

**CONTEXTUALIZING CONSTITUTIONAL DOCTRINE OF  
SEPARATION OF POWERS: A CASE STUDY OF PAKISTAN**



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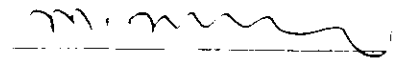
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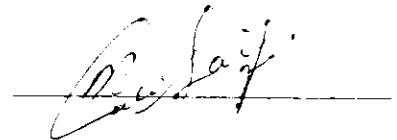


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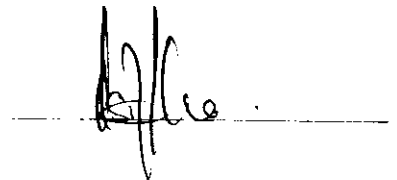
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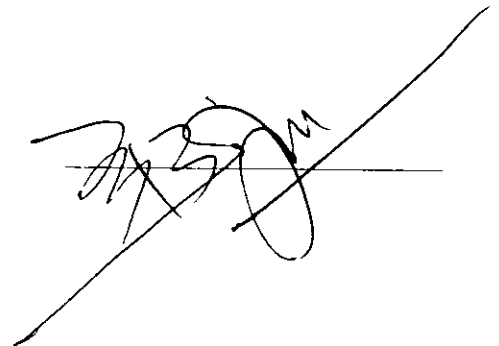
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## **FORWARDING SHEET**

This research thesis titled as, "*Contextualizing Constitutional Doctrine of Separation of Powers: A Case Study of Pakistan*" submitted by Mr. Zia Ullah Ranjah Reg.No.14-SF/PhD Law/F-11 in partial fulfillment of PhD degree in law, has been completed under my supervision and guidance. I am satisfied with the quality of this research work, and allow him to submit this research thesis for further process of evaluation and viva voce examination as per the rules and regulations of the International Islamic University, Islamabad, Pakistan.

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## DECLARATION

It is hereby declared that that this thesis titled as "*Contextualizing Constitutional Doctrine of Separation of Powers: A Case Study of Pakistan*" being submitted for the award of the Degree of Doctor of Philosophy, to the International Islamic University, Islamabad, is genuinely an original research work of my own. It is also affirmed that this thesis or any part of it has not been submitted to this or any other university or institution for the award of any degree, diploma or fellowship.

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## **DEDICATION**

To my parents

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## **LIST OF ACRONYMS**

AGP	Attorney General of Pakistan
AIR	All India Reports
CCI	Council of Common Interest
CDA	Capital Development Authority
CJ	Chief Justice
CJP	Chief Justice of Pakistan
CLC	Civil Law Cases
CLD	Civil Law Digest
FR	Fundamental Rights
HC	High Court
HR	Human Rights
HRCP	Human Rights Commission of Pakistan
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MLD	Monthly Law Digest
NAB	National Accountability Bureau
NRO	National Reconciliation Ordinance
PBC	Pakistan Bar Council
PCO	Provisional Constitutional Order
PLJ	Pakistan Law Journal
P Cr LJ	Pakistan Criminal Law Journal
PIL	Public Interest Law
PILL	Public Interest Law Litigation
PIL	Public Interest Litigation

PLJ	Pakistan Law Journal
PLD	Pakistan Legal Decisions
PBL	ProbonoPublico Litigation
RA	Representative Actions
SOP	Separation of Powers
SAL	Social Action Litigation
SC	Supreme Court of Pakistan
SCMR	Supreme Court Monthly Review
SJC	Supreme Judicial Council
UNO	United Nations Organization
UN	United Nations
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
USA	United State of America

## **ABSTRACT**

The implementation of the constitutional doctrine of separation of powers is challenging due to complex institutional relationship between the legislature, the executive, and the judiciary. This thesis examines this institutional relationship with reference to the separation of powers and the protection of fundamental rights in Pakistan. It offers an in-depth analysis of the vociferous debate in recent times as to whether true adherence to the separation of powers doctrine whereby the state powers are divided into three branches of government, i.e., executive, legislature, and judiciary, helps to protect fundamental rights.

More specifically, the thesis explores what is the doctrine of separation of powers and what are the fundamental rights? How have the courts scrutinized legislative action for fundamental rights protection? How have the courts' protected fundamental rights while examining executive action? Have the courts exceeded their constitutional limitations while interpreting and enforcing fundamental rights in Pakistan?

The thesis contributes theoretical and practical insights to this ongoing debate on the separation of powers and the protection of fundamental rights in Pakistan. It argues that true adherence to the doctrine of separation of powers protects fundamental rights whereas non-adherence to the separation of powers impedes the protection of these rights. The argument is constructed on the constitutional relationship between the doctrine of separation of powers and the protection of fundamental rights in Pakistan. This thesis has assessed this relationship based on the judicial review practice of superior courts when the questions before courts related to the protection of fundamental rights.

The thesis concludes that while interpreting fundamental rights provisions of the constitution, our courts need to appreciate the constitutional separation of powers allowing the realization of fundamental rights through institutionally multi-dimensional process. It proposes a balanced exercise of judicial review powers for the protection of fundamental rights in Pakistan. In other words, it suggests that, while exercising their powers to review acts of the executive and the legislature, the courts should avoid interference in the policymaking domain of the government.

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## CHAPTER ONE

### INTRODUCTION

Pakistan is a constitutional democracy. Its constitution illuminates essential characteristics of a constitutional government i.e., the separation of powers and fundamental rights. Under a social contract theory of states, the constitution provides a catalog of fundamental rights<sup>1</sup> that are to be protected by every branch of the state. In Pakistan, the constitution is tied to essential features of a parliamentary democracy with a federal structure. Certain other rights of Islamic<sup>2</sup> and non-justiciable nature are provided as principles of state policy.<sup>3</sup> Articles 4, 184, 199, focusing on the provisions of fundamental rights and the principles of policy,<sup>4</sup> define the scope<sup>5</sup> and provide the protection mechanisms<sup>6</sup> for fundamental rights in Pakistan. Providing and protecting fundamental rights are seen as essential to the constitution<sup>7</sup>, drawing attention to its core conscience.<sup>8</sup>

Despite the provision of fundamental rights and their protection mechanism, these rights were frequently suspended during political crisis, emergency, and martial law regimes in Pakistan. In these times of political turmoil and constitutional crisis, citizens were barred from approaching the superior courts, as the courts' jurisdiction for the enforcement of fundamental rights was ousted.<sup>9</sup> Unequal distribution of economic and social resources in Pakistan has also contributed in the weakening of basic rights.<sup>10</sup> At the same time, the courts have tried to save the basic rights of the people from the transgressions of the government.<sup>11</sup> In doing so, the courts have occasionally relaxed procedural requirements for aggrieved persons to approach the courts. Specifically, the

<sup>1</sup> See, Articles 9-28, of the Constitution, 1973.

<sup>2</sup> These are the rights as provided under Article 2-A which indeed contains the provisions of the Objective Resolution 1949 emphasizing the rights in term of "*principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam*"; See, also Faqir Hussain, "Public Interest Litigation," *SDPI Working Paper Series* No.5 (1993), 5.

<sup>3</sup> See, Articles 29-40, of the Constitution, 1973; See, also Hussain, *Public*, 5.

<sup>4</sup> This article provides that "Rights of individuals to be dealt with in accordance with law"

<sup>5</sup> See, Mohammad Afzal Zullah, "Human Rights in Pakistan". *Commonwealth Law Bulletin* (1992):1343.

<sup>6</sup> See, Article 8, of the Constitution, 1973.

<sup>7</sup> See, Hussain, *Public*, 5.

<sup>8</sup> See, Granville Austin, "The Constitution of India: The Cornerstone of a Nation." (Oxford: Clarendon Press, 1966), 50.

<sup>9</sup> Among others, the Constitution (Third Amendment), (Fourth Amendment), (Fifth Amendment), Act 1975; Proclamation of Martial Law 1977, Laws (Continuance in Force) Amendment Order, 1977; The Constitution (Second Amendment) Order 1979; CMLA Order 72 of 1979; PCO, 1981; PCO, 1999 and PCO, 2007 have severely influenced the fundamental rights and courts' jurisdiction under the Constitution, 1973.

<sup>10</sup> See, Tassaduq Hussain Jilani C J, *The News*, International Edition, December 12, 2013, 1.

<sup>11</sup> See, *State v. Dosso*. PLD 1958 SC 533, 541.

courts have tried to make justice accessible to all by relaxing the formalistic requirements of the procedure to file human rights petitions, benefitting the most vulnerable citizens.

A prolonged unconstitutional rule imposed on July 5, 1977, by the military dictator Zia-ul-Haq was lifted on December 30, 1985, and democracy was restored. The courts proactively took notice of fundamental rights violations and attempted to enforce the same.<sup>12</sup> In order to redress the grievance of the people, the superior courts frequently allow public interest petitions.<sup>13</sup> While following a liberal mode of constitutional interpretation<sup>14</sup>, then, the courts expanded the meaning and importance of fundamental rights.<sup>15</sup>

The ideals of 'complete justice'<sup>16</sup> have inspired our courts to use judicial review powers more proactively.<sup>17</sup> Article 2-A encouraged our courts to interpret basic human rights in light of notions of justice in Islam.<sup>18</sup> The courts started to use its judicial review powers more liberally in the late 1980s,<sup>19</sup> although the lenient approach of the courts was reflected in decisions a bit earlier.<sup>20</sup>

It is refreshing that the courts did their best to protect fundamental rights in Pakistan.<sup>21</sup> In the *Benazir Bhutto* case,<sup>22</sup> for example, the courts interpreted the constitution in a progressive manner. In this case, the petitioner alleged violations of freedom of association,<sup>23</sup> equality of citizens,<sup>24</sup> and freedom of speech.<sup>25</sup> Thereafter, some prominent judges<sup>26</sup> promoted judicial activism in our legal system.<sup>27</sup> Such a liberal

<sup>12</sup> A long Martial law which was imposed on July 5, 1977 was left over and democracy was restored in Pakistan. (See, *The Revival of the Constitution of 1973*, Order, 1985.)

<sup>13</sup> See, Iqbal, *Right*, 157.

<sup>14</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416,480; See, Iqbal *Right*, 75.

<sup>15</sup> See, Menski et al., *Public*, 64-67.

<sup>16</sup> *Ibid.*, 75.

<sup>17</sup> Articles 184 (3) and 199 of the Constitution read with Article 187(1) of the Constitution

<sup>18</sup> *Ibid.*, 38 and 79.

<sup>19</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416; *Dharshan Masih v. State*, PLD 1990 SC 513.

<sup>20</sup> See, *Imtiaz Ahmed v. Ghulam Ali*, PLD 1963 SC 382; *FazlulQaderChowdhry v. Muhammad Abdul Haque*, PLD1963 SC 486; *Abul A'laMaudoodi v. Government of West Pakistan*, PLD 1964 SC 673; *Fazal Din v. Lahore Improvement Trust*, PLD 1969 SC 223.

<sup>21</sup> See, Menski et al., *Public*, 23.

<sup>22</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416.

<sup>23</sup> See, Article 17, of the Constitution, 1973.

<sup>24</sup> Article 25, *Ibid.*

<sup>25</sup> Article 19, *Ibid.*

<sup>26</sup> See, Chief Justices A.R Cornelius, Hamood-u-Rahman, Muhammad Haleem, Muhammad Afzal Zullah, Dr. Nasim Hassan, Shah, Sajjad Ali Shah, Ajmal Mian, Saeed-uz-Zaman Siddiqui, Iftikhar Muhammad Chaduhay, Tassaduq Hussain Jillani and Mian Saqib Nisar.

<sup>27</sup> See, Menski et al., *Public*, 7.

judicial review approach has been followed in Pakistan and some other countries<sup>28</sup> aiming to deliver socio-economic justice<sup>29</sup> through enforcing fundamental rights provisions.<sup>30</sup> At the same time, this approach of judicial activism challenges constitutional principles like the separation of powers. This tension necessitates further study in Pakistan.<sup>31</sup>

## 1.1 BACKGROUND OF THE STUDY

This study falls into the domain of constitutional law and fundamental rights. It explores how the courts have employed the separation of powers doctrine for the protection of fundamental rights in Pakistan. It notes that adherence to constitutionalism including the separation of powers promotes democracy and fundamental rights. It engages with fundamental rights cases decided by the superior courts in Pakistan.

In the conduct of the fundamental rights cases, the executive, the legislature, and the judiciary appear to have different and sometimes conflicting perspectives on the subject of this study. Some argue that robust implementation of the separation of powers doctrine through judicial review *protects* fundamental rights. Others maintain that, while conducting their review, the courts often assume a policy-making role causing an institutional imbalance of powers that effectively *impedes* fundamental rights as it restrains the political process for the realization of fundamental rights. The veracity of these opinions cannot be ascertained without further research and a nuanced appreciation of the constitutional role of the executive, the legislature, and the judiciary. Thus, examining these competing arguments through an in-depth analysis of case law and academic literature hopes to initiate a more informed debate on constitutionalism, the separation of powers, and fundamental rights in Pakistan.

<sup>28</sup> See, Karen Kong, "Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?" *Civil Justice Quarterly* 28, no. 3 (2009): 327.

<sup>29</sup> See, Muhammad Haleem, "Law, Justice and Society," *Pakistan Legal Decision. Journal* 2 (1986), 205.

<sup>30</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416, 421; See, *S.P. Gupta v. President of India*, AIR 1982 SC 149, 189.

<sup>31</sup> See, Iqbal, *Right*, 166; See, Menski, et al., *Public*, 30.

## 1.2 THE ARGUMENT

The implementation of the constitutional doctrine of separation of powers is challenging due to complex institutional relationships between the legislature, the executive, and the judiciary. This thesis argues that a focus on constitutionalism and adherence to the constitutional doctrine of separation of powers *protects* fundamental rights as it allows materialization of fundamental rights through institutionally multi-dimensional process. It is contended that *non*-adherence to the separation of powers *impedes* the protection of these rights in Pakistan as people build unrealistic expectations from the judiciary alone, believing that, for the provision of fundamental rights, the government is exclusively accountable to the courts and not directly to citizens.

## 1.3 KEY QUESTIONS

This study examines these specific research questions. Each question is explored in a separate chapter.

1. What is the doctrine of separation of powers and what are the fundamental rights from a Western and an Islamic perspective? How are these perspectives brought together in Pakistan?
2. How did the separation of powers doctrine evolve, vis-à-vis fundamental rights, in Pakistan?
3. How have the courts scrutinized legislative action for fundamental rights protection?
4. How have the courts protected fundamental rights while examining executive action?
5. Have the courts exceeded their constitutional limitations while interpreting and enforcing fundamental rights in Pakistan?

## 1.4 MAPPING OUT THE DOCTRINE OF SEPARATION OF POWERS

Throughout history, the distribution of governmental power and its link with rights of the people has been a contested issue. In Pakistan, President Musharraf removed then Chief Justice of Pakistan, Iftikhar Muhammad Chaudhary, from his constitutional position in 2007 on Chaudhary's refusal to act in accordance with his dictation. In a single stroke, introducing a new oath of judicial allegiance to Musharraf, sixty judges who refused to swear the oath were removed from their posts. This onslaught on the judiciary initiated a movement called the 'lawyers' movement' aiming



to restore the deposed judges. Musharraf filed a reference against Justice Iftikhar, which was challenged and the SC restored Justice Iftikhar.<sup>32</sup> The number of petitions were filed against Musharraf challenging his unlawful actions and holding of two offices simultaneously.<sup>33</sup> Wajihuddin being a candidate for the presidency also filed a petition to challenge the candidature of Musharraf. Apprehending an adverse decision in these cases, Musharraf declared emergency through another Provisional Constitutional Order<sup>34</sup> on 3 November 2007. In Wajihuddin's case, the eleven-member bench of the SC passed a restraining order against this PCO.<sup>35</sup> In the meanwhile, a bunch of PCO judges declared the findings of the *Wajihuddin's* case without jurisdiction and unlawful.<sup>36</sup> These PCO judges further upheld the PCO in the *Tikka Iqbal Muhammad's* case.<sup>37</sup> However, succumbing to civil society, the government restored the judges and the independence of the judiciary was promoted, which is essential for the protection of fundamental rights. Since then, we have seen an institutional contest for power bringing the separation of state power and fundamental rights into both constitutional and public debate.

In Malaysia, Prime Minister Mahathir dismissed the Lord President of the Supreme Court in 1988 for overturning decisions of the legislature and the executive through judicial review. Article 121(1) of the Federal Constitution was amended to oust the judicial review power of the High Court. The ousting of judicial review power brought fundamental rights of the people at stake as it incapacitated the judiciary to review acts of the government infringing upon fundamental rights of the citizens. The Malaysian Bar protested against the dismissal of the Lord President and Mahathir's encroachment of judicial power by the government. The bar was unable to roll back Mahathir's amendment, but across Malaysia, Mahathir's actions ushered in a separation of powers debate with reference to basic human rights protections.

Similarly, in the US, *Marbury vs. Madison* (1803) raised a debate that whether the US Supreme Court could review legislation and declare it to be inconsistent with the US Constitution (hence, void). In this landmark case, President Adam appointed William Marbury as a judge. However, the commission was not delivered to Marbury,

<sup>32</sup> See, *Mr Justice Iftikhar Muhammad Chaudhary v. The President of Pakistan*, PLD 2007 SC 578.

<sup>33</sup> President to Hold Another Office Act, 2004.

<sup>34</sup> Order 1 of 2007, PLD 2008 Federal Statutes 110.

<sup>35</sup> See, *Wajihuddin Ahmad v. Chief Election Commissioner*, PLD 2008 SC 25.

<sup>36</sup> *Ibid.*

<sup>37</sup> See, *Tikka Iqbal Muhammad v. General Pervaiz Musharraf*, PLD 2008 SC 6.

so Marbury petitioned for a writ of mandamus seeking delivery of the commission; however, it was refused on the ground that the Act<sup>38</sup> which provided for such writs was not consistent with the US Constitution, and therefore invalid. This decision, elevating the power of the court, marked the dawn of separation of powers jurisprudence in the US. In other words, with increased focus on the separation of powers within the scheme of the US constitution, fundamental rights of the people acquired enhanced protection.

In the UK, *Nicklinson's* case (2014) prompted a vigorous debate about the authority of the judiciary, the mandate of the legislature, and the rights of citizens. The petitioner asserted his right to an assisted death before the court. However, he was denied the right to assisted death, with the court stating that it had the authority to declare a British law incompatible with international human rights law. The court also acknowledged the authority of the parliament to revise the law considering the socio-moral context of the society. In short, this judgment has defined the sphere of the state institutions when it comes to the protection of basic human rights. More recently, the UK Supreme Court declared that Boris Johnson's proroguing of parliament was constitutionally unlawful. It has sparked a heated debate as to the authority and the domain of the judiciary to review an act of the Prime Minister. This judgment highlighted, once again, the doctrine of separation of powers in Britain.

In view of the above, it may be concluded that interpretation and enforcement of the doctrine of separation of power for protecting the fundamental rights are core concerns for any constitutional state. However, this study is confined to Pakistan with necessary references to other jurisdictions.

## 1.5 THEME AND SIGNIFICANCE OF THE STUDY

This study is focused on the implementation of the constitutional doctrine of separation of powers and its impact upon fundamental rights in Pakistan.<sup>39</sup> It argues that focus on the doctrine of separation of powers by the superior courts enhances protection of the fundamental rights in Pakistan; however, stretching fundamental rights provisions beyond the explicitly stated terms of fundamental rights amount to interference into the policymaking domain of the government. For example, adherence to the doctrine of separation of powers requires that right to 'life' is protected and it cannot be taken against the law i.e. killing. However, the judiciary may not interpret

<sup>38</sup> Section 13 of the Judiciary Act of 1789.

<sup>39</sup> See, Robert G. Hazo, "Montesquieu and the Separation of Powers," accessed November 7, 2014, <http://heinonline.org>

'right to life' to include all the necessities of life such as pure water and quality education etc., which falls in the domain of the government policy. It may be argued that this restrictive approach of judicial review will provide vast discretion to the government even if it does not deliver anything to the people. The study proposes that the judiciary should restrain itself to the literal interpretation of the fundamental rights and the ultimate accountability of the government should be left to the people.

The constitution of Pakistan illuminates that the state powers are distributed amongst different branches of the government. In this regard, specific reliance may be placed on Part III (executive), Part V (legislature) with the fourth schedule; and Part VII (judiciary) of the constitution. Each institution draws upon these chapters while exercising its powers. In the absence of clear institutional boundaries, however, all the branches interpret these articles *claiming* to work within the constitutional domain. These claims, however, turn into occasional conflict endangering the constitutional scheme of government and democracy.

The apex court of Pakistan started using its suo motu powers more proactively in 2009 after the judges were restored. The supreme court started deciding cases 'to preserve and protect fundamental rights' but, in doing so, infringing on the core function of the executive as well as the legislature. The suo motu cases filed in the SC after the restoration of judges saw a significant increase in Pakistan.

Debates regarding the constitutional mechanism for appointing judges further raised questions about the respective constitutional mandates of the judiciary and the parliament.<sup>40</sup> Through the 18<sup>th</sup> amendment, the parliament was provided a significant role in the appointment of superior court judges. A Parliamentary Committee was constituted to approve (or reject) appointments made through the Judicial Commission.<sup>41</sup> However, this constitutional amendment was strongly resisted by the judiciary reasserting its autonomy in the realm of appointments which was reflected in the 19<sup>th</sup> amendment.

The distribution of power between different state organs has always been a key question in Pakistan. More specifically, the executive, the legislature, and the judiciary have been struggling to secure a preeminent constitutional role in the exercise of the state power. This institutional struggle raises two possibilities: first, this *struggle*

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<sup>40</sup> See, the 18<sup>th</sup> Amendment to the 1973 Constitution of Pakistan.

<sup>41</sup> See, Article 175, of the Constitution, 1973.

*between these branches actually promotes a constitutional orientation* (indeed, that this struggle highlights a focus on the constitution in ways that promote the rule of law, the balance of power, and fundamental rights). Second, this struggle *hampers* the progress of constitutionalism and the protection of fundamental rights, because in the state of conflict the state institutions cannot function properly within their limits to protect fundamental rights.

Roberto Gargarella argues that institutional conflict creates confusion: which branch will perform which task? Here, the system of checks and balances seems risky. Furthermore, this system may cause a political stalemate and, in the worst situation, a state of war between different branches of government. He further argues that institutional checks and balances creates a permanent war of interest amongst the state institutions.<sup>42</sup> Making an original contribution to scholarship, with particular reference to Pakistan, this study will argue, generally, in favor of the first possibility (hypothesis I: promotes the rule of law and fundamental rights) and against the second possibility (hypothesis II: hampers institutional action and, thus, fundamental rights).

The debate on the separation of powers in Pakistan started in 1956. In the *Moulvi Tamizuddin* case<sup>43</sup>, the executive intervened in the mandate of the parliament while dissolving the constituent assembly. This case initiated a debate on the constitutional domain of the state institutions.

Thereafter, the question of the separation of powers was discussed in many cases. The court dealt with the subject of basic structure<sup>44</sup> and observed that basic features of constitutionalism emerge from the objectives resolution.<sup>45</sup> The *Mehmood Khan Achakzai* case once again highlights the separation of powers debate as the court held that any law, which violates the basic structure of the constitution cannot sustain and thus invalid.

In a few other cases<sup>46</sup>, this debate was fuelled further. These cases pertain to the

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<sup>42</sup> See, Roberto Gargarella, "Democratization and the Judiciary," (Research Council of Norway, 2003), 153, 154.

<sup>43</sup> See, *Moulvi Tamizuddin Khan v. Federation of Pakistan*, PLD 1988 Sind HC 96.

<sup>44</sup> See, *Mehmood Khan Achakzai v. Federation of Pakistan*, PLD 1997 SC 416.

<sup>45</sup> See, Ali Nawaz Chowhan, *The News*, (2010) Ideology, Democracy, and 18<sup>th</sup> Amendment, April 23, 24<sup>th</sup>, 2010.

<sup>46</sup> See, *Baz Muhammad Khan v. Federation of Pakistan*, PLD 2012 SC 923; *Mubashar Hassan v. Federation of Pakistan*, PLD 2010 SC 265; *Nadeem Ahmed v. Federation of Pakistan*, PLD 2010 SC 1165; PLD 2008 SC 673; See, *Suo-Motu Case No.23 of 2012*, Anita Turab Case.

competence of the legislature to make laws, the authority of the executive to define policy, and the power of the judiciary to examine legislation and the executive acts. In these cases, each institution defends its position and claims to work within a constitutional mandate while protecting fundamental rights. This study focuses on this debate in an effort to ascertain the implementation of the doctrine and protection of the fundamental rights as a product of constitutional practice in Pakistan.

The aim of any constitutional government is the promotion and protection of good governance, with particular reference to fundamental rights (as defined by the state). It is argued by Madison and Montesquieu that the implementation of the separation-of-powers doctrine protects the fundamental rights; however, *no study has ever been conducted to contextualize the doctrine and examine its impact on fundamental rights in Pakistan*. Therefore, this issue is examined in light of the judicial practice of our courts.

With this background, this study proposes to analyze the institutional borderlines drawn amongst the three organs of the state. The process of drawing, defining, and interpreting these boundaries impacts the fundamental rights and this study aims to assess this impact.

## 1.6 THEORETICAL FRAMEWORK

Plato may be credited as a founding father of any constitutional government. He maintains that the state power should be divided.<sup>47</sup> John Lock developed this concept further.<sup>48</sup> He argued for a separate legislative power to make the established law, authorized judges to decide the rights of the subjects according to the standing laws, and executive powers to enforce the legislation. The French philosopher Montesquieu analyzed the doctrine in the early eighteenth century in the context of Britain.<sup>49</sup>

James Madison built on Montesquieu's theory in *The Federalist Papers*. He stressed an independent judiciary with enough powers and institutional safeguards to review the unconstitutional acts of other powerful branches of the government as it is a least dangerous branch of the government. He argued that a consolidation of political powers in any form whatsoever in the hands of the executive and legislature by any source of election or selection promotes tyranny.<sup>50</sup> Alexander Hamilton disagreed with

<sup>47</sup> See, Hamid Khan, "Comparative Constitutional Law," (Lahore: Pakistan Law House, 2008).

<sup>48</sup> See, John Lock, "Two Treaties of Government," (Cambridge: University Press, 1967).

<sup>49</sup> See, Montesquieu, "The Spirit of the Laws," transl. by A. Cohler, B. Miller & H. Stone (Cambridge: University Press, 1989).

<sup>50</sup> See, Paper No.51.

Madison and, building on British notions of parliamentary sovereignty, argued for an independent judiciary with relatively *limited* powers. He promoted institutional checks and balances in constitutional governance. He argued for a strong executive to save the rights of the people and establish a stable government. He believed that only a strong executive could save the polity from foreign aggression or internal disturbance and could provide effective administration, good governance, and justice.<sup>51</sup>

The above theoretical background informs the methodology of this study. John Lock, Montesquieu, Alexander Hamilton, and James Madison developed the perspective of this study. Tayyab Mahmud and N.W. Barber further informed me regarding the crucial link and relationship of the separation of powers and the fundamental rights.

Tayyab Mahmud examines the judicial response to constitutional breakdowns in Pakistan and provides a critique of that response. He argues that the superior courts have *undermined* constitution and facilitated an erosion of constitutional governance in Pakistan.<sup>52</sup> This argument partly against my thesis is directly related to this study, which aims to argue that the courts have generally *protected* constitutional governance and thus the fundamental rights in Pakistan. Barber discusses the doctrine of separation of powers in the constitutional context of Britain. Pakistan essentially follows the constitutional practice of Britain. Thus, Barber's insight is helpful to understand the functioning of parliamentary democracy in Pakistan.<sup>53</sup> He further reflects on the devices used by each institution to shield against intervention by the other institutions.<sup>54</sup> This perspective helps to examine the institutional struggle of the three organs of the state vis-à-vis the safeguarding of their constitutional sphere of power while protecting fundamental rights in Pakistan.

Jesse H. Choper, John Hart Ely, and Greg Jones further inform me as to the balanced use of judicial review power in protecting fundamental rights. Choper promotes theory of jurisdictional retrenchment-that is, the judiciary should avoid entertaining matter of political nature.<sup>55</sup> Ely emphasize on process-oriented judicial

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<sup>51</sup> See, Paper No. 78-79.

<sup>52</sup> See, Tayyab Mahmud, *Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan*, 1993, *Utah Law Review* 1253.

<sup>53</sup> See, N.W. Barber, "The Separation of Powers and the British Constitution," (London: university of Oxford, 2012).

<sup>54</sup> See, N.W. Barber, "Self-Defense for Institutions," (London: University of Oxford, 2012) Paper No.61; N.W. Barber, "Prelude to the Separation of Powers," *Cambridge Law Journal*, 2001, 159-60.

<sup>55</sup> See, Choper, *Judicial*.

review. It means the judiciary should consider overall scheme of the constitution while reviewing acts of the other branches of the government.<sup>56</sup> Jones relies on the structure of the constitution including the separation of powers with reference to the protection of fundamental rights.<sup>57</sup>

So, the study is located in the above academic and judicial debates to examine the main research area of the thesis: the institutional relationship of the executive, the legislature, and the judiciary and its impact on the protection of fundamental rights in Pakistan. More specifically, this theoretical framework helps to explore the exact research area of this study: the relationship between the constitutional doctrine of separation of powers and the protection of fundamental rights in Pakistan. It helps to strengthen the main argument of the thesis that ‘an increased focus on constitutionalism and the implementation of a separation-of-powers doctrine by the courts *protects* fundamental rights in Pakistan’.

## 1.7 METHODOLOGY OF THE STUDY

This study shall use the conceptual prism of the functional division of power between three organs of government. This conceptual prism will then help to appreciate cases in which our courts have relied upon these concepts for the protection of fundamental rights. The study uses case law and legislation as a primary source. The argument shall be further supported by scholarly literature as a secondary source. The argument is constructed on the constitutional relationship between the doctrine of separation of powers and the protection of fundamental rights. This relationship is assessed based on the judicial review practice of superior courts when the questions before courts related to the protection of fundamental rights.

Dworkin’s theoretical framework i.e. ‘constructive interpretation’ shall be employed’. At the ‘pre-interpretive’ stage, the textual rules and standards i.e. statutes, articles, books shall be identified to form tentative content of the practice. Then, these contents shall be used to examine the practice of the doctrine for the protection of the fundamental rights in Pakistan via case law (i.e. ‘interpretation’ of statute, etc.). At the post-interpretive stage, the study shall examine what the separation of powers doctrine ‘really’ requires from our constitutional courts.

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<sup>56</sup> See, Ely, *Democracy*.

<sup>57</sup> See, Jones, *Proper*.

This study shall suggest a balanced theory of constitutional interpretation in Pakistan.<sup>58</sup> The study finds that the courts have sometimes restrained themselves from exercising constitutional powers to enforce the fundamental rights such as under martial law regimes and sometimes they have jumped into the areas of policy making unrestrictively on the grounds of the dysfunctionality of the executive branch of the government. Such an inconsistent approach of the judiciary has blurred the constitutional boundaries between the executive and the judiciary impeding the realization of fundamental rights in Pakistan. Thus, it concludes that while interpreting fundamental rights provisions of the constitution, our courts need to appreciate the constitutional limitations allowing the realization of fundamental rights through a political process. It proposes a balanced exercise of judicial review powers for the protection of fundamental rights. In other words, it suggests that, while exercising their powers to review the acts of executive and legislature, the courts should avoid interference in the policymaking domain of the government.

The argument and conclusion are supported by an analysis of case law, statutes, and literature. The focus has been on cases that entail a nexus between the separation of powers and fundamental rights. These cases have sharpened the argument favoring a cautious exercise of judicial powers where the courts give due credence to the domain of other state institutions with regards to the protection of fundamental rights.

## **1.8 LITERATURE REVIEW**

There was not even a single book focusing on the constitutional doctrine of separation of powers with reference to the protection of fundamental rights in Pakistan. Some scholars have written on the subject with respect to the constitutional systems of other countries like the US and the UK.

In Pakistan, the courts interpret the constitution, including fundamental rights, while examining legislation and executive actions. Sometimes, however, the courts appear to act beyond their constitutional domain as envisaged in the constitution, interfering with the policy-making domain of the government. The constitutional role of the courts is to adjudicate and to interpret the constitution. In doing so, they cannot adopt and intervene into the domain of the executive in terms of making or dictating

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<sup>58</sup> See, Ronald Dworkin, "Law's Empire," (Cambridge: Harvard University Press, 1986).



policy to the government. For example, while interpreting the fundamental right provisions relating to education (Article 25A), the courts may not inspect educational institutions and direct on the standards or the mode of education. Thus, this study examines our court's practice of judicial review reflected in rich case law pronounced on the subject. In addition, an extensive literature review is conducted to evaluate the impact of judicial review practice on the status of fundamental rights in Pakistan.

The following section discusses the justification and argument for conducting this study in view of the existing literature (i.e., books, articles, case law) on the subject.

### 1.8.1 BOOKS AND ARTICLES

Hamid Khan analyses the doctrine of separation of powers in the context of the US constitution and briefly discusses the doctrine in the constitutional context of Pakistan. However, the 1956 and the 1962 constitution are excluded from his analysis. He also does not explore the link between the doctrine of separation of powers and *fundamental rights* in Pakistan.<sup>59</sup> In another book, he provides a fair account of the constitutional history of Pakistan.<sup>60</sup>

A.G. Chaudhry discusses the evolution of the doctrine with reference to the US and Indian constitution. He argues that the separation of powers does not exist in the constitution of Pakistan. He erroneously states that Pakistan's constitution hardly provides any balance of powers. He highlights a few relevant cases like the *United Sugar Mills* case<sup>61</sup> and *Fouji Foundation* case<sup>62</sup>, however, his work is not comprehensive.<sup>63</sup>

Asif Saeed Khosa traces the history of the doctrine of separation of powers. He discusses institutional rifts and moments of cohesion between the executive, legislature, and judiciary. However, his article does not elaborate my argument that while implementing the doctrine of separation of powers with reference to the interpretation and protection of fundamental rights in Pakistan, the courts sometimes intervene into the policymaking domain of the government.<sup>64</sup>

Ali Nawaz Chowhan provides a brief account of the doctrine of separation of

<sup>59</sup> See, Hamid Khan, "Comparative Constitutional Law," (Pakistan Law House: Lahore, 2012).

<sup>60</sup> See, Hamid Khan, "Constitutional and Political History of Pakistan," (Oxford University Press: Karachi, 2017).

<sup>61</sup> See, *Federation of Pakistan v. United Sugar Mills Ltd.* PLD 1977 SC 397.

<sup>62</sup> See, *Fouji Foundation v. Shamiur Rehman.* PLD 1983 SC 457.

<sup>63</sup> See, A.G. Chaudhry "Lectures on Constitutional Law," 1994.

<sup>64</sup> See, Asif Saeed Khan Khosa, "Legislature, Executive, and Judiciary: Conflicts and Cohesion," 1994.

powers. While referring to *Mayers v. U.S.*<sup>65</sup> and Montesquieu's book 'The Spirit of Law', Chowhan traces the link of the doctrine to Pakistan's constitution. However, his article fails to examine the relevance of the doctrine as to *fundamental rights* in Pakistan.<sup>66</sup>

Tayyeb Mahmud examines the judicial response to constitutional breakdowns in Pakistan and also provides an interesting description and critique of that response. He argues that our courts have undermined constitutional governance and facilitated an erosion of constitutional governance. This argument may be opposed and it can be maintained that the courts in Pakistan have generally *promoted* constitutional governance and have *protected* fundamental rights.<sup>67</sup>

Siddique argues that our courts have been inconsistent in their approach while deciding upon the dissolution of elected assemblies under different political regimes. However, the author fails to discuss the impact of such cases on constitutional governance including the separation of powers and fundamental rights.<sup>68</sup>

Newberg examines the interaction of our courts with the executive and provides a basis for conducting a systematic study of the implementation of the doctrine of separation of powers in Pakistan. The author discusses constitution-making phases systematically. Her chapters include: Constituting the state (1947-1958); Confining courts and constitutions (1958-1969); Seeking justice (1969-1972); Testing courts and constitutionalism (1972-1977); Silencing courts, muting justice (1977-1988); and Reviving judicial powers (1988-1993).<sup>69</sup>

Anil Kalhan discusses how Pakistan has been struggling under authoritarian and democratic regimes. He argues that an aggressive judiciary weakens the parliament and suggests a balanced role for the judiciary to promote emerging democracies. This work supports my argument that while interpreting the constitution and enforcing fundamental rights, the courts should appreciate the constitutional limits envisaged under the doctrine of separation of powers.<sup>70</sup>

A.K. Brohi provides a basic understanding of constitutional concepts. He

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<sup>65</sup> See, 272 U.S. 52, 71 L. Ed. 160.

<sup>66</sup> See, Ali Nawaz Chowhan, "Judicature in the Trichotomy of Power," 1994.

<sup>67</sup> See, Mahmud, "Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan," 1993.

<sup>68</sup> See, Siddique "Jurisprudence of Dissolutions Presidential Powers to Dissolve Assemblies under the Pakistani Constitution and its Discontents," 2006.

<sup>69</sup> See, Newberg "Judging the State Courts and Constitutional Politics in Pakistan," (1995).

<sup>70</sup> See, Anil Kalhan, "Gray Zone Constitutionalism and the Dilemma of Judicial Independence in Pakistan," *Vanderbilt Journal of Transnational Law* 1, (2013), 46.

elaborates on the powers and limitations of each branch of the government, which is the main focus of this study.<sup>71</sup>

Ishrat Hussains stresses the importance of checks and balances in a constitutional democracy. To him, institutional accountability and fundamental rights are key to good governance. His article is very helpful to appreciate the role of the judiciary and the executive in a constitutional democracy. However, the authors fail to provide insight into how the system of checks and balances can be ensured and what might be its impact upon the fundamental rights, which is the focus of this study.<sup>72</sup>

Santos argues that the judiciary's role in political cases has been expanding in Asia since 1990s. He suggests that an active political role for the judiciary is bound to create institutional tensions with other organs of the state. This study helps in examining the role of courts in Asia and, more specifically, in the changing circumstances in Pakistan since the restoration of the judiciary in 2009. However, this study does not provide any account of institutional accountability and fundamental rights.<sup>73</sup> In fact, the doctrine of separation of powers envisages a limited role for each institution of the state. It promotes institutional accountability and thus the protection of fundamental rights.

Remington examines how the doctrine of separation of powers impacts the capacity of any government to ensure a responsive government. He advocates for a proactive legislature to ensure effective checks over the functions of the executive. However, he does not indicate any link between the decisions of the courts (while interpreting the doctrine of separation of power) and governance including fundamental rights.<sup>74</sup>

Victoria Nourse argues that a standard understanding of the separation of powers begins with the idea of "function" which is not adequate to assess government structures. She suggests an alternative approach, namely, 'the vertical separation of powers', stressing the importance of political relationships between the people and those who govern them (i.e. the state institutions). This article suggests that institutions should represent the will of the people. In other words, institutions should protect the rights of the people. This article sharpens our understanding of the link between state

<sup>71</sup> See, A.K. Brohi, "Fundamental Law of Pakistan," (Karachi: Din Muhammad Press, 1957).

<sup>72</sup> See, Ishrat Hussain, "The Missing Element in Pakistan's governance," 1999, *The Pakistan Development Review*, Vol. 38, No. 4, Papers and Proceedings PART I Fifteenth Annual General Meeting and Conference of the Pakistan Society of Development Economists Islamabad, November 5-8, 1999 (Winter 1999), 511-536.

<sup>73</sup> See, Boaventure de Sousa Santos, "Toward a New Legal Common Sense," 2002.

<sup>74</sup> See, Remington, "Democratization and the Problem of Governance," 2002.

institutions and fundamental rights. Building on this link, it is argued that if the state institutions remain within their constitutional limits that are provided under the separation of powers, it facilitates a key component of constitutional governance, that is the protection of fundamental rights.<sup>75</sup>

Campbell illustrates institutional clashes between the organs of the state through case studies. This is a useful book as it explains how institutions struggle to assert and protect their constitutional role. Though the cases discussed in this book emerge from a foreign jurisdiction, they help to appreciate the institutional conflict with reference to the constitutional separation of powers in Pakistan.<sup>76</sup>

Ran Hirschl explores the origin of constitutionalism highlighting an expansion of judicial power worldwide. He claims that national courts have become a policy-making body, which should be the role of the executive. In a way, he points to the rift between the judiciary and the executive as an emerging trend in constitutional governance globally. This perspective is useful to identify the shifting constitutional role of each organ of the state in Pakistan.<sup>77</sup> This article supports the argument that our courts, sometimes, interfere into the policy domain that is constitutionally reserved for the executive.

N.W. Barber discusses the doctrine of separation of powers in the constitutional context of Britain. Pakistan inherited and follows some of the constitutional practices of Britain. Thus, Barber's insight is helpful to understand the functioning of parliamentary democracy including separation of power in Pakistan.<sup>78</sup> In another article, he elaborates how state institutions use constitutional devices and mechanism to shield against intervention by other institutions.<sup>79</sup>

M.J.C. Vile traces the evolution of the doctrine of separation of power with reference to Britain. Crucially, he examines the criticism of this doctrine as well, which is helpful to contextualize the doctrinal debate on separation of powers and fundamental rights in Pakistan.<sup>80</sup>

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<sup>75</sup> See, Victoria Nourse, "The Vertical Separation of Powers," *Duke Law Journal*, Vol. 49, No. 3 (Dec., 1999), 749-802.

<sup>76</sup> See, Campbell, "Separation of Powers in Practice," (Stanford University Press, California, 2004).

<sup>77</sup> See, Ran Hirschl, "The Political Origins of the New Constitutionalism," *Indiana Journal of Global Legal Studies* Vol. 11: Iss. 1, Article 4.

<sup>78</sup> See, N.W. Barber, "The Separation of Powers and the British Constitution," (London: university of Oxford, 2012).

<sup>79</sup> See, N. W. Barber, "Self-Defence for Institutions," (London: university of Oxford, 2012).

<sup>80</sup> See, Vile M.J.C, "Constitutionalism and the Separation of Powers," 2nd ed., (Indianapolis, Liberty Fund 1998).

### 1.8.2 CASE LAW

The courts in Pakistan have frequently discussed the concept of ‘separation of powers’, ‘checks and balances’, ‘constitutionalism’, ‘democracy’, and ‘good governance’ etc. with reference to fundamental rights.<sup>81</sup> Some important cases are briefly examined to contextualize and build my argument within the practice of our courts.

In the *Moulvi Tamizuddin Khan* case<sup>82</sup>, the executive interfered with the constitutional sphere of the legislature as the executive dissolved the Constituent Assembly. This case raised important questions regarding the independence of the judiciary and the supremacy of the parliament soon after the creation of Pakistan.

In the *Usif Patel's* case<sup>83</sup>, which followed very shortly after *Moulvi Tamizuddin*, the law-making power of the executive and the legislature was discussed again. The court clarified that the executive – the then Governor-General has *no* legislative power as any legislation is the exclusive domain of the Constituent Assembly serving, simultaneously, as the National Assembly.

In the *Haji Saifullah and Tariq Raheem's* case<sup>84</sup>, the power to dissolve the National Assembly under Article 58 (2) (b) of the Constitution – as an unfettered discretionary power of the President – became a moot point. The court asserted its judicial review power and held that such power must be exercised reasonably, fairly, and subject to the scrutiny by the courts through judicial review. Thus, these cases elaborated on the domain of the judiciary and the executive.

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<sup>81</sup> See, *Al Jehad Trust v. Federation of Pakistan*, PLD SC 324; *Federation of Pakistan v. Haji Muhammad Saifullah Khan*, PLD 1989 SC 166; *Sharaf Faridi v. Federation of Islamic Republic*, PLD 1989 SC 404; *Moulvi Tamizuddin Khan v. Federation of Pakistan*, PLD 1955 Sind HC 96; *Usif Patel v. The Crown*, PLD 1955 FC 387; *Federation of Pakistan v. Moulvi Tamizuddin Khan*, PLD 1955 FC 240; *Watan Party v. Federation of Pakistan*, PLD 2006 SC 697; *Registrar Supreme Court of Pakistan v. Qazi Wali Muhammad*, 1997 SC 141; *Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan*, PLD 1992 SC 646; *The State v. Dosso*, PLD 1958 SC 533; *The State v. Ziaur Rehman*, PLD 1973 SC 49; *Nusrat Bhutto v. Chief of Army Staff*, PLD 1977 SC 657; *Muhammd Sharif v. Federation of Pakistan*, PLD 1988 Lahore HC 725; *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *Benazir Bhutto v. Farooq Ahmad Khan Leghari*, PLD 1998 SC 388; *Mehmood Khan Achakzai v. Federation of Pakistan*, PLD 1997 SC 416; *Farooq Ahmad Khan Leghari v. Federation of Pakistan*, PLD 1999 SC 57; *Zafer Ali Shah v. General Pervaiz Musharraf*, PLD 2000 SC 869; *Baz Muhammad Kakar v. Federation of Pakistan*, PLD 2012 SC 923; *Mubashar Hassan v. Federation of Pakistan*, PLD 2010 SC 265; *Nadeem Ahmed v. Federation of Pakistan*, PLD 2010 SC 1165; *Suo-motu case 2008 PLD Supreme Court 673*; *Federation of Pakistan v. United Sugar Mills Ltd*, PLD 1977 SC 397; *Fouji Foundation v. Shamimur Rehman*, PLD 1983 SC 457;

<sup>82</sup> See, *Moulvi Tamizuddin Khan v. Federation of Pakistan*, 1955 PLD Sind 96; *Federation of Pakistan v. Moulvi Tamizuddin Khan*, 1955 Federal Court 240.

<sup>83</sup> See, *Usif Patel v. the Crown*, 1955 Federal Court 384.

<sup>84</sup> See, *Federation of Pakistan v. Haji Muhammad Saifullah Khan*, 1989 PLD SC 166; *Khawaja Ahmad Tariq Raheem v. Federation of Pakistan*, 1992 PLD SC 646.

In the *Sharaf Faridi*<sup>85</sup> case, the constitutional role and limitations of the legislature as well as the executive came into discussion. The court held that in the constitutional scheme of Pakistan the judiciary has a special role as it is obliged to ensure that each institution works in its constitutional domain. Through interpreting the constitution, the judiciary asserted a supreme role vis-à-vis other state institutions.

In the *Azizullah Memon* case<sup>86</sup>, however, the court tried to follow a balanced approach under the constitution. While moving away from the *Sharaf Faridi* case, the court stressed on the principle of a trichotomy of power. The court clarified that no institution, under the constitutional scheme, can claim any kind of superiority over other institutions of the state. This case helps to establish my argument that while protecting fundamental rights, the judiciary should observe the balance of power as maintained under the doctrine of separation of powers.

