Syed Hasan Azhar Rizvi, J.- I have carefully read the majority judgment authored by Justice *Qazi Faez Isa*, the Hon'ble Chief Justice of Pakistan. Although I agree with the conclusion he reached, I regretfully find myself unable to endorse the reasoning. The majority judgment did not provide sufficient justification for the issues at hand. More importantly, unreasonable remarks were made about the Hon'ble former judges of this Court, whose judgment we are reviewing on appeal. In my humble opinion, judicial comity requires that, even when we disagree with the decisions of other judges, we do so with respect and constructiveness. Criticism should focus on legal principles rather than disparaging those who authored the original decision. While I concur with the ultimate conclusion, I feel compelled to offer my own reasoning in a manner that aligns with the respect and decorum expected within our judiciary hierarchy.

2. To avoid repetition, I shall rely on the arguments advanced by the legal representatives and counsel as articulated in the majority judgment, except where specific points are essential for my analysis.

Scope and Extent of Jurisdiction in I.C.A.

3. Before delving into the merits of the case, I would first like to examine the scope and extent of this Court's jurisdiction when adjudicating the first Intra-Court Appeal (I.C.A.) under the newly enacted Supreme Court (Practice and Procedure) Act, 2023 ('**SCPPA**'). Generally, an I.C.A. is a legal mechanism that allows for an appeal within the same court, to a larger or more senior bench, rather than to a higher court. The purpose of the I.C.A. is to provide a remedy for reconsideration when a party is dissatisfied with the decision of a single judge or a smaller bench, without requiring escalation to another tier of the judicial hierarchy. This ensures that errors or inconsistencies in legal judgments are reviewed within the same court, promoting fairness and thoroughness in judicial decision-making. Historically, a similar jurisdiction was exercised by the High Courts under the name Letters Patent Appeal ('**L.P.A.**'), which was discontinued after the promulgation of the Law Reforms Ordinance, 1972. However, Section 3 of this Ordinance still provides for an I.C.A. before a bench of two or more judges of the High Court under certain specified conditions. Similarly, the . Courts and the Supreme Court. Its section 19(i) provides that '*in the case of an order*

passed by a Single Judge of a High Court an intra-Court appeal shall lie to a bench of two or more Judges' of that Court. And, section 19(iii) states that '*in the case of an original order passed by a Single Judge or a bench of two Judges of the Supreme Court an intra-Court appeal shall lie to a bench of three Judges and in case the original order was passed by a bench of three or more Judges an intra-Court appeal shall lie to a Bench of five or more Judges*' of that Court.

4. As the I.C.A., unlike an ordinary appeal that lies before a higher forum in the judicial hierarchy, is heard within the same court, the question of its scope, extent, and power and authority of the bench hearing an I.C.A. becomes highly important, particularly, after reading the majority judgment in this case authored by the Hon'ble Chief Justice. No provision of law has been found regarding the above aspect of the I.C.A., nor has any authoritative judgment been delivered by this Court in the past to clarify this matter. In *Shahid Orakzai v. Pakistan Muslim League* (**2000 SCMR 1969**), this Court, in the context of the Contempt of Court Act, 1976, merely observed that the scope of an Intra-Court Appeal would be examined in another appropriate case. Recently, however, Justice Syed Mansoor Ali Shah, in his concurring note in *Raja Amer Khan and others v. Federation of Pakistan through Secretary, Law and Justice Division, Ministry of Law and Justice, Islamabad* (**PLJ 2024 SC 114**), endeavored to determine the nature of the Intra-Court Appeal—whether it is part of procedural law or substantive law—for the purpose of assessing the validity of the newly enacted *SCPPA*. His lordship, while referring to two judgments from the Division Benches of the Lahore High Court, *Muzaffar Din v. Allah Wasai* (**PLD 1953 Lah. 284**) and *Abdul Haq v. Saif-Ur-Rehman* (**PLD 1968 Lah. 478**), concluded that '*an intra-court appeal is not an appeal in the strict sense but an internal arrangement of the court for reviewing its own decision. The purpose was that they might further assist on this point and bring in notice of the Court any contrary view, if any, so that after examining the reasoning of divergent views, the Court could reach a better judgment*.' I fully agree with the above observation regarding the nature of the Intra-Court Appeal and had already concurred with this observation in *Raja Amer's* case, as I was one of the members of that bench.

5. I have noticed that the Superior Courts of India have extensively expounded upon the concept of the I.C.A., formerly

known as the Letters Patent Appeal. For instance, the Supreme Court of India, in *Asha Devi v. Dukhi Sao and Others* (**AIR 1974 SC 2048**), delineated the limitations on the powers of a bench hearing an L.P.A. and concluded that the single judge, against whose decision the appeal was filed, cannot be considered a subordinate court to the High Court. The relevant paragraph is reproduced below for ease of reference:

> '*There is no dispute that an appeal lies to a Division Bench of the High Court from the judgment of a Single Judge of that Court in appeal from a judgment and decree of a court subject to the superintendence of the High Court. The only question is whether the power of a Division Bench hearing a Letters Patent appeal under Clause 10 of the Letters Patent of Patna High Court or under the analogous provisions in the Letters Patent of other High Courts is limited only to a question of law under Section 100 of the CPC or has it the same power which the Single Judge has as a first Appellate Court in respect of both questions of fact and of law. The limitations on the power of the Court imposed by Sections 100 and 101 of the CPC cannot be made applicable to an Appellate Court hearing a Letters Patent appeal from the judgment of a Single Judge of that High Court in a first appeal from the judgment and decree of the court subordinate to the High Court,* ***for the simple reason that a Single Judge to the High Court is not a Court subordinate, to the High Court***.'

