THE ROLE OF JUDICIAL REVIEW IN PROTECTING HUMAN RIGHTS IN PAKISTAN

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FINAL APPROVAL

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DEDICATION

This research work is dedicated to my parents; Mr. and Mrs.Khalil Yousafzai, to my wife Hira and to my friends.

"My lord! Bestow on them thy mercy even as they cherished me in the child hood"

Surah Al-Isra(24).

Nasir Kamal Yousafzai.

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Nasir Kamal Yousafzai.

LIST OF ABBRIVATIONS

1.	PLD	Pakistan Law Decisions.
2.	SCMR	Supreme Court Monthly Review
3.	MLD	Monthly law digest
3.	SCC	Supreme Court Cases (India)
4.	ILO	International Labour Organization
5.	UDHR	Universal Declaratin of Humman Rights
6.	ART	Article
7.	GOVT	Government

ABSTRACT

My thesis consist of six chapters, chapter number one is regarding the human rights, in this chapter I have thoroughly discussed the basic concepts and features of the human rights and in this chapter I have discussed the role of apex courts of Pakistan in protecting the human rights in Pakistan.

Chapter two deals with judicial review, in this chapter I have discussed the origin of judicial review, its components and its scope and importance.

Chapter three deals with the judicial review and judicial system in Pakistan, regarding most of the constitutions of the civilized states I have discussed their doctrines of judicial review.

In chapter four I have discussed the various theories pertaining to judicial review, and particularly I have discussed judicial review versus judicial restraint.

In chapter number five I have discussed judicial review by superior courts of Pakistan, in the said chapter I have discussed the jurisdiction of SC of Pakistan and kinds of writs, furthermore the interview of human rights activist is also there in the said chapter.

In the sixth which is the last chapter I have made recommendations and the conclusions.

Chapter No.1

JUDICIAL REVIEW

1.1 CONCEPT

Judicial review is the feature of a legal system where the hierarchy of laws related to different law making authority has been clearly defined. It is, of course a conspicuous phenomena of a written constitution specially under federal system where conflicts between the two system may arise and the Courts are necessitated to shoulder the responsibility for the resolution of that dispute. It is possible to premise a decision that it is the subordinate position of the legislature and the executive in the hierarchy of law making as compared to the constitution, which is reservoir from which all laws flow that has made the assertion by the Court of their review power a necessity. If the supremacy of the constitution is required to be maintained in practice, the Courts must refuse to enforce the legislative or executive act which is in conflict with it.

"Moreover, the constitution allocates the powers to various branches of the government and that division, by its very nature creates the foundation of the doctrine of judicial review. It was the constitution of United State of America which originated the era of ''constitutionalism'' with the notion of the supremacy of the constitution over ordinary laws". [1] "The supremacy of the constitution establishes the sanctity of the fundamental laws which carries the sanction of the society as to how they want to be governed. This provides system which requires, on the one hand, the working of the three organs of the government, in coordination with each other on the one hand and on the other that each branch should operate strictly in its province. This constitutional arrangement not only empowers the judiciary to protect the fundamental law of land but it has also attained the role of passing on the validity on the use of powers by the legislature and executive. The question why the constitution is the supreme law of land is very simple to answer.... because it was ordained by the people.... the ultimate source of all political authority". [2]

1.2 JUDICIAL REVIEW AND ITS DEFINITION

"A Court's power to review the action of other branches or level of the government especially the Court's power to invalidate legislative and executive actions as being unconstitutional". [3]

"The power which the court of general jurisdiction and the high court exercises to protect and correct the jurisdictional errors in collateral proceedings is called the power of judicial review". [4].

1.3 HISTORICAL ORIGIN & THE EVOLUTION OF THE JUDICIAL REVIEW

The then Chief Justice of U.S.A Supreme Court has stated that the judicial review has to be exercised in its full swing in order to safe the country from the power-hungry executive or the politician.

The origin of the judicial review has come due to the fact that the power trait executive and the judiciary should exercise its power within the ambit of the constitution.

In the Dr Bonham case, decided in 1610, the issue was the validity of the charter of the Royal College of Physicians, confirmed by an Act of Parliament, which gave the incorporated society of physician's power to impose fine upon physicians going against its rules. The fines so imposed were payable half to the crown and half to the society. Dr Bonham, who was alleged to have violated the society's rules by practising medicine in London without obtaining a proper certificate was summoned before the Royal College of Physicians and fined.

When he refused to pay the fine, he was imprisoned. He brought action for false imprisonment. Lord Coke, chief justice of the Court of Common Appeals before whom the case was listed, held the imprisonment wrongful on the ground that the statute which made the college the judge of its own cause, complainant and prosecutor, was against 'common right and reason', and was void. He declared: When an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.

The judicial activism of Lord Coke shocked many people who strongly believed in the supremacy of parliament. Nevertheless, Lord Coke laid the foundation of judicial review, and history has justifiably conferred on him the title of 'the legal father of judicial review'.

Five years later, another great judge, Hobart, was called upon to decide the Day vs Savadge

case. Chief Justice Hobart ruled: "It is against right and justice and natural equity as to make a man judge in his own case." He emphatically declared: Even an Act of Parliament, made against natural equity, as to make a man judge of his own case, is void in itself, for the laws of nature are immutable, and they are leges begum (the law of laws). Chief Justice Hobart's famous phrase, leges begum, has become the foundation of the modern concept that the constitution, being the basic law, is the law of all laws.

Two hundred years later, John Marshall, chief justice of the US Supreme court, expounded the theory of judicial review in Marbury.. vs..Madison (1803). He had to face a conflict between an act of Congress and the constitution. He said: It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule.

He ruled that it is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it, and any legislative act contrary to the constitution is not law. He propounded the theory of judicial review in relation to the written constitution, what his predecessors, Lord Coke and Justice Hobart, did with respect to the higher norms of the common law and natural equity respectively.

Chief Justice John Marshall's proposition not only infused fundamentality into the constitution but also proclaimed that the court could decide on the constitutionality of the laws. He asserted the power of the courts to curb any illegality, whosoever its author may be.

Tocqueville paid a well-deserved tribute: The power given to the American courts to pass on the constitutionality of statutes constitutes one of the most powerful barriers which have ever been raised against the tyranny of political assemblies.

'Judicial auto-limitation' is a phrase used by Prof Edward McWhinney to describe the principles enounced by Justice Brandies of the US Supreme Court in the Ashwander vs Tennessee Valley Authority (1936) case. All the principles indicated by Justice Brandies in this case are rules to be observed in exercising the power of judicial review. The Brandies principles have been further developed by Justice Frankfurter. They make up the doctrine of judicial self-restraint. This doctrine has been accepted as a judicial policy of non-involvement, as far as possible, in great political and social tension issues.

It is not their view that in the face of legislative tyranny or executive authoritarianism the judiciary must kneel down and muse over its helplessness. If such a situation of judicial helplessness comes to pass, the unique role etched out for the judiciary by the great visionaries of law — Lord Coke, Hobart and John Marshall — would come to nothing.

A striking example of legislative excesses and judicial assertion of its review power in India was witnessed in the Indira Gandhi..vs...Raj Narayan case. Soon after the Allahabad High Court struck down Indira Gandhi's election to parliament (and when the appeal was pending before the supreme court) the then parliament inserted Article 329-A(4) through the constitution (39th Amendment Act, 1975) to validate her election with retrospective effect. The majority ruled against the validity of Article 329-A (4). Justice Mathew said: It is the result of the exercise of an irresponsible despotic discretion governed solely by political necessity or expediency.

The Stuart king, James I, firmly believed that the judges, being his appointees, must obey his order. He ordered Lord Coke that his court must conform to the king's prerogative to dispense with laws in certain cases or be dismissed. To this Lord Coke replied; for my place, I little care. I am old and worn out in the service of the Crown. But I am mortified to find that Your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man can give.

The king replied: "I am determined to have 12 judges who will be of my mind in this matter." Lord Coke replied: "Your majesty may find 12 judges of your mind, but hardly 12 lawyers." Lord Coke lost his position, but some of the other judges of that court recanted and prostrated themselves before the king. While Lord Coke attained immortality, the other judges were thrown into the dustbin of history.

Judicial activism is the role etched out for the judiciary in a democratic society governed by the basic law to keep the horizon of liberty clear and to give substance to the all-pervasive concept of the rule of law. If the judiciary fails in this, nothing can save the democratic policy, as Chief Justice John Marshall concludes: "The constitution itself becomes a solemn mockery."

Let us remind all doubting Thomases; "Be you ever so high, the law is above you. Only knight-errants of executive excesses can fall in love with the dame of despotism, legislative or executive. If the judiciary gives in here, it gives up the ghost." [5]

1.4 Components of Judicial Review:

"Broadly speaking, judicial review comprises of three aspects: judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. The judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of functions, transgress constitutional limitations". [6] "Thus, judicial review is a highly complex and developing subject. It has its roots long back and its scope and extent varies from case to case. It is considered to be the basic feature of the Constitution. The court in its exercise of its power of judicial review would zealously guard the human rights, fundamental rights and the citizens' rights of life and liberty as also many non-statutory powers of governmental bodies as regards their control over property and assets of various kinds, which could be expended on building, hospitals, roads and the like, or overseas aid, or compensating victims of crime". [7].

In ***U.O.I v K.M.Shankarappa*** [8] the Supreme Court held that "section 6(1) of the cinematograph Act is unconstitutional due to the following reasons:

"The Government has chosen to establish a quasi-judicial body which has been given the powers, inter alia, to decide the effect of the film on the public. Once a quasi-judicial body like the Appellate Tribunal gives its decision, that decision would be final and binding as far as the executive and the government is concerned. To permit the executive to review or revise that decision would amount to interference with the exercise of judicial functions by a quasi-judicial board. It would amount to subjecting the decision of a quasi-judicial body to the scrutiny of the executive. Under the Indian Constitution, the executives have to obey the judicial orders. Thus, Section 6(2) is a travesty of the rule of law, which is one of the basic structures of the Constitution. The legislature may, in certain cases, nullify a judicial or executive decision by enacting an appropriate legislation. However, without enacting an appropriate legislation, the executive or the legislature cannot set at naught a judicial order.

The executive cannot sit in an appeal or review or revise a judicial order". [9] The government has got a right of the review if the facts of the case so warrants, the court further held that the government would be bound by the judgment of the tribunal.

In the landmark judgment of ***P.U.C.L v U.O.I*** [10] *Justice Shah* observed: "The legislature in this country has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the courts. The legislature may remove the defect, which is the cause for invalidating the law by the court by appropriate legislation if it has power over the subject matter and competent to do so under the Constitution. The primary duty of the judiciary is to uphold the Constitution and the laws without fear or favour, without being biased by political ideology or economic theory. Interpretation should be in consonance with the constitutional provisions, which envisage a republic democracy". [11] the democratic norms can best be adjudged if the elections are free an transparent and further more if the character of the politicians are known to the voters before hand.

"Justice Shah's such stance clearly speaks the Indian's judiciary stance for constitutional democracy. And due to this fact the constitutional makers and the people of the India has great confidence in the Indian judiciary. The SC of Indian is famous for the most fruit full and energetic judicial activism in its state. It has thus evolved the most famous "Doctrine of basic Structure". With the change in the concept of the state new theories of judicial activism has evolved. Among these theories one of the famous theory is the theory of "Doctrine of proportionality". The said theory was firstly originated in the 19th century in Russia and later on spread to West Germany and other states. By this we can say that when the court is going to solve the disputes regarding the fundamental rights then the court has to see the least restrictive choice has to be made so that the object of fundamental rights should not be tarnished. According to this theory the court has to strike a balance so that the fundamental rights given to the citizen should not be hampered". [12]

The court as far back as in 1952 in ***State of Madras v V.G.Row*** [13] observed: "The test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all the cases. The nature of right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at that time, should all enter the judicial verdict. In evaluating such elusive factors and forming their own conceptions of what

is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judge participating in the decision would play an important part, and limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable". [14]

Ever since 1952, this doctrine has been exercised so vigorously that any administrative action which was and which is against the constitution and against this principle has been declared as null and void by the Indian superior judiciary.

In ***Om Kumar v U.O.I*** [15], however, the Apex Court "evolved the principle of primary and secondary review. The doctrine of primary review was held to be applicable in relation to the statutes, statutory rules, or any order, which has force of statute. The secondary review was held to be applicable inter alia in relation to the action in a case where the executive is guilty of acting arbitrarily. In such a case Article 14 of the Constitution of India would be attracted". [16] "In relation to other administrative actions, as for example punishment in a departmental proceeding, the doctrine of proportionality was equated with *Wednesbury's unreasonable".* [17]

In ***Delhi Development Authority v M/S UEE Electricals Engg.P.Ltd*** [18] the Supreme Court dealt with the judicial review of administrative action in detail. The court observed. "that the administrative action is subject to judicial review under three heads": The first ground is "illegality", the second "irrationality", and the third "procedural impropriety". Courts are slow to interfere in matters relating to administrative functions unless decision is tainted by any vulnerability such as, lack of fairness in the procedure, illegality and irrationality. Whether action falls in any of the categories has to be established. Mere assertion in this regard would not be sufficient. The law is settled that in considering challenge to administrative decisions courts will not interfere as if they are sitting in appeal over the decision. He who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it". [19] The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility.

"The administrative orders must also satisfy the rigorous tests of the "doctrine of legitimate expectation". The principle of legitimate expectation is at the root of the rule of law and requires regularity, predictability and certainty in government's dealings with the public. For a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either:

(i) He had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rationale grounds for withdrawing it or where he has been given an opportunity to comment; or

(ii) He has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn". [20]

"The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made than a benefit of substantive nature will be granted or if the person is already in receipt of the benefit than it will be continued and not be substantially varied, then the same could be enforced. An exception could be based on an express promise or representation or by established past action or settled conduct". [21] The representation must be clear and certain, it can be a representation made to a person in individual capacity of to a group of persons.

"Another tool in the hand of the judiciary in order to check the validity of legislation is the doctrine of "reading down". This doctrine is well famous and prevailing s. It is a rule of harmonious construction in a different name. It is resorted to smoothen the crudities or ironing the creases found in a statute to make it workable. In the garb of reading down, however, it is not open to read words or expressions not found in it and thus venture into a kind of judicial legislation". [22] The rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. It is to be used keeping in view the scheme of the statute and to fulfil its purposes.

In ***B.R.Enterprises v State of U.P*** [23] the Supreme Court observed: "First attempt should be made by the courts to uphold the charged provisions and not to invalidate it merely because one of the possible interpretation leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of the legislation. Cumulatively, it is to sub serve the object of the legislation. Old golden rule is of respecting the wisdom of the legislature, that they are aware of the law and would never have intended for an invalid legislation. This also keeps the courts within their track and checks. Yet in-spite of this, if the impugned legislation cannot be saved, the courts shall not hesitate to strike it down. Here the courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the Constitution". [24] The principle of reading down, however, will not be available where the plain and literal meaning from a bare reading of any impugned of any impugned provision clearly shows that it confers arbitrary or unbridled power.

"It must be appreciated that a statute carries with it a presumption of constitutionality. Such a presumption extends also in relation to a law, which has been enacted for imposing reasonable restrictions on the fundamental rights. A further presumption may also be drawn that the statutory authority would not exercise the power arbitrarily". [25] Further, "where a power is conferred upon a higher authority, a presumption can be raised that he would be conscious of his duties and therefore will act accordingly". [26] These presumptions have to be rebutted before an allegation of unconstitutionality of a statute can be sustained.

"The significance of the recent wide spread adoption of the judicial review cannot be evaluated on the basis of constitutional provisions alone, for, as Latin American experience proves, a dozen constitutional clauses may be less effective then one judge or legislator of the stature of John Marshal. To be considered, therefore, are the questions of whether these recent constitutional provisions for judicial review will have any practical effect, and, if so, whether they will serve the purpose for which they were adopted". [27]

As to the practical effect of the provisions, the brief experience since World War II indicates that judges will exercise their powers if the necessary implementing legislation is enacted and if the independence of judiciary is respected in practice.

"Broader aspects of the operation involved the factors that have entered into the adoption of judicial review. Many of the factor that have effect both the growth of judicial review and its practical operation have been previously mentioned, particularly legal and political traditions, theoretical believes, the effect of federalism, and the considerations of economic and social class interests. These may be added another factor of special importance in the contemporary era". [28]

Totalitarian successes since World War I has demonstrated that undemocratic groups can subvert democratic form and procedure to the over throw of democracy and to the eradication of human rights and liberties. For this reason, rightly and wrongly, many modern democrats have endorsed judicial review as a means of guarding the constitution and protecting individual liberties against the Totalitarian action and undemocratic rules of governmental power.

"Recent constitution making has produced then some what paradoxical result. Judicial review, an institution evolved in the early days of liberal era, is enjoying its greatest popularity in the period of waning liberalism, and is being endorsed by nations with little if any indigenous liberal heritage. In an attempt to salvage that portion of liberal tradition which insist upon the respect for natural rights and fundamental law, recent constitution maker have turned to the very institution, judicial review, which has been most severally criticised as a device which tend to perpetuate the most questionable part of liberal theory or its economic tenets. The result promises to be a controversial and delicate constitutional experiment which merits the attention of democrats everywhere". [29]

1.5 SCOPE AND IMPORTANCE OF JUDICIAL REVIEW

"Judicial review is the process whereby an apex court determines the constitutional status of a law". [30] The power of judicial review is exercised differently in different political systems. In countries like the United Kingdom (UK) where parliament is sovereign, the courts can interpret the constitution, but they cannot invalidate acts of parliament for being inconsistent with the constitution.

"The situation is different in countries where parliament or legislature is not sovereign. For instance, in the USA, the Supreme Court can strike down legislation enacted by Congress if it finds the same to be incompatible with the constitution. Similarly in India, the apex court can declare null and void the laws passed by parliament". [31]

Coming to our own political system, the two pertinent questions are: does the judiciary enjoy the power of judicial review? If the answer is in the affirmative, what are the scope and limits of this power?

"As in case of countries like India and the USA, Pakistan has a federal constitution, which distributes powers between the centre and the provinces. The federal legislature or parliament can make laws on subjects enumerated in the federal legislative list and the concurrent legislative list. Similarly, provincial legislatures are competent to legislate on subjects falling within their sphere of power. If we go by the book, neither parliament nor a provincial legislature can encroach upon the other's legislative powers". [32]

The constitution also places limitations on the powers of the legislations and it says that the legislatures have got no power to make any law which is in conflict with the fundamental rights enshrined in the constitution. In this respect, Article 8 of the constitution states: "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 [Chapter 1], shall, to the extent of such inconsistency, be void. In the second place, no law can be made which is repugnant to the injunctions of Islam".[33] In this connection, Article 227 of the constitution stipulates: "All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah...and no law shall be made which is repugnant to such injunctions." [34]

Thirdly the parliament has got no right to make any law if it is against the basic law or against the constitution. There are thus four limitations on the parliament, firstly that it cannot except in the case of an emergency make any law for the provinces, secondly it cannot make any law which is against the fundamental rights or against the Islamic provisions and the basic character of the constitution.

Keeping in view the preceding four limitations on the power of the parliament one can come to the conclusion that the power of judicial review has been evolved due to this fact so if the parliament makes any interference with the above said four limitations then courts would have the power to exercise the power of judicial review.

It is note worthy that the Pakistani constitution like the constitution of the USA and India does not gives the power to the superior judiciary to make judicial review in express terms rather when the court while interpreting the constitution if comes to a conclusion that a

particular provision or any administrative act is against the constitution that it can be declared as null and void and of having no legal effect.

As a former judge of the US Supreme Court once said: "We [Judges] are under the constitution. But the constitution is what we say it is." [35] it is pertinent to note that the judiciary does not make laws but only to interpret it and during the course of interpretation if the courts comes to a conclusion that a particular enactment is against the constitution then it can be set asides.

Thus the answer to our first question "does the judiciary in Pakistan have the power of judicial review?" must be in the affirmative.

Let's turn to the second question regarding the scope and limits of this power.

No constitution is static. Rather every constitution grows: through conventions, judicial interpretations, and formal amendments. Every constitution lays down a method for its amendment. In case of the 1973 constitution, "the constitution amendment powers vest almost exclusively in parliament. The two houses of parliament can amend any provision of the constitution by a two-third majority and subject to the assent of the president". [36]

Regarding the alteration of the limits of the provinces it is only the provincial assemblies who can do the need full.

A pertinent question is: Is there any limit on the constitution amending power of parliament? In this connection, reference may be made to the constitution, which states: "No amendment of the constitution shall be called into question on any ground in any court. And clause 6 of the same article says: For the removal of any doubt it is hereby stated that there is no limitation whatsoever on the powers of the Majlis-e-Shura (parliament) to amend any of the provisions of the constitution". [37]

Prima facie, the courts are not empowered to enquire into the vires of a constitutional amendment. They can only interpret a constitutional provision; they cannot invalidate it. But does it mean parliament can change the federal character of the constitution, abolish the parliamentary form of government or deprive citizens of their fundamental rights including the right to life simply by passing a bill by a two-third majority? If it can do so, parliament is sovereign.