In the *Al-Jehad Trust* case<sup>87</sup>, the court again emphasized that each institution of the state is bound to remain within its allotted domain under the constitution. With reference to the appointment of judges, the court cautioned all institutions that a constitutional government can only survive if all institutions act within their limits and do not transgress on the domain of other institutions. Again, this case promotes my argument. Similarly, in the *Qazi Wali Muhammad* case<sup>88</sup>, the court said that although strict separation of powers is not stipulated in our constitution, the concept of division of power between different institutions of the state is envisaged in the overall structure of the constitution. The court held that each institution has a defined role and the power of an institution cannot be assigned to the other institutions.

In the *Wattan Party* case<sup>89</sup>, the court observed that the policy-making area of the executive government should not be interfered with by the judicial branch. However, in a suo-moto case<sup>90</sup>, in an attempt to regulate the price of sugar, the court claimed to have constitutional authority to review government policy if it violates fundamental rights. Indeed, this case created serious debate as to the powers of the judiciary and domain of the other state institutions vis-à-vis fundamental rights. This is an important case which establish my assertion that, sometimes, the courts have

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<sup>85</sup> See, *Sharaf Faridi v. Federation of Pakistan*, 1989 PLD Karachi 404; *Government of Sind v. Sharaf Faridi*, 1994 PLD SC 105.

<sup>86</sup> See, *Government of Balochistan v. Azizullah Memon*, 1993 PLD SC 341.

<sup>87</sup> See, *Al-Jehad Trust v. Federation of Pakistan*, 1996 PLD SC 324.

<sup>88</sup> See, *Registrar Supreme Court of Pakistan v. Qazi Wali Muhammad*, 1997 SCMR 141.

<sup>89</sup> See, *Wattan Party v. Federation of Pakistan*, 2006 PLD SC 697.

<sup>90</sup> See, *Suo-moto case No.10 of 2007 PLD SC 673*.

intervened in the policymaking domain while using judicial review power embedded in the theory of separation of powers.

In the *Sindh High Court Bar Association* case<sup>91</sup>, the court held that the executive order to restore the judges cannot be withdrawn by the executive. It was reaffirmed that an order by a military dictator in pursuance of the Provisional Constitutional Order, 2007 was in blatant violation of the constitution, hence void. This case fuelled constitutional debate, once again, as to the role of the institutions of the state and separation of powers.

In the *Munir Hussain Bhatti* case<sup>92</sup>, the court discussed the role of a Parliamentary Committee as to the disapproval of the nomination of High Court judges by the Judicial Commission.<sup>93</sup> The court established its exclusive power regarding the appointment of superior court judges and held that, under the constitutional scheme of distribution of powers, a Parliamentary Committee cannot reject nominations made by the Judicial Commission. This case highlighted the inherent tensions in demarcating the separate and distinct role for various institutions within the constitutional polity of Pakistan.

In the *Nadeem Ahmad's* case<sup>94</sup>, the superior court judge's appointment was challenged in view of the 18<sup>th</sup> amendment. The court asserted its power and asked the parliament to reconsider the formulation of the judicial appointment mechanism proposed in the 18<sup>th</sup> amendment providing a significant role to the parliamentary committee. This case contributes to constitutional debate with reference to the role and domain of the legislature.

The last three cases demonstrate that the separation of power between the executive, legislature, and the judiciary is envisaged in our constitution, and the state institutions are required to exercise their powers within their respective domain for the promotion of democracy including the protection of fundamental rights.

In a suo motu case<sup>95</sup>, the court took notice of the award of an LNG contract to a foreign company and held that it violated rights of the people causing loss to the national economy. In another suo motu case<sup>96</sup>, the court held the National Insurance

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<sup>91</sup> See, *Sindh High Court Bar Association v. Federation of Pakistan*, 2010 PLD SC 1151, 1161.

<sup>92</sup> See, *Munir Hussain Bhatti v. Federation of Pakistan*, 2011 PLD SC 407.

<sup>93</sup> Article 175, of the Constitution, 1973.

<sup>94</sup> See, *Nadeem Ahmad Advocate v. Federation of Pakistan*, 2010 PLD SC 312

<sup>95</sup> See, *Suo-moto case No.5 of 2010 PLD SC 731*.

<sup>96</sup> See, *Suo-moto case No.8 of 2010 PLD SC 821, 927*.

Company Ltd. liable for loss to the public money. In both cases, the court attempted to promote accountability and transparency in transactions made by the government while exercising its judicial review power. In other words, the court interpreted and implemented the constitutional separation of power doctrine to intervene into the policy domain of the government in the name of protecting fundamental rights.

In the *Baz Muhammad Kakar* case<sup>97</sup>, the court held that contempt of court is fundamental right question and courts can review any legislation that violates such right.<sup>98</sup> This case raised an interesting debate as to the law-making power of the legislature and powers of the court to review such legislation under its constitutional mandate of judicial review vis-à-vis fundamental rights.

In a suo motu case<sup>99</sup>, the court took notice of alleged misappropriation of money in the bidding of steel industry. The court, once again, held that bidding of the steel mill was done in a corrupt manner that caused loss to the national money, and thus fundamental rights. These cases demonstrate the topicality and importance of the doctrine in the context of constitutional governance and fundamental rights in Pakistan.

The literature review shows that the existing literature fails to discuss the crucial link between the constitutional doctrine of separation of powers and the protection of fundamental rights in Pakistan. This thesis, thus, explores this link to fill the gap in the existing literature on the institutional relationship between the executive, the legislature, and the judiciary and its impact on the protection of fundamental rights in Pakistan.

## 1.9 LIMITATIONS OF THE STUDY

This study is conducted with a concern that how to advance the argument to assess the theory and implementation of the constitutional doctrine of separation of powers with reference to the protection of fundamental rights in Pakistan. In this regard, Dworkin's constructive interpretation approach is employed for the study of the constitutional practice of the separation of powers in the context of Pakistan. The method used to conduct this study, i.e., analysis of court cases, might have brought some element of subjective interpretation of facts and the law and thus may have

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<sup>97</sup> See, *Baz Muhammad Kakar v. Federation of Pakistan*, 2012 PLD SC 923.

<sup>98</sup> In this case, the Contempt of Court Act, 2012 was challenged before the SC.

<sup>99</sup> See, Suo-moto case No.15 of 2009 PLD SC 610.



influenced the outcome of the research. However, in order to minimize the element of bias and to develop an argument on a sound basis, the scholarly literature is relied.<sup>100</sup>

The principles of statutory interpretation such as a statute must be construed as a whole and those words which are reasonably capable of only one meaning must be given that meaning (i.e., the literal rule), and that ordinary words must be given their ordinary meanings unless absurdity would result (i.e., the golden rule) are used for the analysis of statutes. Methods of political science and sociology, which are more inclined to examine a particular issue in a broader socio-political and cultural context are avoided. An effort has been made to examine the implementation of the doctrine of separation of powers through the judicial review practice of the courts in Pakistan. The findings of this study are confined to the analysis of case law and legal literature. These findings may not be taken as a socio-legal or broader political analysis of constitutional law and judicial practice in Pakistan.

#### **1.10 SCHEME OF THE STUDY**

This book comprises six chapters and a conclusion. A brief description of each chapter is provided as follows.

Chapter one provides the context and background of the study. It presents the thesis statement. It further elaborates on the theme and significance of the study. It enumerates key research questions and discusses the theoretical framework and methodology of the study. It briefly identifies the limitation of the study. It provides a survey of the relevant literature to justify the need for this study.

Chapter two examines the separation of powers debate since the early eighteenth century. Some argue that the division of political power into different branches of government is essential for the protection of rights. Others argue for the centralization of power in one or a few hands in order to keep the government stable. This chapter unpacks the first part of the puzzle regarding the separation of powers with reference to the protection of fundamental rights.

More specifically, this chapter answers these questions: What is the definition of separation of powers? Does the separation of powers exist in the Islamic tradition? How did the separation of power evolve in the West? And how fundamental rights are linked to the separation of powers?

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<sup>100</sup>See, Ronald Dworkin, "Law's Empire" (Cambridge: Harvard University Press, 1986).

This chapter also reflects on the above questions while introducing the main argument of the study, namely, that there is an essential link between the implementation of the doctrine and protection of fundamental rights in Pakistan. This argument is then broken into sub-arguments, i.e., strong adherence to the separation of powers produces stronger protection of fundamental rights and weak adherence results in weaker protection of fundamental rights.

Chapter three examines the constitutional evolution of the doctrine of separation of powers and the fundamental rights. The doctrine envisages the division of government power amongst three branches of the government: the legislature, the executive, and the judiciary. The legislature enacts laws; the executive enforces laws, and the judiciary interprets laws and decides disputes in accordance with the law.

This chapter briefly explains the constitutional basis for the doctrine and how it evolved in the US, the UK, Australia, India, and Pakistan. Do the three branches of the government work under their domain or usurp the powers of other branches in Pakistan? How was the separation of powers doctrine spelled out in the 1956, 1962, and 1973 Constitutions? How have non-civilian regimes affected the applicability of the doctrine and the protection of fundamental rights in Pakistan?

Chapter four examines other important questions: What is the procedure of lawmaking? What is the domain of the federal legislature? What is the sphere of the provincial legislature? What if the laws made by the federal and the provincial legislature conflict with each other? What is constitutional justification for reviewing the legislative action by the judiciary? How does a judicial review on the basis of separation of powers protect fundamental rights? In a nutshell, this chapter explores how the superior judiciary has interpreted constitutional and sub-constitutional legislation under judicial review powers for fundamental rights protection.

Chapter five attempts to answer a few other important questions: What are the limitations of the federal government's executive authority? What are the limitations of executive authority in the provinces? What is the constitutional justification for reviewing executive action by the judiciary? Briefly, this chapter examines courts' role in reviewing the executive action of the State.

Chapter six examines the constitutional concepts of judicial restraint and judicial activism. The previous chapters explained the application of separation of powers doctrine through the exercise of judicial review by our courts. Some argue that the courts have protected the fundamental rights while adhering to the doctrine of

separation of powers. Others maintain that the courts have, in fact, restrained the actualization of fundamental rights by non-adherence to the doctrine. This chapter explores, through case law, how the courts intervene in the functions of the legislature and the executive while enforcing fundamental rights under judicial review. The chapter concludes that the courts have occasionally ignored the constitutional doctrine of separation of powers *impeding* the protection of fundamental rights. This conclusion supports the overall defense of my argument that the courts should interpret and use the doctrine of separation powers in a balanced manner to protect fundamental rights in Pakistan.

The study concludes with a proposal that while exercising judicial review, the courts should focus on constitutionalism and adhere to constitutional doctrine of separation of powers to promote fundamental rights in Pakistan.

## **CHAPTER TWO**

### **THE SEPARATION OF POWERS AND FUNDAMENTAL RIGHTS**

#### **2.1 INTRODUCTION**

The previous chapter provided a background of the study and introduced the main argument that focus on constitutionalism and adherence to the constitutional doctrine of separation of powers could protect fundamental rights in Pakistan. But, empirically, this has not occurred so far in Pakistan. It provided theme and significance of the study and introduced key research questions. It discussed the theoretical framework and methodology of the study. The literature and case law are briefly analysed.

This chapter builds the theoretical foundations of the study. It focuses on these important questions: What is the definition of separation of powers? Does the separation of powers exist in Islamic tradition? How did the doctrine evolve in the West? What are the fundamental rights? It further explores the theoretical link of the doctrine of separation of powers with the protection of fundamental rights. The discussion around these questions helps to lay down the conceptual foundations of this study. It informs that the theory of separation of powers and the conception of fundamental rights exists both in Islamic and Western constitutional jurisprudence. It further illuminates the precise link between the constitutional doctrine of separation of powers and the protection of fundamental rights in a constitutional democracy. In other words, answers to these questions unpack the hypothesis of the thesis that whether focus on constitutionalism and adherence to the doctrine of separation of powers promotes the protection of fundamental rights in Pakistan.

The debate of separation of powers and fundamental rights has occupied the attention of theorists since the early eighteenth century. Some theorists argue that the distribution of political power into different branches of government is essential for fundamental rights protection. Others argue for a centralization of power to keep the government strong, that in turn protects fundamental rights.

With this theoretical background, this chapter briefly reflects upon the above questions, while developing the argument of the study that there is an essential link between the enforcement of the constitutional doctrine of separation of powers and the protection of fundamental rights in Pakistan.

#### **2.2 DEFINING THE SEPARATION OF POWERS**

This study explores how the courts in Pakistan have applied the separation of

powers doctrine while exercising their powers of judicial review. At the outset a question may be asked: what is the definition of 'power' and 'the separation of powers'. M.J.C Vile has also stressed these questions and states that in the literature the word 'power' reflects the legal mandate or ability of governmental agencies or persons representing those agencies to achieve certain objectives and do some acts like making, judging, and enacting laws.<sup>1</sup> In other words, the word 'power' implies authority, force, capacity, and agency to do an act that is legally protected and justified. This study uses the word 'power' to describe a *constitutional* mandate of the organs of the state.

Similarly, the doctrine of separation of powers is bound to create different perceptions about the arrangement of power between state organs. It may be conceded that any attempt to define the word 'power' or 'separation of powers' cannot attain certainty. However, an effort can be made to agree upon certain essential elements that constitute a working definition for the purposes of this study. This definition can then be used as a benchmark to assess its application into a particular constitutional context such as Pakistan. In this regard, this study relies on Vile's definition of separation of powers with certain modifications. Each branch of the government thus performs a specific function (as defined in the constitution) without interfering with the functions of the other branches. Finally, each branch must be able to protect its power from the transgression of other branches through a constitutional mechanism.<sup>2</sup>

This definition provides three essentials for examining the separation of powers doctrine vis-à-vis fundamental rights protection in Pakistan. These essential features are functional and structural division of power and checks and balances amongst the state institutions.

The functional division means that the legislature will make the laws, the executive shall be responsible for implementing the laws, and the judiciary shall interpret the law and decide legal disputes accordingly. The structural division means that there must be separate and distinct institutions i.e. the judiciary should be separate from the executive. The principle of check and balance means that each organ must provide a 'check' on the powers of every other state organ. The judiciary, for example, shall review acts of other branches; the executive shall have the ability to veto legislation; and the executive may be impeached by the legislature. The legislature may

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<sup>1</sup> See, M.J.C. Vile, "Constitutionalism and the Separation of Powers," 2nd ed., (Indianapolis, Liberty Fund 1998).

<sup>2</sup> Ibid.,

further nullify the effect of a judicial decision by enacting a statute or a constitutional amendment. In a parliamentary democracy, the executive can influence the legislature to pass a law curtailing powers of the judiciary. It is argued that the fundamental rights would be better protected in Pakistan if the judiciary remains within its constitutional domain<sup>3</sup> and adheres to this definition of separation of powers.<sup>4</sup> Because judicial restraint or a balanced exercise of judicial review power would allow the growth of political process enabling the people to hold governments accountable for the failure in the provision of fundamental rights. Due to increasing judicial activism, however, this has not happened so far in Pakistan.

### 2.3 UNDERSTANDING THE FUNDAMENTAL RIGHTS

An interest that is created and protected by the law is termed as a legal right.<sup>5</sup> The fundamental rights are premised on a philosophical ground that there is a higher law which cannot be violated by state.<sup>6</sup> That higher law sometimes termed as natural law is incorporated in written constitutions in the form of fundamental rights. The idea behind providing such fundamental rights under a written constitution is to protect these rights from the transgression or tyranny of states.

Our constitution provides for the protection of fundamental rights. The courts appear to have interpreted and enforced these rights with the philosophical assumption that fundamental rights are inherent to humans and are inalienable. These human rights are explicitly envisaged as fundamental. The courts, therefore, are rather obliged to protect these rights from governmental onslaught.

This study examines how the courts have interpreted the constitution including

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<sup>3</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416; *Dharshan Masih v. State*, PLD 1989 SC 533; *A Sharwani v. Government of Pakistan*, 1991 SCMR 1041; *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *Assad Ali v. Federation of Pakistan*, PLD 1998 SC 161; *Maulana Abdul Haque Baloch v. Government of Baluchistan*, PLD 2013 SC 641; *Ch. Muhammad Saddique v. Government of Pakistan*, PLD 2005 SC1; *Watan Party v. Federation of Pakistan*, PLD 2006 SC 697; *Iftikhar Muhammad Chaudhry v. President of Pakistan*, 2010 SC 61; *Muhammad Azhar Siddique Federation of Pakistan*, PLD 2012 SC 774; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; *Vineet Narain and others v. Union of India and others*, AIR 1998 SC 889; *Vellore Citizen's Welfare Forum v. Union of India*, AIR 1966 SC 2715; *Veena Sethi v. State of Bihar*, (1982) 2 SCC 583; *Upendra Baxi v. State of Uttar Pradesh*, (1983) 2 SCC 308; *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420; *Sheela Barsi v. Union of India*, (1988) 4 SCC 226; *SP Gupta v. Union of India*, 1981 Supp SCC 87.

<sup>4</sup> See, Mohammad Waseem, 'Judging Democracy in Pakistan: Conflict between the Executive and Judiciary,' *Contemporary South Asia*, Vol.20, Issue 1(2012); Zia Ullah Ranjiah, 'Defining fundamental rights' (*The Friday Times*, 2018); Irfan Hussain, 'Judicial Overreach' (*DAWN*, 2018); Babar Sattar, 'Judicial imperialism' (*The News*, 2018); Reema Omer, 'Suo motu action' (*DAWN*, 2018); Somnath Chatterjee, 'Activism of Any Institution Has to Be First Directed to the Due Discharging of its Own Duties' (*The Indian Express*, 2007).

<sup>5</sup> See, A.K. Brohi, "Fundamental law of Pakistan," (Karachi: Deen Muhammad Press, 1958), 301-303.

<sup>6</sup> Ibid.,

the separation of powers while enforcing fundamental rights. A standard definition of fundamental rights is used to examine how the courts have stretched and expanded the meaning and scope of fundamental rights while exercising judicial review powers.

The analysis of case law pertaining to fundamental rights reveals that the courts appreciate the socio-economic and political situation of the people.<sup>7</sup> In order to protect fundamental rights, the courts have significantly changed their interpretive approach.<sup>8</sup> Some judges, for example, Sajjad Ali Shah, suggest that while interpreting the constitution including the fundamental rights provisions, the courts should adopt a dynamic and progressive approach to provide maximum benefit to the people.<sup>9</sup> Nasim Hassan Shah stressed that fundamental rights provisions should be interpreted and enforced while considering societal changes and with a futuristic approach.<sup>10</sup> In this regard, the courts preferred a meaningful, liberal, progressive, dynamic, and flexible interpretive approach over a ceremonial, traditional, formal, fixed and static interpretation of the constitution.<sup>11</sup>

While appreciating constant changes in society, the judiciary contended that constitutional interpretation should not be restricted or confined to the past. The constitution is like a living tree and it continues growing over time. A constitutional document embodies the aspirations of the people which may not be contained in time and space.<sup>12</sup> The courts in Pakistan seem to appreciate this ambition and aspirations. Therefore, they have assigned the widest meaning and broadest scope to the fundamental rights provisions and have frequently interpreted the constitution in a liberal manner.<sup>13</sup> The courts dictated for a broader and progressive interpretation of the fundamental rights to meet the changing situations in society.<sup>14</sup> Such a liberal approach of the courts can be seen in procedural as well as substantive aspects of the fundamental rights law. In procedural terms, the courts relaxed the filing and evidentiary requirements in fundamental rights cases. For example, the courts took notice of such cases even on the basis of a letter or news or an incident reported on social media. In substantive terms, the courts often issued broad directions to the legislature and the

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<sup>7</sup> See, *State v. Dosso*, PLD 1958 SC 533, 541.

<sup>8</sup> See, *Iqbal, Right*, 157.

<sup>9</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1998 SC 388, 561.

<sup>10</sup> See, *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473, 557.

<sup>11</sup> See, *Sabir Shah v. Shad Muhammad Khan*, PLD 1995 SC 66, 192.

<sup>12</sup> See, *Asad Ali v. Federation of Pakistan*, PLD 1998 SC 161, 334.

<sup>13</sup> *Ibid.*,

<sup>14</sup> See, *Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 SC 324.

executive.<sup>15</sup> In doing so, the courts have brought the principles of policy into the fold of enforceable rights.<sup>16</sup>

The courts are obliged to enforce fundamental rights of public importance<sup>17</sup> and they have extensively used this power<sup>18</sup> considering the constitution an organic instrument and the rights incorporated therein as indefinite and imprecise legal rights.<sup>19</sup> The courts have used such a progressive and dynamic approach in cases like safeguards against arrest and detention (Article 10)<sup>20</sup>, the right to defend in case of arrest and detention (Article 10)<sup>21</sup>, the freedom of business and profession (Article 18)<sup>22</sup>, prohibition of forced labour (Article 11)<sup>23</sup>, the privacy of the home (Article 14)<sup>24</sup>, the dignity of mankind (Article 14)<sup>25</sup>, the right to consult a counsel (Article 10)<sup>26</sup>, the freedom of forming business unions (Article 17)<sup>27</sup>, the right to individual liberty

<sup>15</sup> See, Mohammad Waseem, 'Judging Democracy in Pakistan: Conflict between the Executive and Judiciary,' *Contemporary South Asia*, Vol.20, Issue 1(2012); Zia Ullah Ranjha, "Defining fundamental rights," (*The Friday Times*, 2018); Irfan Hussain, "Judicial Overreach," (*DAWN*, 2018); Babar Sattar, "Judicial imperialism," (*The News*, 2018); Reema Omer, "Suo motu action," (*DAWN*, 2018); Somnath Chatterjee, "Activism of Any Institution Has to Be First Directed to the Due Discharging of its Own Duties," (*The Indian Express*, 2007).

<sup>16</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416; *Dharshan Masih v. State*, PLD 1989 SC 533; *A Sharwani v. Government of Pakistan*, 1991 SCMR 1041; *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *Assad Ali v. Federation of Pakistan*, PLD 1998 SC 161; *Maulana Abdul Haque Baloch v. Government of Baluchistan*, PLD 2013 SC 641; *Ch. Muhammad Saddique v. Government of Pakistan*, PLD 2005 SC1; *Watan Party v. Federation of Pakistan*, PLD 2006 SC 697; *Ifthikhar Muhammad Chaudhry v. President of Pakistan*, 2010 SC 61; *Muhammad Azhar Siddique v. Federation of Pakistan*, PLD 2012 SC 774; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; *Vineet Narain and others v. Union of India and others*, AIR 1998 SC 889; *Vellore Citizen's Welfare Forum v. Union of India*, AIR 1966 SC 2715; *Veena Sethi v. State of Bihar*, (1982) 2 SCC 583; *Upendra Baxi v. State of Uttar Pradesh*, (1983) 2 SCC 308; *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420; *Sheela Barsi v. Union of India*, (1988) 4 SCC 226; *SP Gupta v. Union of India*, 1981 Supp SCC 87.

<sup>17</sup> See, Article 184 (3) of the Constitution, 1973.

<sup>18</sup> See, *Farooq Ahmed Khan Leghari v. Federation of Pakistan*, PLD 1999 SC 57.

<sup>19</sup> See, *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473, 572; *Hurtade v. California*, 110 US 516.

<sup>20</sup> See, *Mrs. Arshad Ali v. Government of Punjab*, 1994 SCMR 1532; *Khan AsfandYarWali v. Federation of Pakistan*, PLD 2001 SC 607.

<sup>21</sup> See, *Khan AsfandYarWali and others v. Federation of Pakistan*, PLD 2001 SC 607.

<sup>22</sup> See, *Syed Wasev Zafar and Others v. Government of Pakistan*, PLD 1994 SC 62; *Muhammad Yasin v. Federation of Pakistan*, PLD 2012 SC 132; *Darshan Masih v. State*, PLD 1990SC513.

<sup>23</sup> See, *Dharshan Masih v. State*, PLD 1990 SC 513.

<sup>24</sup> See, *CJP Ifthikhar Muhammad Chaudhry v. President of Pakistan*, PLD 2010 SC 61.

<sup>25</sup> *Ibid.*, *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *CJP Ifthikhar Muhammad Chaudhry v. President of Pakistan*, PLD 2010 SC 61.

<sup>26</sup> *Ibid.*.

<sup>27</sup> See, *Darshan Masih v. State*, PLD 1990 SC 513; *Muhammad AkramBunda v. Pakistan Television Corporation*, 1994 SCMR 2279; *Civil Aviation Authority. Islamabad v. Union of Civil Aviation Employees*, PLD 1997 SC 781.



(Article 9)<sup>28</sup>, political freedoms (Articles 15, 16, 17)<sup>29</sup>, the freedom of business and profession (Article 18)<sup>30</sup>, the right to property (Article 23)<sup>31</sup>, and the right to equality of citizens (Article 25).<sup>32</sup>

The courts have even taken cognizance of those matters which arguably do not fall within their constitutional domain as they relate to the policymaking domain of the government. The courts, for example, intervened in the matters pertaining to inheritance<sup>33</sup>, offshore company<sup>34</sup>, write off loans<sup>35</sup>, interest<sup>36</sup>, pollution<sup>37</sup>, supply of clean water<sup>38</sup>, the elimination of exploitation<sup>39</sup>, the principles of policy<sup>40</sup> and Islamic rights<sup>41</sup> while enforcing the fundamental rights provisions. The courts interpreted fundamental rights quite progressively<sup>42</sup> and claimed that they can expand the meaning and definition of fundamental rights<sup>43</sup> to benefit the citizens.<sup>44</sup>

The meaning of the fundamental 'right to life' was stretched to include all the benefits which a free-born person needs to have to live with dignity.<sup>45</sup> More specifically, the court observed that the right to life cannot be interpreted in a restricted

<sup>28</sup> See, *Darshan Masih v. State*, PLD 1990 SC 513; *Khalil-uz-Zaman v. Supreme Appellate Court*, PLD 1994 SC 885; *Baz Muhammad Kakar v. Federation of Pakistan*, PLD 2012 SC 923.

<sup>29</sup> See, *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *Benazir Bhutto v. President of Pakistan*, PLD 1998 SC 388; *Muhammad Nasir Mahmood v. Federation of Pakistan*, PLD 2009 SC 107.

<sup>30</sup> See, *Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 SC 324; *Darshan Masih v. State*, PLD 1990 SC 513.

<sup>31</sup> See, *Inayat Bibi v. Issac Nazir Ullah*, PLD 1992 SC 385; *Syed Wasey Zafar and others v. Government of Pakistan*, PLD 1994 SC 621; *Khan AsfandYarWali and Others v. Federation of Pakistan*, PLD 2001 SC 607; *Muhammad Yasin v. Federation of Pakistan*, PLD 2012 SC 132.

<sup>32</sup> See, *Darshan Masih v. State*, PLD 1990 SC 513; *Inamur Rehman v. Federation of Pakistan*, 1992 SCMR 563; *Khan AsfandYarWali and others v. Federation of Pakistan*, PLD 2001 SC 607; *Ch. Muhammad Siddique v. Government of Pakistan*, PLD 2005 SC 1; *Muhammad Nasir Mahmood v. Federation of Pakistan*, PLD 2009 SC 107; *Baz Muhammad Kakar v. Federation of Pakistan*, PLD 2012 SC 923.

<sup>33</sup> See, *Inayat Bibi v. Issac Nazir Ullah*, PLD 1992 SC 385.

<sup>34</sup> See, *Imran Khan Niazi v. Mian Muhammad Nawaz Sharif*, PLD 2017 SC 265; *Muhammad Hanif Abbassi v. Jahangir Tareen*, Constitutional Petition No. 36 of 2016.

<sup>35</sup> See, *Rai Rashid Ahmed Khan v. President of Pakistan*, PLD 1994 SC 36.

<sup>36</sup> *Ibid.*.

<sup>37</sup> See, *General Secretary West of Pakistan Salt Miners v. The Director, Industries and Mineral Developments*, 1994 SCMR 2061.

<sup>38</sup> See, *Muhammad Naeem v. Chief Engineer, Irrigation Department, and Quetta*, 1994 SCMR 2059.

<sup>39</sup> See, Article 3, of the Constitution, 1973.

<sup>40</sup> See, Articles 29-40, the Constitution, 1973.

<sup>41</sup> See, Article 2-A, the Constitution, 1973.

<sup>42</sup> See, *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473, 666.

<sup>43</sup> *Ibid.*, 674.

<sup>44</sup> *Ibid.*, 506.

<sup>45</sup> See, *Shehla Zia v. State*, PLD 1994 SC 693.

manner.<sup>46</sup>In *Shehla Zia's* case<sup>47</sup>, the court expanded the meaning of the word 'life' given in Article 9 through an activist approach.<sup>48</sup> The court observed that although the constitution does not define the word 'life', yet it cannot be given a restrictive meaning to equate human with animal life. While liberally interpreting the meaning of life, the court observed that a human should be able to live a dignified life with all facilities and pleasures of life being born in a free society. In this case, the court, for the first time, departed from the traditional definition and jurisprudence of fundamental rights in Pakistan.

Following such a progressive interpretation of the fundamental rights, the courts have tried to enforce even non-enforceable or non-justiciable rights such as the aspirations of the state envisaged in the principles of policy. The court granted the right to accommodation to a civil servant while stretching the right to life.<sup>49</sup>The right to life was extended even to drinking clean water.<sup>50</sup> The court held, in another case, that even damage caused to property by floods is a matter of fundamental rights.<sup>51</sup> Likewise, cases of contract employees were taken as a right to life matter.<sup>52</sup>Access to justice was also treated as an issue of the right to life.<sup>53</sup>

It is evident that our courts have occasionally followed a liberal, progressive, creative, and dynamic approach to fundamental rights and, especially, a right to life. The courts relied upon the preamble, the objectives resolution, fundamental rights and the principles of policy provisions to deliver justice to the people (although only fundamental rights are typically seen as 'justiciable' or 'enforceable' provisions).<sup>54</sup>The

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<sup>46</sup> Ibid.,

<sup>47</sup> See, Human Rights Case No.15-K of 1992; the residents of Islamabad approached WAPDA and then the Supreme Court of Pakistan against the construction of a grid station in the green-belt of a residential locality. The petitioners alleged that the construction of grid station as such would be fatal for life and would damage the environment.

<sup>48</sup> See, Dr. Parvez Hassan and Azim Azfar, "Securing Environmental Rights through Public Interest Litigation in South Asia," *Virginia Environmental Law Journal* (2004), 216-236; Dr. Parvez Hassan, "Changing Global Order: Role of Courts and Tribunals in Pakistan in Environmental Protection," *Pakistan Law Journal* (2014), 25-40; Dr. Parvez Hassan and Azim Azfar, "Human Rights and the Environment: A South Asian Perspective," *Journal of Human Rights and the Environment* (2014), 192-212; Dr. Parvez Hassan, "Judicial Activism Toward Sustainable Development in South Asia," (*Pakistan Law Journal* (2003), 39-41. Dr. Nasim Hasan Shah, "Environment and the Role of the Judiciary," (*PLD Journal*, 1992), 27.

<sup>49</sup> Ibid.,

<sup>50</sup> See, *General Secretary West Pakistan Salt Miners Labour Union (CBA) Khewra, Jhelum v. The Director, Industries and Mineral Developments, Punjab* 1994 SCMR 2061, 2069.

<sup>51</sup> See, *Marvi Memon v. Federation of Pakistan*, PLD 2011 SC 854.

<sup>52</sup> See, *Ejaz Akbar Kasi v. Ministry of Information and Broadcasting*, PLD 2011 SC 22, 25.

<sup>53</sup> See, *Assad Ali v. Federation of Pakistan*, PLD 1998 SC 161, 189; *Mehram Ali v. Federation of Pakistan*, PLD 1998 SC 1445; *Sh. Riaz-ul- Haq v. Federation of Pakistan*, PLD 2013 SC 501, 520, 547.

<sup>54</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416.

courts in Pakistan appear to be inspired by the notions of socio-economic justice in Islam. With this objective in mind, the courts seemingly relaxed procedural requirements such as the personal grievances of the petitioner or the filing of a formal petition to seek redressal of the grievance.<sup>55</sup> It may be argued that this procedural relaxation by the courts has opened a flood gate of human rights issues that may be dealt with more appropriately in political forums.

Such a liberal approach in terms of interpreting the procedural as well as substantive aspects of the constitutional law appears to offend the very spirit of constitutionalism that is envisaged in the constitutional doctrine of separation of powers. If courts are allowed to interpret fundamental rights provisions in an unrestricted manner, it may create institutional conflicts and then a crisis or anomaly for the legislature and the executive. Indeed, constitutionalism including the separation of powers dictates that each institution including the judiciary should remain within its constitutional domain so as to protect democracy. However, the above examples illustrate that in judicial passion of protecting fundamental rights, the courts crossed the constitutionally provided limits for the exercise of judicial power.<sup>56</sup> Now, it is briefly explained which conception of fundamental rights is used in this study to examine the judicial review practice of the courts in Pakistan.

For the purposes of this study, the fundamental rights mean those rights which have been explicitly provided in chapter 1 of the 1973 constitution such as the right to life, right to freedom of religion, expression, movement and association, the right to privacy, the right to education, the right to a fair trial, and the right to property, etc.<sup>57</sup> Any other conception or meaning of fundamental rights is discarded from the purview of this study to enhance the precision and legitimacy of the findings of this study.

These rights are considered fundamental because they are essential and integral to the existence of a human being. Humans have these rights just because of being born as a human. These rights are so important that they cannot be taken away except in the circumstances provided under the constitution for the suspension of these rights

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<sup>55</sup> See, *General Secretary West Pakistan Salt Miners v. The Director, Industries and Mineral Developments*, 1994 SCMR 2061, 2071.

<sup>56</sup> See, Jesse H. Choper, "Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court," (Chicago, 1980); Lino A. Graglia, "It's Not Constitutionalism, It's Judicial Activism," *Harvard Journal of Law and Public Policy*, 19 (1996) 296; Archibald Cox, "The Role of the Supreme Court: Judicial Activism or Self Restraint," *Maryland Law Review*, 47 (1987), 121-122; John Hart Ely, "Democracy and Distrust: A Theory of Judicial Review," (Cambridge MA: Harvard University Press, 1980).

<sup>57</sup> See, Articles 8-28, of the Constitution, 1973.

(freedom of movement, freedom of assembly, freedom of association, freedom of trade, business or profession, freedom of association, and protection of property rights) through the proclamation of emergency or constitutional amendment.<sup>58</sup>

Occasionally, in Pakistan, the courts seem to have ignored this standard definition and have interpreted fundamental rights provisions beyond the textual content of the provisions.<sup>59</sup> In doing so, however, the courts appear to have muddled the essence of constitutionalism encapsulated in the doctrine of separation of powers. Such an interpretation disturbs the constitutional balance between the organs of the state and weakens democracy.<sup>60</sup> It amounts to an encroachment on the policy-making domain of other branches of government, as when the courts intervened in the government's domain of regulating environmental pollution.<sup>61</sup> Article 9 of the constitution provides

<sup>58</sup> See, Articles 233, 238, 239, of the Constitution, 1973.

<sup>59</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416; *Dharshan Masih v. State*, PLD 1989 SC 533; *A Sharwani v. Government of Pakistan*, 1991 SCMR 1041; *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *Assad Ali v. Federation of Pakistan*, PLD 1998 SC 161; *Maulana Abdul Haque Baloch v. Government of Baluchistan*, PLD 2013 SC 641; *Ch. Muhammad Saddique v. Government of Pakistan*, PLD 2005 SC 1; *Watan Party v. Federation of Pakistan*, PLD 2006 SC 697; *Iftikhar Muhammad Chaudhry v. President of Pakistan*, 2010 SC 61; *Muhammad Azhar Siddique v. Federation of Pakistan*, PLD 2012 SC 774; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; *Vineet Narain and others v. Union of India and others*, AIR 1998 SC 889; *Vellore Citizen's Welfare Forum v. Union of India*, AIR 1966 SC 2715; *Veena Sethi v. State of Bihar*, (1982) 2 SCC 583; *Upendra Baxi v. State of Uttar Pradesh*, (1983) 2 SCC 308; *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420; *Sheela Bansi v. Union of India*, (1988) 4 SCC 226; *SP Gupta v. Union of India*, 1981 Supp SCC 87.

<sup>60</sup> E. Carolan, 'The New Separation of Powers: A theory of Modern State' (Oxford, 2009) 18; Eric Barendt, 'Separation of Powers and Constitutional Government' *Public Law* (1995) 599; Waldron J, 'Separation of Powers in Thought and Practice' *Boston College Law Review*, Vol.54, Issue 2 (2013) 446; MJC Vile, 'Constitutionalism and the Separation of Powers' (Oxford: Clarendon Press, 1967); Hamilton The *Federalist* No.39 and 78. (Edited by Clinton Rossiter, 1961); James Madison, The *Federalist* No.51 (Edited by Clinton Rossiter, 1961), Baron De Montesquieu, 'The Spirit of Laws' Book XI. Edited by J.Y. Prichard. (Translated by Thomas Nugent. Fred B. Rothman & Co.1991); William Bondy, 'The Separation of Government Powers' (Law Book Exchange Limited, 1999); William Eaton, 'Who Killed the Constitution: The Judges v The Law' (Gateway Books, 1988); Iyer R. Karishna, 'Justice at Cross Road' (New Delhi: Deep and Deep Publication, 1992); John Locke, 'Two Treaties on Government' (London: C Baldwin, 1824); Fazal Karim, 'Judicial Review of Public Action' (Pakistan Law House, 2006); Hamid Khan, 'Constitutional and Political History of Pakistan' (Oxford University Press, 2004); B.N.Kirpal et.al., *Supreme but not Infallible* (Oxford University Press, 2000); Z.K.Maluka, 'The Myth of Constitutionalism in Pakistan' (Oxford University Press, 1995); Paula R. Newberg, 'Judging the State, Courts, and Constitutional Politics in Pakistan' (Cambridge University Press, 1995); S.P.Sathe, 'Judicial Activism in India: Transgressing Borders and Enforcing Limits' (Oxford University Press, 2002).

<sup>61</sup> See, Werner Menski, Ahmad Rafay Alam and Mehreen Raza Kasuri, "Public Interest Litigation in Pakistan," (*Pakistan Law House*, 2000); Mansoor Hassan Khan, "The Concept of Public Interest Litigation and its Meaning in Pakistan," (*PLD Journal*, 1992 ) 84; Parvez Hassan, "Judiciary Leading the Way," (1998) 15(1) *The Environmental Forum* 48; Dr. Parvez Hassan and Azim Azfar, "Securing Environmental Rights Through Public Interest Litigation in South Asia," (2004) 22 *Virginia Environmental Law Journal* 215. Jona Razzaque, "Public Interest Environmental Litigation in India, Pakistan and Bangladesh," (*Kluwer*, 2004); Dr. Parvez Hassan and Azim Azfar, "Securing Environmental Rights through Public Interest Litigation in South Asia," (*Virginia Environmental Law Journal*, 2004), 216-236; Dr. Parvez Hassan, "Changing Global Order: Role of Courts and Tribunals in Pakistan in Environmental Protection," (*Pakistan Law Journal*, 2014) 25-40; Dr. Parvez Hassan and

that, “No person shall be deprived of life or liberty save in accordance with law”. The explicit content of this fundamental right provision may not be extended to include ‘environment’ in any meaning of word ‘life’. Hence, an attempt to regulate environment, for example, while interpreting right to life is an encroachment on the policymaking mandate of the executive.

## 2.5 SEPARATION OF POWERS IN ISLAMIC TRADITION

This part traces the doctrine of separation of powers within the Islamic polity. In Islam Muslims seek guidance from God and His messenger, the Prophet Muhammad (PBUH).<sup>62</sup> They construct their individual and social life on the basis of ‘*Shariah*’. It means ‘path’ or ‘the way of God’. Ideally, *shariah* provides complete guidance to the Muslims in worldly affairs as well as about life after death. However, as the text of the *Quran* and the *Sunnah* do not speak directly to the Muslims, Muslims interpret its meanings to live according to the will of God. This activity of interpretation is called ‘*ijtihad*’ and indulgence by Muslim *legal* scholars to interpret the *Quran* and the *Sunnah* is called ‘*Fiqh*’.

Through *ijtihad*, Muslims attempt to understand the intentions or will of God. Due to the fallible nature of human beings, the meaning given to *Shariah* would always remain probable and subject to modification under the changing circumstances. So, no one can claim certainty and unity of meaning in Islamic discourse. While relying upon the conception of Dr. Shahbaz Ahmad Cheema, it may be argued that Muslims can use this interpretive space for creating a suitable political system to protect their rights and, then, to understand theological and non-theological issues relating to an Islamic state in modern societies.<sup>63</sup> It may be argued that a key difference between Islamic and Western conceptions of democracy is that Muslims are free to create, interpret, repeal, and amend the rules governing their individual and collective conduct only to a certain extent, as *shariah* (even beyond the realm of *ijtihad*) is thought to guide the overall

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Azim Asfar, “Human Rights and the Environment: A South Asian Perspective,” (*Journal of Human Rights and the Environment*, 2014), 192-212; Dr. Pervez Hassan, “Judicial Activism Toward Sustainable Development in South Asia,” (*Pakistan Law Journal*, 2003) 39-41. Dr. Nasim Hasan Shah, “Environment and the Role of the Judiciary,” (*PLD Journal*, 1992) 27; Zia Ullah Ranjha, “Environment and judicial activism,” (*The Friday Times*, 27 September 2019). <https://www.thefridaytimes.com/environment-and-judicial-activism/>

<sup>62</sup> See, Abdul Aziz Said, “Precept and Practice of Human Rights in Islam,” accessed November 7, 2014, <http://heinonline.org>

<sup>63</sup> See, Shahbaz Ahmad Cheema, “Problematizing “Authenticity”: A Critical Appraisal of the Jamaat-i-Islami Gender Discourse” (PhD Thesis submitted in University of Warwick, May 2011).

conduct of the Muslims. This view is endorsed by Sayyid Abu Ala Maududi.<sup>64</sup> In the Western form of democracy, Maududi argues, individuals are absolutely free as there is no limit as such on their freedom to act as per their independent conscience and free will.<sup>65</sup>

Some scholars argue that *shura* and modern democracy are compatible. Muhammad al-Ghazali argues that Islam provides principle of consultation and the form and content of such consultation is left to *ijtihad*. Allal al Fasi argues that *shura* and modern democracy are compatible. Others maintain that the traditional conception of *shura* and modern democracy cannot be reconciled. For example, Abd al-Salan Yasin argues that *shura* is based on the *Quran* whereas modern democracy is premised on the social contract. Muhammad Munir concludes that those who consider that both these conceptions of governance are similar have yet to provide the details of an Islamic democracy, and until a model of Islamic democracy is not provided, Muslims have to follow the Western model of democracy.<sup>66</sup>

The traditional and modern notions of an Islamic state provide the division of power between the different organs of the state. In early Muslim societies, the religious scholars and political rulers had separate spheres of their functions. The rulers, for example, created rules for administering law and order – called *Siyasah*. The religious scholars had exclusive authority to interpret the scriptures through a mode of reasoning called *ijtihad*. However, the power of enforcement vested with the rulers called Khalifa or Amir. In the early state of Madina, the Prophet Muhammad (PBUH) was the executive head of the state. However, he was used to consult his companions in affairs of the state, as the *Quran* ordains consultation amongst companions.<sup>67</sup>

The first four Caliphs of Islam were also used to consult with the tribal heads.<sup>68</sup> This mechanism of consultation in the Islamic state of Madina confirms the separation of power or the existence of the executive and the legislature (consultative assembly or parliament in modern Islamic democracies). Further, qadiz (judges) were appointed to adjudicate. For example, a dispute regarding the ownership of armor occurred between

<sup>64</sup> See, Abu Ala Maududi, "Islamic way of life," 41, 159, 44-5.

<sup>65</sup> Ibid.,

<sup>66</sup> See, Muhammad Munir, "From the State of the Khalifah to the Nation-State: The Transformation of Islamic Legal Politics," *Islamic Studies* 56: 3-4, 2017, 187-202. The concept of Islamic democracy is not the main topic of this thesis; hence, further discussion may be avoided.

<sup>67</sup> See, Al-Quran (42:38).

<sup>68</sup> See, Muhammad Asad, "*The Principles of State and Government in Islam*," (Malaysia: Islamic Book Trust, 2007), 44-68.

the Caliph Ali and a non-Muslim. The judge decided against the Caliph. It shows that the separation of power between the executive and the judiciary existed in traditional Islamic state.<sup>69</sup>

Muslim scholars have thoroughly discussed the separation of power in an Islamic state. While exploring the history of state and government in Islam, Muhammad Asad states that Islam diluted tribal ties to some extent; however, during the rule of the Prophet Muhammad (PBUH) and the first four Caliphs, tribal structure of Arabian society largely remained intact. The tribal heads were the representatives of their tribes. Thus, they were consulted in political affairs of the state. Asad equates the rulers of Madina with the executive branch and the assembly of tribal heads with the parliament of modern Islamic democracies. He considers that in traditional Islamic state, the executive was stronger and largely independent of the opinion of the legislature. Therefore, he is of the view that the presidential system of government such as the US system of government is closer to the Islamic system of governance. He also emphasizes the need of an independent tribunal/judiciary to adjudicate between the executive and the legislature.<sup>70</sup>

Sayyid Abul Ala Maududi believes that Islam is a complete code of life. It covers all aspects of a human life i.e., individual, social, and political. Therefore, he introduced the concept of Islamic democracy or theo-democracy. He emphasized that the sovereignty belongs to the Almighty Allah. The *Quran* and the *Sunnah* are the basic laws to be enforced by the Muslim ruler. Sayyid Maududi promoted consultative decision making in the parliament. He advocated for strong but accountable executive and legislature as affairs of any institution of the state has to be subject to the *Quran* and the *Sunnah*. This concept of 'accountable Islamic democracy' is a unique contribution in the discourse of political Islam.<sup>71</sup> He explains that Islam is a dynamic religion. Islamic law has the capacity to accommodate changing needs of the time subject to the principles laid down in the *Quran* and the *Sunnah*.<sup>72</sup>

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<sup>69</sup> Ibid.,

<sup>70</sup> Ibid.,

<sup>71</sup> See, John L. Esposito, Emad El-Din Shahin, "*The Oxford Handbook of Islam and Politics*," (Oxford University Press, 2013), 147-153; John L. Esposito, Emad El-Din Shahin, "*Key Islamic Political Thinkers*," (Oxford University Press, 2018), 44-61.

