of Lt. Col. Nawabzada Muhammad Amir Khan v. The

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Collector of Estate Duty Government of Pakistan, Karachi (PLD 1962 SC 335).

(ii) In "Yousaf Ali Khan v. The State" (PLD 1971 SC 508), which was also relied upon in Justice Khurshid Anwar Bhinder v. Federation of Pakistan (PLD 2010 SC 483), the scope of review was elaborated.

(iii) In the next judgement M. Moosa v Muhammad and Others (1975 SCMR 115), it was laid down that if a ground has not been taken while arguing the original case, then such a ground cannot be re-agitated.

(iv) These cases were followed by the cases of: -

- Evacuee Trust Property Board v. Hameed Elahi and another (PLD 1981 SC 108)
- Abdul Hamid Saqfi v. Service Tribunal of Pakistan and 22 others (1988 SCMR 1318)
- Muhammad Saifullah Khan v. Federation of Pakistan (PLD 1990 SC 79)
- State v. Iqbal Ahmed Khan (1996 SCMR 767)
- Rafiq Saigol v. Bank of Credit and Commerce International Ltd. (PLD 1997 SC 865)
- Ahmed v. The State (2002 SCMR 1611)

31. A five member Bench of this Court in Abdul Rehman v. Asghar Ali (**PLD 1998 SC 363**) laid down ten principles when it came to the exercise of review jurisdiction by this Court. These principles were:

> "(i) That every judgment pronounced by the Supreme Court is presumed to be a considered, solemn and final decision on all points arising out of the case;
>
> (ii) that if the Court has taken a conscious and deliberate decision on a point of fact or law, a review petition will not lie;

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(iii) that the fact the view canvassed in the review petition is more reasonable than the view found favour with the Court in the judgment/order of which review is sought, is not sufficient to sustain a review petition;

(iv) that simpliciter the factum that a material irregularity was committed would not be sufficient to review a judgment/order but if the material irregularity was of such a nature, as to convert the process from being one in aid of justice to a process of injustice, a review petition would lie;

(v) that simpliciter the fact that the conclusion recorded in a judgment/order is wrong does not warrant review of the same but if the conclusion is wrong because something obvious has been overlooked by the Court or it has failed to consider some important aspect of the matter, a review petition would lie;

(vi) that if the error in the judgment/order is so manifest and is floating on the surface, which is so material that had the same been noticed prior to the rendering of the judgment the conclusion would have been different, in such a case a review petition would lie;

(vii) that the power of review cannot be invoked as a routine matter to rehear a case which has already been decided nor change of a counsel would warrant sustaining of a review petition, but the same can be it pressed into service where a glaring omission or patent mistake has crept in earlier by judicial fallibility;

(viii) that the Constitution does not place any restriction on the power of the Supreme Court to review its earlier decisions or even to depart from them nor the doctrine stare decisis will come in its way so long as review is warranted in view of the significant impact on the fundamental rights of citizens or in the interest of public good;

(ix) that the Court is competent to review its judgment/order suo motu without any formal application;

(x) that under the Supreme Court Rules, it sits in divisions and not as a whole. Each Bench whether small or large exercises the same power vested in the Supreme Court and

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decisions rendered by the Benches irrespective of their size are decisions of the Court having the same binding nature."

(***Underlining is ours***)

32. In Tahir Hussain v. The State **(2005 SCMR 330)** (in para 3 at page 331), the Supreme Court held as follows: -

> "3. We have given our anxious thought to the contentions of the learned counsel for the petitioner and have gone through the referred Hadith and case law. As regards the impugned judgment, learned counsel could not refer to even a single error apparent on the face of record necessitating the review of impugned judgment. The entire arguments advanced by him were made on the judgment of the Federal Shariat Court which is not under review before us, as such, entire submissions being out of context cannot be taken into consideration. Even otherwise, all these contentions were raised at the time of hearing of main appeal which were elaborately dealt with and discussed in the impugned judgment. The scope of review is limited and it does not allow re hearing, re appraisal or appreciation of evidence afresh."

33. In Sh. Mehdi Hassan vs Province of Punjab **(2007 SCMR 755)** (in para 8 at page 758), the Hon'ble Supreme Court decided that: -

> "8. We having heard the learned counsel for the parties at length and perused the record with their assistance have found that the contentions raised by the learned counsel in support of this petition have been exhaustively dealt with in the judgment under review. This is settled law that the points already raised and considered before the Court, cannot be re- agitated in review jurisdiction which is confined to the extent of patent error or a mistake floating on the face of record which if not corrected may perpetuate illegality and injustice. The mere fact that another view of the matter was possible or the conclusion drawn in the judgment was wrong, would not be a valid ground to review the judgment unless it is shown that the Court has failed to consider an important question of law. The learned counsel has not been able to point out any such error of law in the judgment or interference in the review jurisdiction."

34. Reference may also be made to Majid Mahmood Vs. Muhammad Shafi **(2008 SCMR 554)**, paras 5, 7, 8 and the following portion at page 557: -

> "5. ...All the points agitated while arguing the review petitions have been dilated upon and decided after going through entire record with care and caution. From whatever angle the matter may be examined, no case of review is made out. This is settled law that the case cannot be reopened on merits in review. Scope of review is very limited and review petition is not maintainable on those points which have been decided one way or the other. Moreover any dispute which has already been resolved cannot be reviewed, even if the same has been resolved illegally. In Allah Ditta and others v. Mehrban and others 1992 SCR 145, it has been observed that "even otherwise the mere incorrectness of a decision on a particular issue or a question falling for determination in a case can never be a ground for review as to permit a review on the ground of such incorrectness would

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amount to granting the Court a jurisdiction to hear appeal against its own judgment. The review of the judgment cannot be allowed merely on the ground that a party to it conceives himself to be dissatisfied with the decision made therein.

7. It is settled proposition of law that the review cannot be allowed to reopen the case for the purpose of affording rehearing of the points already resolved. In Sh. Mehdi Hassan v. Province of Punjab through Member, Board of Revenue and 5 others 2007 SCMR 755 this Court has observed that "this is settled law that the points already raised and considered before the Court, cannot be re-agitated in review jurisdiction which is confined to the extent of patent error or a mistake floating on the face of record which if not corrected may perpetuate illegality and injustice. The mere fact that another view of the matter was possible or the conclusion drawn in the judgment was wrong, would not be a valid ground to review the judgment unless it is shown that the Court has failed to consider an important question of law.

8. The exercise of review jurisdiction does not mean a rehearing of the matter and as finality attaches to the order, a decision, even though it is erroneous per se, would not be a ground to justify its review. Accordingly, in keeping with the limits of the review jurisdiction, it is futile to reconsider the submissions, which converge on the merits of the decision. It needs no reiteration that before an error can be a ground for review, it is necessary that it must be one which is apparent on the face of the record, that is, it must be so manifest, so clear that no Court could permit such an error to remain on the record. It may be an error of fact or of law, but it must be an error which is self evident and floating on the surface and does not require any elaborate discussion or process of rationcination. It is not denied that if the Court has taken a conscious and deliberate decision on a point of law or fact while disposing of a petition or an appeal, review of such judgment or order cannot be obtained on the grounds that the Court took an erroneous view or that another view on reconsideration is possible. Review also cannot be allowed on the ground of discovery of some new material, if such material was available at the time of hearing of appeal or petition but not produced. The contentions of learned counsel for the petitioner as rightly urged, are nothing but reiteration of the same grounds, which were urged at the hearing of appeals, but were rejected by this Court after consideration. These contentions cannot be allowed to be raised again in review proceedings as in the garb of proceedings for review, the petitioner cannot obtain rehearing of the appeals."

In the same year in "Mirza Shahjehan Haider Gorgani Versus Chairman, Federal Land Commission, Islamabad" (2008 SCMR 575) in para 5 at page 578, the Supreme Court held that if a ground has not been taken then it cannot be re-agitated as review is not an appeal. These were followed by "Sultan through L.R.s Versus Said Khan" (2008 SCMR 562) and Mehmood Hussain LARK Versus Muslim Commercial Bank Limited (2010 SCMR 1036). In "Ghulam Murtaza vs. Abdul Salam Shah" (2010 SCMR 1883), in paras 4 and 5 at pages 1885 and 1886, the Supreme Court held as follows:-

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> "4: We have given our anxious consideration to the contentions of the learned counsel of the parties and perused the record. The memo of revision petition before the High Court, memo of petition before this Court, leave granting order dated 18-4-2003, arguments raised by the learned counsel for the appellant on 13-2-2007 mentioned in para. 2 of the impugned judgment and the grounds urged by him on 17-1-2008 clearly envisage that the grounds on the basis of which notice was issued to the respondents were not raised and taken before this Court. It is settled principle of law that parties are bound of their pleadings. See Murad Begum's case (PLD 1974 SC 322). It is also settled principle of law that even fresh point/plea is generally not allowed by this Court to raise during the arguments of the petition and appeal and fresh pleas cannot be allowed to raise during the arguments of the review petition as law laid down in the following judgments:
>
> *(i)* Ishfaqur Rehman's case (PLD 1971 SC 766)
> *(ii)* John E Brownlee's case (AIR 1940 P.C. 219)."
>
> "Paragraph 5: It is well-settled proposition of law that every judgment pronounced by this Court is presumed to be considered solemn, and final decision on all points arising out of the case. If the Court has taken a conscious and deliberate decision on a point of fact or law a review, petition will not be competent. It is also settled principle of law that a "review petition" not competent where neither new and important evident error has been described nor any error apparent on the face of record. Such error may be error of question of law or fact but the condition precedent is that it must be self-evident floating on the surface and not requiring elaborate discussion or process of ratiocination. It is also settled proposition of law that the review is not meant for re-hearing of the matter. As mentioned above scope of the review is always very limited and confined to the basic aspect of the case referred to at review stage which was considered in judgment but if the grounds taken in support of the petition were considered in the judgment and decided on merits, the same would not be available for review in the form of re-examination of the case on merits. The aforesaid principles are supported by the following judgments of this Court:
>
> *(i)* Abdul Majeed's case (1980 SCMR 504)
> *(ii)* Mst. Kalsoom Malik's case (1996 SCMR 710)
> *(iii)* Noor Hassan Awan (2001 SCMR 367)
> *(iv)* Ayyaz Baig's case (2002 SCMR 380)
> *(v)* Daewoo Corporation's case (2004 SCMR 1213)
> *(vi)* Muhammad Afzal's case (2004 SCMR 1348)
> *(vii)* M/s. PIA's case (2004 SCMR 1737)
> *(viii)* Sh. Muhammad Amjad's case (PLD 2004 SC 32)
> *(ix)* Syed Wajihul Hassan Zaidi's case (PLD 2004 SC 801)."

35. An elaborate discussion on review jurisdiction of this Court can also be found in Justice Khurshid Anwar Bhinder v. Federation of Pakistan (**PLD 2010 SC 483**). In the said matter, an argument was also made (as was done by the learned Attorney General before us) that the review jurisdiction against an order

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passed under Article 184 should be expanded and it be considered akin to an appeal. The Court categorically rejected this argument. This principle was reaffirmed in the case of Iqbal Pervaiz vs.Harsan (**2018 SCMR 359**).