This, however, is not the case. While giving parliament the power to alter the constitution, the constitution uses the word "amend". [38]. The legal meaning of the 'amend' is to make a minor improvement whether it is made through alteration or deletion so this is the job of the parliament but it is pertinent to mention here that the parliament in the grab of the amendment has got no write to 're-write' the constitution other wise it will be against the true and the legal meaning of the amendments.

"Problem may arise if the judiciary declares a piece of legislation -- ordinary or constitutional -- invalid and parliament refuses to abide by the judicial orders on the ground that the law in question is not unconstitutional. True, it is for parliament to legislate. But parliament itself cannot be the judge of the constitutionality of laws passed by it. This is for the judiciary to determine. Therefore, parliament should accept the judiciary's interpretation of the constitution". [39]

1.5.1 Summary

"The function of the judicial review is to act as a check against the excess of power vesting either in legislature or in an administrative functionary. If a law is enacted by the legislature which goes beyond its assigned field in the constitution, the same will be declared by the apex court as ultra vires. If a public functionary or a statutory body exceeds its power allocated to it under the stature or the act of such functionary is mala fide or in violation of the principle of natural justice, the same may be judicially reviewed by superior courts declaring the same as ultra vires, with out law full authority and void". [40]

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[38]. *Article 239 of the Constitution of Pakistan 1973.*

[39]. *Zaidi, Hussain; 'The scope of judicial review' published in daily 'THE NEWS' on 19/08/2007.*

[40]. *Ibid*

Chapter No.2

HUMAN RIGHTS

2.1 INTRODUCTION

The western world was not aware of the concept of rights (as found today) until Thomas Hobbes (1588-1679) "Contract with leviathan" one may be deceived with the names of documents such as the Petition of Rights of 1628, the Bill of Rights of 1689, etc, to be manifestation of the freedom of parliament and democracy and not of human rights. The struggle of human rights continued in western world and torch was passed by Hobbes to John Locke (1632-1704) and to Montesquieu (1689-1755) who talk of human rights but with limitation and reservation.

Montesquieu was followed by Jean Rousseau (1712-1778) who finally said, "man is born free but everywhere he is in chains". This trigged a debates over rights. The glorious revolution of 1688, American Revolution of 1776 and French Revolution of 1789 influence these debates empathetically and two antagonistic points emerged.

Firstly, was the view point of Edmund Burke, who in his book, censured and did not welcome the "emergence of idea of rights". [1]

Secondly, was the view point of Thomas Pain who wrote his Treatise "The Right of Man" and applauded the "Change" and welcome the revolution impact. The strife continued and even today the matter is unsolved and many occidental delineate "Three Generations of Human Rights" namely;

First Generation Rights; (16th century and seventeenth century rights)

(Relating to life, fair trial, prohibition to torture etc)

Second Generation Rights; (18th and 19th century rights)

(Relating to social and economic matters as right to work, social security, education etc. [2]

Third Generation Rights; (20th and 21th century rights)

(Relating to environmental protection, development and right of self determination etc)

Hence, to date no concrete and solid term has emerged and according to many it is still "developing".

2.2 DILEMMA OF HUMAN RIGHTS IN PAKISTAN

"The question of human rights being 'ours' and 'theirs' would not even have arisen and politics not skewed our thinking. Certain things are plain enough; every human being feels pain, every one needs food and health; every one needs clear drinking water; every one needs medicine; every one needs freedom from fear- in short, people want a healthy and happy life. Put like this, few would disagree with these imperatives? The trouble is that when it comes to happiness, we enter the realm of the intangible. that is where people of one culture can easily say that the pursuit of happiness entails the liberty for girls and boys to dance together while another culture may deny this in the name of what it regards even greater gods—religion, morality, the well being of society; the sanctity of individual values and so on". [3]

The condemnation of human rights as 'western human rights' is based on three kinds of arguments. The government make them for purely political reasons. They want to continue imprisoning people; they are not prepared to stop little children working in the sub human conditions; they do not want pressure upon them, so, for all these reasons they come up with the slogan that the west is talking only about 'western human rights'. Others who use the same slogan are ideologically committed to different ways of perceiving reality. This is the toughest question of all. What is one to say to a Hindu committed to sati? A western individualist who believes that providing a home for little children is less important then creating more money? What universal criteria can one invoke in cases of genuine and sincere commitment to values which may increase unhappiness to individuals or societies?

"In all sincerity, there is no satisfactory answer. If liberal humanists were to place their cards on the table, they would have to concede that they do, indeed, believe in the superiority of their values. What they do so, however, is that they believe in moral relativism—i.e. any one can believe in ay kinds of values. This is a pragmatic tactic, hypocrisy or confusion. What ever it is; it does not work those who believe in liberal values must confess to doing so and, In so far as these are also western values, acknowledges this fact. Personally I believe, our interaction with the west has created, at least in some people, certain sensitivity toward egalitarianism, rights of women, majority decision making and the rule of law. There is no need to deny the same. If the rights we are talking about concern these areas we must not hide behind west-bashing or looking for dubious historical roots for thee modern ideas. This is not

to say that ideas like these have never occurred to oriental thinkers in the past. They have indeed, but we who advocate them got these ideas from the west and not from the sources which only a very competent historian can dig out for us". [4]

But the reasons for west bashing are complex. It is only unscrupulous state functionaries are ideologically committed people who react to the west's advocacy of human rights. People who are sensitive to human suffering also condemn the west. They do list for reasons which a reading of a political writings of the famous linguist Noam Chomsky makes clear. Chomsky raised the issue of East Timor in an article entitled: 'the great power and human rights'[5]. In this article he brought out the fact that "Indonesia massacred thousands of people in east Timor from 1975 onwards. The west according to Chomsky, kept silent. It was only by 1994 that some conscientious western intellectuals, notably Chomsky himself, forced the public opinion to take notice. In Muslim countries the west's indifference toward Bosnian Muslims was a similar case. In Pakistan the indifference of the west toward the plight of Kashmir is a live and emotionally charged issue. What people say is this: 'the west only reacts in the name of human rights when it is its interest to do so. It is really a power game which should not fool us'. In short, because the issue of human rights is used to get political mileage in the west, as it is the rest of the world, people condemn the very idea of human rights".

But surely this is wrong. If one look at the state of human rights in Pakistan in 2009 as issued by the human rights commission of Pakistan one finds that "there are things which nothing can excuse. For instance, 102 women and 52 men are killed in the name of honour. They either had, or were or suspected of having, illicit sexual intercourse and were killed brutally. Men were hacked to death with an axe or knife. No ideology condemns this cruelty. This is not a question of 'Asian values'. The law of the land and Islam both requires due process of law but this was denied. If one were to change this concept of honour, to undermine it, one would do favour to countless people. There can be no grounds for claiming that it should be allowed to continue in the name of honour or authentic Sindhi or Pukhtoon culture or what ever". [6]

"In Hyderabad central jail prisoners were kept blind folded, in fetters and hand cuffs. Boys and personable young men were raped and prisoners were tortured. The poorest prisoners were not even produced in the court for as long as five years. There were unauthorised jails and torture cells in them, as well in authorised one, was so wide spread that over 20 deaths in jails were reported. The case of Bihar Lal, an Indian national, was cited in the reports among

other. Now this is not a question of 'Islamic or 'Pakistani' values. It is simple one of the abuse of authority. So, if one desires that prisoners should not be had cuffed or tortured, one is simple demanding a universal right and not a 'western right''. [7]

Let us now come to a more sensitive issue. First, child labour. An ILO survey report that ''3.3 million children work in Pakistan. Many work 56 hour or more per week and for a pittance. Since these unprotected children are in contact with grown ups they are beaten, abused and some times raped. Some are sold as sex slaves and some ends up in foreign countries as virtual slaves". [8] What concept of national interest--- evens the necessity to sell carpets---excuses this crime against innocent children''? How is it 'western' to condemn these out rages? This is universal issue and if the west woke up too it before us, so much the better for western children.

Even more controversial are issue about women and religious dissidents. ''In 2009 there are more then 5000 divorce cases pending in the family courts and 70% women in Lahore's protected institute suits seeking dissolution of their marriage. In the name of religion some authoritarian people want to take away the right f the women to choose their husbands. There was a well published 'Saima Waheed case' whose father Waheed Ropri would not allow her to marry the man of her choice. The Lahore High Court agreed with the Ropri but the SC reversed the judgment. Even worse is the case of the women who cannot escape from a bad marriage. Zainab Noor, whose case even the PM knew, get her marriage from her sadist father annulled in 18 months". [9] Further, women can be raped and then accused of fornication. This law imposed by General Zia, made women lives in secure. One feels that such discrimination, or rather cruelty, should be ended no matter whatever those who finish it as westernise people or not. To me it appears as a pat of universal values, which are denied because the power full always denies rights of the power less.

The intolerance towards Ahmadis and religious dissidents is defended with reference to Islam. "In reality, however, people use sections 295-B, 295-C, 298-B and 298-C of the PPC and the blasphemy laws to take personal revenge. In 2009, there were 658 Court cases against Ahmadis under the anti Ahmadis sections. Another 144 cases were also registered against them under the blasphemy laws. Whether the laws are right or wrong from he purely religious point of view can only be discussed by a scholar of Islam". [10] There are, indeed, Islamic scholars who have disputed the grounds on which these laws are based from the Islamic point of view. But leaving that issue, can it not be said that if a law can be misused---- is regularly

misused--- it causes more harm than good? Although all laws can be misused but why added to that list? Misuse of law is surely a universal issue. One would like to close as many loop holes as possible. Thus, the non interference of the state in religion too can be seen as a universal human right.

"The point, therefore, is that most human rights are universal. We must support them because people need them. As long as any one is in pain is in danger, as long as there is poverty and squalor, as long as power is used to oppress---so long does the concept of 'human rights' remains valid. Whether supported by the west or not, human rights are necessary for our own people who are shackled and fettered and starved. And to that extent the west support the human rights, however hypocritically, we must thank the west. Indeed, we must thank any ne who supports human rights no matter who are and no matter why". [11]

2.3 HUMAN RIGHTS: ISLAMIC LAW PERSPECTIVE

The Islamic Law, right from its outside, not only gave full-flagged developed concept of the Human Right but also provided judicial and social mechanism for its accomplishment. The judicial mechanisms to this end are legal remedies and decrees of Court, whereas 'social mechanism' is inculcating ethical values of members of Muslim society. These values enhance tendency in members of the Muslim society in furthering the cause of accomplishment of the rights granted by Islam.

Moreover, it is noteworthy that besides the 'judicial' and 'social mechanisms', concept of reward in the world hereinafter is also imparted which serves as an impetus in enforcement of the Human Rights. This is the reason that in fourteen centuries history of Muslim no NGOs. IGO's or such other organizations were required for enforcement of the Human Rights is an Islamic State.

"The Human rights in Islamic Law are innumerable and unlimited. This characteristic of the Islamic Law is surely different from the Western philosophy of Human Rights that tend to state only few 'recognized Human Rights'. From this, it would be erroneous to infer that in Islamic Law Human Rights has an imperfect shape or form. In Islamic Law, the orientation is totally different and all the rights are divided into three broad categories namely:

1. Rights of God.
2. Rights of People.

3. Rights of Individuals.

Many writers use the terms 'Public Rights' alternatively with the 'Rights of God' and rightly state.

> "Rights of former class (i.e. Rights of God) are such as involving benefit to the community at large and not merely to a particular individual. They are referred to God because of the magnitude of risks involved in their violation and of the comprehensive benefit, which would result from their fulfilment". [12] It is not to be understood that those rights are called rights of God because they are of any benefit to God for He is above all wants, nor because they are the creation of God for all rights are equally the creation of God who is the Creator of everything. The rights of God correspond to public rights and since the Mohammedan Law regards the observance of obligatory devotional acts as being beneficial to the community there is no difficulty in describing all rights of God as 'Public Rights.

Abdur Rahim beautifully elucidates the difference between the two in the following words.

> "What chiefly distinguishes such a right from a right of man or a private right is this, the enforcement of the former is a duty of the state, while it is at the opinion of the person whose private right to infringed whether to ask for its enforcement or not. It may be that certain acts, which give rise to a public right, affect some particular individuals more than the other do but that fact will not entitle those individuals more to condone the acts of the offender. It is, however, entirely at the discretion of the individual injuriously affected by the infringement of a private right, whether to pardon the wrongdoer or to insist upon redress". [13]

To illustrate the Human Rights in Islamic Law, let us cite some of the examples from the Holy Qur'an and Sunnah [especially from the Farewell Sermon of the Holy Prophet (P.B.U.H)], "which is regarded as the first comprehensive charter found on the basic fundamental rights of man)". [14]

2.3.1 ***The right to life:***

The right to life is of supreme importance in Islam and severe punishment is prescribed for a person infringing this right. The right to life is one of the 'Right of People'.

''And do not kill anyone which Allah has forbidden except for a just cause... " [15]

The punishment imposed on its infraction is very serious and is put in the following words;

"And We ordained therein for them: Life for Life.... " [16]

Similarly, the Holy Prophet (P.B.U.H) in his Farewell Sermon said:

''.... Your blood and your property are as sacred as is this Day and this Month (i.e., 9th Zul-Hijja.... ''

The same "right to life is also envisaged in the Constitution of Pakistan, 1973" [17] and is a right which is of universal nature and all the nations and their people acknowledge it. Therefore "the Universal Declaration of Human Rights which is a manifestation of acknowledgment of Human Rights internationally declares that *'Everyone has the right to life''*. [18]

A cognate right to "the Right to Life is right of Private Defence, which has been provided in Pakistan Penal Code, 1860" [19]. It extends to cause grievous injury or even death (in case of imminent fear of death, grievous hurt, rape unnatural lust, kidnapping or abducting and wrongful confinement) f the person trying to deprive a person of his right to life unlawfully. This Right of Private Defence is not alien to Islamic Law; it existed right from the day one of Islam and has so much significance that a person fearing apprehension to life and in state of extreme duress may even utter word of infidelity.

2.3.2 ***The right to property:***

After the right to life, a lot of significance has been given to the right to property.

Allah says:

"And eat up not one another's property unjustly (in an illegal way)". [20]

In conferring right to property, Islamic law equally bestows non-Muslims with this right notwithstanding their religion, belief and status. Holy Prophet (P.B.U.H) while exhorting Muslim to be trustworthy and fair towards their brothers and to all members of a Muslim society said (on the eve of his (P.B.U.H) Farewell Sermon):

"He who is entrusted with property belonging to another should deliver his trust to whom it belongs".

Likewise, on the eve of Battle of Khyber, a shepherd who was looking after the cattle of Jews against whom the Muslim were gathering to fight for the cause of Allah, came to Holy Prophet (P.B.U.H) and embraced Islam. He then asked for Holy Prophet's (P.B.U.H) permission in order to participate in the Battle. Holy Prophet (P.B.U.H) ordered him to first return the property (i.e. the cattle) of Jews and thereupon join the Muslim army for the holy war. Hence, this is the way in which extreme reverence is shown towards other right.

No emergency, martial law or dictatorship can suspend or revoke the rights given by Islam to its subjects. No more serious emergency than State of war can be conceived and even then as illustrated above the rights of, not only members of a Muslim society but those of enemy are also kept intact. This is the epitome of preservation of rights, which sets both: highest standards of all times and examples to be followed.

"This right too, is accepted universally by all civilized societies and is, therefore, rightly incorporated in the Constitution of Pakistan". [21] In the Universal Declaration of Human Right, 1948, it is provided that "everyone has a right to own property of which he cannot be deprived arbitrarily". [22] In Pakistan Penal Code, "the right to private defence is also extended with respect to protection of property". [23] It gives a member of Pakistani society a right to cause grievous hurt or even death for preservation of his property.

2.3.3 ***Right to law full retribution (Qisas):***

Lawful retribution is a broad-based principle of Islamic Law and all the chaos and lack of stability observed in the extant Muslim world are due to non-observance of this principle. Allah has, repeatedly, in His Book, highlighted the significance and utility of this principle. For example says.

"And there is (a saving of) life for your in Al-Qisas, O' men of understanding that you may become pious". [24]

Establishing the broad principle in unequivocal terms. He says:

"And we ordained there for them: Life for Life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal". [25]

This right of retaliation has neither developed nor incorporated in Islamic Law but could be fund instilled and imbibed from the very first day, in a society where no such concept had its roots and whole of the tribes were used to be killed against a single person. This shows originality of Islamic Law.

The right to lawful retaliation provides in itself a complete operative mechanism of justice. This is one of the characteristics of Islamic Law by virtue of which it bestows upon its subjects such rights as would not be even anticipated by any other legal system or religion.

2.3.4 ***Right to equality before law:***

Equality before law is the hallmark of Islamic Law. This right derives its legality from the following:

Allah says:

"O mankind! Be dutiful to your Lord. Who created you from a single person (Adam), and from him (Adam) He created his wife, and from them both, He created mended women, both". [26]

And He says:

"O you who believe! Al-Qisas is prescribed for you in case of murder: the free for free, the slave and female for female". [27]

Holy Prophet (P.B.U.H) said (on the eve of Farewell Sermon);

"All of you are equal as the finger of a hand".

He also said:

"The Arabs are not superior to non-Arabs, nor the non-Arabs to the Arabs".

Yet, may more explicit texts of Islamic sources of prime nature can be quoted on the point to establish it significance, it seems apposite to see how far this principle is inducted in your Constitution. Our Constitution's chapter dealing with the Fundamental Right states:

"All citizens are equal before law and are entitled to equal protection of law. There shall be no discrimination on the basis of sex alone". [28]

Likewise, this right given first by Islam is now followed as a principle of universal nature as the Universal Declaration of Human Rights 1948, phrases it as:

> *"All are equal before law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against by discrimination".* [29]

2.3.5 ***Right to personal freedom:***

This right, which is thought by many to be a concept of recent times, was indeed, present from the very beginning of Islam.

Allah says:

> *"He it is, Who has made the earth subservient to you, so walk in the path, therefore, and eat of His provision, and to Him will be the resurrection".* [30]

And He says:

> *"O you who believe! Avoid much suspicion; indeed some suspicions are sins".* [31]

Holy Prophet (P.B.U.H) in his life had given tacit approval of this right. Dr. Nasim Hassan Shah, in his book stated it in the following words.

> *"Inferred from sunnah by Imam Khattabi and Imam AbuYusuf. A Tradition is reported by Abu Daud to the effect that some persons were arrested on suspicion in Medinah in the time of the Holy Prophet (P.B.U.H). Subsequently, while the Holy Prophet (P.B.U.H) was delivering the Friday Sermon, a Companion enquired of him as to why and on what grounds had these persons been arrested. The Holy Prophet (P.B.U.H) maintained silence while the question was repeated twice, thus giving an opportunity to the prosecutor, who was present there, to explain the position. When the question was put for the third time and it again failed to elicit a reply from the prosecutor, the Holy Prophet (P.B.U.H) ordered that those persons should be released. On the basis of this Tradition, Imam Khattabi argues in his 'Mualim-ul-Sunnan' that Islam recognises only two kinds of detention.*
>
> *(a) Under the orders of the Court, and*
> *(b) For the purpose of investigation.*

There is no other ground on which a person could be deprived of his freedom". [32]

Umar (RA) has said:

"In Islam no person can be put behind the bars except in accordance with the law". [33]

The Constitution of Pakistan, 1973 [34], writes down that no person should be detained and arrested unlawfully and whoever is detained or arrested must be produced before a Magistrate within twenty-four hours.

"The Universal Declaration of Human Rights 1948, put the principles dealing with personal freedom and protection against arrest, detention and unlawful confinement". [35]

Freedom of religion, rights of minorities, protection against wrongs of others, freedom of opinion, of association, of privacy, right to disobedience of sinners and ingrates, and the right to reputation, to inheritance, to fair trial etc... are some other examples of the human rights provided in Islam and have same binding force as those mentioned above. Family members, right are as given a lot of importance, and one can find a full range of these rights. From right of maintenance for wife to inheritance rights evince the social orientation of Islamic Law. Non-Muslims and the persons who have contracted with Muslim State for asylum have their human rights, which are considered as sacred as those of Muslims.

Besides, these legally enforceable human rights, there are rights which are not enforceable through judicial medium and are included in moral and ethical values of Islam. For example, in Islam one neighbour has right over another, by virtue of which neighbours are bound to take care of each other and share each other's jubilation and woe. These rights cum values may not be enforceable by a judicial authority but will be rewarded or punished (as the case may be) in hereinafter. The rights-cum-values are not based on rhetoric or speculations: they are derived and based on the authentic source of Islamic Law.

2.4 CONCEPT AND IMPORTANCE OF HUMAN RIGHTS:

2.4.1 Concept in Human Rights

The world has no future unless the recognition of human rights is embedded at the national, regional and international level. Human rights are concerned with the protection and the

promotion of the well being of individuals by ensuring respects for rights and dignity of the individual.