<sup>72</sup> See, Sayyid Abu Ala Maududi, "*The Islamic Law and Constitution*," (Lahore: Islamic Publications (Pvt.) Ltd., 1960)

With reference to the creation of Pakistan, Sayyid Maududi said: "The idea of Pakistan owes its origin to the belief that Muslims are a nation, an ideological community, and it is a dictate of their faith to establish a state, a society and a culture in the light of the principles given by the *Quran* and the *Sunnah*".<sup>73</sup> He quoted Muhammad Ali Jinnah's speech in 1945: "The Muslims demand Pakistan, where they could rule according to their own code of life and according to their own cultural growth, traditions and Islamic laws. Our religion, our culture and our Islamic ideals are our driving force to achieve our independence". He further referred to Muhammad Iqbal, who said that: "The life of Islam as a cultural force in this country very largely depends on its centralization in a specified territory. This centralization of the more living portion of the Muslims of India..., will eventually solve the problem of India as well as of Asia." Thus, Sayyid Maududi highlighted the primary importance of Islamic law in an Islamic state.<sup>74</sup>

According to Abu'l Hasan Ali ibn Muhammad al-Mawardi, sovereignty belongs to God and an Islamic state shall run under laws of God; the ruler governs the state as the successor of Prophet Muhammad (PBUH) and he is responsible to enforce *Shariah*. The ruler should uphold justice. He must have knowledge of religion and must not be disabled. He should be wise and brave and must be a descendant of the tribe of the Prophet Muhammad (PBUH). The ruler may be elected or nominated by the ruling Imam.<sup>75</sup>

Abu Hamid Muhammad bin Muhammad bin Muhammad bin Ahmed al-Ghazali states that an Islamic state is a divine state and God is the Supreme Authority. His divine laws should rule. The ruler must be able to wage *jihad*; he should discharge the duties through consultation of experts and ministers. He should have knowledge for the purpose of *ijtihad* along with consultation of religious experts. He must be pious for to carry on his office as a political and religious entity. He must establish justice and settle cases with fairness. He must have knowledge of *shariah* and wisdom to endorse it as the rule of law. He should be a practical Muslim and must show a reliable Muslim character. He must be aware of the official matters and the performance of his

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<sup>73</sup>Ibid.,

<sup>74</sup>Ibid.,

<sup>75</sup><https://rubikh.wordpress.com/tag/al-mawardis-theory-of-an-islamic-state/> accessed 20 May 2020.



administrators. He should seek consultation of men of caliber to speak about the affairs of the state. He must keep his morality.<sup>76</sup>

The survey of Muslim scholars thought establish that separation of state power exists in traditional Islamic state and is also appreciated in the context of modern Islamic democracies. The main difference between the Western and the Islamic conception of governance lies in the fact that the *Quran* and the *Sunnah* are the driving force of political thought in Islam and central to governance in an Islamic state. The Western democracy is premised on the will of the people, whereas, in Islamic democracy, the sovereignty belongs to God. Any law made by the parliament has to conform with the *Quran* and the *Sunnah*. The *Quran* says, "for those who make decisions on other than what God has revealed are unbelievers".<sup>77</sup>

An Islamic state is not a dictatorial or authoritarian government; the public affairs are handled and accomplished by the mutual consultation.<sup>78</sup> The rule of law and the safety of the life and property of the people is one of the main objectives of an Islamic state. The people can approach courts for getting justice: "O ye who believe! stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be against rich or poor: for Allah can best protect both. Follow not the lusts, lest ye swerve, and if ye distort justice or decline to do justice, verily Allah is well acquainted with all that ye do".<sup>79</sup> Finally, Muslim ruler is obliged to order people to do good and stop them from wrong and punish them if they do not: "The believers, men and women, are protectors of each other; they enjoy what is right and forbid what is evil".<sup>80</sup>

In the sub-continent, the Muslim rulers called *Salateen*<sup>81</sup> and Mughal Emperors occupied the state power.<sup>82</sup> However, they distributed the state power amongst different functionaries i.e., judges and administrators. Under the British regime, the state power was distributed between the executive, the legislature, and the judiciary. The Govt of

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<sup>76</sup> Ibid.,

<sup>77</sup> See, Al-Quran (Surah Al-Maida 44).

<sup>78</sup> See, Al-Quran (Surah Shura 38).

<sup>79</sup> See, Al-Quran (Surah An-Nisa 135).

<sup>80</sup> See, Al-Quran (Surah Tauba 71).

<sup>81</sup> See, Symonds, R., "*Making of Pakistan*," (Karachi: Allied Book Corporation, 1966), 20.

<sup>82</sup> See, Zulfikar Khalid Maluka, "*The Myth of Constitutionalism in Pakistan*," (Oxford University Press, 1995), 83.

India Act, 1935 conferred the executive power with the Governor-General being representative of the Crown, which were to be exercised with the consultation of Council of Ministers. The Federal Legislature comprised of the Governor-General as a representative of the King, and two houses, namely, the Council of State and the House of Assembly.<sup>83</sup> A Federal Court was also established to interpret the constitution and to adjudicate between the constituent units of the federation.<sup>84</sup>

In modern Islamic states like Pakistan, then, the power of the state is divided within the government institutions. It may be argued, however, that in Pakistan's Federal Shariat Court (FSC) religious scholars and judges still have legal authority to review rules made by the legislature. Under the 1973 constitution, any law inconsistent with the *Quran* and the *Sunnah* can be challenged before the FSC.<sup>85</sup> So, the FSC declares what is not Islamic, and the Parliament defines what is Islamic. In addition, the Council of Islamic Ideology (CII) may examine the compatibility of a pertinent law vis-à-vis injunctions of the *Quran* and the *Sunnah*. However, its role is merely advisory and not binding on the legislature.<sup>86</sup> In Pakistan, even religious scholars called *Mufti* have non-state authority to interpret religious rules. It may be argued that this state and non-state authority to interpret and determine religious laws is a continuing feature of the traditional Islamic state. However, it is contended that Pakistan's constitution carries a combination of features from the Islamic and Western traditions of governance. It makes this study more challenging and interesting.

The above illustrates that in a modern Islamic state the state's power is distributed across legislative, executive, and judicial institutions. The only deviation from western democracies exists in the fact that religious scholars, via constitutionally established judicial institutions such as the FSC, also have a role in terms of examining the laws made by the legislature.<sup>87</sup> This overall structure and scheme, envisaging this separation of powers, is endorsed by the courts in Pakistan.<sup>88</sup>

<sup>83</sup> See, Section 18 of the Government of India Act, 1935.

<sup>84</sup> See, Section 200 of the Government of India Act, 1935.

<sup>85</sup> See, Article 203B (c) of 1973 Constitution, which defines law as far as the jurisdiction of the Federal Shariat Court is concerned. "Law" excludes the Constitution, Muslim personal law, any law relating to the procedure of any court or tribunal etc.

<sup>86</sup> Ibid.,

<sup>87</sup> See, Mirza, S.B., "The Chaudhry Doctrine: A Small-C Constitutional Perspective," in Cheema and Gilanied, *Politics*, 41.

<sup>88</sup> See, *Sharaf Faridi v. Federation of Pakistan*, PLD 1989 Karachi 404.

## 2.6 FUNDAMENTAL RIGHTS IN ISLAMIC TRADITION

Before the emergence of Islam, there was extreme violation of the rights of the people by powerful tribes and individuals in Arabian society, including female infanticide, violation of the dignity of humans, and the infringement of women rights.<sup>89</sup> It may be argued that all prophets struggled for the rights of the people.<sup>90</sup> The Prophet Muhammad (PBUH) also initiated a movement for the revival of human rights.<sup>91</sup> While addressing the King of Abyssinia, Jaffar Tayyar, a companion of the Prophet said that before the arrival of the Prophet (PBUH) we were used to kill our daughters and attack each other and commit all kinds of evils.<sup>92</sup> The Holy Prophet (PBUH) emphasized the equality of humans and the protection of life and property, the rights of women and slaves in his last speech.<sup>93</sup>

The *Quran* and the Prophet (PBUH) advocate for the equality of mankind, which is a basic human right. The *Quran* says that humans are divided into different tribes so that they could identify each other; otherwise, all human are equal.<sup>94</sup> Freedom of religion is also recognized in Islam as there is no coercion in matters of religion.<sup>95</sup> In Islam, the freedom of expression and consultation is highly regarded and protected. The people are encouraged to decide their matters with consultation.<sup>96</sup> The right to life and security of a human is given utmost importance and is safeguarded. Such is the value of human life that killing of a man in Islam is regarded as killing of all

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*Government of Sindh v. Sharaf Faridi*, PLD 1994 SC 105; *Sind High Court Bar Association v. Federation of Pakistan*, PLD 2009 SC 879; *Ghulam Rasool v. Govt. of Pakistan*, PLD 2015 SC 6; *District Bar Association Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401.

<sup>89</sup> *Ibid.*,

<sup>90</sup> See, Dr. Aslam Khaki, "Reading in Human Rights," (Foundation for Research and Development, Islamabad, 2012), 76-89.

<sup>91</sup> *Ibid.*,

<sup>92</sup> *Ibid.*,

<sup>93</sup> *Ibid.*,

<sup>94</sup> See, Al- Quran: Oh Men, we have created you from a male and a female and made you into nations and tribes that you might identify one and another. The noblest of you in God's view is the most righteous of you. God is wise and all knowing (49:13); See, the Prophet (PBUH) says: There is no preference or superiority of Arab over non-Arab and of non-Arab over Arab, of White over Black and Black over White, except on the basis of *Taqwa*(piety) or good conduct.

<sup>95</sup> See, The Quran: There is no coercion in the matter of religion (2:256); So, would you force the people to become Muslims? (10:99).

<sup>96</sup> See, Al-Quran: The (pious people) conduct their affairs by mutual consultation (42:38); and involve their consultation in the affairs (93:159); The Prophet (PBUH) was used to consult his companions. For example, he consulted them in the matter of prisoners of war of Badar and for the third Jumma call (Friday prayer). A woman once criticized the Caliph Umar in fixing the amount of dower. The Caliph listened her with patience and said: Umar was mistaken and the woman was right.

humans.<sup>97</sup> Further, it is prohibited to take the property of other Muslims through unfair means, and the right to property and privacy is protected in Islam.<sup>98</sup>

Some scholars, like Donnelly, however, argue that human rights originated in the West and other cultures lack the practice and sometimes even concept of human rights. He further argues that, in Islam, no one has any rights; it is only a matter of duties for rulers and individuals. He maintains that the right to justice is a duty of rulers and a right to freedom is only a duty not to hold slaves unjustly; economic rights are a duty to earn a living and help the needy; a right to freedom of expression obliges one to speak the truth. He concludes that the basis for these injunctions are not human rights but divine will, which prescribe duties, dealing with rights not as human rights per se but in the sense of 'what is right'. He admits that promoting human welfare is a key objective in Islam, however he argues that this concern is not equivalent to human rights in the Western sense.<sup>99</sup>

There is no denial of the fact that Western civilization has brought human rights ideas into the mainstream debate of rights at an international level and has campaigned to get such rights formulated in terms of international law; however, this does not necessarily prove the non-existence of the practice and concept of human rights in non-Western cultures e.g. Islam. Muslim scholars like Mashood Baderin appreciate the active role of Western states in the promotion and standardization of human rights concepts at an international level. He argues, however, that the concept of human rights is not unique to Western cultures and societies. It also exists in other civilizations like Islam.<sup>100</sup> As compared with Donnelly's argument, Baderin's argument is more convincing. Specifically, Baderin notes that al-Mawardi discussed the rights of all humans<sup>101</sup> and described the obligations of the ruler to protect the rights of individuals under the concept of *Hisbah* (public order).<sup>102</sup> The irony lies in the fact that Western

<sup>97</sup> See, Al-Quran: And in Old Testament we decreed for them, a life for life, an eye for eye, a nose for nose, an ear for an ear, a tooth for a tooth and for injuries is retaliation (5:45); That was what we laid down for the children of Israel that whoever killed a human being, except in retaliation or in sedition in the earth, should be deemed as though he had killed all mankind (5:32).

<sup>98</sup> See, Al-Quran: Do not devour one another's property through unfair means (2:188); Oh believers! do not enter the house of others until you get permission and the wish them peace upon them (24:27); Oh believers! Avoid most of suspicion, for in some cases suspicion is sin. And do not spy on one another, nor backbite one another (49:12).

<sup>99</sup> See, Donnelly J "Human Rights and Human Dignity," *An Analytical Critique of Non-Western Conceptions of Human Rights* (1982), 303-316.

<sup>100</sup> See, Baderin Mashood, "International Human Rights and Islamic Law," (Oxford University Press 2005), 165-168.

<sup>101</sup> Arabic term, HuquqAdimiyyin.

<sup>102</sup> See, al-Mawardi, "Al-Ahkam al-Sultaniyyah".

ideas about human rights see 'public order' (or disorder) as a condition allowing for a limitation of fundamental rights. Thus, Baderin argues that the term human rights may have special meaning in the Western context, but the idea it implies has universal application to all humans and may be worded in different terminology by different groups. Baderin further argues that human rights should be conceived as an evolutionary process that took its present shape through various stages of human civilization and the same will continue to evolve in the future.<sup>103</sup>

According to Baderin, through such evolution, the term *Huquq Al-Insan* (individuals rights) replaced the word *Huquq Adimiyyain* (rights of a person) to represent human rights in modern terms. He traces fundamental rights to the doctrine of '*maslahah*' (human benefit). His reliance on '*maslahah*' as a justificatory principle merits further consideration for the development of fundamental rights. He divides the jurists in two camps: traditionalists and evolutionists. Traditionalists are 'backward-looking' adherents to the classical legal texts and not willing to reconsider their position in the changing circumstances. However, the evolutionists while identifying with the past look forward to apply the juristic principles meaningfully in the modern context.<sup>104</sup>

Baderin, however, seems to ignore the crucial link between the separation of powers and fundamental rights for the purposes of this study. The evolutionary approach and justificatory principle may be explored to connect the doctrine of separation of powers with fundamental rights. The backward-looking approach does not seem helpful because the traditionalist approach is not receptive to the modern democratic context of Islamic states. Moreover, the traditionalists place much reliance upon the rules given by the founders of four orthodox schools of law in a particular time and space and the books written by *ulama* (religious scholars) in the later centuries. The spirit of Islam may be discovered by interpreting the *Quran* and the *Sunnah*.

Leonard Binder argues that decisions based on human reasoning in one generation can be rejected by the next generation.<sup>105</sup> So, the concept of separation of power in the traditional literature could not take account of the division of state power in modern democracies, thus, the same can be re-interpreted in the changing circumstances. It may be argued that the message of Islam is not time and space specific

<sup>103</sup> See, Baderin Mashood, "International Human Rights and Islamic Law," (London: Oxford University Press, 2005), 165-168.

<sup>104</sup> Ibid., 42.

<sup>105</sup> See, Leonard Binder, "Religion and Politics in Pakistan," accessed November 08, 2014, <http://heinonline.org>

and it is for all times and for the whole world; thus, it can be construed afresh on the basis of new knowledge acquired by humans over the process of history. It may be argued that if the message of Islam is eternal, then it requires constant re-interpretation in view of science, philosophy, psychology, and theology in the modern world.

Then, Baderin proceeds to define the term *masalahah*. The literal meaning of '*masalahah*' is a benefit. It also expresses the principle of public welfare often qualified as '*maslahah mursalah*'. When used in the collective sense is called '*maslahah al-ummah*' and when used in an individual sense is terms '*maslahah shakhsiyyah*'-the latter may be equated with the concept of individual rights.<sup>106</sup>

Baderin, building on al-Ghazali's theory, provides a classification of human benefits/rights. There are 'indispensable' benefits (*daruriyyat*) consisting of protection of life, religion, intellect, family, and property. Then there are 'necessary' benefits (*hajiyyat*). Neglect of these rights may cause hardship for the people. However, non-provision of the same does lead to the collapse of the community. On the third level are those rights which improve the overall quality of human life (*tahsiniyyat*).<sup>107</sup> Thus, the first and third levels relate to and can accommodate the notion of fundamental rights in the modern sense. The concept of *huquq al-ibad* (rights of people) can also be interpreted liberally to protect human rights in the modern age. A ruler is obliged in Islam to cater for the welfare of the people. Therefore, human rights exist and can be further promoted on the principles of *maslahah* and *ijtihad*.

The above discussion suggests that concepts of human rights emerged in the Muslim states before the era of renaissance in Europe. It is appreciated, however, that human rights are inherent in any civilization. These rights are a common heritage of human beings. No civilization may claim exclusive credit for the origin and progress of human rights ideals as they developed over centuries in different human societies in the East and the West.

It may be argued that an absolute agreement between the Western traditions of democracy, the separation of powers, and fundamental rights with the Islamic tradition may not be desired. Different civilizations may have different meanings or terminology to different concepts of governance and rights. They may differ in their understanding and application of concepts like the separation of powers and the rights of the people

<sup>106</sup> See, Baderin Mashood "International Human Rights and Islamic Law," (London: Oxford University Press, 2005), 42-43.

<sup>107</sup> Ibid., 4.

owing to their particular social and historical contexts.

Finally, it may be argued that the division of power between the rulers and religious scholars facilitated the protection of human rights in Islam. Muslim scholars have placed much reliance on the principle of '*maslahah*' and have played an important role for the protection of human rights in Pakistan. The *Shariah* aims to promote human welfare in Islam. Baderin emphasizes that preservation and protection of human interest is the will of God. The *maqasid* approach, he says, in applying the *Shariah* is providing the complete equity [justice] of Islamic law. The minimum requirement of the notion of justice is the protection of human rights.<sup>108</sup>

## 2.7 SEPARATION OF POWERS IN WESTERN TRADITION

Western political discourse values human rights as an integral feature of democracy and constitutional governance. Because individuals are always weak against the might of the state, balancing state powers through the separation of powers increases the possibility of protection of the rights of the individuals. The doctrine appeared as a key feature of constitutional government in the seventeenth century. It was acclaimed as a necessary formulation to support and secure individual liberty. It was promoted as an alternative theory of constitutional governance to the fading system of governance comprised of Kings, Lords, and Commons. In the eighteenth century, the doctrine developed and broadened as a theory of balanced constitutionalism while interacting with other constitutional theories. Interaction with other doctrines of government and resulting concepts wove the fabric of political thought in England, France, and America. The theoretical potential of the doctrine of separation of powers was fully realized when its strands were tested in different places by the proponents of aristocracy and monarchy.<sup>109</sup>

Montesquieu has ingeniously explained the significance of the doctrine of separation of powers with reference to the protection of fundamental rights and

<sup>108</sup> See, Baderin Mashood, "International Human Rights and Islamic Law," (London: Oxford University Press, 2005).

<sup>109</sup> See, M.J.C. Vile, "Constitutionalism and the Separation of Powers," 2nd ed., (Indianapolis: Liberty Fund 1998); See, Gwyn, *Separation*, 127-28; William B. Gwyn, *The Separation of Powers and Modern Forms of Democratic Government*, in *Separation of Powers-Does it still work?* by Robert A. Goldwin and Art Kaufman eds., (Washington, DC: American Enterprise Institute for Policy Research 1986) 68-70; Gerard Carney, G. 'Separation of Powers in the Westminster System', *Australasian Study of Parliament Group, Parliament House, Brisbane* (1993), accessed May, 22, 2018, <http://www.parliament.qld.gov.au/aspg/papers/930913.pdf>; See, Resende, *Report*.

liberties. He explained the concept of liberty as a limit imposed by the law on an individual's freedom to act as he wants. While distinguishing liberty from independence, he informed that an individual can do only what the law permits. If an individual is allowed to do even what is forbidden by the law, there will be no liberty. In that case, he argued, his fellow citizens would also claim liberty without any restriction and ultimately it would lead to chaos in society.

He further argued that political liberty is not always available even in moderate or modern governments. Liberty can be secured only when it is not abused by those who hold state power. He states that human experience shows that whosoever has power abuses it to the maximum. In this context, he emphasized that even claims to virtue should have some limits.

With the human experience of abuse of power, Montesquieu proposed that power should be subject to another power. He specifically explained that life and liberty of citizens cannot be protected without separating the judicial power from other power centers of the government i.e., legislature and executive. Essentially, he argued that the judiciary must be independent from other branches of the government. He also suggested that the judiciary can use its power in a balanced manner when it is not joined with legislature and executive. He fears that judges may act as legislators if their power is mixed with the legislature. They may behave aggressively if they are given executive powers.

In fact, Montesquieu discusses the concept of political liberty, moderate government, and the separation of powers. He claims that political liberty is protected by all moderate or modern (law-bound) governments. To him, political liberty is not doing anything one wants as to his fancy and desires. Rather, he advocated liberty under the limits of law including the separation of powers. He considers that an excess of even the 'good' is not desired. He argues for the division of political power into different state organs or functionaries. He further condemns tyranny and recommends its punishment to protect the liberty of the citizens.<sup>110</sup>

Kairys David sketches the evolution of the doctrine of separation of powers in America. He draws our attention to political, social, and economic context for a proper

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<sup>110</sup> See, Montesquieu, "*The Spirit of the Laws*," trans. by A. Cohler, B. Miller & H. Stone. (Cambridge: University Press, 1989); Martin H. Redish and Matthew B. Arnould, "Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative," *Flare. La Review* Vol.46, no.6 (2012), 1485.



understanding of the doctrine there. He shares Montesquieu's view on the tyranny of political power and asserts that the doctrine was adopted in the US not to promote efficiency but to control the excesses of a democratic government. He states that the main reason leading the founding fathers to draft the constitution was growing concern over the excess and inconvenience of democracy.<sup>111</sup> This concern attracted the framers of the US constitution to look at the British model of mixed government. However, the framers divided the political power into three branches of the government, not amongst social classes and the monarchy. In the US, the features of mixed government were introduced through institutional checks and balances within state power. The feature of judicial review, the executive veto of legislation, and ratification of treaties by the Senate thus kept the government accountable and stable in the early years of the Nation. Kairys, arguing in my terms, states that the constitutional separation of powers ensured the protection of fundamental rights by restraining powers of each organ of the state.

James Madison notes that three branches of the government should be connected to give constitutional control to each other. He particularly cautions against encroachments by the legislature and the executive (*vis-à-vis* one another). He sums up that a mere description of the power of each branch in the constitution is not adequate to guard against institutional encroachment. While providing a solution to the above, he suggests that power must be met by counter-power.<sup>112</sup> This will ensure that the constitution is so designed that each branch keeps the others in their proper sphere.<sup>113</sup>

Alexander Hamilton stresses that the judiciary must be independent of other branches. He considers that the judiciary is the least dangerous branch and the weakest of the three branches, as it has no influence over the purse or the sword. He considers that judicial independence can be only secured through appointing independent and permanent judges so they could perform their duty without fear or favor *vis-à-vis* the other branches. He proposes limits on the legislative branch and sees the enforcement of these limits through the judiciary to uphold the constitution. He emphasized that only the judiciary as a mediator and custodian of the rights of the people could protect their rights against the excesses of a majority government.<sup>114</sup>

Thus, it may be contended that when the power of the judiciary was curtailed in

<sup>111</sup> See, Kairys David, "The Politics of Law A progressive Critique," 3<sup>rd</sup> ed. 1998. 591, 592.

<sup>112</sup> See, Paper No.51.

<sup>113</sup> See, Paper No.48.

<sup>114</sup> See, Paper No.78-79.

Pakistan undermining the constitutional separation of power, it weakened the judiciary, and thus fundamental rights of the people. Others argue that the judiciary has sometimes challenged the separation of powers by over-playing its role and slowing down the actualization of fundamental rights through political process. This study, therefore, would examine this argument from both the perspectives.

## **2.8 CONNECTION OF THE DOCTRINE OF SEPARATION OF POWERS WITH FUNDAMENTAL RIGHTS**

Islamic and Western traditions both envisage limits on the government. Political power in both traditions is divided into different branches to avoid the tyranny of the ruler or majority government. This division of power is, in fact, necessary and has significant nexus with the protection of the fundamental rights in Pakistan. For example, if the legislature makes any law that violates basic rights of the people, the judiciary can set it aside on the touchstone of the constitutional protection of these rights. If the executive violates the fundamental rights of citizens, the judiciary can use judicial review to restrain the executive. Likewise, if the judiciary overreaches its constitutional mandate, the other branches of the government can curtail such overreach by constitutional amendment. Thus, a distribution of power and checks and balances, in fact, promotes constitutionalism including fundamental rights. Because, in case an institution violates rights of the people, other institutions would react as a counter-power. This equilibrium and balance of state power allows citizens to enjoy their rights. Therefore, there exists a link between the separation of powers doctrine and the protection of fundamental rights. If power of the state remains undivided or concentrated on a single authority, the people may suffer from the tyranny of the state.

In Islam, people or representatives of the people exercise political power as a matter of sacred trust on behalf of God. For example, the Constitution of Pakistan, 1973, in its preamble envisages the representative character for the use of political power by the people as agents of God. Under an Islamic dispensation of government, the ruler and/or representatives of the people elected through a political process are, in fact, accountable to God-the ultimate sovereign. Thus, in Islam, the first limit on government power comes from the ultimate sovereign. This aspect of the political system seems to be spiritual rather than temporal. In *practice*, however, the sovereignty of God lies with the people and their elected representatives (as a matter of sacred trust) who are the ultimate check on the state. In modern Islamic states, the people can elect and reject their representatives or ruler through a regular electoral process.

Subject to the constitution, any law made by the ruler or the parliament being against the injunctions of Islam can be challenged before the FSC. However, a more direct and effective limitation on the ruler comes through the people who can change the ruler through the electoral process if he fails to provide and protect their fundamental rights, or Islamic injunctions, as provided under the constitution. The third limit comes when state power is divided into different branches. These constitutional limits on the government ensure that the rights of the people are duly protected.

This study mainly focuses on the separation of powers and its connection and impact on fundamental rights in Pakistan. So, the judicial review powers of the courts have been thoroughly examined to assess their connection and their impact vis-à-vis the constitutional separation of powers and the actual realization of fundamental rights.<sup>115</sup>

## 2.9 CONCLUSION

This chapter may be concluded with the following summary. According to Montesquieu, political liberty can be ensured through the division of political power into different branches of government. The legislature makes the law; the executive enacts the law, and the judiciary interprets the constitution and the law. The fundamental rights of the people can be better protected (against the tyranny of any one branch of the government) if each institution remains in its allotted domain of power.

In Western constitutional theory, checks and balances are provided to protect each branch of the government from the interference and encroachment by the other branches; that constitutional mechanism empowers the courts to review acts of other branches to ensure that, ultimately, *the people* (rather than any particular branch) have their power (i.e. their rights) protected in letter and spirit. M.J.C Vile provides a functional definition of separation of powers: each branch of the government performs a specific function without interfering with the functions of the other branches. Finally,

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<sup>115</sup> See, Mark Tushnet, "Taking the Constitution Away from the Courts," (Princeton University Press, 1999), 99-102, 154; Saikrishna B. Prakash and John C. Yoo, "The Origins of Judicial Review," *The University of Chicago Law Review*, Vol.70 (2003), 389; Martin H. Redish and Matthew B. Arnold, "Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative," *Flare. La Review* Vol.46, no.6 (2012), 1485; Jesse H. Choper, "Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court" (Chicago, 1980); Lino A. Graglia, "It's Not Constitutionalism, It's Judicial Activism," *Harvard Journal of Law and Public Policy*, 19 (1996) 296; Archibald Cox, "The Role of the Supreme Court: Judicial Activism or Self Restraint," *Maryland Law Review*, 47 (1987), 121-122; John Hart Ely, "Democracy and Distrust: A Theory of Judicial Review" (Cambridge MA: Harvard University Press), 1980.

each branch must be able to protect its power from the transgression of other branches through a constitutional mechanism.

Montesquieu, Kairys David, Alexander Hamilton, and James Madison further explained the Western thought on the separation of powers. Kairys discussed evolution of the doctrine in the US in the context of the tyranny of the government and a need for the division of power between different organs of the state. Hamilton stressed on the checks and balances of the constitutional powers of these state institutions. Madison emphasized the importance of the independence of the judiciary being a least dangerous branch of the government.

In an Islamic context, the division of general law-making and executive power (*siyasah*) lies with the ruler, the interpretation of religious rules (*ijtihad*) lies with the scholars, the adjudication with *Qazis*. In modern Islamic states, however, state power is divided between state institutions such as the executive, legislature, and judiciary with their prescribed constitutional boundaries.

In a traditional Islamic state, all rights are derived by religious scholars through interpretation (*ijtihad*) of the main sources of the law, that is, the *Quran* and the *Sunnah*. In modern Islamic democracies, the parliament is the law-making body; however, all laws should be in consonance with the *Quran* and the *Sunnah*.

Thus, both the traditional and modern notions of an Islamic state provide the division of power between the executive, the legislature, and the judiciary. In the state of Madina, the Prophet Muhammad (PBUH) was the chief executive of the Islamic state. However, in administrative affairs of the state, he always consulted his companions. The first four Caliphs of Islam were also used to consult with the tribal heads. This mechanism of consultation in the Islamic state of Madina confirms the separation of power or the existence of the executive and the legislature (consultative assembly or parliament in modern Islamic democracies). The Muslim scholars including Muhammad Asad and Sayyid Abul ala Maududi confirm the separation of state powers between different organs of the state. Muhammad Asad argued that in early Islamic state of Madina, tribal heads were consulted in the affairs of the state. He finds a strong executive in Islamic state and considers that Islamic model of state is closer to the presidential system in the US. Abul ala Maududi presents Islam as a complete code of life. He advocated for an Islamic and accountable democracy as in Islam all laws and orders are to be judged in the light of the *Quran* and the *Sunnah*.

In the sub-continent, the Muslim rulers largely occupied the state power.

However, the state power was divided amongst different functionaries of the state. In the British India, the state power was also distributed between the executive, the legislature, and the judiciary. The Govt of India Act, 1935, for example, conferred the executive power with the Governor-General. The Federal Legislature and the Federal Court was also created. Pakistan adopted constitutional norms from the British in 1947 and our forefathers were inspired from the written constitution of the US. Therefore, powers of the state were divided among different branches of the state.

The fundamental rights are provided under written constitutions and these rights draw upon both the modern conception of human rights reflected in international human rights conventions and Islamic notions of rights. In modern Islamic democracies, the separation of powers and human rights protection is interdependent, and the courts are mandated to exercise judicial review powers for the protection of these rights.

The fundamental rights exist in Islam. The Prophet Muhammad (PBUH) struggled for the protection of rights of the people. He emphasized the equality of humans and the protection of life and property, the rights of women and slaves etc. in his last speech. The *Quran* and the *Sunnah* provides for the protection of human rights such as the equality of mankind, the freedom of religion, the freedom of expression and consultation. The rights to life, privacy, and property are fully safeguarded.

The scholars like Donnelly argue that human rights originated and developed in the Western societies and they do not exist as such in Islam. A Muslim scholar, Mashood Baderin rebuts Donnelly's claim and contends that human rights are a common heritage of the mankind and their conception and progress cannot be attributed to a specific civilization or a legal system. He explores the origin of fundamental rights in the Islamic concept of *masalahah* (human benefit). He divides human benefit into 'indispensable' benefits (*daruriyyat*) consisting of protection of life, religion, intellect, family, and property; 'necessary' benefits (*hajiyyat*); and those rights which improve the overall quality of human life (*tahsiniyyat*). Pakistan's constitution provides a list of fundamental rights such as the right to life, right to freedom of religion, expression, movement and association, right to privacy, right to education, right to a fair trial, and right to property etc. which has been used for an analysis in the study.

In short, both Islamic and Western traditions accommodate the conception of separation of power and fundamental rights. The theoretical link between the constitutional doctrine of separation of powers and the protection of fundamental rights exists in both legal systems. While illuminating that crucial link, this chapter helps to

explore the hypothesis of the thesis: the challenge to implement the constitutional doctrine of separation of powers for the protection of fundamental rights in Pakistan due to complex institutional relationship between the three organs of the state.

The next chapter explores the evolution of the constitutional doctrine of separation of powers with reference to the protection of fundamental rights in Pakistan. It maps out the doctrine in the US, the UK, Australia, and India to provide a comparative understanding as to the application of the doctrine under the constitutions having comparable features with Pakistan's constitution.

## **CHAPTER THREE**

### **THE EVOLUTION AND CONSTITUTIONAL BASIS OF THE DOCTRINE OF SEPARATION OF POWERS**

#### **3.1 INTRODUCTION**

Chapter two discussed the concept of the doctrine of separation of powers and fundamental rights in the context of Western and Islamic states. It also examined the theoretical link between the separation of powers and fundamental rights.

This chapter will explore how the constitutional doctrine of separation of powers works in the US and the UK. The practice of the doctrine in these countries is further contextualized in the former British colonies of Australia and India. The chapter then traces the constitutional basis and practice of the doctrine as to the protection of fundamental rights in Pakistan. The application of the separation of powers regarding the protection of fundamental rights in the US, the UK, Australia, and India is briefly discussed as the doctrine evolved in the US and the UK and then experimented in the colonized states such as Australia, India, and Pakistan.

Pakistan follows constitutional norms of parliamentary democracy as developed in the UK. However, while framing the constitution, our forefathers adopted certain constitutional themes such as the separation of powers, judicial review, and the bill of rights from the written constitution of the US. Further, the features of Pakistan's constitution (with reference to the separation of powers and fundamental rights) can be compared with the constitutions of the above-mentioned countries, hence, a brief overview of the constitutional practice of the separation of power and fundamental rights in these countries is provided in this chapter. It provides useful insights to appreciate the application of the separation of powers doctrine in Pakistan. Moreover, this chapter reviews an institutional struggle of the executive, the legislature, and the judiciary as to the protection of their constitutional powers and its impact upon the state of fundamental rights in Pakistan. It explores the hypothesis of this study (i.e., the complex institutional relationship under the doctrine of separation of powers in Pakistan and its effect on the protection of fundamental rights) in the context of the constitutional history of Pakistan. Hence, important constitutional/political events and cases are discussed.

The constitutional doctrine of separation of powers envisages the division of political power amongst three branches of the government: the legislature, the executive, and the judiciary. The separation of powers is associated more commonly with presidential systems. The fusion of legislative and executive power is a feature of parliamentary government. The doctrine, however, is now considered to be an essence of any constitutional government. Pakistan adopted the principles of constitutional governance such as the separation of powers and fundamental rights from the US and the UK and incorporated the same in the 1956, the 1962 and the 1973 constitutions. The following part explores the evolution of the constitutional doctrine of separation of powers with reference to the protection of fundamental rights in the above-mentioned countries.

### **3.2 THE EVOLUTION OF THE DOCTRINE OF SEPARATION OF POWERS**

Despite distinctive features in different civilizations, the doctrine of separation of powers essentially promotes two concepts: First, it divides the state power between three organs of the state, i.e. judiciary, legislature, and executive.<sup>1</sup> Second, it provides checks and balances on the power of these three organs of the state.

Plato highlighted the importance of this doctrine for the protection of political liberty encompassing fundamental rights and as a check on political power.<sup>2</sup> Thereafter, the doctrine made inroads in different polities in the form of mixed government. In mixed governments, state power was divided between different limbs or branches of the government. The 17<sup>th</sup> century efforts in England flamed the Revolution of 1688 that led to debates regarding the division of state power. However, powers between the legislature and executive remained largely undivided and blurred.<sup>3</sup>

The origin of the modern conception of the doctrine is traced back to the publication of Montesquieu's work in 1748.<sup>4</sup> He illuminated this concept as the division

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<sup>1</sup> See, Malcolm P Sharp, "The Classical American Doctrine of The Separation of Powers," accessed November 7, 2014, <http://heinonline.org>

<sup>2</sup> See, Eric Dodson Greenberg, "Falsification as Functionalism: Creating A New Model of Separation of Powers," accessed November 6, 2014, <http://heinonline.org>

<sup>3</sup> See, Cheryl Saunders, "Separation of Powers and the Judicial Branch," "Good Hart Professor of Legal Science 2005-2006, University of Cambridge, accessed November 6, 2014, <http://heinonline.org>

<sup>4</sup> Ibid.,



of political power for the sake of securing individual freedoms and liberty.<sup>5</sup> He advocated for separate domains of power for each organ created under the constitution of the state.<sup>6</sup> He further emphasized that each organ should be able to serve as a check on the other organs.<sup>7</sup>

In the *Federalist Papers*<sup>8</sup>, James Madison promoted Montesquieu's argument in the US.<sup>9</sup> Madison essentially argued that a consolidation of political powers in any form whatsoever and by any source of election or selection promotes tyranny.<sup>10</sup> Alexander Hamilton, on the contrary, presented a different model of governance. He argued for a strong executive to save the rights of the people and establish a stable government. He believed that only a strong executive could save the polity from foreign aggression or internal disturbance and could provide effective administration, good governance, and justice.<sup>11</sup> In *Marbury v. Madison*, John Marshall settled this debate and held that any controversy as to the division of power would be decided by the courts in accordance with the US constitution.<sup>12</sup>

Now, the evolution of the doctrine of separation of powers is discussed in the specific context of the US, the UK, Australia, India, and Pakistan. The mapping out of the doctrine of separation of powers in these countries would help to conceptualize the doctrine in the constitutional scheme of Pakistan.

### 3.3 SEPARATION OF POWERS UNDER THE US CONSTITUTION

The *Federalist Papers* numbers 47, 48 and 51 discuss the doctrine of separation of powers. Madison argued that division of state power is a necessary ingredient and a requirement of the doctrine; however, *complete* separation of powers as such cannot be possible nor can it be an objective of any constitutional government.<sup>13</sup> While commenting on the constitutional systems of several states, Madison argued that there

<sup>5</sup> See, Norman Doe, "Separation and Sovereignty: Duplication in Constitutional Thought," accessed November 6, 2014, <http://heinonline.org>

<sup>6</sup> See, George Anhang, "Separation of Powers and the Rule of Law: on The Role of Judicial Restraint In "Securing the Blessings of Liberty," accessed November 6, 2014, <http://heinonline.org>

<sup>7</sup> Ibid., 231.

<sup>8</sup> See, Douglas G. Smith, "Separation of Powers and the Constitutional Text," accessed November 7, 2014, <http://heinonline.org>

<sup>9</sup> See, George Anhang, "Separation of Powers and the Rule of Law: on The Role of Judicial Restraint In "Securing the Blessings of Liberty," accessed November 6, 2014, <http://heinonline.org>

<sup>10</sup> See, Woll Peter, *Constitutional Law* (edition 1981, Prentice – Hall Inc. New Jersey USA), 102-3.

<sup>11</sup> Ibid.,

<sup>12</sup> See, *Marbury v. Madison*, 1803 2 L. ed., 60.

<sup>13</sup> See, Stanford Law Review, Considering "Power" in Separation of Powers Author(s): Samuel W. Cooper Reviewed work(s): Source: Stanford Law Review, Vol. 46, No. 2 (Jan., 1994), 361-400 Published by: Stanford Law Review Stable, accessed December 12, 2014 <http://www.jstor.org/stable/1229187>.

is not even a single state in which state powers are divided absolutely and distinctively.<sup>14</sup> Madison, in fact, stressed that a mixture and a balance of governmental power is the only way forward for any government under the written constitution.

Madison further argued that each organ should be independent and capable of safeguarding its powers from the encroachment of other branches. In other words, he proposed a strong system of checks and balances so that each organ not only checks other organs but also defends itself from the transgressions or interference of other organs.<sup>15</sup> The *Federalist Papers* and the US Constitution<sup>16</sup> do not provide for a watertight and clear demarcation of institutional power.<sup>17</sup> However, Articles I, II and III of the US Constitution define the sphere of power and functions of each branch i.e., the President, the Congress, and the US Supreme Court.

Article I provides that Congress (consisting of the House of Representatives and the Senate) shall have the power to make laws<sup>18</sup>; Article II states that the President shall have all executive powers<sup>19</sup>; Article III stipulates that the US Supreme Court and other subordinate courts will exercise judicial power.<sup>20</sup> A brief reading of these articles shows a structural and functional division of power between different state organs. Reading these articles together, also suggest system of checks and balances on state institutions.<sup>21</sup> For example, the President enjoys a veto power on laws made by Congress; Congress can impeach the US President (and overrule a presidential veto); the Supreme Court can invalidate the acts of the other two branches in exercising powers of judicial review. The legislature can undo the effect of the Supreme Court's

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<sup>14</sup> Ibid.,

<sup>15</sup> Ibid.,

<sup>16</sup> See, the US Constitution Accessed on October 25, 2019, <https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-6.pdf>

<sup>17</sup> See, "Charles Manga Fombad, The Separation of Powers and Constitutionalism in Africa: The Case of Botswana," *Boston College Third World Law Journal*, Volume 25 Issue 2 Article 2, January 5, 2005.

<sup>18</sup> Article I of the US Constitution: All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives [...].

<sup>19</sup> Article II of the US Constitution: The executive Power shall be vested in a President of the United States of America [...].

<sup>20</sup> Article III of the US Constitution: The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish [...].

<sup>21</sup> See, Charles Manga Fombad, "The Separation of Powers and Constitutionalism in Africa: The Case of Botswana," Volume 11|Issue 1 Article 4, the Political Origins of the New Constitutionalism Ran (Hirsch University of Toronto), January 1, (2004).

ruling through legislation. The executive has the power of appointing judges of the Supreme Court.

It may be argued that the US Constitution provides an indirect system of checks and balances.<sup>22</sup> A brief reading of the US Constitution reveals that though the separation of powers is envisaged, absolute separation of powers is not there. This conception, in fact, endorses Madison's views presented in the *Federalist Papers*.<sup>23</sup> Further, under the US Constitution, the abuse of state power is less likely as each institution serves as a counter check on the other institutions of the government.<sup>24</sup>

The system of checks and balances is further highlighted by the fact that Congress can overrule a veto made by the President by a two-thirds majority of both houses. However, Congress lacks the power to veto the executive actions of the President. Similarly, the US Supreme Court can review the legislation and invalidate acts of the executive. These features suggest that different state organs in the US work in an interdependent and coherent manner – the key feature and objective of constitutionalism.<sup>25</sup>

The judiciary has enormous power to 'say what the law is'.<sup>26</sup> The exercise of such judicial authority has generated heated debate in the US. In 2005, for example, the US SC invalidated 1987 sentencing legislation<sup>27</sup> that required serious mandatory sentences for Federal crimes on the ground that the statute was beyond Congress's legislative domain.<sup>28</sup> This decision challenged thousands of criminal sentences. However, the Court's command was obeyed by the legislature. In *United States v. Nixon*<sup>29</sup>, the Court ordered President Nixon to hand over tape recordings of his most intimate conversation with his advisors to a prosecutor despite his objections on ground

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<sup>22</sup> Ibid., 106-7.

<sup>23</sup> See, Victoria Nourse, "The Vertical Separation of Powers," *Duke Law Journal*, Vol. 49, No. 3 (Dec., 1999), 749-802.

<sup>24</sup> See, Hamid Khan, "Constitutional and Political History of Pakistan," (Karachi: Oxford University Press, 2009), 236.

<sup>25</sup> Ibid., 237.

<sup>26</sup> *Marbury v. Madison* (1803) 1 Cranch 137, 177: 'It is emphatically the province and duty of the judicial department to say what the law is'.

<sup>27</sup> See, the Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984).

<sup>28</sup> See, *United States v. Booker* (2005) 543 US 220.

<sup>29</sup> See, *United States v. Nixon* (1974) 418 US 683.

of executive privilege. It was a blunt ruling against a President who took expansive views of his executive powers. However, the President produced the tapes in less than two weeks after the decision. In *Brown v. Board of Education*<sup>30</sup>, the US SC prohibited racial discrimination in public schools raising ire of other branches of the government. In the overall analysis, however, the US SC has exercised its judicial review power in a balanced and reluctant manner.<sup>31</sup>

The 'power of purse' held by the legislature operates as an effective check on the judiciary. For example, the Congress can appropriate and decline funds to the judiciary. It can create and abolish courts and redefine the jurisdiction of the courts.<sup>32</sup> The other elected branch, the executive (a President or Governor) has significant check over the courts. The executive has the ability to influence direction and shape constitutional jurisprudence of the courts with his power to appoint judges.<sup>33</sup>

To each institution i.e., the executive, legislative, and judicial branches there is allotted a separate function to prevent an individual or an institution to control the state power absolutely. Now, the constitutional domain and function of the three key state organs in the US are discussed.

### 3.3.1 EXECUTIVE BRANCH OF THE GOVERNMENT

The President is the executive head of the US government and also commands the armed forces.<sup>34</sup> Congress can issue directions to the executive for carrying on the state functions as per the will of the people. However, the President can veto legislative proposals made by the Congress, though Congress can overrule the Presidential veto.<sup>35</sup> This interplay between the executive and the legislature defines a unique feature of checks and balances under the US Constitution.

The executive can nominate federal judges and heads of the federal executive

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<sup>30</sup> See, *Brown v. Board of Education of Topeka* (1954) 347 US 483

<sup>31</sup> See, JA Ferejohn & LD Kramer 'Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint' (2002) 77 *New York Univ LR* 962, 1037.

<sup>32</sup> See, 22 S. Afr. J. on Hum. Rts. 10 2006

<sup>33</sup> Ibid.,

<sup>34</sup> See, Michel Rosenfeld, "Executive Autonomy, Judicial Authority and The Rule of Law, Reflections on Constitutional, Interpretation and the Separation of Powers," accessed January 7, 2015, <http://heinonline.org>

<sup>35</sup> See, Louis J. Sirico, Jr, "How the Separation of Powers Doctrine Shaped the Executive," accessed January 7, 2015, <http://heinonline.org>

agencies in light of approvals offered by the Senate. The executive is also authorized to negotiate and sign international treaties, to forge international relations with other states, and to promote the national interests of the government.<sup>36</sup>

### **3.3.2 LEGISLATIVE BRANCH OF THE GOVERNMENT**

The Congress comprising the House of Representatives and the Senate constitutes the legislative branch of the state.<sup>37</sup> In the House of Representatives, fifty states of the US are given due representation based on the population of each state. Thus, states having a larger population have more seats in the lower house of Congress. The House of Representatives has four hundred and thirty-five seats. The term of the elected members of this house is two years after which they go for re-election. Only a US citizen of twenty-five years of age and a resident of a relevant state can contest the election for this house.

The Senate comprises one hundred total seats. Notwithstanding the population of states, each state can elect two Senators for six years each. After every two years, the terms of one-third Senators expire and new Senators are elected to fill the vacuum in the Senate. A Senator must be a US citizen for at least nine years and be thirty years old. They must also be a resident of the state they want to represent in Congress.

The Congress can make laws, overrule a veto made by the President, and ratify international conventions and treaties entered into by the executive.<sup>38</sup> The legislature can also initiate impeachment proceedings against the President.

