APPROVAL SHEET

This is to certify that we have evaluated the thesis entitled "Role of Judiciary in the Protection of Human Rights by Promoting Good Governance in Pakistan: A Critical Analysis" submitted by Ms. Rabia Busri, Roll #106/FSL/ LLMHRL/F12 in partial fulfillment of the award of the degree of LL.M in Human Rights Law. The thesis fulfills the requirements in its core and quality for the award of the degree.

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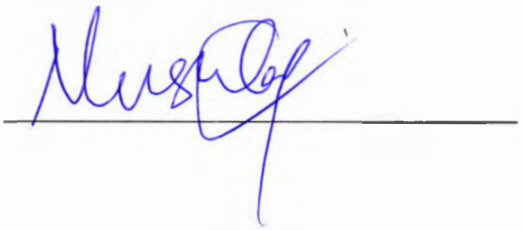

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ACKNOWLEDGMENT

I Thank Allah, the Almighty, who gave me the courage to accomplish this work. Then I pay tribute to my parents who are real assets of my life. I greatly indebted to my brother Ch.Nasir Mehmood who cared for and supported me in every best possible way.

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ABSTRACT

Justice is the greatest interest of man on earth .It is legitimate which holds civilized societies as nations and then civilized nation together. The topic of this research work is "Role of judiciary in the protection and promotion of human rights and an analysis in the light of good governance in Pakistan". The research is an academic one therefore appreciates all the procedure, limitation, methodology and restriction required for the academic research. The research contains codification, explanation and case study along with appropriate case study. The work contains 3 chapters explaining different aspects of research. Though primary focus was to address and sort out the issues related to protection and promotion of human rights through independent judiciary and an equal importance has also given to comparative analysis of the issue of good governance in Pakistan.

The feature of the rule of law and role of judiciary is important part of good governance for the protection and promotion of human rights, that features not only entail respect for the national law but also for law which is dependable with the international human rights framework, with directions to promote justice. Good governance connects political and institutional processes and outcomes that are considered essential to attain the goals of development.

The primary aim of this study is to spring a positive change in the judicial system to shelter and encourage human rights and to make it a source for further research in the area of good governance which leads to an improvement in the standards of life of ordinary citizens in Pakistan. For the purpose; Independent, strong judiciary and good governance is the sole guarantee available to general public for the fortification and endorsement of their rights, in general. Good governance strengthens rule of law, furthers the cause of justice, helps in securing Human rights, accelerates the pace of realization of constitutional objectives and by writing this thesis it has been tried to achieve all the said objectives.

Thesis Statement

Strong and independent judiciary can protect democracy and promote good governance leading to improvement in the standard of life of ordinary citizens in Pakistan through Public interest litigation while the doctrines of separation of powers and checks and balances demand a genuine jurisdictional demarcation so to discourage power tussle between different organs on one hand and guarantee provision of fundamental human rights to Pakistanis on the other.

Research Methodology

The researcher has utilized the qualitative and analytical research methods.Literature written on the Rule of Law, Role of Judiciary and access to justice affecting Human Rights has been reviewed. Number of cases laws is reproduced for the establishment of connection of good governance with Judiciary and Human rights.

Objective of the research

Lack of good governance is an emerging issue in Pakistan and it affects the citizens of Pakistan in different ways that they are deprived of dignity, equality and fundamental rights. The rights of all human beings of the society are based upon freedom, justice and peace in the world. Looking into the current situation of Pakistan thousands of people seems deprived of their fundamental rights. As a student of human rights this situation always make me think about the misery of people, like do Pakistan have good governance ? If yes, then why these people are deprived of their basic human rights? Why they are considered as pupates in the hands of the authorities? And why judiciary is considered to be the only institution which is protecting the human rights and why executive and legislature are silent and judiciary is the only institution which is protecting and promoting good governance? This work is intended to look for answers to these questions that come in the mind of students, lay man, human rights advocates and all those who are deprived of their rights that the government has duty to protect its citizens. In addition this study will establish key points that promotes good governance and its link with judiciary and other organs of the state .All institutions of the state must

fulfill their duties in their prescribed jurisdiction this will ultimately promotes good governance in state which means the protection and the promotion of human rights.

Hypothesis

Genuine jurisdictional demarcation is needed to protect democracy and promote good governance for the better standards of life of ordinary citizens of Pakistan, otherwise power tussle between organs will continue the violation of fundamental human rights Good governance covers all aspects of human rights for instance the rule of law, efficient participation, multi actor partnerships, political pluralism, transparent and accountable development and establishments, an efficient and effective public sector, authority, access to knowledge, information and education, political empowerment of people, equity, sustainability, and attitudes and values that promote responsibility, harmony and tolerance, social justice, equal opportunities, gender equality, reliability, effectiveness and efficiency and above all, promotion and protection of human rights but this is not a comprehensive definition of it.

Framing of Issues

1. Which institutions are concerned with protection and promotion of governance?

2. What is the key ingredient that makes governance good or a poor one?

3. How poor governance constitutes human rights violation?

4. Are the institutions of governance effectively guaranteeing the right to fair justice?

5. Whether interference by judiciary in governance conflicts theory of separation of powers?

6. Democracy, human rights and good governance are interrelated topics, how can judiciary remain active still respectful of democratic framework of separation of powers?

7. Whether is constitutionally permitted to interfere in governance matters? And if yes, to what extent?

8. Under the concept of checks and balances, what parameters need to be laid down for controlling judiciary's "unwarranted" interference?

9. What measure need to be adopted in Pakistan so to enable judiciary play a vital role in promoting good governance in the country?

Literature Review

According to Agere Sam in his book *"promoting good governance principles practices perspectives"* good governance is the highest development and management state in the country. It is good governance which makes government democratic in a true sense. The people participate in a decision making processes, the services are delivered efficiently, human rights are respected and that the government is transparent, accountable and productive. Good governance contributes to economic growth, human development and social justice. Good governance defines the process and structures that guide political, socio-economic relationships. It has major implications for equity, poverty and quality of life.

The same principles of good governance should also be applied to the government. There must be transparency, accountability and separation of powers. These all goals may be achieved by following the principle of good governance. When we have good governance in a country this ultimately resulted into protection and promotion of human rights. This thesis is trying to make it possible that principles of good governance be implemented in way for achieving the goal of protection and promotion of human rights.

Eugene Cotran, Adel Omar Sherif in *"The Role of the Judiciary in the Protection of Human Rights"* tries to shed new light on the relationship between courts, judges and human rights. The Role of the Judiciary in the Protection of Human Rights provides a wide range of perspectives on the importance of the judiciary in the protection of universally recognized human rights. Freedom of human rights and they must be acknowledged and safeguarded in practice. The real scope of the judiciary and human rights relationship the mechanisms which make it possible for the judiciary to play a vital role to protect them.

Furthermore United Nations publications in 2007 published a book *"Good governance practices for the protection of human rights" which* asserts that good governance and human rights are mutually reinforcing. Without good governance human rights cannot be respected in a sustainable manner. Implementation of human rights relies on the conducive and enabling environment. It explores the link between good

governance and human rights in four areas namely, democratic institutions, the delivery of state services, the rule of law and anti corruption measures.

It is further held that the there should be encouragement for civil society and community to formulate and express their positions on issues of importance to them. It is the state responsibility to provide public goods which are essential for the protection of number of human rights. Good governance should ensure that services are accessible and acceptable to all and public participation is necessary in decision making. This thesis is trying to include rule of law as an important factor which makes good governance possible to protect and promote human rights.

Madhav Godbole says in his book "*Public Accountability and Transparency: The Imperatives of Good Governance*" it is true that activism has been push on judiciary due to ineffective, unresponsive and impervious legislative and executive processes. The judiciary can direct these two institutions to take suitable actions. But to take on itself the responsibilities which clearly fall in someone other's sphere which clearly violate the principle of democracy and good governance.

There must be assurance of separation of powers. All the institution whether it is judiciary, executive and legislature all should do their work in prescribed jurisdictions.
Maliha Naveed says in her article titled "*Justice in the essence of good governance*" State is characterized by its three constituting pillars, namely Judiciary, legislature and executive. All three derive their power from the Constitution of the State and work within the domain of these powers as prescribed by the Constitution. Though the nature of their individual tasks is not limited but each mainstay must try that its actions do not have an overriding effect on one another. Legislator is a group of people who makes the laws, the Executive Body implements these laws and makes other administrative decisions while the judiciary is responsible for the smooth functioning of a legal system of a country.
For the purpose of attaining good governance these three pillars should work separately. Separation of powers contributes in the good governance.

INTRODUCTION

An independent judicial system is the essential to a democratic society. The independence of judiciary is an assurance of improved law and order standards, strengthened national security, better economic development and social well being of the people.

The judiciary in any country is central to the protection of the rule of law, the protection and promotion of human rights and freedoms. A fundamental principle of justice is that no judges, no lawyers and no citizens should be above the law, let alone be beyond the law.

It is also a fundamental check and balance on the other branches of the government, which guarantees that laws of the parliament and acts of executive comply with the constitution and the rule of law.

The progress of societies around the globe depends upon the extent of rule of law being implemented there. The most fundamental pillar for modern state is rule of law on which the entire structure of a prosperous and peaceful society stands. The rule of law can only be implemented by an independent judiciary. Therefore, it has the most important duty in this perspective, even if has to go an extra mile, or for that matter seems to influence upon jurisdictions of other organs of the state, must guarantee absolute rule of law.

Only a judiciary that has integrity and is competent, independent, and efficient can guard the rights of the citizens and deliver equal justice.

Independent and unbiased administration of justice, contribute to support constitutional norms and rule of law in the society. An efficient judiciary contributes towards strengthening the state institutions and promoting good governance. This is possible only when state organs and institutions perform functions by remaining within their respective sphere. Good governance, in turn, leads to economic development and social progress. It helps in gathering trade and commercial activities and investment opportunities. The significant times of developed nations shows that the secret of their success is adhere to the constitution, rule of law and a system of government which provides good governance and strong administration.

The administration of inexpensive, unbiased and fair justice leads the society to a civilized form of governance. Equality, impartiality, integrity in dispensation of justice are vital elements for the good governance of the state. Good governance leads to the maintenance of peace, tranquility of the socio-economic activities. The law has assigned a very important but delicate responsibility to the judiciary to maintain rule of law and constitutionalism which is the corner stone of good governance.

The role of judiciary is ever increasingly gaining critical importance with every passing day as citizens are responding great confidence in this institution for the remedy of their grievances. This is further worsen by the fact that the lack of good governance on the part of the executive shifts the burden of responding to insufficiency of governance towards the judiciary which is increasingly relied upon by public for the fulfillment of their desires as citizens of Pakistan.

Human rights in a state can widely be improved through good governance while independent judiciary plays a vital role in protection and promotion of good governance. In a democratic society rule of law is sustained through independent judiciary while good governance itself is a sign of developed human rights. Thus both judiciary and good governance are vital in promotion and protection of human right.

Independent judiciary monitoring and supervising good governance will contribute to improving the standard of life if it will make sure that fundamental human Rights, as basic ingredients of good governance, are promoted and protected.

CHAPTER 1

DEFINITION AND DEVELOPMENT OF JUDICIAL MECHANISM AND HUMAN RIGHTS

Introduction

Good governance and human rights are mutually reinforcing, and good governance is a precondition for the realization of human rights. This has been asserted by various United Nations bodies, often through resolutions, emphasizing the importance of an environment conducive to the full enjoyment of all human rights.[1] In fact, without good governance, human rights cannot be respected and protected in a sustainable manner.[2] The building and maintenance of good governance, and hence the implementation of human rights, depends on many factors, like appropriate legal frameworks and institutions as well as political, administrative, and managerial processes responsible for responding to the rights and needs of the population. Among these are also "a Government that follows the rules and makes no exceptions; a legislature that focuses on its core mandate of adopting wise laws; regulators that are not swayed by special interests; independent auditors that properly review public accounts; a bureaucracy that proudly and professionally serves the public, and private sector that respects and obeys the law."[3]

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[1]Office of the High Commissioner for Human Rights, *Good Governance Practices for the Protection of Human Rights* (Geneva: United Nations, 2007), 1. See, e.g., the joint OHCHR-UNDP Seminar on good governance practices for the promotion and protection of human rights, which took place in Seoul in September 2004. The conclusions of that Seminar emphasized the mutually reinforcing, and sometimes overlapping, relationship be-tween good governance and human rights. See also, the follow up United Nations Conference on anti-corruption measures, good governance and human rights, dated 8-9 November 2006, at Warsaw, Poland (available at http: //www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/WarsawConference.aspx).
[2]Ibid., 1.
[3]Speech by Haruhiko Kuroda, President, Asian Development Bank, "Good Governance and the Judiciary," at the International Conference & Showcase on Judicial Reforms: Strengthening the Judiciaries of the 21st Century, on 29 November 2005, at the Makati Shangri-la Hotel, Manila, Philippines.

Out of all these factors, the most important and indispensable factor might be a judiciary that holds the law above everything and everyone.[4]

The judiciaries of the under-developed countries, especially those of South Asia, have risen to great heights to meet the challenge of good governance and the accompanying protection of human rights. This they have done in the last three or more decades through judicial activism and public interest litigation.[5] The rise of judicial power has been accompanied by a sudden rise in the awareness about human rights since the International Human Rights Conference 1993.[6]

The judiciary of Pakistan too, in the recent past, has played an active role in defending human rights and has participated fully in the movement for the defense of human rights.[7] The judiciary gained true independence after it restoration in 2009. Since then it has worked consistently for creating an environment in Pakistan that is conducive for good governance and hence the protection of human rights. This role of the judiciary in Pakistan needs to be

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[4]Ibid.

[5]See, e.g., Nick Robinson, "Expanding Judiciaries: India and the Rise of the Good Governance Court," *Wash. U. Global Stud. L. Rev.* 8 (2009): 1–69 and Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (Geneva: United Nations, 2002).

[6]See, e.g., *The 20th Anniversary of the Office of the High Commissioner for Human Rights*, http://www.ohchr.org/EN/NewsEvents/OHCHR20_Backup/Pages/Achievements.aspx (accessed March, 2015). "The creation of the po-sition of High Commissioner for Human Rights in 1993 has enabled an independent, authoritative voice to speak out for human rights worldwide. The Office of the High Commissioner responds to crises, supports human rights defend-ers, and brings human rights closer to people. Through advocacy, monitoring and training activities, it contributes to legislative and policy reforms to increase accountability for human rights violations and advance human rights. Many challenges lie ahead in the struggle to promote and enhance the dignity, freedom, and rights of all human beings. In the past two decades, however, significant progress has been made." Ibid.

[7]A special Human Rights Cell was created in the Supreme Court for this purpose. See, e.g., Supreme Court of Pakistan, *Annual Report for the year 2010* (2011), 128-33. "Today, the Human Rights Cell receives an average of 250 applications on a daily basis. The Cell was initially headed by a Director, but subsequent to the restoration of judiciary in 2009, a Director General was also appointed to deal with the increasing influx of applications. The Human Rights Cell is vested with the basic responsibility of managing the initial processing of applications. The staff then scrutinizes all the applications and prepares a brief summary of the grievances for the benefit of and in accordance with the orders of the Hon'ble Chief Justice. With the approval of the HCJ, the concerned agencies of the federal and provincial governments are also called upon to submit reports and all necessary documents to facilitate the dispensation of justice." Ibid., 129.

subjected to a critical appraisal, so that the work done can be assessed in the light of international standards, and recommendations made for possible improvements in the procedures and methodology adopted for securing human rights through good governance. This study will begin, in the first chapter, with a discussion of how domestic law deals with violations of human rights, and how Pakistan, like the rest of the world, has faced such violations. The second chapter will deal with the newfound independence by the judiciary of Pakistan after a political struggle of the people in 2009. The independence of the judiciary and the role of good governance will be highlighted with reference to Pakistan according to what is required by international standards. The relationship of human rights with good governance will then be analyzed and appraised. The lessons learned and the findings of the study will be recorded in the end, so as to make recommendations for the direction that can be taken for future developments.

The current chapter will note the rise of human rights awareness in the last few decades, an awareness that coincides with the growth of judicial power in developing countries. It will also attempt to understand the way in which international human rights law is implemented at the domestic level. This will be followed by an assessment of the expanded role of the judiciary in Pakistan, especially its role in defending human rights.