2.4.2 ***Basic Features of Human Rights***

- "The basic features of human rights are;
- The people have rights simply because they are human and they, therefore, are entitled to lead a human and dignified life. Human rights seek to ensure the conditions that make life human and enable people to live together in harmony and mutual respect.
- Human right are universal, applying equally to all people around the world. Governments are expected to afford equal human rights protection to all, regardless of differences in race, colour, and language, sex, national or social.
- Additional protection may be accorded to meet the specific needs of individuals who are in a disadvantaged or vulnerable position, for instance, people of backward, poor communities, women, children, disabled persons, prisoners, etc.
- Human rights include the fundamental principles of humanity. Some rights, such as right to life, dignity of a man, freedom from torture are absolute meaning thereby cannot be interfered with under any circumstance. However, for the other human rights, under exceptional circumstances, interference with their exercise may be possible;
- Human rights are primarily the rights of individuals. They address directly the relationship between State and individual. Every human being has a claim upon his State as a matter of right, not as a result of some special favour or privilege. State is obligated to the greatest extent possible to satisfy the claims resulting from these rights". [36]
- The promotion and protection of human rights is not confined to the boundaries of State. Human rights hold each nation responsible for respecting and promoting them. Individuals, State and the international community have a responsibility to uphold and to be concerned about human rights across frontiers in any place and at any time.

2.5 Classification of Human Rights

Human rights are classified into three generation of rights. The cold war polarized the world, with Western Bloc prioritizing what have been called 'first generation' rights, which include civil and political rights, that is, the right to life, liberty, security of person, protection against torture, a fair trial, assembly, association, speech, movement, etc. Whilst the socialist Bloc stressed the importance of 'second generation' rights, which include the economic, social and cultural rights, that is, the right to health care, education, food work, shelter, social security, etc. First generation rights appear to be capable of immediate implementation by States, while second generation rights require only progressive compliance as permitted by the economic status of the State.

The obligations imposed by the civil and political rights are negative, that is, the State is not to kill, torture, arbitrarily detain, etc. While economic, social and cultural rights place the States under a duty to take positive step, that is, to provide its citizens with healthcare, education, housing, employment.

"Recently, a new category of human rights called 'third generation' rights have emerged. These are collective or group rights, which include the right to development, right to a healthy environment, right to peace, right to self-determination, right disaster relief assistance, and rights of indigenous peoples. These rights require States to cooperate with each other for their effective realization". [37]

The extent to which these third generation rights impose positive legal obligations on States is debatable, but they are of considerable symbolic value and reflect the growing importance of many Third World Nations which by reason of colonization, had been unable to influence the drafting of the International Bill of Human Rights.

2.6 Importance of Human Rights

"The importance of human rights became widely recognized after the atrocities of the Second World War. The promotion and protection of human rights became a core objective of the United Nations. The UN Chapter established general obligations that apply to all of its Member State, including respect for human rights and dignity". [38] The Vienna conference of 1993 has taken great stress on human rights and dignity and stated that it is the responsibility of each and every civilised state to adhere to these human rights.

"Reform of the development system within the United Nations emphasizes the importance of mainstreaming human rights into all UN activities". [39] The UN Secretary-General at the 1999 session of the UN Human Rights Commission, said; 'promotion and defence of human rights is at the heart of every aspect of our work and every article of our Charter; A new meaning of development has been evolved which is respecting people's human rights....all of them; every single one of them.

"Human rights are important because without them, there could be no human dignity. Life without them would not be worth-living. They are important because there is a close relationship between respect for human rights and international peace and security. In the words of the preamble to the Universal Declaration, 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". [40] Human rights are built on the twin essential principles of justice and non-discrimination.

Human rights are one of the important determinations of the foreign policy of major Western powers. A former U.S Secretary of State proclaimed, 'Human rights are and will remain a key element in our foreign policy'. By resorting to a number of tools like diplomatic demarches, public denunciations, economic sanctions and other political measures, the United State tries to use it leverage in its bilateral relations with governments that have poor reports in respect of their human rights situation.

Some of the economically powerful States have linked development assistance to human rights conditions and others have resorted to the policy of imposing trade embargo to discourage human rights violations. In 1973, the US Congress linked foreign aid disbursements to the human rights performance of recipient countries. Similar efforts were also made at the same time in the foreign aid policies of the Nordic countries. The Helsinki Final Act of 1975 introduced human rights into mainstream of US-Soviet relations. The emerging trend reflected from such initiatives received a major boost from Carter's prominent public human rights diplomacy which started in 1977.

"By the end of the Cold War, human rights have become a regular and well-established part of international relations. International attitudes and practices have been transformed and the resources for national and international action are stronger than ever before". [41]

There is incorporation of human rights concerns into multilateral peace-keeping operations. "The link between human rights and international peace and security, which has been a central part of UN doctrine since the drafting of the Charter, has finally become a part of UN practice. UN peace-keeping operations in Haiti, Rwanda, EI Salvador, Cambodia, Mozambique, Somalia, Bosnia, Croatia and Guatemala had primarily human rights mandates". [42]

Violations of human rights committed by multinational corporations (MNCs) are a significant problem facing the international community and a number of such corporations have come under fire in recent years for human rights violations like environmental damage gravely threatening human health, destruction of indigenous peoples' habitats, inhumane working condition, forced labour, torture, arbitrary detention and killings. For instance, in Jota V Texaco, Inc. (1998), it was alleged that Texaco by improperly dumping large quantities of hazardous waste into local rivers was causing poisoning and other public health problems. In Beanal..v..Freeport McMoran, Inc. (1999), it was alleged that the defendant's mining operations in Java, Indonesia had destroyed the habitat and religious symbols of the Amungme people, forcing them to relocate.

"The prevailing legal framework has failed both to articulate the human rights obligations of MNCs and to provide mechanism for regulating corporate conduct in the field of human rights. In such a situation, the most effective multilateral approach would be to establish an international treaty that specifies the human rights obligations of MNCs and requires State to provide criminal, civil or administrative remedies for violation of those obligations". [43]

2.7 ***Summary***

The united states and some European human rights scholars places more emphasis on civil and political rights than on economic, social and cultural rights. They do not realise that poverty, insecurity and in stability breed human rights abuses. On the other hand, the government of the developing countries are trying to protect and advance the human dignity as a catch—phrase for asserting democracy and freedom, the west must enter into a meaning full dialogue with the east in order to arrive at a compromise to universalise the concepts and meaning of human rights.

It s the responsibility and duty of all the members of the international community to create the necessary conditions full the full realisation of economic, social and political rights and

fundamental freedoms. States should take national and international measures to remove all obstacles to the full enjoyment of those rights.

Because a very serious economic situation in many of the third world countries and the deterioting standards of living of their people, it is recommended that a study should be conducted to assesses the impact on human rights of the policies and policies and practices of the major international monetary fund, world bank and WTO. The study should especially focus on the question of the effect of structural adjustment policies and conditionality on the realization of economic, social and cultural rights in different countries, particularly in those that are experiencing the problems of implementation of structural adjustment programmes.

States should redistribute resources in favour of the human development priority areas such as health, education and infrastructure. The quality of programmes should be improved by making them more responsive to poor needy people. Legal system should promote legal equity and be accessible to every one. The ultimate goal should be to improve human development which encompasses human rights, equity, non discrimination, social in justice, solidarity, moral standards and ethnical principles.

2.8 THE ROLE OF THE APEX COURTS IN PROTECTING HUMAN RIGHTS

General

"The judiciary in a modern welfare state has to perform a vital role in the administration of justice. In this regard the protection of human rights has also become a concern for the judiciary. In Pakistan the courts, remaining with in the ambit of the constitution, have to decide disputes between the citizens, government and the public and the constitutional issues. The previous practice was that only the aggrieved party has to knock the doors of the justice through all legal formalities". [44]

However, recently the courts have taken upon them selves to proceed with the cases which could be of public interest. I this regard all the legal formalities are ignored. So in order to achieve the purpose the judiciary has to play a vital role in the administration of justice.

2.8.1 Instances of the cases rendered by the superior judiciary relating to human rights.

In Pakistan, the Superior Courts have always been vigilant to protect human rights and zealously safeguard the legal rights of the people. The subordinate Judiciary in Pakistan has

also played a very effective role in this behalf and thus the Judiciary as a whole has remained a great source in protecting the human rights of the people.

Following are some of the cases relating to the burning issues of human rights in which the Superior Courts of Pakistan have given verdicts for the protection of human rights:-

The case of "darshan masih" [45] opened a new chapter in the history of Pakistan for the protection of human rights. In this case the court examined the problem of bonded labour and concluded the proceeding by agreement of the parties concerned. The supreme court of Pakistan and the high courts of the provinces started to entertain cases relating to public importance involving human rights, environmental protection and enforcement of fundamental rights granted by the constitution of Pakistan under article 184(3) and 199 of the 1973 constitution. The higher courts widened its jurisdiction and recognized the inclusion of every citizen in the list of the aggrieved persons when the matter is of public importance and the enforcement of human and fundamental rights.

"The start of nineties saw the momentum in the cases of public importance and the SC took Suo Moto notices of human rights violations and issued appropriate directions and made it clear that no technical difficulties should prevent the court from deciding the cases of human rights violations". [46] The SC banned all the politically indulged activities in the educational institutions of Pakistan. [47] The judiciary is playing a very vital role in the current circumstances to protect human rights. In 1994 a news item appeared in the Daily Dawn that nuclear or industrial waste is to be dumped in Baluchistan and business tycoons are making attempt to convert it into dumping ground for waste nuclear and industrial materials which is hazard to the health of the people and also to the environmental and marine life of the region. The SC took notice of it and wrote a letter to the daily dawn "to supply further particulars of the matter, the court also directed the Chief Secretary to seek inquiries from various departments and submit report to the Court. When such report were submitted before the Court and the Court found itself satisfied that no such plot has been allotted to any industrial tycoon for any such purpose, it ordered that no one will apply for the allotment of land for dumping for nuclear or industrial waste". [48] It directed to the authorities to be vigilant in checking the vessels and check that the allottees are not engaged in dumping such waste.

"The WAPDA was constructing a grid station in F-6/1 Islamabad the citizens protested against the construction of such grid station and the cutting of trees. They complaint to the WAPDA chairman and conveyed their apprehension that the construction of the grid station

would cause a serious health hazard to residence of the area particularly the children, the infirm and Dhobi Ghat families that live in the immediate vicinity. The presence of electrical installation and the transmission line would also be highly dangerous to the citizens particularly, the children who play outside in the area. It would damage the green belt and effect the environment". [49] The citizens wrote a letter to the Supreme Court, the Supreme Court held that in cases where life of the citizens is degraded, the quality of life is adversely effected in, health hazard are created, affecting a large number of people, the court in exercise of its jurisdiction under Article 184(3) of the Constitution of Pakistan 1973, may grant relief to the extent of stopping the functioning of factories etc, which create the pollution and environmental degradation. NESPAK was directed to submit report to the matter and the court directed the WAPDA to publicize such matter in future and entertain public objections.

The Benazir Government appointed Judges in the higher courts of Pakistan without the purposeful and meaningful consultation of the respective Chief Justices. The opposition, the press and some quarter of the public criticise the appointment of such judges in contravention of the procedure and guide lines laid down in the Constitution. Some leaders of the opposition called them 'Jiyalays' and openly threatened to throw them out of the courts when came in power, Habib Wahab-ul-Khairi, a practicing Advocate challenged it in the Supreme Court. The court held "that even a member of the public is entitled to see that three limbs of the state, namely the legislature, the executive and the Judiciary acts not in violation of any provision of the Constitution which affect the public at large. The question raised of is of great public importance and this court is entitled to take cognizance of any matter which involve the question of public and human rights importance". [50] The court gave a remarkable judgment and laid down the procedure for the appointment of judges in the courts and held that the consultation of the Chief Justice of respective Higher Courts by the executives shall be meaningful and purposeful.

With the emergence of judicial activism the role of judiciary in protecting human rights has become very important and appreciating and it is now taking keen interest to safe guard common interest. The Prime Minister of Pakistan on his visit to Faisal Abad in the mid of 1997 arrested some public servants on his order and this was shown on TV and reported by all the News Papers. The Supreme Court took Suo-Moto notice of it and issued notices to the concerned quarters to explain whether a fair process has been followed to arrest the public servants. This action on the part of the Judiciary abstained the executive from misuse of power in future and was an example of Judicial Review.

Sectarian violence was erupted in the province of Punjab in the month of June 1997, the Chief Justice of Pakistan took Suo Moto notice of it "and issued notices to the interior Minister of Pakistan, Chief Secretary and Inspector General of Police to inform him that what measures they have taken for arresting culprits and curbing the sectarians violence". [51]

In the case of Civil Aviation Authority the court held that "the petition is maintainable as the requirements of Article 184(3) are complied with namely that the question of public importance with reference to the enforcement of fundamental rights is involved". [52]

The Chief Justice of Pakistan in the light of the Supreme Court decision of March 20, 1996 recommended five judges for the appointment in the Supreme Court but the Federal Government was reluctant to such appointment. A practicing Advocate namely Babar Awan requested the court "to take action in accordance with Article 190 of the Constitution of Pakistan 1973, the Supreme Court maintained the application and ordered accordingly". [53]

A controversy existed on the appointment of Chief Justice of Pakistan as the senior most judge of the apex has to be the Chief Justice. The validity of the appointment of the Chief Justice was challenged and the court held that "any deviation from the method prescribed under the constitution for the appointment of the high office of the Chief Justice of Pakistan would give rise to the infringement of the citizens to have free, fair and equal access to an independent and impartial court". [54]

Gang Rape.-- In a case in which only gang rape and the property rights of females were in particular involved, the Court also discussed various rights conferred by the Constitution and laws on female section of our society. It was observed "that for the eradication of the violation of the fundamental rights as well as for their enforcement, the Court can direct the amendments in law and enactment of necessary legislation and discussed a number of Articles of the Constitution of Pakistan, 1973 in the following manner". [55]

The Constitution provides that "no child below the age of fourteen years shall be engaged in any factory or mine of any other hazardous employment". [56]

The Constitution provides "Equality of Citizens". [57]

"There shall be no discrimination on the basis of sex alone". [58]

"Nothing in this Article shall prevent the State from making any special provision for the protection of women and children". [59]

Another Article of the Constitution relates to the "non-discrimination in respect of access to public places". [60]

Another Article of the Constitution provided that "no citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth". [61]

The Constitution provides that "steps shall be taken to ensure full participation of women in all spheres of national life". [62]

Another Article of the Constitution provides that "the State shall protect the marriage, the family, the mother and the child". [63]

The Constitution provides that "to makes provision for securing just and human conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment". [64]

Another Article secures the "well being of the people irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employee and landlords and tenants". [65]

Another Article ensures the "basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as

are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment". [66]

Brick-kiln--Bonded Labour--Detention.

The Supreme Court of Pakistan not only protected the fundamental rights of the brick-kiln workers but also opened new vistas of public interest litigation based on human rights in Pakistan and ever since, the Superior Courts, utilizing Constitutional provisions, have taken significant strides in the fields of human rights, environment protection and public interest litigation.

In the case of "Darashan Masih", [67] the then Chief Justice of Supreme Court, on receipt of a telegram, while taking cognizance of the matter under Article 184 (3) of the Constitution, directed for the release of detenus, including women and children belonging to brick-kiln labour of Christian community and observed as under:

The system of bonded labour not only in Brick-kiln industry but in all walks of life be abolished and the labour be freed and discharged from all their obligations to render bonded labour.

The ADVANCES and PESHGIS already made and all rights and liabilities accruing there from should stand extinguished.

Giving and receiving of all ADVANCES (PESHGIS) be stopped and made an offence punishable under the law.

Prohibition against CHILD LABOUR should be strictly enforced inter alia, in the Brick-kiln industry.

In compliance thereto, the Government of Pakistan has promulgated the following enactment:

1. "The Employment of Children Act". [68]

2. "The Bonded Labour System Act". [69]

Environmental Pollution in Baluchistan. --The Supreme Court, having noticed a news item in a daily newspaper, "that nuclear or industrial waste was to be dumped in Baluchistan which was in violation of Article 9 of- the Constitution ordered that, no one will apply for allotment of plot, being allotted, for dumping nuclear or industrial waste". [70] Supreme Court further gave a guideline for allotment of plots in the area.

Irregular appointments in Government Departments.—"While inquiring into various complaints of violation of fundamental human rights, it has been found that _the Federal, Government, Provincial Government, Statutory Bodies and the Public Authorities have been making initial recruitments both ad hoc and regular to posts and offices without publicly and properly advertising the vacancies and at times by converting ad hoc appointments into regular appointments". [71] The Court declared that this practice is prima facie violative of the fundamental right (Article 18 of the Constitution), guaranteeing to every citizen freedom of profession.

Solitary Confinement/Torture.-- The Supreme Court observed that "the solitary confinement obviously amounted to the torture and confession is not obtained while under such detention is not voluntary". [72]

Inheritance--Co-share--Rights of Female.--It was held that "the rights of illiterate and deprived female population of the country should be protected in respect of property and inheritance as the brothers do not give share to their sisters in inheritance of their father. Further the matters relating to the contracts which do not contain enough legal safeguard and are against the public policy, were discussed". [73]

Public Interest Litigation.-- The Supreme Court while discussing the question relating to its jurisdiction under Article 184(3) held that "this Article confers jurisdiction on the Supreme Court concurrent with that of the Nigh Courts, regarding enforcement of the constitutionally guaranteed Fundamental Rights and held that the fetters of locus-standi, applicable to High Courts, do not apply to the Supreme Court in this jurisdiction. In the light of this judgment, primarily the Supreme Court has made a considerable headway in the fields of human rights, environmental protection and public interest litigation in Pakistan". [74]

The Supreme Court observed that:--

> "The intervention of the Election Commission which is certainly not a judicial body, in the operation of political parties is, therefore, unwarranted and unreasonable restriction, violation of the fundamental right in question". [75]

It was further observed that:--

"In case of the violation of the fundamental rights of a class or a group of persons who are unable to seek redress from a Court the "traditional rule of locus-standi " can be dispensed with and procedure available in public interest litigation can be made use of, if it is brought before the Court by the person acting bona fide". [76]

Burden of Proof.—"In Suppression of Terrorist Activities (Special Courts) Act, 1975 there was a provision of law, where the burden was shifting upon the accused to prove his innocence which was disapproved by the High Court and Supreme Court of Pakistan". [77]

"The public interest litigation can be initiated for judicial redress for public injury by a person not personally hurt". [78]

Going abroad and Getting Permission. The Supreme Court observed that "the fundamental right of a citizen to proceed abroad and get a passport, to travel cannot be denied. However, undoubtedly, to travel abroad could be barred if it was shown that the applicant was going abroad to meet the enemies of the country and his foreign visit could endanger the security of the State or was against public interest". [79]

Admission in Medical Colleges on Discrimination of Sex.—"The Supreme Court observed that on account of mere discrimination of sex (Female), admission in medical colleges cannot be refused". [80]

Inheritance of Land by a Lady.-- In a case relating to the inheritance of female, the Supreme Court granted leave to appeal and ordered that "petitioner be provided with legal assistance through engagement of a competent counsel at State expenses". [81]

Liberty of Choosing Profession.--The Supreme Court held that "in Islam human beings are allowed liberty of choosing what is best for them. The Court suggested for amendment in West Pakistan Press and Publication Ordinance, 1963". [82]

Show Cause Notice/Hearing.-- The Supreme Court held that "prior notice and right of hearing are basic Islamic rights of a person and observed that "cantonment" employees would stand at par with other employees in such matters and there can be no valid reason for creating any distinction between the employees". [83]

The Right of Appeal in Laws of Forces.—"The right of appeal under Pakistan Army Act, 1952, the Pakistan Navy Ordinance, 1961 and the Pakistan Air Force Act, 1953 was allowed". [84]

Zina-bil-Jabr.--In a case of Zina-bil-Jabr; the Supreme Court has not only decided the case but also "ordered for protection of illiterate poor women in rural society and directed for promotion of social justice and eradication of the social evils in rural areas in accordance with tenets of Islam. The Supreme Court emphasized the extreme urgency in initiating social uplift programs in rural areas". [85]

Power to commute the Sentence of Death by the President.---The question before the Supreme Court was that whether Article 2-A which was inserted by President's Order. No. 14 of 1985 in Constitution of Pakistan, 1973 and made a substantive part of the Constitution, has resulted in denuding the powers of President, of commuting the sentence of death conferred on him by Article 45 of the Constitution. The Supreme Court held that "the President had no such power to commute the death sentences awarded in matters of Hudood, under Qisas and Diyat Ordinance. The power of pardon in such cases only vests with the heirs of the deceased". [86]

Laws Applicable to Federally Administered Tribal Areas.-- The Peshawar High Court rendered a landmark judgment in which the "special criminal and civil laws applicable to the Provincially Administered Tribal Areas of the N.W.F.P. were declared to be violative of the Fundamental Rights". [87]

Laws in Tribal Areas of Balochistan.—"The matter relating to discriminatory nature of the special Criminal and Civil laws applicable in the Tribal Areas of Balochistan were brought before the High Court at Quetta and the Court declared these laws as violative of Constitution". [88]

This judgment was later on upheld by the Supreme Court of Pakistan in the case of Government of Balochistan...v...Azizullah Memon and 16 others. [89]

Public Hanging.--In the matter of public hanging of criminals sentenced to death for commission of heinous offences the Supreme Court took notice of the matter upon a telegram received from the Amnesty International and "declared public hangings to be violative of human dignity by Article 14 of the Constitution as a Fundamental Right". [90]

The concept of equal rights of man and woman is not being respected and the women are still victim of gender inequalities in the Society. The violence of human rights against women, in any form through exploitation or discrimination, is manifestation of gender injustice which must be discontinued. The general justice should be developed as way of life and for proper

protection of human rights, the human consciousness must be developed towards the general justice.