### **3.3.3 JUDICIAL BRANCH OF THE GOVERNMENT**

The judicial branch is headed by the US Supreme Court. It can review and invalidate legislation passed by the Congress or acts performed by the executive branch of the US government.<sup>39</sup> It has the exclusive mandate to interpret the US constitution and all other laws. It can call for the production of documentary evidence or the personal appearance of any person including executive functionaries and members of the legislature.<sup>40</sup>

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<sup>36</sup> Ibid.,

<sup>37</sup> See, Doctrine Kieran Riley, "Trial by Legislature, "Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers," accessed January 5, 2015, <http://heinonline.org>

<sup>38</sup> See, Robert S. Barkert, "Constitutional Justice and the Separation of Powers, "The Case of Costa Rica" accessed January 7, 2015, <http://heinonline.org>

<sup>39</sup> See, Laura E. Little, "Envy and Jealousy: A Study of Separation of Powers and Judicial Review," accessed January 7, 2015, <http://heinonline.org>

<sup>40</sup> Ibid.,

Article III of the US Constitution envisages a hierarchical judiciary consisting of federal courts as well as district courts. Each court has a specified territorial and subject matter jurisdiction. The appellate courts generally review the decisions of the district courts. The President nominates the judges of federal courts, but the Senate can confirm or oppose such appointments. Congress can impeach the judges. Supreme Court judges are appointed for a lifetime as there is no retirement for them. They can continue serving until they feel fit and appropriate. They can be removed only by death or impeachment.<sup>41</sup>

### 3.3.4 CHECKS AND BALANCES IN THE US CONSTITUTION

The US Constitution envisages an effective check and balance in the government. This part explains this unique feature of checks and balances through examples.

The brief facts of the case are that Xavier Alvarez was elected as a Board director of a company. He told his fellow directors that he was awarded a prestigious military Medal. As a matter of fact, he neither served in the US Army nor was honored with any Medal. Making such lies became common to receive employment benefits. It compelled the legislature to make such lying an offense under the Stolen Valor Act of 2005 (the Act).

Alvarez claimed that the Act violates the right of his free speech protected under the first amendment of the constitution. The court declared that the Act places unreasonable restrictions on free speech, hence it was unconstitutional.<sup>42</sup> The court observed that such false statements cannot be considered serious as they neither defamed nor caused any threat to others requiring legal action. The court found that the Act was too broad and criminalized even harmless and otherwise constitutionally protected statements, thus, it could not be sustained.<sup>43</sup>

After the pronouncement of this decision, the executive established a database to investigate and record the actual extent of the issue of making false statements for securing military medals. Congress started working on the Act to amend it. The legislature then issued a reformed Stolen Valor Act of 2011 confining the scope of

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<sup>41</sup> See, Melissa A. Flynn, "Separation of Powers: Permissive Judicial Review or Invasion of Congressional Power?" *Zadvydas v. Davis*, 533 U.S. 678 (2001) accessed January 7, 2015, <http://heinonline.org>

<sup>42</sup> See, G. Alan Tarr, "Interpreting the Separation of Powers in State Constitutions," accessed January 5, 2015, <http://heinonline.org>

<sup>43</sup> See, Richard J. Pierce, Jr, "Separation of Powers and the Limits of Independence," accessed January 7, 2015, <http://heinonline.org>

criminal liability for making false statements which are harmful to others. It shows how the separation of powers and checks and balances operate under the constitutional scheme of the US ensuring the smooth functioning, stability and efficiency of the government.

### 3.4 SEPARATION OF POWERS IN THE UK

The separation of powers is a key principle of constitutionalism in presidential forms of governance such as the US.<sup>44</sup> In countries having a parliamentary system of government like the UK, the doctrine holds a less significant constitutional position. The legislative, executive, and judicial institutions in the UK, however, appreciate the balance and division of power in a rather nuanced manner.<sup>45</sup> This sense of balance is termed as 'fusion of power' in the UK.<sup>46</sup>

It is argued, however, that the sense of balance of power between different institutions of the state is increasingly translated in the UK as a division of powers in various policies of the government. Unlike the US, the legislature and executive are closely knit together<sup>47</sup> in the UK. The close nexus of these two institutions are, in fact, considered a secret of success in parliamentary forms of governments.

The doctrine of separation of powers is sometimes dismissed as irrelevant to analysis of the UK Constitution. However, the Constitutional Reform Act 2005 (CRA) has brought this doctrine in the limelight as the CRA has empowered the UK SC to declare as void any legislation incompatible with the European Human Rights Convention (ECHR). The doctrine has normative significance in the UK as it ensures judicial independence from legislative or executive control. Unlike the US, the judicial independence in the UK is guaranteed by statute and convention, rather than by the terms of a constitution.

Due to supremacy of the parliament in the UK, it retains power to revise a legislation in case the SC declares it incompatible with a Convention right. Thus, power

<sup>44</sup> See, Roger Masterman, "The Separation of Powers in the Contemporary Constitution Judicial Competence and Independence in the United Kingdom," Public Law, 2012, Reviewed by Eric Barendt, accessed December 09, 2013, Westlaw India.

<sup>45</sup> See, Angus Johnston and Eva Nanopoulos, "The New UK Supreme Court, The Separation of Powers and Anti-Terrorism Measures," The Cambridge Law Journal / Volume 69 / Issue 02 / July 2010, pp 217 – 220.

<sup>46</sup> See, Richard Benwell and Oonagh Gay, "The Separation of Powers," (House of Commons Library, 16 August 2016) accessed February 8, 2018, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06053>

<sup>47</sup> Ibid.,

of the judiciary is, thus, limited. The courts, however, have established the separation of judicial and executive functions. In the *Anderson* case, for example, three Law Lords explicitly referring to the separation principle held that the courts must determine the length of a prisoner's sentence, not Home Secretary.<sup>48</sup>

### 3.4.1 SEPARATION OF THE LEGISLATURE AND THE EXECUTIVE

The model of constitutional government of the UK offers a unique perspective on the institutional separation and balance of powers. The Prime Minister and his executive Cabinet come from the House of Commons. The executive is thus closely entangled with the legislature.<sup>49</sup> It is argued that the nexus of the executive and the legislature makes the government stable, efficient, and stronger. It promotes coherence, smoothness, and efficacy in formulating and implementing policies.<sup>50</sup> In such a government, the Prime Minister enjoys enough freedom and ability to act with confidence as he occupies a prominent role and position, being the head of the executive and a full member of the legislature.<sup>51</sup>

The executive functionaries of the government can exercise delegated powers to make rules, regulations, and issue orders and notifications to meet day to day requirements of effective governance. In fact, a strict separation of powers cannot be followed in any parliamentary democracy due to its mix of parliamentary and executive power. This combination of powers, however, does not dilute the power and responsibility of the legislature as the Prime Minister can be held liable for his executive actions before the members of the parliament.<sup>52</sup> In other words, the Prime Minister is bound to consult with cabinet members (which are members of the legislature) in the

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<sup>48</sup> *Anderson* [2002] UKHL 46, at [27] (Lord Bingham), [39]-[40] (Lord Steyn), and [76] (Lord Hutton).

<sup>49</sup> See, Neal Kumar Katyal, "Internal Separation of Powers," *The Yale Law Journal*, Vol. 115, No. 9, *The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law: A Symposium on Executive Power* (2006), pp. 2314-2349. Published by: The Yale Law Journal Company, Inc. Stable accessed <http://www.jstor.org/stable/20455698>

<sup>50</sup> See, Ronald J Krotoszynski, 'The separation of legislative and executive powers' in Tom Ginsburg, Rosalind. Dixon (Eds) *Comparative Constitutional Law*, Cheltenham: Edward Elgar, 2011, 248.

<sup>51</sup> See, "Democracy Promotion as Foreign Policy: Some Cautionary Reflections," *The Hague Journal of Diplomacy* 2 (2007), 101-125; David W. Lovell School of Humanities and Social Sciences, University of New South Wales, accessed November 8, 2014), <http://heinonline.org>

<sup>52</sup> See, Richard Benwell and Oonagh Gay, "The Separation of Powers," (House of Commons Library, 16 August 2016), accessed March 7, 2018, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06053>



executive policymaking and decisions. Thus, in a parliamentary form of government, the legislature enjoys enormous powers of law making and influence on the executive.

### **3.4.2 SEPARATION OF THE JUDICIARY AND THE LEGISLATURE**

The separation of power envisages a division of power between the judicial and legislative functions. This requirement is met by prohibiting judges to contest parliamentary elections.<sup>53</sup> The judges are required to establish the common law through their judgments (called precedents). Superior court judges are appointed on a permanent basis for their entire life. Their removal requires the approval of both houses of parliament. Lower court judges, however, can be removed from a job without such approval. The judges are also immune from any legal action with reference to their judicial acts.<sup>54</sup>

These features make the judiciary in the UK independent and strong, which is a hallmark of any constitutional government. This independence of judges encourages citizens to challenge acts of the executive that infringe on their basic legal rights. The judge's authority to review the legislative act of the parliament (and government) also raise a question of separation of power in the context of the UK that whether judicial opinions can effectively 'legislate' while reviewing acts of parliament.<sup>55</sup>

### **3.4.3 SEPARATION OF THE EXECUTIVE AND THE JUDICIARY**

The theory of separation of powers dictates separation between the executive and the judiciary as well. With reference to the actions of the executive, the judiciary is empowered to examine the vires of delegated legislation. Further, citizens can challenge executive acts or rules before the courts on the touchstone of constitutional or legal protection of their rights, and the judiciary can review these acts.<sup>56</sup> Therefore, the judiciary must be separate and independent from the executive enabling it to render impartial decisions.<sup>57</sup> The judiciary sometimes exercises judicial restraint vis-à-vis executive actions to promote a constitutional separation of powers.<sup>58</sup> The judiciary, for

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<sup>53</sup> The House of Commons (Disqualification) Act 1975.

<sup>54</sup> Ibid.,

<sup>55</sup> Ibid.,

<sup>56</sup> See, Judiciary of England and Wales, "Judicial review," accessed March 7, 2018, <http://www.judiciary.gov.uk/you-and-the-judiciary/judicialreview>

<sup>57</sup> See, D.M Davis, "The Relationship Between Courts and the other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What about Separation of Powers?" 2012 Volume 15 No 5 accessed <http://dx.doi.org/10.4314/pelj.v15i5.20>

<sup>58</sup> See, Richard J. Cummins, "The general principles of law, separation of powers and theories of judicial decision in France," *International & Comparative Law Quarterly*, 1986, accessed December 10, 2013, Westlaw India.

example, can refrain from examining the policymaking domain of the executive such as ratification of international treaties or defining standards of health or education. Such a balanced use of judicial power has strengthened democratic institutions in the UK, allowing the people to get their rights materialized through a political process but holding the government accountable for the poor protection of such rights.

### 3.5 SEPARATION OF POWERS IN AUSTRALIA

In Australia, the separation between different organs such as the judiciary, executive, and legislature exists. Specific state functions are to be performed by each institution. It ensures the running of constitutional democracy in a harmonious and efficient manner. Like the UK, Australia is a parliamentary democracy, hence in Australia state power is divided into the state organs in a mixed form such as that the legislature and the executive work in close cooperation with each other. So, there is no strict division or separation of state power in Australia.<sup>59</sup> Australia essentially follows the UK model of responsible government as featured in the Westminster system. The characteristics of responsible government are reflected in Articles 44, 62 and 64 of the Australian Constitution<sup>60</sup>.

The Australian Constitution provides separate chapters for each organ of the state. Chapter I provides for the Legislature. Chapter II deals with the Executive. Chapter III relates to the Judicature. A brief reading of these chapters shows that division of power in the Commonwealth was inspired by the constitutional ideas and concept of America and Britain as the Australian Constitution separates political power of the state within its organs.

#### 3.5.1 LEGISLATIVE AND EXECUTIVE POWERS

The Westminster model of democracy in Australia envisages checks and balances on political power of the state. The legislative and executive powers are nicely balanced without a strict division of power between these two institutions.<sup>61</sup> State ministers are chosen from the legislature and they are accountable before the parliament.<sup>62</sup> This feature of power-sharing between the legislature and executive, in fact, negates the strict separation of power between the state institutions, as

<sup>59</sup> See, *Hilton v. Wells*, 1985 HCA 16, (1985) 157 CLR 57, HC Australia.

<sup>60</sup> See, The Australian Constitution Accessed on 25 October 2019, [https://www.apf.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Constitution.aspx](https://www.apf.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution.aspx)

<sup>61</sup> See, Carney, G (1993). "Separation of Powers in the Westminster System," (PDF). ASPG (Qld Chapter). Retrieved March 8, 2017.

<sup>62</sup> See, Constitution (Cth.) s. 64 Ministers of State.

incorporated in the US Constitution.

The Australian Constitution provides another interesting feature as to the parliamentary membership of a state minister. Generally, a minister has to be a sitting member of the legislature. Sometimes, however, this rule is relaxed. In 1968, John Gorton was appointed as the Prime Minister of Australia when he was a member of the Senate. He resigned from the Senate to contest elections for the lower house. Instead, he continued working as the Prime minister until he was re-elected. In the *Victorian Stevedoring* case, the Australian High Court affirmed that with respect to executive and legislative powers, the separation of power theory cannot be strictly followed in Australia as it is perceived and applied in the US Constitution.<sup>63</sup>

Despite the fusion of executive and legislative powers, the Australian Constitution provides some mechanism to ensure that these two institutions remain independent from each other's influence. For example, Article 44 of the Constitution stipulates a disqualification criterion for the members of the parliament—that one cannot become a parliamentarian while holding an office of profit under the Crown or if a person is working with the Commonwealth under contract. In the *Sykes v. Cleary*, this disqualification principle was applied in 1992 when Phil Cleary won a seat in the parliament while being on leave from the Department of Education. The court held that Cleary cannot contest the election for the parliament while holding an office of the Crown. The court stressed on Article 44 to hold that it guarantees that the legislature remains independent from any kind of influence of the executive branch of the Commonwealth.<sup>64</sup>

It may be stressed that the executive's scrutiny and accountability in Australia are weak, because for strict political party discipline, members from the large political parties find full support for their actions from the lower house on the basis of their numerical strength in that house. This feature, however, is somehow balanced as the Senate can resist the executive by blocking legislative bills initiated by the majority political party or the government.

### **3.5.2 SEPARATION OF FEDERAL JUDICIAL POWER**

The independence and insulation of judicial power from the influence of other

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<sup>63</sup> See, *Victorian Stevedoring & General Contracting Co Pty Ltd v. Dignan*. 1931 HCA 34, (1931) 467 CLR 73, High Court (Australia), see also *Roche v. Kronheimer*, 1921 HCA 25, (1921) 29 CLR 329, HC Australia.

<sup>64</sup> See, *Sykes v. Cleary*, 1992 HCA 60, (1992) 176 CLR 77, HC Australia.

state organs is considered an essential feature of democracy and constitutionalism. The High Court of Australia observed that judicial independence is a fundamental feature of the Australian Constitution.<sup>65</sup> The court further held that the principle of judicial independence is applicable to all courts, tribunals, and authorities performing judicial functions in Australia.

Specifically, the court emphasized that the judiciary cannot share its powers with any other institution of the state as the independence of the judiciary is essential for any government under the written constitution like Australia.<sup>66</sup> This view was upheld in *Ebner v. Official Trustee in Bankruptcy* case with the observation that non-judicial functions are not compatible with the judicial functions of the courts. It further held that such a confusion of judicial power compromises and weakens the judicial independence.<sup>67</sup>

The High Court moved on to explain that courts can review the acts of the legislature when it assigns or delegates some legislative power to the executive or restricts the exercise of such power through new legislation.

In the *Boilermakers* case, the Court stressed that Chapter III of the Australian Constitution clearly confers judicial powers on the judicial branch. It means no other branch of the government can exercise judicial functions in any manner whatsoever.<sup>68</sup> Therefore, it may be argued that the separation of power in Australia promotes and protects judicial independence. It encourages other branches of the government to show deference to judicial power.<sup>69</sup> This doctrine of separation of power is conceived so that the government should not interfere with the constitutional domain and powers of the judiciary. At the same time, the doctrine of separation of power envisages that the judiciary should let other branches function in their respective fields of power.

In the *Drake's* case, the High Court reiterated that deference and reverence should be shown to the judiciary for its role in promoting constitutionalism.<sup>70</sup> But it is

<sup>65</sup> See, *New South Wales v. Commonwealth*, 1915, HCA 17, (1915) 20 CLR 54, HC Australia.

<sup>66</sup> See, *Kable v. Director of Public Prosecutions*, (NSW) 1996 HCA 24, (1996) 189 CLR 51, High Court (Australia).

<sup>67</sup> See, *Ebner v. Official Trustee in Bankruptcy*, 2000, HCA 63, (2000) 205 CLR 337, HC Australia.

<sup>68</sup> See, *Waterside Workers' Federation of Australia v. J W Alexander Ltd*, 1918, HCA 56, (1918) 25 CLR 434, HC Australia.

<sup>69</sup> See, Kenneth C. Cole, "Government," "Law," and the Separation of Powers, Source: *The American Political Science Review*, Vol. 33, No. 3 (Jun., 1939), 424-440 Published by: American Political Science Association Stable accessed <http://www.jstor.org/stable/1948796>

<sup>70</sup> See, *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*, 1979, AATA 179, (1979) 11 FLR 203, Administrative Appeals Tribunal Australia.

also expected that the judiciary would not substitute decisions made by the executive branch while reviewing the executive action.<sup>71</sup> Finally, in the *Grollo* case, it was held that non-judicial functions generally may not be assigned to the judiciary.<sup>72</sup> However, the court clarified, if such functions are not incompatible with the judicial functions, then the judiciary can perform these functions.<sup>73</sup>

In a nutshell, the doctrine of separation of power is provided under the constitution of Australia. The judiciary, in Australia, is largely immune from the influence of other branches of the government. However, the legislature and the executive function with mutual coordination, hence, the division of political power is less visible in the operations of these two branches of government in Australia.

### 3.6 SEPARATION OF POWERS IN INDIA

India follows a parliamentary form of government that conceives functional separation of powers amongst state institutions.<sup>74</sup> India's model of government, however, does not adhere to the strict notion of the separation of powers. The founding fathers of India envisaged a constitutional scheme under which the judiciary can review acts of other branches of the government.<sup>75</sup> India's Constitution<sup>76</sup> divides state power between the legislature (lead by the Prime Minister), the executive (headed by the President), and a federal as well as a state-level system of courts.<sup>77</sup>

The judiciary has the power to interpret the laws in India<sup>78</sup> and is independent from other branches of the government. The parliament can make laws. The executive power lies with the President constitutionally though under the constitutional scheme exercised in his behalf by the prime minister. The Indian Constitution further provides checks and balances on each organ of the state in order to maintain institutional balance of power.<sup>79</sup> Specifically, the President of India has the authority to disapprove a law

<sup>71</sup> See, *Associated Provincial Picture Houses Ltd v. Wednesbury Corp*, 1947, EWCA 1, [1948] 1 KB 223, Court of Appeal England and Wales.

<sup>72</sup> See, *Grollo v. Palmer*, 1995 HCA 26, (1995) 184 CLR 348, HC Australia.

<sup>73</sup> See, *Wainohu v. New South Wales*, 2011, HCA 24, (2011) 243 CLR 181, HC Australia.

<sup>74</sup> See, Lorand Bartels, "The separation of powers in the WTO: how to avoid judicial activism," *International & Comparative Law Quarterly*, 2004, accessed December 04, 2013, Westlaw India.

<sup>75</sup> See, Peter Gerangelos, "The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations," *Public Law*, 2010, Reviewed by Adam Shinar, accessed December 09, 2013, Westlaw India.

<sup>76</sup> See, India's Constitution Accessed on October 20, 2019, [https://www.india.gov.in/sites/upload\\_files/npi/files/coi\\_part\\_full.pdf](https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf)

<sup>77</sup> Separation of Powers in Constitution of India' (IASPOINT, 26 September 2016), accessed March 8, 2018, <https://academy.gktoday.in/article/separation-of-powers-in-Constitution-of-india/>

<sup>78</sup> See, Lorand Bartels, "The separation of powers in the WTO: how to avoid judicial activism," *International & Comparative Law Quarterly*, 2004, accessed December 04, 2013, Westlaw India.

<sup>79</sup> See, Jain, M.P., "Indian Constitutional Law," LexisNexis Butterworths Wadhwa Nagpur, (2010), 921.

government. The court said that, “Equality is a dynamic concept with many aspects and dimensions and it cannot be ‘cribbed, cabined and confined’ within traditional and doctrinaire limits. From a positivist point of view, equality is antithetical to arbitrariness. In fact, equality and arbitrariness are sworn enemies: one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch.” This wide interpretation of Articles 14 and 21 expanded the role of the judiciary in the protection of fundamental rights. Arguably, it disturbed the constitutional separation of powers between different branches of the government.

The following section discusses the evolution of the separation of power doctrine in Pakistan. The insights from the US, the UK, Australia, and India are used to compare the evolution and practice of the doctrine of separation of power with respect to the protection of fundamental rights in Pakistan.

### 3.7 SEPARATION OF POWERS IN PAKISTAN

The distribution of powers has always been an important and contested constitutional subject in Pakistan. This doctrine is not explicitly provided, but it is enshrined *implicitly* in the 1973 Constitution.<sup>96</sup> The question of separation of powers first emerged in 1956, when Moulvi Tamizuddin Khan challenged an executive action in the Federal Court on the ground that while dissolving the Constitutional Assembly, the executive, in fact, violated the separation of powers doctrine.<sup>97</sup> In the *Mehmood Khan Achakzai v. Federation of Pakistan* case<sup>98</sup>, the SC highlighted this debate by holding that any legislation could be declared null and void if it violates the essential features of the constitution. The debate went further in a few other important constitutional cases.<sup>99</sup> Since 2007, the debate came into public domain when Iftikhar Muhammad Chaudhry was removed from the Supreme Court through an executive action.

It demonstrates that the separation of powers debate has been a key issue in the political context of Pakistan. Though division of powers was implicitly provided under all of Pakistan’s constitutional arrangements, the state institutions have been struggling

<sup>96</sup> See, The Constitution Of Pakistan, 1973 Accessed on October 20, 2019, [http://www.na.gov.pk/uploads/documents/1333523681\\_951.pdf](http://www.na.gov.pk/uploads/documents/1333523681_951.pdf); Chapters III, IV, and VII of the 1973 Constitution.

<sup>97</sup> See, *Moulvi Tamizuddin Khan v. Federation of Pakistan*, PLD 1988 Sind HC 96.

<sup>98</sup> See, *Mehmood Khan Achakzai v. Federation of Pakistan* PLD1997 SC 416.

<sup>99</sup> See, *Baz Muhammad Khan v. Federation of Pakistan*, PLD 2012 SC 923; *Mubashar Hassan v. Federation of Pakistan*, PLD 2010 SC 265; *Nadeem Ahmed v. Federation of Pakistan*, PLD 2010 SC 1165; PLD 2008 SC 673; See, also Suo-Motu Case No.23 of 2012 AnitaTurab Case.

to secure and defend their respective powers.<sup>100</sup>

The constitutions of Pakistan, for instance, were frequently suspended or held in abeyance by the executive. Onslaught on the judiciary by the legislature and the executive have been a common feature of governance in Pakistan. However, this institutional conflict is not unique in Pakistan. Such institutional and constitutional struggle has also been prevalent in other countries such as India and the UK. The judiciary in these countries has also made efforts to shield its judicial power from other branches of the government to protect fundamental rights of the people. With this background, the status of the separation of powers and the fundamental rights is discussed under different constitutions of Pakistan.

### **3.7.1 THE INTERIM CONSTITUTION: ADAPTATION OF GOVERNMENT OF INDIA ACT, 1935**

An interim constitution was adopted in 1947.<sup>101</sup> This interim Constitution built on the Government of India Act 1935, which did not provide any specific protections for the rights of the people and failed to conspicuously extrapolate the demarcation between the organs of the state.<sup>102</sup> Those who drafted the Act, 1935, following the example of parliamentary sovereignty in Britain, did not think it appropriate to incorporate a bill of rights into the Act for the people of the sub-continent. Therefore, the anti-colonial freedom movement was heavily focused on the rights of the people.

Muhammad Ali Jinnah made a historic speech in which he charted out the future of constitutional democracy in Pakistan.<sup>103</sup> He clearly spelled out the aspirations of the people and emphasized the protection of basic rights for both the Muslim majority and any minority. He specifically stressed the right to life, property, equality, and religious freedom. He stated that all the citizens would be entitled to the protection of equal rights. While talking to a Reuter's correspondent in 1946, Jinnah said that Pakistan would be a modern democratic country and all powers will vest with the people.<sup>104</sup>

<sup>100</sup> The Government of India Act, 1935 was adopted as its interim constitution in Pakistan. The subsequent constitutions of 1956, 1962, and 1973 also envisaged a division of state power between the executive, judiciary, and legislature.

<sup>101</sup> The Government of India Act, 1935 with certain modifications, was adopted as the interim Constitution of Pakistan, under Section 8 of the Indian Independence Act, 1947.

<sup>102</sup> See, Kenneth C. Cole, "Government Law and the Separation of Powers," Source: *The American Political Science Review*, Vol. 33, No. 3 (Jun., 1939), 424-440 Published by: American Political Science Association Stable accessed <http://www.jstor.org/stable/1948796>

<sup>103</sup> Muhammad Ali Jinnah, made this speech on 11 August 1947, as a president of the first Constituent Assembly.

<sup>104</sup> Quoted by Muhammad Munir, *From Jinnah to Zia*, Vanguard Books Ltd., Lahore, 1980, p.29.

Under the 1935 Act, the Governor-General had lots of discretionary powers as he was a representative of the Crown in British India. However, his discretion was subsequently curtailed.<sup>105</sup> From 14 August 1947, all powers of the dominion government were conferred on the Cabinet. This was a significant departure from the executive rule to a democratic dispensation in a newly born country as the Constituent Assembly (the Assembly) could hold the Cabinet accountable for any executive act.

In his first Constituent/National Assembly speech, Jinnah clarified that the Assembly would be responsible for framing the Constitution of Pakistan and would also work as the federal legislature.<sup>106</sup> Being a sovereign legislative body, the Assembly had vast legislative powers.<sup>107</sup> As the Assembly was established to frame a new constitution, it had to perform a huge task. The constitutional structure including the separation of powers between different state institutions and the protection of rights of the people were two important issues before the Assembly. So, it constituted various committees for the proper assistance and support of its functions. Two committees, namely, the Basic Principles Committee and the Fundamental Rights Committee were the most important as they were assigned to provide the structure of the future constitution.

The Governor-General and his provincial Governors were empowered to make laws through an ordinance in emergency. An edifice of justice was constructed.<sup>108</sup> The Governor-General was authorized to appoint the judges of the Federal Court and the High Courts. These courts were empowered with jurisdiction to issue writs to government institutions and functionaries.<sup>109</sup>

A special committee constituted to discuss and provide a proposal regarding how to cater to fundamental rights and minority issues in the newly established state presented its report in 1956, which was accepted by the Constituent Assembly. On the basis of this report, fundamental rights were explicitly incorporated in the first

<sup>105</sup> See, [http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga\\_19470030\\_en.pdf](http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdf); Accessed on October 20, 2019, Section 8 (c) of the Indian Independence Act, 1947.

<sup>106</sup> See, Sections 18 and 19, of the Government of India Act, 1935.

<sup>107</sup> It could amend the Act, 1935, and the Independence Act, 1947. Further, any law made by the British Parliament to be extended to Pakistan required domestic legislation by the Assembly.

<sup>108</sup> See, Section 212, of the Government of India Act, 1935: Under the interim constitution, Federal Court and two High Courts (the Dhaka High Court for East Bengal and Lahore High Court for Punjab) were established. In addition to these courts, Court of Judicial Commissioner for NWFP and the Chief Court of Sindh in Karachi continued working. The decision of these courts was binding on subordinate courts in Pakistan.

<sup>109</sup> See, Section 223A of the Government of India Act, 1935.



Constitution of Pakistan, 1956.

### 3.7.2 THE OBJECTIVES RESOLUTION 1949 AND SUBSEQUENT DEVELOPMENTS

The Objectives Resolution, 1949 outlines the basic features of the constitution.<sup>110</sup> It was a foundational stone on which the superstructure of the future constitution was to be built. It stated that exercise of political power would be made by the people through their representatives in the legislature. It assured that the judiciary would be independent and minorities' rights would be protected through a strong judiciary.<sup>111</sup>

The Objectives Resolution was debated and hotly contested by non-Muslim minorities and the Muslim majority in the Constituent Assembly. Mian Mohammad Iftikharuddin, for example, argued that the Objectives Resolution should represent the aspirations of the people in a most progressive, democratic, and dynamic manner. He stressed that it should contain all those principles making Pakistan a real democracy.<sup>112</sup> He expressed his high hopes that the first constitution of the country would provide a democratic government blended with an Islamic conception of governance and social justice.<sup>113</sup>

Chaudhry Mohammad Zafarullah Khan (belonging to a community later deemed 'non-Muslim') highlighted that the Preamble of the first Constitution provided that God was the ultimate Ruler in an Islamic State. He promoted a concept of Islamic democracy that aims to achieve the welfare of the people.<sup>114</sup>

One of the most important committees was the Basic Principles Committee and its three sub-committees. On 22<sup>nd</sup> December 1952<sup>115</sup>, the Committee presented a report to the Constituent Assembly according to which Objectives Resolution was to be considered as the origin of the Constitution. The structure of the federal legislature was

<sup>110</sup> The Constituent Assembly of Pakistan Debates, Volume V-1949, 2-7: The objectives resolution was moved by Liaquat Ali Khan and was passed by the Constituent Assembly on 12 March 1949.

<sup>111</sup> See, William Seal, *The Separation of Powers in the Eighteenth Century*: Carpenter Source: *The American Political Science Review*, Vol. 22, No. 1 (Feb., 1928), 32-44 Published by: American Political Science Association Stable accessed <http://www.jstor.org/stable/1945058>

<sup>112</sup> See, James A. Gardner, "Democracy without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on undemocratic behavior," accessed November 7, 2014, <http://heinonline.org>

<sup>113</sup> Ibid., 54-55.

<sup>114</sup> See, Hamid Khan, "Constitutional and Political History of Pakistan," (Karachi: Oxford University Press, 2009), 61-62.

<sup>115</sup> See, G.W. Choudhry, *Constitutional Developments in Pakistan*, Longman Group Ltd., London, (1969), 73.

based on two houses of parliament. Judicial powers were assigned to the judicial branch of the government.<sup>116</sup> The objectives resolution illustrated the features of separation of powers as it provided for the (executive) government and the legislature shall act as representative of the people. At the same time, it envisaged the protection of fundamental rights through an independent judiciary.

After the Constituent Assembly settled (almost) all the key issues regarding the first Constitution, the Governor-General Ghulam Muhammad declared the Constituent Assembly *sine die*. He declared an emergency and constitutional breakdown in the country on the ground of the failure of the Constituent Assembly to draft the first Constitution.<sup>117</sup> The Governor-General gave instructions for the formation of a Cabinet.<sup>118</sup> This was the beginning of the end for legislative supremacy in Pakistan. However, the burden of the constitutional controversy was shifted to the courts.

Moulvi Tamizuddin Khan challenged the emergency proclamation that dissolved the Constituent Assembly.<sup>119</sup> The petitioner contended that the Governor-General could not dissolve the Constituent Assembly. The Sindh High Court accepted this argument and rejected the claim of the federal government. The argument of the government was that the courts could not issue such writs under the law<sup>120</sup> without the assent of the Governor-General. The Court held that such consent was not required under the law. The Court further held that the Constituent Assembly could not be dissolved by the Governor-General.<sup>121</sup> The government challenged this judgment. The Federal Court accepted the appeal of the government on the technical ground that until a new constitution was formally promulgated the Government of India Act, 1935, required the Governor General's assent, as a representative of the Crown, and without such consent (i.e. under an invalid Act) no powers of issuing writs could have been conferred on the courts.

The Governor-General took full advantage of this judgment and issued Emergency Power Ordinance IX of 1955 (the Ordinance). This Ordinance granted unfettered powers to the Governor-General with respect to creating a new Constitution and validating or rejecting any law made by the Constituent Assembly.

<sup>116</sup> Para 161-163 Chapter I Part X Safdar Mahmood, *Constitutional Foundations of Pakistan*, 1990, Jang Publishers, Lahore.

<sup>117</sup> See, Hamid Khan, "Constitutional and Political History of Pakistan," (Oxford, 2017), 81.

<sup>118</sup> The chief of the Pakistan army was included in this cabinet as the Minister of Defence.

<sup>119</sup> See, *Moulvi Tamizuddin Khan v. Federation of Pakistan*, PLD 1955 Sindh 96.

<sup>120</sup> Section 223-A of the Government of India Act, 1935.

<sup>121</sup> *Ibid.*,

This Ordinance, however, was challenged in the *Usif Patel* case.<sup>122</sup> It was contended that the Governor-General could not authorize himself through an ordinance to make constitutional provisions. The Federal Court set-aside the Ordinance. It created a perplexing situation. The existing laws could not be validated via ordinance, but nor could they be validated in the absence of a legislature. Faced with this constitutional crisis, the Governor-General sought the opinion of the Court on how to validate existing laws unless a federal legislature was constituted. The Federal Court, once again, validated the promulgation of the Emergency Powers Ordinance, 1955 *and* the validation of laws listed in its schedule.<sup>123</sup>

While criticizing the Federal Court judgments, Hamid Khan argued that these judgments caused serious harm in terms of the constitutional progress of the country.<sup>124</sup> It may be argued that ignoring the executive onslaught on other institutions by the judiciary damaged the separation of powers and fundamental rights of the people. Despite these challenges, the second Constituent Assembly succeeded to produce a draft which was adopted as the first Constitution of Pakistan, 1956.

### 3.7.3 THE 1956 CONSTITUTION

On 23<sup>rd</sup> March 1956, Pakistan's first constitution was implemented.<sup>125</sup> The constitution provided for a federal form of government, fundamental rights, and an independent judiciary. The constitution further stated that a law not in consistent with fundamental rights would be void.<sup>126</sup> The courts were empowered to enforce these rights. Thus, a concept of limited government was established giving the power to the judiciary to check the actions of the executive and the legislature.<sup>127</sup> The independence and separation of the judiciary from the executive also envisaged so that both the institutions could work within their constitutional domain.<sup>128</sup>

The first and the second Constituent Assembly had shown their inclination towards a parliamentary government. Before the commencement of the Second Assembly, there were various scenarios that illustrated the authoritarian behavior of the

<sup>122</sup> See, *Usif Patel v. The Crown*, PLD 1955 FC 387.

<sup>123</sup> See, *Reference by Governor General v. Reference by Governor General*, PLD 1955 FC 435.

<sup>124</sup> Hamid Khan, "Constitutional and Political History of Pakistan" (Oxford University Press, 2017), 89.

<sup>125</sup> See, The 1956 Constitution of Pakistan Accessed on October 20, 2019, <http://www.na.gov.pk/publications/constitution.pdf>

<sup>126</sup> See, Article 29, of the Constitution, 1956.

<sup>127</sup> See, A. K. Brohi, "Fundamental Law of Pakistan," (Karachi: Din Muhammad Press, 1958), 309.

<sup>128</sup> Part IX of the Constitution, 1956.

executive. So, the second Constituent Assembly addressed the misuse of executive power and made the Cabinet responsible to the legislature.<sup>129</sup> Some aspired for a pure Islamic state where the executive was more powerful and a repository of administrative, judicial, and legislative powers.<sup>130</sup> However, this argument was repelled by the second Constituent Assembly.<sup>131</sup>

The constitution conferred executive authority on the President. However, he was to act as per the advice of the Prime Minister.<sup>132</sup> The Prime Minister being head of the Cabinet of ministers was required to provide all the information regarding the Cabinet decisions to the President. The legislature could impeach the President on grounds of gross misconduct.<sup>133</sup>

The President was authorized to dismiss the Prime Minister and dissolve the National Assembly. It meant that the Prime Minister could be removed on the subjective discretion of the President. However, two safeguards provided against arbitrary dissolution of the National Assembly. First, in case of dissolution, the President also had to leave the office and fresh elections were to be held for both the office of the President and the National Assembly. Second, in case of impeachment proceedings against the President, he could not have dissolved the National Assembly.

The President was to perform certain legislative functions. For example, he could either grant or withhold assent to bills presented by the National Assembly and could further send bills for a recommendation; however, he was obliged to give his consent in case the majority in the Assembly passed the Bill again.<sup>134</sup> He could also legislate through ordinance.<sup>135</sup>

Another significant feature of the 1956 constitution was a federal system of government and a unicameral system.<sup>136</sup> Generally, the federal system has a bicameral system. However, in the early years of Pakistan, there was a sharp difference as to the number of seats in the federal legislature. In order to satisfy both wings of the country

<sup>129</sup> See, Hamid Khan, "Constitutional and Political History of Pakistan," (Karachi: Oxford University Press, 2009), 101.

<sup>130</sup> Ibid., 100.

<sup>131</sup> See, G.W. Choudhry, "Constitutional Developments in Pakistan," (London: Longman Group Ltd., 1969), 73.

<sup>132</sup> See, Article 39, of the Constitution, 1956.

<sup>133</sup> Article 35, Ibid.

<sup>134</sup> See, Hamid Khan, "Constitutional and Political History of Pakistan," (Karachi: Oxford University Press, 2009), 101, 102.

<sup>135</sup> Article 69, of the Constitution, 1956.

<sup>136</sup> Article 43, Ibid.

(where the East held a demographic majority), it was thought appropriate to provide equal representation in the federal legislature.<sup>137</sup> The same unicameral system was adopted in two provinces. The provincial government structure was exactly the same as that at the federal level.<sup>138</sup>

The constitution ensured that the judiciary would remain independent. The Supreme Court was made the highest court, and it assumed the responsibilities of the Federal Court as described in the interim constitution. It was empowered to adjudicate any dispute and could interpret the constitution.<sup>139</sup> Decisions of the SC were binding on other branches of the government.<sup>140</sup> Writ jurisdiction was also retained.<sup>141</sup> Judges could be removed on the grounds of misconduct by the President, following a speech in the National Assembly.<sup>142</sup>

The above shows that specified powers of each organ of the state were envisaged in the 1956 Constitution. The emphasis on fundamental rights demonstrates the features of a limited government in which the judicial branch protects these rights against transgressions by the government.

General Iskandar Mirza became President when the 1956 Constitution was adopted. On his failure to handle the politico-economic crisis, he declared Martial law and the 1956 Constitution was buried in its inception.<sup>143</sup> The declaration of Martial law created a constitutional crisis. Therefore, General Ayub issued the LCFO, 1958, creating a new legal order.<sup>144</sup> This order was challenged in the *State v. Dosso*.<sup>145</sup> The court observed that according to international law, victorious revolutions are widely recognized for changing governments. The court held that such a revolution creates a new legal order and it becomes the basis to judge the legality of any act of the executive and the validity of any decision of the courts. It may be argued that Dosso's case, again,

<sup>137</sup> See, Hamid Khan, "Constitutional and Political History of Pakistan," (Karachi: Oxford University Press, 2009), 105.

<sup>138</sup> Article 106 of the 1956 Constitution.

<sup>139</sup> Article 156, Ibid.

<sup>140</sup> Article 163, Ibid.

<sup>141</sup> Article 22, Ibid.

<sup>142</sup> One-third of the total members were to approve the removal of judges.

<sup>143</sup> The martial law was declared on 8 October 1958; After the declaration of Martial law, both the assemblies were dismissed and the Prime Minister and his Cabinet were put under house arrest. Ayub Khan was appointed as the Chief Martial law Administrator of the country. A power struggle started between Mirza and Ayub, which ultimately led to the arrest of Iskandar, Mirza. Ayub sent him into exile and took exclusive control of the state.

<sup>144</sup> Laws (Continuance in Force) Order on 10 October 1958; The Order stated that the government shall be governed in accordance with the late constitution

<sup>145</sup> See, *The State v. Dosso*, PLD 1958 SC 533.

derailed Pakistan from the path of constitutionalism.

Ayub got himself elected as a President through a so-called referendum. The Constitution Commission produced a report in 1961 for the future constitution of Pakistan. It proposed provisions regarding fundamental rights, a bicameral legislature and judicial independence.<sup>146</sup> While ignoring the recommendations of the report, Ayub decided to construct a presidential government with highly centralized powers. It again damaged the separation of powers and the fundamental rights in Pakistan.

### 3.7.4 THE 1962 CONSTITUTION

The 1962 Constitution was focused on a strong executive.<sup>147</sup> The President was given extensive powers. Ayub argued that the presidential system is compatible with Pakistan's history and will bring more stability in the country.<sup>148</sup> He further stated that this system is preferred for the reason that it is suitable for a country which has got freedom from a colonial system and is aiming for socio-economic reforms and development. The direct mandate of the president from the people would help to create harmony and unity in the nation.<sup>149</sup> However, this argument undermines the proposals of the first and the second Constituent Assemblies. Obviously, Muhammad Ali Jinnah, the founding father of the country, had categorically stated that in Pakistan, the *people* will have *actual* political power. The same aspiration was spelled out in the Objectives Resolution, 1949, that served as a preamble of the 1956 Constitution.

Under the 1962 Constitution, the President was to exercise his authority under the constitution.<sup>150</sup> However, the Constitution conferred unfettered powers on the President. He was responsible for regulating the business of the central government; had the power to carry out the administration of laws and conduct the foreign affairs; held military and legislative powers i.e. making laws through ordinance. The 1962 constitution empowered the President to exercise his powers independently. The ministers were only supposed to assist him and he was not bound by their advice. The ministers were also not made accountable to the legislature.<sup>151</sup>

<sup>146</sup> See, G.W. Choudhry, "Constitutional Developments in Pakistan," (London: Longman Group Ltd., 1969), 150.

<sup>147</sup> See, the 1962 Constitution of Pakistan Accessed on October 20, 2019, [http://www.na.gov.pk/uploads/documents/1308922472\\_189.pdf](http://www.na.gov.pk/uploads/documents/1308922472_189.pdf)

<sup>148</sup> Speeches and Statements of F.M Mohammad Ayub Khan, Volume IV, P.170.

<sup>149</sup> See, G.W. Choudhry, "Constitutional Development in Pakistan," (London: Longman Group Ltd., 1969), 190.

<sup>150</sup> Article 9, Ibid.

<sup>151</sup> See, Hamid Khan, "The Constitutional and Political History of Pakistan," (Third edition, Oxford, 2017), 141.

The President had a legislative role without being a substantial part of the legislature.<sup>152</sup> He could also dissolve the National Assembly. He could promulgate the ordinance in case of internal and external emergency. It gave a sweeping law-making power in the hands of the executive because he could declare an emergency as and when he wanted without an effective check from the judiciary. It may be argued that making the laws at the subjective discretion of the executive violates the doctrine of separation of powers as law-making is the exclusive domain of legislature.

The 1962 Constitution proposed a unicameral system.<sup>153</sup> At the central level, the legislature was composed of the President and one house, namely, the National Assembly. It was the highest legislative body and no law could be made or take effect without the approval of the legislature.

Through the first amendment to the 1962 Constitution, the judiciary was given judicial review powers to examine acts of other branches of the government.<sup>154</sup> The security of tenure for judges was granted and the Supreme Judicial Council (a body of judges) was created under the 1962 Constitution.<sup>155</sup> It was a major shift. In the past, the President could have removed superior court judges after seeking the National Assembly approval. The 1962 Constitution provided fundamental rights provisions on the pattern of the 1956 Constitution. The superior court was given jurisdiction to enforce the fundamental rights.<sup>156</sup>

Although the fundamental rights were provided<sup>157</sup> and the courts were made independent, but ground realities did not change. It compelled political parties to agitate against Ayub's regime.<sup>158</sup> The government criminalized political activities against the government.<sup>159</sup> In the *Abul Ala Maududi v. Government of West Pakistan* case<sup>160</sup>, arrests caused by the government were challenged and the court stated criminalizing political activities is unlawful and unconstitutional. The court stressed that such an action of the

<sup>152</sup> See, Articles 19 and 22 of the Constitution, 1962. The President and the speaker of the National Assembly both could summon and prorogue the National Assembly. However, when the speaker had summoned the legislature then only, he was entitled to prorogue it.

<sup>153</sup> See, Article 19, of the Constitution, 1962.

<sup>154</sup> Constitution (First Amendment) Act, 1963, Act I of 1964 PLD 1964 Central Statutes 33.

<sup>155</sup> Article 128, Ibid.

<sup>156</sup> See, Hamid Khan, "The Constitutional and Political History of Pakistan," (Third edition, Oxford, 2017), 149.

<sup>157</sup> Constitution (First Amendment) Act, 1963 Act I of 1964 PLD 1964 Central Statutes 33.

<sup>158</sup> See, Herbert Feldman, "From Crisis to Crisis," (London: Oxford University Press, 1962-1969, 1972), 4-63.

<sup>159</sup> The Criminal Law Amendment Act, 1908 as amended by Ordinance XXI of 1960.

<sup>160</sup> See, *Abul Ala Maudoodi v. Government of West Pakistan*, PLD 1964 SC 673.

government violates the fundamental right of freedom of association.

However, after acquiring political power in so-called national elections held in 1965, Ayub attempted to reverse the impact of the *Abul Ala Maududi* case. He made another amendment which empowered him not only to suspend various fundamental rights but also to suspend the right of the citizens to approach the courts for the enforcement of these rights.<sup>161</sup> It allowed the executive to act with impunity on its fancy will and discretion. Such a draconian law created unrest in the country. To control political chaos the government arrested a large number of political leaders and students.

These arrests were challenged in the *Malik Ghulam Jilani v. The Government of West Pakistan*.<sup>162</sup> The court held that to satisfy the allegation of the detaining authority against the detenus the allegation must be based on reasonable grounds and objective criteria. The court asserted, that all orders of the executive authorities regarding preventive detentions were open to judicial review. This case shows the power play between different organs of the state. It shows how the separation of powers doctrine construed and applied in Pakistan and how it helped to protect rights of the people.<sup>163</sup>

Ayub badly failed to control unrest in the country and was made to resign on 25 March 1969. General Yahya Khan issued a PCO, 1969<sup>164</sup> to govern the state.<sup>165</sup> The state of Pakistan, once again, left at the sweat will of the martial law administrator. To remove all possibilities of challenge of PCO, 1969, before the courts, Yahya curtailed jurisdiction of the courts to the effect that any martial order, regulations, or decisions made by military courts or martial authorities shall be final and would not be subject to challenge before any other court.<sup>166</sup> Yahya announced the LFO 1970 to outline the basic features of the Constitution to be framed in the future that included a section on fundamental rights, the independence of judiciary, federalism, and legislature.<sup>167</sup> He also tried to control political unrest in the country but failed. This crisis led to the fall of Dhaka in 1971.<sup>168</sup>

<sup>161</sup> Constitution (Fifth Amendment) Act, 1965, Act XVII of 1965. PLD 1966 Central Statutes 76.

<sup>162</sup> See, *Malik Ghulam Jilani v. The Government of West Pakistan*, PLD 1967 SC 373.

<sup>163</sup> See, Thomas Sargentich, "The Contemporary Debate About Legislative-Executive Separation of Powers," accessed November 7, 2014, <http://heinonline.org>

<sup>164</sup> Provisional Constitutional Order, 1969.