1.1 The Rise of Human Rights in the Last Few Decades

Since 1945, international human rights law has had an ever-growing impact on domestic legal systems throughout the world. This has had a deep impact on the daily work of

domestic judges and the courts in developed as well as underdeveloped countries.[8] According to some, the story starts much earlier with interdiction of the slave trade by Britain in 1824, or the issuance of the "Emancipation Proclamation" by U.S. President Abraham Lincoln in 1863, or by New Zealand becoming the first country to recognize women's suffrage in 1893, and so on.[9] Nevertheless, the great evolving legal situation, which could not have been foreseen half a century ago, re-quires each country and its legal professions to consider ways in which effective implementation of the State's legal human rights obligations can best be secured.[10]

The founding documents for human rights, as for the United Nations, are the Charter of the United Nations (1945) and the Universal Declaration of Human Rights (1948). The Universal Declaration of Human Rights was adopted on 10 December 1948 by an overwhelming majority of states.[11] The United Nations Charter was adopted in June, 1945.[12] The Universal Declaration of Human Rights (UDHR) was adopted as a result of nearly "three years of intensive debate, negotiation, and far-reaching philosophical inquiry. The final text drew on more than fifty constitutions, countless written submissions, and the religious and moral traditions of every major belief system in existence."[13] Pakistan was

[8]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 36.
[9]Robert F. Gorman and Edward S. Mihalkanin, *Historical Dictionary of Human Rights and Humanitarian Organizations* (Lanham, MD: The Scarecrow Press, Inc., 2007), xix.
[10]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 36
[11]Roland Burke, *Decolonization and the Evolution of International Human Rights* (Philadelphia, PA: University of Pennsylvania Press, 2010), 1.
[12]World War II came to an end in the same year in August with the atomic bombings of Hiroshima and Nagasaki. In November, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) was established. In December, the World Bank (International Bank for Reconstruction and Development [IBRD]) and the International Monetary Fund (IMF) were established. Gorman and Mihalkanin, *Historical Dictionary of Human Rights,* xxi.
[13]Burke, *A Handbook of International Human Rights Terminology,* 1.

among the delegations that delivered their assent to this historic document.[14] The key definitions of human rights are to be found in the Universal Declaration of Human Rights (UDHR), in nine core international human rights treaties and in nine optional proto-cols.[15] United Nations human rights work is largely undertaken within this normative frame-work. The treaties are central to the work and activities of the Office of the United Nations High Commissioner for Human Rights (OHCHR) at national, regional and international levels.[16] The treaties and their optional protocols are ratified or acceded to by States on a voluntary basis; once a State becomes a party to a treaty or a protocol, it takes on the legal obligation to implement its provisions and to report periodically to a United Nations "treaty body" composed of independent experts.[17] Ten such bodies monitor the implementation of these treaties and optional protocols through two main channels: periodic reports on the situation of specific rights in a State party and communications submitted by individuals. Some treaty bodies can also visit countries and undertake inquiries.[18] A large number of important Developments took place in international law and also in the area of human rights since the adoption of the Declaration.[19] Awareness of human rights began increasing sharply toward the decade ending in 1990. Thus, for example, mass demonstrations held in Tienanmen Square in 1989; the Berlin Wall was torn down as Germany moved toward reunification; the International Labor Organization (ILO) Indigenous and Tribal Peoples Convention was adopted; the International Convention on the Rights of the Child (CRC) was adopted by the

[14]The delegations were from Afghanistan, Egypt, Taiwan, India, Pakistan, Liberia, Lebanon, Thailand, and the Philippines. Only the communist bloc, apartheid South Africa, and Saudi Arabia withheld their endorsement. Ibid.
[15]Office of the High Commissioner for Human Rights, *The Core International Human Rights Treaties* (Geneva: United Nations, 2006).
[16]Ibid.
[17]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 28-29.
[18]Ibid., 29.
[19]See, e.g., the time line provided in Gorman and Mihalkanin, *Historical Dictionary of Human Rights,* xix–xxxii.

United Nations General Assembly; and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty was adopted.[20] In 1990, along with many major developments, the World Summit for Children was held in New York and adopted the World Declaration on the Survival, Protection, and Development of Children and a Plan of Action; and United Nations General Assembly unanimously adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[21] In short, major developments took place during this period in the area of human rights.

In 1993, this remarkable awareness led to the holding of the World Conference on Human Rights in Vienna. The Vienna Declaration and Program of Action, adopted by this World Conference, "marked the beginning of a renewed effort in the protection and promotion of human rights and is regarded as one of the most significant human rights documents of the past quarter century."[22] Following this the United Nations General Assembly created the mandate of High Commissioner for the promotion and protection of all human rights in December 1993. The GA was acting on a recommendation from delegates to World Conference on Human Rights held in Vienna earlier the same year.[23] On the 20th Anniversary of the Office of the High Commissioner for Human Rights, the official website has published a list of about 20 achievements since the 1993 Vienna Declaration.[24] This list is worth reading in order to understand what the human rights project has grown into. A few headings are reproduced below.

[20]Ibid., xxxii.
[21]Ibid.
[22]http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx (accessed March 2015).
[23]Ibid
[24]http://www.ohchr.org/EN/NewsEvents/OHCHR20_Backup/Pages/Achievements.aspx.

- Economic, social, cultural, civil, and political rights and the right to development are recognized as universal, indivisible, and mutually reinforcing rights of all human beings, without distinction.
- Human rights have become central to the global conversation regarding peace, security and development.
- New human rights standards have built on the 1948 Universal Declaration of Human Rights and the implementation of international human rights treaties is significantly improved.
- Additional explicit protections in international law now exist covering, among others, children, women, victims of torture, persons with disabilities, and regional institutions. Where there are allegations of breaches, individuals can bring complaints to the international human rights treaty bodies.
- Women's rights are now acknowledged as fundamental human rights. Discrimination and acts of violence against women are at the forefront of the human rights discourse.[25]

The above are just the first five claims of the Office of the High Commissioner for Human Rights. The claims, as a whole, are a reflection of the rise of awareness of human rights as well as of the major achievements and developments in this area. It is because of these achievements that writers can easily claim the following:

> The study of human rights should not be undertaken for mere intellectual stimulation or pleasure. It should be undertaken by all persons at appropriate levels

[25]Ibid.

> and in both academic and nonacademic contexts so that a culture of human rights is inculcated in the learner. The learner (whether a student or not) is the bearer or holder of internationally recognized human rights. Human rights are the birthright of humanity, and their protection is the first responsibility of all states. They are inherent attributes of the human personality, and their purpose is the legal protection of the inherent human dignity of each individual human being. Life itself can be at stake if they are not preserved.[26]

We may now turn to the implementation of human rights law at the domestic level.

1.2 International Human Rights Law at the Domestic Level

1.2.1 Human Rights Law and the Types of Rights

Mrs. Eleanor Roosevelt, chairperson of the committee that produced the first draft of the Universal Declaration of Human Rights (UDHR), commenting on where human rights begin, is reported to have said:

> In small places, close to home—so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: The neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without

[26]H. Victor Cond, *A Handbook of International Human Rights Terminology*, 2nd ed. (Lincoln, Nebraska: Univer-sity of Nebraska Press, 2004), xi.

> concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.[27]

According to Jayawickrama, Mrs. Roosevelt was emphasizing that human rights first need to be protected at home. "Since human rights principally involve the relationship between the individual and the state, and sometimes also between individuals, the task of protecting and promoting human rights is primarily a national one."[28] It is at the national level that the first defense must be established.

The human rights project is based on the idea that every nation is under an obligation to respect the human rights of its citizens. If they do not then other nations and the international community have a right, and responsibility, to protest in support of this obligation.[29]

> International human rights law consists of the body of international rules, procedures, and institutions developed to implement this concept and to promote respect for human rights in all countries. While international human rights law focuses on international rules, procedures, and institutions, it typically also requires at least some knowledge of and sensitivity to the relevant domestic law of countries with which the practitioner is concerned. In particular, one must be aware of national laws regarding the implementation of treaties and other international obligations, the conduct of foreign relations, and domestic protection of human rights. Indeed, since international law is generally applicable only to states and may not normally create rights directly enforceable by individuals in national courts,

[27]Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Ju-risprudence* (Edinburgh: Cambridge University Press, 2002), 95 quoting *Teaching Human Rights* (New York: United Nations, 1963), 1.

[28]Ibid., 95.

[29]Richard B. Bilder, "An Overview of International Human Rights Law," in *International Human Rights Practice*, 4th ed., ed. Hurst Hannum (New York: Transnational Publishers, Inc., 2004), 3.

> international human rights law can be made most effective only if each state makes these rules part of its domestic legal system.[30]

The learned author is pointing out that there are two sides to human rights law. The first is the body of international rules, procedures and institutions. The other side consists of domestic laws, which must be understood and appreciated by the learner. As human rights law is directed against states, it is probable that a state will not make laws against itself. It is for this reason that many human rights "initiatives are directed at encouraging countries to incorporate international human rights standards into their own internal legal order."[31] Once a state incorporates human rights in its civil rights regime, the distinction between the two types of rights starts blurring, except that human rights are always claimed from the courts against the state. This meaning is also found in the term civil rights.[32] Thus, the work of international human rights lawyers and national human rights (or "civil rights") lawyers is closely related.[33] According to Bilder, in practice, "the differences between international human rights and national civil rights often lie more in emphasis than substance."[34]

We, therefore, see that not only do human rights touch the everyday life of the individual, as Mrs. Roosevelt pointed out, but that these are rights that are similar to those civil rights that may already be protected by the domestic or municipal system. The main task then is to

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[30]Bilder, "An Overview of International Human Rights Law," 3.
[31]Ibid.
[32]"Civil rights: The individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th. 14th, 15th. and 19th Amendments, as well as by legislation such as the Voting Rights Act. Civil rights include esp. the right to vote, the right of due process. and the right of equal protection under the law."*Black's Law Dictionary*, 9th ed., ed. Brian Garner (United States: West & Thomson, 2009), s.v. "civil right." One of several federal statutes enacted after the Civil War (1861-1865) and, much later, during and after the civil-rights movement of the 1950s and 1960s, for the purpose of implementing and giving further force to the basic rights guaranteed by the Constitution, and esp. prohibiting discrimination in employment and education on the basis of race, sex, religion. Ibid., s.v. "civil rights."
[33]Bilder, "An Overview of International Human Rights Law," 3.
[34]Ibid

ensure that most of the human rights upheld by the international human rights law are also protected by the domestic system. This can be done only by including these rights in domestic legislation or by including the international instruments within domestic legislation. We may now examine the different ways in which this is done.

1.2.2. The Application of International Law

The main question then is how international law is incorporated into the domestic legal systems, and if there is more than one way then which is the best method for a country like Pakistan? And again, which method does Pakistan follow?

There are two points to be noted here. The first concerns a rule contained in article 27 of the Vienna Convention on the Law of Treaties. It says: a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Thus, for example, we in Pakistan cannot turn around and say that the *shar¯ı'ah* prevents us from following a certain provision of the treaty that we have ratified.[35] The second point is that states are free to choose their own methods for effectively giving legal shape to their international legal obligations, so that national law can be made suitable for these obligations.[36] It is not always clear to the judges and lawyers what the requirements of international law are. It is, therefore, up to "each domestic judge, prosecutor and lawyer concerned to keep him or herself informed as to the manner of incorporation of the State's international legal obligations into national law."[37]

[35]See, e.g., Imran Ahsan Khan Nyazee, "Islamic Law and the CRC: Convention on the Rights of the Child," *Islamabad Law Review* 1 (2003): 98-103.
[36]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 20.
[37]Ibid.

The training manual called *A Manual on Human Rights for Judges, Prosecutors and Lawyers* meant for human rights and the administration of justice mentions the different methods in which a State can modify its municipal law so as to bring it into conformity with its international legal obligations. The first method is based on the *monist* theory. This theory comes in many forms,[38] but in general it means that international law and domestic law are, broadly speaking, one legal system. Thus, "once a State has ratified a treaty for the protection of the human person, for instance, the terms of that treaty *automatically* become binding rules of domestic law."[39] In another way, it may be stated that where the monist theory is followed, international law and municipal law on the same subject operate concurrently and, in the event of a conflict, the former prevails.[40] The second method is called the *dualist* theory. This theory maintains that municipal law and international law are different legal systems. It is municipal law that is supreme, and if municipal judges have to apply international treaty rules, then these have to be specifically adopted or "transposed" into domestic law.[41] Accordingly, after a human rights treaty, or another treaty, is ratified by

[38]See, e.g., Ian Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford: Clarendon Press, 1979), 34."There are different theories about the coexistence of international law with municipal law. The oldest, perhaps worn out, theory is that of Dualism, which regards the two law systems as separate. The other view, upheld by Hans Kelsen and Hersch Lauterpacht, is called Monism, which views municipal law as a subset of international law. A third theory is that of Monism-Naturalism, which considers municipal law to be subservient to international law and international law subservient to natural law. This theory was upheld by Georges Scelle and also Joseph G. Starke. The fourth theory is that of Coordinationism, which maintains that municipal courts are generally obliged to make municipal law conform to the requirements of international law. This theory has been advanced by Gerald Fitzmaurice and Charles Rousseau. As far as one can observe the activity of the United Nations and its agencies, in collaboration with the non-governmental agencies, it is this last theory that is being vigorously pursued these days." Imran Ahsan Khan Nyazee, "Islamic Law and Human Rights," *Islamabad Law Review* 1 (2003): 58.

[39]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 20 (emphasis in the original).

[40]Jayawickrama, *The Judicial Application of Human Rights Law,* 96.

[41]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 21.

the State concerned, it cannot be invoked by local judges for deciding cases, unless the treaty is incorporated into municipal law.[42] This process normally requires an Act of Parliament.

The manual mentioned in the previous paragraph maintains that these theories are usually criticized on the grounds that they do not reflect the actual conduct of national and international organs as witnessed in practice. Consequently, these theories are losing ground.[43] As awareness and utility of international law, in particular human rights law, increases, greater use will be made of the domestic courts. It is, therefore, beneficial to focus on the principal means through which international human rights norms can be contained in municipal law, and can be applied by domestic courts or other competent authorities. These means are described by the manual and we may summarize as follows:

- **Constitutions:** Many constitutions actually contain numerous human rights provisions, which sometimes follow the text of the Universal Declaration of Human Rights, or the International Covenant on Civil and Political Rights or the regional human rights conventions. Due to the use of common language, the domestic judges feel they are on familiar ground. Further, international jurisprudence can easily be used for interpreting the meaning of domestic constitutions or other laws;
- **Other national legislation:** Many States adopt specific legislation either to clarify or elaborate on their constitutional provisions, or in order to adapt their domestic laws to their international legal obligations;
- **Incorporation:** It is also common for States to incorporate international human rights treaties into their domestic law by enacting a national law. This is for instance the case with the European Convention on Human Rights in the United Kingdom, where

[42] Ibid.
[43] Ibid.

that Convention was incorporated into British law by virtue of the Human Rights Act 1998, which entered into force on 2 October 2000;

- **Automatic applicability:** In some States treaties take precedence over domestic law and are thus automatically applicable in domestic courts as soon as they have been ratified by the State concerned;

- **Interpretation of common law:** In interpreting common-law principles, judges may be governed by international human rights law and international jurisprudence interpreting that law;
- **When there is a legal vacuum:** In some countries there may be an absence of national legislation with regard, *inter alia,* to human rights; but, judges and lawyers may be able to rely on international human rights law as well as relevant international case-law in order to apply some basic legal principles for the protection of the human person.[44]

In Pakistan, talking about *monism* and *dualism*, in *Ms. Sheila Zia and others v. W.A.P.D.A.,*[45] the Supreme Court of Pakistan observed:

> An international agreement between the nations if signed by any country is always subject to ratifications, but it can be enforced as a law only when legislation is made by the country through its Legislature. Without framing a law in terms of the international agreement the covenants of such agreement cannot be implemented as a law nor do they bind down any party.[46]

Thus, the Court upheld the *dualism* theory. In *SGS Societe Generale v. Pakistan,*[47] the Lahore High Court recalled this view and observed that in Pakistan "dualism" is still the

[44]Ibid., 21-22.
[45]Ms. Sheila Zia and others v. W.A.P.D.A., P.L.D. 1994 S.C. 693, 710.
[46]Ibid., 70 For a complete discussion, see Nyazee, "Islamic Law and Human Rights," 57-59.
[47]SGS Societe Generale v. Pakistan, C.L.D. 2002 Lah. 790.

accepted norm. The learned Court discussed *Dualism* and *Monism*. The issue of the applicable law came up in the recent *Raymond Davis case,* where an American operative shot dead two persons in Lahore. A news item read as follows: "Raymond Davis case: Pakistani law holds sway over Vienna Convention."[48] Accordingly, Pakistan upholds *dualism* and requires that human rights law be translated into legislation before it can be applied. Nevertheless, there are moral obligations to be considered once a treaty has been ratified.

1.2.3 The International Standards of Judicial Independence

The international standards of judicial independence and impartiality revolve around what are called the Basic Principles on the Independence of the Judiciary.[49] We will attempt to summarize what these basic principles say, and then apply them to the situation in Pakistan in the next section. In 1985, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary, which were subsequently unanimously endorsed by the General Assembly. These principles can therefore be described as being declaratory of universally accepted views on this matter by the States Members of the United Nations, and they have become an important yardstick in assessing the independence of the Judiciary in the work of international monitoring organs and non-governmental organizations (NGOs).[50]

[48]http://www.thenews.com.pk/Todays-News-2-30251-Raymond-Davis-case-Pakistani-law(accessed February, 2015).
[49]United Nations GA, *Basic Principles on the Independence of the Judiciary*, adopted by the "Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders" held at Milan from 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[50]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 153.