36. The conclusions which can be drawn from the above cited case law are as follows: -

(i) Review jurisdiction is well-known in jurisprudence;

(ii) It is attached with the concept of "finality" of the judgements of the apex Court i.e. the judgements of the Supreme Court are final and can only be re-opened on limited grounds of review;

(iii) To give sanctity to the concept of "finality", the Court only exercises power of review and does not rehear the case by sitting in appeal over its judgements and orders;

(iv) The scope of review is well-defined in Order 47 Rule 1 CPC in civil cases and this is what review is;

(v) The Supreme Court described what is meant by the "review jurisdiction" in "Lt. Col. Nawabzada Muhammad Amir Khan vs. The Controller of Estate Duty"(PLD 1962 SC 335) and the framers of the 1973 Constitution consciously and deliberately adopted this meaning;

(vi) The framers of the 1973 Constitution were not under any misconception, were conscious and aware of the fact that review jurisdiction could not be expanded or equated to appeal, and knowingly used the word "review" and not "appeal" in Article 188 (just as the framers of the Constitution in 1956 and 1962 had also specifically used the word "review" and not "appeal");

(vii) In "Lt. Col. Nawabzada Muhammad Amir Khan's case *ibid,* the Hon'ble Judges stated that Supreme Court should frame rules to regulate its review jurisdiction. The matter was considered by the Full Court in 1980, and after full deliberation Order 26(1) was framed, which clearly and unambiguously states what review jurisdiction is;

(viii) It is not possible to attribute to the authors of the Constitution that they were unaware of what review meant

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nor it is possible to attribute lack of knowledge of law to the judges who framed the Supreme Court Rules, 1980 that they did not appreciate the difference between review and appeal;

(ix) The Supreme Court, consisting of eminent Judges in 1980 and thereafter, were well-aware that they could not expand or restrict the scope of review under Article 188. If they had considered that the review jurisdiction under Article 188 could be "expanded" to appellate jurisdiction, then they would not have restricted this power to the one contained in Order 47(1) CPC;

(x) It is clear that Order 26 of the Supreme Court Rules, 1980 is an explanation and elucidation of the meaning of "review jurisdiction" and does not expand or restrict it;

(xi) Since 1980, the Supreme Court has always been aware that there is only one nature, scope, ambit and meaning of review as used in Article 188 i.e. review jurisdiction means review jurisdiction and nothing more or less. It is therefore, wholly fallacious to suggest that review jurisdiction under Article 188 can be equated with appeal or can be expanded or restricted in any manner;

(xii) To suggest that the scope of "review" under Article 188 is or can be the same as "appeal", is also wholly incorrect as it assumes that when the framers of the Constitution stated that the Supreme Court can review its judgement and orders, they did not know the scope of "review" and actually meant "appeal";

(xiii) The Constitution makers were well-aware of the concept of "appeal" and when appellate jurisdiction was to be conferred upon the Supreme Court, it was clearly so mentioned in Article 185;

(xiv) The framers of the Constitution deliberately did not use the word "appeal" in Article 188 but specifically limited it to "review" jurisdiction; and

37. This constitutional, legal and jurisdictional landscape continued until the enactment of the 2023 Act, ostensibly passed under the authority vested in Parliament under Article 188 read with Article 191 of the 1973 Constitution. It goes without saying

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that in view of Article 189 of the 1973 Constitution, the judgments of this Court discussed above defining the constitutional parameters of review jurisdiction under Article 188, are binding precedents and leave no room for ambiguity. It is quite clear to us that the Parliament believed that the power of review as used in Article 188 is the same which is well-known in our settled jurisprudence whereby a review cannot be equated with an appeal. This is the reason why the Act states that the scope of review, on both facts and law, shall be the same as an appeal under Article 185 of the Constitution. If Parliament had believed that the scope of review under Article 188 was the same as that of appeal under Article 185, there would be no need to promulgate the Act. The question which needs to be examined is whether the legislature can, by way of ordinary legislation, override the rules framed by the Supreme Court of Pakistan in exercise of express powers available to it under Article 188 of the 1973 Constitution and overturn consistent judicial pronouncements embodying the contours and limits of Article 188 of the 1973 Constitution and in doing so, for all intents and purposes, create a right of appeal by indirectly amending Article 188 of the Constitution through ordinary legislation?

THE 2023 ACT:

38. In order to answer the above question, having traced the history of review jurisdiction and the jurisprudence spanning over many decades, we may now advert to the 2023 Act itself.

39. In our current constitutional dispensation, the legislature legislates, the executive implements the law and the judicial branch interprets laws and the Constitution which *inter alia* includes the power to examine the vires of a law or any provision thereof on the touchstone of the Constitution.

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COMPETENCE OF THE PARLIAMENT WITH RESPECT TO ENACTMENT OF THE 2023 ACT:

40. The Majlis-e-Shoora (Parliament) derives its existence from Chapter 2 of the 1973 Constitution, its procedure for legislative business from Articles 70 to 77 and its legislative competence from Article 141. Presuming that a Bill has gone through the rigours of the relevant Articles depending on its nature and has been passed by the Parliament and is assented to by the President of Pakistan in terms of Article 75, it becomes law and is called an Act of the Majlis-e-Shoora (Parliament) itself.

41. Under Article 142(a), the Parliament, subject to the Constitution, "shall have exclusive power to make laws with respect to any matter in the Federal Legislative List." The Federal Legislative List is found in the Fourth Schedule to the Constitution. For the purposes of these Petitions, the relevant Entry in the Fourth Schedule is Entry No.55. The said Entry is reproduced hereunder for ease of 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 authorised by or under the Constitution, the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers."
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> (**Underlining is ours**)

42. The first limb of the Entry is straightforward. Parliament cannot legislate regarding any matter relating to jurisdiction and powers of the Supreme Court. It is the second limb which states that Parliament can legislate on the enlargement of the jurisdiction of the Supreme Court and the conferring thereon of supplemental powers as is expressly authorized by or under the Constitution. At first glance, it may (if seen in isolation and read out of context) appear that Parliament may be competent to

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legislate and pass the 2023 Act since the said Entry read with Article 188 appears to subject the review jurisdiction of this Court to an Act of Parliament. However, a closer look at the extent, scope and constitutional implications of the 2023 Act paints a totally different picture. What the legislature has failed to realise is that the authority to legislate with respect to the review jurisdiction of Article 188 is circumscribed by other Articles of the Constitution and the scheme of the Constitution ensuring independence of judiciary. Further, the scope to frame rules under Article 191 to regulate its practice and procedure vests in the Supreme Court. The Supreme Court, cognisant of the need to structure the said jurisdiction and in exercise of its powers under Article 191 had already embarked upon and completed that exercise as far back as 1980 when it framed the 1980 Rules. These Rules and Article 188 became the subject of judicial precedent when this Court rendered a plethora of judgements discussed above whereby this Court clearly enunciated a constitutional point of law with respect to Article 188. Where such rule-making power has been exercised, any legislation by placing reliance on Entry No.55 under the garb of “enlargement of jurisdiction of the Supreme Court”, is indisputably an intrusion in the independence of the judiciary, specifically so where a right of appeal is sought to be provided when none exists in the Constitution. Since this Court derives its review jurisdiction from Article 188 (and structures such jurisdiction by way of the 1980 Rules), Parliament cannot, by way of ordinary legislation, render the 1980 Rules, framed, reiterated, followed, acted upon and sanctioned in judicial pronouncements of this Court, null and void through ordinary legislation. The said Rules have been framed in exercise of an independent Constitutional power keeping in mind a fundamentally important

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feature of the Constitution namely independence of judiciary and cannot be changed, modified, or overridden by ordinary legislation. Further, there is no “express authorization” anywhere in the Constitution empowering the Parliament to “enlarge” the review jurisdiction of the Supreme Court under Article 188 of the Constitution. In addition, the 2023 Act does not “enlarge” review jurisdiction, it “creates” a new appellate jurisdiction which has no constitutional basis, sanction or authorization. Therefore, any attempt by way of ordinary legislation to interfere in the scope of its powers and jurisdiction including but not limited to its review jurisdiction would constitute a wrong and erroneous reading and interpretation of the Constitution. There can be no two opinions that the power to interpret the Constitution vests exclusively with the Supreme Court of Pakistan. The 2023 Act appears to be an overt and glaring intrusion in the independence of the judiciary, which is a grund-norm of our constitutional scheme and has been vigorously, resolutely, and robustly guarded by the framers of the 1973 Constitution as is evident from various provisions of the 1973 Constitution. The very preamble of the 1973 Constitution categorically states: “... the independence of the judiciary shall be fully secured”. Any legislation interfering with the independence of the judiciary, would by its nature and from its very inception, be unconstitutional, null, void and of no legal effect.

43. If the review jurisdiction, as stated in Article 188, has to be converted into an appellate jurisdiction, it may and subject to its harmony with other provisions of the Constitution and the well recognized rule of finality only be done through a Constitutional amendment and not through ordinary legislation. It is a well-recognized principle that ordinary law cannot amend, change, delete or add to the Constitution. The effect of Section 2 is that

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under Article 188, instead of the Supreme Court exercising review jurisdiction as provided therein, it is to exercise another and newly created jurisdiction, namely an appellate jurisdiction to be termed as “Review”. This amounts to amending Article 188 under the garb of enlarging the scope of review. Section 2 of the 2023 Act provides that a review petition under Article 188 will be treated as an appeal under Article 185. A review remains a review and cannot be changed to an appeal otherwise it does not remain a review. Section 2 purports to change the inherent nature of review. Further, Article 188 provides for a review in all cases, whereas Section 2 purports to carve out an appeal by stating that review mentioned in Article 188 shall in case of judgments and orders passed under Article 184(3) be an appeal. There is therefore a clear and irreconcilable conflict between Article 188 and Section 2 *ibid*. There can be no two views in concluding that in case of a conflict between a Constitutional provision and the law, the Constitution prevails and the law is liable to be struck down.

44. Without prejudice and in addition to what has been stated above, Section 2 of the 2023 Act for all intents and purposes provides that review jurisdiction is to be treated as appellate jurisdiction (as far as orders passed under Article 184(3) are concerned). This is certainly not an “enlargement” of review jurisdiction but a complete change of the same and hence, beyond the competence of the Parliament. The meaning of the phrase “subject to Act of [Majlis-e-Shoora (Parliament)]” in Article 188, cannot be, that by such Act, the very nature of review can be altered and replaced by an appeal. If “subject to the Act of [Majlis-e-Shoora (Parliament)]” were to mean that a Constitutional provision could be changed or modified by ordinary law then that would mean that even the fundamental rights could be denied and

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other Articles of the Constitution could be amended through ordinary legislation.

45. We therefore find that, in the instant matter, Parliament was not competent to legislate with respect to Article 188 in the manner that it has done by way of the 2023 Act. Where such rule making power has been exercised by the Court, any legislation by placing reliance on Entry 55 under the garb of "enlargement of jurisdiction of the Supreme Court" is indisputably unconstitutional and an intrusion in the independence of the judiciary specifically so where a right of appeal is sought to be provided when none has been provided by the Constitution. The so-called "enlargement" has no constitutional sanction or basis and is not anchored in any provision of the 1973 Constitution relating to the judicature or the Supreme Court of Pakistan.

46. We also note that Section 2 conflates Appellate jurisdiction of the Supreme Court with that of review jurisdiction under Article 188 and thereby renders Article 188 to the extent of orders/judgments passed under Article 184(3) redundant by providing an appeal for all intents and purposes under the facade of review. This appears to be an attempt to remodel the Constitutional scheme relating to judicature and potentially opening the door for diminishing, undermining and eroding the power and jurisdiction of the apex court of the country. Under the Constitution, orders and judgements passed by the Supreme Court under Article 184(3) are final except to the limited extent that the same may be subject to review jurisdiction under Article 188. Section 2 by providing an appeal on facts and law against the judgements and orders passed under Article 184(3), reduces rather than enlarges the jurisdiction of the Supreme Court under Article

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184(3) since such judgements and orders are now subject to a re-hearing and re-appraisal by a larger bench hearing the review as an appeal thereby destroying the finality of such judgments or orders. It may be noted that looked at from another angle, an "expansion" of review jurisdiction and converting it into an appeal would necessitate amending various Constitutional Articles (including Articles 184(3), 185 and 188) as well as modification of the 1980 Rules. The 2023 Act alone, and by itself, cannot alter, modify or amend Constitutional provisions without adhering to the mandatory requirements set forth in Articles 238, 239 and 269 of the 1973 Constitution.

47. If there was any doubt in anybody's mind (there is none in ours) that the real purpose of the 2023 Act is to provide for an appeal against judgements and orders passed by this Court in exercise of its power under Article 184(3) of the 1973 Constitution (where the Constitution does not provide for an appeal), Section 3 of the 2023 Act should be enough to unravel the thin veil of trying to "facilitate and strengthen the power [of review]" and "enlarge jurisdiction of the Supreme Court". By providing in Section 2 that "... the scope of review on both facts and law shall be the same as an appeal under Article 185 of the Constitution" and supplementing it by stating (in Section 3) that the review petition shall be heard by a Bench larger than the Bench which passed the original judgement or order, it has been ensured in the 2023 Act that:

i) The "review" will be heard by a larger bench, which may or may not consist of the members of the bench that passed the original order/judgement. The "review" bench will surely include judges who had not heard the matter earlier. This would necessitate rehearing of the

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entire case on both facts and law. Further, if the original judgment/order under Article 184(3) of the Constitution was passed by a full Court, how would a larger Bench be constituted? Would that mean that there would be no power of review against such order/judgment?

ii) Regardless and without prejudice to the above, the "review" bench of the Supreme Court would, for all intents and purposes, sit in appeal over a judgement of the Supreme Court irrespective of the number of Hon'ble Judges who sat on a Bench that heard the matter under Article 184(3) of the Constitution. There is no provision in the Constitution providing for the Supreme Court to sit in appeal over its own judgements passed in exercise of powers under Article 184(3) of the 1973 Constitution.

(iii) Further, providing for appointment of a counsel of choice (Section 4) who may or may not be the counsel who appeared and argued the matter in the first place, the basic concept of review, as incorporated in Order XXVI of the 1980 Rules has been discarded. The purpose behind the rule that the same counsel who argued the matter in the first place may file and argue a review petition is that he is fully conversant with what he had argued, which grounds were pressed and which were given up. A new counsel being unaware of such details would obviously re-argue the entire matter on questions of law as well as facts which is contrary to the basic concept of review.

(iv) To allow a party to substitute its counsel in the review proceedings and to raise new points of facts and law would be tantamount to allowing litigants to get another shot at overturning a judgement of this Court not to mention offend the principles laid down by this Court relating to

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finality attached to the judgements of this Court. A larger bench, possibly a new lawyer and hearing of "review" petition both on facts and law begs the question, what else is an appeal?