<sup>165</sup> This Order stated that notwithstanding the 1962 Constitution stands abrogated, the state shall be governed, *as nearly as possible*, in accordance with that Constitution.

<sup>166</sup> Jurisdiction of Courts (Removal of Doubts) Order, 1969.

<sup>167</sup> The Legal Framework Order, 1970, was issued on 28 March 1970.

<sup>168</sup> General Niazi and General Jagit Singh signed the instrument of surrender on December, 16, 1971.



Yahya was made to resign and Bhutto took over the government. The martial law terminated and the Interim Constitution of 1972 was adopted by the National Assembly. The fundamental rights, a unicameral legislature, presidential system of government and judicature was provided under the interim constitution. Bhutto promised to make a new constitution of the country and appointed a constitution committee to make proposals.<sup>169</sup>

### 3.7.5 THE 1973 CONSTITUTION

The 1973 Constitution is hailed as a major success of the political parties in Pakistan because it was passed with a broad political consensus.<sup>170</sup> The essential features of the Constitution include, the principles of policy<sup>171</sup>, fundamental rights<sup>172</sup>, federalism<sup>173</sup>, judicature<sup>174</sup>, and the separation of powers between different organs of the state.

To provide a stable government, the Constitution strengthened the position of the Prime Minister making him the Chief Executive.<sup>175</sup> The office of the President was made ceremonial as the executive power was to be exercised by the Prime Minister and the Cabinet.<sup>176</sup> The removal of the Prime Minister through no-confidence vote was made difficult.<sup>177</sup> The Prime Minister and his ministers were collectively accountable to the parliament.<sup>178</sup> The veto power of the President was effectively curtailed as was to give assent to a bill within seven days, otherwise, it would become law.<sup>179</sup> The advice of the Prime Minister was made binding on the President.<sup>180</sup> An electoral college of the parliamentary members would elect the President.<sup>181</sup> He could hold office for two consecutive terms only.<sup>182</sup> He was further made bound to the Prime Ministers' advice

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<sup>169</sup> The Constitution Committee comprised of twenty-five members of the National Assembly. On the recommendations of this committee, on 30 December 1972, Bhutto government moved a Constitutional Bill in the National Assembly which was approved by a large consensus on 10 April 1973.

<sup>170</sup> The Constitution of 1973 came into force on 14 August 1973.

<sup>171</sup> See, Article 8-40, of the Constitution 1973.

<sup>172</sup> Article 8-28, of the Constitution 1973.

<sup>173</sup> Article 41-100. Ibid.

<sup>174</sup> Article 175-212B, Ibid.

<sup>175</sup> See, Article 90 (1), of the Constitution, 1973.

<sup>176</sup> Article 90, Ibid.

<sup>177</sup> Article 96, Ibid.

<sup>178</sup> Article 90, Ibid.

<sup>179</sup> Article 75, Ibid.

<sup>180</sup> Article 48, Ibid.

<sup>181</sup> Article 41, Ibid.

<sup>182</sup> Article 44, Ibid.

for the dissolution of the National assembly.<sup>183</sup>

The fundamental rights of the citizens were given paramount importance. All democratic freedoms and rights such as freedom of speech, assembly, and association and civil rights including the right to life, religion, property were incorporated in the Constitution.<sup>184</sup> The Constitution stated that all laws inconsistent with fundamental rights were to be rendered void.<sup>185</sup> Furthermore, the superior courts were empowered to issue directives and writs for the enforcement of the fundamental rights.<sup>186</sup> However, certain fundamental rights could be suspended by the President during an emergency in the country.<sup>187</sup>

Departing from the 1956 and the 1962 constitutions, a bicameral system was provided under the 1973 Constitution. Two particular aspects, distinguish this constitution from the earlier constitutions. First, there were two federating units; now, it had four provinces. Second, the parity principle followed in the previous two constitutions was abandoned under the new constitutional dispensation. The provincial government was just a replica of the federal government with the exception that in provinces there was one house only.<sup>188</sup>

The members of the National Assembly were privileged and no action could be taken against them for anything said or done in the Parliament. The separation of powers was respected as no court had the right to challenge the proceeding of the parliament, likewise, no discussion could be inaugurated in the parliament regarding the conduct of the judge.

There is a significant change regarding powers of the courts. The courts have only that jurisdiction which is granted by the law.<sup>189</sup> The intention of the legislature seems to be very clear that the courts may not overstretch their jurisdiction beyond the constitution or the law. It may be argued that the doctrine of separation of power is implicit in this provision as the courts are sometimes inclined to extend their jurisdiction to the matter which does not fall in their constitutional jurisdiction.

The Constitution further provides that all courts and executive authorities are

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<sup>183</sup> Article 58, Ibid.

<sup>184</sup> Article 8-28, Ibid.

<sup>185</sup> Article 8, Ibid.

<sup>186</sup> See, Article 184 (3) and Article 199, Ibid; "Human Rights in Pakistan," accessed November 8, 2014, <http://heinonline.org>

<sup>187</sup> See, Article 233, of the Constitution, 1973.

<sup>188</sup> See, Article 129-140A, of the Constitution, 1973.

<sup>189</sup> Article 175 (2), Ibid.

bound by the law as laid down by the SC.<sup>190</sup> All the judicial and executive authorities are bound to execute the orders of the SC.<sup>191</sup> The SC can interpret the Constitution and the law and adjudicate matters between the federal and provincial governments, between two provincial governments or between citizens and the government.<sup>192</sup> The Supreme Judicial Council can remove the superior courts judges if they are found to be guilty of misconduct or infirm.<sup>193</sup>

In the years that followed the adoption of the Constitution, the sanctity of the Constitution was violated and its efficacy was diluted through various amendments and unconstitutional orders by the civilian and non-civilian regimes in Pakistan that seriously undermined the separation of the powers, fundamental rights, independence of the judiciary and the legislature, and the supremacy of the constitution.

Through the Second Amendment to the Constitution<sup>194</sup>, the Bhutto government declared Ahmadis non-Muslims apparently offending the spirit of the fundamental right to religion and belief. Third Amendment to the Constitution<sup>195</sup> increased the powers of the government to put political opponents behind the bar for a longer period. A serious blow was caused to the judiciary through promulgating the Fourth Amendment<sup>196</sup>, which deprived the high courts from the fundamental rights enforcement jurisdiction. This amendment was aimed to deprive the political opponents of seeking bail from the High Courts. Through the Sixth Amendment<sup>197</sup>, further damage was caused to the judiciary as the period for the separation of the judiciary and the executive was extended from three years to five years. The powers of the courts to initiate contempt proceedings were withdrawn. These amendments, in fact, damaged constitutionalism and rights of the people.

General Ziaul Haq, on 5 July 1977, imposed martial law again on the ground of massive rigging in the general elections held in March 1977. The political leaders including Bhutto were arrested and the Constitution was shelved.<sup>198</sup> The LCFO,

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<sup>190</sup> Article 189, *Ibid.*

<sup>191</sup> Article 187 and 190, *Ibid.*

<sup>192</sup> Article 184, *Ibid.*

<sup>193</sup> Article 209, *Ibid.*

<sup>194</sup> Constitution (Second Amendment) Act, 1974 (Act XLIX of 1974) PLD 1974 Central Statutes 425.

<sup>195</sup> Constitution (Third Amendment) Act, 1975 (Act XXII of 1975) PLD 1975 Central Statutes 109.

<sup>196</sup> Constitution (Fourth Amendment) Act, 1975 (Act LXXI of 1975) PLD 1975 Central Statutes 337.

<sup>197</sup> Constitution (Sixth Amendment) Act, 1976 (Act LXXXIV of 1976) PLD 1976 Central Statutes 46.

<sup>198</sup> Proclamation of Martial Law, 5 July 1977, PLD 1977 Central Statutes 326.

1977<sup>199</sup> was issued to run the government.<sup>200</sup> The writ jurisdiction of the courts to enforce fundamental rights was ousted. However, this jurisdiction was partially restored exempting the martial law authorities from the reach of the constitutional courts.<sup>201</sup> It means all actions under the martial law regime were fully protected.<sup>202</sup>

The detention of Bhutto was challenged on the ground that martial law was unconstitutional. However, the court dismissed the petition on the ground that the LCFO, 1977 ousted fundamental rights jurisdiction of the courts. The court, without specifying any date for the general election, held that the chief martial law administrator *can* even amend the Constitution.<sup>203</sup> The CMLA was still not satisfied with this favor by the judiciary. To protect his actions from judicial review, he added Article 212-A in the Constitution.<sup>204</sup> It was a serious violation of the separation of powers as judicial powers were given to the executive branch establishing military courts.

On 25 March 1981, Zia issued the Provincial Constitutional Order (PCO)<sup>205</sup> suspending the enforceability of fundamental rights and ousting the jurisdiction of the courts to review the PCO or any other order, rule, regulation made thereunder. The PCO reiterated that CMLA *can* amend the Constitution. The judges were required to take a fresh oath. The judiciary, once again, compromised its independence and the separation of power. The PCO was challenged; however, the court upheld the PCO.<sup>206</sup>

In February 1985, general elections were held in the country. Zia promulgated the famous Eighth Amendment through a president's order making significant alterations in the Constitution such as the insertion of Art.58 (2) (b) that empowered Zia to dissolve the National Assembly at his sole discretion.<sup>207</sup> The nature of parliamentary democracy was drastically changed through this amendment. It made the executive more powerful than the legislature. The judiciary was already stripped from

<sup>199</sup> Laws (Continuance in Force) Order, 1977.

<sup>200</sup> Chief Martial Law Administrator's Order 1 of 1977, PLD 1977 Central Statutes 327.

<sup>201</sup> CMLA Order 2 of 1977.

<sup>202</sup> Laws (Continuance in Force) (Amendment) Order, 1977, PLD 1977 Central Statutes 325.

<sup>203</sup> See, *Begum Nusrat Bhutto v. Chief of Army Staff*, PLD 1977 SC 657.

<sup>204</sup> Constitution (Second Amendment Order 1979, President's Order 21 of 1979, PLD 1979 Central Statutes 567.

<sup>205</sup> Provisional Constitutional Order, 1981, CMLA's Order 1 of 1981, PLD 1981 Central Statutes 183.

<sup>206</sup> See, *Tajjamal Husain Malik v. Federal Government of Pakistan*, PLD 1981 Lahore 462.

<sup>207</sup> Revival of the Constitution 1973 Order, 1985, President's Order 14 of 1985, PLD 1985 Central Statutes 456.

essential judicial powers after the 8<sup>th</sup> amendment, all unlawful orders of Zia were given constitutional protection under Article 270-A of the Constitution.

Thereafter, Zia lifted the martial law as he was confident as to the impunity of his actions.<sup>208</sup> When some difference arose between Zia and the civilian government led by Prime Minister Junejo, he used Article 58 (2)(b) to dissolve the government on the charges of corruption and inefficiency.

The dismissal of Junejo's government was challenged in the *Muhammad Sharif v. Federation of Pakistan* case.<sup>209</sup> The court stated that a constitution for free people could not envisage such discretion for the dismissal of the government; however, the petitioner was refused relief. The court held that a declaratory order cannot bring the dissolved assembly back. This decision was challenged before the SC in the *Federation of Pakistan v. Haji Saifullah Khan* case.<sup>210</sup> The court held that such exercise of powers is subject to judicial review and the courts can examine whether such powers were exercised reasonably and lawfully. Though these judgments were announced after the death of Zia, yet they set a good precedent for the rule of law in the country.

The President exercised the same power to dissolve elected government of Benazir twice, first in 1990, and second in 1996. She challenged the dismissal of her first government in the *Ahmed Tariq Raheem v. Federation of Pakistan*<sup>211</sup> case and of second government in the *Benazir Bhutto v. Farooq Ahmad Leghari* case.<sup>212</sup> However, the court upheld dismissal orders in both cases. In her second term, Benazir attempted to interfere with the independence of the judiciary in terms of the appointment of judges. Her government appointed many loyalists who were not suitable for the appointment as a superior court judge. The SC in the *Al-Jehad Trust v. Federation of Pakistan*<sup>213</sup>, however, settled this issue and provided broad principles promoting merit and transparency in the appointment of judges.

In 1993, the Nawaz Sharif's government dissolved. He challenged the dissolution in the *Muhammad Nawaz Sharif v. Federation of Pakistan* and the SC restored his government.<sup>214</sup> He again won the national election and became the Prime Minister in 1997. This time, he was determined to scrap Article 58 (2)(b) as it was

<sup>208</sup> Zia's martial law was lifted on 30 December 1985.

<sup>209</sup> See, *Muhammad Sharif v. Federation of Pakistan*, PLD 1988 Lahore 725.

<sup>210</sup> See, *Federation of Pakistan v. Haji Saifullah Khan*, PLD 1989 SC 166.

<sup>211</sup> See, *Ahmed Tariq Raheem v. Federation of Pakistan*, PLD 1991 Lahore 78; PLD 1992 SC 646.

<sup>212</sup> See, *Benazir Bhutto v. Farooq Ahmad Leghari*, PLJ 1998 SC 27.

<sup>213</sup> See, *Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 SC 324.

<sup>214</sup> See, *Muhammad Nawaz Sharif v. Federation of Pakistan*, PLD 1993 SC 473.

hanging like a sword on the heads of civilian leaders. He omitted Article 58(2)(b) through an amendment to the Constitution.<sup>215</sup> Like Benazir, he confronted with the judiciary on the appointment of judges. This tussle increased to the highest level with the initiation of contempt proceedings against Nawaz Sharif. The Nawaz government issued a new Contempt of Court (Amendment) Bill, paving a way for appeal before another bench of the SC, in case a contempt order is passed by the SC. This Bill was moved apprehending punishment in the contempt proceedings lying before the then-CJP, Sajjad Ali Shah. The President was restrained by Sajjad Ali Shah to sign the Bill on which a battle started between the judiciary and the executive. The SC judges stood divided on this issue. Two judges bench restrained the Chief Justice from working.<sup>216</sup> The CJP suspended that order and started contempt proceedings against Nawaz Sharif which lead to the storming of the SC.<sup>217</sup> A full-bench comprising of ten judges held in the *Asad Ali v. Federation of Pakistan* case that Justice Ajmal Mian should assume the position of CJP.<sup>218</sup>

In the backdrop of Kargil Crisis, military takeover took place on 12 October 1999. Two days later, through Provincial Constitutional Order (PCO), the Constitution was put in abeyance, once again.<sup>219</sup> Keeping with the tradition of earlier martial law regimes, the judges were administered a fresh oath<sup>220</sup>, and the courts were barred to review acts of the self-declared Chief Executive and authorities working under him. The fundamental rights in contravention with the declared emergency were suspended. The military takeover was challenged before the SC and the same was not only upheld by the PCO judges in the *Zafar Ali Shah v. General Pervaiz Musharraf* case<sup>221</sup>, they even allowed constitutional amendments under the military regime. Taking advantage of this judgment, Musharraf made drastic constitutional amendments<sup>222</sup> including the revival of infamous Article 58(2)(b) which had been frequently used to dissolve the elected governments in the past. Further, clause (3) added in Article 58 (through the Seventeenth Amendment) provided that in case of dissolution of the National Assembly by the President, the reference would be made to SC within 15 days of the dissolution.

<sup>215</sup> See, Act I of 1997, PLD 1997 Central Statutes 323.

<sup>216</sup> See, 1998 SCMR 122; The Constitution (Thirteenth Amendment) Act, 1997.

<sup>217</sup> See, *Muhammad Ikran Chaudhry v. Mian Muhammad Nawaz Sharif*, 1998 SCMR 176.

<sup>218</sup> See, *Asad Ali v. Federation of Pakistan*, 1998 SCMR 119.

<sup>219</sup> See, PLD 1999 Central Statutes 448.

<sup>220</sup> The Oath of Office (Judges) Order, 2000.

<sup>221</sup> See, *Zafar Ali Shah v. General Pervaiz Musharraf*, PLD 2000 SC 869.

<sup>222</sup> See, Legal Framework Order, 2002.

These amendments effectively established presidential rule in the country. In the *Pakistan Lawyers Forum v. Federation of Pakistan*, the PCO judges upheld the Seventeenth Amendment.<sup>223</sup> These developments made the legal fraternity alarmed.

Iftikhar Muhammad Chaudhry declared the government's attempt to privatize Pakistan Steel Mills as arbitrary and unlawful.<sup>224</sup> He took suo motu notice of various human rights and corruption cases such as the missing persons case, which was taken as a threat to government actions. On 9 March 2007, Musharraf pressed Iftikhar Chaudhry to resign, but he refused. Through a presidential order, Iftikhar was restrained to perform his judicial functions; a reference was filed against him and he was put under house arrest. He challenged this reference; the SC restored Justice Iftikhar.<sup>225</sup> The lawyers started a nationwide movement against Musharraf for maltreating a sitting Chief Justice of the country. The number of petitions was filed against Musharraf challenging his unlawful actions and holding of two offices simultaneously.<sup>226</sup> Wajihuddin being a candidate for the presidency filed a petition to challenge the candidature of Musharraf. Apprehending an adverse decision in these cases, Musharraf declared emergency through another Provisional Constitutional Order on 3 November 2007.<sup>227</sup> In the *Wajihuddin's* case, the eleven-member bench of the SC passed a restraining order against this PCO.<sup>228</sup> Musharraf put these judges under house arrest. In the meanwhile, a bunch of PCO judges declared the findings of the *Wajihuddin's* case without jurisdiction and unlawful.<sup>229</sup> These PCO judges further uphold the PCO in the *Tikka Iqbal Muhammad's* case.<sup>230</sup>

These developments fuelled the lawyers' long march which led to the restoration of all judges (who refused to bow before Musharraf and take the PCO oath) on 17 March 2009. Musharraf was made to resign on 18 August 2009. All the actions taken by Musharraf and orders passed by him were declared unconstitutional, unlawful and void.<sup>231</sup> Further, in 2010, the Constitutional (Eighteenth) Amendment Bill<sup>232</sup> was

<sup>223</sup> See, *Pakistan Lawyers Forum v. Federation of Pakistan*, PLD 2005 SC 719.

<sup>224</sup> See, *Watan Party v. Federation of Pakistan*, PLD 2006 SC 697.

<sup>225</sup> See, *Mr Justice Iftikhar Muhammad Chaudhary v. The President of Pakistan*, PLD 2007 SC 578.

<sup>226</sup> President to Hold Another Office Act, 2004.

<sup>227</sup> Order 1 of 2007, PLD 2008 Federal Statutes 110.

<sup>228</sup> See, *Wajihuddin Ahmad v. Chief Election Commissioner*, PLD 2008 SC 25.

<sup>229</sup> Ibid..

<sup>230</sup> See, *Tikka Iqbal Muhammad v. General Pervaiz Musharraf*, PLD 2008 SC 6.

<sup>231</sup> See, *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 2009 SC 879.

<sup>232</sup> The Eighteenth Amendment effected 97 Articles, an Annex, and four Scheduled of the Constitution.

passed restoring the Constitution in original form.<sup>233</sup> However, amendment in Article 175 A (appointment of superior court judges) created a difference between the judiciary and the legislature as this amendment had provided an effective role for the parliamentary committee in the approval of the judge's appointment. The 18<sup>th</sup> amendment was challenged before the court and it referred the matter to the legislature for reconsideration.<sup>234</sup> In the *Munir Hussain Bhatti v. Federation of Pakistan* case,<sup>235</sup> the SC again reiterated that the judicial committee is the proper body to appoint judges and to assess their skills and the parliamentary committee has no power as such in this regard. These judgments illustrate how the separation of powers doctrine is practiced in Pakistan.<sup>236</sup> Consequently, in the Nineteenth Amendment<sup>237</sup>, the legislature incorporated the recommendations of the SC further enhancing the role of judges in the judicial appointments.

In 2012-2013, the government and the judiciary confronted each other. The SC issued contempt proceedings against two sitting Prime Ministers and removed them from their office for their avoidance to execute Orders of the Court for initiating civil proceedings against the President for holding the alleged accounts in Switzerland.<sup>238</sup> These orders were issued in Dr. Mubashar Hassan's case<sup>239</sup> while declaring the National Reconciliation Order 2007 (NRO) as void and unconstitutional. The government passed a new Contempt of Court Act, 2012 (2012 Act), to save its skin. However, the court linked the contempt matter with fundamental rights, and held that it can review any legislation which offends fundamental rights and declared the 2012 Act as unconstitutional raising a heated debate as to the separation of powers and fundamental rights in Pakistan.<sup>240</sup>

In 2015, the Nawaz Sharif government passed 21<sup>st</sup> Amendment in the

<sup>233</sup> Essentially, it repealed The Legal Framework Order 2002, The Constitution (Seventeenth Amendment) Act 2003, added Articles 10A, 19A, and 25A to the Constitution, and omitted Article 58 (2)(b).

<sup>234</sup> See, *Nadeem Ahmad Advocate v. Federation of Pakistan*, PLD 2010 SC 1165.

<sup>235</sup> See, *Munir Hussain Bhatti v. Federation of Pakistan*, PLD 2011 SC 407.

<sup>236</sup> See, Jeremy Waldron, "Separation of Powers in Thought and Practice?" accessed November 6, 2014, <http://heinonline.org>

<sup>237</sup> See, PLD 2011 Federal Statutes 19.

<sup>238</sup> The Prime Minister Yousaf Raza Gillani was removed for the contempt of court and the government issued a new Contempt of Court Act, 2012 to avoid the contempt proceedings against the new Prime Minister, Raja Pervaiz Ashraf. The 2012 Act was also challenged before the Supreme Court.

<sup>239</sup> See, *Dr Mubashar Hassan v. Federation of Pakistan*, PLD 2010 SC 265; *Federation of Pakistan v. Dr Mubashar Hassan*, PLD 2012 SC 106.

<sup>240</sup> See, Thomas Sargentich, "The Contemporary Debate About Legislative-Executive Separation of Powers," accessed November 7, 2014, <http://heinonline.org>



Constitution and established military courts for the trial of civilians allegedly involved in terrorism. This amendment was challenged before the SC. The seventeen-member bench upheld the 21<sup>st</sup> Amendment. However, six judges wrote dissenting opinions and observed that the military being part of the executive could not carry out judicial functions.<sup>241</sup> In this case, the court appears to compromise on the separation of powers, allowing to permit trials in the military courts and the legislature to enact laws against the fundamental rights. The legislature passed the 23<sup>rd</sup> Amendment in March 2017 to provide further extension and cover to the military courts.<sup>242</sup> However, these courts are abolished on 30 March 2019.<sup>243</sup>

The Imran Khan's government filed a judicial reference before the Supreme Judicial Council alleging that Justice Qazi Faez Isa, a Supreme Court judge, concealed his property in London while filing wealth statements before the tax authorities. Justice Isa denies these allegations and states that he does not own these properties. In his reply, he submitted that these properties belong to his wife and children who have independent sources of income. Justice Isa argues that these prejudiced proceedings were initiated against him as some of his judgments made the government and security agencies uncomfortable.<sup>244</sup> He argues that the government wants weak and subservient judiciary.

The counsel for Justice Isa argued that the confidential information regarding the alleged property of his client was collected through surveillance of the judge, his wife and children without due approval of the lawful authority. That secret information was then shared with a person who was not a civil servant. That person was, in fact, a proxy complainant. The counsel pointed out that such information was obtained after the decision in Faizabad sit-in, in which, the learned judge made some comments about the security establishment such that the security agencies and the executives should work within their constitutional domain.

The counsel stated that the complainant acquired information about the alleged properties through online search. However, the counsel argued, that under the laws of the UK, one cannot get such information via online channels. Rather, the land registry

<sup>241</sup> See, Accessed on October 19, 2019, <https://www.dawn.com/news/1198632>

<sup>242</sup> Military courts given legal cover by senate. DAWN, March 29, 2016.

<sup>243</sup> See, Accessed on October 19, 2019 <https://www.icj.org/pakistan-as-military-courts-lapse-government-must-prioritize-reform-of-the-criminal-justice-system/>

<sup>244</sup> Qazi Faez Isa states that uttering an 'uncomfortable truth' is the sole cause of judicial reference against him, which is an attack on the independence of the judiciary.

provides such information either to the real owner or to a legally authorized person. The counsel argued that this information was provided to a proxy by the government agencies without any authorization as such just to make a false case against his client aiming to weaken the judiciary. Therefore, such an investigation, collection of evidence, and the subsequent reference against a sitting judge of the superior court damages the concept of the independence of the judiciary. The counsel argued that the safeguards provided under Article 209 for proceeding against the superior court judges should have been observed. Essentially, the counsel argued that the reference is an attack on the independence of the judiciary so it entitles to be dismissed.

The government, on the other hand, claimed that the reference was filed without any malafide against the judge. The attorney general argued that the three properties in London were purchased in the name of the family members, whereas, the honorable judge is the actual owner of that property. The government contended that Justice Isa fails to explain the means of his wife and the children through which they purchased the three properties in London. The SC dismissed the presidential reference declaring it 'invalid' and directed the Federal Board of Revenue (FBR) to conduct enquiry proceedings against spouse and children of Justice Isa and explain the sources for buying the properties in London.<sup>245</sup> The order of the SC to the extent of initiating the FBR proceedings is challenged before the SC.<sup>246</sup> The final outcome of this reference would further illuminate the theory and practice of the doctrine of separation of powers and its link with the enforcement of fundamental rights in Pakistan.

### 3.8 CONCLUSION

The doctrine of separation of powers is practiced for the protection of fundamental rights in different constitutional systems (i.e., US, UK, Australia). The US model stresses a strong executive with lesser accountability to the legislature. The UK constitution combines powers of the executive and the legislature and promotes a strong legislature. Australia essentially follows the UK model. Similarly, in Pakistan, this doctrine has its distinctive features, which may be compared and contrasted with the constitutions of the US, the UK, and Australia due to common historical factors. The prominent features of the doctrine of separation of powers such as the judicial review and the protection of fundamental rights and liberties are reflected in Pakistan's

<sup>245</sup><https://www.dawn.com/news/1564513> accessed 20 July 2020

<sup>246</sup><https://www.dawn.com/news/1570148> accessed 20 July 2020

different constitutions.

Pakistan inherited common law constitutional norms from the British model as enshrined in the Government of India Act, 1935, which were incorporated in the interim constitution in 1947. The founding fathers of Pakistan also adopted certain features of written constitutions such as judicial review, fundamental rights, and the separation of powers from the US Constitution. The first and second Constituent Assemblies thoroughly discussed the division of political power between different organs of the state and the status of fundamental rights. The Constituent Assemblies proposed a parliamentary system of government and a balanced constitutional relationship between the three state institutions. The basic features of the Constitution were reflected first in the Objectives Resolution 1949, which provided for the separation of powers and the independent judiciary for the provision of socio-economic and political justice as enunciated in Islam. It specifically provided for the freedom of thought, expression, belief, faith, worship and association.

The Constituent Assemblies debated the above features and recommended its incorporation in the first constitution of Pakistan. Thus, the features of separation of powers and the protection of fundamental rights were duly considered while drafting the first Constitution of 1956. The 1956 constitution provided for a federal form of government, fundamental rights, and an independent judiciary. It further provided that a law being inconsistent with fundamental rights could be declared void. The constitutional courts were given power to review acts of other branches of the government and enforce the fundamental rights.

Iskandar Mirza became President when the 1956 Constitution was adopted. When he failed to handle crisis in the country, he declared Martial law and the 1956 Constitution came to an end. General Ayub issued the LCFO, 1958, creating a new legal order. This Order was challenged in the *State v Dosso*; however, the SC validated this order on the basis of a so-called theory of successful revolution.

Ayub promulgated the 1962 Constitution. He deviated from the parliamentary system and envisaged a strong executive under the presidential system. He could dissolve the National Assembly on his subjective assessment of the performance of the legislature. The legislature could have hardly removed a strong executive through impeachment. However, the judiciary was empowered to review the legislative and the executive action for the enforcement of fundamental

rights. Ayub's government failed to control political and economic affairs of the state. General Yahya Khan took over the government and issued a Provisional Constitutional Order in 1969. He issued a Legal Framework Order, 1970, and conducted national elections. However, due to heightened political rift in the country government was not formed which led to the fall of Dhaka in 1971. Yahya had to resign and Bhutto took over the government. The martial law was terminated and the Interim Constitution of 1972 was adopted. The fundamental rights and judicature was provided under the interim constitution. The 1973 Constitution, finally, provided a parliamentary system of government with a separation of powers alongside fundamental rights.

The frequent imposition of martial law in Pakistan has damaged the separation of power and fundamental rights. During the martial law regimes, the executive was given excessive powers and the legislature was weakened. Legislation was made through presidential orders and ordinances, which severely reduced the institutional role of parliaments. The legislature approved executive-friendly constitutional amendments, for example, the Eighth Amendment in 1985 without any hesitation. This abdication of legislative responsibility empowered the executive to make the legislature a rubber stamp. The Eighteenth Amendment in 2010, however, restored some balance of power in favor of the parliament.

Similarly, the judiciary validated the dissolution of the first Constituent Assembly in the *Moulvi Tamizuddin Khan* case, the Laws (Continuance in Force) Order of 1955 in the *Dosso* case, the Laws (Continuance in Force) Order 1977 in the *Nusrat Bhutto* case, and the military takeover of 1999 in the *Zafar Ali Shah* case. The judiciary thus upheld the dissolution of elected governments under M.K. Junejo, Benazir Bhutto, and Nawaz Sharif. Many judges of superior courts took an oath before the martial law administrators ignoring their earlier oath under the Constitution. The presidential references against Iftikhar Muhammad Chaudhary and Qazi Faez Isa show the complex nature of institutional relationships between different organs of the state.

Despite these challenges, however, the *Wajihuddin's* case, the *Sindh High Court Bar Association* case, and the Faez Isa reference demonstrate that the judiciary can withstand the pressure of the executive and enforce the constitutional separation of powers and the

fundamental rights of the people in Pakistan. It indicates that increased focus on constitutionalism and the doctrine of separation of powers can protect fundamental rights in Pakistan-that is the hypothesis of the thesis.

The next chapter will examine how the judiciary has implemented the constitutional doctrine of separation of powers to protect fundamental rights in Pakistan while examining acts of the legislature.

## **CHAPTER FOUR**

### **THE SEPARATION OF POWERS AND LEGISLATIVE ACTION**

#### **4.1 INTRODUCTION**

Chapter three briefly discussed how the separation of powers doctrine is envisaged in the constitutions of the US, the UK, Australia, India, and how it was interpreted for the protection of fundamental rights. It explored the evolution of the doctrine and its relationship with the fundamental rights in the context of the 1947 Interim Constitution of Pakistan, the Objectives Resolution 1949, and the 1956, the 1962, and the 1973 Constitution.

This chapter examines how our courts have implemented the constitutional doctrine of separation of powers regarding the protection of the fundamental rights in Pakistan while reviewing acts of the legislature. It addresses several important questions: What is the procedure of lawmaking? What is the domain of the federal and the provincial legislature? What if the central and provincial laws conflict with each other? What is constitutional basis and justification for reviewing the legislative action by the judiciary? Finally, some fundamental rights cases are analysed to show how have the courts scrutinized legislative action for fundamental rights protection in Pakistan?

These questions help to understand the procedural mechanism and the lawmaking domain of the federal and the provincial legislature. The appreciation of the 'extent' and the 'limits' of lawmaking domain of the legislature contributes developing a nuanced sense of the doctrine of separation of powers. This understanding facilitates to appreciate how the judiciary has employed this doctrine for the protection of fundamental rights in Pakistan. The section relating to constitutional basis and justification for the judicial review provide theoretical foundation for analyzing case law and appreciating approach of the courts for interpreting the separation of power and the fundamental rights. Each section of this chapter, thus, serves as a conceptual block for building the main argument of this thesis: that focus on constitutionalism and adherence to the separation of powers protects fundamental rights in Pakistan.

#### **4.2 THE LAW-MAKING PROCEDURE**

The legislative function involves constitutional law making and ordinary legislation. The 1973 Constitution provides a governance structure of the state. It divides political power into the executive, the legislature, and the judiciary. The ordinary or sub-constitutional law making facilitates the state to achieve its constitutional objectives and the state policy formulated from times to time. The

constitutional and sub-constitutional laws regulate the institutions and the conduct of the citizens. The federal lawmaking power is bestowed on the Parliament. A bill when approved by the House, in which it is initiated, is transmitted to the other House and when passed by the other House is presented to the President for approval.<sup>1</sup> The constitutional laws are passed with two-third majority in both the houses, whereas, ordinary laws are made with a simple majority in the house.

Moreover, the President of Pakistan has the power to make the law through ordinances for four months.<sup>2</sup> The lower house can extend the ordinance for four months. However, this extension can be made once only.<sup>3</sup> Almost all the bills are initiated by the government which is legally responsible for their presentation and drafting, for overseeing their passage from both houses, for implementing the laws after they are approved by the President.<sup>4</sup>

Provincial assemblies can legislate with a simple majority of the house. Any law passed as such is then presented to the governor for approval.<sup>5</sup> The governor can also promulgate ordinances for a period of ninety days.<sup>6</sup> The ordinance may be extended by the provincial assembly for another period of ninety days for once.<sup>7</sup>

#### **4.3 DISTRIBUTION OF LEGISLATIVE POWERS**

The 1973 Constitution deals with the distribution of legislative authority among the federal and provincial legislature.<sup>8</sup> Article 141 provides that Parliament can legislate for the whole or any part of Pakistan, however, the provincial legislature can legislate for the province or any part of the province. According to Article 142(c), Parliament shall legislate regarding the matters mentioned in the Federal Legislative List. The provincial assemblies thus can make laws pertaining to the items not covered in the Federal Legislative List. The Concurrent Legislative List is abolished through the 18<sup>th</sup> amendment to the Constitution.<sup>9</sup>

The Constitution, thus, clearly provides legislative distribution of powers; that the federal legislature can exclusively make laws on the items stated in the Federal

<sup>1</sup> See, Article 75, of the Constitution, 1973.

<sup>2</sup> See, Article 89, of the Constitution, 1973.

<sup>3</sup> See, Article 89(2) (a) (i), of the Constitution, 1973.

<sup>4</sup> See, A.G Chaudhry, "Lectures on Constitutional Law," (Lahore: Eastern Law Book House Press, 2013), 35.

<sup>5</sup> See, Article 116, of the Constitution, 1973.

<sup>6</sup> See, Article 128, of the Constitution, 1973.

<sup>7</sup> See, Article 128(2) (a), of the Constitution, 1973.

<sup>8</sup> See, Article 141-144, of the Constitution, 1973.

<sup>9</sup> The Constitutional (Eighteenth Amendment) Act, 2010.

Legislative List; the provinces can legislate only on those matters that are not mentioned specifically in the Federal Legislative List. It means that only the residuary matters are left for legislation by the provincial legislatures. If a provincial assembly makes a law that is not in its legislative domain, it can be assailed through judicial review as ultra vires to the Constitution.<sup>10</sup> The legislative distribution of power, therefore, helps the judiciary to enforce the doctrine of separation of powers in Pakistan.

In case of any conflict between the laws made by the federal or the provincial legislature, the constitutional theory of pith and substance can help to determine the validity of the relevant law.<sup>11</sup> The doctrine of pith and substance aims to ascertain the true nature or essential nature of a particular act or statute; thus, it helps in discovering the true nature of an Act.<sup>12</sup> For example, in case of any confusion, this theory facilitates to find under which head of legislative subject i.e., education, health, environment a given piece of legislation falls. In the *Punjab Higher Education Commission v. Dr. Aurangzeb Almgir*<sup>13</sup>, the Lahore High Court coined the concept of cooperative federalism. It means any conflict between the policy of the federal and any provincial government requires a coordinated and intergovernmental policy and cooperation.

As the 1973 Constitution is the supreme law of the land, it is the primary function of the superior courts to construe any law and declare it invalid if it offends any provision of the constitution, e.g., the fundamental rights provisions. Thus, in any written constitution, the courts have the power to construe the constitution as well as to review the legislative activities of the government. In a system of constitutional governance, the authority of the courts to examine the actions of the legislature cannot be taken away by any government.<sup>14</sup>

#### 4.4 CONFLICT OF FEDERAL AND PROVINCIAL LEGISLATION

Article 143 of the Constitution deals with inconsistency and repugnancy of the legislation between the federal and the provincial governments. The laws made by the parliament have an overriding effect over the laws made by the provinces as per Article 143 of the constitution. In other words, if a law made by the province contradicts the law of the parliament then the law made by the parliament shall prevail.

<sup>10</sup> See, *State v. Syed Mir Ahmed Shah and another*, PLD 1970 Quetta 49.

<sup>11</sup> See, *Province of Punjab v. National Industrial Cooperative Credit Corporation and others*, 2000 SCMR 567.

<sup>12</sup> See, Narendra Mahovia, "What is the Doctrine of Pith & Substance?" accessed October 9, 2019 <https://www.quora.com/What-is-the-doctrine-of-Pith>

<sup>13</sup> *Punjab Higher Education Commission v. Dr. Aurangzeb Almgir etc.*, 2017 Lahore 1341.

<sup>14</sup> See, *Province of East Punjab v. Sirajul Haq Patwari*, PLD 1966 SC 854.



The legislature is supreme within its limits; it is free to make any law within its legislative domain. The only restriction on the authority of the parliament to legislate is that the law should not contradict any provision of the constitution or its overall scheme; no legislation can be declared invalid by the courts merely on the reason of mala fide by the legislature.<sup>15</sup>

Where two provisions of a legislation can work without interfering with each other, they cannot be called inconsistent with each other.<sup>16</sup> The doctrine of occupied field can be pressed in service only there is a clash between a law passed by the provincial legislature, which incidentally encroaches upon the legislative domain of the federal legislature. It means that a provincial law cannot sustain or be treated as a valid law if it hits the forbidden field of the federal legislature.<sup>17</sup>

For example, foreign policy, defence and currency comes under the legislative domain of the federal legislature. If a provincial legislature makes a law on any of these subjects it would be an encroachment upon the occupied field of the federal legislature. Thus, the doctrine of occupied field, like the doctrine of incidental encroachment, is another way to ascertain the true nature of any piece of legislation. These two doctrines help the legislature and the courts to determine the validity of any law vis-à-vis the legislative domain of a particular legislature.<sup>18</sup>

#### **4.5 CONSTITUTIONAL BASIS FOR THE PROTECTION OF FUNDAMENTAL RIGHTS**

The fundamental rights were not provided under the Government of India Act, 1935, which was opted by Pakistan in 1947.<sup>19</sup> Pakistan's first Constitution of 1956, however, provided and protected<sup>20</sup> fundamental rights<sup>21</sup> with an effective mechanism for their enforcement.<sup>22</sup> The 1962 Constitution also provided for the fundamental rights through a constitutional amendment in 1964.<sup>23</sup> The 1973 Constitution has provided fundamental

<sup>15</sup> See, *Abdul Rehman v. The State*, PLD 1983 SC 76 (DB).

<sup>16</sup> See, AIR 1956 SC 676.

<sup>17</sup> Ibid.,

<sup>18</sup> See, *Quetta Textiles Mills Ltd v. Province of Sindh*, PLD 2005 Karachi 55.

<sup>19</sup> See, Section 8, of the Indian Independence Act, 1947.

<sup>20</sup> See, Articles 4, the Constitution, 1956.

<sup>21</sup> See, Articles 5-21, of the Constitution, 1956.

<sup>22</sup> See, Articles 22 and 170, of the Constitution, 1956.

<sup>23</sup> In 1964, the 4<sup>th</sup> Amendment was made in the Constitution, 1962, and thereby fundamental rights were provided in this constitution.

rights<sup>24</sup> and an elaborated mechanism of their enforcement.<sup>25</sup> As Pakistan largely follows fundamental rights concept of Western civilizations, some discussion of that conception is essential for the analysis of the fundamental rights cases in this chapter.

The fundamental rights are those basic human rights that an individual is entitled to enjoy being born as a human. The creation of these rights does not depend on the existence of a political entity. According to Emanuel Kant, humans have certain natural rights since birth prior to the creation of a political state.<sup>26</sup> Kant endorses John Lock who holds that humans have basic rights and freedoms before the emergence of the concept of state. These basic rights are integral to the existence of an individual<sup>27</sup> and collective<sup>28</sup> progress of a human society.<sup>29</sup>

The idea of basic human rights has its origin both in religion<sup>30</sup> and secular conception of statehood.<sup>31</sup> However, these rights became popular during the intellectual movement in Europe called the age of enlightenment.<sup>32</sup> These rights then found recognition in the laws of political governments providing protection to citizens against the might of states.<sup>33</sup>

The jurists have approached the idea of human rights from different perspectives. H.L.A. Hart<sup>34</sup>, for example, considers that fundamental rights are in fact

<sup>24</sup> See, Articles, 9-28, of the Constitution 1973, which provide for the Fundamental Rights.

<sup>25</sup> This enforcement mechanism is in term of Judicial Review powers of High Courts and the Supreme Court under Articles 199 and 184(3) of the Constitution, 1973, respectively.

<sup>26</sup> See, Kant, Groundwork, in Mary Gregored, Trans Practical, 410.

<sup>27</sup> See, E. Barker in Conceptual Analysis of Human Rights, 29, accessed June 19, 2016, [www.shodhganga.inflibnet.ac.in/bitstream/10603/19847/8/08\\_chapter%201.pdf](http://www.shodhganga.inflibnet.ac.in/bitstream/10603/19847/8/08_chapter%201.pdf)

<sup>28</sup> See, Harold J. Laski, "A Grammar of Politics," (London: George Allen and Unwin, Limited 1925), 91; Bosanquet, in *Conceptual Analysis*, 29.

<sup>29</sup> See, Chiranjeet Singh and M.R. Garg, "Human Rights as the Base Component of Democratic State," in B.P. Singh Sehgal ed., *Human Rights in India-Problems and Perspectives*, (New Delhi: Deep and Deep Publications, 1996), 98.

<sup>30</sup> *Magna Carta Libertatum* frequently called as *Magna Carta*. It is a charter of rights which was agreed to by King John of England at Runnymede, on June 15, 1215. It stated that the grant was made "through the inspiration of God.... for the honour of God and the exaltation of Holy Church" (See, Z Chafee, *Documents on Fundamental Human Rights*, and Vol. I, (Cambridge, Mass: Harvard University Press, 1951), 2 39.

<sup>31</sup> See, *The Magna Carta*, 1215.

<sup>32</sup> A phase of society when the conventional hierarchical orders in socio-political setup were transmuted assertively by an order founded on the concepts of liberty and equality. The reference may be made to the French Revolution (1789). It motivated the publishing of "The Declaration of the Rights of Man and of the Citizen," which was written by Marquis de Lafayette. Such document even in contemporary period has encouraged the rights-based liberal democracy worldwide.

<sup>33</sup> See, Stanford Encyclopedia of Philosophy, (Stanford University: 2007), accessed July 11, 2019, <https://stanford.library.sydney.edu.au/archives/fall2007/>

<sup>34</sup> The idea of this theory was propounded by HLA Hart in his seminal work titled as 'Are There Any Natural Rights?' through which he argues that "If there are any moral rights at all, it follows that there is at least one natural right; the equal right of all men to be free..."<sup>34</sup> The other prominent proponents of 'Will Theory' include Austin, Steiner, Wellman, and Simmonds.

an individual's self-expression and self-assertion and its protection ensure the welfare of the individuals. Jeremy Bentham<sup>35</sup> and others<sup>36</sup> assert that these rights are means for securing human's well-being. These two strands of thought promote a common interest or welfare of the individuals.

Before the emergence of political governments, these rights were either recognized as provisionally rightful possession<sup>37</sup> or ethical supremacy<sup>38</sup> or positive morality<sup>39</sup> and non-obligatory.<sup>40</sup> This transitional period in the history of human rights is described as a 'pre-legal period'.<sup>41</sup>

In the transitional phase of history of rights, all the people were not equal.<sup>42</sup> Plato's narrated fabulous myth- the one Royal lie depicts such inequalities.<sup>43</sup> Likewise, Aristotle describes the human's aspiration to set him free from oppression prevailing in the 'state of nature'.<sup>44</sup> The equality<sup>45</sup> and the elimination of exploitation of weaker segment of the society has always been an aspiration of human beings.<sup>46</sup>

The natural law theory<sup>47</sup> has promoted morality, justice, and equality in society. This theory stresses individual liberties<sup>48</sup> and the dignity of man.<sup>49</sup> According to this

<sup>35</sup> See, Bentham, J. *Anarchical Fallacies*, in, Jeremy Waldron, ed., *Nonsense upon Stilts*, (New York: Methuen, 1987).

<sup>36</sup> For the adoption of this theory the reference may be made to Lyons, David, *Rights, Welfare, and Mill's Moral Theory* (Oxford: Oxford University Press, 1994); Raz, Joseph, *The Morality of Freedom*, (Oxford: Oxford University Press, 1986).

<sup>37</sup> See, Kant, *Groundwork in Mary Gregored trans Practical*. 410.

<sup>38</sup> See, Stumpf Samuel Enoch, "Morality and the Law," (Tennessee: Vanderbilt University Press, 1966), 204-205.

<sup>39</sup> See, Roger Cotterrell, "The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy," (London: LexisNexis Butterworth's Tolly, Ltd, 2003) 54-56, 65-70.

<sup>40</sup> Ibid., 54-56, 65-70.

<sup>41</sup> Ibid., 166-167, 181-188.

<sup>42</sup> See, Conceptual 43, accessed June 19, 2016, [shodhganga.inflibnet.ac.in/bitstream/10603/19847/8/08\\_chapter%201.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/19847/8/08_chapter%201.pdf)

<sup>43</sup> See, Plato *Republic*, Book III, 303, Classics Club Edition.

<sup>44</sup> See, Aristotle *Politics*, Book I, Classics Club ed., 25, 248.

<sup>45</sup> See, Krishna Murthy, *Human Rights and the Indian Police*, (Bangalore: R.R. Publishers, 1994), 29.

<sup>46</sup> See, Pathak R.S., "The Protection of Human Rights, *Indian Journal of International Law*," 18, (1978), 274-78.

<sup>47</sup> According to this theory human rights are decided by morality instead of the authority like that of the government etc. This theory recognizes law and morality as closely connected, yet not the same. According to this theory a law is defined from the idea that morality sprouts from nature. Contrary to the Natural Law Theory, is the theory of Legal Positivism. The major proponents, among others are Thomas Aquinas (See, Thomas Aquinas, *On Law, Morality and Politics* (Indianapolis: Hackett Publishing Company, 1988) ; See, John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); Finnis, John M. "Natural Law Theory: Its Past and Its Present," *American Journal of Jurisprudence*, 81, Vol. 57(2012), accessed July 11, 2019, [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/1085/](https://scholarship.law.nd.edu/law_faculty_scholarship/1085/)

<sup>48</sup> See, Krishna Iyer, "The dialectics and Dynamics of Human Rights," (Calcutta: Eastern Law House, 1999), 54.