These Basic Principles on Independence of the Judiciary set out the elements of the independence of the judiciary in Principles 1-7. The content of these 7 principles implies, as a basic premise, that the independence of the judiciary must be ensured by the State and enshrined in the Constitution or in the law of the country.[51] On the other hand, the judiciary must decide matters impartially on the bases of facts and the application of law, without any restrictions, improper influences, inducements, pressures, threats or interferences.[52] The courts themselves shall decide whether they have jurisdiction to hear a matter. There must be no unwarranted interference with the judicial process, including the appointment of judges, by the other branches of government (legislative and executive).[53] The government is not to displace the jurisdiction of the ordinary courts with a tribunal that does not follow established legal procedures. As such, all citizens shall have the right to be tried by ordinary courts or tribunals using established legal procedures. This should be understood in the context of the military courts recently set up in Pakistan. The judiciary has the authority and obligation to ensure that judicial proceedings are conducted fairly and that the rights of parties are respected.[54] These principles, as a whole, deal with the following subjects: (i) independence of the Judiciary; (ii) freedom of expression and association; (iii) qualifications, selection and training; (iv) conditions of service and tenure; (v) professional secrecy and immunity; and (vi) discipline, suspension and removal. Without seeking to be in any sense exhaustive, the present chapter will deal with some of the significant issues relating to the independence and impartiality of the judiciary.[55] In what follows, in this section, we shall try

[51]United Nations Office on Drugs and Crime, *Access to Justice,* 5
[52]Ibid.
[53]Ibid.
[54]Ibid.
[55]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 153.

to summarize the content of some of the most important principles according to the above framework.

1.2.4. The Instruments of International Law Applicable to Independence of Judiciary

The instrument may be first be listed in summary form as follows:

1. **Universal Instruments:**

   - The International Covenant on Civil and Political Rights, 1966 recognizes that all members of human family are equally inherent the right related to freedom, justice and peace. The entitlement of rights related to fair trial, independence and impartiality of tribunals for public hearing shall be accessible in all state of affairs.
   - Basic Principles on the Independence of the Judiciary, 1985 directed the states to guarantee the independent, impartial judicial process and competence of decisions must be defined by the Law. The states are under obligation to provide adequate resources which facilitates the judiciary to perform its functions properly.
   - Guidelines on the Role of Prosecutors, 1990 bright out the responsibilities of prosecutors, their course of action to perform and accomplish the functions by practicing improved legal methods. Furthermore, the prosecutors are guided in a way to have professional trainings and follow all other necessary means to perform their duties in combating criminality and other legal concerns.

2. **Regional Instruments:**

- The African Charter on Human and Peoples' Rights, 1981 entitles every individual to have a right of fair trial and there must not be any sort of deprivation related to the freedom and liberty of a person except the reasons laid down by law and the arbitrary arrest and detention must be in accordance with law.
- The American Convention on Human Rights, 1969 recognizes that every individual is person before law. Every person is protected by this to have respectful life and Capital punishments shall not be imposed upon a pregnant women and the person under age of 18 and above the age of 50.Everyone has a right to apply for pardon in all cases.
- The European Convention on Human Rights, 1950 includes the rights of person to be dealt according to the Law and directs the court to avoid violation related to their administrative issues and all other requirements to be fulfilled to perform their function fairly and vibrantly.

3. Council of Europe Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the independence, efficiency and role of judges.

In addition to these binding and non-binding legal sources, ethical standards have been adopted by professional associations such as judges', prosecutors' and lawyers' associations. Such standards may provide useful guidance to the legal professions. See e.g. the following standards adopted by the International Bar Association (IBA): *IBA Minimum Standards of Judicial Independence, 1982*; *IBA Standards for the Independence of the Legal Profession,*

1990. There is also the IBA statement *of General Principles for Ethics of Lawyers, IBA Resolution on Non-Discrimination in Legal Practice,*

as well as the IBA paper *Judicial Corruption Identification, Prevention and Cure of 14 April 2000.*[56]

All the above general universal and regional human rights instruments guarantee the right to a fair hearing in civil and criminal proceedings before an independent and impartial court or tribunal.[57] Here we should attempt to analyze the meaning of the terms "independent" and "impartial" in the light of the literature of the competent international monitoring organs. The treaties listed may not solve all the problems arising with particular regard to the notion of independence of the Judiciary; they do provide a number of essential clarifications. Thus, one of the most important treaties, the International Covenant on Civil and Political Rights states in its article 14(1) that "all persons shall be equal before the courts and tribunals" and further, that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." In support of this, the Human Rights Committee has unambiguously held that "the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception."[58] It is thus a right that is applicable in all circumstances and to all courts, whether ordinary or special.

The above principles are affirmed by article 7(1) of the African Charter on Human and Peoples' Rights, article 8(1) of the American Convention on Human Rights, and article 6(1)

[56]These documents can be found at the IBA web site: http://www.ibanet.org.
[57]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 117.
[58]Communication No. 263/1987, M. Gonzalez del Ro v. Peru (Views adopted on 28 October 1992), in UN doc. GAOR, A/48/40 (vol. II), p. 20, para. 5.2.

of the European Convention on Human Rights. In addition, they also emphasize rights like "the right to be presumed innocent until proved guilty," "the right to be tried within a reasonable time by an impartial court or tribunal" and "every individual shall have the right to have his cause heard," and so on. Countries are also bound by customary rules of international law, as well as by general principles of law, of which the principle of an independent and impartial judiciary is generally considered to form part.[59]

1.2.5 Independence and Impartiality Elaborated

Judicial independence is important for exactly the same reasons for which the judiciary itself is important.[60] The concept of "independence" is closely linked to the idea of "impartiality."[61]

It is due to this reason that in certain cases international control mechanisms have dealt with them jointly. Both concepts, however, are independent and each has its specific meaning and requirements.[62] The notion of independence "connotes not only a state of mind but also a status or relationship to others—particularly to the executive branch of government—that rests on objective conditions or guarantees."[63] This status or relationship of independence of the Judiciary "involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative

[59]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 117.
[60]Office of Democracy and Governance, *Guidance for Promoting Judicial Independence and Impartiality, 5.*
[61]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 119.
[62]Ibid.
[63]See, the Canadian case, (1985) 2.S.C.R *Valiente v. The Queen* 673. Available at http://www.lexum.umontreal.ca/csc-scc/en/pub/1985/vol2/html/1985scr2_0673.html, p. 2.

relationships to the executive and legislative branches of government."[64] As compared to this the concept of judicial "impartiality" as referring to "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case." [65] This view has also been confirmed at the international level, where, for instance, the Human Rights Committee has held that the notion of "impartiality" in article 14(1) "implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties." [66] In simple words, the notion of impartiality contains both a subjective and an objective element: not only must the tribunal be impartial, free prejudice or bias, but it must also be impartial from an objective viewpoint as well, that is, it must offer guarantees to exclude any legitimate doubt in this respect.

In short, if a judiciary cannot be relied upon to decide cases impartially, according to the law, and not based on external pressures and influences, its role is distorted and public confidence in government is undermined. In democratic societies, independent and impartial judiciaries contribute to the equitable and stable balance of power within the government. "They protect individual rights and preserve the security of person and property. They resolve commercial disputes in a predictable and transparent fashion that encourages fair competition and economic growth. They are key to countering public and private corruption, reducing political manipulation, and increasing public confidence in the integrity of government." [67]

The influence of the judiciary has increased enormously over the past several decades. Legislation protecting social and economic rights has expanded in many countries, and with

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[64]Ibid
[65]Ibid
[66]Communication No. 387/1989, *Arvo O. Karttunen v. Finland* (Views adopted on 23 October 1992), in UN doc. GAOR, A/48/40 (vol. II), p. 120, para. 7.2.
[67]Office of Democracy and Governance, *Guidance for Promoting Judicial Independence and Impartiality,* 6.

it the court's role in protecting those rights. The judiciary has growing responsibility for resolving increasingly complex national and international commercial disputes.[68] Judiciaries in countries making the transition to democratic governance and market economies face an even greater burden. Many of these judiciaries must change fairly dramatically from being an extension of executive branch, elite, or military domination of the country to their new role as fair and independent institutions. In such a situation, the judiciary often finds itself a focal point as political and economic forces struggle to define the shape of the society. "It would be unrealistic to think that the judiciaries can carry the full burden for resolving these complex problems. At their best, they have played a leadership role. At the very least, they need to complete their own evolutions and begin the task of confronting the multitude of problems before them."[69] Independence and impartiality then are crucial concepts for judiciaries all over the world.

1.2.6 Independence of the Institution: The Judiciary Itself

Institutional independence means that the Judiciary has to be independent of the other branches of government, that is, the Executive and Parliament. [70] According to Principle 1 of the Basic Principles on the Independence of the Judiciary: "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary." [71] Furthermore, according to Principle 7 of the Basic Principles, "It is the duty of each Member State to provide adequate resources to enable the

[68]Ibid.
[69]Ibid.
[70]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 120.
[71]United Nations GA, *Basic Principles on the Independence of the Judiciary*, resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

judiciary to properly perform its functions." [72] True independence of the Judiciary from the other two branches of government can only be secured when this independence is guaranteed by the Constitution or by other legal provisions.

1. **Independence as to administrative matters**: Although no details are provided as to how this institutional independence is to be realized in practice, it is clear that, as a mini-mum, the Judiciary must be able to handle its own administration and matters that concern its operation in general. This includes "the assignment of cases to judges within the court to which they belong," which according to Principle 14 of the Basic Principles "is an internal matter of judicial administration." [73]
2. **Independence as to financial matters**: This is addressed by Principle 7 of the Basic Principles; the Judiciary must further be granted sufficient funds to properly perform its functions. Without adequate funds, the Judiciary will not only be unable to perform its functions efficiently, but may also become vulnerable to undue outside pressures and corruption. Moreover, there must logically be some kind of judicial involvement in the preparation of court budgets. [74]
3. **Independence as to decision-making**: The Judiciary's independence as to decision-making is obvious and is supported by Principle 4 of the Basic Principles, according to which: "There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by

[72]United Nations GA, *Basic Principles on the Independence of the Judiciary*, resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[73]Ibid., Principle 14.
[74]High Commissioner for Human Rights, *Human Rights in the Administration of Justice*, 121.

competent authorities of sentences imposed by the judiciary, in accordance with the law."[75]

According to Principle 1 of the Basic Principles, the other branches of government, including "other institutions," have the duty "to respect and observe the independence of the judiciary."[76] This means that the Executive, the Legislature, as well as other authorities, such as the police, prison, social and educational authorities, must respect and abide by the judgments and decisions of the Judiciary, even when they do not agree with them. "Such respect for the judicial authority is indispensable for the maintenance of the rule of law, including respect for human rights standards, and all branches of Government and all State institutions have a duty to prevent any erosion of this independent decision-making authority of the Judiciary."[77] This may be one of the most important conditions of all.

4. **Jurisdictional competence**: According to Principle 3 of the Basic Principles, the independent decision-making power of the Judiciary also comprises "jurisdiction over all issues of a judicial nature and . . . exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law."[78] This rule of judicial autonomy in the determination of questions of competence is well established at both national and international levels. It is also found in article 36(6) of the Statute of the International Court of Justice, and, as regards the European Court of Human Rights, in article 32(2) of the European Convention on Human Rights.

[75]United Nations GA, *Basic Principles on the Independence of the Judiciary*, resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[76]Ibid.
[77]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 121.
[78]United Nations GA, *Basic Principles on the Independence of the Judiciary*, resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

5. **The right and duty to ensure fair court proceedings and give reasoned decisions**: This is a condition for the independence of the judiciary, but as it is dependent on personal skills, it is discussed below.

It is not only the Judiciary that must be independent but individual judges must also enjoy independence in carrying out their professional duties. "This independence does not mean, of course, that the judges can decide cases on the basis of their own whims or preferences,

1.2.7 Individual Independence: Independence of the Judge

It means that they have both a right and a duty to decide the cases before them according to the law, free from fear of personal criticism or reprisals of any kind, even in situations where they are obliged to render judgements in difficult and sensitive cases."[79] It is unfortunate that judges are not always allowed to carry out their work in this spirit of true independence, but in many countries have to suffer undue pressure. This independence is secured in different ways, of which the important ones are:

1. **Appointment**: Principle 10 of the Basic Principles says:

> Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a

[79]High Commissioner for Human Rights, *Human Rights in the Administration of Justice*, 121.

candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.[80]

2. **Security of tenure**: Principle 11 of the Basic Principles therefore provides that "The term of office of judges, their independence, security, adequate remuneration, and conditions of service, pensions and the age of retirement shall be adequately secured by law." Principle 12 further specifies that "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."[81]

3. **The right and duty to ensure fair court proceedings and give reasoned decisions**: The independence of a tribunal is indispensable to fair court proceedings, be they criminal or civil. As laid down in Principle 6 of the Basic Principles: "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."[82]

1.2.8 The Notion of Impartiality

The concept of impartiality, as indicated earlier, is closely linked to that of independence and sometimes the two notions are considered together. The requirement of impartiality is

[80]United Nations GA, *Basic Principles on the Independence of the Judiciary*, resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[81]United Nations GA, *Basic Principles on the Independence of the Judiciary*, resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[82]United Nations GA, *Basic Principles on the Independence of the Judiciary*, resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

contained in article 14(1) of the International Covenant on Civil and Political Rights, article7(1) of the African Charter of Human and Peoples' Rights, article 8(1) of the American Convention on Human Rights and article 6(1) of the European Convention on Human Rights. Principle 2 of the Basic Principles also specifies that "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[83] An impartial judiciary will reduce the influence of government officials, legislators, political parties, and other powerful elites who are used to operating above or out-side the law.[84] The judicial hierarchy itself may stand to lose, particularly in many countries where higher court judges have the ability to exert undue and arbitrary control over lower court judges.[85]

1.2.9 Military and Other Special Courts and Tribunals

The creation in special situations of military courts or other courts of special jurisdiction is commonplace and often gives rise to violations of the right to due process of law.[86] This means, for instance, that military or other special tribunals which try civilians must comply with the condition of independence and impartiality. A problem is created in such cases as exceptional procedures are applied which do not comply with normal standards of justice.[87]

[83]United Nations GA, *Basic Principles on the Independence of the Judiciary*, resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[84]Office of Democracy and Governance, *Guidance for Promoting Judicial Independence and Impartiality*, 10.
[85]Ibid.
[86]High commissioner for Human Right, Human Rights in the Administration of Justice,127
[87]Ibid

The survey and summary of the Basic Principles of international law applicable to the independence and impartiality of the judiciary is complete. These Basic Principles will now be applied to those factors that have affected the independence of the judiciary in Pakistan.

1.3 The Concept of Judicial Growth in the World, Especially India and Pakistan

In the previous section, we have seen the growth in awareness about human rights in the last two or three decades. The present section notes the sudden rise in the activism of the courts all over the world. Indeed, the interference by the courts in matters of state has sometimes risen to such heights that it has provoked occasional critical remarks from think tanks. For example, the journal *Foreign Policy* has published a list of the most meddlesome courts implying thereby that the courts are playing politics.[88] The reason for such statements is that in the last few decades has witnessed increasing debate about what is sometimes referred to as "judicial activism" or even the "judicial phenomenon." Judges, all over the world, are making more and more decisions in areas that seem to belong to policy and politics. It is obvious that these are areas thought by many to be the exclusive prerogative of elected legislators.[89] Judicial activism is not confined to a few countries, it is found in all corners of the globe: from New Zealand to Singapore, from America to China and many other countries.[90]

[88]See a report in The News International, *The World's Most Meddlesome Supreme Courts: The United States isn't the only country where judges aren't exactly above the political fray.* http://foreignpolicy.com/2012/06/25/the-worlds-most-meddlesome-supreme-courts/ (accessed March 2015).
[89]Beverly McLachlin, "Judicial Power and Democracy," *Singapore Academy of Law Journal* 12 (2000): 311.
[90]See, e.g., Stephen Gardbaum, "Human Rights and International Constitutionalism," in *Ruling the World? Constitutionalism, International Law, and Global Governance*, ed. Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge: Cambridge University Press, 2009), 233–257; George Athan Billias, *American Constitutionalism Heard Round the World, 1776-1989: A Global Perspective* (New York: New York University Press, 2009);

1.4 Definition of Judicial Activism

"Judicial activism" has acquired so many different meanings that its meaning stands obscured like many other catchwords. It is, however, not a term that can simply be ignored as intellectually irrelevant due to the attached vagueness, therefore, its clarification is necessary.[91] Judicial activism can mean many things, but we may examine the meanings identified by an Australian judge. Justice David Ipp[92] of New South Wales, in a speech delivered in China, said:

> In modern times the common law world has seen at least three forms of judicial activism. The first is activism in reforming procedural rules. The second is activism in political and social reforms and the third is activism in human rights. Inherent in each of these forms of judicial activism are difficult and important questions of judicial ethics.

Shylashri Shankar, "The Em-bedded Negotiators: India's Higher Judiciary and Socioeconomic Rights," in *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*, ed. Daniel Bonilla Maldonado (Cambridge: Transna-tional Publishers, Inc., 2013), 95–128; Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (Cam-bridge: Cambridge University Press, 2014); James Allan, "The Rise of Judicial Activism in New Zealand," *Agenda* 24 (1997): 465–474; McLachlin, "The Rise of Judicial Activism in New Zealand," Pratap Bhanu Mehta, "India's Unlikely Democracy: The Rise of Judicial Sovereignty," *Journal of Democracy* 18 (2007): 70–83; Ran Hirschl, "The Judicializa-tion of Mega-Politics and the Rise of Political Courts," *Annu. Rev. Polit. Sci.* 2 (2008): 70–83; and Ken I. Kersch, "The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law," *Wash. U. Glob. Stud. L. Rev.* 4 (2005): 345–387. There are many other examples besides these.