The Superior Courts of Pakistan also took Suo Moto notices in number of high profile cases of human rights violations like Mirawala case (gang rape), Mianwali case of Wanni and Shaista Almani case of marriage by choice. It is due to the interference of Superior Courts coupled with the efforts of media and N.G.Os. That graph of such cases is coming down. In the past, such cases of grave human right violations were neither reported nor noticed. Awareness of rights through education and media has accelerated and eased the work of Superior Courts to check such violations therefore the role of the educators, press and media personnel and N.G.Os has tremendously increased as they are responsible for the awareness of these rights. I would commit injustice if I do not appreciate the positive role of media in this respect, vis-à-vis the role of the Judiciary. Education in human rights is an essential instrument of liberation and source of awareness: The educators should take indicatives and accept the responsibility to ensure that education contributes to the promotion of equity, peace and the universal realization of human rights.

The new millennium is the millennium of human rights in which the civilization of the individual as well as of the nation, would be judged on the touchstone of human rights to eradicate social and economic injustices. In this direction, the Government of Pakistan under the valiant leadership of General Pervez Musharraf, President of Pakistan, has taken effective steps towards the realization of human rights in the economic, social and political spheres and has generously and zealously protected the rights of disadvantaged classes of Society like women, children, labour and the disabled. The women seats in the National and Provincial Assemblies and in the Senate have been increased. Women have also been given sufficient representation in the local bodies. The right of peace of the people, has been protected by curbing terrorism in the country. The right to vote on attaining majority, i.e. 18 years has been recognized. The first Convention in the history of Pakistan on `Human Rights and Human Dignity' was held in 2000 and the then regime having taken effective measures in the field of human rights rendered valuable service to the people, much more to that of any other Government in the past.

The conclusion is that Human Rights violations cause general unrest and lead towards greater injustice in the society as a result of which happiness in life disappears. The global order today marches towards the sustainable foundation of just development with a purpose to restore peace and prosperity to the world community. The Government of Pakistan adheres to its pioneer commitments in supporting the globalization of Human Rights and adopting appropriate initiatives for bringing peace, justice, democracy and prosperity to the nation.

2.9 Summary

The role of the Judiciary in protecting human rights is purpose oriented and should be confined to the emancipation of justice to the poor, down trodden and the common public. The judicially must be careful to see that under the guise of redressing the public grievances of human rights it does not encroached the sphere reserved by the constitution for the executive and legislature. As the courts in Pakistan are burdened, so, it should not allow its process to be abuse by the politicians and persons acting malafide. The emphasizes of the Court must to be vindicate the cause of justices and not the personal gain of any individual. The judiciary must activate itself further with bonafide intention to redress the public as it is the last ray of hope for the people of Pakistan. Injustice creates unrest and the solution is the vigilant and active judiciary which is to make socio-economic justice available to all. The parties involved should realize the purpose and co-operate which each other.

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Chapter No.3

JUDICIAL REVIEW AND JUDICIAL SYSTEM OF PAKISTAN

3.1 THE JUDICIAL REVIEW AS A CHECKS AND BALANCES

The arguments against the judicial activism are of two types: legal and political. We begin with the former.

"The basic legal argument against judicial activism is that it runs counter to the principle of trichotomy of powers and sovereignty of parliament as contained in the constitution of Pakistan. The principle of the trichotomy of powers provides that the legislature, the executive and the judiciary have their powers and functions defined in the constitution and it will amount to constitutional impropriety if any organ oversteps its jurisdiction and interferes in the functions of the other". [1]

It is pertinent to mention that although the constitution of Pakistan 1973 does confer the separation of power among the three pillars of the state but it is to be noted that it is not in as water tight compartment, as a matter of fact the number of the judges of the superior judiciary is to be fixed by the parliament and like wise the court has got an ample powers to done away with the laws passed by the parliament.

The Constitution provides that "no court shall have any jurisdiction except conferred on it by the constitution or any ordinary law". [2]. However, in case of a dispute regarding the jurisdiction it has to be solved by the superior judiciary, although the parliament has got the power to limit the jurisdiction of the superior judiciary but it is it self subject to judicial review by the superior courts.

The doctrine of the judicial review is being exercised by the supreme court of Pakistan under article 184(3) of the constitution of Pakistan 1973, which empowers the Supreme Court to take suo motu action if there is a question of fundamental rights and it relates to the public importance.

The Constitution empowers the Supreme Court to "issue all such directions, orders and decrees, as it deems necessary, and secure the attendance of any person and production of any document for doing complete justice in any matter before it". [3] Under the Constitution, "all executive and judicial authorities shall act in aid of the Supreme Court. [4]

There is a widespread misconception that parliament in Pakistan is sovereign. Rather sovereignty is vested in the constitution. An act of parliament is valid only if it does not conflict with the constitution. If a dispute arises as to the validity of an act of parliament or an executive order, it is for the superior judiciary to decide. Having said that, it does not mean that the judiciary's power to interpret the constitution is untrammelled. Rather it is also limited by the constitution. The courts cannot declare any action which is manifestly unconstitutional — such as abrogation of the constitution — to be constitutional and thus valid. Similarly, the courts cannot assume the power of amending the constitution." That power is exclusively vested in the legislature under the constitution". [5]

It was held by the Supreme Court in State versus Zia-ur-Rahman and others that: "In the case of a Government set up under a written Constitution, the functions of the State are distributed among the various State functionaries and their respective powers defined by the Constitution.... It cannot, therefore, be said that a Legislature, under a written Constitution possesses the same powers of 'omnipotence' as the British Parliament. Its powers have necessarily to be derived from, and to be circumscribed within the four corners of the written Constitution." [6]

Although the parliament has got the power to amend the constitution by 2/3rd majority but such amendments must be with in the four corners of the constitution other wise it is to be declared as null and void by the SC. Thus through amendments only minor Changes can be brought with in the constitution. Thus the parliament has got a right to name the SC as a federal court and vice versa but cannot make changes in the basic structure of the function of the SC.

The great dilemma with the court is that if they declare any act of the parliament as null and void then they are charged for being a third branch of the legislature and if they do other wise they are blamed for having a conspiracy with the politicians.

Another arguments against the judicial activism is that of political, it is stated by the politicians that when democracy establishes its roots in the political system of Pakistan and vows to root out the terrorism then it is the judiciary which weaken such forces.

The argument is a fallacy. Judicial activism is the effect rather than cause of ineffective role of both parliament and the executive. If the two organs of the state like the executive and the legislature had and have performed its role in the due course of law the SC would not have taken such actions, take the example of the recent sugar price hike, had the SC not interfered in the matter the rights of the people would not have been protected.

Secondly, the present government has not bothered to pass a resolution regarding the November 3 2007, act of General Pervaiz Musharaf as an un constitutional, it was only the supreme court of Pakistan who has declare November, 3 2007 act as unconstitutional and declare the act of the then general as unconstitutional otherwise the politicians would have not done so.

Thirdly, the PPP government had all along defended the NRO and there are a number of the politicians who had taken benefits from the same but it was the SC who had declared the NRO as un-constitutional.

Fourthly, the mutli-billion rupee Punjab bank scam should have been resolved by the executive itself rather than leaving it to the Supreme Court. Fifthly, it is a matter of fact that money worth billion of the rupees have stashed abroad so it was the SC who took the matter by itself. Finally, despite its commitment from day one, the PPP government has not repealed the seventeenth amendment to the constitution. Suppose the amendment is challenged in the Supreme Court for being in conflict with the basic character of the constitution. The SC would either validate or invalidate it for being incompatible with the basic character of the constitution. The decision either way will arouse criticism.

It is said that in western democracies, courts exercise judicial restraint and do not dabble into political questions. No doubt, in such countries political questions are normally not brought before the courts — the major reason being that they are settled at the appropriate forum.

However, in case no other remedy is available or works, then judicial intervention is the answer. An obvious example is the 2000 disputed presidential election in the USA, which was settled by the Supreme Court.

It is the politicians and not the SC which is the main problem, had the [politicians of Pakistan stick to its principles the SC would not have adhered to the judicial review.

3.2 ISLAMIC PERSPECTIVE OF JUDICIAL REVIEW

From the Shariah view point, the Quranic ordain that, "Those charged with authority among you" [7], in fact, establishes the Government authority of the Islamic polity, consisting on three main organs namely, Legislature (Majlis-e-Shura) which makes the laws in the light of Shariah; Executive (Emirate) which is responsible for the administration, and Judiciary, (Qaziah) which administers the justice.

The Islamic political philosophy emphasis for a political framework which characterized with harmony and coordination of these three organs. The Holy Quran says, "Hold fast, all together, to the covenant of God, and do no separate" [8]. Such integration requires the power-sharing policy among authorities i.e., legislature, executive, and judiciary. Of course, this principle seems to be embodied in the political and constitutional system as an attribute of Islamic state, as Holy Quran says, "...who (conduct) their affairs by mutual consultation..... [9] "and, "…..consult them in affairs….."[10] However, their functioning must be within the jurisdiction and limits provided for in Shariah. This state of affairs is, in fact the principle of check and balance of the Government power eventually for good governance, the basic theme of the welfare state.

Islamic state contemplates a truly representative Government based on doctrine of rule of law. Accountability of Umaraa (Rulers) to Ummah (people), is a basic feature of such political system. Ummah (people) has a right to keep a constant vigil on rulers' policies, activities and performance to keep them right. For this reason, Hazrat Abu Baker (R.A), the First Caliph of Islam, is reported to say that "If I do good, support me: if I err, then set me right... Obey me as long as I obey God and His Apostle (S.A.W.S), and if I withdraw from God and His Apostle (S.A.W.S) you withdraw from me, as in that case obligation of obedience on your part to me terminates. [11]" Second Caliph, Hazrat Umar (R.A) exhorted that "the Government is entrusted to me, and I am accountable for it before the people." [12] This concept of governance in an Islamic state finds its true meaning and justification where the state is acting within the framework of Shariah.

"History both profane and divine teaches us that as long as time and human nature exist, there will be issues to decide the causes to adjust." [13] Though the difference of opinion is referred as blessing, it turns out to be nuisance when resulted from abuse of power. Of course, abuse of powers is inevitable natural phenomenon particularly in matter of power exercising as "power tends to corrupt, and absolute power tends to corrupt absolutely". Therefore, such situation must be checked and resolved, otherwise the fabric of the political society will be scratched. Of course, conflict of opinions causing deadlocks cannot easily be resolved. Islamic political philosophy however is not devoid of the potential for the resolution of a dispute. For effective safeguard against possible disagreement among, or abuse of powers by the Government authorities, Shariah provides the guild line, termed as "Arbitration of Quran and Sunnah", the principle for the resolution of conflicts on the touchstone of Shariah.

Such idea is appreciated by the Divine Law and is enshrined, in the Holy Quran, int he sense that "O ye who believe! Obey Allah, and obey the Messenger, and those discharged with authority among you. Then, if ye differ in anything among yourselves, refer it to Allah and his Messenger, if ye do believe in Allah and the Last Day; that is best, and most suitable for final determination." [14] The last part of this verse shows that in case of a disagreement, matter requires to be decided in accordance with the Quran and Sunnah. This is the best option for ultimate resolution of conflicts among/between Governmental organs or between Governmental authority and individuals.

The Holy Prophet Hazrat Muhammad (S.A.W.S) was Sharia, Ameer and Qazi of the Islamic state of Madinah. In such capacity, he pursued the principle embodied in the above mentioned Quranic provision, for the determination of the differences, happened among Ummah, on the touchstone of the Shariah. He (S.A.W.S) was committed to resolve the conflicts among the peoples, in the light of Divine commands. The Madina Pact, a constitution [15], of the Islamic state of Madina, confirms this philosophy, in which among other matters, it was agreed by the parties that in case of any dispute, the matter will be referred to the Allah, al-mighty and Holy Prophet Hazrat Muhammad (S.A.W.S) for final determination. [16]

The Islamic history is evident of the fact that this principle was also practically formulated in Islamic state system. The differences [17] on the issues of return of Hazrat Abu Jandal (R.A), Abu Baseer (R.A), and Hazrat Ume Kalsoum (R.A) to their claimants were resolved on the touch stone of the shariah. In these controversial matters the holly Prophet (P.B.U.H) ruled out that the return of Hazrat Abu Jandal (RA) on the demand of his father and, of Abu Baseer (RA) on the demand of this two close relatives, is binding on Muslims in the light of the Treaty of Hudaibiya [18] and Quranic commands. In this regard the Holy Quran provides as, "Those who believed and emigrated....in the cause of Allah..... if they seek your aid in religion, it is your duty to help them, except against the people with whom ye have treaty of mutual alliance..."[19] Whereas the case of Ume Kalsoum (R.A) on the claim of her brothers, was dealt and return was refused in the light of Surah Mumtahinah which forbids the deliverance of a Muslim woman to non-Muslim. Here, the Quranic guideline goes as, "O ye who believe! When there came to you believing women refugees..... if you ascertain that they are believers, then send them not back to the unbelievers....."[20]

The same principle regarding the resolution of conflicts on the touchstone of Shariah, has had been followed by the righteous capliphs during their Khilafat, and subsequently by their successors as well. Once, Hazrat Umer (R.A) was disagreed for stressing the Muslims to minimize the amount of the dower money, and ultimately Khalifa himself review his command and withdraw it" [21], on the touchstone of the Holy Quran, which says, " ..... if ye had given.... a whole treasure for dower, take not the least bit of it back...."[22] Military action launched by Hazrat Amir Moavia (R.A) was alleged by a group of Shabha (RA) led by Hazrat Umro Bin Umbah (RA) on the ground that this action is contrary to the essence of the existing contract between Muslims and Christen tribe Bani Taghlub. Resultantly action was withdrawn [23] because it was not in the consonance with the provisions of Shariah that the contract must not be breached as the Holy Quran directs, "O ye believe! Fulfill (all obligations" [24]. The conquest of Samer Quand made by Qatebah bin Muslim was alleged on some formal irregularities amounting to the violation of the Islamic International law. It was challenged by Buddha citizens in the Court of Qazi Asaker who declared the conquest to be repugnant to the Islamic injunctions and ordered the forces to vacate the conquered territory. [25]

This is the distinctive feature of the Divine Law [26] similarly to the secular concept of the judicial review. Of course, the similarity is of the objective of holding the supremacy of the Shariah and Constitution as the case may be, in their respective state system, otherwise procedural mechanism for the application of Islamic principle of "Arbitration of Quran and Sunnah" has had been different from that the "Judicial Review" in the modern judicial system when there is a fundamental difference between or among"..... those charged with authority among you...."[27] i.e., the legislature (Majlis-e-Shura), Executives (Emirate) Judiciary, (Qaziah), or between such authorities and individuals, point in dispute must be referred by either of the two sides to arbitration of Quran and Sunnah. The Holy Quran commands, "..... ye differ in anything among yourselves, refer it to Allah and Messenger..."[28] Such arbitration, as per view of Muhammad Asad, [29] is to be more explicit, a body of arbitrators who, after impartial appreciation of the issue, would decide which of the two conflicting views, is closer to the spirit of Shariah. Such body of the arbitrators is a supreme tribunal which is the guardian for upholding of the supremacy of the Shariah in the Islamic state.

This tribunal should have the jurisdiction to arbitrate in all instances of disagreement, referred to the tribunal by the either sides, or even then on its own motion and decide, on its own accord, whether or not any legislative act passed by the Legislature (Majlis-e-Shurah), or

any administrative act on the part of the Emirate, is in inconsonance with the basic essence of a Nass-i-Sharie (Ordinance of Quran or Sunnah).

As to composition of such tribunal, Muhammad Asad, a celebrated Islamic scholar says that it is needless to say, [30] such a tribunal must be composed of the best jurists that cane be found in the community, who have not only mastered the Quran and the science of Haidth, are also fully well equipped on the contemporary affairs of the society, for it is only such man that could decide, with a degree of certainty as is granted to human intellect, whether or not a doubtful legislative act or an administrative act, is in accordance with the spirit of the Shariah. Obviously this function can be performed by an arbitral authority, the proper and technical form of which may be the judiciary (Qaziah).

3.2.1 CONSTITUTIONAL APPROACH OF JUDICIAL REVIEW IN ISLAMIC CONTEXT

The Constitution 1973 possesses the feature of Islamic character, Eco-political and lego-judicial system was intended and designed, originally as well as subsequently, [31] to be developed on Islamic guideline. However, the practical formulation of Islamic spirit went under distress during different regimes. Of course, certain steps were taken but for vested interests of the then rulers. However, in some matter Islamic ideology was given practical formulation in its true sense. Among those, the establishment of the Federal Shariat Court, though critically suspicious for certain reasons, [32] was the most significant step in this regard.

Empowering of Federal Shariat Court to "examine and decide the question whether or not any law is in accordance to the Holy Quran and Sunnah of the Holy Prophet (S.W.A.S)....." [33] was in fact, the recognition and carrying out the 'Islamic principle of judicial review', in the Constitution 1973 of Pakistan. The conferring of such a power of review has not parallel in judicial history. Even then, no such powers were expressly conferred on Courts during the Muslim rule, when Islamic Fiqah was the governing law. Next to the state of Madina, in the legal history of Islam, it is for the first time that such power of the Court to review the validity of laws on the ground of their repugnance to the injunction of Sharia has been recognized expressly in the constitution system of Pakistan.

This review power of Federal Shariat Court under the Article 203-D is other than to the judicial review jurisdiction of Superior Courts provided under Articles 184 (3) and 199 of Constitution 1973, and by necessary implication in a number of other provisions, such as Articles 8, 142 and 143 of the same Constitution. "The Constitution of Pakistan says Justice (Rtd) Fazal Karim, [34] has thus the singular distinction of incorporating in it both the Islamic and the modern judicial review". The same has been rightly observed by the Federal Shariat Court [35] that, the provisions are available to be challenged both on the ground of their conflict with the provisions of the Constitution and the injunctions of Islam as laid down in the Holy Quran and Sunnah.

3.2.2 JUDICIAL REVIEW AND FEDERAL SHARIAT COURT

Initially, through the President's Order 22 of 1978, Shariat Benches in each High Court for the Province, and Shariat Appellant Bench in the Supreme Court of Pakistan, were established. Afterward, a Federal Shariat Court was constituted under the Constitution 1973, "consisting of not more than eight Muslims judges including the Chief Justice" [36] and among those, "not more than three shall be Ulema having at least fifteen years experience in Islamic law, research or instruction". [37]

Article 203-D of the Constitution 1973 confers powers, which may be described as Original as well as "Judicial Review" jurisdiction, on the Federal Shariat Court. Under this jurisdiction. "The Court may either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet (S.A.W.S)....." [38] "If any law or provision of law is held by the Court repugnant to the Injunctions Islam.... such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Courts takes effect". [39]

The aforesaid jurisdiction of Federal Shariat Court is within the limits provided in the Constitution, which excludes certain laws from the meaning and scope of 'law' for the purpose of be tested on the touchstone of Shariah. Thus, for the ascertainment of Islamic validity of laws, "law includes any custom or usage having the force of law but does not include the Constitution, Muslim personal law, any law relating to the procedure of any Court or tribunal or, until the expiration of ten years from the commencement of this charter, a

fiscal law or any law relating to the levy and collection of taxes and fees or banking insurance practice and procedure. [40] Therefore, it is held in a case that Court cannot stretch its jurisdiction to the matters specially exempted and barred by the Constitution. [41] Moreover, the scope of such judicial review jurisdiction is extent to the ascertainment of the validity of legislative acts only, and it does not cover up the executive actions.