<sup>49</sup> See, V.D. Devasia and LeelamaDevasia, "Women, Social Justice and Human Rights", New Delhi: APH Publishing Corporation, 1998) 1; See, Krishna Iyer, "Justice at Cross Road," (New Delhi: Deep and Deep Publication 1992), 21.

theory, natural rights correspond to modern-day human rights or basic rights.<sup>50</sup> The safety of fundamental rights is the responsibility of a modern democratic state.<sup>51</sup> These rights were mentioned in rudimentary form in Babylonian law<sup>52</sup>, religious laws<sup>53</sup>, and the Charter of Magna Carta.<sup>54</sup> Basu traces these rights to the emergence of political philosophy.<sup>55</sup> The modern international instruments<sup>56</sup> and domestic constitutional documents<sup>57</sup> specifically mention the provision and protection of fundamental rights.

The modern-day states have the mandate to govern its citizens. John Lock, thus, emphasized that the governments should be restrained in the exercise of political power to safeguard the rights of the citizens.<sup>58</sup> The constitutional democracies worldwide envisage these basic human rights in constitutions in one form<sup>59</sup> or the other.<sup>60</sup> Almost all democracies declare and protect fundamental rights.<sup>61</sup> The reference

<sup>50</sup> See Louis B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States," *American University Law Review* Vol. 32, no. 1 (1982). Thomas Buergenthal and Dinah Shelton, "Protecting Human Rights in the Americas, Cases and Materials", 11, in Dr. U. Chandra, *Human Rights* (Allahabad: Allahabad Law Agency Publications, 1999), 21.

<sup>51</sup> See, Singh and Garg, Human in Sehgal ed. Human, 98.

<sup>52</sup> Such Babylonian law may be referred to Hammurabi Code, and in Vedic period e.g. Manusmriti and later in Kautilya's Arthashastra; See, Nirvani, Sharada T., "A Critical Study of Judicial Enforcement of Human Rights in India Through Public Interest Litigation with special Reference to Right to Life", PhD Diss., (Saurashtra University, 2005), 25.

<sup>53</sup> See, Chafee, *Documents*, 239.

<sup>54</sup> It was granted by King John of England on June 15, 1215 A. D. Through it an absolute monarch was obliged to realize that the people have certain rights which could not be infringed even by a mighty sovereign. This instrument proved to be the inspiration for putting the human rights in term of Fundamental rights in the constitutional documents of different jurisdictions.

<sup>55</sup> See, Durga Das Basu, "Human Rights in Constitutional Law," 2nd ed., (New Delhi: Wadhwa and Company Nagpur, 2003), 2.

<sup>56</sup> See, Article 55 and 56, UNO Charter 1945; United Nations Declaration of Human Rights, (UNDHR), 1948; Article 2, International Covenant on Civil and Political Rights (ICCPR), 1963; Article 2, International Covenant on Economic, Social and Cultural Rights (ICESCR), 1963; European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953.

<sup>57</sup> These rights are incorporated and guaranteed in the constitutional texts of the countries; See, Articles 8-28, 199 and 184 (3) of Constitution, 1973 of Pakistan, Articles 13-35, and 226 of Constitution, 1950 of India; Articles 3, 6 and the Amendments 1-10, 14 and 15 of the Constitution 1789 of USA.

<sup>58</sup> See, Thomas E. Patterson, "The American Democracy," (New York: McGraw-Hill, Inc, 1993), 63.

<sup>59</sup> These are the civil and political rights constitutionally termed as fundamental rights. See, Articles 9-28, of the Constitution, 1973; Article 14-34, of the Constitution, 1950 of India.

<sup>60</sup> These are the socio-economic and cultural rights termed as principles of policy. See, Articles 29-40, of the Constitution, 1973; Articles 36-51, of the Constitution, 1950 of India.

<sup>61</sup> Declaration of Independence of the thirteen States of America in 1776 (The Virginia Declaration, 1776); The Constitution of USA, 1789, with amendments in 1791, 1865, 1869 and 1919 guaranteed a number of rights. The French Declaration of the Rights of Man and of Citizen of 1789 inspired other European States to include certain provisions in their laws for the protection of human rights. So, Sweden in 1809, Spain in 1812, Belgium in 1831, Prussia in 1850 and Switzerland in 1874 provided for the fundamental rights of people. Initially, till the year 1998, there was no particular declaration for fundamental rights in Britain. However, there has been an emerging trend that guaranteed civil rights serve practical purpose, so Britain should also have a written Bill of Rights. On July 7, 1975 a resolution was presented in the House of Commons requiring the specific Bill of Rights. Later on, Britain government promulgated the European Charter on Human Rights 1995. Afterward the British Parliament passed the Human Rights Act, 1998.

to such rights is also made in various national<sup>62</sup> and international instruments.<sup>63</sup>

The fundamental rights are generally considered a synonym of human rights.<sup>64</sup> Human rights jurisprudence<sup>65</sup> conceives fundamental rights as a legal privilege granted to citizens. According to Black's Law Dictionary, fundamental rights are those which have their origin in the express term of the constitution or which are necessary to be implied from those terms.<sup>66</sup>

The fundamental rights are provided under the constitution to confer special status and grant a specific procedure for their protection.<sup>67</sup> On the basis of such constitutional protection, acts of the legislative and the executive may be questioned on the point of inconsistency and violation of fundamental rights.<sup>68</sup> Tayal argues that the incorporation of fundamental rights in a constitutional document provides a check on the executive and the legislatures<sup>69</sup> and the protection of such rights by the might of the states<sup>70</sup> through a judicial process.<sup>71</sup>

In Pakistan, therefore, a deliberate effort has been made to safeguard the fundamental rights of the citizens. Chapter 1 of the 1973 Constitution provides various fundamental rights i.e., basic human rights<sup>72</sup>, socio-cultural<sup>73</sup>, and economic rights<sup>74</sup>, and political freedoms.<sup>75</sup> These fundamental rights reflect the human rights principles

<sup>62</sup> See. Reference may be made to the Constitutions of the democratic countries like of India, 1950, USA, 1789 and Pakistan, 1973.

<sup>63</sup> See, Preamble and Article 1(3) of the Charter, 1945 of UNO; UNDHR, 1948; ICCPR, 1966; ICESCR, 1966.

<sup>64</sup> See, Gianluigi Palombella, "Arguments in Favour of a Functional Theory of Fundamental Rights", 299 accessed on December 7, 2017, [http://works.bepress.com/gianluigi\\_palombella/12/](http://works.bepress.com/gianluigi_palombella/12/)

<sup>65</sup> See, Article 8, of the UDHR, 1948.

<sup>66</sup> See, Black's Law Dictionary 5<sup>th</sup> ed., 248.

<sup>67</sup> See, *West Virginia State Board of Education v. Barnett*, 319 US 624.

<sup>68</sup> See, Basu, *Human Rights*, 2.

<sup>69</sup> See, Tayal, B.B. and Jacob, A. *Indian History, World Developments and Civics*, 2005, A-24.

<sup>70</sup> See, *Province of East Pakistan v. Mehdi Ali Khan*, PLD 1959 SC 387.

<sup>71</sup> See, *Abul Ala Maududi v. Government of West Pakistan*, PLD 1964 SC 673.

<sup>72</sup> See, Article 9, 'Security of person'; Article 10, 'Safeguards as to arrest and detention'; Article 10-A, 'Right to fair trial'; Article 11, 'Prohibition of slavery, forced labor, human trafficking and compulsory services'; Article, 12 'Protection against retrospective punishment'; Article 13, 'Protection against double punishment and self-incrimination'; Article 14, 'Inviolability of dignity of man'; Article 15, 'Freedom of movement'; Article 19, 'Freedom of speech'; Article 19-A, 'Right to information'; Article 25, 'Equality of citizens'; Article 26, 'Non-discrimination in respect of access to public places'; Article 27, 'Safeguards against discrimination in services' of the Constitution, 1973.

<sup>73</sup> See, Articles 20, 21, 22, 'Freedom of Religion'; Article 24-A, 'Right to Education'; Article 28, 'Preservation of Language, Script and Culture' of the Constitution, 1973.

<sup>74</sup> See, Article 18, 'Freedom of Trade' Business and Profession'; Article 23 and 24, 'Rights of Property and Protection of Property Rights' of Constitution, 1973. These are the fundamental rights provided in substantive provisions of constitutional law establishing a claim for the provision of certain services and a claim of financial nature.

<sup>75</sup> See, Article 17, 'Freedom of Association', of the Constitution, 1973.

envisaged in the UDHR 1948.<sup>76</sup>

The fundamental rights are, in fact, limitations upon powers of any government.<sup>77</sup> Our superior courts have observed that fundamental rights have special status under the constitution. Though these rights are subject to certain limitations<sup>78</sup>, they are to be protected by the courts as it is the judicial obligation to safeguard these rights.<sup>79</sup> A special constitutional mechanism, therefore, is provided for the protection of these rights under Articles 184(3) and 199 of the constitution. While relying on these provisions, the courts have proactively reviewed the actions of the legislature to safeguard the fundamental rights.<sup>80</sup>

It may be argued that the concept of social contract forms the basis of constitutional governments. The people submit to the state to safeguard their liberties and rights as citizens. The state is thus liable to safeguard these rights against the will and power of the majority in a political dispensation. In Pakistan, Articles 9 to 28 of the 1973 Constitution provide for the fundamental rights of the citizens. Such a robust constitutional arrangement ensures the rule of law establishing an egalitarian society. The fundamental rights are permanent in nature and can only be suspended in exceptional circumstances mentioned in the constitution.<sup>81</sup> Any legislative or executive act is inconsistent with or being made in contravention of the fundamental right is to be held void.<sup>82</sup>

Despite the constitutional guarantee of fundamental rights, there has been a

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<sup>76</sup> Though UDHR, 1948 along with ICCPR and ICESCR do not demonstrate an extensive scheme for the attainment of a perfect situation, they declare certain ideals which reflect guidance for all over the world. But in international community, respect for the human rights depends upon system and functioning of the State and her institutions. Thus, the condition of human rights varies manifestly country to country. (See, Louis Henkin, *The Rights of Man Today*, (London: Stevens and Sons, 1979), 31.

<sup>77</sup> See, *Hurtado v. California*, 110 US 516 (1884).

<sup>78</sup> See, *Nasrullah Khan v. District Magistrate*, PLD 1965 Lahore 642. The Court observed that “only a few of these rights can be stated in the form of absolute propositions. Most of them require qualification in the general interests of society, particularly in a social welfare state, where the individual’s interest is considered to be subordinate to the public welfare.”

<sup>79</sup> See, *Abul Ala Maududi v. Govt. of West Pakistan*, PLD 1964 SC 673; *Province of East Pakistan v. Mehdi Ali Khan*, PLD 1959 SC 387.

<sup>80</sup> See, Mohammad Yasin Brig. Tariq Banuri, “The Dispensation of Justice in Pakistan,” (Oxford University Press: 2004), 60.

<sup>81</sup> See, Articles 8(5) and 233, of the Constitution, 1973.

<sup>82</sup> See, *State v. Dosso*, PLD 1958 SC 533; *Federation of Pakistan v. United Sugars Mill Limited*, PLD 1977 SC 397; *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416; *Shirn Munir v. Government of Punjab*, PLD 1990 SC 295; *Pakistan Lawyers Forum v. Federation of Pakistan*, PLD 2005 SC 719; *Saeem Raza v. State*, P LD 2007 Karachi 139; *Ch. Mohammad Issaquah Advocate v. Cantonment Executive Officer*, PLD 2009 Lahore 240; *Dr. Mubashir Hassan v. Federation of Pakistan*, PLD 2010 SC 1.

divergence of opinion as to the provision and protection of these rights throughout the constitutional history of Pakistan.<sup>83</sup> These rights have not only been taken away without any explanation but have also been suspended by the operation of law under martial law regimes.<sup>84</sup> The jurisdiction of courts to enforce such rights was curtailed through proclamations of emergencies<sup>85</sup> and the abrogation and the suspension of the constitutions.<sup>86</sup>

The judiciary was weakened through unconstitutional measures by dictators making the courts powerless in the face of a powerful executive.<sup>87</sup> The courts conveniently ignored onslaught on the constitution and turned over judicial responsibility to the military.<sup>88</sup> From 1977 to 1985, the 1973 Constitution effectively remained suspended or in abeyance. Resultantly, constitutionalism and fundamental rights of the citizens suffered.<sup>89</sup> However, after 1985, the judiciary realized its constitutional duty to put into effect the fundamental rights.<sup>90</sup>

It might be stressed that in the preamble of the 1973 Constitution the values of social justice, equality, liberty, and democracy are mentioned as aspirations of the state. The constitution envisages two types of rights: justiciable (fundamental rights) and non-

<sup>83</sup> See, Ahmad Rafay Alam, "The Law of Public Interest Litigation in Pakistan," in Werner Menski, et al., *Public Interest Litigation in Pakistan*, (Karachi: Pakistan Law House, 2000), 30.

<sup>84</sup> See, Article 8(5) which allows the suspension of the fundamental rights as proclaimed by the Constitution, 1973. See, Article 233 of the same. Under these provisions guarantee for fundamental rights has not been provided.

<sup>85</sup> See, Proclamations dated 24<sup>th</sup> January, 1949; 29<sup>th</sup> December, 1951; 14<sup>th</sup> March, 1954; 29<sup>th</sup> May, 1954; 27<sup>th</sup> March, 1955; 26<sup>th</sup> May, 1956; 31<sup>st</sup> August, 1956; 21<sup>st</sup> March, 1957; 25<sup>th</sup> June, 1958. For these Constitutional Documents of Pakistan, Ministry of Law and Parliamentary Affairs, Law Division Vol. IV-B, Orders and Proclamations, 1823, 1827, 1831, 1834, 1838, 1839, 1843, 1847, 1854. For adverse consequences of these Proclamations on fundamental rights, and judicial powers, See, Abdul Quddoos Sial, "Constitutional Deviations and their Implications for Democracy in Pakistan," PhD Diss., (The Islamia University Bahawalpur, 2005), 114-117.

<sup>86</sup> Since 1947 four times Martial Law was imposed in the country. It was pretended in the name of Islamic democracy aiming at the socio-economic justice through ensuring the enforcement of civil liberties, and maintaining the rule of law. First Martial Law was enforced on 7<sup>th</sup> October, 1958: See, Constitutional Documents of Pakistan, Ministry of Law and Parliamentary Affairs, Law Division, Vol. IV-B, Orders and Proclamations, p. 1857; *Second Martial Law*, on 25<sup>th</sup> March, 1969; *Third Martial Law* on 5<sup>th</sup> July, 1977; See, *Proclamation of Martial Law 1977*, CMLA Order 1 of 1977. For detail discussion and effects of these Martial laws on constitutional system and fundamental rights and judicial powers; See, Sial, Constitutional, 204-278; Fourth Martial Law was forced on 14<sup>th</sup> October, 1999; See, PLD 1999 Central Statutes 448 and again emergency was proclaimed on 3 November, 2007; See, PLD 2008 Federal Statute 108 and the Constitution was suspended, and Provisional Constitution Order 1 of 2007 was issued; See, PLD 2008 Federal Statutes 110. Besides, the imposition of Martial laws, four times assemblies and governments have been dissolved in the years 1988, 1991, 1993, 1996.

<sup>87</sup> See, Alam, Law, 25, in Menski et al., *Public*.

<sup>88</sup> See, Paul R. Newberg, Paul R., "Judging the State, Courts and Constitutional Politics in Pakistan," (Cambridge University Press, 1995), 169.

<sup>89</sup> Ibid.,

<sup>90</sup> Ibid.,

justiciable (principles of the policy).<sup>91</sup> The non-justiciable rights include the elimination of exploitation<sup>92</sup> social, economic and cultural rights.<sup>93</sup> The courts have interpreted these rights quite liberally including them into fundamental rights as consequential rights.<sup>94</sup> The judiciary has progressively construed and linked non-justiciable rights to fundamental rights.<sup>95</sup> The courts have further extended the definition of fundamental rights beyond its text and traditional understanding of the fundamental rights. For instance, the courts have extended the connotation of the right to life to a number of other rights such as environmental protection.<sup>96</sup> In doing so, the courts have demonstrated judicial activism to safeguard basic rights of the people.

The judiciary has built upon the constitutional provision pertaining to the fundamental rights such as the objectives resolution<sup>97</sup>, the fundamental rights<sup>98</sup>, and the principles of policy<sup>99</sup> to proactively safeguard these rights.<sup>100</sup> In the *Benazir Bhutto's* case, the court expanded the fundamental rights provisions ensuring socio-economic justice to the citizens.<sup>101</sup> While interpreting Article 184(3), the court held that the whole constitution should be interpreted to attain democracy and social justice as per Islam.<sup>102</sup>

Muhammad Afzal Zullah J. expanded the understanding of fundamental rights beyond its conventional scope<sup>103</sup> while interpreting the Preamble and Article 4 (the right of individuals to be dealt with in accordance with the law) of the 1973 Constitution.<sup>104</sup> Mehreen argues that these articles ensure the provision of justice for

<sup>91</sup> See, Article 2-A (principles of democracy, equality, tolerance, freedom and social justice, as pronounced by Islam); Article 3 (elimination of all types of exploitation); Article 4 (people to be treated in accordance with the law); Articles 29-40 (Principles of Policy) of Constitution, 1973.

<sup>92</sup> See, Article 3, of the Constitution, 1973.

<sup>93</sup> See, Articles 29-40, of the Constitution, 1973.

<sup>94</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD1988 SC 416.

<sup>95</sup> See, Sujata Manohar, "Human Right Agenda: A perspective for Development," Vol. 45, *J.I.L.I.* (2003), 169.

<sup>96</sup> Right to life has been included the environmental protection; See, *Shehla Zia v. WAPDA*, PLD 1994 SC 693; Human Rights Case, PLD 1994, fair trail : See, *Khalil-uz-Zaman v. Supreme Appellate Court, Lahore*, PLD 1994 S.C 885), clean water : See, *General Secretary West Pakistan v. Director Industries*, 1994 SCMR 2061 allotment of residence ; See, *Employees of Pakistan Law Commission v. Ministry of Works*, 1994 SCMR 1548), Rule of Law and Judicial Independence (See, *Malik Assad Ali v. Federation of Pakistan*, PLD 1998 SC 161; *Shah Liaquat Hussain v. Federation of Pakistan*, PLD 1999 SC 504.

<sup>97</sup> See, Article 2-A, of the Constitution, 1973.

<sup>98</sup> See, Articles 9-28, Ibid.

<sup>99</sup> See, Articles 29-40, Ibid.

<sup>100</sup> Ibid.,

<sup>101</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416, 489.

<sup>102</sup> Ibid.,

<sup>103</sup> See, Mohammad Afzal Zullah, "Human Rights in Pakistan. Commonwealth Law Bulletin," (London: Commonwealth Law Secretariat, 1992), 1343.

<sup>104</sup> See, Article 4, of the Constitution, 1973; PLD 1978 Lahore 523.



all.<sup>105</sup> As the courts are mandated to deliver justice<sup>106</sup>, they have interpreted these provisions liberally to establish an egalitarian society in Pakistan.<sup>107</sup> The courts have exercised the necessary powers to issue such directions to other branches of the government to do complete justice.<sup>108</sup>

#### 4.6 THE JUSTIFICATION OF JUDICIAL REVIEW

It may be argued that mentioning fundamental rights in a fundamental document called constitution is a partial success. The materialization of fundamental rights depends on the enforcement mechanism. Without an effective mechanism for the implementation of the fundamental rights, these rights largely remain a constitutional allusion and a legal fiction. Therefore, in constitutional democracies worldwide, the judiciary is empowered to safeguard the fundamental rights.<sup>109</sup> The international legal framework also dictates for the provision and the judicial enforcement of the fundamental rights.<sup>110</sup> Pakistan being a party to such international conventions is obliged to protect fundamental human rights through an independent judiciary.

In this spirit, the 1973 Constitution provides an effective procedure for the protection of fundamental rights. Articles 2-A, 4, 8, 9-28, 199, 184(3), 187 and 190 of the Constitution specifically provide for the protection of fundamental rights and confer this responsibility on the judiciary. The use of judicial review power as per the doctrine of separation of powers is meant to safeguard the fundamental rights of the people. The use of such power, however, may be exercised while remaining within the constitutional parameters prescribed by the separation of powers between the three organs of the state. The judiciary, thus, has a constitutional duty to enforce the separation of powers to protect the fundamental right.<sup>111</sup>

<sup>105</sup> See, Raza, *Reviewing*, in Menski et al., *Public*, 72.

<sup>106</sup> See, Khalid Ishaque, *Powers of the Supreme Court under Article 184(3) of the Constitution* referred in Hussain, Faqir, *Public*, 5.

<sup>107</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416.

<sup>108</sup> See, Article 187 (1), of the Constitution, 1973.

<sup>109</sup> See, Articles 3 and 6, the Constitution 1789 of United State of America; Articles 32 and 226, the Constitution, 1950 of India; Articles 199 and 184(3), the Constitution, 1973 of Pakistan; Articles 102, the Constitution, 1971 of Bangladesh; Section 3 of the Human Rights Act, 1998 of UK.

<sup>110</sup> Though there is no express provision imposing legal obligation on the UNO member-states to get the basic human rights enforced. However, such an obligation is in Article 56 which provides that "all Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in article 55." In this context Article 55 asserts that UNO shall attempt to endorse the widespread recognition for, and preservation of human rights and fundamental freedoms for all. The UDHR, 1948, though, is of limited importance from a practical point of view; however, it has an importance contribution for securing the human rights; See, also European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953; Article 2, ICCPR, 1966; Article, 2, ICESCR, 1966.

<sup>111</sup> See, Third Schedule, Oaths of Office of Judges of the Superior Courts, of the Constitution, 1973.

Pakistan's judiciary being cognizant of its constitutional duty, appreciated the socio-economic context and liberally construed the fundamental rights provisions to provide social justice since the 1980s when Article 2-A was made the essential part of the 1973 Constitution.<sup>112</sup> While deciding the *Benazir Bhutto* case, the judiciary extended the meaning and horizon of the basic rights relaxing the procedure for invoking jurisdiction of the courts. Thereafter, the courts used its judicial review powers liberally to interpret and safeguard the fundamental rights of the people in Pakistan.<sup>113</sup>

#### 4.7 JUDICIAL REVIEW OF THE LEGISLATIVE ACTION

This section discusses some cases in which the superior courts have adhered to the separation of powers doctrine while reviewing the legislative action under its judicial review powers to enforce the fundamental rights. These cases discuss and protect specific aspects of fundamental rights in Pakistan.

The court took on the matter of broadcasted content on TV channels in the *Pakistan Broadcasters Association v. Pakistan Electronic Media Regulatory Authority*<sup>114</sup> and examined Pakistan Electronic Media Regulatory Authority (PEMRA) Ordinance, 2002, regarding license agreements of broadcasters that restricted the maximum period of an advertisement break during prime time, and also R.15(3) of Pakistan Electronic Media Regulatory Authority Rules, 2009 which set a minimum time duration between two successive advertisement breaks.

After hearing the arguments, the court observed that “Broadcasters attempted to lengthen commercial breaks by putting more advertisements to maximize revenue irrespective of whether the viewer was willing or not...the state was obliged to regulate the right to speech when it came in conflict with the right of the viewers or listeners”.<sup>115</sup>

The court held that the Rule 15(3) of the PEMRA Rules, 2009 and the impugned clause only controlled length of ads and the gaps between ads; and the same neither banned the stuff of any program, nor restricted the right to free speech, thus the “said rule and clause were also in conformity with the Article 18 of the Constitution, which protected the right to conduct a lawful business, but also made it permissible to regulate any profession”.<sup>116</sup>

<sup>112</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416; See, also Alam, Law, in Menski, et al., *Public*, 36-41.

<sup>113</sup> Ibid.,

<sup>114</sup> See, *Pakistan Broadcasters Association v. Pakistan Electronic Media Regulatory Authority*, 2016 PLD 2016 SC 692.

<sup>115</sup> Ibid.,

<sup>116</sup> Ibid.,

The court further observed that the right to freedom of speech and freedom of expression are significant fundamental rights under our constitution. These fundamental rights help to promote the intellectual growth of society, constitutionalism, and democracy. Thus, the court held that the right to free speech helps a person in self-achievement, and prompts revelation of truth; it fortifies the limits of a person to make decisions and gives a way to accomplishing a developed and civilized society. The independence of media depends on the reason that sufficient information from assorted and opposing sources was essential to the prosperity of the individuals. Freedom of media is the basis of free government. Any endeavor to negate such rights would unquestionably deprive the citizens of the right to free speech under the law.<sup>117</sup>

Further, the court held that the state functionaries can only exercise legislative powers to promote and protect fundamental rights with reasonable restrictions. The legislative power can be used only under the mandate of law and the constitution. The court noted the reasonableness cannot be decided with precision however it can be judged, as per the prevailing circumstances. It is impossible to make an abstract universally acceptable standard of reasonableness. The word 'reasonableness' requires intelligent care and consideration. A reasonable action is always fair and just and should not be oppressive, arbitrary and fanciful.<sup>118</sup>

The court held that it has the authority to review the right to free speech when the same conflict with the rights of the people. No one could be forced to listen a content which he did not like while watching any TV show. The court emphasized that equilibrium must be made in this regard by reasonably restricting freedom of speech to maintain the public order. Therefore, the court held that the Government should strike an equitable and sensible harmony between the individuals' entitlement to the right to free speech and the need to regulate the business of broadcasting.<sup>119</sup>

The court observed that in modern jurisprudence, prohibitions and duties are co-existed to promote the right to free speech. Therefore, the government should make a reasonable balance between ensuring the right to speak of the people and on control of the business of broadcasting. Thus, the court observed that the High Court had rightly upheld the legality of R.15 (3) of the PEMRA Rules, 2009 and the impugned clause.<sup>120</sup>

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<sup>117</sup> See, Article 19, of the Constitution, 1973.

<sup>118</sup> See, *Pakistan Broadcasters Association v. Pakistan Electronic Media Regulatory Authority*, 2016 PLD 2016 SC 692.

<sup>119</sup> Ibid.,

<sup>120</sup> Ibid.,

In this case, the court reviewed the legislative acts and protected the right to free speech and right to business. The court rightly observed that the government should create a reasonable balance between the right to free speech of the people and the right to doing the business of broadcasting and publishing. The court by applying a balanced and justified approach upheld the impugned legislation and at the same time directed the government to regulate the broadcasted content and the business of broadcasting.

In the *Younas Abbas v. Additional Sessions Judge, Chakwal*<sup>121</sup>, the appellants questioned the vires of Section 22-A and 22-A (6) of the CrPC. The court heard the arguments and observed that functions of Ex-officio Justice of Peace under S.22-A (6), CrPC are quasi-judicial and could not be named as ministerial or executive. Such duties of Ex-officio Justice of Peace correspond to functions of police and thus do not amount to meddle with the investigative functions of the police. Moreover, the duties of the Ex-officio Justice of Peace are not ministerial or executive as he does not perform his duties mechanically.<sup>122</sup>

The court observed that such functions as described under the law<sup>123</sup> are quasi-judicial as Ex-officio Justice of Peace took applications, scrutinized the record, heard the parties and passed orders by applying mind. He decides every lis by exercising discretion. Therefore, the duties of Ex-officio Justice of Peace could not be labeled as an executive or administrative. The court can declare the provision of law *ultra vires* if the same violates the Constitution.

Thus, the court held that Sections 22-A (6) and 25 of CrPC are not *ultra vires* to the constitution as they did not abuse any provision of the constitution which ensures and promotes the theory of trichotomy of powers, fundamental rights as well as the independent judiciary. The court found that the *vires* of Sections 22-A (6) and 25 of CrPC could not be questioned even on the touchstone of the legislature's competence to make the law as there is no defect found in them in this regard.

In this case, the court by exercising the authority of judicial review under the Constitution reviewed the legislative instrument to check its validity and held that Sections 22-A(6) and 25 of CrPC, are not in contravention of the constitution as they did not conflict with any article of the constitution which guaranteed basic rights and independence of the judiciary. This case plainly shows whereby applying the doctrine

<sup>121</sup> See, *Younas Iqbal v. Additional Sessions Judge*, PLD 2016 SC 581.

<sup>122</sup> Ibid.,

<sup>123</sup> See, Section 22-A (6) clauses (i) (ii) (iii) of CrPC.

of separation of powers the court upheld the constitution and protected the basic rights of the citizens.<sup>124</sup>

In the *Khan Asfandiyar Wali v. Federation of Pakistan*, the court examined the *vires* of National Accountability Bureau Ordinance (XVIII of 1999)<sup>125</sup> on the ground of the separation of powers. The Ordinance had vested numerous judicial powers like the grant of bail and discharge of accused during the pending trial or make an appeal to the executive violating the principle of separation of powers. Sections 9(c) and 24(d) of the Ordinance had conferred Chairman, National Accountability Bureau the authority to discharge the accused on any conditions as he may deem appropriate.

The petitioner argued that such powers are purely judicial under Sections 426, 491, 497, 498 and 561-A of the CrPC and Articles 175, 202 and 203 of the constitution. As per the concept of separation of power as well as the judicial independence the judicial functions cannot be conferred to the executive. Moreover, it was argued that the denial from the right of appeal under the Ordinance was violative of Article 2-A of the constitutional power of superior courts to correct the orders and the natural justice. Thus, Section 13(c) which denied the right of appeal to the accused was against the Islamic injunctions and needs to be amended.

The court heard the arguments and declared Section 32 of the Ordinance as *ultra vires* to the constitution and directed to amend the same as it ousts the jurisdiction of superior courts under the law.<sup>126</sup> The court held that constitutional jurisdiction of courts cannot be taken away by subordinate legislation.

The court directed to amend Section 6 of the Ordinance regarding appointment, tenure, salary, terms and conditions and removal of the Chairman, National Accountability Bureau. The court declared requirement under the clause (b) (i) of section 6 for Chairman of National Accountability Bureau to hold office as per the pleasure of the President is *ultra vires* to the constitution being against the independence of the institution. Furthermore, the court directed to amend S.7(b) to provide that the Deputy Chairman shall be appointed for a minimum two years and shall only be removed on committing misconduct as per S.2(4) of the Government Servants (Efficiency and Discipline) Rules, 1973.

The court held that Article 203 of the constitution is applied to courts under

<sup>124</sup> See, *Younas Iqbal v. Additional Sessions Judge*, PLD 2016 SC 581.

<sup>125</sup> See, *Khan Asfandiyar Wali v. Federation of Pakistan*, PLD 2001 SC 607.

<sup>126</sup> See, Articles 199 and 184 (3) of the Constitution, 1973.

the Ordinance and thus the courts are under the supervision of the High Courts. The High Court can relocate the lis if the Court thinks a fair trial cannot be held before a particular accountability court.

The court further directed that cases could be taken back only with the permission of the accountability court and the Chairman, National Accountability Bureau nor the Prosecutor-General or Deputy Prosecutor-General can withdraw such cases. The court further directed the government to make rules under the Ordinance to make the process of accountability transparent; to pass appropriate legislation within two months from the order of the court to make necessary amendments, modifications and alterations.

This case shows close nexus between the doctrine separation of powers as well as the protection of fundamental rights. The court specifically mentioned that as per the system of trichotomy of powers the court can review the legislative actions to protect the basic rights of the people. In this case, the court protected the basic rights of the citizens under Articles 12, 13, 23, 24 and 25 of the constitution by declaring certain provisions of the Ordinance, *ultra vires* the constitution.

In the *Dr Mobashir Hassan v. Federation of Pakistan*, the court examined the constitutionality of the National Reconciliation Ordinance, 2007 (NRO).<sup>127</sup> The court following the principle of trichotomy of powers sent the NRO to the Parliament to make it the Act of the Parliament. However, the Government withdrew the NRO after putting the same before the National Assembly.

It was argued that under the constitution, there is a separation of powers amongst three branches of the state. The legislature legislates the law, the executive executes the law and the judiciary construes the law. No branch can encroach the domain of the other branches. The court leans towards the constitutionality of the legislation and tries to save the statute instead of destroying the same. Presumption of constitutionality is attached to the legislation unless it is *prima facie* contravenes the constitution.

Moreover, the withdrawal of the case under the law would mean that public officers absolved from charges of corruption.<sup>128</sup> Therefore, the legislature transgressed into the domain of the judiciary because under the constitution it is the domain of the

<sup>127</sup> See, *Dr Mobashir Hassan v. Federation of Pakistan*, 2010 PLD SC 265.

<sup>128</sup> See, Section 33F of the National Accountability Ordinance, 1999, inserted through Section 7 of NRO.

judiciary to exonerate the accused after following the judicial process.

The court heard the arguments at length and held that the NRO is not a valid law; it discriminates and contradicts with the basic rights and violates the Articles 62, 63, and 175 of the constitution. The court reiterated that Articles 5 and 8(2) of the constitution commands that every citizen is bound to follow the law and the state cannot formulate a law that abridges fundamental rights. It seems that by promulgating the NRO the legislature has intentionally violated Article 8 of the constitution.

The court further held that equality among the people is an important principle of Islamic justice. When there is inequality among citizens then there is no justice. The court observed that Article 25 of the constitution has its origin in Islam. Thus, no legislation shall be passed which is against Islam. Therefore, the court found, that the NRO is enacted violating the Islamic Injunctions under article 227(1) of the constitution.

The court observed that the pending prolonged proceeding is not a ground of termination or withdrawal of cases. As per the law the chosen representative of the people can only exercise the power of Allah Almighty as per the commands of Allah and the constitution.<sup>129</sup> Therefore, provisions of NRO are void being violative of Islamic injunctions and Articles 62, 63 and 175 of the constitution.

The court employed the concept of trichotomy of powers and protected the basic rights of the people by nullifying the NRO as unconstitutional. Therefore, this case displays a connection between the constitutional doctrine of separation of powers and the protection of fundamental rights.<sup>130</sup>

In the *Baz Muhammad Kakar v. Federation of Pakistan through Ministry of Law and Justice*, the court examined the legality of the Contempt of Court Act, 2012, (Act, 2012).<sup>131</sup> It was argued that as per Article 204 (3) of the constitution, the legislature can legislate to control the use of the authority bestowed on a court as per Article 204 of the constitution. However, the legislature is bound to follow the relevant law as well as the constitution while legislating concerning the jurisdiction of the court.

It was argued that by exercising the power of judicial review, the courts can review the actions of the legislature to check their constitutionality. The superior courts

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<sup>129</sup> See, Article 2A of the Constitution, 1973.

<sup>130</sup> See, Articles 12, 13, 25 of the Constitution, 1973.

<sup>131</sup> See, *Baz Muhammad Kakar v. Federation of Pakistan through Ministry of Law and Justice*, 2012 PLD SC 923.

can annul a law to the level of conflict if the same contradicts the basic rights, judicial independence and the constitution as a whole. The court observed that the significance of judicial independence cannot be ignored as without independence of judiciary there would be no protection of fundamental rights. The judiciary has the mandate to review any legislation which contravenes the constitution. The power given under the law does not protect and promote the self-esteem of the judges but it safeguards the rights of the citizens.<sup>132</sup> By using the power under the law, thus, the courts ensure the enforcement of fundamental rights.<sup>133</sup>

The court declared the preamble and Sections 2 (a), 3, 4, 6, 8, 10, 11, 12 and 13 of the Act, 2012 void and unconstitutional. The court further observed that when Section 13 was a void, then the remaining Sections of the Act, 2012 would serve no purpose. Thus, the court found, that the principle of severability is not attracted in the case. The court declared the Act, 2012 void and unconstitutional and the Contempt of Court Ordinance, 2003 was restored.

In this case, the court used judicial review power to safeguard the basic rights of the citizen. The court protected the fundamental rights of the people i.e. Articles 9, 19 and 25 of the constitution by declaring that the legislature could not make a law barring the people to approach the courts of law.

In the *Sh. Riaz-Ul-Haq v. Federation of Pakistan through Ministry of Law*, the court dealt with the right of access to justice with reference to civil servants.<sup>134</sup> The court examines all Service Tribunals Acts and the rules of the country.<sup>135</sup> It was argued that the right of access to justice is a well-perceived sacred right. This right found in due process of law. It includes being treated as per law, fair trial before a capable and impartial court. The independent judiciary and right to access to justice are basic rights of the people under the constitution.

Service Tribunals exercised judicial powers; thus, the judicial powers must be separated from the executive as per Article 175(3) of the constitution. When the tribunals decide the rights of the parties by determining relevant facts and taking evidence as per the law then they act as a court. When judicial power is given to any

<sup>132</sup> See, Article 204, of the Constitution, 1973

<sup>133</sup> Ibid.,

<sup>134</sup> See, *Sh. Riaz-Ul-Haq v. Federation of Pakistan through Ministry of Law*, 2013 PLD SC 501.

<sup>135</sup> Service Tribunals Act, 1973, the Sindh Service Tribunals Act, 1973, the Khyber Pakhtunkhwa Service Tribunals Act, 1974; the Balochistan Service Tribunals Act, 1974; Federal Service Tribunal Chairman and Members Service Rules, 1983, and Service Tribunals (Qualifications of Members) Rules, for appointment of Chairman and the Members of Service Tribunals.



authority it gains the status of a court. The use of judicial power is a vital feature of a court; it creates a distinction from the administrative tribunal.

The court observed that to make the Chairman and the Members of the Service Tribunals independent, it was required to appoint them with the purposeful meeting of the concerned Chief Justices; all appointments made without such consultation were void. Where a retired Judge of the High Court was to be appointed as Chairman of the (Service) Tribunal, selection should be made in consultation with the Chief Justice of the High Court in the case of a Provincial Service Tribunal and in consultation with the Chief Justice of Pakistan in the case of Federal Service Tribunal.

The court held that Chairman and members of the service tribunals must have legal/judicial experience thus, an individual who is qualified to become a presiding officer of the district court can be employed as a member of the service tribunal. For safer administration of justice, a retired judge of High Court preferably must be appointed as Chairman of the Service Tribunals. It will improve the quality of judgment and judicial independence to protect and promote the fundamental rights.

The court further observed that both the Federal and Provincial Service Tribunals perform important judicial functions i.e. the terms and conditions of civil servants thus, it is imperative that appropriate laws be made post-haste.

The court declared that certain sections of the Acts and Rules<sup>136</sup> were ultra vires, void, being a derogation of the Constitution.<sup>137</sup> The court further directed the government to appoint Chairmen/Members of the (Service) Tribunals afresh within thirty days in accordance with the orders of the court. If the Governments failed to comply with orders of the court within a specified time the law which had been declared void would cease to have an effect, consequently whereof, the incumbent Members/Chairmen of the Service Tribunals, whose cases did not come under the recommended legislation, would cease to hold office.

This case illustrates a robust connection among the principle of separation of powers as well as the protection of the fundamental rights of the people. In this case, the court protected the right of access to justice of civil servants by declaring

<sup>136</sup> Section 3(1), (3), (3)(b), (4) & (7) of the Service Tribunals Act, 1973; S.3(3)(b) of the Sindh Service Tribunals Act, 1973; S.3(3)(b) of the Khyber Pakhtunkhwa Service Tribunals Act, 1974; S.3(3)(b) of the Balochistan Service Tribunals Act, 1974; Rule 1 of Federal Service Tribunal Chairman and Members Service Rules, 1983, and Rule 2 of Service Tribunals (Qualifications of Members) Rules, 1974

<sup>137</sup> See, Articles 2A, 9 and 175 of the Constitution, 1973.

various sections of the acts and the rules<sup>138</sup> void, ultra vires to the constitution and protected fundamental rights of the citizens.<sup>139</sup> Such a dynamic approach of the court protects fundamental rights and constitutionalism.

In the *Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law*,<sup>140</sup> the court took on the issue of disqualification of legislators holding dual nationality under the law.<sup>141</sup> It was argued that as concerns Article 63 (1)(c) of the constitution, an individual who held dual nationality yet wished to become a Parliamentarian, needed to repudiate citizenship of foreign state. An individual, who held dual nationality at the moment of presenting his nomination papers, would be excluded to be chosen as Parliamentarian. Where any public representative got dual nationality, he would lose his seat of the Parliament. The law clarified that an individual keeping dual nationality is ineligible from being chosen as a public representative.<sup>142</sup>

The court held that the bearers of the state authority must be seen as fiduciaries as the government authority is just like a sacred trust. The members of the National and Provincial Assemblies made decisions of great importance which have an impact on the basic rights of the citizens. The members must show the utmost loyalty to the people and the state. If the members make false assertions before the state institutions then the people will lose trust from their representative. The constitution required from the members to solemnly swear they would bear real faith as well as loyalty to Pakistan and their duties in the interest of the state.

The court held that the members were ineligible to become public representatives due to their ineligibility as per law as they had acquired the citizenship of a foreign state.<sup>143</sup> The members had got the foreign nationality and they made false assertions in front of the Election Commission at the moment of submitting their papers and thus seem to be liable for the fraudulent act under the law.<sup>144</sup>

The court directed the Election Commission to de-notify the members and start

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<sup>138</sup> See, sec 3(1), (3), (3)(b), (4) & (7) of the Service Tribunals Act, 1973; S.3(3)(b) of the Sindh Service Tribunals Act, 1973; S.3(3)(b) of the Khyber Pakhtunkhwa Service Tribunals Act, 1974; S.3(3)(b) of the Balochistan Service Tribunals Act, 1974; Rule 1 of Federal Service Tribunal Chairman and Members Service Rules, 1983, and Rule 2 of Service Tribunals (Qualifications of Members) Rules, 1974.

<sup>139</sup> See, Articles 2A, 9 and 175, of the Constitution, 1973.

<sup>140</sup> See, *Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law*, 2012 PLD SC 1089.

<sup>141</sup> See, Article 63(1) (c) of the Constitution and Sec.14 of the Pakistan Citizenship Act, 1951.

<sup>142</sup> See, Article 63(1)(c) of the Constitution and S.14 of Pakistan Citizenship Act, 1951 (as amended by Pakistan Citizenship (Amendment) Act, 1972).

<sup>143</sup> See, Article 63(1) (c) of the Constitution.

<sup>144</sup> Section 78 of Representation of the People Act, 1976.

legal action against them as per the law<sup>145</sup>; also, to scrutinize the record of other members of the legislature by taking fresh oath from them whether they had foreign nationality or not when they submitted nomination papers. The court further directed the public representatives to return all monetary benefits they had obtained from the national exchequer while enjoying the public office.

This case displays a solid connection among the doctrine of separation of powers, protection of fundamental rights, and constitutionalism. In this case, the court attempted to protect mandate and fair representation of the people as the court specifically mentioned that government power is like a sacred trust and its holders must look as trustees.

In the *Province of Sindh Through Chief Secretary v. M.Q.M. through Deputy Convener*, the court examined the legality of Local Government elections, i.e. whether the delimitation officer can make a rural part as an urban part without earlier notification.<sup>146</sup>

Under the impugned law a panel system was introduced in the Union Council under Section 18 (14) of Sindh Local Government Act, 2013. It was provided that if a political party or independent applicants failed to form a group in the elections, the nomination papers of all such applicants shall be rejected. Such requirement of forming a panel and in the event of failure to do so, the penalty of rejection of nomination papers on the face of it appeared to be a clog on the fundamental right of equality of citizens.

The court held that Sections 18 (12) and (14) of the impugned legislation violate the Act and the constitution. The court emphasized a need for a neutral body to carry out the delimitation exercise because there were instances when in such process the voting strength of a minority or an ethnic group was diluted, which violates Article 25 of the constitution.

The Court further held that such authority had been given to the officer devoid of any rules and the same was subjective. The proviso to S.13 (1) of the law<sup>147</sup> was biased and had been included to invalidate the real background of the Act<sup>148</sup> as well as to safeguard the actions of the officers retrospectively. Moreover, the proviso raised

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<sup>145</sup> Section 82 of the Representation of the People Act, 1976 read with Sections 193, 196, 197, 198 and 199, PPC.

<sup>146</sup> See, *Province of Sindh Through Chief Secretary v. M.Q.M. through Deputy Convener*, 2014 PLD SC 531; S. 13(1), Sindh Local Government (Third Amendment) Ordinance (XV of 2013).

<sup>147</sup> The Sindh Local Government Act, 2013.

<sup>148</sup> Ibid..

questions on the fairness of the process of the election. Thus, the court observed that proviso to S.13 (1) of the Act contravened the Act as well as the constitution.<sup>149</sup>

The court held that the federal government should make necessary laws to empower the Election Commission to do the delimitation of constituencies; that the Provincial Government should also amend the Act correspondingly.<sup>150</sup>

This case connects the separation of power with the protection of fundamental rights as the court safeguarded the representation as well as will of the citizens by holding that making a panel and in the event of failure to do so, the penalty of rejection of nomination papers seemed to be an obstruction in the exercise of fundamental rights. In addition, the court promoted the fairness of the process of election by holding proviso to S.13 (1) of the Act discriminatory and ultra vires of the constitution.<sup>151</sup>

In the *Munir Hussain Bhatti* case<sup>152</sup>, the court discussed the role of a Parliamentary Committee as to the disapproval of the nomination of High Court judges by the Judicial Commission.<sup>153</sup> The court established its exclusive power regarding the appointment of superior court judges and held that, under the constitutional scheme of distribution of powers, a parliamentary committee cannot reject nominations made by the Judicial Commission. In the *Nadeem Ahmad's* case<sup>154</sup>, the superior court judge's appointment was challenged in view of the 18<sup>th</sup> amendment. The court asserted its power and asked the parliament to reconsider the formulation of the judicial appointment mechanism proposed in the 18<sup>th</sup> amendment providing a significant role to the parliamentary committee. These two cases contribute to constitutional debate with reference to the role and domain of the legislature and the importance of judicial independence for the protection of fundamental rights in Pakistan.

#### 4.8 CONCLUSION

To conclude, the main points of the preceding discussion are summed up. The 1973 Constitution provides a comprehensive procedure for making the law. The legislative function encompasses making of constitutional and sub-constitutional laws. The constitutional law-making requires two-thirds of the total membership of

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<sup>149</sup> Ibid.,

<sup>150</sup> Ibid.,

<sup>151</sup> Ibid.,

<sup>152</sup> See, *Munir Hussain Bhatti v. Federation of Pakistan*, 2011 PLD SC 407.

<sup>153</sup> Article 175, of the Constitution, 1973.

<sup>154</sup> See, *Nadeem Ahmad Advocate v. Federation of Pakistan*, 2010 PLD SC 312

both the houses of the parliament. The sub-constitutional laws can be passed with a simple majority of the house. Articles 141-142 of the 1973 Constitution, specify the law-making domain of the federal and provincial governments. There is only a federal legislative list. The provincial assemblies can legislate on those subjects which are not included in the federal legislative list. The subject of criminal law, criminal procedure, and evidence falls in the legislative domain of both the federal and the provincial legislatures. The 18<sup>th</sup> constitutional amendment in 2010, has abolished the concurrent legislative list. Under Article 143, in case of any conflict, the law made by the federal legislature prevails. The President and Governor can also make the law through ordinances. However, law made through ordinance is valid for a specified period and requires the approval of the relevant assembly for its validity and continuation.