[91]Thomas Sowell, *Judicial Activism Reconsidered* (Stanford: Hoover Institution Stanford University, 2014), 1. " 'Judicial activism' and 'judicial restraint' raise logically obvious but often ignored questions: Activism toward what? Restraint toward what? Are judges deemed to be activist or restrained toward (1) the current popular majority, (2) the legislature representing the current popular majority, (3) the statutes passed by present or past legislatures, (4) the acts of current of past executive or administrative agencies, (5) the meaning of the words in the Constitution, (6) the principles or purposes of those who wrote the Constitution, or (7) the legal precedents established by previous judicial interpretations of the Constitution?

Activism or restraint toward one of these does not imply the same toward all the others, and may in some instances imply the opposite toward some other or others. For example, a 'restrained' jurist, attempting to hold fast to the 'original intentions' of constitutional provisions, must actively strike down statutes passed by a legislature which repeatedly oversteps the bounds of those provisions. Conversely, an 'activist' jurist may passively accept expansive legislative action of a sort deemed consistent with general constitutional 'values;' even if lacking specific constitu-tional authorization or entering a 'gray area' of constitutional prohibitions." Ibid., 1.

[92]Judge of Appeal, Supreme Court of New South Wales.

All three forms of judicial activism involve increases in judicial power. The corollary of increased judicial power is increased judicial responsibility. Judicial responsibility is no longer seen as a function of State power; nor as a function of the prestige and independence of the judiciary itself. Rather, it is now regarded as the function of an institution that serves the community. This view requires the judiciary to com-bine impartiality with responsiveness to the individual members of society, at whose service only the system of justice must work. A former Chief Justice of Australia, Sir Anthony Mason, has said: "[W]e must recognize that the courts are institutions which belong to the people and that the judges exercise their powers for the people. The requirement that judges respond to the needs of the individual members of society contains within it the expectation that judges will intervene in order to achieve justice."

These principles inform all aspects of judicial activism.[93] Procedural activism, in reality, represents an unmistakable trend throughout the common law world. There has been an increased intervention by judges in the pre-trial and trial process.[94] Judicial activism in reforming procedure involves judges taking steps, themselves, to cope with increases in litigation and injustices through unnecessary delays and excessive costs.[95] This has led to what is called managerial judging. It has become generally accepted in most developed adversarial judicial systems and has led to case management systems. Case management entails the overall management of pre-trial procedures and the trial itself. Case management

[93]Edited version of a paper given at a conference in Beijing organized by the National Judicial College, Beijing, 12 October 2004 and to the Shanghai Judicial College, Shanghai, 19 October 2004.
[94]David Ipp, "Judicial Intervention in the Trial Process," *Australian Law Journal* 69 (1995): 365.
[95]Speech at National Judicial College, Beijing, 12 October 2004, quoted above.

is de-signed to achieve cheaper, swifter and more efficient justice. In Pakistan, it may be pointed out, the access to justice program was implemented with the help of the Asian Development Bank, and a major component of this program was case management and procedural innovations.

The second type of judicial activism that is activism in political and social reforms, works against the long accepted idea that it is the duty of the legislature is to enact laws designed to further the common good, while it is the duty of the judiciary is to uphold those laws.[96] This was long thought to be the judicial ideal. In simple language, it means that judges must follow the law and not act upon their own predilections or fancies.[97] This is an ideal of judicial conduct that is epitomized by the blindfolded goddess of justice. The second type of judicial activism asks whether the blindfold be removed. A movement, contrary to the judicial ideal, has arisen in some parts of the common law world. This movement promotes the idea of judicial activism in the field of social reform and argues that the blindfold should be removed from the goddess.[98] There is a hidden danger in this movement that one will be faced with the notion of the goddess of justice, blindfold removed, will be absorbed entirely by her own personal image, that is, the personal image of the judge. Many people recommend that this movement should be adopted with wisdom and restraint. This movement is also linked with the making of new law by the judges. It is now generally believed that judges do make law to some extent, that is, the creative theory of adjudication has dominated the declaratory theory of adjudication. Even in a civil law system, the courts

[96]Ibid.
[97]J. B. Thomas, *Judicial Ethics in Australia,* 2nd ed. (Sydney: The Law Book Co. Ltd., 1997), 61.
[98]Speech at National Judicial College, Beijing, 12 October 2004, quoted above.

must still unravel obscurities, ambiguities, and conflicts and fill in gaps between the legislative provisions. In these ways it cannot be denied that judges make law.[99]

The third type of judicial activism involving human rights is illustrated by Justice David Ipp through the example of South Africa in the latter half of the twentieth century.[100] He maintains that this provides an important case study of judicial passivity in regard to the abuse of human rights, and also provides lessons for judges all over the world.

> After 1948, when the Nationalist Party came into power, the system of apartheid was implemented. So began what became an all embracing web of racial laws promulgated by Parliament. These resulted in discriminatory laws relating to voting rights, rights to live in residential areas, rights to work in business areas, rights to work in particular occupations, rights to be educated in an equal manner, freedom of movement rights, rights of sexual freedom and marriage. In the cause of white supremacy, people were forcibly removed from their homes. Family members were separated from each other and many were sent to live in impoverished areas. On the grounds of race, the right to vote and the right to work were restricted.[101]

[99]Some judges have strongly criticized what they term judicial activism, that is, too great a readiness to change established laws. On the other hand, there is the attitude of judges epitomized by the famous English judge Lord Denning, who was always ready to take the law in new directions. He referred to those who were more reticent as "timorous souls." He was once asked by a student to make no more changes to the law until the exams were over. Ibid.

[100]Ibid.

[101]Ibid.

Some judges finally stood up in defense of human rights. This story is well known. South Africa, however, is not alone among western countries which have adopted far-reaching security legislation. Such legislation existed in Northern Ireland and similar criticisms have been made about the judiciary there.[102] In the USA, the criticisms of the judiciary in regard to the conduct of cases involving black people in the southern states prior to 1970 are well known.[103] The legislation that has given rise to the detention in Guantanamo Bay is open to serious question.[104] Australia and New Zealand have now also legislated for detention without trial.[105] We may conclude from these examples that an erosion of human rights has taken place very gradually, and with this increase has risen the judicial activism of the judiciary in defense of human rights.

After looking briefly at the nature of "judicial activism," we may turn to a concrete example that is highly relevant for Pakistan. The concrete example is provided by India and its famous judicial activism. In fact, many developments in Pakistan have been taken from the role played by the Indian judiciary.[106] The next section summarizes the judicial activism movement in India.

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[102]Ibid.
[103]Ibid.
[104]Ibid.
[105]Ibid.
[106]"Public interest litigation (PIL) in India can serve as a vehicle for creating and enforcing rights and is critical to the sustenance of democracy. PIL in India can address the needs of its citizens when legislative inertia afflicts the Indian National Congress. . . . PIL in India can serve as a model for other developing nations struggling with legislative inertia and can provide recourse to marginalized and disadvantaged communities. Furthermore, while PIL obscures the traditional boundaries of power in a liberal democratic polity, democracy is in fact strengthened by the expansion of standing to include any citizen who has suffered a rights abuse." Zachary Holladay, "Public Interest Litigation in India as a Paradigm for Developing Nations," *Indiana Journal of Global Legal Studies* 19 (2012): 555.

1.4.1 Judicial Activism in India: PIL as the Model for Pakistan

The global reputation of Indian courts as judicial innovators and defenders of the interests of the disadvantaged and downtrodden rests largely on Public Interest Litigation (PIL), a new set of procedures for expanding access to justice that were developed some 30 years ago.[107] PIL or "social action litigation," originated in the late 1970s. The judiciary "encouraged litigation concerning the interests of the poor and marginalized, and to do so loosened rules and traditions related to standing, case filing, the adversarial process, and judicial activism" remedies."[108] There are some writers who view this as a wider movement of "judiciary that includes PIL as one of its types.

S.P. Sathe maintains that the post-emergency period of 1977-98 is known as the period of judicial activism, because "it was during this period that the Court's jurisprudence blossomed with doctrinal creativity as well as processual innovations."[109] The emergency mentioned here refers to Indira Gandhi's declaration of emergency rule. The author implies that two forms of judicial activism were observed in India during the post-emergency period. The first form related to doctrinal activism while the second form was procedural activism. From another perspective, the post-emergency period may be seen as exhibiting three forms of judicial activism.[110] The first form of judicial activism was the evolution of human rights jurisprudence. The second form of judicial activism was the procedural innovations through

[107]Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving?* (New York: The World Bank, Development Research Group, 2009), 2.
[108]Ibid., 2.
[109]S. P. Sathe, *Judicial Activism in India :Transgressing Borders and Enforcing Limits,* 2nd ed. (New Delhi: Oxford University Press, 2002), 100.
[110]Ibid.

Public Interest Litigations. The third form was doctrinal activism through the concept of rule of law.[111] There are others who do not make this distinction. Thus, for example, Holladay says:

> Through my research at the organization, I discovered the especially omnipotent power of the Indian courts. PIL allows for any individual who claims a violation of one of her or his fundamental rights, as enshrined in the Constitution, to bypass the local courts and appeal directly to one of the state's High Courts or to the Supreme Court.[112] The preferred remedy is often in the form of equitable relief, such as an injunction, to compel the government to take appropriate measures to redress violations of fundamental rights. In many instances, however, the courts will assume a more legislative role in enforcing rights through the issuance of writs of mandamus that force the government to pass legislation dealing with rights disparities. For ex-ample, in a sexual harassment case, the Supreme Court enacted anti-harassment guidelines that function effectively as law.[113] These approaches underscore the apparent lack of trust in the legislature to carry out its duties.[114]

In this section the, we will briefly focus on Public Interest Litigation (PIL) in India as that is more relevant for human rights and is what has been adopted in Pakistan. During the 1970s, a majority of the people in India had very little access to justice due to prohibitively expensive fees and a lack of awareness of their legal rights.[115] At his time the then-Prime

[111]Ibid.
[112]See generally (describing the Indian judiciary as a two-tiered system composed of an upper judiciary, which includes the High Courts and the Supreme Court, and a lower judiciary, which is comprised of district courts and specialty courts, such as family and property courts).
[113]See Visaka v. Rajasthan, A.I.R. 1997 S.C. 3011 (India).
[114]Holladay, "Public Interest Litigation in India," 555.
[115]Ibid., 558.

Minister Indira Gandhi declared an emergency suspending elections and civil liberties. This period lasted from June 25, 1975 to March 21, 1977.[116] Many citizens were expecting the Supreme Court to intervene, but the Court failed to do so and sided with Indira Gandhi's autocratic tendencies.[117] Thus, the Court held in *A.D.M. Jabalpur v. Shivakant Shukla* that certain fundamental rights, including the right to liberty, did not survive the executive's proclamation of emergency.[118] This was a case that damaged the Court's image. What came to the rescue of the Court was a letter received by the Supreme Court from an inmate in 1978, giving the details of torture of another inmate at the hands of the prison guards. The note led the Court to assume jurisdiction over the case ruling that a prisoner was entitled to the same rights and liberties conferred on the rest of society.[119] The case opened the doors to a large number of public interest claims of all forms including media reports, formal briefs, and letters.

Public interest litigation means that any public spirited citizen can move/approach the court for the public cause (public interest or public welfare) by filing a petition in the Supreme Court under Art. 32 of the Constitution or in the High Court under Art.226 of the Constitution. It is said that the seeds of the concept of public interest litigation were initially sown in India by Krishna Iyer J., in 1976 in *Mumbai Kamgar Sabha vs. Abdul Thai*,[120] and PIL was initiated in *Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v. Union of India*[121] In the latter case an unregistered association of workers was permitted to institute a writ petition under Art.32 of the Constitution for the redressal of common grievances. Justice

[116]See Derek P. Jinks, "The Anatomy of an Institutionalized Emergency. Preventive Detention and Personal Lib-erty in India," *Michigan Journal of International Law* 22 (2001): 311, 344-47.
[117]Robinson, "Expanding Judiciaries," 33
[118]A.I.R. 1976 S.C. 1207
[119]S.P. Sathe, "Judicial Activism: The Indian Experience," *Wash. U. J. L. & Policy* 6 (2001): 29, 47.
[120]AIR 1976 SC 1455.
[121]AIR 1981 SC 298.

Krishna Iyer enunciated the reasons for liberalization of the rule of *locus standi* in *Fertilizer Corporation Kamgar Union v. Union of India*[122], and the idea of "Public Interest Litigation" came forth in its full form in *S.P. Gupta and others vs. Union of India.*[123] The Court, in this case, said:

> But if no specific legal injury is caused to a person or to a determinate class or group of persons by the act or omission of the State or any public authority and the injury is caused only to public interest, the question arises as to who can maintain an action for vindicating the rule of law and setting aside the unlawful action or enforcing the performance of the public duty. If no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it. The Courts cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened. The view has therefore been taken by the Courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a merc

[122]AIR 1981 SC 344. "In a society where freedoms suffer from atrophy, and activism is essential for participative public justice, some risks have to be taken and more opportunities open-ed for the public minded citizen to rely on the legal process and not be repelled from it by narrow pedantry now surrounding locus Standi."
[123]AIR 1982 SC 149.

busy-body or a meddlesome interloper but who has sufficient interest in the proceeding.[124]

According to Jain, the most significant point to note in regard to Public Interest Litigation is that it discards the traditional concept of *locus standi*, which means that only the person whose legal rights are being violated can approach the Court for redress.[125]

> We should have thought that if any citizen brings before the Court a complaint that a large number of peasants or workers are bonded serfs or are being subjected to exploitation by a few mine lessees or contractors or employers or are being denied the benefits of social welfare laws, the State Government, which is, under our constitutional scheme, charged with the mission of bringing about a new socioeconomic order where there will be social and economic justice for every one and equality of status and opportunity for all, would welcome an inquiry by the court, so that if it is found that there are in fact bonded laborers or even if the workers are not bonded in the strict sense of the term as defined in the Bonded Labor System (Abolition) Act 1976 but they are made to provide forced labor or are consigned to a life of utter deprivation and degradation such a situation can be set right by the State Government.[126]

In the words of Justice Bhagwati, "a new dimension has been given to the doctrine of *locus standi* which has revolutionized the whole concept of access to justice." The Court said:

> It was only in the years 1981 in the Judges Appointment and Transfer Case that this Court for the first time took the view that where a person or class of persons to whom

[124]S.P. Gupta and others vs. Union of India, AIR 1982 SC 149.
[125]M. P. Jain, *Indian Constitutional Law*, 7th ed. (Haryana, India: LexisNexis, 2014),
[126]1371. Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802, 811.

> legal injury is caused by reason of violation of a fundamental right is unable to approach the court for judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting bona fide can move the court for relief under Article 32 and a fortiori, also under Article 226, so that the fundamental rights may become meaningful not only for the Richand the well-to-do who have the means to approach the court but also for the large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resources unable to seek judicial redress.[127]

The Court also stated that PIL is "not in the nature of adversary litigation but [as] a challenge and an opportunity to the government and its officers to make basic human rights meaningful . . . ."[128] Public Interest Litigation now serves a much broader function than merely espousal of the grievances of the weak and disadvantaged persons. It is now being used to ventilate public grievances where the society as a whole feels aggrieved.[129] The Courts have also tried to refine the qualifications of the petitioner in such cases. For example, the Supreme Court of India has said:

> The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper but who has sufficient interest in the proceeding.[130]

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[127]Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802, 813.
[128]Bandhua, A.I.R. 1984 S.C. 802, 811.
[129]Jain, *Indian Constitutional Law*, 1372.
[130]S.P. Gupta and others vs. Union of India, AIR 1982 SC 149.

Finally, we may reproduce here excerpts from the guidelines issued by the Supreme Court of India on PIL petitions.

SUPREME COURT OF INDIA COMPILATION OF GUIDELINES TO BE FOLLOWED FOR ENTERTAINING LETTERS/PETITIONS RECEIVED IN THIS COURT AS PUBLIC INTEREST LITIGATION.

(Based on full Court decision dated 1.12.1988 and subsequent modifications).

No petition involving individual/ personal matter shall be entertained as a PIL matter except as indicated hereinafter.

Letter-petitions falling under the following categories alone will ordinarily be entertained as Public Interest Litigation:—

1. Bonded Labor matters.
2. Neglected Children.
3. Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of Labor Laws (except in individual cases).
4. Petitions from jails complaining of harassment, for (pre-mature release)* and seek-ing release after having completed 14 years in jail, death in jail, transfer, releasc on personal bond, speedy trial as a fundamental right.
5. Petitions against police for refusing to register a case, harassment by police and death in police custody.

6. Petitions against atrocities on women, in particular harassment of bride, bride-burning, rape, murder, kidnapping etc.

7. Petitions complaining of harassment or torture of villagers by co- villagers or by police from persons belonging to Scheduled Caste and Scheduled Tribes and economically backward classes.
8. Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wild life and other matters of public importance.
9. Petitions from riot-victims.
10. Family Pension.

All letter-petitions received in the PIL Cell will first be screened in the Cell and only such petitions as are covered by the above mentioned categories will be placed before a Judge to be nominated by Hon'ble the Chief Justice of India for directions after which the case will be listed before the Bench concerned.

If a letter-petition is to be lodged, the orders to that effect should be passed by Registrar (Judicial) (or any Registrar nominated by the Hon'ble Chief Justice of India), instead of Additional Registrar, or any junior officer.