The Constitution 1973 also provides the establishment of the Shariat Appellate Bench of the Supreme Court. This bench consists of, "three Muslim judges of the Supreme Court; and not more than two Ulema to be appointed by the President to attend the sitting of the Bench as adhoc members thereof, from amongst the Judges of the Federal Shariat Court or from out of a panel of Ulema to be drawn up by the President in consultation with the Chief Justice". [42] This Bench will entertain the appeals against the decisions of the Federal Shariat Court where, "Any party to any proceedings before the Court under Article 203-D aggrieved by the final decision of the Court (Federal Shariat Court) in such proceedings, may prefer an appeal to the Supreme Court (Shariat Appellate Bench)". [43] In term of appeal, this bench sits with the objective to ascertain the validity of laws in Islamic view point, and exercises the same jurisdiction of Federal Shariat Court as provided under Article 203-D. In appeal, the decision, whatsoever may be (either accepted or rejected), this Court is fact, determines, whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet (S.A.W.S).

From the above discussion, it is clear that the both Federal Shariat Court, in original jurisdiction, as well as Shariat Appellate Bench of Supreme Court, in its appellate jurisdiction, have the power of judicial review, [44] under the Constitution, 1973, for the determination of validity of laws on the touchstone of Sharia.

Federal Shariat Court cannot enact a new statute, but can merely gives its opinion tot he Government concerned about an existing statute leaving the rest to the law making organs of the state, [45] and same is effect of the verdict of the Shariat Appellate Bench of the Supreme Court. Such judicial review by Federal Shariat Court or by Supreme Court (Shariat Appellate Bench) does not include only the declaration of laws to be against Sharia, it covers the matters in which law may be declared to be in consonance with the basic essence of the Shariat well.

Federal Shariat Court through this jurisdiction has made remarkable contribution for the preservation of the Shariah in Pakistan. There is a long list of cases wherein laws were

challenged [46] or suo moto action were taken, [47] and the Federal Shariat Court or the Shariat Appellate Bench of Supreme Court declared the validity of alleged piece of legislation on the touchstone of the Shariah. In this context Federal Shariat Court has dealt a number of cases in which certain laws have been declared un-Islamic, [48] and certain other laws have been declared Islamic. [49] In these case important matters have been interpreted in the light of Islamic injunctions, and declared either violative to, or consonance with the Shariah, having for reaching effects on the legal, political socio-economic and cultural development of the country. Among those the important matters are concerned with the criminal law, [50] law of evidence, [51] mercantile law, [52] international law, [53] political matters, [54] interest, [55] and religious matters. [56] In addition to these issues, certain verdicts are concerned with judicial independence, [57] civil liberties, [58] principal of natural justice, [59] institutionalization, [60] the basic foundations for the welfare state.

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[25] *Supra No. 39, p.59-60.*

[26] *Justice (R) Fazal Karim, 'Judicial Review of Public Actions', Pakistan Asia Law House Karachi, 1st Ed. 2002. P.3.*

[27] *Supra No.1.*

[28] *Ibid.*

[29] *See Muhammad Asad, 'The Principles of State, and Government in Islam', Islamic Book Trust, Kualalumpur, 1999. P,66.*

[30] *Ibid, P67.*

[31] *See Supra No.8. Articles 1, 2, 2-A, 31, 41, 227-229, 203-D and Oaths of President and Prime Minister.*

[32] *The establishment of the Federal Shariat Court has been highly criticized for the defeat of the Independence of the judiciary, because of the insertion of the Article 203-C(4), (4-A), (4-B) (5) (7). It has had been the place where judges of the Superior Courts were transferred against their will. Of Course, this situation to some extent, has been corrected through the 18th Amendment in the Constitution 1973, recently.*

[33] *Supra No. 8, Articles 203-D.*

[34] *Justic (R) Fazal Karim, 'Judicial Review of Public Actions' Pakistan Asia Law House Karachi, 1st Ed. 2002. P.3.*

[35] *See Muhammad Ismail Qureshy..V...Federal Government of Pakistan, PLD 1992FSC 445, 468.*

[36] *Supra No.8, Article 203-C (2).*

[37] *Ibid, Article 203-C (3A).*

[38] *Ibid, Article 203-D (1).*

[39] *Ibid, Article 203-D (3) (b).*

[40] *Ibid, Article 203-B (C).*

[41] *See Haji Muhammad Saifullah..V... Federal Government, PLD 1992 FSC 376.*

[42] *Supra No. 8 Article 203-F (3).*

[43] *Ibid Article 203-F (I).*

[44] *The jurisdiction exercised by an appellate Court in appeal cases, is in another sense a judicial review of judicial actions, classified as 'vertical judicial review'. See. Vijay Lakshmi Dudeja, 'Judicial Review in India', Radiant Publisher, P. 18.*

[45] *See Ashfaq Ahmad .V. Government of Pakistan, PLD 1992 FSC 286.*

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[49] *Ibid.*

[50] *See Habib-ul-Wahab Alkheri..V.. Federation of Pakistan, PLD 1992 FSC 484; Muhammad Riaz etc...Vs.. Federation of Pakistan, etc. PLD 1980 FSC 1.*

[51] *See Haider Hussain..V.. Government of Pakistan, PLD 1991 FSC 139.*

[52] *See In; Reference, the Specific Relief Act, 1877, PLD 1983 FSC 113.*

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[55] *See Muhammad Iqbal Chaudhry Advocate.V. Federation of Pakistan, PLD 1992 FSC 501; See Messers Mumtaz Industries.V.. Industrial Development Bank of Pakistan, PLD 1992 FSC 360.*

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CHAPTER 4

THEORIES OF JUDICIAL REVIEW

4.1 Introduction:

The Supreme Court of U.S.A is the most power full judicial body in the world. Its multiple functions and many powers surpass those of any other courts. Those few judicial bodies with similar powers were all created in conscious imitation of the American example.

"In parts the special powers of the SC comes from its place at the apex of an unusually active legal system. 'Scarcely any political question arises n the USA that is not resolved sooner or later into judicial question'. De Tocqueville wrote in 1835. And American courts have become far important in recent year. The simple fact of federalism--- and two largely independent sets of law and law givers—force people to turn to the courts of clarification and choice of law more then in most nations. This may have established the patters of high judicial involvement in public matters, in striking contrast to the allow profile of courts in most countries. But the USA SC's prestige ad power a lot flow from its right of judicial review—the power to declare un constitutional (1) laws of the congress and (2) laws of the state governments, as well as (3) actions and regulations of the executive. This power gives to the SC glamour and a decisive weapon that allow t to compete ion a plane of equality with the other and more active branches of the govt; when the burger court invalidated legislative veto in a 1983 decision, INS....v....CHANDA, it was declaring some two hundred laws unconstitutional in a single decision. These were laws enacted over a fifty years period, many after lengthy political bargaining with congress or with the president". [1] Most decisions of unconstitutionality are less dramatic, but the court enhances its position even where it sustain the action of another branch, or where it exercises less far reaching and more routine judicial authority. The power of judicial review is the wedge by which courts have assumed progressive expanding authority over pubic issues, policies and institutions.

This power has troubled thinkers both on and off the bench. Why should nine life appointees makes such momentous decisions for a majoritarian society? Why should five justices be able to set aside the action of the congress and presidency, who are responsible to the electorate? The justification of judicial power is neither easy nor obvious. Oddly, the

constitution does not explicitly call for JR. the SC however, decided in MARBURY..v..MADISON (1803) that it "had the power, and I spite of the obvious peculiarity of its authority resting upon its own decision, the court has been able to make that decision stick". [2]

"JR would undoubtedly be more firmly rooted if the constitution did provide explicitly for such a role. CJ Mrshall, in Marbury, argues that a constitution really does just that. But at best, he shows there in words compatible with JR, even suggestive of its power, but not compelling such an interpretation.

The justification of JR, then, must be a more complex and subtle one. There are many arguments to the justification, summarize under six headings:1) the argument from intent: a weaker form of arguing direct authorization, it suggests the framers must have wanted JR, deduse from a total pattern of behavoiur, even though there is no explicit delegation; 2) historical acceptance, deriving legitimacy from the general support give the SC and JR THROUGH MOST OF OUR HISTORY; 3) the counter-majoritarian argument, which finds restrain on the "tyranny of the majority" as a strengthening rather than a dilution of democracy; 4) the educative and more role then the court can play when it issues reasoned decisions, as did in striking down segregation in BROWN...v.....BOARD OF EDUCATION (1954); 5) The courts role I dealing with issues that politically might be in curably divisive but can be resolved through the symbolism of the law and the myth of the constitution; and 6) JR as a balancing devise of federalism, which seems explicit in Article 6 and suggests the legitimacy of even broader court power". [3]

4.2 JUDICIAL REVIEW VERSUS JUDICIAL RESTRAINT

4.2.1 THE ARGUMENTS FROM INTENT:

"MARSHALLS opinion in MARBURY drew heavily on hamilton's argument in federalist 78 and is an impressive bit of argumentation, although in the end the opinion is neither conclusive nor answerable. Essentially, Marshall advanced three major justification of power: (1) the nature of the written constitution implies limits on legislative power enforceable in the court; (2) the nature of the judicial function is to declare what law is, with JR being a special form of this task; and 3) the constitutional text indirectly orders review". [4]

The written constitution must be obeyed and that limits set by them must be judicially enforced is argued strongly in federalist papers 78: "it is not other wise to be supposed, that the constitution could intend to enable the representatives o the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter with in the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A conclusion is in fact and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of a particular act proceeding from the legislative body. If there should happen to be irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents". [5]

But as many have pointed out, including Judge Gibson in EAKIN AND OTHERS...vs...RAUB AND OTHRS (1825), THE ARGUMENT FOR A LIMITED GOVT does not require judicial enforcement. "Constitutions are also addressed to congress, the president and the public. Other countries have adopted constitutions, both before and after 1804, and have trusted political forces to respect constitution limits". [6]

Much the same reply can be made to the second argument of MARBURY in the federalist; namely, the JR is required by the very existence of the judiciary. That argument suggests the power to declare laws UN constitutionally is the burden, part of the dilemma of deciding a case. In settling a controversy judge, must choose between laws and inevitable must choose the higher law, the constitution.

"The obvious answer to this argument is that through out history judges in other countries have not found the power of JR to be necessary. It is also obvious that it simplifies the judicial process, and makes the task of a judge clearer, if the judiciary assumes that the 'law' is what the legislature enacts and that the legislatures, being aware of the constitution, have obeyed it. The 'burden' of JR is one that Marshall wanted to take on, not one that forces its self upon the judge". [7] Marshall is only a bit more convincing when he goes through the constitution its self. Weakest argument of all is that a judge are required to swear allegiance

to the constitution, ignoring the fact that so are the other government officials. Indeed the president oath is the only one the constitution prescribes word for word. (Art 2, clause 8). Arguing from the supremacy clause article 6 Section 2 is much more effective. This provision specifies that treaties, the constitution, and laws in pursuance thereof are the supreme law of the land and binding upon State Judges. Marshall read "in pursuance thereof" to mean "consistent with" and he conclude that State Judges can refuse to enforce act in conflict with the constitution i.e not in pursuance thereof. The action of State Judges dealing with federal matters are reviewable by the Supreme Court, so the justices also must have the power to sustain or invalidate acts.

This is plausible, but not absolutely compelling, interpretation of the supremacy clause. "In pursuance thereof" might be a stylist flourished or might mean "passed after adoption of the constitution". Marshalls interpretation of the supremacy clause received powerful support from actions of members of the Constitutional Convention in subsequent official capacities. The Federal Judiciary Act of 1789, another portion of which was at issue in MARBUARY, provided for Supreme Court review of state court cases in which the constitutionality of a federal law "is drawn into question". "This act is an unambiguous restatement of the Supremacy Clause's "in pursuance thereof", as Marshall interpreted it. The act was passed by the very first Congress, which was dominated by Founding Fathers, who must have known what the Constitution intended. Further, justices who sat in judgment before Marshall reached the Court, in several cases (e.g., CALDER...V...BULL and Hylton...Vs...U.S., 1796) carefully considered invalidating the statutes in question and painfully sustained them. Obviously, the act of reviewing constitutionality indicates that these judges felt they could declare laws unconstitutional. While the evidence to support Marshall's view is strong, it remains perplexing that the Founders left so vital an issue to be decided by interference when plain language would have been easy". [8] It seems clear that they did not envision the full-blown power of judicial review as we now know it and did not consider judicial review an important tool of governance.

4.2.2 <u>The arguments from acceptance</u>:

"Court power has been controversial from time to time in American history. But the controversy has been surprisingly muted. Few serious frontal attacks have been mounted

against judicial power, and nothing approaching a successful constitutional amendment to curtail the basic power of judicial review has ever been advanced". [9]

Furthermore, both controversy over the basic grant of power and efforts to curtail it have actually diminished over time. It is fair to say that two centuries of acceptance constitute a significant claim to legitimacy.

"The Jeffersonians were the most determined nay-sayers to judicial power. They brought impeachment proceedings against the Justice Chase, who was acquitted by the Senate, and by Act of Congress forbade the sitting of the Supreme Court for a full year. Jetterson wrote darkly of the need to take away the Court's monopoly over review. But little came of all this except the Eleventh Amendment, which still is the only amendment directly aimed at curtailing court power". [10] (The Eleventh Amendment, adopted in 1798, provides that citizens of one state may not sue another state in federal state).

"Populist-progressive forces (1890-1925) highly critical of Supreme Court actions and backed a proposal for the recall of state judges". [11] This non sequiture underlined the standing of the Supreme Court in the eyes of the public and how much opponents shied away from direct confrontation. President Roosvelt's Court-packing proposal (1973), talk of impeaching Warren Court justices, and the Nixon administration's efforts to remove Justice Fortas (successful) and Justice Douglas (unsuccessful) were other indirect attacks on the "Court through its membership.

"Much more common have been efforts to change specific decisions. These have included amendments to effectively reverse specific decisions; for example, the Sixteenth Amendment nullifying the Court's anti-income tax decision in POLLACk...V....FARMER LOAN AND TRUST CO. (1895). Congress, in recent time, has also threatened to use it power over Supreme Court jurisdiction and its power of defining liberties under the Fourteenth and Fifteenth Amendments to doctorial changes". [12]

But this brief accounting underscores the fact that criticism of the Court has generally been either vague and unfocused, or else dealing with particular policies or decisions. Challenges to the basic grant of power are few and far between, and only one

relatively technical challenge to Court power has been constitutionally successful. Judicial review itself has not faced tough political challenges, and this a negative form of validation.

4.2.3 The counter majoritarian arguments:

"Probably the strongest justification of judicial review is that it helps control runaway temporary majorities". [13] The founders believed in a republic, one that limited democracy. The system they created has many checks on simple majorities, such as the equal vote in the Senate of states with widely differing population, and the need for special majorities in both congress and the state to amend the constitution.

"Compared to such serious and permanent departures from simple majority rule, judicial power is seen as less capricious and less harsh. While granting special power to minorities in the political process may be permanently vesting a veto power in representatives of a particular interest or sectional group, the judiciary is reasonably independent from such considerations. And while political figures such as senators are responsive almost exclusively to their own constituencies, judges are aware of the power that Congress and the President have over major bases of Court authority. The "political branches" can change Supreme Court jurisdiction and alter the number and composition of judges (though impeachment o sitting judges is limited and very difficult). Congress may also alter laws, thus requiring judgments in future cases to be different. When Congress and the President agree on criticism of Court decisions, history has shown that legal compromise or outright capitulation by the Courts is the result. So, it is argued, judicial review is a check on temporary majorities but not a bar to strong, enduring majorities". [14]

The life tenure of judges allows them the luxury of standing against momentary fads. Their legal training and the force o precedent can given them a more philosophical view derived from history. In fact, the Supreme Court has emerged in the last half century as the defender of freedom of expression. And judicial responsibility for taking the long view has been given new emphasis.

Courts are also defended as valued supplements to simple head counting, since they add reasoned judgment and technical competence to the process of decision making.

Judges present justifications of their decisions in opinions that are analyzed, criticized, and defended. The justices sign their opinion, and Justice Brandeis one suggested that the real prestige of the Supreme Court derived from their being the last people in Washington doing their own work, instead of relying upon staff aides. Some concern is expressed over the growing work load of the justices, the resulting increase in the number of their law clerks, and the growing reliance on such help. Still, many opinions are recognizably the work of the individual justices, distinctive in style, and open to evaluation by professors and lawyers in law reviews and other judges in legal opinions.

"Justice Stone's famous footnote in the CAROLENE PRODUCTS (1938) case pointed to other justifications for judicial review. Majorities could vote to curtail democracy itself. Courts, he argued, have a special responsibility to eliminate majoritarian measures that deprive people of equal political power. Censorship laws prevent critics of censorship laws from organizing to eliminate such abuses. A temporary majority could take away all voting rights from a majority that otherwise could work to become a majority". [15]

And Stone also argued that some groups- religious and racial minorities- might be so seriously cut off from political power that they needed special protection against the majority. These imperfections in a democratic order, and judicial protection of the system, are then defended as only superficial violations of democracy since, in reality, they are designed to ensure the democratic process itself.

4.2.4 The supreme court as educator; the arguments from principle and judicial decision makings:

"The reality of reasoned decision making is also invoked to suggest another defense of judicial review. Courts educate the public in democratic values and principles of fairness and of group justice. They do this, it is argued, by example-in the very process of hearing and deciding cases, and in their enunciation of rules and principles which guide them". [16] In turn, these principles infect public discussion and direct other aspects of democratic life. The Supreme Court is thus seen as an educator and advocate for our constitutional order.

"The strongest advocate of this position was Herbert Wechsler, who found the essence of law and the authority of the Court to lie in its ability to formulate "neutral general principles". Such principles, he argued, must apply to all who come within its compass. They must not be formulated for particular parties or because claimants have an unusually sad story to tell". [17]

"Examples of Wechsler's "natural principles" abound. When Ku Klux Klan supports wished to meet in a border state, and American Nazis wanted to march through a largely Jewish suburb outside Chicago, their lawyers successfully invoked precedent established in the course of black civil rights demonstrations in the 1960s led by the martyred Martin Luther King. In this sense, the Supreme Court helps teach the law is not a narrow partisan but a respecter of rights for all persons". [18]

Critics of the "neutral principles" notion suggestion its truth is highly limited. They cite novelist Anatole Franch's biting comment on "the majestic equality of the law" that forbids rich and poor alike "to sleep under bridges and beg in the streets." On some matters, particularly those relating to procedure and method in law and in politics, we take turns in different roles, so that laws are neutral. In others, such as the regulation of the rights of the blind, the appearance of generality may be a sham.

"The case that principled opinion making generation public support of democratic behavior is a weak one. Clearly, the Court has been in the forefront of opinion on desegregation, school prayer, and such emotional matters as exemption from saluting the flag. The public has come to strongly support these positions. Yet, while the Supreme Court has affected public opinion, there is little evidence that the specific general principles enunciated have been an important part of the public debate, even on these issues". [19]

"The very process of Supreme Court decision aggregation works against clean, decisive general principles emerging. Since Marshall's time, Supreme Court opinions have been assigned to a member of the majority in the Court's conference, who generally tries to keep together or even add to the majority. Within limits of conscience, opinion writers try to write a decision that does not alienate other justices. The non-writing justices, in turn, seek changes to bring the opinion closer to their own view. The product is a negotiated text, a joint product, and all too often reads that way. Justice Blackmum, the author of the much

criticized abortion decision- even scholars who support the outcome are unhappy with the text and its reasoning has openly indicated that its sometime contradictory approaches were necessary to gain a majority opinion. This is not unusual". [20]

Perhaps the most important educative role is, in fact, played by dissenting opinions. These are often solo efforts, so dissenting justices feel free to express themselves pungently. As they usually need to please only themselves, dissenters often write more decisive and coherent opinions, based on simple direct principles. Many famous dissents, particularly those of the first Justice Harlan and Justices Holmes and Brandeis, were not only more famous in their time than the majority views, but have since been vindicated by new majorities overruling those precedents. Of course, the mere fact that we not only permit public dissent by our officials but print and disseminate such disagreements is itself a profound symbolic act.

4.3 The mystic function of judicial review:

"Some see the contribution of judicial review as lending legitimacy and "sacredness" to the laws. In this view, the Court and the constitution play some of the role that royal families played in nineteenth-century constitutional monarchies or priests play in some societies even today- not actually governing, but lending an aura of continuity and mystery to the process. The argument is somewhat at variance with the notion that the Supreme Court educates through neutral principles, but perhaps the thought is that different segments of our society respond to different aspects of the judicial function". [21]

Of course, legitimation occurs only if the population is convinced the Court has made a genuine enquiry into the conditionality of a statute or policy. Thus, oddly, the function of legitimation entails invalidation of some laws in order that the Supreme Court has the authority to validate other laws.

4.4 Judicial review and federalism: the court as an umpire:

"The English judge and legal philosopher Lord Devlin has spoken of the legal vacuums created by federalism. It is striking that most of the legal systems that have judicial review are federal systems. There is an affinity, a symbiotic relationship, between judicial review and divided government". [22]

Federalism in the U.S embraces the national legal order and those of the fifty states. Courts must mediate and choose between conflicting laws of these multiple systems. For the Supreme Court, it is advantageous to be seen as objective and posed above the battle, rather than as the agent of national power.