Under Articles 184 and 199 of the Constitution, an effective mechanism for judicial review and the enforcement of fundamental rights is provided. Article 8 provides that any law not in consistent with the fundamental rights can be declared void. In the *Benazir Bhutto* case, the judiciary extended the scope of the protection of fundamental rights while relaxing the procedural requirements for invoking the jurisdiction of courts. It has raised a debate of the separation of powers and fundamental rights in Pakistan.

Constitutional theorists like Emanuel Kant, H.L.A Hart, and Jeremy Bentham have emphasised the importance of human rights. Kant argues that natural human rights are acquired since birth and were created before the development of a political state. Before the emergence of modern political states, human rights were recognised as ethical supremacy and positive morality. Hart equates these rights with the self-expression of humans and advocates their protection for the welfare of the humans. Bentham also considers these rights as a means of securing well-being of humans. Thus, modern democracies are obliged to protect these rights. John Lock stressed that governments should be restrained in the exercise of power to protect rights of citizens.

Thus, the courts have a constitutional mandate to examine any legislative instrument which infringes the fundamental rights of the people. The courts can nullify such law, partly or wholly, subject to the nature of the law. The courts have applied the constitutional doctrine of separation of powers while reviewing the actions of the legislature for the protection of the fundamental rights. In some cases, the courts have declared legislation as unconstitutional on the criterion of the fundamental rights

of the citizens in Pakistan.

In the *Pakistan Broadcasters Association* case, the court while upholding the impugned legislation directed the government to regulate the broadcasted content to protect both the fundamental right to business and the right to freedom of speech and expression. In the *Younas Abbas* case, the appellants questioned the vires of Sections 22-A and 22-A (6) of CrPC on the ground that these sections violate the separation of power between the executive and the judiciary and thus infringes the fundamental rights such as the right to life and liberty. The court restrained itself and held that the impugned sections of law do not offend any fundamental right. In the *Province of Sindh Through Chief Secretary v. M.Q.M. through Deputy Convener*, Section 18 (14) of Sindh Local Government Act, 2013 was challenged on the ground of the violation of the fundamental right of equality and the right to vote as it introduced a panel system for the local bodies election. The court declared the requirement of forming a panel for the election of local bodies a clog on the fundamental rights.

In this chapter, the analysis of theory and the practice of judicial review helps to prove the main thesis: that focus on constitutionalism and the constitutional doctrine of separation of powers promotes fundamental rights in Pakistan.

The next chapter shall discuss the executive domain and the nature of functions of the federal and the provincial governments. It will discuss grounds and the approach of judicial review and elaborate how our courts have examined the executive action for the enforcement of fundamental rights in Pakistan.

## **CHAPTER FIVE**

### **THE SEPARATION OF POWERS AND EXECUTIVE ACTIONS**

#### **5.1 INTRODUCTION**

Chapter four examines how the courts have protected the fundamental rights while employing the doctrine of separation of powers on legislative action. It explored the lawmaking domain of the federal and the provincial legislature. It briefly examined the justification for the judicial review of the legislation. Finally, it analysed some cases to assess how the courts have applied the separation of powers doctrine for the protection of fundamental rights in Pakistan.

This chapter explores how the courts have examined the executive action and have protected the fundamental rights of the people? It attempts to answer a few specific questions: What is the extent of the executive power of the federal and the provincial governments? What is the nature and scope of the functions of the executive? What is the constitutional justification for the judicial review of the executive action? On which grounds the executive action can be reviewed by the courts? How can judicial review be exercised in a balanced manner?

Answers to these questions are important as they help to examine the hypothesis of this study that aims to explore the institutional relationship between the three organs of the state to assess its impact on the protection of fundamental rights in Pakistan. Thus, this chapter contributes to proving the overall hypothesis of the thesis.

#### **5.2 EXTENT OF THE FEDERAL EXECUTIVE**

The federal government exercises the executive power of the federation in the name of the President. The federal government consists of the Prime Minister and the federal ministers. The Prime Minister is a chief executive of the federation and the federal government acts through him. The Prime Minister may act directly or through his ministers to fulfill his duties under the constitution.<sup>1</sup> The cabinet comprises of the Prime Ministers and ministers; the Prime Minister heads the cabinet. The Prime Minister and the Cabinet remain accountable to the parliament for the performance of their executive functions. The cabinet also advises the President to carry out his constitutional duties.<sup>2</sup> The federation has the executive authority in all matters on which

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<sup>1</sup> See, Article 90, of the Constitution, 1973.

<sup>2</sup> See, Article 48, of the Constitution, 1973.

the parliament can legislate.<sup>3</sup> On the recommendation of the federal government, the federal legislature by making law can also empower the subordinate officers or authorities of the federal government to perform different executive functions.<sup>4</sup>

Ordinarily, the authority of the executive is not limited only to execute the laws in existence. In order to enable it to carry on its day-to-day functions, there may be no specific law in existence<sup>5</sup>; however, it does not mean that the executive can infringe on the right of the citizens. It is the very nature and importance of the fundamental rights, that they cannot be taken away by the executive authorities except in accordance with the law.<sup>6</sup>

### **5.3 EXTENT OF THE PROVINCIAL EXECUTIVE**

The executive power of the provinces covers the issues regarding which the provincial legislature has the authority to formulate laws. The matters in which both a provincial legislature and the parliament have law-making authority, the executive authority of the federal government shall prevail over the executive authorities of a province.<sup>7</sup> Like the federal government, on the sanction of the provincial government, the provincial legislature by formulating laws can empower the subordinate officers of the provincial government to perform different functions of the executive nature.<sup>8</sup>

### **5.4 FUNCTIONS OF THE EXECUTIVE**

The executive has all functions regarding governance of the country except the lawmaking function of the legislature and judicial functions of the courts, which is an essential feature of the doctrine of separation of powers. However, a limited legislative role is also assigned to the executive under the constitution such as making laws through ordinances and delegated legislation.

The executive authority generally includes maintaining the law and order situation, defense of the state, the advancement of prosperity and welfare of the state, the provision of basic rights to the people, the management of public administration, and the development of good relations with foreign states. The executive duties have a residual character. They are performed over the range of subjects extending from making of the state policy to the administration of the affairs of the governance. The

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<sup>3</sup> See, Article 97, of the Constitution, 1973.

<sup>4</sup> See, Article 98, of the Constitution, 1973.

<sup>5</sup> See, *State v. Zia ur Rahman*, PLD 1973 SC 49.

<sup>6</sup> See, *Lords Blanesburgh and Atkin and Sir Lancelot Standerson v. Officer Administering the Government of Nigeria and others*, AIR 1931 PC 248.

<sup>7</sup> See, Article 137, of the Constitution, 1973.

<sup>8</sup> See, Article 138, of the Constitution, 1973.



executive functions are performed in the name of the President.

The executive functions of the state, in any constitutional government, are disseminated amongst different institutions and the government officials. The armed forces, police, the local authorities and the statutory bodies perform the specialized executive functions.<sup>9</sup> The nature of the executive functions shows the separation of powers among three organs of the state<sup>10</sup> and these organs are required to exercise their respective functions under the constitution.<sup>11</sup>

Thus, the following two sections discuss the supremacy of the constitution and the authority of the courts to interpret the constitution. This discussion will help to sharpen theoretical understanding of the exercise of judicial review powers for the protection of fundamental rights in Pakistan.

## 5.5 SUPREMACY OF THE CONSTITUTION

The executive, the legislature, and judiciary are creation of the constitution. The constitution provides for their powers and also the limits on those powers. So, each institution is obliged to follow the spirit and dictates of the constitution. With reference to the enforcement of fundamental rights and the separation of powers, the judiciary is authorized to uphold the supremacy of the constitution. If the judiciary fails to maintain constitutional supremacy, the fundamental rights of the people suffer.

The constitution being basic law of the state is supreme.<sup>12</sup> It embodies the will of people so it must be upheld to protect the basic rights of the citizens. In the situation of any conflict among the acts of the any branch of the government and the constitution, the later will hold.<sup>13</sup> The supremacy of the supreme law of the land is, thus, a basic purpose and feature of any written constitution.

The written constitution put limits on the authority of governments. If the written constitution is not held supreme the whole concept of constitutional government

<sup>9</sup> See, A.G Chaudhry, "Lectures on Constitutional Law," (Lahore: Eastern Law Book House Press, 2013), 36.

<sup>10</sup> See, William E. Raftery, "The Legislature Must Save the Court from Itself," Recusal, Separation of Powers, and the Post-Caperton World accessed January 5, 2015, <http://heinonline.org>

<sup>11</sup> See, *State v. Zia UR Rahman*, PLD 1973 SC 49.

<sup>12</sup> See, A. G. Chaudhry, "Lectures on Constitutional Law," (Lahore: Irfan Law Book House, 2013), 81.

<sup>13</sup> This is the general principle as established by the judiciary under the authority of judicial review in various cases. Among those, the leading cases in different national jurisdictions are namely, *Marbury v. Madison*, 5 US (1 Cranch) 137 (1803); *State v. Zia-ur-Rehman*, PLD 1973 SC 49; *Golaknath v. State of Punjab*, 1967 AIR 1643 SCR (2) 762.

would defeat.<sup>14</sup> The constitution being the supreme law<sup>15</sup> of the land carries the highest normative status in any legal system.<sup>16</sup> The constitution is considered supreme as it contains the cluster of supreme principles and rules, which establish and regulate the institutional arrangements of a state.<sup>17</sup>

The written constitution serves two basic purposes: First, it envisages the concept of limited government and the norm of constitutionalism. Second, it provides and protects fundamental rights.<sup>18</sup> Pakistan's constitution also stipulates these two key functions of a constitutional government. Again, with reference to any written constitutions two questions are very important: First, who is responsible to interpret and maintain the rule of the constitution? Second, what are the parameters of exercising such constitutional authority? The following part briefly examines these two questions:

## **5.6 JUDICIAL AUTHORITY FOR INTERPRETING THE CONSTITUTION**

To protect the constitution is the responsibility of all the state authorities.<sup>19</sup> All government officials are obliged to uphold the constitution, and even those officials interpret the constitution in course of making and applying the law.<sup>20</sup> However, a separate and independent institution of the judiciary is a must for upholding and interpreting the constitution including the protection of fundamental rights.<sup>21</sup> Without such judicial authority, there would be institutional conflict and constitutional crisis in any government.<sup>22</sup>

Lock and Montesquieu were of the view that people will preserve and protect their constitutions through their chosen representatives.<sup>23</sup> Dicey argued that only a Monarch could effectively hold power and arbitrate a balance of powers between

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<sup>14</sup> See, Hamilton, Alexander, "The Federalist No. 78," *Independent Journal* (1788). in *The Documentary History of the Ratification of the Constitution*, Volume. 18, ed. Gaspare J. Saladino and John P. Kaminski Madison (Wisconsin Historical Society Press, 1995); See, *Marbury v. Madison*, 5 US 1 Cranch, 137(1803).

<sup>15</sup> See, Gewirtz, *Approaches*, 201.

<sup>16</sup> See, Louis Henkin, "Economic Rights under the United States Constitutions," *Columbia Journal of Transnational Law*, Vol. 32 (1994), 40-42), *Grimm*, (2010B 9).

<sup>17</sup> See, YanivRoznai, "Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers," PhD. Diss., (London School of Economics, 2014), 9.

<sup>18</sup> See, Chaudhry, *Lectures*, 2.

<sup>19</sup> See, Contents of Oath of Legislatures, "Executives and Judges in the Constitutions of Pakistan, 1973, India, 1949 and United States of America," 1789.

<sup>20</sup> See, Gewirtz, *Approaches*, 208.

<sup>21</sup> See, Carl J. Friedrich, "Constitutional Government and Democracy," (New Delhi: Oxford and IBH Publishing Company, 1974), 265.

<sup>22</sup> See, *Eugene v. Rostow*, "The Sovereign Prerogative: The Supreme Court and the Quest for Law," (New Haven: Yale University Press, 1962), 118.

<sup>23</sup> See, Friedrich, *Constitutional*, 650.

different organs of a political state.<sup>24</sup> However, modern democracies functioning under written constitutions bestow this authority on the judiciary<sup>25</sup> as it is considered to be a neutral institution of the government.<sup>26</sup> Without a neutral and independent arbitrator, the constitution would be a dead letter.<sup>27</sup> The judiciary is, thus, the final authority on the constitution as the constitution is what the courts say it is.<sup>28</sup> It is the obligation of the judiciary to interpret as well as uphold the constitution. In case of any ambiguity as to the meaning and scope of the constitution and its consonance or conflict with any other sub-constitutional law, the judiciary is to decide the matter exclusively.<sup>29</sup>

If any institution transgresses its constitutional domain, the judiciary is bound to maintain institutional checks and balances.<sup>30</sup> Justice Jackson observed that the judiciary is obliged to interpret the constitution maintaining the system of checks and balances and the separation of powers in a society in which fast changes upset the institutional equilibrium, without exceeding its own limited powers.<sup>31</sup> An emphasis may be placed on the statement: *without exceeding its own limited powers*. It means that while restraining transgression of other branches, the judiciary in itself must be cognizant of the use of its *own* power. It *must* restrain itself. It may be argued that if the institution that is responsible to maintain constitutional balance between the three branches of the government, itself loses the constitutionally provided balance of power, it would destabilize the overall system of constitutional governance. Resultantly, the fundamental rights would suffer. In this context, Chief Justice John Marshall said that it is for the judges to say what the law is<sup>32</sup>; he also observed<sup>33</sup> that we need never overlook it is a constitution we are construing.<sup>34</sup> Similarly, in the UK, it is for the judiciary to

<sup>24</sup> See, Fridrich, *Constitutional*, 249; See, A.V. Dicey, "Law of Constitution," (Eighth Ed., 1926), 420.

<sup>25</sup> See, Alexander, *Federalist*. However, it is pertinent to note that there are also somewhat different practices for interpreting the constitution in different national jurisdictions around the world. Among those are the courts of general jurisdiction checked by the Supreme Court, Specialized Constitutional Court, French Conseil Constitutionnel and Standing Committees as under Article 156 of the Constitution of PRC; See, Gewirtz, *Approaches*, 209). In Switzerland this power lies with the Federal Assembly. In the constitutional system of the French Republic, this power is for the Constitutional Committee; See, Chaudhry, *Lectures*, 82).

<sup>26</sup> See, Fridrich, *Constitutional*, 265.

<sup>27</sup> See, A. De Tocqueville, "Democracy in America," (P. Bradley ed., 1945), 151.

<sup>28</sup> See, Hughes, Charles Evans, "Addresses and Papers of Charles Evans Hughes," (New York: G. P. Putnam's Sons, 1908), 139.

<sup>29</sup> See, Hamilton, *The Federalist No. 39*, (C. Rossiter ed. 1961), 245.

<sup>30</sup> *Ibid.*, 196.

<sup>31</sup> See, Robert H. Jackson, "The Supreme Court in the American System of Government," (Cambridge, MA: Harvard University Press, 1955), 61.

<sup>32</sup> See, *Marbury v. Madison*, 5 US 1 Cranch, 137 1803, 177.

<sup>33</sup> See, *Mcculloch v. Maryland*, 1819 17 US 316, 407.

<sup>34</sup> *Ibid.*,

determine and pronounce what the common law is.<sup>35</sup> However, while pronouncing the law, the judiciary neither can make the policy nor execute it on behalf of other organs of the state. If it does so, it would violate the doctrine of separation of powers and will undermine the fundamental rights of the people.

The courts may not be totally immune from the political dynamics of their time; however, the courts are much more likely than other institutions to have the required impartiality to examine the constitutional questions fairly and to implement the fundamental values embedded in the constitution in a balanced manner.<sup>36</sup> Pakistan's judiciary reaffirms this principle and has pronounced that its mandate is to maintain the supremacy of the constitution.<sup>37</sup>

### **5.7 INTERPRETING THE CONSTITUTION THROUGH JUDICIAL REVIEW**

The constitution is interpreted and upheld through judicial review by the courts.<sup>38</sup> The courts use this power under the doctrine of separation of powers. The courts review the functions of both the executive and the legislature to ensure that these branches do not transgress constitutionally prescribed boundaries effecting the fundamental rights of the people. The judicial review, in fact, works as a check on the governmental powers. It is an effective measure that keeps the state functionaries under constitutional check and legal control.<sup>39</sup> The concept of judicial review is briefly discussed in the following paragraphs to provide a foundational understanding for a thorough analysis of the competing approaches of judicial review in the next chapter.

Different jurists have understood and defined the concept of judicial review within a specific political and constitutional context. Brian Thompson, for example, defines judicial review as the authority of the judiciary to declare void executive and legislative actions, if they fail to conform to the constitution.<sup>40</sup> E.S. Crown stated that the judicial review is the authority of the judiciary to examine the validity and the

<sup>35</sup> See, *Thomas Bonham v. College of Physicians*, 77 Eng. Rep. 638 (1610)

<sup>36</sup> See, Gewirtz, *Approaches*, 209.

<sup>37</sup> See, *Syed Zafar Ali Shah v. Pervez Musharraf*, PLD 2000 SC 869, 1123.

<sup>38</sup> Alexander M. Bickel, "The Least Dangerous Branch: The Supreme Court at the Bar of Politics," (Yale University Press 1986), 1; Michael Halley, "Response, Constitutional Interpretation and Judicial Review: A Case of the Tail Wagging the Dog," *Michigan Law Review* Vol. 108 (2010): 60; David A. Strauss, "The Modernizing Mission of Judicial Review," *University of Chicago Law Review*, Vol. 76(2009): 859; See, *Cohens v. Virginia*, 19 US 264 (1821).

<sup>39</sup> See, Soli J. Sorabjee, "Obliging Government to Control Itself-Recent Development in Indian Administrative Law," *Public Law*, (1994), 39.

<sup>40</sup> See, Brian Thompson, "Text book on Constitutional and Administrative Law," (Blackstone Press, 1997), 397.

constitutionality of the actions of the legislature and the executive.<sup>41</sup> The judicial review is judicial scrutiny of the functions of the governments on the touchstone of the constitution, says S.P. Sathe.<sup>42</sup>

Justice Brennan argues that judicial review is the enforcement of the rule of law over the executive action to ensure that the executive does not transgress from the assigned powers so that the rights of the individuals are protected.<sup>43</sup> On these premises, determining the legitimacy of governmental acts on the basis of the constitution is called judicial review in Pakistan.<sup>44</sup>

In any democratic system, the judicial review is used to interpret and enforce the constitution to uphold constitutionalism and fundamental rights of the people. Historically, Greek philosophers laid the foundations of judicial review.<sup>45</sup> The modern conception of judicial review, however, developed in constitutional jurisprudence of the US and the UK. While using judicial review powers, the US Supreme Court in the *Marbury v. Madison* annulled<sup>46</sup> an act of Congress as unconstitutional.<sup>47</sup> This judgment has provided conceptual premises of judicial review and the separation of powers to constitutional governments. John Marshal emphatically stated that the phraseology of the US Constitution confirms the concept that law inconsistent to the written constitution is null and void.<sup>48</sup> This jurisprudence has influenced the constitutions of different states including Pakistan.<sup>49</sup>

In Pakistan, the courts have extensively used judicial review authority to examine the executive and legislative acts of the government enforcing the fundamental rights of the citizens. The doctrine of 'trichotomy of power' as envisaged in the 1973

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<sup>41</sup> See, E.S. Crown, "Essay on the Judicial Review *Encyclopedia of Social Sciences*," Volume 8(1962), 457.

<sup>42</sup> See, S. P. Sathe, "Judicial Activism: The Indian Experience," *Washington University Journal of Law and Policy*, Vol. 6 (2001).

<sup>43</sup> See, *Church of Scientology v. Woodward*, 154 CLR 25 (1982), 70.

<sup>44</sup> See, *Syed Zafar Ali Shah v. Pervez Musharraf*, PLD 2000 SC 869, 1123.

<sup>45</sup> See, Dr. Shoukat Hussain, "Judicial Review of Legislation-A Powerful Mechanism and its Historical Over-view," *The Pakistan Legal Decision*, Journal 19 (2009), 22, 23.

<sup>46</sup> See, *Marbury v. Madison*, 5 U S 1 Cranch 137, 1803.

<sup>47</sup> Ibid..

<sup>48</sup> See, Kermit Lance Hall, "The Oxford Guide to United States Supreme Court Decisions," (Karachi: Oxford University Press: 2001), 174.

<sup>49</sup> This principal spread the world over in different national jurisdictions: See, Constitution of Argentina 1994; Austrian Constitution of 1920; See, Weimar Constitution, 1919; Italian Constitution 1948; the Bonn Constitution, 1949; the French Constitution, 1958; Portuguese Constitution, 1976; Spanish Constitution 1978; Indian Constitution, 1950.

constitution provides a conceptual rationalization for the use of judicial review power.<sup>50</sup> The jurists agree that only the judiciary should interpret and enforce the constitution and the fundamental rights.<sup>51</sup> However, there is some disagreement as to the scope and the extent of judicial review power. This disagreement will be thoroughly discussed in the next chapter.

The following section briefly discusses the grounds for the judicial review of the executive action. It will help to analyse the executive action relating to the fundamental rights cases discussed in this chapter.

## **5.8 GROUNDS FOR JUDICIAL REVIEW OF THE EXECUTIVE ACTION**

An executive act can be declared void if the same is unlawful or if it contravenes the constitution. Under the judicial review powers, the courts exercise an effective check on the executive, when the latter transgresses from its constitutional authority. There are some jurisdictional principles that enable the reviewing courts to regulate the use of power by the executive authorities.

### **5.8.1 THE DOCTRINE OF REASONABLENESS**

The doctrine of reasonableness provides that the executive should use its discretionary powers in a reasonable manner. It means the executive powers have to be used judiciously and not in an arbitrary and unpredictable manner.<sup>52</sup> Capricious use of jurisdiction has been termed as the misuse of power.<sup>53</sup> For example, if the executive authorities acquired land without establishing its immediate need for a public purpose, its acquisition was held arbitrary.<sup>54</sup> In another case, where an election tribunal cancelled certain ballot papers which were proved to be free from defect, the court observed that the tribunal had acted wantonly in excluding from count those ballot papers as spoiled and it struck down such order being unreasonable, arbitrary, and capricious.<sup>55</sup>

### **5.8.2 IMPROPER MOTIVES**

The courts can inquire about the motives of the executive authorities passing orders when such orders are under review. Where the government issued notifications for the acquisition of a land, declaring that the property was required for a public

<sup>50</sup> See, Dr. Shoukat Hussain, "Judicial Review of Legislation-A Powerful Mechanism and its Historical Over-view," *The Pakistan Legal Decision Journal* (2009), 19-20; See, *Zafar Ali Shah v. Pervez Musharraf*, PLD 2000 SC 869, 1121.

<sup>51</sup> See, Larry David Kramer, "Judicial Supremacy and the End of Judicial Restraint," Vol. 100:621, *Calcutta. Law Review*, (2012), 632.

<sup>52</sup> See, *Commissioner of Income Tax v. Asiatic Industries Ltd*, PLD 1964 Dacca 769.

<sup>53</sup> See, *Nasreen Fatima Awan v. Principal*, PLD 1978 Quetta 17.

<sup>54</sup> See, *Safar Ali v. Province of East Pakistan*, PLD 1963 Dacca 467.

<sup>55</sup> See, *Akbar Ali v. Raziur-ur-Rehman*, PLD 1966 SC 492.

resolve, while in fact it was required for a commercial company, the acquisition was held invalid.<sup>56</sup> The executive proceedings were held mala fide when a piece of legislation was used just as a cap to hide an action which in reality is not done although it pretends to have been done, as per the law. If a government awards a contract to favor a particular contractor without following the relevant rules, such an act could be said to have been done with an improper motive.<sup>57</sup>

### 5.8.3 IRRELEVANT CONSIDERATIONS

It is an established principle that in using discretion, the executive officials should consider relevant things and ignore irrelevant considerations.<sup>58</sup> Where a settlement authority disallowed a request for authorization to carry out an interchange of properties on the ground that permitting the authorization would bring about substantial labor for authorities of the settlement branch, and that the applicant was a big landowner, the court observed that such grounds were not appropriate for the dismissal of the petition being based on irrelevant considerations.<sup>59</sup>

### 5.8.4 ACTING UNDER DICTATION

The discretionary authority should be used only by the persons authorized by the statute. One of the rules to ensure this policy is that the persons so authorized must not act under the dictation of others. Where a licensing authority acted under directions issued by the government which was not authorized as such by the statute, the decision was set aside on judicial review.<sup>60</sup> Even where the government delegates certain authority to one of its officers, such an officer is required to act on his own satisfaction and not under dictation from his delegator. A district Magistrate, empowered by the government to cause arrest and detention of certain citizens could only do so on his own satisfaction and should not refer the matter to government for further satisfaction.<sup>61</sup>

### 5.8.5 ABDICATION OF AUTHORITY

This principle requires that persons invested with discretion must exercise it properly and are not allowed to surrender their power to any other authority. Thus, where the Chief Settlement Commissioner did not apply his independent mind to the question (of divisibility of a house and the entitlement of one of the parties to the

<sup>56</sup> See, *Safar Ali v. Province of East Pakistan*, PLD 1963 Dacca 467.

<sup>57</sup> See, *Zafar-ul-Ahsan v. The Republic of Pakistan*, PLD 1960 SC 113.

<sup>58</sup> See, *Associated Provincial picture house Ltd v. wednesbury corp.* 1948 1 KB 223.

<sup>59</sup> See, *Deputy Director of Consolidation v. DeenBaNdhru*, AIR 1965 SC 484.

<sup>60</sup> See, *B Rajagopala v. S.T.A Tribunal*, AIR 1964 SC 1573.

<sup>61</sup> See, *Noor Mohammad v. District Magistrate*, PLD 1976 Lahore 233.

dispute) raised on the petition for revision but merely countersigned to the note put up by the Settlement Commissioner, it was held that he had not exercised the jurisdiction vested in him.<sup>62</sup> In another case, the court held that expulsion from a scholarship scheme by a government department did not render a student liable to be expelled from the university. The court observed that expulsion from the university has to be ordered by the proper authority in accordance with the relevant statutes and regulations.<sup>63</sup>

#### 5.8.6 SUBJECTIVE DISCRETION

The exercise of subjective discretion by an executive authority allowed under an enactment was brought under judicial review. The court held that expressions such as “*shall make such orders as it may think fit*” does not allow an authority to make a fanciful or arbitrary order unrelated to the case before it. The order should be as per the rule of reason, the law as well as justice.<sup>64</sup> Exercise of judicial control over the subjective discretion of administrative bodies is not without its difficulties. Where an authority could detain a person when it suspects on the ground of appearing to such authority to be reasonable, it was held that the reasonableness of the grounds is personal to the authority and is not objective so that the courts can examine their reasonableness.<sup>65</sup>

The following section will discuss three different approaches of constitutional interpretation, namely, the theory of jurisdictional retrenchment, the theory of process-oriented judicial review, and the theory of structural judicial activism. The case studies used in chapters 4 and 5 show that the courts have largely appreciated these theories in the exercise of judicial review powers, which has, in turn, helped to protect fundamental rights. However, our courts, occasionally, appear to deviate from these theories of judicial review, impeding the protection of fundamental rights through a political process in Pakistan.

### 5.9 THEORY OF JURISDICTIONAL RETRENCHMENT

The theory of judicial retrenchment was presented by Jesse H. Choper in his efforts for reconciling competing approaches of judicial review—that are, judicial restraint and judicial activism.<sup>66</sup> This theory primarily concentrates on the *political*

<sup>62</sup> See, *Ghulam Mohiuddin v. Chief Settlement Commissioner*, PLD 1964 SC 829.

<sup>63</sup> See, *Hamid Javed v. Dean, faculty of engineering*, PLD 1964 Lahore 483.

<sup>64</sup> See, *Muhammad Tufail v. Province of Punjab*, PLD 1978 Lahore 87.

<sup>65</sup> See, *Nasim Fatima v. Government of West Pakistan*, PLD 1967 Lahore 103.

<sup>66</sup> Choper presented this principle in his seminal work, “Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court,” (See, Choper, *Judicial*). It is also named as ‘Political Safeguards’. According to Greg it was “*First argued by Professor Herbert*



*process* of the government than allotted constitutional powers to the judiciary.<sup>67</sup> It means Choper is less concerned about the interpretation of the constitution by the judiciary and is more inclined to find out when the judiciary could or should intervene in the political process.<sup>68</sup> He advanced startling proposals regarding the interpretation of constitution such as the separation of powers and fundamental rights aimed to regulate and protect the judicial power.<sup>69</sup>

Choper partly agrees with Alexander M. Bickel and considers courts a deviant institution and appreciates the advantages of passive virtue.<sup>70</sup> At the same time, he argues for an assertive judiciary when it comes to safeguarding the basic rights of the people against the transgression of the state power.<sup>71</sup> He seems to find a balanced, principled, functional and desirable role for judicial review.<sup>72</sup> He suggests that the judiciary should abstain from taking decisions affecting the constitutional distribution of powers<sup>73</sup> between the state institutions and thus weakening democracy.<sup>74</sup> However, he maintains that the judiciary should resist when the government attempts to restrict judicial power. He argues that jurisdictional retrenchment *preserves* the *moral* and *constitutional* power of the judiciary to be applied when the rights of the citizens are endangered by the government.<sup>75</sup>

Choper appreciates the distribution of state power under a federal system of government. He concedes that the judiciary is subject to some political influence, but it is the least democratically responsive institution, whereas, other branches of the government are purely democratic.<sup>76</sup> Therefore, he argues, the judiciary should remain within its constitutional limitations envisaged by the doctrine of separation of powers to safeguard democratic institutions.<sup>77</sup>

Choper shows awareness of the counter-majoritarian dilemma of the active use of

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*Wechsler in the 1950s.*" (See, Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *Columbia Law Review* Vol. 54, Iss., 4 (1954), and "given its strongest voice by Professor Jesse Choper in the 1980s" ( See, Choper, *Judicial*). (See, also Greg, 171).

<sup>67</sup> See, Grzebielski, *Judicial*, 781, 782.

<sup>68</sup> See, Choper, *Judicial*.

<sup>69</sup> *Ibid.*.

<sup>70</sup> See, Bickel, *Least*, 18.

<sup>71</sup> See, Choper, *Judicial*, 26-30, 361.

<sup>72</sup> *Ibid.*, 1054.

<sup>73</sup> *Ibid.*, 2.

<sup>74</sup> *Ibid.*.

<sup>75</sup> *Ibid.*.

<sup>76</sup> See, Grzebielski, *Judicial*, 782.

<sup>77</sup> See, G. Allison, *The Essence of Decision*, (Little, Brown, 1971).

judicial review. He fears that judicial activism may create a conflict between the judiciary and the legislature and, resultantly, judicial power may be curtailed by the legislature<sup>78</sup> by limiting jurisdiction<sup>79</sup>, impeaching judges<sup>80</sup> and overruling the decision.<sup>81</sup> The legislature and the executive may also defy the judicial mandate severely affecting its capacity to enforce the fundamental rights.<sup>82</sup> Therefore, Choper suggested the judicial review power should be used with care and caution and when the judiciary can contribute more effectively to the growth of democracy and safeguard the rights of the citizens.

Choper is mainly concerned with three areas: the individuals rights, federal matters, and the separation of powers. To him, the most appropriate subject for exercising judicial power is individual rights. The judiciary should protect rights of the people if they are infringed by other branches of the government.<sup>83</sup> He considers that the court should avoid examining federal matters<sup>84</sup> as these matters can be better resolved through political processes such as the legislatures<sup>85</sup> and democratic lobbies.<sup>86</sup> If a similar or better solution could be found through political institutions, the judiciary should restrain from interfering with such matters of political nature.<sup>87</sup> Finally, Choper advises that the judicial organ must observe the concept of separation of powers in its letter and spirit and avoid taking cognizance of the matters which fall in the domain of other branches of the government. He considers that the denial of exercising judicial review in policy matters may cause an impression of weakness or institutional damage of the judiciary, instead, it is safer to leave such matters to the wisdom of the legislature and the administration of the executive.<sup>88</sup> To him, judicial restraint is better than inappropriate judicial intervention.<sup>89</sup>

A few scholars have criticized Choper. For example, Greg Jones argues that the

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<sup>78</sup> See, Choper, *Judicial* 157. The similar has happened in Pakistan (See the Cases evaluated in Chapter 6, "Exercising Jurisdiction of 'Separation of Power' in Constitutional Petitions: A Critical Appraisal," of this research thesis.

<sup>79</sup> See, Choper, *Judicial*, 52-55.

<sup>80</sup> *Ibid.*, 50.

<sup>81</sup> *Ibid.*, 49.

<sup>82</sup> See, Choper, *Judicial*, 158-160. This has been observed in Pakistan because of judicial activism during 2015-2018 in the cases involving political questions - resulting the reaction both from leaders and people.

<sup>83</sup> See, Grzebielski, *Judicial*, 784.

<sup>84</sup> Federal matters include the scope of national powers *vis-a-vis* the states.

<sup>85</sup> *Ibid.*, 176-177.

<sup>86</sup> *Ibid.*, 180-181.

<sup>87</sup> *Ibid.*, 217-19.

<sup>88</sup> See, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579 (1952).

<sup>89</sup> See, Grzebielski, *Judicial*, 784.

theory of judicial retrenchment apparently looks reasonable, but it suffers from problems as it fails to take into account fast changes occurring in the political process and increasing the power of the governments.<sup>90</sup> Calabresi declares Choper's views as a historical anomaly due to the changing nature of modern democracies.<sup>91</sup> According to O'Brien, Choper fails to address the current controversies over the judicial role in ordering and supervising institutional reforms.<sup>92</sup> Hence, he declares Choper's proposal as not so modest judicial approach.<sup>93</sup>

Notwithstanding this criticism, Choper's theory seems to be a break-through from the mainstream conception of judicial activism and judicial restraint theories. In any constitutional government, no institution (including the judiciary) could be granted unrestricted powers. Hence, Choper's theory can be endorsed from the viewpoint of constitutionalism and the separation of powers. Choper's theory of constitutional role of courts, thus, possesses qualitative implications for the constitutional separation of powers between the three organs of the state in Pakistan.

#### **5.10 THEORY OF PROCESS-ORIENTED JUDICIAL REVIEW**

John Hart Ely presents the theory of process-oriented judicial review to address the challenge posed by judicial activism and judicial restraint. He stresses that all the institutions should work within their constitutional domain preserving *overall scheme of the constitution*, democracy, and civil liberties.<sup>94</sup> He appreciates the difficulty of the judiciary in drawing constitutional lines between the allotted sphere of each institution while interpreting the constitution. He rejects the idea that constitutional provisions are self-contained and can be interpreted without seeking help from external sources such as legislative history.<sup>95</sup>

Ely criticizes judicial restraint as it promotes a rigid following of the constitution in a try to find legislative intent of the lawmakers. He considers that judicial activism is also employed by the judiciary to impose subjective views of the judges on other branches of the government which negates the very essence of the constitution and democratic dispensation. Considering the flaws and inadequacies of these theories of constitutional interpretation, Ely proposes 'a representation reinforcing theory' that

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<sup>90</sup> See, Jones, *Proper*, 172.

<sup>91</sup> See, Steven G. Calabresi, "A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez," *Michigan Law Review*, Vol. 94, Iss. 3 (1995), 793.

<sup>92</sup> See, O'Brien, *Judicial*, 1059.

<sup>93</sup> *Ibid.*,

<sup>94</sup> See, Ely, *Democracy*, 7.

<sup>95</sup> *Ibid.*, 12.13.

focuses on ‘the constitutional scheme’. This theory dictates that judges should interpret the constitution in a way that appreciates each provision of the constitution, its scheme as a whole and the overall structure of the constitution.

Ely builds his understanding of the constitutional interpretation on three themes: first, constitution is based on democratic underpinnings; second, it promotes a procedural fairness in adjudication of disputes between the state and the citizens and desires open participation in the enterprise of the government; third, that judges are expected to be expert to ensure procedural fairness in dispute resolution.<sup>96</sup> According to Ely, judicial review should follow the overall arrangement of the constitution as well as the objectives of the democracy.<sup>97</sup> Protecting the democratic process and institutions and fundamental rights of the people should be the guiding principles for the judicial review.<sup>98</sup>

While referring to some court decisions<sup>99</sup>, he speaks of the legitimate exercise of judicial review—that is, the judiciary should ensure open participation in the political process than interfering with the merits of the political choice and decisions.<sup>100</sup> It suggests Ely is deeply concerned about the rights of the people (while ensuring fairness of the procedure) and independence of democratic institutions (while refraining from interference in political matters).

In fact, Ely favors a proactive use of judicial review powers for the enforcement of procedural fairness expanding freedom and choice of the people to participate in the democratic process for the realization of their rights and hold the governments responsible and accountable to the people.<sup>101</sup> In the final analysis, Ely has drawn our attention to the basic feature and structural elements of the constitution that are the balance of powers, federalism and basic rights of the citizens. His theory of constitutional interpretation promotes constitutionalism and democracy by preventing the courts not to interfere in the political questions and preferences, and leave them for the political players and actors on the one hand, and on the other, encouraging the courts

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<sup>96</sup> Ibid., 87.

<sup>97</sup> See, Ely, *Democracy*, 12, 16.

<sup>98</sup> Ibid., 87.

<sup>99</sup> Among others See, namely, *The New York Times v. Sullivan*, 376 US 254, (1964), 267-83, on freedom of speech; *Bates v. City of Little Rock*, 361 US 516, (1960), 522-23, on freedom of association; *Cardona v. Power*, 384 US 672 (1966), 674, on supervision of reapportionment and voting rights; *Kutzenbach v. Morgan*, 384 US 641, (1966), 646-58, on voting rights; *Harper v. Virginia State Bd. of Elections*, 383 US 663, (1966) 665-67, on reapportionment.

<sup>100</sup> See, Ely, *Democracy*, 131

<sup>101</sup> Ibid., 105.

to be prepared for the protection of basic rights of the citizens from the encroachments of other organs of the state.

### 5.11 THEORY OF STRUCTURAL JUDICIAL ACTIVISM

Greg Jones highlights the basic structure of the constitution while appreciating a space for variations under different written constitutions. He contemplates the separation of powers as the supreme feature of any constitution.<sup>102</sup> These two features, in fact, guarantee individual freedoms and liberties from the transgressive act of the legislature and the executive.<sup>103</sup>

The doctrine of separation of powers dictates the distribution of government authority as well as power amongst the federal and state-level units, which is called vertical distribution of powers. It also divides powers between the state institutions horizontally so that a system of check and balance may be introduced for the safety of the rights of the citizens from the aggression of the government bodies. Under federalism, political authority is divided amongst the federal and provincial units. Thus, both the federalism and the separation of powers are integrated and serve the same purpose—that is—a division of political power. These features of the constitution are integral for any constitutional government as they protect the fundamental rights of the citizens against the tyranny of the majority government or any institution or branch of the government.<sup>104</sup>

Jones considers that judicial review, while appreciating the constitutional structure, promotes democratic governance and protects the fundamental rights of the people.<sup>105</sup> Steven G. Calabresi supports Greg Jones and argues that the judiciary should take care about the structure of the constitution while exercising judicial review powers for the interpretation of the constitution.<sup>106</sup>

It may be argued that judicial review is the most important power given to the judiciary. It allows the judiciary to promote constitutional government including the protection of rights of the people. At the same time, it may be used as an instrument to weaken democracy while incapacitating other branches of the government through judicial activism. Through judicial activism, the judiciary can attempt to impose a

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<sup>102</sup> See, Jones, *Proper*, 141.

<sup>103</sup> See, *Clinton v. City of New York*, 524 US 417, 452 1998.

<sup>104</sup> See, Jones, *Proper*, 161.

<sup>105</sup> See, Jones, *Proper*, 141.

<sup>106</sup> See, Calabresi, *Government*, 770.

judicial solution on the issues of purely political nature.<sup>107</sup>

Considering the above, Greg Jones categorized judicial review into 'proper' and 'improper' categories. According to him, improper exercise of judicial review involves judges into political issues of the government that the constitution expressly or impliedly prohibits.<sup>108</sup> Such an exercise of judicial review challenges the constitutional concept of the separation of powers and is an affront to democracy. In such a case, judicial decisions do not come from the constitution but from subjective views of the judges. In improper exercise of judicial power, the judges assume themselves to be the savior of the people and flag bearers of morality and goodness. They adopt the role of a revolutionist or a passionate reformer.<sup>109</sup>

However, Greg Jones keeps hope while considering the challenge of improper exercise of judicial review authority. He states there is a way of using judicial review power in an appropriate and proper manner.<sup>110</sup> He called it 'proper judicial activism'. The proper judicial activism centers, again, on the structure of the constitution and demands restraint on the part of judges while examining and nullifying acts of the other organs of the state.<sup>111</sup> This method of judicial review discourages judicial inclination of stepping into the shoes of the other branches.<sup>112</sup>

The structural activism or proper judicial activism promotes majorities<sup>113</sup>, proper statutory interpretation<sup>114</sup>, judicial integrity<sup>115</sup> and fidelity to the constitution.<sup>116</sup> This type of judicial review is required and justified under written constitutions. Governments under written constitution implies a system of checks and balances that may not be secured without allowing the judiciary a proper space to construe and put into effect the constitution that keeps all institutions in limits (including the judiciary

<sup>107</sup> See, David L. Anderson, "Note, When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante," *Stan. Law Review* 42, (1990), 1559, 1570.

<sup>108</sup> See, Lino A. Graglia, "It's Not Constitutionalism, It's Judicial Activism," *Harvard Journal of Law and Public Policy*, 19 (1996), 296

<sup>109</sup> See, Archibald Cox, "The Role of the Supreme Court: Judicial Activism or Self Restraint," *Maryland Law Review*, 47 (1987), 121-22.

<sup>110</sup> See, Jones, *Proper*.

<sup>111</sup> *Ibid.*, 144.

<sup>112</sup> See, William Eaton, "Who Killed the Constitution: The Judges v. The Law," (Gateway, Books, 1988).

<sup>113</sup> The structural activist "respects the process of democratic decision making embodied in legislative enactments" See, Anderson, *Restraint* 1559, 1570; See, Archibald Cox, *The Role of the Supreme Court in American Government* 28 (1976) as referred in Jones, *Proper*, 168- "takes care not to embroil himself unnecessarily in the turbulent waters of political controversy."

<sup>114</sup> See, Jones, *Proper*, 168.

<sup>115</sup> See, *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986); Jones, *Proper*, 170-171.

<sup>116</sup> "The structural activist does these things because, above all, the judge respects the principles upon which the Constitution is founded and the People for whom he adjudicates." (Jones, *Proper*, 168).

itself) to protect the fundamental rights of the citizens and to uphold the integrity and supremacy of the constitution.<sup>117</sup> Eaton supports Greg's theory of constitutional interpretation as it serves a carefully designed purpose that is to preserve the structure of the constitution for the stability of a polity.<sup>118</sup>

Brutus suggests that judges are *independent, both of the legislature as well as the people. Their judgment cannot be corrected by any power above them.*<sup>119</sup> Greg Jones, however, called Brutus views as an exaggeration. Greg, on the contrary, considers that those judges should neither force nor will, but pass a judgment declaring the sense of the law. He cautions judges that even efficacy of their judgments depends on the aid of the executive.<sup>120</sup> Basically, Greg argues for a restrained or proper exercise of judicial review while preserving the structure of the constitution.

The written constitution conceives a limited government. This means no organ of the state enjoys absolute or unfettered powers. Rather, the state power is distributed amongst three organs: the legislature, the executive, and the judiciary.<sup>121</sup> Unrestricted use of judicial review does nothing except to block legislative or executive initiatives.<sup>122</sup> In words of Choper, venturing beyond the constitution is to call upon the individual conscience which is not the law.<sup>123</sup> Therefore, the proper exercise of judicial power, as proposed by Greg Jones, would help in upholding the rule of the constitution, preserving the essence or structure of the constitution, promoting democracy and the fundamental rights.

The analysis of the fundamental rights cases in the following part shows how the judiciary has employed the doctrine of separation of powers (as debated in the above theories of judicial review) for the protection of fundamental rights in Pakistan.

## 5.12 JUDICIAL REVIEW OF THE EXECUTIVE ACTION

In the *Shahab Usto v. Government of Sindh through Chief Secretary and Others*, the court took on the issue of availability of clean drinking water to the residents of

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<sup>117</sup> See, Jones, *Proper*, 163.

<sup>118</sup> See, Eaton, *Who*, 13.

<sup>119</sup> Brutus XI, *New York Journal* (1788) in 2, *Debates Debate on Constitution* 129 (Bernard Bailyn ed., 1993)

<sup>120</sup> *Ibid.*,

<sup>121</sup> See, *Gregory v. Ashcroft*, 501 U. 452 (1991), 457; See, *United States v. Lopez*, 514 U.S. 549 (1995), 552.

<sup>122</sup> See, Cox, *Role*, 128.

<sup>123</sup> See, Choper, *Judicial*, 59

Sindh.<sup>124</sup> The reports and visual footage showed in the court that the polluted water entering into the canals and main rivers and adversely affecting the health of the citizens. It was argued that the provincial government failed to safeguard the fundamental rights i.e. clean drinking water to the people and the safe environment.

The court heard the contentions of the parties and ordered to send the visual reports to the provincial assembly so that the representative of the people could appreciate the prevailing situation of drinking water and sanitation in Sindh.

The court ordered the provincial government to act as per the directions of the commission constituted by the court and provide all required support to the commission to achieve its objective. The commission was empowered to seek any information related to water supply issues in Sindh, and it could also pass judgment as a judge of the high court for the compliance of its objective and the decision of the commission was binding on all provincial authorities.

This case demonstrates how the judiciary reviewed the executive functions for the protection of fundamental rights. In the *Mustafa Impex, Karachi v. The Government of Pakistan*<sup>125</sup>, the Federal Government exempted certain companies which imported cellular phones and textile related items from the sales tax in 2008. However, the government withdrew these exemptions via notifications issued in 2013. The impugned notifications were signed by an Additional Secretary of Finance with the approval from an advisor of the Prime Minister.

M/S Mustafa Impex challenged the 2013 notifications in the court on the ground that an Additional Secretary was not competent to issue such notifications. While elaborating the role of the Cabinet in the parliamentary form of government such as Pakistan, the court specifically referred to the protection of the rights and liberties of the people. The court held that the Federal Government comprises of the members of the Cabinet and the Prime Minister. It explained that the Prime Minister alone cannot perform executive functions on behalf of the Cabinet. On this premises, the court set aside the impugned notifications issued by the Federal Government. This case demonstrate how the courts can review the executive actions without indulging in judicial outreach and protect the fundamental rights of the people.