To begin with only one Hon'ble Judge may be assigned this work and number increased to two or three later depending on the workload. *Submission Notes be put up before an Hon'ble Judge nominated for such periods as may be decided by the Hon'ble Chief Justice of India from time to time. Cases falling under the

following categories will not be entertained as Public Interest Litigation and these may be returned to the petitioners or filed in the PIL Cell, as the case may be:

1. Landlord-Tenant matters.
2. Service matter and those pertaining to Pension and Gratuity.
3. Complaints against Central/ State Government Departments and Local Bodies except those relating to item Nos. (1) to (10) above.
4. Admission to medical and other educational institution.
5. Petitions for early hearing of cases pending in High Courts and Subordinate Courts.

In regard to the petitions concerning maintenance of wife, children and parents, the petitioners may be asked to file a Petition under sec. 125 of Cr. P.C. Or a Suit in the Court of competent jurisdiction and for that purpose to approach the nearest Legal Aid Committee for legal aid and advice.

We have now provided an adequate description of the growth of judicial activism in India in general, and a somewhat detailed description of the Public Interest Litigation (PIL) movement in particular. This movement in India has served as a model for Pakistan. The Supreme Court of Pakistan, inspired by the Indian Supreme Court, initiated its own PIL movement. This is taken up in the next section.

1.4.2 The Role of the Judiciary in Pakistan

The traditional view of *locus standi* was affirmed by the SC by saying that "in a petition for a writ, the first question that the Court has to consider is whether the petitioner has *locus standi* to invoke the extraordinary jurisdiction of the Court."[131] In another case, Justice Muhammad Munir held that a petitioner "cannot move the Court pro-bono-publico."[132] A beginning was made for the PIL movement in Pakistan when the Supreme Court of Pakistan began the discussion of PIL in *Benazir Bhutto v. Federation of Pakistan* in 1988. The rule of *locus standi* or the "rule of standing" was relaxed in the following words:

> It is therefore permissible when . . . in other cases where there are violations of Fundamental Rights of a class or a group of persons who belong to the category as foretasted and are unable to seek redress from the Court, then the traditional rule of locus standi can be dispensed with, and the procedure available in public interest litigation can be made use of, if it is brought to the notice of the Court by [a] person acting bona fide.[133]

The learned Court also used words to the effect that whenever there arises a question of public importance with reference to enforcement of Fundamental Rights provided by the Constitution of 1973, then SC can take up the matter under Art.184(3), because "the plain language of Art.184(3) shows that it is open ended. The Article does not say as to who shall

[131]Tariq Transport Company, Lahore v. Sarghodha-Bhera Bus Service, PLD 1958 SC 437. See also Fazl-e-Haq v. The State, PLD 1960 SC 295, and Islamic Republic of Pakistan v. Muhammad Saeed, PLD 1961 SC 192.
[132]Province of East Pakistan v. Mehdi Ali Khan, PLD 1959 SC 387.
[133]PLD 1988 SC 433, 491.

have the right to move the SC."[134] These words and the quotation above, all remind us of the judgement in the Indian case, *S.P. Gupta v. President of India,* quoted above.

A few years after the *Benazir Bhutto case,* the Chief Justice of Pakistan exercised his *suo moto* powers to convert a letter revealing violations of fundamental rights into a petition under Article 184(3) of the Constitution. He marked the petition to Mr. Justice Afzal Zullah. This was the well known *Dharshan Masihs case*[135] This was the first example of the exercise by the Superior Court of PIL, and within a few years, a number of remarkable PIL cases had been decided.

Today, there is a Human Rights Cell of the Supreme Court. It is obvious that the Supreme Court can be moved in a number of ways to address the violation of fundamental rights when there is involved a question of public importance. Out of the ways, the Human Rights Cell is one of the important ways to move the Court. The Human Rights Cell (HRC) was activated in August 2005. It has a Daak (Mail) Room annexed with the court of Honorable Chief Justice of Pakistan. The applications relating to violation of human rights can be filed either through post, fax, telegram, email or through use of court box available in the Supreme Court. The matters of such violation can even be initiated on the basis of print or electronic media reports. Once the violation of human rights came to the knowledge of the Court either through a petition or Suo motu notice , it is registered and then and internal procedure takes place till the matter is resolved. It is said that so far the Court has decided more than six thousand human rights cases.

[134]PLD 1988 SC 416, 488.
[135]PLD 1990 SC 513.

The concept of enforcement of fundamental rights by the Supreme Court in its original jurisdiction started developing under the 1973 Constitution. As soon the 1973 Constitution came into force, the first petition under Article 184(3) was filed in case titled *Ch. Manzoor Elahi v. Federation of Pakistan.*[136] The case established two important principles: (1) That extraordinary jurisdiction can be invoked where there is violation of fundamental rights and brings a matter of public importance to the Supreme Court. (2) That if the High Court and the Supreme Court have concurrent jurisdiction, it will only be for the high court, where the matter will be heard first. These principles are similar to the position under articles 32 and 226 of the Indian constitution. And, although we talk about fundamental rights under the Constitution that are justiciable, they are human rights that have been declared fundamental by the Constitution. The jurisdiction of the Supreme Court under Article 184 is as under:

> 184. Original Jurisdiction of Supreme Court.—(1) The Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in any dispute between any two or more governments.
>
> *Explanation.*—In this clause, "Government" means the Federal Government and the Provincial Governments.
>
> (2) In the exercise of jurisdiction conferred on it by clause (1), the Supreme Court shall pronounce declaratory judgments only.
>
> (3) *Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that question of public importance with reference to the enforcement*

[136]PLD 1975 SC 66. Chief Justice Hamoodur Rahman stated that this was the first application of its kind.

of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article.[137]

The Supreme Court of Pakistan rules governing applications for the enforcement of fundamental rights are as under:—

Order XXV of the Supreme Court Rules, 1980

Applications for Enforcement of Fundamental Rights (under Art. 184(3) of the Constitution of Pakistan, 1973)

Habeas Corpus

1. An application for a writ of habeas corpus shall be filed in the Registry and shall be accompanied by an affidavit by the person restrained, stating that the application is made at his instance and setting out the nature and circumstances of the restraint. The application shall also state whether the applicant has moved the High Court concerned for the same relief and, if so, with what result:

   Provided that where the person restrained is unable owing to the restraint to make the affidavit, the application shall be accompanied by an affidavit to the like effect made by some other person, which shall state the reason why the person restrained is unable to make the affidavit himself.

2. The application shall be heard by a Bench consisting of not less than two Judges.

[137] Art. 184 of the Const. of Pakistan (italics added).

3. If the Court is of opinion that a prima facie case for granting the application is made out, a rule nisi shall be issued calling upon the person against whom the order is sought to appear on a day to be named therein to show cause why such order should not be made and at the same time to produce in Court the body of the person or persons alleged to be illegally or improperly detained then and there to be dealt with according to law.
4. On the return day of such rule of any day to which the hearing thereof may be adjourned, the Court shall, after hearing such parties as are present and wish to be heard, make such order as in the circumstances it considers to be just and proper.
5. In disposing of any such rule, the Court may in its discretion make such order for costs as it may consider just.

Mandamus, Prohibition, Certiorari, Quo Warranto, etc.

6. An application for the enforcement of any other fundamental right shall be filed in the Registry. It shall set out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and shall be accompanied by an affidavit verifying the facts relied on, and at least six copies of the said application and affidavit shall be lodged in the Registry. It shall also state whether the applicant has moved the High Court concerned for the same relief and, if so, with what result. The application shall be made by notice of motion, but the Registrar may in appropriate cases put up the application before the Court for orders as to the issue of notice.

7. Such application shall be heard by a Bench consisting of not less than two Judges of the Court. Unless the Court otherwise directs, there shall be at least eight clear days between the service of the notice of motion and the day named therein for the hearing of the motion.
8. Copies of the said application and the affidavit in support thereof shall be served with the notice of motion and every party to the proceeding shall supply to any other party, on demand and on payment of the proper charges, copies of any affidavit filed by him.
9. The notice shall be served on all persons directly affected, and on such other persons as the Court may direct: Provided that on the hearing of any such motion, any person who desires to be heard in opposition to the motion and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with the notice of motion and shall be liable to costs in the discretion of the Court.
10. The Court may in such proceedings impose such terms as to costs and as to the giving of security as it deems fit.
11. The provisions of Order XVII relating to petitions shall, so far as may be applicable, apply to applications under this Order.

In what follows in the rest of this chapter, we will mention some of the important fundamental rights cases, including some of those that the Supreme Court itself considers to be human rights cases.

Conclusion

The essentials for good governance are a Government that follows the rules and makes no exceptions; a legislature that focuses on its core mandate of adopting wise laws; regulators that are not swayed by special interests; independent auditors that properly review public accounts; a bureaucracy that proudly and professionally serves the public, and private sector that respects and obeys the law, but above all the most important and indispensable factor might be a judiciary that holds the law above everything and everyone

CHAPTER 2

JUDICIAL INDEPENDENCE AND GOOD GOVERNANCE IN PAKISTAN

Introduction

"The judiciary finds itself under huge pressure in many countries, especially where there are political and/or constitutional crises, armed conflicts or post-conflict instability. The judiciary is also vulnerable where democracy is weak, where interference by the executive is commonplace and where the resources of the judiciary are scarce. Counter-terrorism measures have also served to increase the pressure on the judiciary in a number of countries. An independent judiciary is essential for the protection of human rights."[138]

These words justifiably apply to the situation in Pakistan, and it also identifies some of the factors that weaken judicial independence. In the modern state, the idea of an independent Judiciary has its origin in the theory of separation of powers, whereby the Executive, Legislature and Judiciary form three separate branches of government.[139] According to the theory, the three organs constitute a system of mutual checks and balances aimed at preventing abuses of power to the detriment of a free society.[140]

The Meaning of Judicial Independence and Good Governance

In systems with roots in the common law, the judiciary has traditionally enjoyed significant power and independence.[141] The separation of powers model has always viewed the judiciary

[138]http://www.icj.org/themes/centre-for-the-independence-of-judges-and-lawyers/(accessed March, 2015).
[139]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 115.
[140]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 115.
[141]United Nations Office on Drugs and Crime, *Access to Justice: The Independence, Impartiality and Integrity of the Judiciary* (New York: United Nations, 2006), 1.

as a separate and independent arm of government.[142] Com-mon law system judges typically have security of tenure, and considerable autonomy over their budgets and internal governance.[143] A disadvantage associated with such systems however can be that the judicial appointments procedure in some countries is political—in some jurisdictions judges may be popularly elected—rather than merit-based, and may lack transparency.[144] "This independence means that both the Judiciary as an institution and also the individual judges deciding particular cases must be able to exercise their professional responsibilities without being influenced by the Executive, the Legislature or any other inappropriate sources."[145] There are two basic models defining the relationship of the judiciary to the rest of the government: (1) a judiciary dependent on an executive department for its administrative and budgetary functions; and (2) a judiciary that is a separate branch and manages its own administration and budget. Although there are clear examples of independent judiciaries under the first model, the trend is to give judiciaries more administrative control, to protect against executive branch domination.[146]

It is generally acknowledged that only an independent Judiciary is able to render justice impartially on the basis of law, and this enables it to protect human rights and fundamental freedoms of the individual.[147] To fulfil this task efficiently, the public must have full confidence in the ability of the Judiciary to carry out its functions in this independent and

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[142]Ibid., 1.

[143]Ibid.

[144]Ibid. "In all countries, judiciaries play an important role in stabilizing the balance of power within government, and their performance can enhance public confidence in the integrity of government. Historically, common law and civil law systems differed in their conceptualisation of the institution of the judiciary. In recent decades, however, these system have evolved and been influenced toward increased commonality. It is therefore important not only to understand the historical background to a country's judiciary, but also to recognize and acknowledge the changes that have been made in recent years." Ibid.

[145]High Commissioner for Human Rights, *Human Rights in the Administration of Justice*, 115.

[146]Office of Democracy and Governance, *Guidance for Promoting Judicial Independence and Impartiality* (Wash-ington, DC: U.S. Agency for International Development, 2002), 2.

[147]High Commissioner for Human Rights, *Human Rights in the Administration of Justice*, 116.

impartial manner.[148] Without this confidence of the public, neither the Judiciary as an institution nor individual judges can perform this important task properly.[149] To conclude these introductory paragraphs, we may say that "the principle of independence of judges was not invented for the personal benefit of the judges themselves, but was created to protect human beings against abuses of power."[150] This imposes on the judges a duty not to act arbitrarily in any way by deciding cases according to their own personal preferences; their duty is and remains to apply the law. Absent all this, the experts say that unless "judges and prosecutors play their respective key roles to the full in maintaining justice in society, there is a serious risk that a culture of impunity will take root, thereby widening the gap between the population in general and the authorities."[151] What they mean by this is that if people encounter problems in securing justice for themselves, they may be driven to take the law into their own hands, resulting in a further deterioration in the administration of justice and, possibly, new outbreaks of violence.[152]

As compared to judicial independence, "good governance," according to the Office of the High Commissioner for Human Rights, does not have a single and exhaustive definition, nor is there a delimitation of its scope, that commands universal acceptance. In other words, the term is used with great flexibility. The flexibility is supposed to grant an advantage, but also a source of some difficulty when it comes to implementing the ideas that it contains.[153] Nevertheless, in general good governance is said to encompass: full respect of human rights, the rule of law, effective participation, multi-actor partnerships, political pluralism,

[148]Ibid.
[149]Ibid.
[150]Ibid.
[151]Ibid.
[152]See, e.g., UN Doc. E/CN.4/2000/3, *Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions,* para. 87.
[153]http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx (accessed March, 2015).

transparent and accountable processes and institutions, an efficient and effective public sector, legitimacy, access to knowledge, information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance.[154]

From the perspective of a legal mind, a judge for example, one of the keys for economic progress, the most important one for it forms the basis for other factors, is good governance. Good governance, according to such experts, is not just effective or efficient governance, but good governance: "that system of rules, rule-making, and rule-enforcement that regulates the behavior of people and norms of society, upholds the law, and delivers timely justice to all—equally and fairly. Our various governance and private sector assessments, as well as those of other development partners and independent rating agencies, confirm that investors prefer to go where governance is good."[155] It is no longer enough to offer tax incentives or exceptions to labor laws, or to carve out exceptional economic zones. In this highly competitive world, those inducements are only the first of many steps to successfully entice investors into countries. More needs to be done to make foreign and local investors want to stay, and expand, in a country.[156] Good governance is, therefore, good economic and investment policy, which is so crucial for countries like Pakistan. It is this then that a good governance court seeks to promote, and this is what we will discuss in this chapter.

[154]Ibid.
[155]Speech by Haruhiko Kuroda, President, Asian Development Bank, "Good Governance and the Judiciary," at the International Conference & Showcase on Judicial Reforms: Strengthening the Judiciaries of the 21st Century, on 29 November 2005, at the Makati Shangri-la Hotel, Manila, Philippines.
[156]Ibid.

In addition to the investors, the economy and economic development, there is another group that needs the attention of the judiciary. These are the individuals in society for whose benefit economic development and social progress are sought and sustained.[157]

Just as good governance and a good judiciary are indispensable to investors, they are essential to the individual. They give people a chance to improve their own lives. They level the playing field and open opportunities for business, gainful employment, and fair competition with others in society. At a very fundamental level, people need to know their individual rights will be upheld even against the most powerful authorities. An independent judiciary with integrity can do this; apply the law fairly and dispassionately, without regard to the personalities or powers involved. A strong judiciary, with the power to review acts of Government, can protect the citizenry from unlawful acts of Government and hold government officials accountable for their graft, corruption, and abuse of power; and do so in a timely manner.[158]

It is on these criteria that a judiciary is to be judged, and it is these results that will truly show whether a judiciary is independent. We must, therefore, provide a description of the judicial system of Pakistan so as to assess whether it is performing these tasks or is in a position to do so.

2.1 Historical Overview of the Judicial System of Pakistan

2.1.1 Foundation for the Good Governance

[157]Ibid.
[158]Ibid.