6. In *Baddula Lakshmaiah and Others v. Sri Anjaneya Swami Temple and Others* (**(1996) 3 SCC 52**), the Supreme Court of India defined the nature and scope of the powers of a Letters Patent Bench hearing an appeal against the decision of a Single Judge and held as follows:"

> '*2. Mr. Ram Kumar, learned Counsel for the appellants, inter alia contends that the Letter Patent Bench of the High Court could not have upset a finding of fact recorded by a learned Single Judge on fresh reconciliation of the two documents, arriving at different results than those arrived at earlier by the two courts afore-mentioned. Though the argument sounds attractive, it does not bear scrutiny. Against the orders of the trial court, first appeal lay before the High court, both on facts as well as law. It is the internal working of the High Court which splits it into different 'Benches' and yet the court remains one.* ***A letters Patent Appeal, as permitted under the Letters Patent, is normally an intra-court appeal whereunder the Letters Patent Bench, sitting as a Court of Correction, corrects its own orders in exercise of the same jurisdiction as was vested in the Single Bench. Such is not an appeal against an order of a subordinate Court. In such appellate jurisdiction the High Court exercises the powers of***

> ***a Court of Error.*** *So understood, the appellate power under the Letters patent is quite distinct, in contrast to what is ordinarily understood in procedural language. That apart the construction of the afore-mentioned two documents involved, in the very nature of their import, a mixed question of law and fact, well within the powers of the Letters Patent Bench to decide. The Bench was not powerless in that regard.*'
>
> **Emphasis Supplied**.

7. Again, the Supreme Court of India, in the case of *B. Venkatamuni v. C.J. Ayodhya Ram Singh and Others* (**AIR 2007 SC 311**), explained the scope and extent of a bench hearing an L.P.A. and observed as follows:

> '9. *In an intra-court appeal,* ***the Division Bench undoubtedly may be entitled to re-apprise both questions of fact and law****, but the following dicta of this Court in Umabhai and Anr. v. Nilkanth Dhondiba Chavan (Dead) By Lrs. and Anr. MANU/SC/0285/2005 : (2005)6SCC243 , could not have been ignored by it, whereupon the learned Counsel for Respondents relied:*
>
> *It may be, as has been held in Asha Devi v. Dukhi Sao MANU/SC/0019/1974 : [1975]1SCR611* ***that the power of the appellate court in intra-court appeal is not exactly the same as contained in Section 100 of the Code of Civil Procedure but it is also well known that entertainment of a letters patent appeal is discretionary and normally the Division Bench would not, unless there exist cogent reasons, differ from a finding of fact arrived at by the learned Single Judge****. Even as noticed hereinbefore, a court of first appeal which is the final court of appeal on fact may have to exercise some amount of restraint...'*

8. In *Anindita Mohanty Vs. The Senior Regional Manager, Hindustan Petroleum Co. Ltd. and Ors.* (**AIR 2020 Ori 135**), the Orissa High Court, while relying upon the *Baddula Lakshmaiah's case* supra, observed as under:

> *'11. We have carefully considered the submissions advanced by the learned Counsel for the parties and perused the documents available on record. Let us first examine the power of the Division Bench while entertaining a Letters Patent appeal against the judgment/order of the Single Judge. This writ appeal has been nomenclatured as an application under Article 4 of the Orissa High Court Order, 1948 read with clause 10 of the Letters Patent Act, 1992. Letters Patent of the Patna High Court has been made applicable to this Court by virtue of Orissa High Court Order, 1948.* ***Letters Patent Appeal is an intra Court appeal where under***

> ***the Letters Patent Bench, sitting as a Court of Correction, corrects its own orders in exercise of the same jurisdiction as vested in the Single Bench.*** *(Ref: (1996) 3 Supreme Court Cases 52, Baddula Lakshmaiah Vrs. Shri Anjaneya Swami Temple).* ***The Division Bench in Letters Patent Appeal should not disturb the finding of fact arrived at by the learned Single Judge of the Court unless it is shown to be based on no evidence, perverse, palpably unreasonable or inconsistent with any particular position in law.*** *This scope of interference is within a narrow compass. Appellate jurisdiction under Letters Patent is really a corrective jurisdiction and it is used rarely only to correct errors, if any made.'*
>
> **Emphasis Supplied**.

9. In light of the above, it may be concluded that an I.C.A. is not an appeal in the traditional sense, but rather an internal mechanism of the court to review its own decisions. Accordingly, the bench hearing the appeal functions as a Court of Correction, rectifying its own orders while exercising the same jurisdiction as the original bench against which the appeal was filed. In any case, the I.C.A. is not an appeal against the decision of a subordinate court. Moreover, the appellate bench should not disturb the factual findings of the original bench unless those findings are unsupported by evidence, perverse, palpably unreasonable, or inconsistent with established legal principles or earlier rulings.