48. It may further be noted with reference to Section 3 that review petitions are not petitions seeking leave to appeal in terms of Article 185(3), they are dealt with Order XIII and XVII of the 1980 Rules. Once all the formalities prescribed in the Rules are met, the matter is placed before a Bench constituted by the Chief Justice of Pakistan in terms of Order XI of the 1980 Rules. The question whether the legislature can enact a law on the subject of the constitution of benches has to be answered in the negative for the reason that a five-member bench of this Court, in SMC No.4 of 2021 (**PLD 2022 SC 306 @ para 33**), has already held that:

> " ... it is settled law that it is the Chief Justice alone who is the master of the roster and who, from time to time, constitutes Benches for the exercise of the various jurisdictions of the Court. This applies (to take the language of Order XI of the 1980 Rules) to "every cause, appeal or matter" to be heard and disposed of by the Court ...".

49. Since this Court has declared that under the 1980 Rules, it is the sole prerogative of the Chief Justice of Pakistan to constitute Benches, to fix the number of Judges who constitute the said Benches, it would veer towards irrationality to hold that while the original exercise and invocation of jurisdiction under Article 184(3) is the sole prerogative of the Chief Justice under the 1980 Rules, the legislature has the authority to supersede the Chief Justice and enact a law taking away the prerogative of the Chief Justice of nominating and fixing the number Judges to hear a review petition. The power to constitute benches has always vested with the judicial branch of the State and to suggest that the legislature can legislate on the issue of the mode and manner of composition and strength of benches to hear certain matters (in this case review petitions), would be a gross intrusion and

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incursion in judicial exercise of powers under the Constitution. Therefore, the said Section violates the express command of the 1973 Constitution. We also find that Sections 2 and 3 of the 2023 Act go against the basic principle of separation of powers and offend against *inter alia* Articles 175(2), 175(3), 184(3), 185 and 188 of the 1973 Constitution by unduly intruding into and interfering with the independence of the judiciary, and therefore, diminish the mandate of this Court to protect and enforce the fundamental rights of the people of Pakistan.

50. The learned Attorney General as well as Mr. Sajeel Swati submitted that this Court may read down the provisions of the Act if it finds the Act in its present form to be ultra vires the Constitution. We have carefully considered the said argument but find it to be misconceived. Reading down is a well-known concept but cannot be used to amend legislation. Unfortunately, there is no constitutionally acceptable way of reading down the provisions of the Act which provides in unambiguous words that the scope of review on both, facts and law, shall be same as an appeal and provides ancillary provisions to buttress the scheme of the Act. Any purported "reading down" would not change or cure the inherent and fundamental flaw in the Act that the scope of review under Article 188 has been converted into an appeal through ordinary legislation.

51. We have also gone through the judgements relied upon by the learned Attorney General for Pakistan. We find that firstly the judgements cited before us do not state that the review jurisdiction under the relevant Article of the Indian Constitution is the same as appellate jurisdiction or can be equated with it or expanded to become an appellate jurisdiction. Secondly, the

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judgement of the Indian Supreme Court in Indian Young Lawyers Association and Rupa Ashok Hurra *ibid* is inconclusive and not relevant to the case in hand for the proposition being advanced. The main question before the Indian Supreme Court in the Indian Young Lawyers Association *ibid* was whether or not the matter before it should be referred to a Full Bench. The rest of the observations are *obiter dicta*. Thirdly, with all due respect, the rationale and logic of the *obiter dicta* is in a different context and on the basis of a different constitutional dispensation. It has therefore not been found by us to be of any persuasive value in the facts and circumstances of the *lis* before us. Fourthly, in any case, the jurisprudence of Pakistan as established through exhaustive judgements relating to review jurisdiction is so clear and unambiguous that any decision of Courts of foreign jurisdictions which exist and function under different constitutional and legal dispensations cannot have the effect of changing our jurisprudence. Fifthly, the judgements of the Indian Supreme Court cited and relied upon by the learned Attorney General do not propose any test or criteria on the scope of expansion of review jurisdiction. What the Indian Supreme Court is certainly not saying is that review jurisdiction means that it can be equated with an appeal. On the other hand, a plain reading of Section 2 of the 2023 Act leaves us in no manner of doubt that it means and intends, in no uncertain terms, to convert a review under Article 188 into an appeal under Article 185 of the Constitution on facts and law by virtually amending Article 188 of the Constitution read with the 1980 Rules which cannot be done under the Constitution.

52. It has also been argued by the learned Attorney General as well as Mr. Swati that under Article 187, the Supreme Court has the power to do complete justice. The argument appears

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to be that somehow the 2023 Act can be validated because the Supreme Court has the power to do complete justice under Article 187. With all due respect, we are unable to agree. Firstly, because the Act has been challenged on the ground that Parliament does not have the competence to amend the Constitution and, hence, the powers that the Supreme Court has under Article 187 of the Constitution, have no bearing on the question of competence of the Parliament to amend the Constitution under the garb of expanding the scope of review through ordinary legislation. Secondly, in any case, Article 187 is not an Article which confers jurisdiction on the Supreme Court, the Supreme Court can exercise powers under Article 187 in a case or matter pending before it once the Court has competently assumed jurisdiction. In order to understand the scope of Article 187, it is relevant to elaborate the difference between “jurisdiction” and “power”. Jurisdiction of a Court is a well-understood concept which means the capacity of a court to decide a dispute arising before it. On the other hand, the “power of the Court” means the actions which a Court may take i.e. the judgement or order it may pass after assuming jurisdiction. While the Supreme Court has jurisdiction under Articles 184, 185, 186 and 188, Article 187 confers the power to do complete justice. It is not a jurisdiction. As far back as 1962 in the case of Lt. Col. Nawabzada Muhammad Amir Khan vs. The Controller of Estate Duty **(PLD 1962 SC 335)**, the Judges of the Supreme Court held that the power to do complete justice (the then Article 163 of the Constitution) does not “enable a court to exercise jurisdiction in cases where otherwise they could not exercise jurisdiction".....It does not grant jurisdiction to the Court to review cases which it could not otherwise have reviewed.....these limitations.....are inherent in the exercise of review jurisdiction.....”. The Court also

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emphasized the words “in any case or matter pending before it” as used in Article 187 to state that the case has to be first competently filed and only thereafter the power under Article 187 can be used for doing complete justice. In the original 1973 Constitution, Article 187 did not contain the words “subject to clause (2) of Article 175”. These words were inserted vide Constitutional Amendment No.5 on 13/09/1976. In the case of Ch. Zahur Elahi Vs. The State **(PLD 1977 SC 273)**, there were some observations relating to Article 187 being relatable to the jurisdiction of the Supreme Court which necessitated Constitutional Amendment No.5 on 13/09/1976 under which the words “subject to Clause (2) of Article 175” were inserted. In the case of Pir Sabir Shah vs. Shad Muhammad Khan **(PLD 1995 SC 66)**, Ajmal Mian, J (as he then was) noted as follows:

> “26. On the other hand, Mr. Khalid Anwer has drawn our attention to Article 175 of the Constitution which deals with the establishment and jurisdiction of the Supreme Court and the High Courts in the Provinces and clause (2) of which provides 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". He has further pointed out that original clause (1) of Article 187 did not contain the words "Subject to clause (2) of Article 175; but they were added by the Constitution (Fifth Amendment) Act, 1976) (Act LXII of 197) with effect from 13-9-1976. After the decision in the case of Ch. Zahur Ilahi, M.N.A. v. The State PLD 1977 SC 273, which was rendered on 15-7- 1976 and in which it was held that under Articles 199 and 187 of the Constitution, the superior Courts while exercising their Constitutional jurisdiction had the power to set aside actions taken or orders passed by Executive Authorities notwithstanding finality conferred by Special defence laws as the Constitution overrides all the laws including defence laws. The petitioner was granted bail in exercise of the power contained in clause (1) of Article 187 of the Constitution by this Court. It may be advantageous to reproduce from the opinion of Muhammad Afzal Cheema, J, the following observation on the above question:--
>
> > "Considering the entire position in the background explained above, the conclusion I have reached is that prima facie reasonable grounds appear to exist to give rise to the belief that the allegations of mala fide may not be untrue. It is nothing but the expression of a tentative view analogous to the opinion of the Court which it is called upon to express at the pre-trial stage in bail matters under section 497, Cr.P.C. I am in respectful agreement with my learned brother Salahuddin Ahmed, J. that this prima facie finding would be good enough to justify the .grant of interim bail to the petitioner, and that it was wrongly denied to him by the High Court. I also respectfully endorse the following observation of his Lordship in Manzoor Ilahi v. Federation of Pakistan P L D 1975 SC 66 wherein incidentally also the detention of the

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present petitioner was challenged by his brother, when the liberty of a person is involved a High Court can exercise its jurisdiction under Article 199 of the Constitution and grant him relief even though he has misconceived his remedy and came up with an application under sections 498 and 561-A of the Criminal Procedure Code'. I am also of the view that in the circumstances of the case, this Court would be competent to allow bail to the petitioner in legitimate exercise of its Constitutional jurisdiction under Article 187 of the Constitution. The provision reads as follows:--

> (187).--(1) The Supreme Court shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document.'
>
> Doing complete justice is indeed a very comprehensive term and in my humble opinion means doing real and substantial justice without being fettered by legal formalism, so that the paramount interests of justice are not allowed to be sacrificed at the altar of mere technicalities. It is to safeguard these interests that the Constitution has conferred vast discretionary powers on the Supreme Court which is on the apex of the judicial hierarchy and the Court of last resort. This view finds support from the following observation made by Hamoodur Rahman, C.J. in Noora's case PLD 1973 SC 469."

27. There is no doubt that in none of the above cases cited by Mr. Syed Sharifuddin Pirzada, the above amendment made in Article 187(1) of the Constitution with effect from 13-9-1976, was noticed. The effect of the above amendment seems to be that the provision of clause (1) of Article 187 can be pressed into service subject to clause (2) of Article 175 of the Constitution. In other words, the Supreme Court shall have no jurisdiction save as is or may be conferred on it by the Constitution or by or under any law. To put it differently clause (1) of Article 187 itself does not confer any jurisdiction on the Supreme Court but it provides a provision whereby the Supreme Court can exercise its jurisdiction conferred by the Constitution or by any other law more effectively by issuing such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it and in doing so the. Supreme Court will not be fettered with technicalities which may result in miscarriage of justice. It may be pointed out that - there is no similar amendment made in Article 210(2) of the Indian Constitution and, therefore, the decisions of the Courts of Indian jurisdiction will not be relevant for the purpose of construing clause (1) of Article 187 of the Constitution after 13-9-1976..."

Reference may also be made to the following remarks made by:-

(i) Justice Sajjad Ali Shah (paras 14, 17, 19, 20, 21 and 22) in which it held that Article 187 does not confer any jurisdiction. It recognizes inherent powers of the apex Court to do complete justice.

(ii) Saleem Akhtar, J (in paras 9 and 10) in which he held that the Court can decide questions of vires of the act while doing complete justice but the Court will not cross the frontiers of Constitutional law. It was further held that the Court can grant ancillary relief and mould the relief within its jurisdiction depending upon the facts and circumstances of the case. However, Article 187 does not confer any jurisdiction. It recognizes the inherent power of this apex Court to do complete justice.

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53. Mehr Zulfiqar Ali Babu Vs. Government of Punjab **(PLD 1997 SC 11)** was a case which was filed under Article 184(3). In this case no violation of fundamental rights was alleged hence the petition under Article 184(3) was not maintainable. The question before the Court was "Can a relief be given under Article 187 directly?" In para 9A, this Court held that no independent proceedings can be initiated under Article 187. However, once it is seized of a *lis* competently under the relevant law, its power to grant applicable relief is not controlled by the technicality of the proceedings. The Court held that the key words were "pending" which meant competently brought before the Court. Article 187 can be pressed into service only in a matter which is competently filed before the Court but it does not give an independent right to initiate proceedings of the nature in question. In Dossani Travels Pvt. Ltd and others vs. Travels Shop **(PLD 2014 SC 1)**, it was held that Article 187 was an enabling provision which could be invoked if the matter was competently filed. Reliance in this case was placed on Hitachi Limited vs. Rupali Polyester and others **(1998 SCMR 1618)**. In WAPDA vs. Saadullah Khan **(1999 SCMR 319)**, it was held that Article 187 was controlled by Article 175(2) of the Constitution. Reference may also be made to Saeed Akhtar vs. The State **(2000 SCMR 383)** and Munir A. Sheikh vs. Khursheed Ismail **(2000 SCMR 456)**.

54. In view of the aforenoted legal position, the argument that the power of this Court under Article 187 can be resorted to in order to save and protect the 2023 Act is found to be misconceived and is accordingly repelled.