The Government of India Act, 1935, remained the Constitution of Pakistan till 24 October 1954 The constitution of Pakistan was promulgated on March 23, 1956 while martial law was clamped on the country on October 7, 1958. The Government of India Act, 1935, did not provide for any fundamental rights in it. In addition, Part IX providing for the apex court called the Federal Court did not grant any powers to issue writs.[159] The powers granted to the Federal Court were those of resolving disputes between the governments, with Art. 204 and Art.205[160] hence, limiting its jurisdiction. Afterwards in the Constitution of 1956, the High Courts were given powers to issue writs of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari* against any person, authority or government, hence provided Fundamental Rights along with adaptation of Islamic Provisions.[161] In addition to this, the nomenclature of the apex court was changed from "Federal Court" to the "Supreme Court of Pakistan."[162]

Article 163(3) of 1956 Constitution gave vast powers to the Supreme Court for doing complete justice. The Article read as follows: "163(3).—The Supreme Court Shall have power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it, ..."[163] The procedure for this was to be governed by *Application for Enforcement of Fundamental Rights, Order XXV, Rules 1 to 11 of the Supreme Court Rules, 1956.*. Article 170 of the Constitution gave the High Courts the power to issue various writs for the enforcement of Fundamental Rights and for any other purposes. The Article said: "170.—Notwithstanding anything in Article 22, each High Court shall have power, throughout the territories in relation to which it exercises

[159]See Part IX, Arts. 200 to 218 of the Government of India Act, 1935, as adapted.
[160]Part IX, Government of India Act, 1935, as adapted.
[161]For the details, see Muhammad Munir, *Constitution of the Islamic Republic of Pakistan: Being a Commentary on the Constitution of Pakistan, 1962* (Lahore: All Pakistan Legal Decisions, 1965), 41–44.
[162]Art. 148 of 1956 Constitution. "There shall be a Supreme Court of Pakistan . . . ." Ibid.
[163]1956 Constitution, Art. 163(3).

jurisdiction, to issue to any person or authority, including in appropriate cases any Government, directions, orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto,* and *certiorari,* for the enforcement of any of the rights conferred by Part II and for any other purpose."[164]

The edifice includes a basic feature called "Judicial Review," which is so crucial for judicial independence. The Supreme Court of Pakistan has only recently started exercising this power of judicial review in the true sense. "Only after the United States Supreme Court's 1803 decision in *Marbury v. Madison* was judicial review firmly adopted by any country, and outside the United States the concept was at first slow to catch on. It was not until the run up to World War II that judicial review became common. Since then, not only has the number of courts with the power to perform judicial review increased, but so, too, has the diversity of ways in which these courts use this power."[165] These innovations have corresponded with a marked rise, especially recently, in the influence of courts around the world.[166] The Indian Supreme Court is usually mentioned as an example of this global trend of the strengthening judiciary, because there are few issues of political life in India with which the higher judiciary is not in some way involved, often critically.[167] "The [Indian] Supreme Court has come to sit as what amounts to a court of good governance over the rest of the government—some say seriously realigning India's constitutionally envisioned separation of powers."[168] As the Supreme Court of Pakistan usually follows the Indian Supreme Court in many things, we can easily assume that our apex Court is head- ing in the same direction, and will soon become "a court of good governance." Although "judicial

[164]1956 Constitution, Art. 163(3).
[165]Robinson, "Expanding Judiciaries," 3.
[166]Ibid.
[167]Ibid.
[168]Ibid.

review" has been fully acknowledged by the Supreme Court of Pakistan, as we shall see later, there are still voices that can be heard about the supremacy of the Parliament.

2.1.2 The Constitutions of Pakistan 1962 and 1973: Turmoil and ultimate Stability

The Constitution of 1962 did not make major structural changes to the judiciary, but the powers of the existing courts were curtailed. The jurisdiction of the Supreme Court was considerably lessened as compared to the 1956 Constitution denying the power of "judicial review". The doctrine of parliamentary supremacy as adopted in UK was, therefore, upheld. It was a departure from the system of judicial review that exists in USA, and indeed a backward step as far as a written Constitution is concerned.

It was for this reason that the 1962 Constitution was amended in March 1963. The power of judicial review was restored and fundamental rights were made justiciable. The Court was granted the power to declare any law passed by any legislature null and void on the ground that the law in question was repugnant to any fundamental right. Thus the amendment made the courts rather than the legislature the custodian of the Constitution and fundamental rights. Another factor that affects the independence of the judiciary was also altered somewhat. The President was now to appoint a council to be known as the Supreme Judicial Council consisting of the Chief Justice and two most senior judges of the Supreme Court and the Chief Justice of each High Court for the removal of the judges. The provisions still exist in the 1973 Constitution. Other provisions relating to the judiciary regarding appointment of the judges including Chief Justices of the superior courts, their qualifications, their retirement age, transfer of judges and their remuneration were identical or similar to the provisions of

the 1956 Constitution. Ac-cording to Justice Nasim Hasan Shah, President Ayub Khan used to interview the judges before appointment.[169] This was viewed as an attack on the independence of the judiciary.

The major provisions affecting the judiciary in the Constitution o the 1973 were similar to those of the earlier Constitutions of 1956 and 1962. Our purpose here is not to go into the details of the developments and the ups and downs seen by the Constitution and the judiciary during two spells of martial law in this period. All this is well known history, and is beyond the scope of this study. There have been many battles for the independence of the judiciary during this period. First, considerable progress has been made in the separation of the judiciary from the executive,[170] although it has taken considerable time. The government continued to postpone and delay the separation of the judiciary from the executive at the lower level, and ultimately petitions were filed and the courts had to step in to compel the government to take action. The second important step was the struggle for the power to appoint judges of the Higher Courts. This has led, after a protracted struggle, to the 19th Amendment to the Constitution. Instead of going into historical details, it will be better if we focus on the factors that have damaged the independence of the judiciary in Pakistan. To understand these factors, it is essential first to understand the factors that are considered significant for judging judicial independence. This will be done in the next section in the light of the international standards affecting judicial independence. Once these factors have been assessed, we will return to the factors that have had sway in Pakistan.

[169]Chief Justice (Retd) Nasim Hassan Shah, *Ahad Saz Munsif*, 49.
[170]The constitution of Pakistan 1973, Art175(3).

2.2 Role of Judiciary of Pakistan in Defense of Human Rights

The Supreme Court of Pakistan website is regularly updated and judgements are placed on this website. There are a large number of cases that have been called human rights. There are also tables showing, in summary form, the various judgements issued by the Supreme Courts. One such lists mentions seven human rights cases of torture. Another such list mentions cases of missing persons from 2005 to 2009, about eight cases. The objective of this study is to highlight ways in which the judiciary can secure human rights by improving governance. In this section, we shall mention a few cases that may be treated as representative cases for human rights and good governance. These cases go a long way in showing the relationship between human rights and good governance as well

An example of a contribution made by the Supreme Court is the passage of the Bonded Labor System (Abolition) Act, 1992 following the *Dharshan Masih case.* The Chief Justice of Pakistan, on 30 July 1988, received a telegram from Darshan Masih (Rehmatay) and 20 companions with women and children that they were living in a state of hiding and terror as they were being hunted by the brick-kiln owner.[171] This telegram was passed on to the Lahore Registry. The matter was deemed to fall under public interest litigation and direct cognizance by the Supreme Court under Article 184 of the Constitution was taken to initiate proceedings accordingly.[172] After hearing all the concerned at length, the Court passed an interim order that was in reality an agreement between all those who were involved in this exercise to solve the problem of bonded labor in Pakistan. The remarks of Justice Zullah given below are particularly important:

[171] Darshan Masih v. The State, PLD 1990 SC 513, 519.
[172] Ibid.

> The proceedings have not been treated as of adversary character. The laborers , employers, and their organizations projected their views with candidness and honesty of purpose representing their respective interests. It is in this context that it has to be further clarified that no party as such would be deemed to have been recognized as "complainant," "accused," or "contesting party"; nor, the interim decision shall be treated as the success or failure in any form, of any person, party or institution.[173]

The Court has also remarked that fundamental rights under articles 9, 11, 14, 15, 18 and 25 had been violated is apparent. The Court was of the view that the procedural requirements could be dispensed with in a suitable case of violation of fundamental rights, as laid down in the *Benazir Bhutto case* (PLD 1988 SC 416). The learned judge further observed that "in a fit case of enforcement of Fundamental Rights, the Supreme Court has jurisdiction, power and competence to pass all proper/necessary orders as the facts justify."[174] This way, Supreme Court of Pakistan provided relief to a deprived class of citizens whose fundamental rights were violated, and at the same time ensured good governance by eliminating an age-old practice of brutal and tyrannical exploitation at the hands of brick-kiln owners.

Another example of the Superior Courts contributing to good governance through PIL is the Pakistan Environmental Protection Act, 1997 (PEPA). The Superior Courts had faced numerous environment-related PIL cases, whether on applications or *suo moto*.[175] The

[173]PLD 1990 SC 513, 534.
[174]PLD 1990 SC 513, 545.
[175]See, e.g., Ch. Riaz Ahmad Yazdani v. Federation of Pakistan, 1990 CLC 1406; Shehla Zia v. WAPDA, PLD 1994 SC 693; General Secretary, West Pakistan Salt Mines Labour Union (CBA) Khewra, Jehlum v. The Director, Indus-tries and Mineral Development, Punjab, Lahore, 1994 SCMR 2061; Ameer Bano v. S.E. Highways, PLD 1996 Lah 592; M.D. Tahir Advocate v. Provincial Government, ***through*** Secretary, Forest

debates generated by these created for the Parliament, and the law was passed. PEPA set up an environmental regulator, the Pakistan Environmental Protection Agency, as well as special Environmental Tribunals. The law also sets out environmental standards, defines environmental offences and, in general, provides for the improvement and protection of the environment. It is a magnificent contribution that has yet to blossom through implementation.

In the case of Shehla Zia versus Wapda etc. The Chief Justice of Pakistan received a letter from citizens regarding apprehension against construction of grid station by Wapda. The Supreme Court took the cognizance of the case as Public Interest Litigation,and made appropriate directions to the authority[176].

Finally, we may mention a case of probable corruption in the shape of the privatization of Pakistan Steel Mills. The Government of Pakistan took steps to privatize the Pakistan Steel Mills Corporation (PSMC), but during the process a direct petition, *Wattan Party v. Federation of Pakistan,*[177] was filed before the Supreme Court to challenge the vires of the whole process alleging that the transaction had caused loss of billion of rupees to the national exchequer. The Court declared the process of privatization of PSMC as "vitiated by the acts and omissions and commissions on the part of certain State functionaries." The Court declared the matter to be of public importance where violation of fundamental rights under articles 4 and 9 of the Constitution were alleged, therefore, the petition was declared as maintainable as a PIL case. Ultimately, the Court declared the whole transaction as null and void on the basis of a large number of grounds that indicated violation of the rules and their

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Department, 1995 CLC 1730; *Pollu-tion of Environment caused by smoke emitting vehicles, Traffic Muddle,* 1996 SCMR 543; *Human Rights (Environment Pollution in Baluchistan),* PLD 1994 SC 102. 38

[176] PLD 1994 SC 693

[177] PLD 2006 SC 587 and PLD 2006SC.

gross misapplication. In this case, the Court also explained its power of judicial review of administrative action, saying:

> [W]hen the law entrusts a power to an authority it has to be exercised by the said authority and this Court may not substitute its opinion with that of the said author-ity. But if the decision of the authority betrays total disregard of the rules and the relevant material, then the said decision fails the test of reasonableness laid down by the Constitutional Courts for the exercise of the power of judicial review. Faced with such a situation a Constitutional Court would be failing in its Constitutional duty if it does not interfere to rectify the wrong more so when valuable assets of the nation are at stake.[178]

Conclusion

The above cases go a long way in showing that the Judiciary of Pakistan is not only active in protecting human rights,

Judicial activism in all three meanings has been witnessed in Pakistan. In particular, in the area of PIL the Superior judiciary has been highly active. A large number of human rights cases have been taken up, which have truly advanced the cause of good governance. The cases go a long way in showing that the Judiciary of Pakistan is not only active in protecting human rights, but that in many cases it is doing so by implementing the generally accepted standards of good governance.

[178]697.PLD 2006 SC 697, 755-6.

CHAPTER 3

ROLE OF JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS BY PROMOTING GOOD GOVERNANCE

Introduction

As discussed earlier good governance and human rights are mutually reinforcing, and good governance is a precondition for the realization of human rights. The same has been emphasized consistently by United Nations bodies through their resolutions and other instruments.[179] Hence it is vital to analyze the relationship of human rights with good governance and the role that the judiciary plays in this context. This section will elaborate what constitutes good governance, that is, what are those attributes on the basis of which good governance can be recognized along with the significance. Good governance has now come to play an important role through human rights instruments. Moreover link between human rights and good governance for the judiciary of Pakistan is worth mentioning also.

3.1 Appraisal of the Judicial Independence in Pakistan

The First Constituent Assembly of Pakistan passed the Objectives Resolution in march 1949, which declared that "the independence of the Judiciary shall be fully secured." The Objectives Resolution remained a preamble of all Constitutions of Pakistan. It was made

[179]See, e.g. High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 1.In a seminar held Seoul in September 2004, it was highlighted that the mutually reinforcing, and sometimes overlapping, relationship between good governance and human rights needs to be recognized. This was followed up by the United Nations Conference on anti-corruption measures, good governance and human rights, from 8-9 November 2006, at Warsaw, Poland (available at http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/ WarsawConference.aspx).

enforceable by virtue of the Eighth Amendment to the Constitutions in 1985, under Article 2-A. This Article provides that the principles and provisions set out in the Objectives Resolution are made substantive part of the Constitution and shall have effect accordingly.[180]

We will not go into too much details here, but looking first at institutional independence itself, that is, the independence of the judiciary as distinct from the independence of the judges, it can safely be said that to a great extent the judiciary is independent. This has been the position at least in the last few decades. Thus, the judiciary has considerable independence although in some matters it is supported by the Executive in the shape of the Ministry of Law and Justice. The Judiciary has an independent budget and the postings, transfers and promotions of the lower judiciary are fully in the control of the Superior Judiciary. We can safely say that the Judiciary is able to handle its own administration and matters that concern its operation in general. This definitely includes the assignment of cases to judges within the court to which they belong. See the discussion of Principle 14 of the Basic Principles above.[181] The Judiciary is also independent in financial matters. The budget is determined by the Executive, of the Federation or the Provinces as the case may be, but usually what is determined by the judiciary as its need is usually met. The Judiciary then administers and manages its own budgetary allocations.[182] The judiciary of Pakistan is also independent as to as to decision-making. This could not be said to be true in the past when there have been occasional interferences by governments whether civilian or military. The

[180]Article 2-A was inserted by President's Order No: 14 of 1985.
[181]This principle talks about administrative matters that should be in the control of the Judiciary, although it does not go into details.
[182]This is addressed by Principle 7 of the Basic Principles, which requires that the Judiciary must be granted sufficient funds to properly perform its functions. Without adequate funds, the Judiciary will not only be unable to perform its functions efficiently, but may also become vulnerable to undue outside pressures and corruption. See above.

Inference , as stated in Principle 4 of the Basic Principles, means inappropriate or unwarranted interference with the judicial process, especially by making judicial decisions by the courts be subject to revision.[183] From another perspective it also means respect shown by other institutions for the decisions of the Judiciary. In general this respect is shown in Pakistan, but there are occasional deviations as well. As far as jurisdictional competence is concerned, there are very few or rare cases where the Executive, for example, may have stepped on the toes of the Judiciary. More recently, there have been reverse complaints where it is the Judiciary that has been said to have interfered in policy matters of the domain of the Executive.

The Judiciary as a branch of government in Pakistan appears to be considerably independent of the Executive and Parliament. We may now look at the independence of the individual judges. This type of independence means that judges should be able to decide cases on the basis of merit and not on the basis of their own whims or preferences. This as we discussed above means that they have both a right and a duty to decide the cases before them according to the law, free from fear of personal criticism or reprisals of any kind, even in situations where they are obliged to render judgments in difficult and sensitive cases.[184] This ability of the judges has unfortunately been influenced in the past in Pakistan in the past. Most of the time, the basic pressure tactic arises from the appointment of judges, whether initial or elevation to higher positions. We may, therefore, briefly consider the protracted struggle that has taken place in Pakistan with respect to the appointment of judges. The struggle started in earnest when the question came before the Supreme Court in a reference sent by the President in 1996 under Article 186 of the Constitution for the opinion

[183]See the discussion of principle 4 above.
[184]See the discussion above in the context of the independence of individual judges.

whether the President is permitted to appoint Judges of the Superior Courts in his sole discretion or only on the advice of the Prime Minister? Two Constitutional petitions on the same issue about the same time, were also filed in the Supreme Court under Article 184(3) by Wahab-ul Khairi on behalf of Al-Jehad Trust and by Zafar Iqbal Chaudhry, seeking a declaration that the President was the appointing authority for the Judges of the Superior Judiciary and that the advice of the Prime Minister under Article 48(1) of the Constitution was not required. The Supreme Court held then that there is no conflict between Article 48 and Articles 177 and 193 of the Constitution. The court concluded that the President was bound by the advice of the Prime Minister in respect of appointment of judges of the superior judiciary under Articles, 177 and 193 of the Constitution.[185] The Court also concluded that "consultation is supposed to be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and Chief Justice of High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reason to be recorded in writing by the President/Executive".[186] In *Malik Asad Ali v. Federation of Pakistan*[187] it was held that the senior most judge of the Supreme Court is to be appointed as the Chief Justice of Pakistan unless for some solid or strong reason. In any case, the multiple issues raised and discussed were ultimately resolved through the 18th Amendment to the Constitution by inserting a new article 175-A into the Constitution. This was further amended by the 19th Amendment which is self explanatory, providing detailed procedure for the appointment of Judges to the Supreme Court, High Courts and the Federal Shariat Court.

[185] Al Jehad Trust v. Federation of Pakistan, PLD 1997 SC 84.
[186] PLD 1996 SC 405
[187] PLD 1998 SC 161.