Factual Background

10. Mr. Imran Ahmad Khan Niazi ('**the respondent'**) filed a petition under Article 184(3) of the Constitution challenging the validity of the National Accountability (Amendment) Act, 2022 ('**First Amendment**') and the National Accountability (Second Amendment) Act, 2022 ('**Second Amendment'**), collectively referred to as the '**2022 Amendments**' on the touchstone of the Fundamental rights as enshrined in Chapter 1 of the Constitution. The petition was fixed before a three-member bench ('**Original Bench'**) of this Court. During the hearing, the Original Bench, in paragraph 24 of the impugned majority judgment, limited the scope of the case by observing that although the respondent sought the nullification of nearly all the 2022 amendments, it was not convinced that every section of those amendments violated the Fundamental Rights of the people of Pakistan. The Original Bench concluded that *prima facie* judicial scrutiny was required only for sections 2, 8, 10, and 14 of

the First Amendment and sections 2, 3, and 14 of the Second Amendment. As for the remaining provisions of the 2022 amendments, the Original Bench held that they may be considered later in an appropriate case. The relevant para of the impugned majority judgment specifying the effects of the 2022 Amendments is reproduced hereunder for ease of reference:

> '24. *In his Constitution Petition the petitioner has sought the nullification of virtually the entire 2022 Amendments. However, on a careful examination of these we are not convinced that the Fundamental Rights of the people of Pakistan are violated by each and every section of the 2022 Amendments.* ***Our considered view at the outset about the provisions of the 2022 Amendments is that prima facie judicial scrutiny of only Sections 2, 8, 10 and 14 of the First Amendment and Sections 2, 3 and 14 of the Second Amendment is required.*** *These provisions have brought about the following modifications in the NAB Ordinance:*
>
> *i. Section 3 of the Second Amendment has changed the definition of 'offence' in Section 5(o) of the NAB Ordinance by inserting a minimum pecuniary jurisdiction of Rs. 500 million below which value the NAB cannot take cognizance of the offence of corruption and corrupt practices;*
>
> *ii. Section 2 of the First Amendment by inserting subsections (a)-(f) into Section 4 of the NAB Ordinance and Section 2 of the Second Amendment by adding subsection (g) in Section 4 of the NAB Ordinance has excluded certain holders of public office from application of the NAB Ordinance and thereby limited its effect;*
>
> *iii. Section 8 of the First Amendment has inserted new ingredients in the offence under Section 9 (a) (v) of the NAB Ordinance and added explanations thereto. Section 9(a)(v) criminalizes the act of holding assets beyond means;*
>
> *iv. Section 10 of the First Amendment has deleted Section 14 of the NAB Ordinance which provides evidentiary presumptions that may be drawn against the accused;*
>
> *v. Section 14 of the First Amendment has deleted Section 21(g) of the NAB Ordinance which permitted foreign evidence to be admissible in legal proceedings under the mutual legal assistance regime; and*
>
> *vi. Section 14 of the Second Amendment has added a second proviso to Section 25(b) of the NAB Ordinance whereby an accused who enters into a plea bargain duly approved by the Accountability Court under Section 25(b) can renege from the same if he has not paid the full*

amount of the bargain settlement as approved by the Accountability Court.

The remaining provisions of the 2022 Amendments may be considered later in an appropriate case.'

Emphasis Supplied.

11. The above-quoted para clearly suggests that the constitutionality of only sections 2, 8, 10, and 14 of the First Amendment and Sections 2, 3, and 14 of the Second Amendment was examined in the impugned judgment culminating in the following conclusion:

'48. On the basis of the above discussion the Court holds:

i. *The titled Constitution Petition is maintainable on account of violating Articles 9 (security of person), 14 (inviolability of dignity of man), 24 (protection of property rights) and 25 (equality of citizens) of the Constitution and for affecting the public at large because unlawful diversion of State resources from public development projects to private use leads to poverty, declining quality of life and injustice.*

ii. Section 3 of the Second Amendment pertaining to Section 5(o) of the NAB Ordinance that sets the minimum pecuniary threshold of the NAB at Rs.500 million and Section 2 of the 2022 Amendments pertaining to Section 4 of the NAB Ordinance which limits the application of the NAB Ordinance by creating exceptions for holders of public office are declared void ab initio insofar as these concern the references filed against elected holders of public office and references filed against persons in the service of Pakistan for the offences noted in Section 9(a)(vi)-(xii) of the NAB Ordinance;

iii. Section 3 of the Second Amendment and Section 2 of the 2022 Amendments pertaining to Sections 5(o) and 4 of the NAB Ordinance are declared to be valid for references filed against persons in the Service of Pakistan for the offences listed in Section 9(a)(i)-(v) of the NAB Ordinance;

iv. The phrase 'through corrupt and dishonest means' inserted in Section 9 (a) (v) of the NAB Ordinance along with its Explanation II is struck down from the date of commencement of the First Amendment for references filed against elected holders of public office. To this extent Section 8 of the First Amendment is declared void;

v. Section 9(a)(v) of the NAB Ordinance, as amended by Section 8 of the First Amendment,

shall be retained for references filed against persons in the service of Pakistan;

vi. *Section 14 and Section 21(g) of the NAB Ordinance are restored from the date of commencement of the First Amendment. Consequently, Sections 10 and 14 of the First Amendment are declared void; and*

vii. *The second proviso to Section 25(b) of the NAB Ordinance is declared to be invalid from the date of commencement of the Second Amendment. Therefore, Section 14 of the Second Amendment is void to this extent.*'

Regarding the constitutionality of the National Accountability (Amendment) Act, 2023, it has been noted that it was introduced, during the pendency of the main petition, to give effect to the 2022 Amendments, addressing complications that arose concerning the transfer of cases from Accountability Courts to other courts, tribunals, and forums. Since this amendment is procedural in nature and relates to the implementation of the 2022 Amendments, the Original Bench hearing the main petition did not address it. Furthermore, the petitioner did not challenge it in his amended petition. Therefore, this amendment is not under consideration in this note.