55. With respect to Sections 5, we note that the purpose behind the said section is to allow those who may be aggrieved by

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a judgement rendered by this Court with respect to any order passed in exercise of jurisdiction conferred under Article 184(3) to file a review petition on both facts and law, the scope of which shall be the same as an appeal under Article 185 of the Constitution. Besides and in addition to other reasons including our finding that the 2023 Act in effect purports to amend the Constitution, the effect of the said Section would be to open a floodgate of litigation and to allow filing of review petitions irrespective of the date when the order complained against had been passed. This would be notwithstanding the fact that such order had become a past and closed transaction by reason of expiry of the period of limitation to file a review petition under Article 188 read with the 1980 Rules. It goes without saying that the threshold, requirement and scope under Article 188 in terms of the criterion laid down by this Court in the 1980 Rules rests on a higher pedestal than ordinary legislation. In the judgement reported as Justice Khurshid Anwar Bhinder vs. Pakistan (**PLD 2010 SC 483**) this Court has already in categoric terms, held that:

> "37. ... a line of distinction is to be drawn between statutory rules made by the executive pursuant to an Act or an Ordinance and statutory rules made by the Supreme Court pursuant to the mandate of Constitution as conferred upon it under Article 188 of the Constitution. In the former case we are mindful of the fact that "statutory rule cannot enlarge the scope of the section under which it is framed and if a rule goes beyond what the section contemplates, the rule must yield to the statute. The authority of executive to make rules and regulations in order to effectuate the intention and policy of the Legislature, must be exercised within the limits of mandate given to the rule making authority and the rules framed under an enactment must be consistent with the provisions of said enactment. The rules framed under a statute, if are inconsistent with the provisions of the statute and defeat the intention of Legislature expressed in the main statute, same shall be invalid. The rule-making authority cannot clothe itself with power which is not given to it under the statute and thus the rules made under a statute, neither enlarge the scope of the Act nor can go beyond the Act and must not be in conflict with the provisions of statute or repugnant to any other law in force" ... The Supreme Court Rules are on a higher pedestal and promulgated on the basis of mandate given by the Constitution itself and not by the Government, object whereof was to enhance the power of review as conferred upon Supreme Court under Article 188 of the Constitution."

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56. The Constitution also envisages that all judgements of this Court are meant to be obeyed and respected by the parties before it, and to the extent they decide questions of law or are based upon or enunciate a principle of law, be binding on all other Courts of Pakistan (under Article 189). To allow the existence of Section 5 in its present form on the Statute books would seriously rupture the principle of finality and binding precedent attached to the judgements of this Court without there being any constitutional sanction behind it.

57. With respect to Section 6, we must bear in mind that the purpose behind litigation and a judicial system is that the process must come to an end and finality be attained inter se rights of the litigants. In this context, reference may usefully be made to Muhammad Javaid Shafi vs. Syed Rashid Arshad (**PLD 2015 SC 212**) where this Court held that:

> "5. ... From the obvious object of the law is that if no time constraints and limits are prescribed for pursuing a cause of action and for seeking reliefs/remedies relating to such cause of action, and a person is allowed to sue for the redressal of his grievance within an infinite and unlimited time period, it shall adversely affect the disciplined and structured judicial process and mechanism of the State, which is sine qua non for any State to perform its functions within the parameters of the Constitution and the rule of law."

58. The 1980 Rules were made pursuant to Article 191 (the Rule making power of this Court) and as stated above stand on a higher pedestal than ordinary legislation. The same cannot be changed, modified, amended or altogether displaced by ordinary legislation being beyond the legislative competence of the legislature.

59. Lastly, coming to Section 7, we note that the said Section is a classic judicial ouster clause. It provides that "notwithstanding anything contained in any other law, rules or regulations for the time being in force or judgment of any court

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including the Supreme Court and a High Court, the provisions of the 2023 Act will prevail". We would like to reiterate and re-emphasize that in our current constitutional dispensation, the legislature legislates and the judicial branch interprets the law. No law that is found to offend any provision of the Constitution including the fundamental rights enshrined in the 1973 Constitution can be saved or protected by way of an ouster clause. Article 8(1) of the 1973 Constitution expressly states that: "Any law ... in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void." It is trite that ouster of jurisdiction provisions contained in statutory instruments do not and cannot affect, curtail or diminish the Constitutional powers and jurisdiction of this Court.

60. In addition and without prejudice to the above discussion, having held that Section 2 of the 2023 Act, which is the heart of the 2023 Act is ultra vires the Constitution, the entire superstructure built on it in the form of Sections 3, 4, 5, 6 & 7 are destined to fall to the ground. It is a settled principle of law that if the gist of the Act and its very basis is declared to be unconstitutional then the ancillary provisions too must go as those cannot stand alone. Parliament is deemed to have passed those ancillary provisions on the assumption that the main gist or life of the Act, namely that the review be converted into an appeal before a larger bench, is valid. If Section 2 is declared to be unconstitutional and void then the remaining sections of the Act cannot stand on their own and the entire Act ought to be declared void.

61. We are mindful of the fact that although the constitutional Courts have a duty to protect and defend the

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Constitution and have been conferred with the power to rule on the vires of laws on the touchstone of the Constitution, the power of striking down laws, has to be exercised with a great deal of care and caution. A law should not be struck down unless no alternate interpretation is available that can harmonize the Statute with the provisions of the Constitution. We have carefully examined the 2023 Act and placed it next to the Constitution as well as applied the settled principles for discharging the solemn duty of whether or not to declare the 2023 Act unconstitutional, as spelt out in the judgment of this Court reported as Lahore Development Authority v. Imrana Tiwana **(2015 SCMR 1739)**. However, despite our earnest effort to harmonize the Act with the provisions of the Constitution, we have concluded that 2023 Act is so patently, manifestly and irretrievably in conflict with and violative of various Articles of the 1973 Constitution that it is not possible to harmonize the two in any manner whatsoever.

62. For avoidance of doubt, it is held and declared that all review petitions, whether filed against judgments and orders passed under the original or appellate jurisdiction of this Court are and shall continue to be governed by the provisions of Article 188 of the 1973 Constitution read with the 1980 Rules, which were, are and continue to be the governing law on the subject for all intents and purposes.

63. For the reasons recorded above, the instant Petitions are allowed and it is declared that:

(i) These Petitions are maintainable for the purposes of Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973.

(ii) The Supreme Court (Review of Judgements and Orders) Act, 2023 is repugnant to and ultra vires the Constitution of the Islamic Republic of Pakistan, 1973 being beyond

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the legislative competence of the Parliament. It is accordingly struck down as null and void and of no legal effect.

Chief Justice

Judge

Judge

ANNOUNCED IN OPEN COURT ON _____ AT ISLAMABAD.

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ANNEX

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PART I

Acts, Ordinances, President's Orders and Regulations

SENATE SECRETARIAT

Islamabad, the 29th May, 2023

No. F. 24(28)/2023-Legis.— The following Act of *Majlis-e-Shoora* (Parliament) received the assent of the President on 26th May, 2023 and is hereby published for general information:—

ACT No. XXIII OF 2023

An

Act

to facilitate and strengthen the Supreme Court of Pakistan in the exercise of itspowers to review its judgment and orders

WHEREAS Article 188 of the Constitution of Pakistan empowers the Supreme Court, subject to the provision of any Act of Majlis-e-Shoora (Parliament) and any rules made by the Supreme Court, to review any judgment pronounced or any order made by it;

AND WHEREAS to facilitate and strengthen the exercise of this power, it is necessary to enlarge the jurisdiction of the Supreme Court as expressly provided under Article 188;

AND WHEREAS it is necessary to ensure the fundamental right to justice by providing for meaningful 'review 'of judgments and orders passed by the Supreme Court in exercise of its original jurisdiction under Article 184;

It is hereby enacted as follows:—

1. **Short title, commencement and extent.—(1)** "this Act shall be called the Supreme Court (Review of Judgments and Orders) Act, 2023.

(2) It shall come into force at once.

2. **Enlargement of jurisdiction of the Supreme Court**.—In case of judgments and orders of the Supreme Court in exercise of its original jurisdiction under Article 184 of the Constitution, the scope of review on both facts and law, shall be the same as an appeal under Article 185 of the Constitution.

3. **Larger Bench**.—A review petition shall be heard by a Bench larger than the Bench which passed the original judgment or order.

4. **Right to appoint counsel.—**The review petitioner shall have the right to appoint any advocate of the Supreme Court of his choice for the review petition.

5. **Judgments and orders made prior to commencement of this Act**.— The right to file a review petition 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 review petition under this section shall be filed withinsixty days of the commencement of this Act.

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6. **Limitation.—** A review petition may be filed within sixty days of *the passing of the original order.*

7. **Act to override other laws etc.—** The provisions of this Act shall have effect notwithstanding anything contained in any other law, rules or rules or regulations for the time being in force or judgment of any court including theSupreme Court and a High Court.

Sd/-
MOHAMMAD QASIM SAMAD KHAN
Secretary."

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IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:
Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Ijaz ul Ahsan
Mr. Justice Munib Akhtar

Constitution Petition Nos. 21-23 of 2023

JUDGMENT

Munib Akhtar, J.: A review is not an appeal. Indeed, it is quite different and distinct from it. So says conventional wisdom. Nonetheless, can the review jurisdiction of this Court under Article 188 of the Constitution, at least in respect of a judgment or order under Article 184, be directed by legislative fiat to be so exercised that "the scope of review on both facts and law, shall be the same as an appeal under Article 185 of the Constitution"? The words just quoted come from s. 2 of the Supreme Court (Review of Judgments and Orders) Act 2023 ("2023 Act") the vires of which are challenged by means of these petitions.

2. In enacting the 2023 Act, Parliament has, in the recitals of the preamble, specifically identified the legislative competence it has exercised. It is as conferred by Article 188 itself, the recitals stating as follows:

> "WHEREAS Article 188 of the Constitution of Pakistan empowers the Supreme Court subject to the provision of any Act of Majlis-e-Shoora (Parliament) and any rules made by the Supreme Court to review any judgment pronounced or any order made by it;
>
> AND WHEREAS to facilitate and strengthen the exercise of this power, it is necessary to enlarge the jurisdiction of the Supreme Court as expressly provided under Article 188;
>
> AND it is to ensure the fundamental right to justice by providing for review of judgments and orders passed by the Supreme Court in exercise of its original jurisdiction under Article 184;"

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Article 188 provides as follows:

> "The Supreme Court shall have power, subject to the provisions of any Act of Majlis-e-Shoora (Parliament) and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it."

Section 2 of the 2023 Act may also be set out:

> "**2. Enlargement of jurisdiction of the Supreme Court**.- In case of judgments and orders of the Supreme Court in exercise of its original jurisdiction under Article 184 of the Constitution, the scope of review on both facts and law, shall be the same as an appeal under Article 185 of the Constitution."

The 2023 Act is a brief enactment, comprising in all of seven sections. Sections 4 to 7 are clearly ancillary to s. 2 and are, essentially, in the nature of adjuncts thereto. The question of the Act's vires turns primarily on ss. 2 and 3 both of which have, as will be seen, their own problems and difficulties on the plane of constitutional principle.

3. The submissions of the learned petitioners, who are all advocates of this Court, and Mr. Ali Zafar, learned counsel appearing for a respondent who supports the petitioners' case, and those of the learned Attorney General in opposition and Mr. Swati, learned *amicus,* who (through his written note) reaches conclusions supportive of the latter have been set out in the judgment of my learned colleague and need not therefore be rehearsed. The learned Attorney General objected to the maintainability of the petitions. That point is dealt with in detail by my learned colleague in terms with which I am in agreement. The objection is not sustainable. I therefore move straightaway to a consideration of the case on the merits.

4. In my view, review jurisdiction, whether that conferred constitutionally on this Court or by statute on other courts, is inextricably linked with and cannot be understood without keeping in mind one of the most basic and fundamental principles that underpin the whole of the legal system. This is

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the principle of res judicata. Lawyers are perhaps most familiar with this principle as codified in s. 11, CPC. However, it is well established that the principle is of much broader application. It infuses the whole of the legal system and applies at all points therein. In the oft-quoted words of the Privy Council in *Sheoparsan Singh and others v Ramnandan Prasad Narayan Singh and others* AIR 1916 PC 78, [1916] UKPC 18:

> "... their Lordships desire to emphasize that the rule of *res judicata*, while founded on ancient precedent, is dictated by a wisdom which is for all time.
>
> > "'It has been well said,' declared Lord Coke, '*interest reipublicoe ut sit finis litium*, otherwise great oppression might be done under colour and pretence of law'".—(6 Coke 9 A.)
> >
> > ...
>
> And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law." (pp. 80-81)

To put what Coke said in plain English, it is in the interest of the public weal that there should be an end to litigation. It must also be kept in mind that the principle applies not only to a final determination (which is the domain of s. 11 CPC) but also, as appropriate, even to interlocutory proceedings. This point was also made long ago by the Privy Council, in *Ram Kirpal v Rup Kuari* (1883) 11 IA 37, [1883] UKPC 58:

> "The question, if the term *"res judicata*" was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case. The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application, in which the orders reversed by the High Court were made, was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon s. 13, Act X of 1877 [now s. 11, CPC], but upon general principles of law. If it were not

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> binding, there would be no end to litigation. The judgment or order of Mr. Probyn was an interlocutory judgment...." (pg. 273)

The grand sweep and encompassing nature of these observations (and the allied maxim that no person should be vexed twice in the same cause) and the broad scope of the principle of res judicata has never been doubted or questioned and always followed and applied.