In this new arrangement, instead of one person, namely the Chief Justice, or at best two, namely the Chief Justice of Pakistan and the Chief Justice of the High Court, taking a decision on the competence and suitability of a potential judicial appointee, the decision making power has been diffused and spread over a collegium that comprises thirteen persons. A similar diffusion appears to have been intended for the executive's role in the judicial appointments by constituting a Parliamentary Committee. Further, it has been held that Article 175A is to be read as a part of the larger constitutional scheme and not as an insular "bunch of separate clauses and provisions" or as a self-contained island within the Constitution, unconnected with its other parts.[188]

The Superior Judiciary in Pakistan enjoys complete security of tenure. Removal is only possible through a reference sent to the Supreme Judicial Council, which is provided for in the Constitution. The salaries of the entire judiciary are raised periodically, and today the judiciary may be considered to be very well paid as compared to the rest of the public servants.

AS for the right and duty to ensure fair court proceedings and give reasoned decisions, which is demanded by principle 6 of the Basic Principles. This principle says that the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."[189] Judges have an obligation to decide the cases before them according to the law, protect individual rights and freedoms, and constantly respect the various procedural rights that exist under domestic and international law. All this depends on the quality of judgements, which is something that needs considerable improvement. Things have

[188]PLD 2011 SC 407.

[189]United Nations GA, *Basic Principles on the Independence of the Judiciary*, resolutions 40/32 of 29 November 1985 and 40/146 of 13 December

improved more recently, and the Courts have handed down judgments that may qualify them for being called "Good Governance Courts."

3.2 The Courts and Good Governance

The Indian Supreme Court has rightly been pointed to as an example of the global trend of the strengthening of judiciary. In the recent past, there have been few issues of political life in India with which the higher judiciary has not in some way involved, often critically.[190] "The Supreme Court has come to sit as what amounts to a court of good governance over the rest of the government—some say seriously realigning India's constitutionally envisioned separation of powers." We will examine this role of the Indian Supreme Court in the next chapter to see how far Pakistan has followed the lead of the Indian Court in its stride toward good governance.

3.3 Characteristics of Good Governance

The terms "governance" and "good governance" have become so common in development literature that almost everyone has become familiar with the terms, even if they do not know what they exactly mean. As a consequence, the term "bad governance" is now regarded as "one of the root causes of all evil within our societies."[191] It is obvious that the concept of "governance" is not new, and is as old as human civilization. Today, however, governance is often used in several contexts such as corporate governance, international governance, national governance and local governance. In most of these contexts, the basic meaning is

[190] 12 Robinson, "Expanding Judiciaries," 3.
[191] Yap Kioe Sheng, *What is Good Governance?* (Thailand: United Nations Economic and Social Commission for Asia and the Pacific, 2007), 1.

the same, therefore, "governance" can be defined as: "the process of decision-making and the process by which decisions are implemented or not implemented."[192] Another definition, sometimes preferred, is: "the responsible use of political authority to manage a nation's affairs."[193] These may be workable definitions, but there is no single and exhaustive definition of "good governance," nor is there a delimitation of its scope that commands universal acceptance.[194] However, there is a significant degree of consensus that good governance relates to political and institutional processes and outcomes that are deemed necessary to achieve the goals of development.[195] It has been said that good governance is the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights in a manner essentially free of abuse and corruption, and with due regard for the rule of law.[196] The true test of "good" governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights.[197] The key question it is said is: "are the institutions of governance effectively guaranteeing the right to health, adequate housing, sufficient food, quality education, fair justice and personal security?"[198]

The concept of good governance has been clarified by the work of the former Commission on Human Rights. In its resolution 2000/64, the Commission identified the key attributes of good governance. Thus, Good governance has 8 major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and

[192]Ibid.
[193]Clarence J. Dias and David Gillies, *Human Rights, Democracy and Development* (1993), 10.
[194]http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx (accessed June, 2015).
[195]http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx (accessed June, 2015).
[196]Ibid.
[197]Ibid.
[198]Ibid

efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society.[199]

3.3.1 Participation

It means that the public can participate (either directly or through representatives) in the decision-making and the implementation of public projects or other government activity. Participation by both men and women is a key cornerstone of good governance.[200] Representative democracy does not necessarily mean that the concerns of the most vulnerable in society would be taken into consideration in decision making. Participation needs to be informed and organized. This means freedom of association and expression on the one hand and an organized civil society on the other hand.[201] Democracy is making rapid strides in the country, but unless some-thing is done by feudalism and family groupings. In addition to this, Pakistan is still not rid of massive rigging and manipulation of elections.

[199]Sheng, *What is Good Governance?*, 2. The term is used with great flexibility; this is an advantage, but also a source of some difficulty at the operational level. Depending on the context and the overriding objective sought, good governance has been said at various times to encompass: full respect of human rights, the rule of law, effective participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions, an efficient and effective public sector, legitimacy, access to knowledge, information and education, political em-powerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tol-erance. http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx (accessed June, 2015)

[200]Sheng, *What is Good Governance?*, 2.

[201]Ibid.

3.3.2 Rule of law and Impartiality

Good governance requires fair legal frameworks that are enforced impartially. Impartial enforcement of laws requires an independent judiciary and an impartial and incorruptible police force.[202]

But the situation of the police in Pakistan is going from bad to worse. In the last few years there have been numerous allegations of extra-judicial killings[203] mostly leveled in Sindh and Punjab.

3.3.3 Transparency

Transparency means that decisions taken and their enforcement are done in a manner that follows rules and regulations. It also means that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement. It also means that enough information is provided and that it is provided in easily understandable forms and media.[204]

3.3.4 Responsiveness

Good governance requires that institutions and processes try to serve all stakeholders within a reasonable timeframe.[205]

3.3.5 Consensus oriented decisions

There are several actors and as many view points in a given society. Good governance requires mediation of the different interests in society to reach a broad consensus in society on what is in the best interest of the whole community and how this can be achieved. It also

[202]Ibid.
[203]These were levelled by a political party (called PAT) in Lahore.
[204]Sheng, *What is Good Governance?*, 2.
[205]Ibid.

requires a broad and long-term perspective on what is needed for sustainable human development and how to achieve the goals of such development. This can only result from an understanding of the historical, cultural and social contexts of a given society or community.[206] Pakistan is in great need of such consensus.

3.3.6 Equity and inclusiveness

A society's well being depends on ensuring that all its members feel that they have a stake in it and do not feel excluded from the mainstream of society. This requires all groups, but particularly the most vulnerable, have opportunities to improve or maintain their well being.[207]

3.3.7 Effectiveness and efficiency

Good governance means that processes and institutions produce results that meet the needs of society while making the best use of resources at their disposal. The concept of efficiency in the context of good governance also covers the sustainable use of natural resources and the protection of the environment.[208]

3.3.8 Accountability

Accountability is a key requirement of good governance. Not only governmental institutions but also the private sector and civil society organizations must be accountable to the public and to their institutional stakeholders. Who is accountable to whom varies depending on whether decisions or actions taken are internal or external to an organization or institution. In general an organization or an institution is accountable to those who will be affected by its

[206] Ibid.
[207] Ibid.
[208] Ibid.

decisions or actions. Accountability cannot be enforced without transparency and the rule of law.[209]

3.4 Good Governance and Human Rights Issues

Good governance and human rights are mutually reinforcing.[210] Human rights are people centered while good governance, such as democratic and responsive institutions, the rule of law and anti-corruption, are minimum standards for political institutions that respond to the rights and need of a countries' population.[211] Human rights principles provide a set of values to guide the work of governments and other political and social actors. They also provide a set of performance standards against which these actors can be held accountable.[212] Moreover, human rights principles inform the content of good governance efforts: they may inform the development of legislative frameworks, policies, programs, budgetary allocations and other measures.[213]

On the other hand, without good governance, human rights cannot be respected and protected in a sustainable manner. The implementation of human rights relies on a conducive and enabling environment. This includes appropriate legal frameworks and institutions as well as political, managerial and administrative processes responsible for responding to the rights and needs of the population.

Following areas will link good governance and human rights showing how a variety of social and institutional actors and State agencies can carry out reforms:

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[209]Ibid.
[210]http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx.High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 1.
[211]UN (2000) The role of good governance in the promotion of human rights. Commission on Human Rights reso-lution 2000/64.
[212]http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx.High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 1.
[213]High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 1-2.

3.4.1 Democratic Institutions

When led by human rights values, good governance reforms of democratic institutions create avenues for the public to participate in policymaking either through formal institutions or informal consultations.[214] In Pakistan, democratic institutions are gradually being strengthened, although the progress may appear slow to some. To take up this issue seriously, for example, the Pakistan Institute for Parliamentary Services (PIPS) has been established.[215] This premier institution has been created to provide quality research and capacity building services for parliamentarians and parliamentary functionaries. The establishment of a sustainable institute for legislative research and capacity building had been a long standing demand of parliamentarians. An Act of Parliament was passed to achieve the major step. PIPS is a momentous initiative of the parliamentarians to establish an exclusive centre of excellence with an aim to impact the practice of an effective strong legislature in Pakistan. The Institute provides quality services to national as well as provincial legislators. The Institute is envisions establishing a peoples' representative forum to equip parliamentarians with cutting-edge strategies and tools to per-form their representative, legislative and oversight functions effectively and efficiently. There are other institutions too and they ususally seek help from international agencies.

As far as the judiciary is concerned, major developments have already been highlighted in the first chapter. Among these are the setting up of a Human Rights Cell at the Supreme Court. The Human Rights Cell has become one of the important ways to move the Court. The Human Rights Cell (HRC) was activated in August 2005. The applications relating to violation of human rights can be filed either through post, fax, telegram, email or

[214]http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx.Ibid., 2.
[215]http://www.pips.gov.pk/ (acessed October, 2015).

through use of court box available in the Supreme Court. The matters of such violation can even be initiated on the basis of print or electronic media reports. Once the violation of human rights came to the knowledge of the Court either through a petition or *suo motu* notice, it is registered and then an internal procedure takes place till the matter is resolved. It is said that so far the Court has decided more than six thousand human rights cases. It receives an average of 250 applications on a daily basis. The work of the cell has gone a long way to strengthen democratic institutions and to create basic awareness.[216] they may encourage civil society and local communities to formulate and express their positions on issues of importance to them.[217] Various NGOs and in-stitutes are quite active in Pakistan and keep on highlighting important issues, particularly the civil-military relations that are a significant issue in Pakistan.[218]

3.4.2 Service Delivery

In the realm of delivering State services to the public, good governance reforms advance human rights when they improve the State's capacity to fulfil its responsibility to provide public goods which are essential for the protection of a number of human rights, such as the right to education, health and food.[219] Reform initiatives may include mechanisms of accountability and transparency, culturally sensitive policy tools to ensure that services are accessible and accept-able to all, and paths for public participation in decision-making.[220]

[216]http://www.supremecourt.gov.pk/web/page.asp?id=1758 (accessed Septermber 2015).
[217]http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx. High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 2.
[218]See, e.g., the website of Pakistan Institute of Legislative Development and Transparency http://www.pildat.org/.
[219]http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx.High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 2.
[220]http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx.High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 2.

The situation about service delivery may be said to be poor. There is no dearth of law and good intentions. Even funds are sanctioned and projects are launched, but it is the implementation of the laws that is important. Thus, for example, Article 25A guarantees free and compulsory education for all children who are up to sixteen years of age. It says: "Art. 25A. **Right to education.**—The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law."[221] In reality, however, this remains a distant dream. There are schools that lack basic facilities and many have no teachers. Ghost schools are said to exist on paper, but not in reality.

The situation about public utilities is preposterous in certain. There is constant shortage of electricity and "load-shedding" which is adding to the levels of poverty as factories close down.[222]

While the Superior Courts have contributed to good governance through PIL, as in the case of Pakistan Environmental Protection Act, 1997 (PEPA), still much more needs to be done.

3.4.3 Rule of Law

When it comes to the rule of law, human rights-sensitive good governance initiatives reform legislation and assist institutions ranging from penal systems to courts and parliaments to better implement that legislation. Good governance initiatives may include advocacy for legal re-form, public awareness-raising on the national and international legal framework, and capacity-building or reform of institutions.[223] In Pakistan, the Rule of Law is governed

[221]Constitution of Pakistan, 1973, Art. 25A.
[222]See, e.g., "Nepra sticks to report on power sector deficiencies" Dawn http://www.dawn.com/news/1210568 (accessed October 2015).
[223]http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx.High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 2.

by Articles 4 and 5 of the Constitution giving citizens a right to be dealt in accordance with law and obligating them to be loyal to state and obedient towards Constitution and law.

These articles of the Constitution have been separated from the Fundamental Rights provided in the Constitution. The reason is that while Fundamental Rights can be suspended during an emergency, the Articles dealing with the Rule of Law will remain intact. Article 233 deals with the suspension of fundamental rights.

The Courts keep on laying down additional rules for rule of law. Some of the important cases in this respect. Some of the important cases on rule of law are: *Benazir Bhutto v. Federation of Pakistan*,[224] *Manzur Ellahi v. Federation of Pakistan*,[225] and *Federation of Pakistan v. Ghulam Mustafa Khar*.[226] The situation needs to be considerably improved as far as practice is concerned. Great damage has been done to the application of rule of law by the rampant corruption in the country.

3.4.4 Anti-Corruption

Anti-corruption measures are also part of the good governance framework, and anti-corruption measures rank high on the UN agenda.[227] Thus, Ban Ki-moon, United Nations Secretary-General, has said: "Corruption undermines democracy and the rule of law. It leads to violations of human rights. It erodes public trust in government. It can even kill—for

[224]PLD 1988 SC 416.
[225]PLD 1975 SC 66.
[226]PLD 1989 SC 26.
[227]Some of the important documents on the subject are: HRC resolutions 7/11 and 19/20 "The role of good gov-crnance in the promotion and protection of human rights"; HRC resolutions 17/23, 19/38 and 22/12 "The negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation"; HRC resolution 21/13 "Panel discussion on the negative impact of corruption on the enjoyment of human rights"; HRC resolution 23/9 "The negative impact of corruption on the enjoyment of human rights"; Report of the High Commissioner for Human Rights "Comprehensive study on the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of hu-man rights, in particular economic, social and cultural rights" (A/HRC/19/42); Summary report of the Human Rights Council panel discussion on the negative impact of corruption on the enjoyment of human rights (A/HRC/23/26).

example, when corrupt officials allow medicines to be tampered with, or when they accept bribes that enable terrorist acts to take place."[228] Although the links between corruption, anti-corruption measures and human rights are not yet greatly explored, the anti-corruption movement is looking to human rights to bolster its efforts.[229] Navi Pillay, United Nations High Commissioner for Human Rights has said: "Let us be clear. Corruption kills. The money stolen through corruption every year is enough to feed the world's hungry 80 times over. Nearly 870 million people go to bed hungry every night, many of them children; corruption denies them their right to food, and, in some cases, their right to life. A human rights-based approach to anti-corruption responds to the people's resounding call for a social, political and economic order that delivers on the promises of 'freedom from fear and want.' "[230] In fighting corruption, good governance efforts rely on principles such as accountability, transparency and participation to shape anti-corruption measures. Initiatives may include establishing institutions such as anti-corruption commissions, creating mechanisms of information sharing, and monitoring Governments' use of public funds and implementation of policies.[231]

It is the conclusion of UN bodies that in countries where corruption is rampant in governments and legal systems, law enforcement and legal reform are almost always

[228]Office of the United Nations High Commissioner for Human Rights, *The Human Rights Case Against Corruption* (Geneva: United Nations, 2013), 1. This publication briefly outlines the case against corruption from a human rights perspective. It explores the nexus between the promotion and protection of human rights and corruption, including through discussion of relevant human rights standards and mechanisms. It includes a list of key reference materials on human rights and corruption, several of which are directly included in the text. By doing so, the pamphlet provides a basic foundation for rights-based advocacy against corruption for those with an interest in fighting the negative impacts of corruption on the enjoyment of all human rights including the right to development.

[229]http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx. High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 2.

[230]Office of the United Nations High Commissioner for Human Rights, *The Human Rights Case Against Corrup-tion*, 22.