"The Supreme Court has historically been "the Court of the Union," preserving a balance betweens nation and state. It has found national measures unconstitutional, as encroaching on state power, though such decisions are rare today. It has more than found that state measures intrude upon national commerce power or prevent the free flow of persons or good among the state". [23]

"The notion of the Supreme Court as system umpire was historically more attractive because of the assumption that Courts were not merely dispassionate, but also rather weak and fragile. The Federalist authors note many time that the judiciary is inherently "the least dangerous branch" of government. Paradoxically, this perceived weakness has been a source of strength allowing the court to generally enjoy public support and confidence. Periodically, however, the power of the court system has become a public issue". [24]

"The notion of the Court as umpire is somewhat tainted by its role as a creature of the national government. Its power and privilege can be directly affected by the President and Congress in ways that state government cannot. Its functional role is also different with respect to the federal division of authority. Both in theory and in practice it has less ability to constrain state power. And both John Marshall and Oliver Wendell Holmes Jr. thought the need for judicial control over congressional authority to be less vital than control over the states. As Marshall emphasized, an individual state could gain selfish advantage over others or over the national government. The national government (with states strongly represented, especially in the Senate) was politically unlikely to move against the states, unless majorities within most states wished such a move". [25]

The clue to the Court's continued vitality as umpire is in Marshall's analysis. The Court has seldom been out of pace with public opinion in its balancing act between nation and state.

"Marshall himself, largely by force of personality, kept the Court nationalistic as states –right notion became predominant in American politics. This was rather significant in establishing a firm constitutional order. Still, his court moved toward accommodating new patterns, permitting states to regulate even when purists might have seen infringement of national power, particularly in the area of interstate commerce. The Taney Court hastened the spread of local authority but more as a modification than a reversal of Marshall". [26]

After the Civil War, the Court was again mainly a nationalizing instrumentality, encouraging and abetting the growth of a national economy. Its reluctance to permit social regulation and redistribution measures put it out of step with growing sentiment for such measures, but it bobbed and weaved its way effectively until the Great Depression.

"What the Court did from roughly 1896 to 1937 was to create two lines of precedent, one emphasizing national authority, the other the Tenth Amendment prerogatives of the states. Which line was used to test the constitutionality of a measure depend mainly on the social nature of the legislation. National power was upheld with respect to regulating meat plants and stockyards-most justices are not vegetarians-but not as to wages or work hours for children. The power of umpiring federalism became a power to regulate social policy". [27]

With the changes in constitutional doctrine after 1937, the Court's role in federalism relations became less pronounced and less controversial. Where controversy has grown is in a new and different line of development-a set of decisions applying the provisions of the Bill of Rights to the states. Here the Court acts as quite a different kind of umpire, not between nation and state, but between individual citizen and state. This transformation of the Court's leading role is dramatic and significant. The Commerce Clause remains a major base of Court explication and adjudication. But the Fourteenth Amendment has surpassed it, transforming the Court's place in our system.

4.5 Judicial activism and judicial restrain

4.5.1 Judicial restrain.

Traditionally, judges embrace notions of limited authority and constrained activity, for such a position is at the same time a shield and a claim. If judging is limited to a tiny segment of

political claims made in a society, then the judiciary can truly advertise itself as the least dangerous branch of government. If it functions within a sphere of legally defined a rather precise circumstances, the judiciary can claim it is acting in obedience to that mandate and not volitionally.

"The notion that the power of declaring legislative acts unconstitutional should be exercised with circumspection arises from Marshall's seminal opinion in MARBURY. The Supreme Court, he suggests, should used the power of only when there is collision of law and the constitution, and only in clear cases of conflict. Some critics have suggested that limiting the power to "clear cases" is a confession of doubt as to whether it is appropriate at all. At any rate, Marshall acknowledged that congressional action represents the voice of the people-in-day-to-day-politics. It is the superior voice of the people-as-Constitution-makers that the judges implement". [28]

The argument for limited use of judicial review helped keep the Court in check for the better part of a century. Only as regular invalidation became the pattern did a sustained critique of judicial review emerge.

"The clearest exposition of a highly limited judicial role was developed by J.B Thayer, a great Harvard law professor, who deeply impressed many students, including Justice-to-be Felix Frankfurter. In a classic essay on "The Origin and Scope of the American Doctrine of Constitutional Law," Thayer made the case for delimiting judicial review as a highly exceptional incursion on majority review. Whether one looked at the rhetoric of judges about the power, or the actual behavior of courts in using judicial review, most the first century of our experience clearly showed it was not conceived of as a routine matter. Thayer, writing in 1893, suggested the Courts of deference to legislatures and violating the Marshallian injunction to invalidated only in clear cases. Statutes, Thayer argued, should be invalidated only when clearly irrational or when in clear repudiation of the Constitution. His critics suggested Thayer wanted the Court to function as a "Lunacy Commission" sustaining "rational" legislation an invalidating it only when the legislature had gone mad. Supporters suggested such a line of demarcation was necessary if we were to avoid substituting government by "nine old men" for majority rule". [29]

On the Court, a parallel argument was being advanced by Justice Oliver Wendell Holmes, later joined by Justice Louis Brandeis. The former was philosopher and legal historian of the highest order, the latter a legal technician and social architect, together they constituted a formidable due, Justice Harlan Stone experienced a complete transformation under their influence. Justice Frankfurter, their friend and disciple, was to continue the argument until his own retirement in 1962.

The Holmes-Brandeis argument substantially emphasized the primacy of the will of the majority and the duty of the judges to defer to that will. "Courts are not the only agency of government that are presumed to have the capacity to govern" Justice Stone sarcastically suggested in one dissent. The right of review was also circumscribed. Whether the enacting agency had the power to deal with a subject was legitimate inquiry. But the wisdom of the legislation was not a subject that ought to concern judges.

"Brandeis also perfected a serious of techniques to limit the judiciary. Taking seriously Marshall's suggestion that the Court act on constitutionality only when confronted by the dilemma of contradiction between Constitution and statute, he suggested ways by which the Court should minimize such contradictions – for example, by reinterpreting statutes wherever possible to avoid unconstitutionality. Brandeis meticulously scanned past opinion to produce his masterful ASHWANDER (1935) rues. This gem of legal craftsmanship purports to be merely summary (which in part if was, of course) of rules of which the Court avoids exercise of judicial review. By force of its compilation, the ASHWANDER summary influenced future cases and made it less seemly for justices to plunge into constitutional rulings when they could be avoided". [30]

This two-pronged effort pushed the Court in one direction: Except under extreme conditions, Courts should avoid making social policy, avoid standing in the way of making social policy, and avoid standing in the way of popular majorities. To help ensure this, judges should construe strictly their own jurisdiction, ruling on questions only when stringent requirements for Court action were met.

"The Brandeis-Holmes-Stone classic articulation of this philosophy of restraint was developed in response to a Court trying to constrain both national and state governments to economic formulate regarded by most as obsolete. By the mid-1940s, the classic Holmes-

Brandeis-Stone dissents had prevailed, but Justice Frankfurter felt their truths still applied to efforts to use the judiciary to promote civil liberties. Recognizing a special judicial obligation to the Bill of Rights, Frankfurter insisted the judicial role in such matters was not substantially different from the judge's function in, say, preventing taking of property or protecting free movement of goods in interstate commerce. Most of the key protections of the individual against governmental intrusion on "economic" or "civil" liberty are commingled throughout the Constitution; often they are check-by-jowl, as in the Fifth Amendment, which protects both against taking of property and against compulsory self-incrimination. The judiciary, Frankfurter insisted, had no more right to bifurcate the Bill of Rights and create hierarchies of rights than the Taft Court had to hallow the liberty of contract above all other privileges. Ultimately, he argued, if judges were seen as the real defenders of liberty of expression and the equalizer of all, the public would never learn the fundamental truth that freedom required majority support or survive. Both because he respected majority rule and because he felt majority lapses from full freedom should become object lesions in the cost of such lapses, Frankfurter argued against heavy-handed judicial creativity, even in the interest of liberty and equality". [31]

The Warren Court found Frankfurter's approach less and less attractive, and his influence waned over the last years. Still, John Marshall Harlan, like Frankfurter a highly respected craftsman, and Lewis Powell made the argument of judicial restraint uniquely their own.

"Off the Court, too, there have been significant contributions to the arguments for judicial restraint. Herber Wechsler, a great criminal law innovator as well as constitutional expert, suggested that activism and "result-oriented" decision making undercut the basic contribution of law, which is the development of "neutral general principles." (A dramatic example of such general principles in action occurred when American Nazis were allowed to march in Chicago under legal doctrine developed in response to the civil rights marches of Dr. Martin Luther King in the 1960s)". [32]

Alenxaner Bickel, an admirer of Frankfurter, also contributed t concepts of restraint. Nothing that the eye of the journalist catches the dramatic assertion of power, Bickel exalted the "passive virtues" of courts that knew when not to intervene, either for reasons of lack of authority or, even, for tactical reasons. Certainly, the Taney Court might have

profited from a moral lecture suggesting that there are times when Courts should not decide, in a case before them, every fundamental issue they can think of.

4.6 Result oriented law Judicial activism

"Doubts about the legal power o the Court were historically those of the democratic majoritairan left, who saw the Court as façade by which their cause was continuously thwarted. The departure from democracy was seen as usurpation. As the court now has served their purposes fro four decades, liberals generally have made their peace with Court action. Although the political right is more inclined to see the Court as a legal rather than a political institution, the republican platform of 1980, with an explicit call for pledges from prospective appointees on key issues, is the clearest example of accepting the Court as a pure instrument of policy". [33]

In terms of actions of the justices, the result-oriented approach has been called "activism". The recourse to legal techniques for limiting Court intervention is labeled "judicial restraint". By and large, the terms have been fighting labels of the "restraint" people – Frankfurter, Harlan, and Lewis Powell. Those justices most accused of "activism" – like Black, Douglas, Murphy, and Warren – never accepted the label or acknowledged its applicability. It is indeed difficult to see how a judge could officially accept such a description without losing effectiveness both on and off the Court.

"On of the most impassioned please for activism is the dissenting opinion of Sutherland, for himself and the other members of the ultraconservative bloc of the 1930s. Stung by Stone's widely praised dissent in U.S....v....BUTLER (1936), which sternly warned against judicial abuse of power and called for exercise of restraint, Sutherland replied effectively, if a year late, in WEST COAST HOTEL Co... v....PARRISH (1937)":

"Rational doubts must be resolved in favor of the constitutionality of the statute. But whose doubts, and by whom resolved? Undoubtedly it is the duty of a member of the Court, in the process of reaching a right conclusion, to give due weight to the opposing views of his associates; but in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is

constitutional or engender in his mind a rational doubt upon that issue. The oath which he takes as a judge is not a composite oath, but an individual one. And in passing upon the validity of a statute, he discharges a duty imposed upon him, which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in his mind. If upon a question so important he thus surrenders his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence". [34]

The suggestions that the self restrain theory is the faculty of the judge own mind is totally unbelievable rather the judges are bound to decide a case keeping in mind the oath of a judge and the constitutional obligations.

Today's activists essentially are still the intellectual heirs of the Holmes-Brandeis-Stone tradition and have usually found it necessary that the constitution is simply the product of its impact on the minds of five jurists.

Paradoxically, modern activists find their justifications in one of the most distinct contributions of Mr. Justice Stone's his famous footnote in the CAROLENE PRODUCTS case. Like scripture, Stone can be quoted with great power, on both sides of this debate.

Stone's basic notion is attractive and simple. Economic and other social policies should be decided, in the main, by majoritarian agencies in a democratic society. If bad policies are adopted, the hue and cry will cause reappraisal. Good causes will be convincing causes. They do not require judicial protection.

"Restrictions of freedom of expression, however, are not only bad policies. They also prevent appeal to the corrective mechanism, the thinking process of the community. The special class of laws that simultaneously change the right of political effectiveness and prevent redress includes not only political expression (press, speech, political organization), but also apportionment, voting, and representation. In the domain, judges with technical knowledge and a broad view of constitutional history can bring something special to bear. Because they do not act as representatives of an economic class and are not involved in

immediate social conflicts, the judges are more able to take the long view than persons in other branches of government". [35]

The Court's detachment, Stone suggested, also allow it to protect those politically isolated groups that find it hard to protect themselves in the majoritarian arena. The protection of the unpopular group or the weak or politically isolated is, in this approach, a special responsibility of nonpolitical, principled process. The Warren Court, in particular, saw its mission as the "elimination of nonpersons" in American law, which entailed expanding the groups specially protected. Among those were small religious groups, social radicals, criminals, the indigent, the illegitimate, ad the mentally disturbed. While critics saw this mission as quixotic and arbitrary, its social appeal was manifest in its continuation and expansion, through at a slower pace, under the Burger Court.

Still, the implications of liberal activism were barely spelled out in their lifetime. It was, as we have noted, the Warren Court, garlanded with its triumph in ending legal segregation, that went on to tackle other social issues, including de facto segregation, with less clear-cut results.

Racial discrimination was not merely attacked by the Courts under their constitutional authority. Congress passed broad statutes instructing courts to protect all kinds of minorities, in treatment by government, with respect to housing, schooling, right of employment, pay and conditions of employment. The effect was to blur the boundaries of Courts acting under Fourteenth Amendment standards and under specific statutes. It also case federal courts in unfamiliar, and even administration, tasks.

"Nor is this bursting of legal patterns limited to majority rights. It includes expanding legal protection for women (who are numerically the majority). Similarly, the administration of programs nominally for the benefit of "weaker" groups such as welfare recipients, the handicapped, prisoners, and the mentally ill has been closely scrutinized by courts in recent years. This is a sharp contrast to norms prevailing before the 1960s, when such matters involving "grants" rather than "entitlements" would have been seen as free-will gifts governments could offer with whatever conditions and brusqueness they wished. The domains consumer protection, production safety for employees, and environmental

protections, though statutory in origin, have also involved the Courts in unprecedented ways with the issues involved and thy very mode of court interaction with society". [36]

The leading interpreter of these developments is Abram Chayes, a Harvard law professor, who sees federal Courts as constructively moving slowly away from preoccupation with relatively trivial disputes between two private parties and moving toward a "public law" concern. Elaborating Chayes, notions, Owen Fiss suggests that judges now have taken broad responsibility to affect structural reform; that is, the Courts have undertaken institutional supervision and reconstruction. As government bureaucratic become both larger and less visibly accountable, society (including congress) expects the courts to be troubleshooters and supervisions of those structures.

"The new activism is currently even more characteristic of lower court than of the more conservative Supreme Court, but the Burger Court did not move in any decisive way to stem the tide. Rather, its moves were small-scale, generally resulting in multifaceted rules that maximized its own decision-making power, and therefore aggravated the problem of judicial policy making". [37]

Donald Horowitz has sharply criticized the courts for intruding into areas that transcend their capacities, into social engineering, where the judges try to predict what effect policies will have on public behavior – role best left, he asserts, to the legislative branches. Another leading critic, Nathan Glazer, a neoconservative sociologist, suggests the Courts has destroyed the old limits imposed by technical rules of standing of litigants, ripeness of review, and doctrines of restraint like the political questions doctrine. At the same time they have, he suggests, become convinced political reprisals are ineffectual. Remedies for court overreaching are available in the President, in Congress's control over jurisdiction, in congressional, control over jurisdiction, in congressional power over the number of justices on the Court, and even in the right of impeachment. But efforts to "curb the Court" have failed miserably over nearly four decades. Thus we have created in Glazer's view, an "imperial judiciary". [38]

But judicial activism need not be seen as completely subjective and arbitrary. As Thomas Grey argues, principled doctrine can be formulated around constitutional words. These principles, in turn, if carefully chosen and articulated, create a legal imperative that leads to

still other decisions. It is at least arguable that the main reasons Burger Court was not able to reverse Warren Court doctrine is precisely because the Warren Cour's somewhat sloppy decisions concealed reliance on persuasive principles. Critics of the Warren Court may have underestimated the force of long-standing doctrine, as did those who admired it precisely because they thought the liberal justices had abandoned the boundaries of legal rules.

In general, result-oriented law is a dangerous game for the Court. If it is indeed a question of will and not law, whey should lawyers have a monopoly? And why so small a group as the Supreme Court? And why not a court whose membership is replenished more regularly.

At present there is little challenge to the general legitimacy of judicial review and Supreme Court power–even federal court power – over policy on principles. There are strong pockets of criticism of specific lines of decision – abortion, busing, police control, school prayer – that have persisted for some time and have won some on Court or off-Court victories. There also is a broad intellectual challenge to the continued expansion of judicial power. Yet pragmatically we turn in that direction on more and more matters. There is tension and trouble inherent in that contradiction. It is not clear that the Rehnquist court will content itself with less activism. It seems likely, in fact, that it will merely alter the values aggressively defended.

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CHAPTER 5

JUDICIAL REVIEW BY SUPERIOR COURTS OF PAKISTAN

5.1 THE JUDICIAL REVIEW BY SUPERIOR COURTS OF PAKISTAN.

5.1.1 Concept

Sovereignty of a state in a modern political system expresses itself with three essential organs namely; executive, legislature and judiciary. The relationships between these three organs have been defined by the supreme law of the land called the constitution. With this document no one within the state can successfully claim to exercise any power not conferred upon him, either by the constitution or any other law. In this way every government becomes a government of law and not a government of men.

5.1.2 Judicial Review.

According to a definition, "judicial review is the authorities of judges to interpret the constitution and to refuse and enforce measures that are in their opinion are in conflict with the constitution." [1] In other words it can be said as a "constitutional doctrine that gives a court system, the power to anal unconstitutional" [2] "The Supreme court cannot pronounce upon the constitutionality or otherwise of legislative measures on its own initiative, but only on matter referred to it by an aggrieved party. The object of Judicial Review is to empower courts to passed orders on the vires of administrative actions and also to enable the superior courts to contain inferior tribunals and courts within their allotted jurisdiction. Power of judicial review is essential to check legislature to exceed its authority." [3]

In democracy law is enacted by a legislature which if goes beyond its assigned field, it will be declared as ultra vires or beyond the power. Similarly, if a statutory body exceed its power allocated to it under the stature or the act of some functionary is malafide or in violation of the principles of natural justice, the same may be judicially reviewed by superior courts declaring the same as ultra vires or against the constitution.

In England no court can challenged law passed by Parliament. The British parliament is a sovereign body. The duty of the British courts is only to interpret a law. They cannot declare it unconstitutional. But in United States of America and in Pakistan the situation is different.

In these countries, the Supreme Court is the supreme body. However, in America the Constitution has given limited powers to the congress and the State legislatures, if they overstep their limits, the Supreme Court of America can declare their laws null and void, but in United State of America and in Pakistan the situation is different. In these countries the Supreme Courts is the supreme body. However, in America the Constitution has given limited powers to the congress and to State of legislature, if they overstep their limits, the Supreme Courts of America can declare their law null and void.

"There are three main rules for reviewing when judges interpret the meaning of the Constitution.

1. The courts should not rule on Constitutional issue unless such a ruling proves absolutely necessary to settle a case.
2. When there are two reasonable or possible interpretation of a given law, the courts should choose the interpretation that upholds the law as constitutional.
3. A court should limit a constitutional ruling as much as possible and strike down only the unconstitutional portion of a law. It should never anticipate or decide issue not immediately before the court." [4]

5.2 Judicial Review under the constitution of Islamic Republic of Pakistan 1973.

In the 1973 Constitution of Pakistan, the part 7 from Article 175 to Article 212 A deals with judicature. These contain the judicial power of the state and provide the procedure for judicial review. Judicial power is an exercise of the sovereign power by courts of law established under article 175 of the Constitution to decide the controversy and dispute between the subject or between state and its subject. It also determines limits and parameter of the power of each organ of the state. Article 184 and 199 deals with judicial review by superior courts in Pakistan.

The Constitution define "jurisdiction of the Supreme court and Article 199 of the constitution" [5] deals with the jurisdiction of the High Courts. In these Articles it is said that the Supreme Court has jurisdiction to exercise and undertake judicial review of administrative action and legislative instrument in the same way as the high court can do

under Article 199, if question of public importance relating to fundamental rights is involved. The High Courts power to issue orders or directions where fundamental rights are involved, is discretionary and the Supreme Court only by granting leaves to appeal from judgment of the High Court or under Article 184(3), if a question of public importance are involved and the question of fundamental rights arises.

5.2.1 Jurisdiction of Supreme Court of Pakistan.

Article 184 is about the original jurisdiction of the Supreme Court. It provides that without prejudice to the provision of Article 199 the Supreme Court shall if considers that the question of public importance with reference to the enforcement of any fundamental right is involved, have the power to make an order of the nature mentioned in the said Article." [6] "The Article 184 contains the following four essential elements for the purpose of issuance of writs similar to those issued by the High Court under Article 199;

A. The matter in which the writ is sought must be of public importance. In other words it should not be a mere private grievance against the Government or a public functionary without having impact on general public.