12. I have carefully examined the 2022 Amendments as well as the impugned judgment and found that the confusion primarily arises from the understanding of section 3 of the Second Amendment, which has modified the definition of the term 'offence' in Section 5(n) of the National Accountability Ordinance, 1999 (**N.A.O.**). Under this amendment, offences of corruption and corrupt practices involving amounts less than Rs.500 million have been excluded from the jurisdiction of the National Accountability Bureau (**NAB**). Additionally, section 2 of the First Amendment, by inserting subsections (a)–(f) into section 4(2) of the N.A.O., and section 2 of the Second Amendment, by adding subsection (g) to section 4(2) of the NAO, have excluded certain holders of public office from the application of the N.A.O. and exceptions have been created for the decisions, advice, reports, opinions of and works, functions, projects, schemes undertaken by the holders of public office and public/governmental bodies unless there is evidence of the holder of public office or a person acting on his behalf having received monetary or other material benefits. The majority of the Original

Bench seemed most concerned with the cases of the elected holder of public office i.e. members of the Parliament and Provincial Assemblies relating to the offence of corruption and corrupt practices of the value less than five hundred million rupees being beyond the jurisdiction of the NAB under the new 2022 Amendments. For this reason, they posed a question to the counsel for the Federation: *'If the Accountability Court were to send or transfer a reference against a parliamentarian (elected holder of public office) due to lack of jurisdiction, which court would be the competent transferee to adjudicate the reference, and under which law*? In a written response, the learned counsel for the Federation referred to the provisions of the Prevention of Corruption Act, 1947 ('**P.C.A.**'); the Pakistan Penal Code, 1860 ('**P.P.C.**'); the Income Tax Ordinance, 2001; and the Anti-Money Laundering Act, 2010 for the trial of the offences not within the jurisdiction of NAB.

13. There is no doubt that the three laws mentioned above—the Pakistan Penal Code, 1860 (except Chapter IX—Offences relating to illegal gratification other than legal remuneration in respect of an official act), the Income Tax Ordinance, 2001, and the Anti-Money Laundering Act, 2010—are the general laws of the land and apply to every citizen of Pakistan without any distinction for committing any offences specified therein. They, however, do not directly relate to offences of corruption and corrupt practices by holders of public office. The real confusion arises regarding the application of the P.C.A. and Chapter IX (Offences relating to illegal gratification other than legal remuneration in respect of an official act) of P.P.C., as both laws apply only to public servants as defined under Section 21 of the P.P.C. The majority of the Original Bench was of the view that holders of public office under N.A.O., could be categorized as either persons in the service of Pakistan or the members of Parliament and the Provincial Assemblies ('**elected holders of public office**'). Having the above-said view, they concluded that the first category falls within the definition of 'public servant' and can, therefore, be prosecuted under the P.C.A. and Chapter IX of the P.P.C. for offences of corruption and corrupt practices involving amounts less than Rs. 500 million not within the jurisdiction of NAB under new 2022 Amendments. However, they erred in holding that elected holders of public office do not qualify as public servants and, as such, are not triable under the above laws

for corruption and corrupt practices involving amounts less than Rs. 500 million, if NAB lacks jurisdiction over them. Further observed that once excluded from the jurisdiction of the NAB no other accountability fora can take cognizance of their alleged acts of corruption and corrupt practices as noted above; such blanket immunity offends Articles 9, 14, 23 and 24 of the Constitution because it permits and encourages the squandering of public assets and wealth by elected holders of public office as there is no forum for their accountability; it also offends the equal treatment command of Article 25 of the Constitution as differential treatment is being meted out to persons in the service of Pakistan rather than to elected holders of public office.

14. It is evident that the majority reached the above conclusion on the basis of *R.S. Nayak v. A.R. Antulay* (**AIR 1984 SC 684**) wherein the Supreme Court of India held that members of the Legislative Assembly (equivalent to our elected holders of public office) are not public servants within the meaning of Section 21 of the Indian Penal Code, 1860 and that of the High Court Division of the Supreme Court of Bangladesh in *Zakir Hossain Sarkar v. State* [**70 DLR (2018) 203**] wherein it was held that a Member of Parliament is not a public servant because he is neither appointed by the Government nor paid by it and he does not discharge his constitutional duties of law-making in accordance with the rules and regulations made by the Executive. It is of great significance to note that the finding in Zakir Hossain's case *supra* was rendered by the High Court Division of the Supreme Court of Bangladesh, merely relying on *A.R. Antulay*'s case from the Supreme Court of India. Therefore, the primary question that needs to be addressed is whether the declaration made by the Supreme Court of India regarding the legal status of the members of legislative assemblies, while interpreting the provisions of Section 21 of the I.P.C., aligns with our domestic jurisprudence and law. However, I do not find it necessary to revisit this aspect of the matter, as Justice Syed Mansoor Ali Shah, in his dissenting note in the impugned judgment, has comprehensively examined and highlighted the differences in the wording of section 21 (the part relating to present controversy) of the respective Codes of all three countries. His Lordship, based on the noted differences in the definitions of Section 21 across these jurisdictions and while referring to another five member bench

judgment of the Supreme Court of India in *Narsimha Rao v. State* (**AIR 1998 SC 2120**), concluded that a member of Parliament fulfills all the conditions to fall within the scope of the definition of 'public servant' as provided in the second limb of the latter part of clause nine of Section 21, P.P.C., and is, therefore, triable under the P.P.C. and the P.C.A. as a 'public servant' for the commission of the offence of corruption and corrupt practices. The relevant portion of the dissenting note is reproduced hereunder for ease of reference:

> '*10.3. The close examination of the Antulay thus reveals that it was decided on the ratio that even though an M.L.A. receives pay and also performs public duties, he does not receive that pay from the Government nor is he remunerated by fees by the Government but rather he is remunerated by fees under the Constitution. Therefore, he does not fall within the definition of "public servant" under clause (12) (a) of Section 21 of the IPC**. The deciding factor in that case was the requirement of being in the pay of the Government or being remunerated by fees by the Government.** At the cost of repetition but for clarity and emphasis, it is restated that the Indian Supreme Court held:*
>
> > *[An M.L.A.] no doubt performs public duties cast on him by the Constitution ... for which he is remunerated by fees under the Constitution and not by the Executive [Government].*
>
> ***It is, therefore, the absence of the word "Government" in the second limb of the latter part of clause ninth of Section 21, P.P.C., that makes the real difference in the meaning and scope of the relevant definition clauses of "public servant" in the penal codes of three countries***.'
>
> **Emphasis Supplied.**

15. Although *Narsimha Rao* supra has recently been overruled by a seven-member bench of the Supreme Court of India in *Sita Soren v. Union of India* (**AIR 2024 SC 1701**), I am nonetheless in full agreement with the conclusion reached by Justice Syed Mansoor Ali Shah, who conducted an independent scrutiny of the relevant clauses of Section 21 of the Codes of Pakistan, India, and Bangladesh relating to the definition of a public servant. His lordship has rightly concluded that a member of Parliament, thus, fulfills all the conditions to fall within the scope of the definition of "public servant" provided in the second limb of the latter part of the ninth clause of Section 21, P.P.C., and is, therefore, triable under the P.P.C. and the P.C.A for the alleged offence of corruption and

corrupt practices. The misinterpretation of the status of elected holders public office erroneously led the majority to conclude that the provisions of the 2022 Amendments violate Articles 9, 14, 23, and 24 of the Constitution, as they permit and encourage the mismanagement of public assets and wealth by elected holders of public office without any forum for accountability. Had the majority regarded them as public servants, their conclusion would likely have been different.

16. It is obvious from the 'Statement of Objects and Reasons' of the Second Amendment that it was introduced to exclude private transactions from the scope of the NAB and to limit its jurisdiction to mega scandals. To achieve this, a minimum threshold of Rs. 500 million was provided through Section 3 read with section 1(2) of the Second Amendment with retrospective effect from the commencement of the NAO. However, the majority of the Original Bench held section 3 of the Second Amendment as unconstitutional on account of absolving persons accused of the offence of corruption and corrupt practices involving an amount of Rs. 500 million or less without a judicial verdict while declaring it a legislative judgment. I am very surprised by the majority's next observation that no cogent argument was put forward by the learned counsel for the respondent/Federation as to why Parliament set a threshold of Rs. 500 million and above for NAB to entertain complaints, when the Superior Courts have termed acts of corruption and corrupt practices causing losses of Rs. 100 million as mega scandals. It would be relevant to mention here that the Courts can strike down a law made by Parliament on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Chapter I of the Constitution or any other constitutional provision. There is no third ground. Therefore, an enactment cannot be struck down merely because the court finds it unjustified or non-compliant with its earlier recommendations or directions. Under the law, the function of the Court is not to legislate or to question the wisdom of the Legislature in making a particular law nor it can refuse to enforce it even if the result of it is to nullify its own decisions. Reference may be made to the case of *Zaman Cement Company (Pvt.) Ltd. v. Central Board of Revenue and others* (**2002 SCMR 312**).

17. Even otherwise, one of the cardinal principles of interpretation is that a law should be interpreted in a way that preserves it rather than destroys it. It has time and again held by this Court that the Courts should lean toward upholding the constitutionality of legislation, and it is therefore incumbent upon them to be extremely reluctant to strike down laws as unconstitutional. This power should be exercised only when absolutely necessary, as the injudicious use of it can result in grave and serious consequences, as has happened in this case. Reference in this regard may be made to *the Province of East Pakistan v. Sirajul Haq Patwari* (**PLD 1966 SC 854**); *Mehreen Zaibun Nisa v. Land Commissioner, Multan and other*s (**PLD 1975 SC 397**); *Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan* (**PLD 1997 SC 582**); *Dr. Tariq Nawaz and another v. Government of Pakistan* (**2000 SCMR 1956);** *Mian Asif Islam v. Mian Muhammad Asif and others* (**PLD 2001 SC 499**); *Syed Aizad Hussain and others v. Motor Registration Authority and others* (**PLD 2010 SC 983**); *Messrs Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others* (**2018 SCMR 802**). I am of the considered view that the Parliament, being composed of representatives of the people, is supposed to know and be aware of the needs of the people and what is good and bad for them. For this reason, Parliament, in its wisdom, provided the above minimum threshold so that NAB, instead of wasting its time on minor cases, may focus its energies on cases involving corruption or corrupt practices at a higher level. The Court, therefore, cannot pass judgment on their wisdom. Given the above context, I respectfully believe that the majority's observations are legally incorrect and misconceived, as even after the amendment, cases against elected public office holders are to be investigated and tried under the P.C.A. by the respective anti-corruption investigating agencies and anti-corruption courts of the Federation and Provinces, as applicable.