5. If one may, for present purposes, refer to res judicata as the "finality" principle, this "finality" can come about in at least two ways. Firstly, by choice of parties. At whatever stage any litigation is (first instance or appeal), the parties thereto (for their own reasons or by mutual consent) may simply choose not to pursue it further even though there may be rights of appeal still available. Secondly, by operation of the legal system: the law may allow the litigation, inclusive of rights of appeal, to go so far and no further. Both these senses are encompassed in the first two clauses of s. 114 and Order 47, Rule 1 CPC, which set out when review jurisdiction may be invoked (the third clause is now essentially anachronistic): when there is a right of appeal, but no appeal is preferred (clause (a)) or where there is no right of appeal (clause (b)). There is also another sense in which "finality" may be understood. It is in relation to the court which has given the decision. The matter (including one that is interlocutory) may become 'final' for that court even though the *lis* may still be alive, e.g., by way of an appeal pending before a higher forum. (One may here take a broad approach to "appeal" and, if only for present purposes, regard it as including a revisional jurisdiction of the sort, e.g., envisaged by s. 115 CPC and even, at a (considerable) stretch, the writ jurisdiction of a High Court under Article 199.)

6. Of course, however one approaches the "finality" principle and regardless of the number of higher forums there may be to which an aggrieved party can "appeal", every legal system inevitably and invariably has a court of final appeal or last

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resort, in our system the Supreme Court. In the end, there must be an end. So where does the review jurisdiction fit in? Every legal system attempts, in its own way, to do justice and do right by the parties in litigation. That is why there are, generally speaking, rights of appeal (though in some limited classes of disputes justice may, according to that legal system, even require that there be none). But such rights cannot in any case go on *ad infinitum*; hence, the "finality" principle. The tension between these two competing desirables was well stated by Justice Jackson of the US Supreme Court. As he famously put it in *Brown v Allen* (1953) 344 US 443: "We are not final because we are infallible, but we are infallible only because we are final". But he also said there in sentences preceding the one just quoted:

> "However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed."

It is in the interstice of these competing tugs, between on the one hand the frailty of human justice and on the other the need for finality in the affairs of this world, that the review jurisdiction lies. Even when "finality" has been reached, the desire to do justice is not sated. And so, notwithstanding "finality", there is just that little bit more: the review jurisdiction. In a sense the review jurisdiction is an inroad into, and perhaps even a breach of, the "finality" principle: the end has not, as it were, ended after all. But an end there must be. And so, the scope of the review jurisdiction is carefully and narrowly circumscribed. It is pertinent to note that even though of the three bases on which review can be sought under Order 47, Rule 1 CPC the last prima facie appears to be broadly worded ("for any other sufficient reason"), the Privy Council has explained, in *Chhajju Ram v Neki and others* AIR 1922 PC 112, [1922] UKPC 21, that this ground is only analogous to the other two. This decision has also been applied and affirmed since then, e.g., in *Justice Khurshid Anwar Bhinder and others v Federation of*

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Pakistan and others PLD 2010 SC 483 (see at pg. 526), a decision to which I will return.

7. Once the foregoing points are kept in mind, the distinction between the review and appellate jurisdictions is clear on the plane of principle. For there to an exercise of the review jurisdiction, the "finality" principle must have become applicable. But, once the principle becomes applicable there is no scope for appellate jurisdiction. Likewise, if the appellate jurisdiction is available, and exercised or exercisable, then "finality" has not been reached. And if the "finality" principle does not apply there is no review. Res judicata is therefore the great dividing line, on either side of which lie the review and appellate jurisdictions respectively. Even if the channel is the same (i.e., the same court) the waters of the two jurisdictions run in parallel. To try and mix them is only, as it were, to muddy the waters, with unhappy results. As will be seen, that unfortunately is what has happened in the case of ss. 2 and 3 of the 2023 Act.

8. Having set out what in my view is the conceptual framework in which the issues raised fall to be decided, I turn to take a closer look at the review jurisdiction of the Court. In order to have a better understanding of it, it will be appropriate to put it in historical context. I begin therefore with the Federal Court, a court created for the first time in the sub-continent through the Government of India Act, 1935 ("1935 Act"), an Act of the Imperial Parliament which served from the time it came into force till 1947 as the constitution for British India. The Federal Court was not a court of final appeal. Appeals, some by right though mostly by leave (either of the Federal Court or the Privy Council) lay to the latter. The 1935 Act did not confer any review jurisdiction on the Federal Court. Nonetheless, the Court, in *Raja Pritwhi Chand Lal Choudhry v Sukhraj Rai and others* AIR 1941 FC 1, asserted an inherent jurisdiction (though strictly circumscribed and limited) along the lines as claimed by the House of Lords and the Privy Council, of rehearing a matter in

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appropriate circumstances. It is to be noted that neither of the other two judicial forums were expressly conferred a review jurisdiction, though they were certainly courts of last resort. In the relevant judgments, "review" and "rehear" were terms used more or less interchangeably. What were the circumstances in which this inherent jurisdiction could be exercised? The question had been answered by the Privy Council as far back as 1836, in *Rajunder Narain Rai v Bijai Govind Singh* 1 Moo PC 117, [1836] UKPC 114 in passages repeatedly cited with approval in subsequent cases, and cited also by the Federal Court (pg. 2; emphasis supplied):

> "*It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in this Court can be re-heard, and that an Order once made, that is, a report submitted to His Majesty and adopted, by being made an Order in Council, is final, and cannot be altered*. The same is the case of the judgments of the House of Lords, that is, of the Court of Parliament, or of the King in Parliament as it is sometimes expressed, the only other supreme tribunal in this country. Whatever, therefore, has been really determined in these Courts must stand, there being no power of re-hearing for the purpose of changing the judgment pronounced; nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by common law, the same power which the courts of Record and Statute have of rectifying the mistakes which have crept in.... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have, however, gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects, in order to enable the Decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies. But with the exception of one case in 1669, of doubtful authority, here, and another in Parliament of still less weight in 1642 (which was an Appeal from the Privy Council to Parliament, and at a time when the Government was in an unsettled state), no instance, it is believed, can be produced of a re-hearing upon the whole cause, and an entire alteration of the judgment once pronounced....
>
> It is impossible to doubt that the *indulgence* extended in such cases is mainly owing to the natural desire prevailing to prevent *irremediable injustice* being done by a Court of last resort, where by some accident, without any blame,

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> the party has not been heard and an order has been inadvertently made as if the party had been heard."

Thus, the power to rehear was a mere "indulgence" granted only to prevent "irremediable injustice". And indeed, the Federal Court sternly noted with regard to its own jurisdiction as follows (pp. 3-4; emphasis supplied):

> "The power which we are invited to exercise in these two cases is one to be *exercised with extreme caution and only in very exceptional cases*; and applications for its exercise will not be encouraged by this Court. Neither applicant has brought himself, even remotely, within the exceptions to the general rule. Both applications are dismissed; and we think it right to say that future applications of the kind will run the risk of receiving more summary treatment."

9. The 1935 Act became the first constitution for both the Dominions of Pakistan and India, as suitably adapted for each under the Indian Independence Act, 1947. Those adaptations did not confer any review jurisdiction on the Federal Court. In 1950 appeals to the Privy Council were abolished and the Federal Court did become the court of final appeal in this country (the same position prevailing in India). In *Mirza Akbar Ali v Mirza Iftikhar Ali and others* PLD 1956 FC 50 the Federal Court continued to assert the power to rehear or review a matter though only in circumstances as set out above. A distinction was drawn "between an application for the rehearing of a decided case and reconsidering in a subsequent case a question of law previously decided" (pg. 54). The jurisdiction in the former situation was described as an "indulgence, which is of the nature of an *extraordinarium remedium*, [and] will be granted in very exceptional circumstances" (pg. 55).

10. This brings me to the 1956 Constitution. A review jurisdiction was now expressly conferred on the forum of final appeal, the Supreme Court. Article 161 of the late Constitution provided as follows:

> "The Supreme Court shall have power, subject to the provisions of any Act of Parliament and of any rules made

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by the Supreme Court, to review any judgment pronounced, or order made, by it."

This provision was, in terms, identical to Article 188 of the present Constitution. There was however, a difference. While Article 188 is all that the Constitution has to say with regard to the review jurisdiction insofar as the constitutional text is concerned, the position was somewhat different under the 1956 Constitution. There, the approach taken in the Indian Constitution was adopted. For ease of reference, the relevant provisions are set out in tabular form below:

Indian Constitution	1956 Constitution
137. Review of judgments or orders by the Supreme Court.—Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it. **145. Rules of Court, etc**.—(1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including— ... (e) rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered; ...	[Article 161 already set out above] **177. Application of Third Schedule**- Until other provisions in that behalf are made by Act of Parliament the provisions of the Third Schedule shall apply in relation to the Supreme Court and High Courts in respect of matters specified therein. [Third Schedule] 3. *Rule-making power of the Supreme Court*--(1) The Supreme Court may, with the previous approval of the President, make rules for regulating the practice and procedure of the court, including rules as to- ... (b) the conditions subject to which any judgement pronounced, or order made, by the court may be reviewed, and the procedure for such review, including the time within which applications for such review are to be entered;...

It will be seen that in both Constitutions the rule making power in relation to the review jurisdiction was expressly linked to the general rule making power of the Court. The latter expressly conferred a power to make rules in relation to that

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jurisdiction including, inter alia, the power to specify the conditions subject to which the review jurisdiction could be exercised. The rule making power was subject to the approval of the President and subject also to an Act of Parliament. The position under the present Constitution is different. In the context of Article 188, the nexus between the rule making power and an Act of Parliament does not exist and, at the least, the two are placed on an equal footing.

11. Before proceeding further, the rule making power of the Court may also be looked at in its historical context. The 1935 Act conferred rule making power on the Federal Court, which framed such rules first in 1937 and then in 1942. Since, as noted, the 1935 Act did not confer any review jurisdiction no reference was made thereto in the rules. After Independence, the Federal Court framed rules in 1950 repealing and replacing those inherited from before. Again, these rules did not make any reference to review jurisdiction. Thereafter, once the 1956 Constitution came into effect, the Supreme Court framed eponymously titled rules in 1956 ("1956 Rules"). Review jurisdiction was dealt with in Order XXVI. This Order comprised in its totality of one paragraph, which was as follows:

> "Applications for review shall be filed with the Registrar within 30 days after judgment is delivered in the cause, appeal or matter, and shall distinctly state the grounds for review and be accompanied by a certificate of counsel that the petitioner has reasonable and proper grounds for review."

It will be seen that the 1956 Rules did not specify any conditions in terms of which a review petition could be filed, i.e., the grounds only on which the aggrieved party could seek review of the cause, appeal or matter.

12. This brings me to the important, and in many respects foundational, case of *Lt. Col. Nawabzada Muhammad Amir Khan v Controller of Estate Duty and others* PLD 1962 SC 335 (herein after referred to as "*Muhammad Amir Khan*"). This decision has

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to be considered in detail. The case was decided by a learned four member Bench of the Court. As noted in the judgment of the learned Chief Justice (Cornelius, CJ) the review petitions (there were five in all) had been admitted for hearing "to make a thorough examination of the scope and extent of the power of review expressly conferred upon the Court by the late [i.e., 1956] Constitution" (pg. 339). It was noted that no Act of Parliament had yet been enacted in relation to the review jurisdiction, "nor has the Supreme Court itself made any rules to define or limit its powers of review" (*ibid*), an obvious allusion to Order XXVI of the 1956 Rules. It will be seen, and this is one reason why the judgment is so important, that the lack of any "conditions" laid down by the 1956 Rules meant that the Court could consider the review jurisdiction *per se*, i.e., in terms of the constitutional grant itself. The constitutional landscape was uncluttered by any codification, whether in the form of legislative intervention or an exercise by the Court of its rule making power. The Court could therefore, in its judicial capacity, reach the essence and innate nature of the jurisdiction uninfluenced by anything else. But before turning to examine what the learned Judges said I have to pause. For, *Muhammad Amir Khan* was not quite the first time that the Court had looked at the review jurisdiction. That "feather" belonged to another case, *Ilam Din v Muhammad Din*.

13. In the litigation just mentioned, the petitioner had filed a leave petition against a judgment of the High Court of West Pakistan (CPSLA 2/1960) which was dismissed by order dated 26.02.1960. Against this dismissal, the petitioner filed a review petition (CRP 3/1960). The petition was allowed by judgment dated 07.02.1961. Leave to appeal was granted, the judgment of the Court being delivered by Justice B. Z. Kaikaus. The ensuing appeal (CA 54/1962) was dismissed by majority decision vide judgment dated 22.06.1964, which is reported as *Ilam Din v Muhammad Din* PLD 1964 SC 842. It is of course the judgment in exercise of review jurisdiction that is relevant for present purposes (herein after referred to as the "*Ilam Din* review"). That

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judgment remains unreported. It is considered in the judgments in *Muhammad Amir Khan*, and portions from it are also reproduced therein. As an aid to understanding the said judgments, and a prelude to them, the whole of the relevant portion of the judgment in the *Ilam Din* review is therefore set out in an annex to this judgment. With this background in mind, I turn to a consideration of the judgments in *Muhammad Amir Khan*.