[231]http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx. High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 2.

prevented and resisted by corrupt judges, lawyers, prosecutors, police officers, investigators and auditors.[232] This compromises of the people to equality before the law and the right to a fair trial.[233] It also under-mines the access of disadvantaged groups to justice, as they cannot pay bribes due to poverty and cannot trade influence for favorable judgements.[234] It is important to note that corruption in the rule-of-law system weakens the accountability structures that have been implemented, and it is these structures that are responsible for protecting human rights. This contributes to a culture of impunity, since illegal actions are not punished and laws are not consistently upheld.[235]

Further when corruption is prevalent in a country like Pakistan, for example, those in public positions fail to take decisions with the best interests of society in mind.[236] The primary result of this is that the prevalent corruption damages the legitimacy of the regime, leading to a loss of public support and trust for the government and its institutions. "When widespread, practices like electoral fraud, illicit funding of political parties or even the perceived disproportionate influence of money in politics can erode confidence in governments."[237]

All this affects human rights directly. It is well known that human rights are indivisible and interdependent and the consequences of corruption touch upon them all—civil, political, economic, social and cultural, as well as the right to development.[238] For example, corruption undermines a state's human rights obligation to maximize available resources for the

[232]Office of the United Nations High Commissioner for Human Rights, *The Human Rights Case Against Corruption*, 5.
[233]Ibid.
[234]Ibid.
[235]Ibid., 6.
[236]IBid.
[237]IBid. This is so true and it appears that the situation described here by the UN is exactly what is happening in Pakistan.
[238]Ibid., 6.

progressive realization of rights recognized in Article 2 of the International Covenant on Economic, Social and Cultural Rights.[239] The destruction of management by corruption leads to compromises of public resources and also the state's ability to deliver services, including health, education, and welfare, which are essential for the realization of economic, social and cultural rights.[240] Corruption leads to discriminatory access to public services in favor of those able to influence authorities, including by offering bribes.[241] Groups who are economically and politically disadvantaged as well as persons, who are so disadvantaged, suffer disproportionately in these circumstances. The reason is that they are most dependent on public services but least able to influence State policies and corrupt officials.[242]

Pakistan has a National Anti-Corruption Strategy (NACS) project that was conceived by the National Accountability Bureau (NAB) with the major goal of accountability and transparency. The Project aimed to:

- undertake a review and assessment of the causes, nature, extent and impact of corruption from a broad perspective;
- develop a broad based, high level and integrated strategic framework for tackling corruption, focusing on prevention as well as monitoring and combating corruption, ensuring consistency with the good governance reforms and
- create an implementation plan based on the strategic framework to tackle corruption.[243]

The details cannot be discussed here, but the overall and long term objective of the NACS is to eliminate corruption by engaging all stakeholders in the fight against corruption, through a

[239]Ibid.
[240]Ibid.
[241]Ibid.
[242]Ibid.
[243]National Accountability Bureau, *National Anti-Corruption Strategy* (Islamabad: NAB, 2002

program which is holistic, inclusive and progressive.[244] The means and timetable to achieve this is alleged to be realistic and practical. The short term objective of NACS is to set in motion systemic improvements that will strengthen the national integrity system and the people against corruption. The immediate objective of the strategy is to assist the new political dispensation inculcating a high set of public standards, publicly declared and verifiable, which will contribute to the attainment of good governance.[245] At present, there are almost 175 mega corruption cases.[246] The general impression among the general public is that the National Accountability Bureau is not really independent and takes its cue from the Federal Government. In the last month it has started showing some activity by going after bigger high profile cases. As compared to this, the accountability bureau set up by the Khyber paktunkhwa province enjoys a much better reputation with respect to independence; it has arrested and begun proceedings against some serving ministers.

Here we will merely look at few judgments given by the Supreme Court and High Court of Pakistan. These judgments are intended to serve as illustrations of what might be one the way.

3.4.5 Honor Killings

The daily "Dawn" dated 11th October, 2003 filed a report captioned "Couple's Killing Ordered by Jirga.". The report stated that on the orders of a *jirga*, a couple had fallen in love and married in violation of the rites and traditions of their clans. The then Chief Justice of Pakistan, Mr. Justice Nazim Hussain Siddiqui, took *suo motu* notice of this news item and directed the District and Sessions Judge, Sanghar to hold an inquiry into

[244]Ibid.
[245]Ibid.
[246]http://www.nab.gov.pk/nab_ops.asp (accessed October, 2015).

the matter.[247] However, the Report of Sessions Judge, as also other reports by the Police Committee, concluded that "neither a Jirga was held nor any firing squad was constituted for the murder of the couple."[248] A local police investigation also resulted in a similar finding. It was, however, brought on record that this double murder is a simple "honor killing," because the alleged main accused was father of the deceased girl. Investigation into the matter by the Court revealed that the deceased couple "had contacted the police for providing the protection but on the contrary, they were handed over to the relatives of the girl who murdered them."[249]

The Court expressing serious doubts about the investigations undertaken so far directed the Inspector-General Police, Sindh to prepare his report about the killings in one month. The Court also directed the IGP to look into the matter personally in order to ascertain the individual liability of the concerned police officers about their involvement in the matter.[250] As a result of the Court's intervention, the truth was uncovered and liability fixed.

3.4.6 Harassment

An instant application was submitted by Mst Rukhsana that her brother murdered a child when she was only 3 years old. However, the Jirga decided in reconciliation proceedings between the parties that to give her in the Nikkah of deceased's brother who was 50 years old and father of four children's. Now Mst. Rukhsana is well educated lady and she refused to accept the so called decision of the Jirga. She decided to marry with her own choice and contracted a marriage with her cousin through Court. False criminal case of abduction

[247] *In re Suo Motu Case No. 4*, PLD 2004 SC 556.
[248] Ibid.
[249] Ibid.
[250] Ibid.

against her family is lodged. The Court directed to provide protection to her and there should not be any sort of harassment against her family and case was disposed of.[251]

3.4.7 Torture

The application related to deplorable condition of women prisoners in Jail was sent to the High Court and HCJ took a Suo Moto Action in this regard and it was directed that during the working hours, services of lady health visitor shall be available and a lady doctor will be scheduled once a week. Moreover it was decided that the criminal cases will be dispose of against ladies in accordance with law and not more than period of six months .Social Welfare Department was given a task to conduct a survey in this regard that whether children's of female prisoners can stay with their family and relative instead of living in the jails and they are provided a facility to visit their mothers once a week for a period of 6 to 8 hours[252].

3.4.8 Abduction matter

The instant Press Clipping in daily Jang brought the matter of abduction before the court on 20th November 2009 and the recovery of missing married daughter is prayed by the applicant under Human Rights Case 6460/-P 2009 was disposed of and the court directed that abductee has been recovered and case has been registered against the culprits.[253]

3.4.9 Privatization of Pakistan Steel Mills

The Government of Pakistan proceeded to privatize the Pakistan Steel Mills Corporation (PSMC) in furtherance of the decision taken by the Council of Common Interest dated 29 May 1997. During the process of privatization, a direct petition, *Wattan Party v.*

[251] http://www.supremecourt.gov.pk/HR_Cases/10th%20final/10th.htm (accessed October, 2015)
[252] http://www.supremecourt.gov.pk/HR_Cases/11th%20final/11th.htm (accessed October, 2015)
[253] http://www.supremecourt.gov.pk/HR_Cases/7th%20final/6460-Pof2009.pdf(accessed October, 2015)

Federation of Pakistan, was filed before the Supreme Court to challenge the vires of the whole process maintaining that the transaction had caused a loss of billion of rupees to the national exchequer. The Court, through a short order, declared the process of privatization "vitiated by the acts and omissions and com-missions on the part of certain State functionaries.[254] The Court declared the petition maintainable as it was a matter of grave public importance in which violation of fundamental rights under articles 4 and 9 of the Constitution were alleged.

The court later, taking into account a number of law and rules by the Privatization Commission— like the non-addition of cost of land in calculating the per share valuc; violation of formalities in the initial public offering to the successful bidder and the final terms/conditions offered to highest bidder; non-application of disqualification clause on successful bidders; illegal special treatment to successful bidders to avoid taxation and vires of agreement with the matters of national security, among others—as sufficient grounds to declare the whole transaction as null and void. The Court explained its power of judicial review as follows:

> When the law entrusts a power to an authority it has to be exercised by the said authority and this Court may not substitute its opinion with that of the said authority. But if the decision of the authority betrays total disregard of the rules and the relevant material, then the said decision fails the test of reasonableness laid down by the Constitutional Courts for the exercise of the power of judicial review. Faced with such a situation a Constitutional Court would be failing in its

[254]PLD 2006 SC 587. The detailed order is reported as PLD 2006 SC 697.

Constitutional duty if it does not interfere to rectify the wrong more so when valuable assets of the nation are at stake.[255]

In this chapter, we began by elaborating the relationship between judicial independence and good governance. This was followed up by an overview of the developments within the legal system of Pakistan with respect to judicial independence. The international standards and principles laid down for judicial independence were then studied. We then saw that in the recent past Pakistan has attained considerable judicial independence. The last hurdle in relation to the appointment of the judges of the Superior Courts was also resolved through the 18th and 19th amendments to the Constitution of Pakistan. In the last section, we mentioned two representative judgments order to show that the Supreme Court of Pakistan is now poised for and is about to rise as a good governance Court.

3.5 Good Governance, Human Rights and Development

A report of the UN Secretary-General begins by saying: "Five years into the new millennium, we have it in our power to pass on to our children a brighter inheritance than that bequeathed to any previous generation. We can halve global poverty and halt the spread of major known diseases in the next 10 years. We can reduce the prevalence of violent conflict and terrorism. We can increase respect for human dignity in every land. And we can forge a set of updated inter-national institutions to help humanity achieve these noble goals.

[255]PLD 2006 SC 697,at 755-6

If we act boldly—and if we act together—we can make people everywhere more secure, more prosperous and better able to en-joy their fundamental human rights."[256]

All this depends upon the interconnection between good governance, human rights and sustainable development as has been made directly or indirectly clear by the international community in a number of declarations and other global conference documents. For example, the Declaration on the Right to Development proclaims that every hu-man person and all peoples "are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development"[257] In the Millennium Declaration, world leaders affirmed their commitment to promote democracy and strengthen the rule of law as well as to respect internationally recognized human rights and fundamental freedoms, including the right to development. According to the United Nations strategy document on the millennium development goals (MDGs), entitled "The United Nations and the MDGs: a Core Strategy," "the MDGs have to be situated within the broader norms and standards of the Millennium Declaration," including those on "human rights, democracy and good governance."

These ideas have been promoted early in the history of human rights. Thus, a report of the International Commission of the Jurists said: "The Rule of Law is seen as a dynamic concept to be used to advance not only the classical civil and political rights of the

[256]United Nations, Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Hu-man Rights for All* (New York: United Nations, 2005), 3.

[257]The General Assembly, Declaration on the Right to Development, A/RES/41/128 4 December 1986, 97th plenary meeting 41/128, Art, 1. The text of the Article is: " 1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

Article 3 says: "3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom."

individual, but also his economic, social and cultural rights, and to promote social and development policies under which members of the community in which he lives may realize their full potentiality."[258] Peter Unwin says that the "development enterprise, then, is of more recent origin than the human rights one, both in terms of its intellectual roots and its current manifestation. It has, however, rapidly surpassed the human rights world in resources and attention, the main reason being that 'development' became a widely shared goal, technical in nature and expensive in financial resources for the entire international community, including the UN system, while human rights, given their deeply political nature, remained contested and marginalized for much of the time."[259]

These statements show the importance of development and its relationship to human rights. Indeed, so important is human development along with human rights that they grow hand in hand and are essential for the good governance of any country.

3.6 The Concept of Good Governance in the Main International Human Rights Instruments

From a human rights perspective, the concept of good governance can be linked to principles and rights set out in the main international human rights instruments. Many documents highlight the importance of good governance and its essential link with human rights. The following, in particular, are good examples:

- Article 21 of the Universal Declaration of Human Rights recognizes the importance of a participatory government and article 28 states that everyone is entitled to a social and

[258]International Commission of Jurists, *Development, Human Rights and the Rule of Law: Report of a Conference held in The Hague* (Oxford: Pergamon Press, 1981), 4.
[259]Peter Uvin, *Human Rights and Development* (Bloomfield, CT: Kumarian Press, Inc., 2004), 12-13.

international order in which the rights and freedoms set forth in the Declaration can be fully realized. The two International Covenants on Human Rights contain language that is more specific about the duties and role of governments in securing the respect for and realization of all human rights.

- Article 2 of the International Covenant on Civil and Political Rights requires states parties to respect and to ensure the rights recognized in the Covenant and to take the necessary steps to give effect to those rights. In particular, states should provide an effective remedy to individuals when their rights are violated, and provide a fair and effective judicial or administrative mechanism for the determination of individual rights or the violation thereof.
- Under the International Covenant on Economic, Social and Cultural Rights, states are obliged to take steps with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means.
- The human rights treaty monitoring bodies have given some attention to the different elements of good governance. In general comment No. 12, on the right to food, the Committee on Economic, Social and Cultural Rights stated that "Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all." The Committee on the Rights of the Child has on several occasions addressed the issue of governments' capacity to coordinate policies for the benefit of the child and the issue of decentralization of services and policy-making. It has also ad-dressed corruption as a major obstacle to the achievement of the Convention's objectives.

- The Human Rights Committee generally addresses issues related to the provision of adequate remedies, due process and fair trial in the context of the administration of justice in each state. It regularly emphasizes the importance of independent and competent judges for the adequate protection of the rights set forth in the Convention.

The relationship between the judiciary, human rights and good governance is thus a recur-ring theme in different instruments and the different bodies of the UN emphasize these elements again and again.

3.7 The Courts of Pakistan and the Link Between Human Rights and Good Governance

The Government of Pakistan and the Provincial Governments have been allocating a fairly good size of public funds to health and education.[260] It is, however, a matter of public knowledge that these facilities and public spending on health and education is typically enjoyed more by the people who are not really poor. The schools and health centers in areas where the poor live are often dysfunctional and extremely low in technical quality. Much more needs to be done in this areas.

It must be acknowledged that in Pakistan there are three institutions that have played remarkable roles in improving public service delivery and improving good governance in Pakistan. These institutions are: (i) the judiciary; (ii) the media; and (iii) the civil society. As we are concerned here with the judiciary, it can safely be said that the recent successes in the attainment of an independent character by the judiciary has been of immense help. The

[260]This is done with an increase every year in the annual budgets. These allocations have become a measure for the quality and usefulness of the budget.

judiciary has intervened meaningfully to correct failures in service delivery by the executive, and this has gone a long way in improving governance. Public Interest Litigation (PIL) has emerged as a powerful tool in the hands of individuals as well as nongovernmental organizations (NGOs). In recent years, the High Courts and the Supreme Court have intervened in diverse matters to improve delivery of services, ranging from the supply of foodstuffs to individuals from public distribution networks to the correction of electricity overbilling by distribution services. Unfortunately, the judiciary is saddled with hundreds of thousands of pending cases and is slow in delivering judgments. The nexus between lawyers, court staff and litigants often results in the prolonging of cases through the method of seeking adjournments. There are also no time limits for case disposals.

Thus, the Supreme Court of Pakistan has taken up many human rights cases, some of which we described in the preceding two chapters. The setting up of the Human Rights Cell, described earlier, has gone a long way in bringing these cases to the forefront. Here we may recall the well known case of probable corruption in the shape of the privatization of Pakistan Steel Mills i.e. *Wattan Party v. Federation of Pakistan,*[261]

Conclusion

This case is a very good example of corruption, human rights and good governance in Pakistan. It shows how the Supreme Court is occupied with the issues of corruption and good governance, and it is through its decisions that it is promoting good governance. The cases go a long way in showing that the Judiciary of Pakistan is active in protecting human rights by employing the generally accepted standards of good governance.

[261] PLD 2006 SC 587 and PLD 2006 SC 697.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

1. We began by saying in the first chapter that the essentials for good governance are a Government that follows the rules and makes no exceptions; a legislature that focuses on its core mandate of adopting wise laws; regulators that are not swayed by special interests; independent auditors that properly review public accounts; a bureaucracy that proudly and professionally serves the public, and private sector that respects and obeys the law, but above all the most important and indispensable factor might be a judiciary that holds the law above everything and everyone
2. The rise of judicial power has been accompanied by a sudden rise in the awareness about human rights since the International Human Rights Conference 1993.6 The judiciary of Pakistan too, in the recent past, has played an active role in defending human rights and has participated fully in the movement for the defense of human rights. The judiciary gained true independence after it restoration in 2009. Since then it has worked consistently for creating an environment in Pakistan that is conducive for good governance and hence the protection of human rights.
3. Judicial activism in all three meanings has been witnessed in Pakistan. In particular, in the area of PIL the Superior judiciary has been highly active. A large number of human rights cases have been taken up, which have truly advanced the cause of good governance. The cases go a long way in showing that the Judiciary of Pakistan is not

only active in protecting human rights, but that in many cases it is doing so by implementing the generally accepted standards of good governance.

4. It is generally acknowledged that only an independent Judiciary is able to render justice impartially on the basis of law, and this enables it to protect human rights and fundamental freedoms of the individual.
5. The Judiciary as a branch of government in Pakistan appears to be considerably independent of the Executive and Parliament. The independence of the individual judges, that is, their ability to decide cases on the basis of merit and not on the basis of their own whims or preferences. This ability of the judges has unfortunately been influenced in the past in Pakistan in the past. Most of the time, the basic pressure tactic arises from the appointment of judges, whether initial or elevation to higher positions. This has been improved somewhat.
6. In the final chapter, we identified the crucial factors that reveal a link between good governance and human rights. Different areas in which this link is visible were also considered and the position of Pakistan was compared. It appears that Pakistan is not making use of this essential link in a systematic way.
7. A concerted effort is required by all, especially the judiciary, to pursue these aspects in a planned and systematic manner. It is only then that the benefits of the link between good governance and human rights will reach the masses. The judiciary is a powerful institution for achieving this objective.
8. The movement that started in 2009 has slowed down somewhat and the judiciary should not give up its activism completely, although moving in a balanced way is to be

appreciated. The judiciary should promote interest in the following areas through its judgements:

- To promote the protection and preservation of all human rights and duties to society in accordance with the Constitution and the laws of the land.
- To receive allegations and complaints regarding violation of human rights. To conduct enquiries into matters involving the violation of human rights and the contravention of the principles of administrative justice.
- To promote the undertaking of research into human rights, administrative justice and good governance issues and to educate the public about such issues.
- To visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the persons held in such places and to make recommendations to redress existing problems.
- To make recommendations relating to existing or proposed legislation, regulation or administrative provisions to ensure compliance with human rights norms and standards and the principles of good governance.
- To co-operate with international and regional and other national agencies and in-situations competent in the areas of protection and promotion of human rights and administrative justice.

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