18. Under Articles 141 and 142, Parliament is fully competent to make laws regarding criminal law, criminal procedure and evidence for the whole or any part of Pakistan. The courts, in exercising the power of judicial review, can strike down any legislation that violates fundamental rights or is beyond legislative competence; however, the courts cannot direct the legislature to frame or enact a law in a particular manner or based on their

recommendations. The legislature has the power to enact laws including the power to retrospectively amend laws and thereby by bona fide remove causes of ineffectiveness or invalidity. When a law is enacted with retrospective effect, it is not considered as an encroachment upon judicial power. However, the legislature cannot, by way of an enactment, declare a decision of the court as erroneous or a nullity, but can amend the statute or the provision so as to make it applicable to the past. The legislature has the power to rectify, through an amendment, a defect in law noticed in the enactment and even highlighted in the decision of the court. This plenary power to bring the statute in conformity with the legislative intent and correct the flaw pointed out by the court, can have a curative and neutralizing effect. When such a correction is made, the purpose behind the same is not to overrule the decision of the court or encroach upon the judicial turf, but simply enact a fresh law with bona fide with retrospective effect to alter the foundation and meaning of the legislation and to remove the base on which the judgment is founded. This does not amount to statutory overruling or passing a legislative judgment by the legislature, as observed by the majority. In this manner, the earlier decision of the court becomes non-existent and unenforceable for interpretation of the new legislation. No doubt, the new legislation can be tested and challenged on its own merits and on the question of whether the legislature possesses the competence to legislate on the subject matter in question and there exists no conflict of interest, but not on the ground of non-observance of their recommendations.

19. The provision of Section 9 (Corruption and Corrupt Practices) of the NAO has been entirely replaced by a new provision, while the provision of Section 14 (Presumption Against Accused Accepting Illegal Gratification) has been omitted through Sections 8 and 10 of the First Amendment, respectively. The majority, while examining the validity of these provisions, held that the newly substituted Section 9 of the NAO, to the extent of the phrase *'through corrupt and dishonest means*' used in clause 9(a)(v), was ultra vires to the Constitution for being unworkable. The provision of Section 10 of the First Amendment was also declared invalid, and the original provision of Section 14 of the NAO was restored. The majority was of the view that the presumptions contained in the omitted section 14(c) of the NAO provided that, once the NAB had

established that the accused, or any person on his behalf, was in possession of assets or pecuniary resources disproportionate to his known sources of income, the accused was presumed guilty of corruption and corrupt practices unless he could account for the resources or property recovered from them. The NAB was not required to prove that the accused had obtained the resources or property *'through corrupt and dishonest means*,' as the mere presence of disproportionate assets created a presumption of corrupt and dishonest conduct against him. It has been noted that this aspect of the matter has also been examined by Justice Mansoor Ali Shah in his dissenting note and has rightly observed that the different clauses of the omitted Section 14 of the NAO are the descriptive instances of the applicability of the principle of "evidential burden" enshrined in Article 122 of the Qanun-e-Shahadat, Order 1984 (formerly Section 106 of the Evidence Act 1872), which provides, '*When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him*' and concluded that the omission of section 14 has no substantial effect on the mode of proving the offence of unaccounted assets possessed by a holder of public office beyond his known sources of income; as when the prosecution succeeds in proving that the particular assets of the accused are disproportionate to his known sources of income (legal means) and are thus acquired through some corrupt and dishonest means, the burden of proving the "*fair and honest means*" whereby the accused claims to have acquired the same, being within his knowledge, are to be proved by him as per provisions of Article 122 supra. I agree with the above conclusion and the same is upheld. On the other hand, the majority did not specify which particular fundamental right had been violated by omitting the provision of Section 14 of the NAO. Despite such an innocuous effect, the change in the rules of evidence falls within the legislative competence of Parliament under Article 142(b) of the Constitution. Unless such a change infringes upon any fundamental rights, it is not subject to judicial review.

20. The majority has declared ultra vires the Constitution the addition of Explanation II to Section 9(v), which provides that for calculation of movable assets, the sum total of credit entries of bank account shall not be treated as an asset but rather the bank balance of an account on the date of initiation of inquiry may be treated as

a movable asset and that a banking transaction shall not be treated as an asset unless there is evidence of creation of corresponding asset through that transaction. I have carefully examined the above clause and found that it defines the term 'movable assets' for the purpose of NAO. Through this clause, the Parliament provides a specific criterion for calculating movable assets with reference to banking transactions. The language of the clause is clear and unambiguous. Further, it would eliminate any confusion and misunderstanding in determining the correct financial liability of the accused and the jurisdiction of the NAB to entertain a reference against him. The majority struck down the same by simply observing that '*the source, object and quantum of credits/ receipts in the bank accounts can now no longer be shown for proving the creation of assets. Nor can debit transfers from one account to another be used to show the accumulation of money for the creation of an asset. It goes without saying that bank records are usually the most pivotal evidence in financial crimes. However, by virtue of Explanation II limited resort can be made to them*.' The above observation of the majority is not legally sufficient to render a provision of law invalid unless a specific fundamental right or other provision of the Constitution that the provision in question violates has been identified. The majority did not identify any such violation; hence, the above observation is devoid of any merit. Similarly, the majority has declared ultra vires the Constitution the following amendments also, (i) the omission of clause (g) of section 21, which omission has made applicable the provisions of the Qanun-e-Shahadat to documents or any other material transferred to Pakistan by a Foreign Government in legal proceedings under NAO; and (ii) and the addition of second proviso to Section 25(b), which provides that in case of failure of accused to make payment in accordance with the plea bargain agreement approved by the Court, the agreement of plea bargain shall become inoperative to the rights of the parties immediately. While declaring so, the majority has not explained how they infringe any of the fundamental rights or any other provision of the Constitution. To sum up, I have no hesitation in stating that the above amendments neither take away nor abridge any fundamental rights in terms of Article 8(2) of the Constitution. They fall within the legislative competence of Parliament.