14. Each member of the Bench gave his own judgment. For reasons that will become clear shortly, I will take up the judgment of the learned Chief Justice at the end, and begin with the judgment of Fazle-Akbar, J. After referring to the position that prevailed in the House of Lords and the Privy Council and also the Federal Court both before and after Independence, and citing extracts from the relevant cases, his Lordship referred to the *Ilam Din* review and cited an extensive passage from the latter (pg. 351). Then, continuing to refer to the *Ilam Din* review, his Lordship observed as follows (pg. 352; emphasis supplied):

> "From the number of review petitions filed since the above decision I may not be far wrong in assuming that there is a feeling that this Court has unlimited powers to review its decisions. I think the language of the above decision excludes such an implication. No doubt the learned Judge has stated that "there are no fetters at all on the discretion of this Court to grant a review wherever it deems proper to do so for the ends of justice", but he qualifies the above in the next sentence by the expression that "though of course the discretion will be exercised consistently with the nature of review jurisdiction and with due regard to the principle that there must be an end to litigation." This decision may be more easily understood if proper emphasis is laid on the last sentence, namely, "with due regard to the principle that there must be an end to litigation". *From the last sentence it is clear that the Court was fully sensible of the importance of maintaining the absolute finality of its decision*. It may then be said that in view of the express provisions in the late Constitution this Court has wider power to exercise powers of review than those enjoyed by the Judicial Committee or the House of Lords. *To my mind Art. 161 of the late Constitution merely gave recognition to the power which since then was exercised by the Courts of last resort in its inherent jurisdiction. It does not, however, mean that this*

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Court has an unfettered discretion to re-hear a case which had been conclusively determined by it.

The precedents referred to in the earlier part of the judgment are of great authority, long standing and uniform. The principles laid down by those Courts are based on sound cogent reasons and I do not think it will be wise to depart from that practice. The warnings contained in those observations must not be lost sight of. *A liberal use of this power is bound to cause great mischief by throwing doubt on the finality of the decision of this Court*. I do not think this Court would be disposed to interfere with the established current of decisions on the question as to the limit to be placed by the Court of last resort on the power of review. *I may further add that I know of no authority for the proposition that the Court has unlimited power to re-hear and re-open a case which has been finally decided*.

For the above reasons I am of opinion that the power of review should be exercised within the limits laid down in the case of *Akbar Ali v. Iftikhar Ali*. *In other words "a decision of this Court should be re-opened with very greatest hesitation and only in very exceptional circumstances"*.

This Court, therefore, may consider the desirability of framing rules prescribing the limits within which it would exercise its power of review."

15. The judgment of Kaikaus, J. can, at least as regards the question of review jurisdiction, be regarded as an extended exposition on the views his Lordship had expressed when giving the judgment of the Court in the *Ilam Din* review. It was observed as follows (pp. 353-4; emphasis supplied):

"I have been given to understand that my judgment in *Ilam Din v. Muhammad Din* was regarded as granting wide powers of review to this Court and that in consequence a large number of review petitions were filed. This comes to me as a surprise. *I did say in that judgment that Article 161 did not contain any limitations but I had made it clear that limitations are implied in the very nature of review jurisdiction*. Let me state now that *these limitations are a logical result of the inevitable principle of finality of litigation*. It appears quite obvious that if there is to be an end to litigation *(and an end there has to be)* the mere incorrectness of a conclusion reached can never be a ground for review. If it was, the Court would be bound when an application for review was submitted to consider de nevo whether the conclusion reached was correct *and against the order which it passed on the review application, whatever the nature of that order, a review petition could be*

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filed and this procedure will continue ad infinitum. Nor can it be said that while mere incorrectness is not a good ground if the judgment appears to the Bench that hears the review petition to be clearly erroneous there is a ground for review.... *To permit a review on the ground of incorrectness would amount to granting the Court the jurisdiction to hear appeals against its own judgments or perhaps a jurisdiction to one Bench of the Court to hear appeals against other Benches; and that surely is not the scope of review jurisdiction*. No mistake in a considered conclusion, whatever the extent of that mistake, can be a ground for the exercise of review jurisdiction. On a proper consideration it will be found that the principles underlying the limitations mentioned in Order XLVII, rule 1, Civil Procedure Code, are implicit in the nature of review jurisdiction. While I would prefer not to accept those limitations as if they placed any technical obstruction in the exercise of the review jurisdiction of this Court I would accept that they embody the principles on which this Court would act in the exercise of such jurisdiction. It is not because a conclusion is wrong but because something obvious has been overlooked, some important aspect of the matter has not been considered, that a review petition will lie. *It is a remedy to be used only in exceptional circumstances*."

16. Hamoodur Rahman, J. dealt with the review jurisdiction in the following terms (pg. 361; emphasis supplied):

"Having said this, however, I must also point out that, notwithstanding my own personal views in the matter, the question yet remains to be considered as to whether, even assuming that this Court had fallen into error, that would be a sufficient ground for a review in the strict sense. This Court is competent, no doubt, to reconsider a question of law previously decided in a subsequent case *but this Court has no jurisdiction to sit on appeal over its own judgments*, *and although Article 161 of the late Constitution gives it the power to review its decisions in very wide terms that power, as pointed out by this Court in the case of Ilam Din v. Muhammad Din (Civil Petition No. 3 of 1960), will only be exercised "consistently with the nature of review jurisdiction and with due regard to the principle that there must be an end to litigation*." *I for my part would be inclined to hold that a review is by its very nature not an appeal* or a rehearing merely on the ground that one party or another conceives himself to be dissatisfied with the decision of this Court, but that it should only be granted for some sufficient cause akin to those mentioned in Order XLVII, rule 1 of the Code of Civil Procedure, the provisions whereof incorporate the principles upon which a review was usually granted by Courts of law in England. *The indulgence by way of review*

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> *may no doubt be granted to prevent irremediable injustice being done by a Court of last resort*, as where by some inadvertence an important statutory provision has escaped notice which, if it had been noticed, might materially have affected the judgment of the Court, *but in no case should a rehearing be allowed upon merits*."

17. This brings me to the judgment of the learned Chief Justice. His Lordship dealt with the matter by linking the review jurisdiction with the power conferred on the Court by Article 163(3) to issue such directions, orders, decrees etc "as may be necessary for doing complete justice in any cause or matter pending before it". The provision relied upon is in terms very similar to Article 187(1) of the present Constitution (though there are certain differences). (Incidentally, a similar provision, in relation to the Federal Court, was inserted in the 1935 Act in 1950 by substituting s. 209 thereof.) His Lordship held as follows (pp. 340-41; emphasis supplied):

> "For the present purpose, the emphasis should, in my opinion, be laid upon the consideration that, for the doing of "complete justice", the Supreme Court is vested with full power, and *I can see no reason why the exercise of that full power should be applicable only in respect of a matter coming up before the Supreme Court in the form of a decision by a High Court or some subordinate Court. I can see no reason why that purpose, in its full scope, should not also be applicable for the purpose of reviewing a judgment delivered by the Supreme Court itself provided that there be found a necessity within the meaning of the expression "complete justice" to exercise that power. It must, of course, be borne in mind that by assumption, every judgment pronounced by the Court is a considered and solemn decision on all points arising out of the case, and further that every reason compels towards the grant of finality in favour of such judgments delivered by a Court which sits at the apex of the judicial system*. Again, the expression "complete justice" is clearly not to be understood in any abstract or academic sense. So much is clear from the provision in Article 163 (3) that a written order is to be necessary for the purpose of carrying out the intention to dispense "complete justice". There must be a substantial or material effect to be produced upon the result of the case if, in the interests of "complete justice" the Supreme Court undertakes to exercise its extraordinary power of review of one of its own considered judgments: if there be found material irregularity, and yet there be no substantial injury consequent thereon, the exercise of the power of review to alter the judgments

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would not necessarily be required. The irregularity must be of such a nature as converts the process from being one in aid of justice to a process that brings about injustice. Where, however, there is found to be something directed by the judgment of which review is sought which is in conflict with the Constitution or with a law of Pakistan, there it would be the duty of the Court, unhesitatingly to amend the error. It is a duty which is enjoined upon every Judge of the Court by the solemn oath which he takes when he enters upon his duties, viz., to "preserve, protect and defend the Constitution and laws of Pakistan." But the violation of a written law must be clear. An instance of review based upon such violation will be found in the Privy Council case *North-West Frontier Province v. Suraj Narain Anand* [PLD 1949 PC 1]. The ascertainment of a breach by a mode of interpretation will not in all cases furnish good ground for interference. For the interpretation of the Constitution and the laws is a function which is entrusted especially to the Superior Courts of the country, and while it is true that in doing so they will follow the generally recognised principles applicable to statutory interpretation, in elaboration of the rules contained in the interpretation statutes namely, the General Clauses Acts, that is a field in which a degree of latitude is of necessity to be allowed to them. The laws come in an infinite variety, and the use of the language, even of the simplest and commonest terms, is so kaleidoscopic and subject to such delicate shades of meaning and emphasis that the duty frequently falls upon the Superior Courts to establish principles whereby effect may be given to the laws according to the intention of the legislators, and that despite ambiguity or deficiency in the language they have employed. The task is frequently complicated through ineptitude on the part of the Legislature and its legislative draftsmen in the use of words or in the thorough delineation, by the machinery of a statutory instrument, of the whole meaning and purpose of the legislation.

These are the principal aspects in which the need for a review is urged as a necessity in the present case. There may be, and probably, are a great variety of other basic matters which could attract the power of review in appropriate cases, but I do not propose to concern myself with them here....”

18. The foregoing approach, of a linkage between the review jurisdiction and Article 163(3), was not however found persuasive by the other learned members of the Bench. Fazle-Akbar and Hamoodur Rahman, JJ. did not refer to Article 163(3) at all. Kaikaus, J. expressly took a view opposed to that taken by

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the learned Chief Justice, holding as follows (pg. 354-55; emphasis supplied):

> "The Chief Justice has referred to Article 163 in support of a conclusion that for doing complete justice between the parties the Court can review a judgment. *As I read Article 163 it is intended to state not the circumstances which will enable this Court to pass any order but the kind of order which can be passed*. The provision is similar to Order XLI, rule 33, of the Civil Procedure Code, which grants powers to the Appellate Court. It runs:-
>
> > "Power of Court of Appeal.-The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection:
> >
> > Provided that the Appellate Court shall not make any order under section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."
>
> For the grant of a power to pass decrees or orders, words similar to those used in Article 163 have been employed here except that the words for "doing complete justice" do not exist but the report of the Select Committee on this rule said "it was imperative that the Appellate Court should have the fullest power to do complete justice between the parties". The words of rule 33 have been taken from the English rule 4 of Order LVIII according to which the Court has power to give any judgment and pass any order which ought to have been made and pass such further or other order as the case may require. *These are ordinary provisions regarding the powers of an Appellate Court. Such provisions do not enable a Court to exercise jurisdiction in cases where otherwise they could not exercise jurisdiction*. They only empower Courts to pass appropriate orders in cases in which they have jurisdiction. *Similar is the effect of Article 163. It does not grant jurisdiction to the Court to review cases which it could not otherwise have reviewed. In fact as I have stated above there are limitations which are inherent in the exercise of review jurisdiction. They cannot be got rid of as long as we are consistent*."

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It is therefore clear that insofar as consideration of the review jurisdiction is concerned, the learned Chief Justice was distinctly in the minority. Anything said by his Lordship on the point does not therefore, in my respectful view, form part of the *ratio decidendi* of the case in this context.

19. A careful study of the three judgments that do constitute the *ratio* reveals at least three points of primary importance. Firstly, and perhaps most relevantly for present purposes, the fundamental distinction, going to the very essence of the jurisdiction, between a review and an appeal. Here was the wisdom that became conventional: *a review is not an appeal*. Secondly, the importance of the finality of litigation and of the decisions, in particular, of the court of final appeal or last resort. Thirdly, the narrowness of the scope of the review jurisdiction. This point is tied to both the points just noted, and in a sense flows naturally and necessarily from them. However, for reasons that will become apparent later it will, if only to some extent, have to be re-examined.

20. *Muhammad Amir Khan* has been affirmed and applied many times by the Court, both on the judicial side and in its rule making capacity. From the multitude of instances of the former special note may be made of *Justice Khurshid Anwar Bhinder and others v Federation of Pakistan and others* PLD 2010 SC 483, a decision which is considered later. On the rule making side, in 1969, in line it appears with the suggestion that had been made by Fazle-Akbar, J. Order XXVI of the 1956 Rules (which continued to operate under the 1962 Constitution) was substantially amended. (The amendments can be found at PLD 1969 Cent. Stat. 63.) In particular, Rule 1 of the Order now stated as follows:

> "Subject to the law and the practice of the Court, the Court may review its judgment or order in a Civil proceeding on grounds similar to those mentioned in Order XLVII, rule I of the Code and in a criminal proceeding on the ground of an error apparent on the face of the record."

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The Order as so amended was carried into the present rules, when the 1956 Rules were replaced with the Supreme Court Rules, 1980 ("1980 Rules").