B. It is the satisfaction of the Supreme Court that the matter involved in the petition brought before it in its original jurisdiction under this Article is of public importance.

C. The matter so brought before the Supreme Court must be with reference to the enforcement of any of the fundamental rights as provided in part 2 of chapter 1 of the Constitution.

D. The order that the Supreme Court can make under this Article must be in the nature as mentioned in the Article 199 which empowers High Courts to make order in the nature and on the pattern of various English writs of prohibition, mandamus, certiorari, habeas corpus, quo warranto, and issue such other orders and directions as the exigency of the situation in the interest of justice demand." [7]

5.3 Kinds of writ in Pakistan.

"Following are the writs under Article 199 of the Constitution.

1. Prohibition.
2. Mandamus.

3. Certiorari.
4. Habeas corpus.
5. Quo Warranto." [8]

5.3.1 Prohibition.

The writ of the prohibition is issued to prohibit an inferior body or tribunal from containing to act in relation to a matter which is beyond its authority. Therefore, a prohibition will not issue.

1. Where the tribunal has become functus officio (having discharge his duty), and the execution of the order does not lie in his hands or the hand of any of its offices or any one acting under its control.
2. Where a defect of jurisdiction is apparent on the face of record, a prohibition will lie if an order to be executed. A prohibition is justified where there is an unlawful assumption of jurisdiction as distinguish from erroneous an improper exercise of it, mere irregularities in matter over which there is jurisdiction being not a ground for a prohibition.
3. Where the defect of jurisdiction is apparent on the face of the record, a writ of prohibition may be asked as of right , but where such defect is latent, the writs is neither of right nor of course, and the court has a discretion to refuse it on the ground of applicant's conduct.

5.3.2 Mandamus.

"The Article 199 of the Constitution in the same paragraph (i) of sub-clause (a) of clause (i)" [9] provides for the writ of mandamus (we command).

Writs of mandamus is a command which is issued from a court to any person, authority, tribunal or a subordinate court requiring them to perform the act specified in the command which they are under law obliged to do but which they either failed or refused to do.

A mandamus will not issue where no duty of a public nature is involved and the right claimed is merely a private right. To be entitled to a mandamus the applicant must have legal duty. The office held by the applicant must be of a public nature. The discretion must

be exercised reasonably, honestly and not arbitrarily n in bad faith. Relief by mandamus; being a discretionary relief may be refused on the ground of delay or some other conduct of applicant or other irregularity in procedure. The petition for writ of mandamus should allege demand and denial of justice but the rule is not inflexible.

5.3.3 Certiorari.

According to the definition, it is, "a writ from a higher court to a lower one requesting a transcript of the proceeding of a case for review." [10] "The object of writ of certiorari as described in clause (1) (a) of the Article 199, is to bring for examination before a High Court, the proceedings, orders r judgments of subordinate courts and tribunals having duty to act judicially, where they have exceeded the jurisdiction or authority assigned to them, and declare they same as without lawful authority." [11]

"Certiorari jurisdiction is based on the principle that where ever judicial jurisdiction is exercised by an inferior court or tribunal, it is in cases of abuse or excess liable to correction by the king's Bench Division of the High Court." [12]. "The difference between a writ of mandamus and a writ of certiorari is that to justify the former there must have been a clear violation of some mandatory provision by an Act or omission, while to justify the later it must first be found that the statutory Act was essentially judicial in nature. The Article will apply to all statutory functionaries but it will not be applicable to the persons who are engaged in private activities. Both in Pakistan an India, certiorari process has been used against every conceivable kind of statutory functionaries or department, Central and Provincial Government, Administrative Authorities and the Tribunals, Criminal courts, Licensing Authorities, Board of Education and Board of Revenue, Claims of Commissioner, Excise and Taxing Authorities, Land Acquisition Authorities, and Land Reform Regulation Authorities if they exceed their jurisdiction. No writ can issue against the recommendation of a Public Service Commission unless the commission is governed by a law and there has been breach of law. Where the law prescribes a particular form of procedure for the exercise of power of discretion, the requirement of law must be fulfilled, or it will be enforced by certiorari". [13] In England certiorari was based n the concept that the High Court, as a delegate of supreme judicial authority from the sovereign, is responsible for

keeping subordinate Courts or Tribunals exercising judicial powers within the limits of their jurisdiction.

In English law on certiorari lies to control the action of an administrative authority which is not required to act judicially, but in Pakistan certiorari against such authority acted beyond its lawful limits. In this way certiorari lies in all cases where there is a duty to act judicially or where there is a judicial act or order or where the proceeding are judicial or quasi judicial.

5.3.4 Writ of Habeas Corpus.

According to the definition it is, "a prerogative writ directed to a person who detains another in custody and commands him to produce or 'have the body' of that person before the court." [14]

"Chapter 1 of Fundamental Rights of the Constitution" [15] "describes about the denial of Habeas Corpus in these words, 'No person who is arrested shall be detained in custody without being informed as soon as may be defended by a legal practitioner of his choice". [16] Every person who is arrested and detained in custody shall be produced before a magistrate within period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate. The basic purpose of writ is to provide a quick and effective remedy to a person against his illegal authority and capricious arrest on detention r illegal restraint of an individual not only by the state but also by same private person.

The first thing to notice about the provision is that the person who apples and the person who detained need not be identical, and the restriction that the application should be by an aggrieved party is not applicable to an applicant for the writ.

Where a person is detained in prison under a wholly illegal order the son may apply for a writ. In the matter of a minor, however the application should be by a person who is entitled to the custody of a minor and in the absence of such person, by the person interested in the welfare of the minor and the rule is the same in the case of lunatic, a wife or a person has a right to apply for a writ.

This Article applies to all forms of custody, public or private. The legality of a detention is to be determined with reference to the law of the state on which the writ to be issued and not on the date of the application.

The High Court has power to examine the sufficiency or reasonableness on the ground for detention even if the law under which the person has been detained provides that sufficiency of the ground shall be determined by the authority ordering the detention. Relief in the certiorari is discretionary but in application for writ of habeas corpus, the court is bound to release the prisoner once it is found that his detention is without lawful authority. It is important to note that illegality of detention must in existing illegality and not a part of illegality.

5.3.5 Writ of Quo Warranto.

"It is a high prerogative writ by the crown against one who claim or usurped any office, franchise or liberty, to inquire by what authority he supported his claim. If lay also in case of non user, of a franchise, or where any public trust was executed without authority." [17]

The writ of Quo Warranto may be granted by the High Court under "the Constitution of Pakistan upon a petition against a person who claims an office to be inquired from him by what authority he claims to hold that office." [18] It is necessary for the issue of writ that the office should be one created by the state, by charter or by statute, and that the duty attaching should be of public nature'. It is necessary also that the respondent should in possession of the office. Under this provision High Court may require a person in the province to show under what authority of law he claims a public office. The writ of Quo Warranto is not a writ of course and the court may in the exercise of its discretion, refuse it if the application is made for a collateral purpose. Supreme Court has not interfere where High Court has exercise its discretion on sound judicial principles. A decision given by the High Court in favour of the holder of the office is sufficient warrant for him to hold the office.

5.3.6 Limitation.

The court play a key role in the interpreting the meaning of the Constitution through Judicial Review. Still, the courts not used judicial review whenever they wished. Nor can groups or individual simply file law suits any time they disagreed with the Government action.

A number of restrains impose by the Supreme Court limits the courts use of judicial review. Three restrictions determined the nature of the cases which qualify for the judicial review; (1) the life controversy rule, (2) the standing to sue doctrine, and (3) the doctrine of political question.

5.4 THE JUDICIAL REVIEW BY SUPERIOR COURTS OF PAKISTAN IN FIRST FIFTY YEARS.

The constitutional history of Pakistan began even before Pakistan was legally constituted as a State. The constituent Assembly of Pakistan had met on 10th of August, 1947. This body was charged with the dual purposes of framing the Constitution and acting as a Federal Legislature, or Parliament until a constitution for the new state come into effect. Mr. M.A.Jinnah was elected its first President and he addressed the Constituent Assembly of Pakistan on 11th August, 1947. The State of Pakistan later came into existence on 15th of August 1947.

Lord Mountbatten was keen and Indian Independence Act provided that, unless and until provision to the contrary is made by a law of the Legislature of either of the new dominion, the same person may be Governor-General of both the new dominion, Pakistan opted against this course. Mr. M.A Jinnah was finally designed to be the first Governor-General.

"By virtue of Indian Independence Act the Governer-General was to be appointed by His Majesty to represent him for the purposes of the Government of the Dominions." [19] The oath of the office of the Governor then in use was "to bear true faith and allegiance to His Majesty" Mr. Jinnah refused and changed it to "bear true allegiance to the Constitution..." and under new oath assumed the office of Governor-General. Jinnah made it quite clear that the loyalty of the Governor-General of the new State was to the Constitution and not to

any other source legal, extra legal or conventional. Accordingly he would assent the law as the Governor-General bearing allegiance to the Constitution and not bearing "true allegiance to His Majesty" and a priori in case of Constitutional Bill, he would affix his signatures as the President of the Constituent Assembly (and not as Governor-General). So began the history of constitution-making in Pakistan.

Quaid-e-Azam died on 11th of September, 1948 and the sovereign Constituent Assembly was called upon to fill the vacuum of leadership and also to complete the drafting of the constitution. Indian independence act, otherwise a classy piece of legislative drafting, did not provide for as time frame for completing the constitution. Not being so constrained the constituent assembly proceeded with its own pace, with progressively slowed down due to insurmountable problems faced by the new State, controversial issues between the two wings, lack of cohesive leadership and, in the later period even self-interest of the members who by no framing the Constitution could prolong their own life as member of the Parliament..... it being conterminous with enforcement of the Constitution.

Yet in March, 1949 a constitutional document was approved by the Constituent, Assembly, in the form of a resolution called "Objectives Resolution". This is an 'enactment' which retained importance in Pakistan's constitutional life long after the Constituent Assembly itself was dissolved. While later constitutional documents came and went, the Objectives Resolution was always there to serve either as the preamble of a Constitution or as a constitutional ground norm, and since 1985 incorporated as an operative part of the Constitution.

The Resolution while delineating the State structure combines federalism, democracy and popular sovereignty with Islamic principles. Generality of its terminology was an attempt to accommodate Islamic modernists and traditionalists alike. Resolution received while approval except from the minorities but generally the members of Constituent Assembly share the enthusiasm of Liaqat Ali Khan, the Prime Minister of Pakistan, who said "I consider this to be a most important occasion in the life of this country next in importance only to the achievement of independence....."

Liaqat Ali Khan, the Prime Minister of Pakistan, was assassinated on 15th of October 1951. By this time very little progress had been made towards framing of the Constitution.

The politician or to be more precise the parliamentarians failed to address themselves promptly to the most crucial issue of Constitution-making. Therefore, bureaucracy in the higher echelon of the State structure became restless and wary of the politicians. They gradually moved from their bureaucratic seats to political offices. A cavalcade of the servants made their way to highest slot. Ghulam Muhammad who started his career in Audit Branch of the Indian Civil Service was notified on the death of Liaqat Ali Khan as the Governor-General on 18th October, 1951. Sikandar Mirza, an Indian Army Officer, who graduated from Sandhurst and later opted or the civil side of government, became the closest associate of Ghulam Muhammad.

Ch. Muhammad Ali, holder of a new bureaucratic post of Secretary General of Government of Pakistan, rose to the office of Prime Minister-ship, and then Muhammad Ali Bogra, a civil servant serving as ambassador was hosted as Prime. Politicians were surrounding their rights to govern the State.

In this backdrop of bureaucratic ascendancy the issue of removing an undesirable prime minister was summarily tackled by Ghulam Muhammad as Governor-General, who dismissed the entire cabinet through a proclamation on the ground "that the cabinet of Khwaja Nazimuddin has proven entirely inadequate to grapple with the difficulties facing the country. Ghulam Muhammad presumably was considering himself as the inheritor of the prestige and authority of Quaid-e-Azam Muhammad Ali Jinnah (a misconception which afflicted a few other successors).

Dismissal of the Cabinet, which still enjoyed the confidence of the assembly, was a serious setback to the prestige and authority of Legislature. The initial reaction of the members was docile. They acquiesced into obedience (it was then that Muhammad Ali Bogra, the career diplomat, was summoned to become the Prime Minister). The unconventional and un-precedental authority exercised by the Governor-General and the docility of the members ushered in a new era of horse trading.

Unfortunately the right to dismiss the cabinet or the prime minister is once again being debated under the constitutional package recently announced in July, 2002 by the present government. If any lesson is to be learnt from the past one should promptly omit the

innovation of giving powers to President to dismiss the prime minister or the cabinet, otherwise the history while repeating will exact a higher price than before.

While the assembly was progressing towards the final version of a Constitution, it somehow decided to react (though belatedly) to the dismissal of Nazimuddin's Cabinet. On 21st of September, 1954 the Constituent Assembly amended the Government of Indian Act precluding the Governor General from acting except on the advice of his ministers. On the same day the Constituent Assembly voted its approval of the draft constituent later fixing 25th of December, 1954 as the day for its enforcement. The unexplained gap between the passing of the constitution and its enforcement proved fatal.

On 24th of October Ghulam Muhammad issued a proclamation stating therein that the "constitutional machinery has broken down.... the constitutional assembly at present constituted has lost the confidence of the members and can no longer function". This proclamation along with the State of emergency was treated as equivalent to the dissolution of the Constituent Assembly and so the draft Constitution of 1954 was still born child thrown away with the Constituent Assembly.

With the dissolution of Constituent Assembly the venue of constitutional matters shifted from political field to the judicial forum. The President of the Constituent Assembly, Moulvi Tamizuddin, challenged the action of the Governor-General. It would not be possible to enter into the detail of the litigation on account of paucity of space. Suffice is to touch upon the two aspects namely, what the Court did decide and what it did not decide. The final decision of Federal Court of Pakistan was that the assent of the Governor-General was essential to all types of legislation be it constitutional or otherwise. "Thus the power of issuing writs conferred on the High Court through a constitutional amendment of the Government of India Act" [20] not having received the assent of the Governor-General could not be availed of by the Courts for enforcing the rights of Moulvi Tamizuddin as the President of the Constituent Assembly. What the Court did not decide was the vires of dissolution of Constituent Assembly.

At the end of all this, the Governor-General was left with no legislature and the country with neither a constitution nor a Constituent Assembly. Federal Court as the second player in the field of the structuring the constitutional basis of the country forced the Governor-General

to concede an election of a new Constituent Assembly. Justice Muhammad Munir observed that "on no democratic principle can the power to dissolve vest in the executive unless the exercise of that power to dissolve vest in the executive unless the exercise of that power is followed by an appeal to the people". The country was brought back to its democratic roots. It also demonstrated Courts' ability to prevent autocracy. (In subsequent times and in similar situation the Supreme Court seems to have lost this ability as in and even in Zafar Ali Shah's case the period of three (03) year given compared to what Mr. Muhammad Munir allowed Ghulam Muhammad, the then Governor –General appears too spacious) .

The newly elected Constituent Assembly met in the cool and breezy hill-station of Murree on 07th of July 1955 and later elected Ch. Muhammad Ali as the new Prime Minister. What followed can be described as speedy constituent-making. In the leap year of 1956 the Assembly sat until nearly midnight of 29th of February and just before the stroke of twelve, final clause was approved.

On 25th of March, 1956 the constitution was enforced and Pakistan became an Islamic Republic under a Constitution framed by the sons and daughters of the soil.

Ch. Muhammad Ali who cannot be denied the credit of bringing about the consensus on the constitution himself did not survive long, and for ineptly dealing with the politics within the House had to resign on 08th of September, 1956. In the next one and a half year three more prime ministers followed suit. The bureaucrat-turned-politicians had also failed. Constitution by itself could not hold the country. The time was ripe for the Man of House back to enter the scene.

On 8th of October Sikandar Mirza who had taken Oath as the President to preserve the Constitution of 1956 made an announcement "that the constitution has been abrogated, martial law proclaimed and General Ayub Khan appointed Chief Martial Law Administrator". We shall examine its legal and political impact shortly but the impact on civil life was that "next morning it was business as usual in the government offices, courts, bazaars and public institution. The people welcomed the change openly. The had become fed up with the minister and the ever growing corruption and insufficiency". This response (or apathy) was later treated as the rationale for holding that the coupe of October was in fact a silent revolution.

Coupe of October was accepted as successful resolution judged by the efficacy of its operation and general acceptance by the people. The doctrine that might is right replaced the theory of constitutional supremacy.

October Resolution established parallel military and civil structures to operate at the pleasure of the regime. It was one circle in reverse from a civilian government headed by the founder of the Nation to a military-cum-civilian regime headed by the Commander-in-Chief of the Armed Forces... the defender of the Nation.

Ayub Khan had a definite plan to change the political culture of the country by introducing a Presidential system instead of parliamentary and by replacing adult franchise with the concept of a limited electorate of basic democrats to elect the National and Provincial Assemblies.

With this in-view he gave a new constitution in 1962 after consulting a Constitution Commission headed by Justice Shahabudin of Supreme Court (although he did not adopt all the recommendation in toto).

Finally a comprehensive list of fundamental rights and the role of political parties was integrated into 1962 Constitution by an amendment in 1965. But Ayub Khan's interest in political parties remained minimal. He accepted them as relevant in controlling and disciplining the members of the Assembly. I joined Ayub's Cabinet as Minister of Law and Parliamentary Affairs on 25.03.1965.

However the fact Ayub Khan as the President of the country was not obliged to please or cater for the needs of the parliamentarians, gave him an opportunity to undertake social reforms and enforce bureaucratic efficiency for economic development. Country saw appreciable improvement in economic, industrial and agriculture sector. On social side Family Law Ordinance, Auqaf Acts and Land Reform Regulations were a leap forward. (People fondly remember Ayub's era as the country made significant progress in the industrial field and a vibrant private sector came into operation).

A war broke out between India and Pakistan and peace efforts at Tashkent culminated in Tashkent Declaration on 11th of January 1966, People in West Pakistan felt betrayed as the believed that the gains of the war were lost on the negotiation table. People in East Pakistan

had a frightening realization that they were by and large left under defended during the war. One thing led to the other, and a movement started against the regime. Soon Ayub realized that his party, the Pakistan Muslim League, had left him alone to tackle the crises. He had to fall back on the administration and such power as were available to him under the Constitution.

The regime resorted to emergency, suspension of fundamental rights detention of political opponents, and censorship etc. A strong lobby pressurized Ayub to curtail powers of the Judicial Review which S.M Zafar resisted and the constitutional amendment drafted for his purpose was dropped.

For various reasons, too unwidely to be discussed in this paper, Field Martial Ayub Khan surrendered all the way to the opposition and finally agreed in a Round Table Conference consisting of political parties of combined opposition and some others to revert to parliamentary form of government and adult franchise thereby going back to the point form where he took the nation to a new course. Notwithstanding this reversal and concession, the agitation did not abate. Opposition leaders had lost control of the public unrest that they had generated and as observed by the Supreme Court in one of the cases "sometime politician play with fire that becomes conflagration.

On 24th of March, 1969 an unnerved President wrote to his "Commander-in-Chief" to undertake his legal and constitutional responsibility to defend the country not only against external aggression but also to save it from internal disorder and chaos". Thus a seal was put on the possibility of any return to presidential system and it was clear that future constitutional development in Pakistan will be on parliamentary lines.

General Yahya Khan perceived that the only way he could perform his constitutional duty was to ignore the 1962 Constitution and go for a new Constituent Assembly. After his initial imposition of Martial Law on the 25th March, 1969 the later promulgated Legal Framework Order (LFO) of 1970, for electing a house with dual purpose of framing the Constitution and acting as Federal Legislature.

This was Indian Independence Act, 1947 revisiting except that a time-frame of 120 days was envisaged to complete the Constitution.

In a fair and free election based on the principle of one-man-one-vote and direct adult franchise a Constituent Assembly was duly elected. The political backdrop influenced the outcome. Awami League dominated the position in East Pakistan and thereby secured majority in the Constituent Assembly. PPP won overwhelmingly in Western Provinces. Political dialogue on the basic structure of a new Constitution particularly the issue of a confederate-like centre with fewer subjects dragged on and degenerated into hardening of position. A civil war broke out and amongst fire and death on 17.02.1971 East Pakistan, seceded and with the fall of Dacca, Bangladesh was, de-facto, put on the map of the world.

General Yahya Khan and his Martial Law was replaced in Islamabad by Zulfiqar Ail Bhutto and his Civilian Martial Law. Legal Framework Order and a reduced Constituent Assembly consisting of members from the Provinces of West Pakistan and two from East Pakistan remained to provide the constitutional base and a machinery to start again. Zulfiqar Ali Bhutto was elected the President of Constituent Assembly as well. He once referring to the number game prided that "I am wearing four hats being the President of Pakistan, President of Constituent Assembly, Chairman of PPP and Chief Martial Law Administer whereas on the day of independence Quaid-e-Azam wore only three hats". Mr. Bhutto did not realize that his additional fourth so-called distinction of Chief Martial Law Administer was in contradiction to the other three positions held by him, whereas Quaid-e-Azam was free of such contradictions.