21. It is pertinent to mention that these appeals have been filed under Section 5 of the SCPPA (Supreme Court (Practice and Procedure) Act, 2023). The vires of this Act were also challenged before this Court, and except for Section 5(2), which provides a retrospective right of appeal against an order passed under Article 184(3) before its commencement, the Act was upheld by the Full Court Bench of this Court (by a majority of 10 to 5) in *Raja Amer Khan's* case supra. The majority opinion was authored by Justice Qazi Faez Isa, the Hon'ble Chief Justice. However, Justice Syed Mansoor Ali Shah, in his additional note supporting the SCPPA, made an important observation regarding the validity and legality of the constitution of benches and their decisions during the pendency of the petitions challenging the vires of the SCPPA as it prescribes a special procedure for constituting benches to hear cases involving the interpretation of a constitutional provision. The said observation (**citation(s) omitted**) is reproduced below for reference:

> '*33. To avoid this question, I had earlier expressed my view that until the question of the constitutionality of the Act was decided, the cases invoking the original jurisdiction of this Court under Article 184(3) of the Constitution or that which involved the interpretation of the constitutional provisions should be adjourned or heard by a Full-Court Bench. Nonetheless, I have now thought over the question as it has actually arisen and the ramifications of its answer in either way, in light of the cases where this Court espoused the doctrine of past and closed transactions.* ***The principle that I gathered from reading such cases is that the acts done in accordance with the law prevailing at the time of their doing are generally protected under this doctrine. The operation of the Act having been suspended by an eight-member Bench of this Court, the then Hon'ble Chief Justice constituted the Benches in accordance with the law that was prevailing at that time, i.e., Order XI of the Rules.*** *One may argue that the Court should not have suspended the operation of the Act, but cannot deny the fact that it was indeed suspended.* ***So when applying the said principle to the question under consideration, we find that the act of constituting Benches by the then Hon'ble Chief Justice should be protected unless some exceptional circumstances may justify departure from the principle.*** *No one from among the learned counsel who argued this case before us presented or pointed out any of such exceptional circumstances.*
>
> *34. When the inconvenience or injustice likely to occur due to applying or non-applying the doctrine of past and closed transactions is measured on the principle of proportionality, the scales tilt in favour of following the*

> *above principle rather than the exception thereof; for a great amount of public time had been spent in hearing and deciding the cases by the Benches of this Court constituted by the then Hon'ble Chief Justice.* ***I would therefore apply the doctrine of past and closed transactions to the acts of constitution of benches and decisions of the cases by those benches during the period of suspension of the operation of the Act****.*
>
> *36. Since I have addressed herein some points that are not included in the leading judgment authored by the Hon'ble Chief Justice, let this be circulated among my learned colleagues who joined in para 1 of the short order of the Court in sustaining the constitutional validity of the Act.'*
>
> ***Emphasis Supplied.***

22. The said additional note addressed important legal aspect of the case that was not dealt with in the majority judgment; therefore, it was circulated among all the members of the Full Court Bench (*Qazi Faez Isa, CJ, Sardar Tariq Masood, Amin-ud-Din Khan, Jamal Khan Mandokhail, Muhammad Ali Mazhar, Athar Minallah, Syed Hasan Azhar Rizvi, and Musarrat Hilali, JJ.*) who upheld the SCPPA. They all agreed and signed the said additional note. However, Justice Muhammad Ali Mazhar and I expressed our disagreement only with respect to paragraphs 20 and 35 of the additional note, which relate to Section 5(2) of the Act, providing the retrospective right of appeal. It is by now well settled that when a case is heard by a Bench of two or more Judges, the case is decided by the opinion of such Judges or the majority of such Judges. Judgment or order of the Court is pronounced in terms of the majority opinion; such judgment or order is of the Bench that heard the case and, for that matter, of the Court, and not only of the Judges whose opinion prevailed as a majority opinion. This is why a unanimous opinion of a five-member bench on a legal question can be overruled by a majority of four Judges while sitting in a seven-member Bench. It is the numeric strength of the whole Bench that determines the judicial power of its Members and not the number of individual Judges in the majority. Reference may be made to the case *Messrs Cherat Cement Co. Ltd., Nowshera and others v. Federation of Pakistan through Ministry of Petroleum and Natural Resources and others* (**PLD 2021 SC 327**).

23. In view of the above legal position, the opinion expressed in the additional note would now be the opinion of the

Full Court Bench of this Court. No doubt, the petition challenging the 2022 Amendments involved the interpretation of a constitutional provision and was required to be heard by a bench comprising not less than five judges, as mandated by section 4 of the SCPPA. However, it was heard and decided by a three-member bench of this Court. At the relevant time, the operation of the said Act was suspended; therefore, the decision of the three-member bench is fully protected under the doctrine of past and closed transactions, as held by the Full Court Bench of this Court in *Raja Amer's case* (supra). The Hon'ble Chief Justice overlooked this important aspect and also forgot that he was a signatory to the above additional note while stating that '*I agreed with my distinguished colleague and the points determined herein may be considered as part of the decision of this Court*.' Therefore, his observation in paragraph 14 of the majority opinion rendered in the present appeals, stating that '*These appeals could justifiably be allowed on the ground that since the Petition was not heard and decided as required by the Act by a five-member Bench the impugned judgment is coram non judice and a nullity in law. However, in deference to the learned Judges of the three-member Bench who had spent considerable time in hearing the Petition (55 dates of hearing) it may not be appropriate to set aside the impugned judgment on this ground alone*' is contrary to the law declared by a Full Court Bench of this Court and is, therefore, *per incuriam*.