21. I now turn to consider s. 2 of the 2023 Act in the light of the foregoing discussion and analysis. The learned Attorney General submitted that the jurisdiction conferred on the Court by Article 184 was original, with the result that any proceedings within the terms of either clause (1) or (3) thereof began and ended in this Court itself. This position, it was said, was different from other cases, matters and causes that came before the Court, since those overwhelmingly came under its appellate jurisdiction. The *lis* and issues raised in those matters had been considered by other forums in the judicial system/hierarchy including the High Courts and in many instances at least twice if not more. That was patently not so in respect of the cases under Article 184. Therefore, the learned Attorney General submitted, the judgments and orders of the Court under Article 184 constituted a special class, for the review of which it was permissible to provide a different manner or criterion. Section 2 gave effect to this qualitative difference and thus was a permissible exercise of legislative competence in terms of Article 188.

22. As has already been seen s. 2 seeks to set out the "scope" of the review jurisdiction in respect of judgments and orders of the Court under Article 184. The scope, "on both facts and law", is established as being "the same as an appeal under Article 185". The Article last mentioned deals with the appellate jurisdiction of the Court from judgments, decrees etc. of the High Courts (clause (1)). It provides for two sorts of appeals: those as of right (clause (2)) and those where the appeal lies only if the Court grants leave (clause (3)). While there are certain differences between the appeals under clauses (2) and (3) the first point to note is that in neither case does an appeal lie on a question of fact. Appeals lie only on questions of law. Therefore,

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even on the most cursory of perusals, s. 2 clearly goes beyond even Article 185 when it provides for the "scope" of the appeal as including questions of fact. Generally speaking, it is only in first appeal (i.e., from a decision at first instance) where the appellate forum is said to be the master of whole field, of both the facts and the law. Now, s. 3 of the 2023 Act mandates that a review petition under s. 2 "shall" be heard by a Bench "larger than the Bench which passed the original judgment or order". Section 4 allows for the "review petitioner" to have, as of right, "any advocate of the Supreme Court of his choice for the review petition". This may be contrasted with Rule 6 of Order XXVI of the 1980 Rules, which provides that unless special leave is obtained from the Court it is only the advocate who appeared "at the hearing of the case" who will "be heard in support of the application for review". The practice and procedure of the Court unambiguously establish that such leave is granted only in exceptional and rare circumstances. It is certainly not claimable as of right. Section 7 is an overriding clause, which gives such effect to the 2023 Act notwithstanding anything contained in, inter alia, "any other law, rules or regulations for the time being in force". These words are clearly broad enough to encompass the 1980 Rules. In other words, a review petition in respect of a judgment or order under Article 184 must, in every sense substantively relevant, be decided in terms of the 2023 Act and not otherwise. Finally, while the meaning of the word "scope" is clear enough any doubt on the point may be removed by looking at its dictionary meaning, such as the relevant entry in the *Shorter Oxford English Dictionary* (6th (2007) ed., pg. 2701): "The sphere or area over which any activity operates; range of application; the field covered by a branch of knowledge, an inquiry, etc."

23. When the foregoing factors are taken together and added up, and considered in light of the analysis and discussion already undertaken, the conclusion in my view is clear and inescapable: s. 2 is nothing other than an attempt to give a right of appeal (being in the nature of a first appeal) under cover of

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the review jurisdiction. But that runs against the grain of the review jurisdiction conferred by Article 188, when it is considered in its essence. That is what the Court held in *Muhammad Amir Khan*, where it was able to examine the core of the constitutional grant untroubled by any legislative action or even any exercise of the rule making power. The conclusion, already noted, was clear beyond doubt: a review is not an appeal. What s. 2 has sought to do is to transform the nature of the jurisdiction by purporting to alter the "scope" in relation to judgments or orders under Article 184. No doubt a judgment or order of the Court in exercise of that jurisdiction is a decision at first instance, even though here the forum is that of last resort. But that cannot mean that the review jurisdiction even in relation to such a judgment or order can be so altered that it, in substance, is transformed into an appellate jurisdiction. That however, is precisely what it would mean if the Court were to "review" a judgment or order in terms of s. 2. It is only an appellate forum hearing a first appeal that, as noted, is the master of both facts and the law. To give such "mastery" to the Court when called upon to exercise review jurisdiction under Article 188 is to seek to do what *Muhammad Amir Khan* has categorically said the Court cannot. To repeat the oft-quoted words of Marshall, CJ in *Marbury v Madison* 5 US (1 Cranch) 137 (1803)), "[it] is emphatically the province and duty of the Judicial Department to say what the law is". Once such judicial determination has been made on the constitutional plane it is binding on the legislature and even, for that matter, on the Court itself in relation to its rule making power. Neither an Act of Parliament nor any rules made by the Court can therefore do what s. 2 seeks to achieve.

24. Quite apart from its conflict with the exposition set out in *Muhammad Amir Khan*, s. 2 has other constitutional problems. If it is to be applied as it stands, the question arises: who would be the members of the Bench hearing the review petition? It is a settled rule that the Bench hearing a review should include at least the author of the judgment under review, and if he not be

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available then any other Judge from the "original" Bench who agreed with him (or her). Apart from this, subject to the discretion of the Chief Justice as master of the roster, the direction contained in Order XXVI, Rule 8 that the petition be posted before the "same Bench" would be subject to the requirements of practicability. Thus, in hearing a review petition under s. 2 at least one of the Judges from the "original" Bench would have to be included, and possibly more or even all of them could be on the review Bench. But there would be a problem. The review under s. 2 would have to be heard as though it were an appeal under Article 185. Now, it is a settled and cardinal rule that no Judge can hear an appeal from his (or her) own judgment. This is of constitutional importance, fundamental to the rule of law and the proper administration of justice. Indeed, it can be regarded as an aspect of the fundamental right of access to justice. (This requirement, it is to be noted, is different from the Judge hearing a subsequent case in which the question of law raised was decided in an earlier case heard by a Bench of which the Judge was a member. There would be no issue in such a situation.) Thus, s. 2 creates a dilemma, and one that sounds on the constitutional plane. At least one, and possibly more, of the Judges hearing a review in terms thereof would be forced to treat the matter as an appeal from his (or their) own judgment.

25. The only way out of this dilemma would be for none of the Judges who originally heard the matter to be part of the Bench constituted to hear the review petition. While that would no doubt be contrary to a legal rule at least the constitutional rule would not be violated. This result, that not even the author-Judge would be able to sit on the review Bench, is certainly startling. But it serves to make apparent the true import of s. 3. The section provides as follows: "A review petition shall be heard by a Bench larger than the Bench which passed the original judgment or order". If the section is applied literally, what it requires would appear to be satisfied if the review petition is posted before a Bench numbering even one Judge more than the

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"original" Bench. But, as just noted, for any of those members to be part of the review Bench would be constitutionally impermissible. Thus, the review petition under s. 2 would perforce have to be posted before a larger Bench comprising wholly of Judges other than those who originally heard the matter. *That would exactly be the composition of a Bench hearing an intra-Court appeal*. Thus, when s. 3 is stripped of its apparent innocuousness it directly shows, and serves to confirm, the true nature of and intent behind s. 2: that it is nothing other than a right of appeal masquerading as a "review". No such right can be granted in purported exercise of the legislative competence under Article 188, which is confined to the review jurisdiction alone. Furthermore, even if somehow the review Bench could be formed comprising of some members of the "original" Bench and other Judges who were not members thereof, the result would be strange. Those members of the review Bench who had earlier heard the matter would exercise review jurisdiction properly so called, i.e., in terms of O. 26, R. 1 since they would be precluded from hearing it in any manner as an appeal. On the other hand, those members of the review Bench who had not earlier heard the matter would have to hear it as an appeal in terms of s. 2. The same Bench hearing the same matter would, at one and same time, decide it in terms of two distinct and separate jurisdictions, with some members applying the one and the rest the other. This is certainly a startling conclusion but one that would necessarily come about. Any such putative Bench would be a strange "hybrid" that, if I may say respectfully say so, be neither fish nor fowl.

26. There is yet another consequence of s. 3. Since the "review" under s. 2 would have to be heard by a larger Bench, the Full Court could never be constituted to hear a matter under Article 184. Full Courts are constituted from time to time to hear matters of great constitutional importance and more often than not in exercise of jurisdiction under Article 184. Any such possibility would stand practically precluded by reason of s. 3. Indeed, the section indirectly sets an upper "cap" on the

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composition of any Bench constituted to hear a matter under Article 184. It can never be greater than less than half of the total number of Judges for the time being on the Court. These results undercut another rule of fundamental importance to the practice and procedure of the Court: the position of the Chief Justice as the master of the roster. Although the 2023 Act purports only to regulate the review jurisdiction under Article 188 it oversteps that bound and constrains and limits, necessarily even though indirectly, also the power of the Chief Justice. This power, of determining and fixing Benches, is fundamental to the administration of justice. Its exercise free from executive or legislative interference is necessary for the independence of the Judiciary, which is recognized as a fundamental right.

27. The conclusion is clear: ss. 2 and 3 violate more than one constitutional principle and rule. These provisions are ultra vires the legislative competence conferred by Article 188. The 2023 Act necessarily fails and it ought to be so declared. However, this conclusion may at this point be marked as provisional. The reason is that the effect of one judgment of the Court, in *Justice Khurshid Anwar Bhinder and others v Federation of Pakistan and others* PLD 2010 SC 483 (herein after "*Bhinder*"), remains yet to be considered.

28. In *Bhinder* the Court was invited to review its judgment in *Sindh High Court Bar Association and another v Federation of Pakistan and others* PLD 2009 SC 789. Both decisions were of the Full Court. A preliminary objection was taken as to the maintainability of the review petitions. By a majority of 13-1 the objection was sustained and the review petitions stood dismissed. The judgment of the Court was authored by Javed Iqbal, J.

29. Several points were made in relation to the review jurisdiction, of which the following two are relevant for present purposes. Firstly, *Muhammad Amir Khan* was cited with

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approval. At pg. 525 and also at pg. 526-7, extracts from the judgment of Hamoodur Rahman, J. (already set out above) were reproduced. Secondly, the judgment, in paras 36-7 (pp. 531-536) examined "the legal status of the Supreme Court Rules" (pg. 531). After considering principles of constitutional and statutory interpretation it was noted as follows (pg. 534):

> "37. In view of the above discussed principles of interpretation it seems immaterial to discuss whether Supreme Court Rules are subservient to Article 188 of the Constitution for the simple reason that the main object to enact Article 188 of the Constitution was to enhance the power of review conferred upon this Court and in order to achieve this object it has been provided specifically in the Article itself that such power would be subject to "any rules made by the Supreme Court" meaning thereby that it was entirely left to this Court that how and in what manner such power is to be regulated and exercised...."

Certain other principles of interpretation were then set out. Ultimately, the conclusion drawn from the discussion was in the following terms (pg. 536, last sentence of para 37; emphasis supplied):

> "The Supreme Court Rules are on a higher pedestal and promulgated on the basis of mandate given by the Constitution itself and not by the Government, *object whereof was to enhance the power of review as conferred upon Supreme Court under Article 188 of the Constitution*."

30. The words used in Article 188 in relation to the Court's rule-making power, i.e., that the review jurisdiction is "subject to" the same are of course well known. They are conventionally understood to be words of limitation. Ordinarily, they are regarded as circumscribing or controlling whatever it is that follows them. In *Bhinder*, so it seems, the Court has concluded that in the context of Article 188 the proper understanding is that these words have been used in an uncommon sense. The constitutional intent is to allow the Court, through its rule-making power, to "enhance" the review jurisdiction. One point may be made here. Given the understanding of the rule-making power set out in *Bhinder* it is clear that its nature, in the context of Article 188, is qualitatively different from that of the rule-

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making power conferred by Article 191. Thus, the linkage between the two that existed in the 1956 Constitution cannot be relevant for the present Constitution. Each of Articles 188 and 191 has to be treated separately and on its own terms. In my view, the conclusions to be drawn are as follows. The power of review conferred by Article 188 has a certain core meaning or essence, innate to the very concept of review. Such meaning is to be determined without consideration of anything done in exercise of the rule-making power. This understanding of the jurisdiction serves, as it were, as the "baseline". The rule-making power can "enhance" the jurisdiction beyond the baseline. Two questions arise in this context. Firstly, what is the baseline, i.e., has any judgment of the Court established this? Secondly, can the power to "enhance" be so exercised that it alters the very nature of the review jurisdiction, making it into something qualitatively different? Not to put too fine a point on it, can the power to enhance "convert" the review jurisdiction, directly or indirectly, into an appellate jurisdiction?