1971 to 1973 were somber year. A saddened nation lock-up to judiciary for help. Supreme Court assuaged the national anger and anguish by declaring that Yahya Khan was a usurper and that his regime cannot be given a revolutionary legitimacy. In another judgment it handed down the verdict that notwithstanding the illegitimate and non-condonable nature of usurpation, the Legal Framework Order could provide legitimacy at least to the election held under it and that a Constitution framed by such assembly would be acceptable. Supreme Court was aware that there can be no status quo ante in history.

The joint Opposition Parliamentary Party nominated a Constitution Committee headed by Ghous Bukhsh Bazinjo (who became the Governor of Balochistan). S.M. Zafar acted as the Constitutional Advisor and was present of the important meetings. The political leaders involved in constitutional dialogues seemed to be convinced that a parliamentary system

would be more suitable to the situation in Pakistan. Finally the Constitution was hammered in which parliamentary form of government with certain innovation, and federal structure with adequate provincial autonomy and satisfactory safeguards for the provincial rights were provided. Not only Islamic provisions were incorporated but Islam was declared the religion of the State. Functional rights were comprehensive issue of President versus strong Prime Minister was settled in favour of the Prime Minister and the President of 1973 Constitution became ceremonious and decorative head of the State. Prime Minister was the chief executive whose advice was binding on the President in every matter.

Abrogation, repeal or subversion of Constitution was declared treason and punishable (a reaction to the two Martial Laws).

On 12th March, 1973 the Constitution Assembly passed and promulgated the Constitution and the nation heaved a sigh of relief. Ch. Fazal Elahi became the President and Mr. Zulfiqar Ali Bhutto assumed the office of the Prime Minister.

Rule of Mr. Bhutto was that of a populist leader. Major policies undertaken by his regime were nationalization of industry from private sector, nationalization of education and depriving of civil servants of the Constitutional protection. When elections were held under the framework of 1973 Constitution in the year 1977 the atmosphere got marred by the allegation of massive rigging. Combined opposition of nine political parties got into a political alliance called Pakistan National Alliance. The religious forces joined this movement as they found liberalism of PPP unacceptable. So equally balanced were the two forces that it was a no-win situation for either. There appeared no institutional office including the President to be able to interfere. The dialogue between PPP and PNA prolonged to a point that finally on 05th of July, 1977 notwithstanding the newly added Article declaring abrogation as high treason, a third Martial Law was imposed. The Constitution of 1973 was suspended and the leaders of the PPP and PNA were taken in 'protective custody' and elections were announced to be held within 90 days.

Judiciary was once gain called upon to determine the legitimacy of the Martial Law regime. This time departing from the previous two precedents, the Court neither treated Zia's take-over as a revolution, nor declared him a usurper; rather it examined through the assistance of detailed arguments, the material and historical causes that led to the intervention. Finally

the Court endorsed the action and politics that justified the take-over Supreme Court founded its decision on law of necessity.

The Court attempted to fabricate a regime in which military were to function under the parameter of law of necessity as defined by the Supreme Court.

Acting on the assumption that such a relationship has come into existence, judiciary took up certain cases and reviewed the actions of Martial Law Administer. Zia showed patience for some time but when the Chief Justice of the Lahore High Court, Lahore while hearing a constitutional petition asked Mr. Sharifuddin Pirzada, the Attorney-General of inquire from his "client" when would he fulfil the obligation of holding the election? Zia called it a day.

"Zulfiqar Ali Bhutto had already been executed on 04th of April, 1979 and the members of the PNA who had joined General Zia-ul-Haq Cabinet, had been sent home. General Zia-ul-Haq felt free to act. "He promulgated the Provincial Constitution Order" [21] commonly known as "PCO". Judicial review was effectively controlled. A large number of confirmed judges of Supreme Court and High Courts were sent home. The ghost of Doso's judgment controlled the atmosphere. So much so that the Court started refusing to entertain petitions against Martial Law Administrator by simply returning the petitions with a stamp indicating "Hit by PCO".

"General Zia-ul-Haq tried to establish a political base through his nominated Shoora (Parliament) but finally settled for an elected Assembly on non-party basis. He got a ready ally in Pir Ali Mardan Shah of Pagara, the President of Pakistan Muslim League. S.M.Zafar was the then Secretary-General of the party and realizing the danger of an election on a non-party base. He vehemently opposed such a move. His arguments were that "such an election will give rise to provincial, sectarian an ethnic prejudices; will encourage Baradari system and help local and money mafia to reach the National and Provincial Assemblies and it will then be difficult to dislodge them". President of the party, Pir of Pagara saw it differently. He was convinced that those who would get elected on non-party basis will eventually joint Muslim League. An election on non-party basis were held for National Assembly and Provincial Assembly in 1985. Unfortunately both of us turned out to be right. All the demons that I talked about had come to life and made their strong holds in the society as well as in the Assemblies". [22] But majority of the members who got elected did,

as predicted by Pir Pagara, joint Muslim League under the Prime Minister-ship of Muhammad Khan Junejo. I had no alternative but to withdraw from the party.

"The Assembly met under the umbrella of Martial Law and after it passed the Eighth Amendment the Constitution of 1973 was revived and later the Martial Law was lifted. Powers of the President were enhanced and he inter-alia could within certain parameters dissolve the National Assembly in his discretion. The power to dissolve was however subjected to holding election viz an appeal to the people." [23]

"1985-1987 is a journey from party-less to party base regime, which in some mysterious way was brought about what General Zia-ul-Haq did and, or what happened to him. In exercise of the powers acquired under English Amendment, he dissolved the National Assembly of Pakistan in 1988 thereby bringing to an end Mr. Muhammad Khan Junejo's Government. He fixed 17th of November, 1988 as the next date of elections but he died in a plane crash of 18th of August, 1988. It is debatable, if he would have held the election on party-base if he were alive or would he have reverted to his original plans. However in the meantime a decision by the Supreme Court upholding the right of a political party to get allocated a symbol of its choice finally set the stage for party-based elections.

When General Zia-ul-Haq took over as Chief Martial Law Administrator, he had assured the nation to hold elections under the prevalent system in 90 days. Elections were not held then. It is an extraordinary blood chilling coincidence that the elections on party-basis were finally held on the 90th day of his death i.e 17th of November, 1988." [24]

The two abortive attempts to govern the country through non-party elections, first by Ayub Khan (1962-1965) and then by Zia-ul-Haq (1985-1987) provide an unmistakable evidence that the civil society of Pakistan is firmly committed to party-base regime. This augurs well for political parties.

From 1987 to 1999 are the years in which PPP and PML alternatively came into power, each losing to the other after the President exercised his discretion and dissolved the National Assembly. The Supreme Court dealt with each dissolution on case to case basis but there was undoubtedly public reaction against the non-elected executive to dissolve an elected house.

"Be as it may, holding four elections within a period of eleven (11) years by an appeal to the political sovereign (after each dissolution) did help in creating some awareness in the public and each election indicates improved maturity of the electorate. During this period, two-party system unmistakably emerged and the political leaders tried to remove the innovations introduced by General Zia-ul-Haq and vest the Prime Minister with the same authority as is available under a standard parliamentary system. Party in power and the opposition joined hands to delete Article 58(2) (b) of the Constitution and denude the President of his discretionary powers to dissolve the Assembly was addressed in "in order to prevent instability in relation to the formation and functioning of the Government " Article 63-A was added, providing for disqualification of elected members on the ground of defection. Generally a wholesome provision except that disciplinary power vested in the head of the party had the potential of encouraging autocracy in the political party. The constitutional jurists believed that parliamentary sovereignty was being restored." [25]

Notwithstanding many ups and downs in the journey towards democracy, certain milestones are well fixed and discernible. Before I refer to the military take over of 12th of October, 1999 it would be appropriate to identify these milestones which are;-

(a) Out of the two well-known systems of governance, namely the presidential and parliamentary, only the latter is acceptable and, or workable in the present-day Pakistan.

(b) The adult franchise with a right to form political parties is a part of national consensus.

(c) Electorate ends to prefer a two-party (or fewer party system) in the parliament.

(d) Intervention by the armed forces has been acquiesced in as an interregnum only to get rid of an irremovable bad governance-yet the military rule was not tolerated for long time. In fact any attempt to convert de facto rule into a de jure legitimacy has been resisted by the parliaments whenever restored as well as by the Courts who adopt the doctrine of past and closed transaction and thereby bury the past and provide a start judging the new regime in term of the Constitution.

(e) Superior Courts of Pakistan did not take upon themselves to restore democracy by their edict (which otherwise is the primary responsibility of the civil society in general and political parties in particular) but Court did help in stopping the perpetuation of arbitrary rule and facilitated the eventual return to democracy. Law of necessity was used for condoning the take over but showing a way out.

"In the backdrop of the above evolving political culture Mian Muhammad Nawaz Sharif claiming a "mandate" on behalf of the nation, proceeded to further reform the Constitution—an exercise in which most of the leaders indulged as if changes in constitutional provisions will ipso facto change the fate of the suffering masses. PML majority approved the Fifteenth Constitution Amendment Bill of 1998 with a view to make Shariah the Supreme law of the country and it was inter alia provided that any provision of the Constitution could henceforth be amended by simple majority to bring it is line with the provisions of the Amending Bill". [26] My comments on it were that Fifteenth Amendment if enacted would make the rest of the Constitution subservient to the will of the assembly. For lack of requisite members of Senate the bill could not become the law.

"However simultaneous to these political corrections, the issue of good governance assumed importance as all the four dissolutions had an under-pinning of allegation of corruption and inefficiency. So much so that the Supreme Court in its judgment dealing with the last dissolution of the Assembly, commended the dissolution when it found corruption as a ground for the action." [27]

"PML Government adopted unusual policy of using armed forces in aid of civil matters such as combating terrorism to the extent of manning the Courts by personnel from the armed forces (till Supreme Court interference). Again army was called to unearth ghost schools or detect electricity theft even during the conflict between the Prime Minister on the one side and President and Chief Justice in the contempt proceeding Gen. Jahangir Karamat was drawn in as a referee and his neutral attitude led to the resignation of President and C.J. from their respective offices. But when contentious issue of National Security Council was raised by Gen. Jahangir Karamat during his address at the Pak Navy War College the Prime

Minister made his resign and General Pervaiz Musharaf was selected as Chief of the Army Staff. [28]

Somewhat emboldened Mian Muhammad Nawaz Sharif on controversy relating to apportionment of responsibility on occupation of Kargil an out post in the heights of Kashmir by Mujahiddin backs by Armed Forces summarily and unconventionally dismissed his own nominated Chief of Army Staff while he was on board PIA flying from Colombo where he had gone to attend a high level military conference. Armed Forces of Pakistan took it as an act of absolute bad governance, and coupled with the other allegations of high corruption and mismanagement staged a coup de'tat and took over the Government.

This time the take-over has not been called a Martial Law nor fundamental rights are suspended. Moreover, the Army has been asked by the Supreme Court to hand over Government to the civilian after holding election by 12th October 2002. Elections are on the anvil and hopefully they will be held in time. The present Government has also like its predecessors proposed number of amendments in the Constitution, which shall have to be finally debated in the Parliament.

It appears to me that only way out for the political parties, the army and the civil society is to concentrate on managing an above board, fair and free and internationality accepted transparent election to the parliament and the provincial assemblies.

We must catch the time of the forelock. There will be enough time and talent in the Parliament to discuss and deal with the Constitutional issue, and get seriously busy with good governance.

Interview with human rights activist

In connection with my thesis I had made a contact with the respected **Mr. Qazi Muhammad Anwar,** the Ex-President of Supreme Court Bar Association and thus on 07.03.2011 I jolt down an interview with him in connection with Judicial Review in Pakistan and its impact on human rights, the interview is reproduced below, which was in shape of question and answer;-

Nasir Kamal: Sir, how you can define Judicial Review & Judicial Activism?

Qazi Anwar: In my opinion, Judicial Review/Judicial Activism is one and the same thing and in my opinion Judicial Review is a struggle of the superior Courts, particularly of the Supreme Court & of the High Courts, whereby they have got enormous powers to declare the act of the parliament or an act of the administration as against the constitution and ultra-vires.

Nasir Kamal: Sir, how you see the struggle of the judiciary relating to judicial review?

Qazi Anwar: In my opinion, it is a struggle which is in the right way and on the right track and particularly the struggle has gain the momentum in the year 2007 till now.

Nasir Kamal: Sir, what is your opinion whether judiciary in Pakistan is independent or not?

Qazi Anwar: In spite of the fact that the judicial review/judicial activism has gain a momentum but despite this fact the judiciary in Pakistan is still not independent. This is because of the fact that the superior courts are not exercising their power of judicial review within the four corners of Article 184 (3) of the Constitution of Islamic Republic of Pakistan, 1973.

Nasir Kamal: Sir, how the judicial activism is not within the four corners of the Constitution?

Qazi Anwar: By this, I means that the Supreme Court and particularly the present Chief Justice took Suo-Moto notices in all human right cases, but in spite of this every day we can see that the news paper is full of human rights violation, the stories are there mentioned in the news papers, so if one of the case is taken up by the Chief Justice and the other cases not taken by the Chief

Justice than it would amounts to injustice whose case is not taken by the Chief Justice.

Nasir Kamal: Sir, do you means that there must be certain cases in which Suo-Moto action should be taken?

Qazi Anwar: Yes, you are right. There must be certain mega cases in which the Supreme Court should take Suo-Moto action, the Supreme Court took Suo-Moto action in Steel Mill Case, but in rest of the cases, this is my opinion that Supreme Court should not interfere because there are Courts functioning in Pakistan, e.g if Supreme Court want to take action in family matters there are family Courts established under the Family Court Act, 1961, so the Supreme Court by doing so would amount to interference in the jurisdiction of the Family Court, which is not warranted by the law. Furthermore, the High Courts must be given powers to take Suo-Moto actions.

Nasir Kamal: Sir, how High Courts can take Suo-Moto actions?

Qazi Anwar: Under Article 199 of the Constitution of Pakistan, 1973 ample powers are given to the High Courts in connection with Writ Jurisdiction, so if these powers are exercised by the High Courts Suo-Moto then there will be no burden of work upon the Supreme Court.

Nasir Kamal: Sir, do you think that the power of Judicial Review means interfering in the matters of other pillars of the State?

Qazi Anwar: If judicial review is exercised within the four corners of Articles 199 & 184 (3) of the Constitution of Pakistan 1973, then its ok or in the other case if the powers are not exercised within the four corners of the above said articles then it would render the other organs of the State redundant.

Nasir Kamal: Sir, what is your opinion about the judgment of the Supreme Court in 18th amendment case?

Qazi Anwar: Under the 18th amendment 100 different articles were amended but in the Supreme Court only five pertaining to the appointment of judges of the superior Courts were challenged, it is to be noted that prior to the 19th amendment if that was not challenged then the politician's, lawyers would occupy the

seats of the judges of the superior Courts, so 19th amendment has curtailed all such kind of activities.

Nasir Kamal: Sir, do you think that judicial activism and democracy runs counter to each other?

Qazi Anwar: No, if the powers of the judicial review as I cited above is exercised within the four corners, then it would never render democracy redundant. It is to be noted that judiciary in fact produces strength to democracy, if exercised in a proper way and in accordance with the constitution.

Nasir Kamal: Sir, what should be the reforms pertaining to judicial review?

Qazi Anwar: In my humble opinion following reforms should be made pertaining to judicial review;-

a) The law maker should define in the first instance what is infact judicial review.
b) The areas of judicial review must be defined, that in what type of cases the judicial review shall be exercised.
c) High Courts under Article 199 should exercise Suo-Moto powers extensively so that the burden of work should be lessened on the Supreme Court.
d) In mega cases where wealth of the nation is involved Supreme Court in such cases should exercise Suo-Moto powers otherwise not.
e) The Supreme Court should not interfered in the jurisdiction of other Courts, while exercising the power of judicial review.

Nasir Kamal: Sir, thanks?

Qazi Anwar: Thanks, welcome.

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[26] *Ibid.*

[27] *Ibid.*

[28] *Ibid.*

CHAPTER 6

recommendation & conclusion

In light of the discussion that I have made in connection with my thesis I have come to the conclusion that following shall be the recommendation and conclusion regarding Judicial Review;-

1. That first of all it shall be the duty of the legislature to define in fact what is meant by Judicial Review, although in this connection there are landmark judgments which have defined the doctrine of Judicial Review but in fact this is not sufficient, it is for the law makers to define the doctrine of Judicial Review so that in future there shall be one definition which must be unanimous, the benefit of this could be that in future when the judges are going on to decide the cases pertaining to the Judicial Review then they would be left with no option but they will be stick to one definition only.

2. It is of vital importance that the scope of the Judicial Review shall also be defined, by this I mean that the law makers shall decide that what shall be the scope of the Judicial Review.

3. It is also of vital importance that the limitations pertaining to Judicial Review shall be made obvious, and unbridled power of Judicial Review shall not be given to the superior Courts on the ground that by this the power of law making made by the parliament shall be come redundant.

4. That in petty matter the doctrine of Judicial Review shall not be invoked, rather the petty matter shall left to the lower judiciary, if the superior Courts are going to tilt in favour of Judicial Review then it would amount to interference in the jurisdiction of the lower judiciary which is not warranted by the law and by the constitution of the civilized states.

5. It is note worthy that in mega cases, I mean where national money is involved the doctrine of Judicial Review shall be invoked as the Supreme Court of Pakistan did in Pakistan Steel Mill and in NRO cases, this is beneficial in state like Pakistan where the structure of the State and particularly the politicians are corrupt and involved in kickbacks and corrupt practices, so in order to curb such kind of activities in state like Pakistan the invoking of judicial review is the need of the hour.

6. The jurisdiction of the Federal Shariat Court conferred under Article 203-D of the Constitution of Pakistan 1973, or for this that matter of any other Court, is proposed to be extended to the matters excluded from the jurisdiction of Federal Shariat Court by virtue of the limits in terms of the definition of law provided by the Article 203-B(C). According 203-B (C) should be amended as law includes any customs or usage having the force of law, constitution, Muslim Personal Law, any law relating to the procedure of any Court or tribunal, a fiscal law or any law relating to the levy and collection of taxes and fees or banking insurance practice and procedure. However, regarding the constitutional provisions, jurisdiction of Federal Shariat Court under Article 203-D of the Constitution of Pakistan 1973, must be ousted, and it be confined only and exclusively for the Supreme Court of Pakistan.

7. Jurisdiction and powers under Article 203-D of constitution of Pakistan 1973, regarding constitutional provisions should be conferred exclusively on the Supreme Court of Pakistan because the preservation of Islamic character being the basic feature of the constitution in fact, the constitutional obligation of the Supreme Court, hence, the bar of jurisdiction placed upon the Supreme Court under Article 203-G "not to exercised the jurisdiction under Article 203-D" is proposed to be removed and a new clause 4 should be added to article 203-D as "without prejudice to the preceding provisions the Supreme Court shall, if considered that any provisions of the constitution is not inconsonance with the injunction of the Holy Qur'an and Sunnah, have the exclusive power to make an order of the nature mentioned in this article. For, this purpose of exercising this jurisdiction, the Supreme Court shall consist all of its Muslim judges". Whereas for ousting the jurisdiction of the Federal Shariat Court under Article 203-D of the Constitution of 1973, regarding "constitutional provisions", as suggested above, it is proposed to insert the word "subject to the constitution" in the beginning of the Article 203-D which will restrict the jurisdiction of the Federal Shariat Court, in the presence of the above suggested clause 4 of Article 203-D regarding the constitutional provisions.

8. Scope of Article 203-D of the Constitution of 1973, should be extended to the executive acts of all level as well.

9. Constitutional provisions under Article 203-C(4), (7) concerning the Federal Shariat Court, making the independence of judiciary doubtful, shall be removed by making appropriate amendments in the concerned provisions of the constitution.

These recommendations are last but not the least to advance the scope and purpose of the doctrine of Judicial Review of the legislative and executive action including the socio-economic policies of the government on the touch stone of Islamic injunction. The development of such review will provide an effective mechanism for the clarification of certain vague and ambiguous concepts regarding the secular matters in Islamic perspective having implications on the socio-economic and lego-political development of Pakistan. Therefore, the exercise of such jurisdiction has become the order of the day in Pakistan, to give effect to the will of the people of Pakistan to establish an order, wherein the sovereign power i.e., legislative, executive and judicial functions will be exercised within the limits prescribed by Islamic injunctions as sacred trust, with a view to establish an orderly society placing the justice, security, safety and welfare in Islamic Republic of Pakistan.

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