24. This Court, in exercising jurisdiction under Article 184(3) of the Constitution, which is inquisitorial in nature, has the same powers as those available to the High Court under Article 199 of the Constitution. It is not limited to acting only at the instance of an aggrieved party, as in adversarial proceedings. When dealing with a case, the Court is neither bound by the procedural requirements of Article 199 nor by the limitations mentioned therein. Therefore, a petitioner before this Court under Article 184(3) of the Constitution may not need to have a personal grievance in the matter. If the petitioner can satisfy the Court that the issue raised is of public importance and pertains to the enforcement of fundamental rights guaranteed by the Constitution for a reasonably large section of the population, the petition can be successfully maintained. Reference in this regard may be made to *Shahida Zahir Abbasi v. President of Pakistan* (**PLD 1996 SC 632**); *Malik Asad Ali and others v.*

Federation of Pakistan (**PLD 1998 SC 161**); *Watan Party and another v. Federation of Pakistan and others* (**PLD 2011 SC 997**)and *Abdul Wahab and others v. HBL and others* (**2013 SCMR 1383**) *Imran Ahmad Khan Niazi v. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan* (**PLD 2017 SC 265**). In light of the above, it can safely be said that whether a particular case involves the element of 'public importance' is a question to be determined by this Court with reference to the facts and circumstances of each case. There is no hard and fast rule that an individual grievance can never be treated as a matter of public importance. Similarly, it cannot be said that a case brought by a large number of people should always be considered one of public importance simply because many are interested in it. Public importance should be assessed with reference to the freedoms and liberties guaranteed under the Constitution, their protection, and the infringement of these rights in a manner that raises a serious question regarding their enforcement, regardless of whether such infringement is alleged by an individual or a group. However, to qualify as having 'public importance,' the case must raise a question that interests or affects the entire community or public at large. In other words, the case must give rise to questions affecting the legal rights or liabilities of the public or community, even if the individual subject to the case may be of no particular consequence.

25. In this case, the petitioner raised a question of public importance regarding the enforcement of the 2022 Amendments, alleging that these amendments would affect the entire community and the public at large. Therefore, such an important question could not be resolved without scrutinizing the case on its merits. It would be highly unjust to hold that the three-member bench assumed jurisdiction in disregard of the mandate of Article 184(3) of the Constitution. Furthermore, the word 'consider' in Article 184(3) of the Constitution pertains to the subjective assessment of this Court, which is the final authority on matters relating to the judicial determination of the constitutional provisions. Thus, once the Supreme Court concludes that a question of public importance, having nexus with the Fundamental Rights guaranteed by the Constitution, has been raised, the exercise of its jurisdiction under Article 184(3) cannot be challenged by anyone. Reference in this

regard may be made to *Ali Azhar Khan Baloch & others v Province of Sindh and others* (**2015 SCMR 456**).

26. In view of the foregoing, it is found that Parliament has competently enacted the 2022 Amendments, which do not violate any Fundamental Rights or any other provisions of the Constitution. Therefore, the appeals are allowed, and as a result, the impugned judgment is set aside. No order as to costs.

Passing of Remarks against Judges of the same Court

27. Before parting with this note, I am constraint to record that the Hon'ble Chief Justice while expressing his disagreement with the views of the former Hon'ble Judges (Umar Ata Banidal, CJ. and Ijaz ul Ahsan, J.) of this Court did not keep in view the judicial propriety expected of a Judge of a Superior Court. A Judge of a Superior Court while taking oath of his office also undertakes to abide by the 'Code of Conduct for Judges of the Supreme Court and High Courts' framed by the Supreme Judicial Council under Article 128 (4) of the 1962 Constitution as amended up-to-date under Article 209(8) of the Constitution. Its preamble requires that 'the prime duty of a Judge as an individual is to present before the public an image of justice of the nation. As a member of his court, that duty is brought within the disciplines appropriate to a corporate body.' Besides other important requirements, the Article IX of the Code of Conduct requires as follows:

> **'ARTICLE- IX**
>
> *In his judicial work, and his relations with other Judges, a Judge should act always for the maintenance of harmony within his own Court, as well as among all Courts and for the integrity of the institution of justice.* ***Disagreement with the opinion of any Judge, whether of equal or of inferior status, should invariably be expressed in terms of courtesy and restraint***.'
>
> **Emphasis Supplied**.

28. The Hon'ble Chief Justice perhaps made the said remarks because his lordship was hearing an Intra-Court Appeal under the newly enacted law, i.e., the Supreme Court (Practice & Procedure) Act, 2023, and as such assumed himself as an appellate/superior authority over a bench of the same Court which passed the impugned judgment. If the Hon'ble Chief Justice was really considering it in this manner, he, therefore, misconceived his

position and the above law as well. The petitions under Article 184(3) of the Constitution are being filed and adjudicated by this Court as a routine matter. After the enactment of the SCPPA, now a Judge of this Court may sometimes be the member of a bench that originally decides a petition under Article 184(3) of the Constitution and sometimes he may be the member of the bench that may decide an I.C.A under the SCPPA against an original order/judgment in that petition. Thus, if a member of an appellate bench makes remarks against a member of the bench that issued the original judgment, it is likely that the other member would respond when he gets a chance to be a member of an appellate bench against his order. This may lead to a cycle of passing remarks against one another, which would not only become routine but also diminish the stature of this Court, both in the eyes of the people of Pakistan and internationally.

29. To sum up, it must be remembered that an I.C.A. is not an appeal against the decision of a subordinate court. Moreover, Article XI of the Code of Conduct must be more strictly adhered to when a judge of a Superior Court expresses dissent or disagreement with the view of another judge of the same Court, as judges of Superior Courts, including the Chief Justice, are equal. It is therefore desirable that dissent and disagreement never take the form of comments akin to those of an appellate forum but should always be expressed with courtesy and restraint. Dissent and disagreement should remain confined to matters of law and, under no circumstances, extend to the conduct or personality of another judge.

(SYED HASAN AZHAR RIZVI)
Judge

APPROVED FOR REPORTING
*Ghulam Raza/**