31. As regards the first question, in my view the answer has to be that the baseline was set in *Muhammad Amir Khan*. At the risk of repetition, the question in that case was to consider the "scope and extent" of the review jurisdiction. This analysis was unencumbered by any exercise of the rule-making power; the 1956 Rules did not say anything at all as regards the nature, or affecting the exercise, of the jurisdiction. The Court there was thus able to examine the essence of the jurisdiction, i.e., its intrinsic nature. Now, also as noted, the Court in 1969 did amend Order XXVI of the 1956 Rules to set out the grounds on which the jurisdiction can be invoked and exercised. Those changes have been carried almost verbatim into the 1980 Rules. This leads to the interesting question: is what the Court has done in exercise of the rule-making power an 'enhancement' within the understanding of *Bhinder* or simply a codification of the core meaning, i.e., the baseline as set out in *Muhammad Amir Khan*? The meaning of "enhance" is well known. But, to again refer to the *Shorter Oxford English Dictionary* (6th (2007)

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ed., pg. 836): "raise the level of", "raise in degree, heighten, intensify". It must be kept in mind that 'enhancement' necessarily implies that the position or situation prior thereto was something lesser or at least of a lesser degree, i.e., more confined or moving within a narrower locus. If therefore, what is set out in Order XXVI (and in rule 1 in particular) is to be regarded as an 'enhancement' it necessarily follows that the 'baseline' of the review jurisdiction set in *Muhammad Amir Khan,* i.e., its essence or innate nature, was narrower and more restricted. Would that be a correct reading of the judgments there? The relevant extracts have already been set out above, which must now be examined from this perspective. As mentioned, in *Bhinder* it was the extracts from the judgment of Hamoodur Rahman, J. that were specifically reproduced. His Lordship had there, inter alia, observed as follows: "The indulgence by way of review may no doubt be granted to prevent irremediable injustice being done by a Court of last resort... but in no case should a rehearing be allowed upon merits." These words appear to correlate the scope and extent of the review jurisdiction to the power of rehearing asserted by the House of Lords and the Privy Council, and latterly by the Federal Court. The same position, it could be said, found favour with Fazle-Akbar, J. when he said (already extracted above):

> "To my mind Art. 161 of the late Constitution merely gave recognition to the power which since then was exercised by the Courts of last resort in its inherent jurisdiction. It does not, however, mean that this Court has an unfettered discretion to re-hear a case which had been conclusively determined by it."

The approach of Kaikaus, J. may now be considered. It will be noted from the last sentence of the extract from his judgment in the *Ilam Din* review reproduced in the Annex that he felt that there was "no analogy" between the review jurisdiction and the power of review or rehearing of the Federal Court (and therefore, by extension, the House of Lords and the Privy Council) and that "no assistance" could be derived from those

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cases. In *Muhammad Amir Khan* his Lordship observed as follows (already extracted above; emphasis supplied):

> "On a proper consideration it will be found that the principles underlying the limitations mentioned in Order XLVII, rule 1, Civil Procedure Code, *are implicit in the nature of review jurisdiction*. While I would prefer not to accept those limitations as if they placed any technical obstruction in the exercise of the review jurisdiction of this Court I would accept that *they embody the principles on which this Court would act in the exercise of such jurisdiction*."

32. Having carefully reviewed the foregoing in the context now under consideration, in my view the clinching point is that in *Bhinder* the judgment of the Full Court twice chose to reproduce extracts from the judgment of Hamoodur Rahman, J. In the passage extracted in *Bhinder* his Lordship also observed as follows (again, already extracted above):

> "... [Review] should only be granted for some sufficient cause akin to those mentioned in Order XLVII, rule 1 of the Code of Civil Procedure, the provisions whereof incorporate the principles upon which a review was usually granted by Courts of law in England."

These words appear to take the view that found favour with Kaikaus, J. Reading these passages as a whole, and placing them in the context of their respective judgments, it is my view that the exercise of the rule-making power in terms of Order XXVI was not an 'enhancement' within the meaning of *Bhinder* but rather only a codification of aspects of the essence or innate nature of the review jurisdiction.

33. This brings me to the second question posed in para 30 above. It is clear that the power to "enhance" cannot mean or include a power to distort or deviate or transform and of course certainly not to destroy. That which is being "enhanced" must, after 'enhancement', remain true to its essence or innate nature. Therefore, the rule-making power conferred on this Court, even as applied in terms of the understanding made clear in *Bhinder*, can never be so exercised as to change or transform the very

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nature of the review jurisdiction and convert it into something which it is not. In particular, it cannot be purported to be "enhanced" such that it becomes, directly or indirectly, a thing in the nature of appellate jurisdiction.

34. In *Bhinder* the Court was only concerned with the 1980 Rules. I have already expressed my view that in the context of Article 188 the legislative competence conferred on Parliament and the rule-making power of the Court are at least equal. It follows, prima facie, that what the Court said in *Bhinder* regarding the nature of the rule-making power would apply *mutatis mutandis* to the competence of Parliament. In other words, prima facie Article 188 permits Parliament to "enhance" the review jurisdiction of the Court. (It may be noted in passing that in the context at least of constitutional provisions relating to the judiciary where a legislative competence is expressly stated to be exercisable by Act of Parliament an Ordinance cannot be promulgated in its stead.) The question therefore becomes: was the 2023 Act an 'enhancement' of review jurisdiction within the understanding of Article 188 expressed in *Bhinder*? It was because of this judgment and to consider its effect in relation to the statute that the conclusions expressed in para 27 above were stated to be provisional.

35. In my view, ss. 2 and 3 of the 2023 Act do not come within the understanding articulated in *Bhinder*. No doubt the marginal note to s. 2 speaks of the "enlargement" of the jurisdiction. It could perhaps be argued that to "enlarge" is to "enhance" and therefore s. 2 is intra vires. In my view that cannot be so. It has been seen that the provisions of the 2023 Act purport to, and indeed effectively, transform the review jurisdiction into an appellate one. This is wholly beyond the scope of Article 188 and *Bhinder*. The sections are not only transformative; they represent a deviation and distortion. There is no "enlargement" in the nature of an 'enhancement'. The sections have sought to bring about a sea change, going to the very root of the review jurisdiction and discarding it in favour of something wholly alien

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to Article 188. They are ultra vires the Constitution. Therefore, the view stated earlier to be provisional can now be said to be conclusive. Since the other provisions of the 2023 Act stand or fall with these two sections the Act as a whole fails. The 2023 Act is hereby declared as ultra vires the Constitution, being repugnant thereto, and without legal effect.

36. These petitions are accordingly allowed in terms as set out above.

JUDGE

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ANNEX

IN THE SUPREME COURT
(Appellate Jurisdiction)

PRESENT:
Mr. Justice A.R. Cornelius C.J.
Mr. Justice S.A. Rahman
Mr. Justice Fazle- Akbar
Mr. Justice B.Z. Kaikaus
Mr. Justice Hamoodur Rahman
****

CIVIL REVIEW PETITION NO.3 OF 1960
(In the matter of review of the judgment and order of this Court, dated the 26th of February, 1960, in Civil Petition for Special Leave to Appeal No.2 of 1960)
****

Ilam Din, son of Piran Ditta ----- Petitioner

v.

Muhammad Din, son of Amir Bakhsh ----- Respondent

For the Petitioner ------- Mr. M. Naqi Chaudhary, Advocate, Supreme Court, instructed by Ejaz Ahmad, Attorney

For the Respondent ------- Mr. Muhammad Iqbal, Advocate, Supreme Court, instructed by Mr. Sardar Bokhary, Attorney

Date of hearing ------- February 7, 1961.

B. Z. Kaikaus, J.- …

[From printed pg. 6 onwards:]

The case before us is one which would even be covered by the provisions of O.47, r.1 C.P.C. because the Court had not applied its mind to a part of the case of the petitioner, but the powers of this Court are not even circumscribed by O.47, r.1, C.P.C. Article 161 of the late Constitution which empowers this Court to review its judgments and orders does not confine the exercise of the power to any particular grounds. The Constitution by presumption is a carefully prepared document and this omission to refer to any grounds would be deliberate. The intention was to leave it to the Supreme

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Court to determine whether the case before it was a fit one for exercise of the power of review. The provision is similar to that for grant of special leave and there are no fetters at all on the discretion of this Court to grant a review wherever it deems proper to do so for the ends of justice, though of course the discretion will be exercised consistently with the nature of review jurisdiction and with due regard to the principle that there must be an end to litigation. When a case has been fully heard and a decision given on all available material the party adversely affected by the decision cannot apply for review on the simple ground that it is not satisfied with the correctness of the decision.

In support of his contention that the present is not a proper case for the exercise of the power of review learned counsel for the respondent referred to Akbar Ali v. Iftikhar Ali and others [PLD 1956 FC 50] wherein a contention that the powers of review of the Federal Court are not subject to the restrictions contained in the Code of Civil Procedure was repelled. Following is the passage on which learned counsel relies:

> "All that is alleged by Mr. Abdul Qayyum Khan is that the restrictions on the power of a court are not applicable to the Federal Court and that its powers to reopen and rehear cases finally determined are untrammelled and unrestricted. The contention, if accepted, would shake the very foundations of this Court's adjudications because on this view the losing party may always ask for a review of the judgment, however carefully and thoroughly delivered it might be."

While considering the powers of review of this Court reference to the powers of the Federal Court of Pakistan is altogether inappropriate. There was no provision empowering the Federal Court of Pakistan to review its judgments. The jurisdiction of the Federal Court in this respect was the same as that of the Privy Council and so far as the Privy Council is concerned it had been unequivocally laid down in a case decided by their Lordships as long ago as [1836], that is, Rajunder Narain Rae, And Cower Mohainder Narain Rae v. Bijai Govind Singh [2 M Ind App 181], that they possessed no jurisdiction for review at all, excepting of course the inherent jurisdiction which every court possesses to rectify mistakes which have crept into its judgments and which is not, strictly speaking, a power of review. Their Lordships said at p. 216:-

> "It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in this Court can be re-heard, and that an Order once made, that is, a report submitted to His Majesty and adopted, by being made an Order in Council, is final, and cannot be altered. The same is

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> the case of the judgments of the House of Lords, that is, of the Court of Parliament, or of the King in Parliament as it is sometimes expressed, the only other supreme tribunal in this country. Whatever, therefore, has been really determined in these Courts must stand, there being no power of re-hearing for the purpose of changing the judgment pronounced; nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by common law, the same power which the courts of Record and Statute have of rectifying the mistakes which have crept in. The Courts of Equity may correct the Decrees made while they are in minutes; when they are complete they can only vary them by re-hearing; and when they are signed and enrolled they can no longer be re-heard, but they must be altered, if at all, by Appeal. The Courts of Law, after the term in which the judgments are given, can only alter them so as to correct misprisions, a power given by the Statutes of Amendment. The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have, however, gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects, in order to enable the Decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies. But with the exception of one case in 1669 (Dumaresq v. Le Hardy, 11 March 1667-68), of doubtful authority, here, and another in Parliament of still less weight in 1642 (which was an Appeal from the Privy Council to Parliament, and at a time when the Government was in an unsettled state), no instance, it is believed, can be produced of a re-hearing upon the whole cause, and an entire alteration of the judgment once pronounced."

There is a full discussion in this judgment of the powers of the review of the Privy Council as well as the House of Lords.

Again, in a case decided in 1950, that is, Piyaratana Unnanse and another v. Wahareke Sonuttara Unnanse [PLD 1950 PC 38], their Lordships had to consider the extent of the inherent jurisdiction of a Court to review its judgments and this is what they said at p. 42 :

> "The general rule is clear that once an Order is passed and entered or otherwise perfected in accordance with the practice of the Court, the Court which passed the Order is functus officio and cannot set aside or alter the Order however wrong it may appear to be. That can only be done on appeal."

This passage will establish the proposition for which much support can otherwise be found that a review like an appeal is a creation of statute and there is no inherent power to review a final judgment. When a court decides a

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case its jurisdiction to decide is exhausted and a further grant of power is needed to enable it to reconsider the matter. The case of North-West Frontier Province v. Suraj Narain Anand [PLD 1949 PC 1], which is a well-known case may have created a misapprehension which should be removed. In that case after the hearing was concluded and a judgment recorded the respondent in the appeal submitted a petition for reconsideration of the judgment on the ground that the judgment assumed the applicability of the Police Rules of 1937, whereas in fact the Police Rules had come into force only after the dismissal of the respondent and were not applicable. Their Lordships reconsidered their judgment and dismissed the appeal although in the first judgment their Lordships had allowed the appeal. But it was made clear in the second judgment that their Lordships had not as yet tendered their advice to His Majesty in Council. Their Lordships said:

> "Subsequently to the delivery of the judgment, and before their Lordships had tendered their advice to His Majesty, the respondent submitted a petition wherein he moved that their Lordships might reconsider their decision, mainly on the ground that it had been ascertained that the Police Rules of 1937 were in fact printed and published on 29th April 1938, that is to say, four days after the dismissal of the respondent.
>
> Their Lordships accordingly found it necessary to hear further argument and on 29th July 1948, counsel for both parties appeared at their Lordships' bar."

There is no discussion in this judgment as to the power of review and the reconsideration was based on the fact that as yet advice had not been tendered by their Lordships to His Majesty. It will be observed that according to Rajunder Narain Rae, And Cower Mohainder Narain Rae v. Bijai Govind Singh [*supra*], it was only after advice was tendered and an Order in Council made that a case could not be re-heard and therefore this case is not in any way inconsistent with that judgment.

In view of what has been stated above it should be clear that there is no analogy between the powers of review of this Court and that of the Federal Court of Pakistan and no assistance can be derived from cases where the power of review was not exercised by that Court….

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