In the *Haider Ali and another Versus DPO Chakwal and others*<sup>126</sup>, the court

<sup>124</sup> See, *Shahab Usto v. Government of Sindh through Chief Secretary and Others*, 2017 SCMR 732.

<sup>125</sup> *Mustafa Impex Karachi v. Government of Pakistan*, PLD 2016 SC 808.

<sup>126</sup> See, *Haider Ali and another v. DPO Chakwal and others*, 2015 SCMR 1724.



dealt with the matter of the misuse of authority by the police department as regards to the recording of First Information Report, orders of Justice of Peace, violations of the fundamental rights and accountability of police funds and the performance reports.<sup>127</sup>

After hearing the arguments at length, the court observed that even the earlier orders of this court regarding the betterment of the criminal system were ignored by the executive. The court noted that when the fundamental rights are desecrated by the executive authorities then they adopt the way of lawlessness. The court observed that a better criminal justice system helps to safeguard and promote basic rights and democracy in the country. The efficient criminal justice system is focused on the basic rights of the citizens such as the due process of law.

The court further directed training of the police and the availability of funds for police investigation. The court ordered the relevant authorities to make a website for the public to file complaints; and until the making of the website, Section 154 of CrPC must be followed by police and legal actions should be taken against any police officer who neglects to obey the aforementioned directions. Furthermore, the court ordered that the action against vexatious complaints must be taken strictly and criminal cases ought to be recorded under the law.<sup>128</sup> The court directed that no person ought to be booked if the police have no adequate proof to support the detention.<sup>129</sup> In the case of a wrongful arrest, compensation will be paid by the police officer to the aggrieved person. Finally, the court directed the concerned police officers to submit a compliance report as per the direction of the court within a specified time. This case, again, illustrates the protection of fundamental rights i.e. right to life, right to a fair trial and right to dignity of a person through review of the executive action.<sup>130</sup>

In the *Muhammad Aslam Awan's case*<sup>131</sup>, the court dealt with the issue of the seniority of the superior court judges. It was argued that decision regarding the seniority of High Court judges by the President and Chief Justice of High Court deprived of any criterion would raise the question of the judicial independence, which is essential for the protection of the basic rights of the people.<sup>132</sup> The independence of the judiciary is

<sup>127</sup> See, Articles 9-28, of the Constitution, 1973.

<sup>128</sup> See, Sections 182 and 211 of PPC.

<sup>129</sup> See, Muhammad Bashir's case PLD 2007 SC 539.

<sup>130</sup> The right to life, safeguards as to arrest and detention, right to fair trial and dignity of man (Articles 9, 10, 10A and 14) of the Constitution.

<sup>131</sup> See, *Muhammad Aslam Awan Advocate Supreme Court v. Federation of Pakistan and Others*, 2014 SCMR 1289.

<sup>132</sup> This Article provides that rights of individuals to be dealt with in accordance with law.

essential so that the public could have confidence in the judiciary that their cases would be decided on merit and rights are protected.<sup>133</sup>

The court held that the independence of the judiciary has the basis on the constitutional principle of trichotomy of powers in which each organ has its independent powers and no organ intrudes into the other organs of the government. The constitutional makers made the judiciary independent from other organs of the government because they want the judiciary to protect the rights of the people without any fear or favor. The court noted that the basic rights provided under the constitution cannot be safeguarded under Articles 199 and 184(3) without an independent judiciary. Therefore, the court emphasized that the judiciary is kept independent from other branches.

The court further observed that the independence of the judiciary can be protected by improving the procedures of the appointment, accountability, and removal of judges. The judicial commission sends its recommendation to the committee of Parliament and the committee has to decide within fourteen days and in case of failing to decide it then the recommendation of the commission will be considered final. The judiciary has supremacy in the whole process of appointment of superior judges. The court recommended guidelines regarding shaping seniority among judges of the High Court. In this case, the court held that the constitutional makers made the judiciary independent from other organs because they want the judiciary to protect the rights of the people. The court, in fact, has emphasized the importance of the separation of powers for the protection of the fundamental rights.

In the *Mubashir Raza Jaffri v. Employees' Old-age Benefits Institutions*, illegal appointments in the Employees Old-Age Benefits Institutions (EOBI) grounded on politics and favoritism was challenged before the court.<sup>134</sup> The grievance in the case concerned the rights of the applicants who had applied for posts in EOBI but their applications were turned down illegally, violating their basic rights such as equality of citizens protected in the constitution.

The court heard the arguments of the parties and held that the employees were appointed at such a time when there was no available post for them. These appointed

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<sup>133</sup> See, Donnelley J, "Human Rights and Human Dignity," (An Analytical Critique of Non-Western Conception of Human Rights 1982), 303-316. Human Rights 1982), 303-316. man Rights 1982), 303-316.

<sup>134</sup> See, *Mubashir Raza Jaffri v. employees' old-age benefits institutions, (EOBI)*, 2014 SCMR 949.

employees were regularized and their regularization was approved by the cabinet sub-committee which does not possess the authority to rectify such illegal appointments.

The court further observed that the civil servants are prone to the fancies of the rulers that damage the government bodies and badly demolish democracy and constitutionalism. The court declared the illegal placements in EOBI of no legal effect. The court directed that all vacant posts in EOBI must be publicized and the appointments be strictly made in accordance with the law. Moreover, the court ordered that the issue of illegal appointments must be probed by the National Accountability Bureau and all officials found guilty in this regard ought to be proceeded as per the law.

This case demonstrates a connection between the protection of fundamental rights and the separation of powers. The court rightly reviewed the executive action (while employing the judicial review powers granted under the doctrine of separation of powers) of illegal appointments on the basis of political influence.

In a suo-motu case, the court took notice of the right to free education<sup>135</sup> as the government neglected its duty to ensure the provision of free schooling to the childrens of a particular age group.<sup>136</sup> The court held that some schools were not being used for imparting education and were illegally occupied by the government departments, and some schools were even abandoned but monthly salaries were being paid from the government exchequer.

The court directed to appoint District and Session judges of all the provinces to carry out survey to determine how many schools were functioning properly and how many ghost schools were present in their districts; to determine as to how much fund was being spent for imparting education to the children and what was the ratio of children studying in their respective areas; to determine reasons for illegal occupation of school buildings and why cases concerning such encroachments were not being expedited and why no action was taken against those who encroached upon the buildings of schools.

The court highlighted that under the 18th amendment of the constitution, Article 25-A was included in the constitution; nevertheless, the executive neglected to make available the right to education to the people. The court reaffirmed that the judiciary is mandated under the constitution to act as a custodian of the rights of the people. In this

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<sup>135</sup> See, Article 25-A of the Constitution, 1973.

<sup>136</sup> See, Petition regarding Miserable Condition of the Schools, 2013 SCMR 764.

case, the judiciary has attempted to promote the fundamental right to education in Pakistan. The case indicates a robust connection between the constitutional separation of powers and the protection of the fundamental rights. The court exercised its authority to review the action of the executive and directed to guarantee the fundamental right to education.

In the *Dr Shahid Masood v. Federation of Pakistan*,<sup>137</sup> the grievance of the petitioners was that Pakistan Electronic Media Regulatory Authority (PEMRA) and cable technicians suspended telecasting and transmission of their networks. It was argued that Act of operators of cable TV grids, obstructing broadcast of petitioners as well as to the audiences, was an abuse of the law<sup>138</sup> and, therefore, attracted punitive provisions of the Ordinance.<sup>139</sup> Moreover, it was the most important fundamental right<sup>140</sup> of the people that they had access to information about all subjects of national significance.

The court after hearing the parties directed that Chairman PEMRA would guarantee instant dissemination of airing services to the licensed channels; moreover, strict legal action must be taken against the negligent cable TV technicians. The court further directed that Chairman PEMRA would confirm that broadcast of the TV channels was constantly be aired devoid of any interruption. The provincial police officers were ordered to take strict legal action against the delinquent person who obstructs the broadcast of the channels. In this case, the court attempted to safeguard the fundamental rights of the people i.e. freedom of speech and expression by using judicial review powers under the constitutional doctrine of separation of powers.

In the *Wattan Party* case<sup>141</sup>, the court observed that the policy-making area of the executive government should not be interfered with by the judicial branch. In the *Sindh High Court Bar Association* case<sup>142</sup>, the court held that the executive order to restore the judges cannot be withdrawn by the executive. It was reaffirmed that an order by a military dictator in pursuance of the Provisional Constitutional Order, 2007 was in blatant violation of the constitution, hence void. This case fuelled constitutional debate in Pakistan as to the role of the institutions of the state and the separation of powers.

<sup>137</sup> See, *Dr Shahid Masood v. Federation of Pakistan*, 2010 SCMR 1849.

<sup>138</sup> See, Sections 20 and 24 read with the provisions of Sections. 27 and 28 of Pakistan Electronic Media Regulatory Authority Ordinance, 2002.

<sup>139</sup> See, Sections 30 and 33 Pakistan Electronic Media Regulatory Authority Ordinance, 2002.

<sup>140</sup> See, Article 19, of the Constitution, 1973.

<sup>141</sup> See, *Wattan Party v. Federation of Pakistan*, 2006 PLD SC 697.

<sup>142</sup> See, *Sindh High Court Bar Association v. Federation of Pakistan*, 2010 PLD SC 1151, 1161.

In the *Usif Patel's* case<sup>143</sup>, the law-making power of the executive and the legislature was discussed. The court clarified that the executive – the then Governor-General has *no* legislative power as any legislation is the exclusive domain of the Constituent Assembly serving, simultaneously, as the National Assembly. In the *Haji Saifullah and Tariq Raheem's* case<sup>144</sup>, the power to dissolve the National Assembly under Article 58 (2) (b) of the Constitution – as an unfettered discretionary power of the President – became a moot point. The court asserted its judicial review power and held that such power must be exercised reasonably, fairly, and subject to the scrutiny by the courts through judicial review. These two cases depict the tension between the judiciary and the executive as to their respective role under the constitution.

In the *Azizullah Memon* case<sup>145</sup>, the court followed a balanced approach under the constitution. The court clarified that no institution, under the constitutional scheme, can claim any kind of superiority over other institutions of the state. This case helps to establish argument of the study that while protecting fundamental rights, the judiciary need to observe the balance of power as maintained under the doctrine of separation of powers.

The above cases demonstrate that the judiciary has largely used judicial review powers to review acts of the executive to protect fundamental rights of the people in Pakistan. Sometimes (*Haji Saifullah and Tariq Raheem's* case), however, the courts appear to interfere into the domain of the executive. This inclination of the judiciary to take cognizance of questions of political nature shall be discussed in the next chapter.

### 5.13 CONCLUSION

The supremacy of the constitution and the protection of fundamental rights calls for judicial review of the executive action so that all actions leading to the violation of basic rights are annulled and the constitution is upheld. Under written constitutions powers of the state are divided in the executive, the legislature, and the judiciary. Pakistan's constitution also envisages the separation of powers. It confers judicial review powers on courts to examine the acts of the executive under the doctrine of separation of powers.

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<sup>143</sup> See, *Usif Patel v. the Crown*, 1955 Federal Court 384.

<sup>144</sup> See, *Federation of Pakistan v. Haji Muhammad Saifullah Khan*, 1989 PLD SC 166; *Khawaja Ahmad Tariq Raheem v. Federation of Pakistan*, 1992 PLD SC 646.

<sup>145</sup> See, *Government of Balochistan v. Azizullah Memon*, 1993 PLD SC 341.

The executive power of the federal government encompasses the areas in which the federal government has the power to legislate. The executive authority is exercised by the Prime Minister, ministers, civil servants, and executive institutions such as military, police, and statutory authorities in the name of the President. The legislature can hold the Prime Minister and the cabinet accountable in the performance of executive functions. Similarly, the executive authority of provinces extends to their respective domain of law-making subjects. The executive functions include maintaining law and order, the provision of basic rights, defense and welfare of the state, and public administration etc.

Written constitution defines and restrict the executive power of the government. The authority to interpret the constitution and to protect the fundamental rights is conferred on the judiciary due to its neutrality. Thus, it is the duty of the judiciary to uphold the supremacy of the constitution. It is for the judges to say what the law is. Under the doctrine of separation of powers, the judiciary maintains rule of the constitution through judicial review powers. It serves as a check on other branches of the government and helps to protect the fundamental rights. Brian Thompson and E.S. Crown define judicial review as the authority of the judiciary to examine the validity and to declare acts of the executive and the legislature void. Greek philosophers laid down the foundation of judicial review. However, its modern conception is associated to the US and the UK, which influenced the constitutional jurisprudence of other countries.

The judiciary reviews the executive action on the grounds of reasonableness, improper motives, irrelevant considerations, acting under dictation, abdication of authority, and subjective discretion. Constitutional theorists have proposed approaches for a balanced exercise of judicial review power. Jess H. Choper introduces a theory of jurisdictional retrenchment. It demands apolitical, principled, functional, and a balanced role for judicial review. John Hart Ely proposes a theory of process-oriented review. It emphasizes on the overall structure and scheme of the constitution so that the separation of power could be maintained. Greg Jones coins a theory of structural judicial activism. It highlights the doctrine of separation of powers as a supreme feature of any constitution and advocates a proper exercise of judicial review. It means the exercise of judicial review should uphold the supremacy of the constitution, preserve essence of the constitution and promote democracy and fundamental rights.

In Pakistan, the judiciary has examined the executive acts of the government

and protected the fundamental rights. In doing so, the courts generally have adhered to the doctrine of separation of powers. For example, in the *Haider Ali* case<sup>146</sup>, the court dealt with the misuse of police authority and safeguarded the fundamental rights such as the right to life and liberty. In the *Dr Shahid Masood* case<sup>147</sup>, the court directed to the Chairman PEMRA to guarantee instant dissemination of airing services to the licensed channels as a matter of the freedom of speech and expression. These cases demonstrate that the courts have effectively checked the transgression on fundamental rights by the executive.

The analysis of literature and case law exhibit that the courts have protected fundamental rights while reviewing acts of the executive. This finding proves the hypothesis of this study that focus on constitutionalism including the separation of powers protects fundamental rights in Pakistan.

The next chapter shall examine the jurisprudential bases and the implementation of prominent judicial review approaches, namely, judicial activism and judicial restraint in Pakistan. It would propose a balanced interpretation of the constitution promoting constitutionalism and adherence to the separation of powers that, in turn, protects fundamental rights.

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<sup>146</sup> See, *Haider Ali and another v. DPO Chakwal and others*, 2015 SCMR 1724.

<sup>147</sup> See, *Dr Shahid Masood v. Federation of Pakistan*, 2010 SCMR 1849.

## **CHAPTER SIX**

### **THE SEPARATION OF POWERS AND JUDICIAL OVERREACH**

#### **6.1 INTRODUCTION**

The previous two chapters examined the protection of fundamental rights through judicial review of the legislative and the executive action. Chapter five briefly discussed the interpretation and the supremacy of the constitution. It discussed grounds and introduced three approaches of judicial review that propose a balanced interpretation of the constitution.

This chapter thoroughly analyses two competing arguments for judicial review and the protection of fundamental rights in Pakistan: Some argue that the judiciary protected fundamental rights while following the doctrine of separation of powers. Others maintain that the judiciary restrained the actualization of fundamental rights through the political process while ignoring the separation of power and interfering into the policymaking domain of the government.

This chapter examines these arguments in the light of two approaches of judicial review, namely, judicial restraint and judicial activism. It addresses a specific question: have the courts exceeded their constitutional limitations while interpreting and enforcing fundamental rights in Pakistan? In other words, has the judiciary ignored to follow the doctrine of separation of powers while enforcing fundamental rights in Pakistan? Answer to this question, in fact, helps to test the hypothesis of the thesis while unpacking the complex institutional relationship between the three organs of the state and assessing its effect on the protection of fundamental rights.

Some cases relating to fundamental rights are also discussed. This chapter proposes a balanced exercise of judicial review allowing the actualization of fundamental rights through political process. It concludes that the judiciary has occasionally failed to focus on constitutionalism and adhere to the constitutional doctrine of separation of powers impeding the protection of fundamental rights in Pakistan. Briefly, this chapter helps to test the hypothesis of this thesis.

#### **6.2 PROACTIVE USE OF JUDICIAL REVIEW POWERS**

The judiciary in Pakistan has interpreted the fundamental rights provisions promoting values of economic and social justice through public interest litigation.<sup>1</sup> The

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<sup>1</sup> These are the rights inferred from broadening the extent of the existing fundamental rights including the socio-economic and cultural rights under the subject of Principles of Policy; See. Articles 29-40, the



courts have sometimes used judicial review powers quite actively. Through judicial activism, the courts appear to intervene in the constitutional realm of other branches.<sup>2</sup> In the following part, the examination of judicial review power is carried out to find out the *limits* of judicial review power. This examination aims to find a balanced way for the interpretation of the constitution. It is hoped that such an interpretation of the constitution would result into increased adherence to the doctrine of separation of powers leading to an enhanced protection of the fundamental rights in Pakistan.

### 6.3 THE LIMITS OF JUDICIAL REVIEW

The limits of judicial review were contested since the inception and incorporation of judicial review powers in the written constitutions.<sup>3</sup> This debate got momentum in Pakistan since 1960s due to proactive use of judicial review powers by the courts.<sup>4</sup> This debate was shaped in terms of two competing approaches of judicial review, namely, judicial activism and judicial restraint.<sup>5</sup>

These two approaches are associated with two different schools of jurists: the conservative school of thought and the liberal school of thought. In Pakistan, the courts have used judicial review power for the enforcement of fundamental rights while following one judicial approach or the other. The subjective preference of judges or understanding of the law or specific socio-economic context seems to have influenced their judicial review approach.

In the following part, both the approaches of judicial review are examined. It will help to appreciate why and how our judiciary exercised a specific judicial review approach while examining acts of other branches of the government.

#### 6.3.1 JUDICIAL RESTRAINT

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Constitution 1973, rights of Islamic nature as provided in Objective Resolution, 1949; See, the Article 2-A, the Constitution 1973, elimination of exploitation ; See, the Article 3, the Constitution 1973) and right to be dealt according to the law; See, Article, 4, the Constitution, 1973. For judicial jurisprudence as developed for the enforcement of all these rights; See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416.

<sup>2</sup> See, Hamid Khan, "Role of Bar in the Administration of Justice," *Pakistan Law Journal, Magazine* 3(1998), 148; *Report of the National Judicial Conference* (Islamabad: National Judicial (Policy Making) Committee, 2011), 28-36; See, Khurshid Iqbal, "*The Right to Development in International Law: The Case of Pakistan*," (London: Rutledge Taylor Francis Group, 2010), 166; Raza, *Reviewing*, in Werner Menski et al., *Public*, 105; *Lahore Conservation Society v. Chief Minister of Punjab*, PLD 2011 Lahore 344; *High Court Bar Association v. Government of Baluchistan*, PLD 2013 Quetta 75; See, Mohammad Waseem, "Judging Democracy in Pakistan: Conflict between the Executive and Judiciary," *Contemporary South Asia*, Vol. 20, Iss.1 (2012), 1.

<sup>3</sup> See, *Calder v. Bull*, 3 U S 3 Dall 386, 388 (1798).

<sup>4</sup> See, Martin H. Redish, "Judicial Review and the 'Political Question Doctrine'," *Northwestern University Law Review*, 79 (1985), 2.

<sup>5</sup> *Ibid.*,

The judicial restraint approach is rooted in two prominent strands of thought called 'judicial supremacy'<sup>6</sup> and 'popular constitutionalism'.<sup>7</sup> These two schools of thought agree on the principle that the judiciary must exercise restraint while interpreting or upholding the constitution when it reviews governmental actions. They argue that the judiciary can nullify the executive and the legislative action only when there is an apparent violation of the provisions of the constitution.

Judicial restraint requires that judges should hold unless they find that government action is manifestly against the constitution.<sup>8</sup> However, the question remains: how do courts determine that particular action of the government is *apparently* unconstitutional?<sup>9</sup> Wilkinson suggests that the judges must be moderate in their aspirations and overrule the results of the democratic course only where the constitution *clearly* demands it.<sup>10</sup> He further suggests that the judges should never push a particular agenda of social, political, or economic nature while reviewing acts of the government.<sup>11</sup>

Another notable constitutional theorist, James Bradley Thayer, argued that the judiciary should refrain from setting aside acts of the legislature whenever it is possible to do so, as the legislature is the ultimate sovereign in a political state.<sup>12</sup> Both the liberal<sup>13</sup> and the conservatives<sup>14</sup> support a restrictive use of judicial power when it

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<sup>6</sup> This notion is argued by 'Federalists' as developed in American jurisprudence. They categorically discarded the suggestion that the public had any authority for interpreting the constitution. By the middle of 1790s, Federalists had appeared to hold a position similar to the one prevailing today: constitution entrusts the ultimate authority of interpretation to the judiciary, and thus they have developed the idea of 'judicial supremacy' for interpreting the constitution.

<sup>7</sup> This notion is advocated by the 'Republicans' as emerged in American jurisprudence concerning the constitutional supremacy. They have the idea that the people have the primary authority of interpreting the constitution, and it is properly exercised through their representatives which are legislature and executive.

<sup>8</sup> See, *Fletcher v. Peck*, 6 Cranch 87, 3L Ed. 162 (1810) wherein the Court held that judges should declared the legislation unconstitutional only when they "feel a clear and strong conviction" of unconstitutionality.

<sup>9</sup> See, Zachary Baron Shemtob, "Following Thayer: The Conflicting Models of Judicial Restraint," 6, accessed May 29, 2018, <http://www.ssrn.com/abstract=2029687>

<sup>10</sup> See, Harvie Wilkinson III, "Of Guns, Abortion, and the Unraveling Rule of Law", *Virginia Law Review* 95 (2009), 253.

<sup>11</sup> *Ibid.*.

<sup>12</sup> See, Bradley Thayer, *John Marshall* (Boston: Houghton Mifflin 1901), 109.

<sup>13</sup> For the liberals, the lesson of the *Lochner* era (1897-1937) continued to require the limited review.

<sup>14</sup> See, Douglas H. Ginsburg, "Delegation Running Riot," *Regulation*, 83 (1995), 84; See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (United Kingdom: Princeton University Press, 2004). For conservatives, just the contrary was appropriate, trend of restraint emerged as an argument to check the liberal activism of the Warren and early Burger Courts. Even, as Conservatives criticized those courts for departing the 'true' constitution in 'exile' by discarding from their constitutional obligation of scrutinizing the power of congress and defend certain other rights preferred by Conservatives.

comes to interpreting the constitution and reviewing acts of the other branches.

The judicial restraint does not represent a singular principle of constitutional interpretation, but it embodies various models of judicial conduct.<sup>15</sup> The challenge, again, remains how to find an appropriate criterion or yardstick to determine the constitutionality of governmental actions? To address these challenges jurists have proposed different methodologies of constitutional interpretation.<sup>16</sup>

James Bradley, for example, presents a model of 'sense and reflection test'.<sup>17</sup> According to this model, violation of the constitution or constitutional rights must be clear to everyone as an axiomatic truth.<sup>18</sup> Essentially, he proposes that judges should not declare any act of the legislature and the executive unconstitutional unless it is manifestly clear even to an ordinary man of sense and reflection that such an act violates the constitution.<sup>19</sup> On similar lines, Oliver Wendell Holmes introduces a 'reasonable man' test to suggest that a specific action of the regime may not be declared unconstitutional unless a reasonable man could perceive that act as unconstitutional.<sup>20</sup> Different judgments of the US courts also endorse this approach.<sup>21</sup> Gerald Gunther proposes that the judiciary can review governmental action only when it finds empirical or historical evidence that the impugned act has failed to serve the public interest.<sup>22</sup>

Frankfurter presented the 'precedence-based test'.<sup>23</sup> According to this test, notwithstanding judicial political belief, while striking down a governmental act, the judiciary must follow the precedents, which is a hallmark of common law system.<sup>24</sup> J. Harvie Wilkinson coined the theory of 'textlist test' that dictates that the judiciary can nullify a legislative act when it is against the legitimate content of the text.<sup>25</sup> If legislation is textually sustainable, the judiciary should put off its hands.<sup>26</sup>

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<sup>15</sup> See, Shemtob, *Following*, 1.

<sup>16</sup> *Ibid.*, 10.

<sup>17</sup> See, Shemtob, *Following*, 11.

<sup>18</sup> See, Thayer, *Origin*, 140.

<sup>19</sup> *Ibid.*, 36.

<sup>20</sup> See, Frederic Rogers Kellogg, "Oliver Wendell Holmes, Jr., *Legal Theory and Judicial Restraint*," (Cambridge University Press, 2006), 6, 110, 151.

<sup>21</sup> See, the judgements in the cases namely, *Adair v. United States* 208 US 61 (1908) 191; *Coppage v. Kansas*, 236 US1, (1915), 27.

<sup>22</sup> See, Gunther, *Learned*, 248.

<sup>23</sup> See, *Board of Education v. Barnette*, 319 US (1943) 624.

<sup>24</sup> See, *Poe v. Ullman*, 367 US 1961, 497.

<sup>25</sup> See, Wilkinson, *Guns*, 253.

<sup>26</sup> *Ibid.*,

Alexander M. Bickel stresses on values of the society<sup>27</sup> or the scheme of ordered liberty.<sup>28</sup> In other words, he suggests that legislative action should not be declared unconstitutional unless it offends the core values or ordered scheme of the society. Bickel seems to have pushed the idea of judicial restraint in its advanced or extreme form. He persuades the judiciary not to interfere in the domain of other branches of the government. He appreciates Thayer's 'rule of clear mistake'<sup>29</sup> for constitutional adjudication which means that the judiciary should restrain from declaring a governmental action unless it is amply clear that the administration has clearly committed a mistake or blunder which hits the basis of a constitutional government. This restrictive approach of judicial review is widely hailed as a 'passive virtue' in the academic literature.<sup>30</sup>

While appreciating the passive virtue, the judiciary in Pakistan<sup>31</sup>, India<sup>32</sup>, UK<sup>33</sup>, and USA<sup>34</sup> have shown manifest reluctance in declaring actions of the executive and the

<sup>27</sup> See, Anthony Townsend Kronman, "Alexander Bickel's Philosophy of Prudence", *Yale Law Journal* 94 (1985), 1575.

<sup>28</sup> See, Learned Hand's Lecture at Harvard on "Judicial Restraint and the Bill of Rights," reviewed by Alexander M. Bickel, *The New Republic* (1958), 5, accessed June 20, 2018, accessed July 11, 2019. <https://www.scribd.com/document/35196787/Learned-Hand-s-Holmes-Lecture-At-Harvard-On-Judicial-Restraint-And-The-Bill-Of-Rights-Reviewed-By-Alexander-Bickel-From-The-New-Republic-Dated-12-May>

<sup>29</sup> *Ibid.*, 21-22.

<sup>30</sup> See, Gerald Gunther, "The Subtle Vices of the 'Passive Virtues'-A Comment on Principle and Expediency in Judicial Review," *Columbia Law Review*, 64 (1964), 1, 25.

<sup>31</sup> See, *State v. Dosso*, PLD 1958 SC 533; *Asma Jilani v. Govt. of Punjab*, PLD 1972 SC 139; *State v. Zia-ur-Rehman*, PLD 1973 SC 49; *Begum Nusrat Bhutto v. Chief of Army Staff*, PLD 1977 SC 657; *Syed Zafar Ali Shah v. Pervez Musharraf*, PLD 2000 SC 869; *Wasim Sajjad v. Federation of Pakistan*, PLD 2001 SC 233; *Tika Iqbal Muhammad Khan v. Gen Pervez Musharraf*, PLD 2008 SC 178.

<sup>32</sup> See, *Infra* Notes 167.

<sup>33</sup> The principle of judicial review could not prevail for a long time in England because the Parliament neutralized the supremacy of King with its own. This principle was replaced by the doctrine of parliamentary sovereignty. (See, *Lee v. Bude and Torrington*, (1871) LR 6 CP 576) Where Justice Wills held "We do not sit here as a Court of Appeal from the Parliament; if an Act of Parliament has been obtained improperly, it is for the Legislature to correct it by repealing it but so long as it exists as law, the Courts are bound by it." Sir William Black Stone inflicted the legitimacy of judicial review by upholding the parliamentary supremacy. (See, William Blackstone, *1 Commentaries* (15<sup>th</sup> Ed., 1765) 91, c.1; See, S.N. Ray, *Judicial Review and Fundamental Right* (Calcutta: Eastern Law House, 1974), 17). Thus, the doctrine of judicial review as it started with *Dr. Bonham Case* (*Thomas Bonham v. College of Physicians*, Court of Common Pleas (1610) 8 Co Rep 114) afterward having an aversive emergence in Public Law jurisprudence of England, in as much as the authority was used by the courts narrowly. For such judicial trend (See, the cases namely, *R v. London Sessions Appeal Committee*, (1951) 2 K.B 508; *Ealing Corporation v. Jones*, (1959) 1 Q B 384; *Gouriet v. Union of Post Office Workers*, (1977) 3 W.L.R. 300. Therefore, the English Judiciary while acknowledging the parliamentary supremacy abandoned the notion of judicial review and retreat from 'supervisory review' until 1930.

<sup>34</sup> In the early constitutional jurisprudence of USA, there was a notion that "primary authority to interpret the Constitution lies with the people and not with the court." (See, Kramer, *Judicial*, 621). The development of this idea, as per view of Judge Posner, is traced back to James Bradley Thayer's renowned work, 'The Origin and Scope of the American Doctrine of Constitutional Law' published in 1893. (See, Thayer, *Origin* 129). However, some other authors have referred this matter "to the time of the Founding era and the origin of judicial review in 1780s." (Kramer, *Judicial*, 622). Such approach

legislature as unconstitutional. Going even to an extreme end of judicial restraint, the courts sometimes compromised in upholding the constitution including the protection of the fundamental rights. For example, the courts validated various martial law regimes in Pakistan on the basis of doctrine of necessity.<sup>35</sup> Such an exercise of judicial restraint attracts criticism anywhere in the world.<sup>36</sup>

Those who support judicial restraint are of the view that the judiciary is not expert in legislative and executive functions, so it should not interfere with these domains of expertise of other branches of the government. It is argued that policy matters may not be left to subject to judicial review as policies are formulated to advance specific objectives of political nature. Justice Harlan Stone beautifully stated that only check on the use of judicial review is the judiciary's own wisdom of self-restraint.<sup>37</sup>

The theory of judicial restraint, in fact, promotes democracy.<sup>38</sup> Fredric justifies judicial restraint on the basis of the judge's fallibility.<sup>39</sup> Those who know their scholarly limits refuse to carry out their privatenotion of the good on collective democratic conscious.<sup>40</sup> Democracy is appreciated for its experimental qualities exercised for resolving the complex issues through innovative solutions instead of judicial inventiveness.<sup>41</sup> It is argued that allowing unfettered powers to the judiciary may discourage democratic initiatives.<sup>42</sup>

Despite obvious advantages, the theory of judicial restraint is criticized as well.

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has been holding the field till "the replacement of this concept of popular constitutionalism with the modern doctrine of judicial supremacy—a change that took hold only in the 1960s." (Kramer, Judicial, 621). In early 20<sup>th</sup> century, judicial restraint was commonly called up by Liberals in the expectation of restraining the judiciary from invalidating the progressive and new deal in economic regulations. Among Justices of the Supreme Court allied with the growing trend of judicial restraint, the notable judges include Oliver Wendell Holmes Jr. (1902-32), Louis Brandies (1919-39) and Flex Frankfurter (1939-62). In the latter half of this century, particularly during the period of Chief Justice Earl Warren (1953-69), the Supreme Court embarked on taking liberals' positions, and the trend of restraint appeared a general conservative political issue. The Justices approving restraint in this phase were included John Marshall, Harlan and Frankfurter, who constantly endorsed this idea.

<sup>35</sup> See, Rajshree, J. "Pakistan's Judicial Renaissance: A New Phase", *ISAS Insights*, 166 (2012), 1-7.

<sup>36</sup> See, Shemtob, *Following*, 1.

<sup>37</sup> See, *United States v. Butler*, 297 US 1, 78-79 (1936).

<sup>38</sup> See, Bickel, *Least*.

<sup>39</sup> See, Kellogg, *Oliver*, 6, 110.

<sup>40</sup> See, Shemtob, *Following*, 5.

<sup>41</sup> See, Wallace Mendelson, "The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter", *Vanderbilt Law Review* Vol. 31 (1978), 76.

<sup>42</sup> Justice Brandeis has repeatedly expressed such concern that, "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory." (See, *New State Ice Company v. Liebmann*, 285 US 262 (1932), 311.

The courts being delegates of sovereign authority are considered the agent of the people.<sup>43</sup> It is argued that if courts fail to maintain the supremacy of the constitution, they would be, in reality, failing to meet their constitutional duty as a matter of public trust. Further, failing to exercise the judicial review effectively, would amount to compromise on the protection of basic rights which is the basic function of the courts. Thus, passive virtue, would impede the materialization of fundamental rights and encourage transgression of governmental power.

David Luban is of the view that though we do not want government by judiciary, the judiciary is expected to correct legislatures, recognize methods of democratic failure, as well as shutter authorized paths.<sup>44</sup> Richard Posner considers judicial restraint a self-contradictory theory.<sup>45</sup> The critics of judicial restraint argue that this theory does not embody the actual function of the judiciary, that is, to construe the constitution to determine whether there is any violation by the government.<sup>46</sup> The judges should decide constitutional matters and their decisions could be obviously correct as well as incorrect.<sup>47</sup> Thus, Anotnio declared Bickel's 'passive virtue' as problematic.<sup>48</sup> Leslie found Bickel's argument as irrational.<sup>49</sup> Martin H. Redish considered Bickel's theory of 'passive virtue' faulty as its political and social costs out weight its theoretical gains.<sup>50</sup> Gouverneur Morris went to an extreme end while criticizing judicial restraint said: judicial policy of restraint indeed let the constitution be put as an immeasurable value in the hands of idiots and insane men<sup>51</sup> and according to Morris, it is not less than the greatest follies and absurdities.<sup>52</sup>

The critics argue that judges have employed judicial restraint to promote conservative activism<sup>53</sup> and thus consider judges as 'tragically' political.<sup>54</sup> Carl Black,

<sup>43</sup> Republicans' approach started in 1980 s from USA.

<sup>44</sup> Ibid., 449,455,510.

<sup>45</sup> See, Posner, *Rise*, 524.

<sup>46</sup> See, Cass R. Sunstein, "Backlash's Travels," *Harvard Civil Rights-Civil Liberties Law Review* 42 (2007), 335, 345.

<sup>47</sup> See, Posner, *Rise*, 28.

<sup>48</sup> See, Anotnio F. Perez, "The Passive Virtues and the World Court: Pro-Dialogic Abstention by International Court of Justice," *Michigan Journal of International Law*, 18 (1997), 399.

<sup>49</sup> See, Leslie Pickering Francis, "Law and Philosophy: From Skepticism to Value Theory," *Loyola of Los Angeles Law Review*, 27 (1993), 65, 76.

<sup>50</sup> See, Redish, *Judicial*, 1033.

<sup>51</sup> Ibid.,

<sup>52</sup> See, Gouverneur Morris Statement (See, 11 Annals of Congress (1802), 3.

<sup>53</sup> See, Richard Garnett, 'Citizens United and 'Conservative Judicial Activism', *National Law Review*, accessed June, 20, 2018, <https://www.nationalreview.com/.../citizens-united-and-conservative-judicial-activism->

<sup>54</sup> See, Posner, *Rise*; Bruce Ackerman, *The Perils of Judicial Restraint*, accessed June 20, 2018, [http://www.slate.com/articles/news\\_and\\_politics/.../the\\_perils\\_of\\_judicial\\_restraint.html](http://www.slate.com/articles/news_and_politics/.../the_perils_of_judicial_restraint.html)

therefore, has suggested that judicial restraint must be discarded as a model of judicial review.<sup>55</sup> To critics of judicial restraint, the so-called 'passive virtue' has made the governments unaccountable and has put the rights of the people at stake. Thus, an alternative judicial approach called judicial activism is considered a remedial mean of judicial review upholding constitutional supremacy and promoting the fundamental rights of the people.

### 6.3.2 JUDICIAL ACTIVISM

Judicial activism became popular by the mid of the 20<sup>th</sup> century in constitutional law jurisprudence in the USA.<sup>56</sup> However, its excessive use was criticized when the US Supreme Court declared legislative acts as unconstitutional.<sup>57</sup> Many jurists questioned the active use and legitimacy of the judicial review.<sup>58</sup> Some judges<sup>59</sup> and jurists<sup>60</sup> proposed even the elimination of the judicial review power and empowering of the Congress to overrule activist judicial decisions.<sup>61</sup> The judicial efforts to police the boundaries of national power were considered unwarranted by Professor Kramer.<sup>62</sup> By the end of the 20<sup>th</sup> century, the judicial activism jurisprudence developed by the US Courts influenced the British jurisprudence compelling Lord Denning to criticize the same.<sup>63</sup>

The judicial activism found its traces in various judgments.<sup>64</sup> In the sub-

<sup>55</sup> See, Carl Black, Jr., *The People and the Court: Judicial Review in a Democracy*, (New York: Macmillan 1960), 203; Rostow, *Sovereign*, 39, 179.

<sup>56</sup> See, *Brown v. Board of Education of Topeka*, 347 US 483 (1954); *United States v. Students*, 412 U.S. 669 (1973); *Environmental Defense Fund v. Environmental Protection Agency*, No. 97-1637, (1999).

<sup>57</sup> See, *Marbury v. Madison*, 5 US (1 Cranch) 137 (1803); *Printz v. United States*, 521 US 898, 935 (1997); *United States v. Morrison*, 529 U.S. 598, 619 (2000); *Kimel v. Florida Board of Regents*, 528 US 62, 67 (2000).

<sup>58</sup> See, Philip P. Frickey and Steven S. Smith, "Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique," 111 *Yale Law Journal* (2002), 1707; Robert C. Post and Reva B. Siegel, "Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimmel," 110 *Yale Law Journal* (2000), 441; Lynn A. Baker and Ernest A. Young, "Federalism and the Double Standard of Judicial Review," 51 *Duke Law Journal*, (2001), 75; Steven G. Calabresi, "A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez", 94 *Mich. Law Review* (1995), 752.

<sup>59</sup> See, Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges*, (American Enterprise Institute, 2003), 92.

<sup>60</sup> See, Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999) 99-102, 154; See Larry D. Kramer, "Foreword: We the Court," 115 *Harvard Law Review* (2001), 4; Larry D. Kramer, "Putting the Politics Back into the Political Safeguards of Federalism," 100 *Colum Law Review*, (2000), 215.

<sup>61</sup> See, Tushnet, *Taking*, 99-102, 154.

<sup>62</sup> See, Saikrishna B. Prakash and John C. Yoo, "The Origins of Judicial Review," *The University of Chicago Law Review*, Vol. 70 (2003), 889.

<sup>63</sup> See, S. A. de Smith et al. *Principles of Judicial Review*, (London: Sweet and Maxwell 1999), 54.

<sup>64</sup> See, *R v. Thomas Magistrate's Court, Ex-parte Green Barren* (1957) 5 LGR 129; *R v. Paddington Valuation Officer*, (1966) 1QB 380; *Philips v. Berkshire CC*, (1967) 2 Q.B. 991; *Club v. Ende* (1977) 2 WLR 974; *R v. Police Commissioner*, (1973) 2 Q B 241; IRC case (1982) A.C. 617. *The Attorney-*

continent, judicial review power was declared as a basic structure of India's constitution.<sup>65</sup> The limits of judicial review, however, debated in India.<sup>66</sup> At times, the Indian judiciary used judicial review powers more proactively.<sup>67</sup> In Pakistan, the courts have exercised their judicial review powers in a mixed manner.<sup>68</sup> Since the 1980s, Pakistan's judiciary has shown increasing activism while interpreting the constitution with reference to the acts of the legislature and the executive. Starting from the *Benazir Bhutto* case<sup>69</sup> judicial activism became more popular in Pakistan. Iftikhar Muhammad Chaudhry<sup>70</sup> and Mian Saqib Nisar used judicial review power aggressively.<sup>71</sup> Arguably, they intervened into the policy-making domain of other branches of the government.

Therefore, such active exercise of judicial review power is criticized in Pakistan on the reason that the judiciary is violating the separation of powers doctrine while

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*General. Ex-parte ICI PLC* (1987) 1 CMLR72; *R v. GLC*, (1976) 1 WLR 550; *R v. Secretary of state for the Environment* (1994) 4 All ER 329; *R v Somerset CC*, (1998) 75 P. & C.R. 175; *R v. London Underground*, (2002) EWHC 2307; *R v. The Environment Agency. Secretary of State (Defendants) and Rugby Ltd*, (2004) EWHC 736; *Osterreichischer Rund Funk v. Austria* (35841/02 (2006) ECHR 1043); See, also Lord Denning, *The Discipline of Law*, (London: Butterworth, 1979), 133.

<sup>65</sup> See, *Keshananda Bharti v. State of Kerala*, AIR 1973 SC 461.

<sup>66</sup> See, Justice K.G. Balakrishnan, "Growth of Public Interest Litigation in India," (Address, Singapore Academy of Law, 8<sup>th</sup> October, 2008, accessed June 20, 2018, <http://www.indialawyers.wordpress.com/2009/03/06/speeches-of-cji-of-india-2008/>; See, *Shankari Prasad Singh Deo v. Union of India*, AIR1951 SC 458.

<sup>67</sup> Judicial activism as exercised in the name of public interest for protecting the fundamental rights particularly for the access to justice for deprived has indeed caused serious reservations for all concerned. The executive through Manmohan Singh, the then Prime Minister complained that "the dividing line between judicial activism and judicial overreach is a thin one . . . A takeover of the functions of another organ may, at times, become a case of over-reach." (See, "Don't Overstep Limits, PM tells Judiciary," *The Indian Express* (New Delhi), April 8, 2007; On the similar line the Speaker of the House of People, Somnath Chatterjee, himself a lawyer wrote, "Now-a-days, there are umpteen instances where the judiciary has intervened in matters entirely within the domain of the executive, including policy decisions. . . . Activism of any institution has to be first directed to the due discharging of its own duties." (Somnath Chatterjee, *The Indian Express* (New Delhi), April 28, 2007. The judiciary itself seems not satisfied from such approach as Justices A. K. Mathur and MarkandayKatju in *Divisional Manager, Aravali Golf Club v. Chander Hass*, Appeal (civil) 5732 of 2007, pronounced that "Recently, the Courts have apparently, if not clearly, strayed into the executive domain or in matters of policy..."

<sup>68</sup> Among those cases some important are, namely, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416 ; *Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 SC 324; *Mrs. Shahida Zahir Abbasi v. President of Pakistan*, PLD 1996 SC 632; *Mian Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *Liaqat Hussain v. Federation of Pakistan*, PLD 1999 SC 504; *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 2010 SC 1161; *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan*, PLD 2010 SC 61; *Dr. Mobashir Hassan v. Federation of Pakistan*, PLD 2010 SC 265; *Bank of Punjab v. Haris Steel Industries*, PLD 2010 SC 1109; *Imran Ahmed Khan v. Muhammad Nawaz Sharif*, PLD 2017 SC 265; PLD 2017 SC 692; *Zulfiqar Ahmed Bhutta v. Federation of Pakistan*, PLD 2018 SC 370.

<sup>69</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416

<sup>70</sup> See, Moeen H. Cheema and Ijaz Shafi Gilani ed., *The Politics and Jurisprudence of the Chaudhry Court. 2005-2013*, (Karachi: Oxford University Press, 2015).

<sup>71</sup> See, *Imran Ahmed Khan v. Muhammad Nawaz Sharif*, PLD 2017 SC 265; PLD 2017 SC 692; *Zulfiqar Ahmed Bhutta v. Federation of Pakistan*, PLD 2018, SC 370



intervening in the policy-making domain of the government.<sup>72</sup> It may be argued that the courts used judicial review powers as an instrument to interfere in the policy decisions of the government.<sup>73</sup> There is a perception that in the disguise of judicial review the judges allow personal views to impact the public policy.<sup>74</sup> While reviewing the governmental actions, the judiciary, sometimes, attempts to legislate violating the separation of power between the three organs of the state.

It is argued that the judicial branch is not the least dangerous, but, appears to be the most dangerous institution<sup>75</sup> in terms of its power to split 'the chains of the constitution.'<sup>76</sup> Thus, according to critics, judicial activism establishes a parallel government by the judiciary.<sup>77</sup> It is argued that while deciding judicial questions, the judiciary embarks on political questions<sup>78</sup> disturbing the balance of power between different organs of government such as the executive and the legislature. It negates the concept of constitutionalism envisaged in the constitutional principle of the separation powers. Uncontrolled judicial review causes a counter-majoritarian difficulty shaking the very foundation of democracy and constitutional governments.<sup>79</sup>

Judicial activism has been a hot issue in Pakistan. Some consider it necessary to uphold constitutionalism and to safeguard basic rights in the face of transgression by the executive in under developed democracies. Others argue that the judicial review is appreciated for upholding constitutional supremacy including human rights; however, it must be criticized for its potent coercive power<sup>80</sup> and its legitimacy to upset the

<sup>72</sup> See, Hamid Khan, "Role of Bar in the Administration of Justice," *Pakistan Law Journal, Magazine* 3(1998), 148; *Report*, 28-36; See, Iqbal, *Right*, 166; See, Raza, *Reviewing*, in Menski, et al., *Public*, 105; Waseem, *Judging: High Court Bar Association v. Government of Baluchistan*, PLD 2013 Quetta 75; *Tariq Saeed v. Director, Anti-Corruption*, 1996 MLD 1864.

<sup>73</sup> See, Nicholas Katers, "Judicial Activism and Restraint: The Role of the Supreme Court," referred in "Separation of Powers, Judicial Review and Judicial Activism" by Markandey Katju, accessed on July 11, 2019, <http://justicekatju.blogspot.com/2013/10/separation-of-powers-judicial-review.html>

<sup>74</sup> See, Garner A. Bryan, *Black's Law Dictionary* (West Group Publication, 2002).

<sup>75</sup> See, A. Hamilton, *The Federalist No. 78*, (C Rossiter, ed. 1961), 465.

<sup>76</sup> See, Thomas Jefferson, "Resolutions concerning, The Alien and Sedition Laws," 17 (A. Lipscomb & R. Bergh eds. 1905), 389.

<sup>77</sup> See, Raoul Berger, "Government By the Judiciary," (Indianapolis Liberty Fund, 1997), accessed on July 11, 2019, <https://books.google.com.pk/books?isbn=0865971447>; See, Glazer, "Towards an Imperial Judiciary?" *Public Interest* 41, (1975).

<sup>78</sup> See, I A. De Tocqueville, eds. *Democracy in America* (New York: A.A. Knopf, 1945), 28.

<sup>79</sup> The famous statement of the 'Counter-majoritarian Difficulty' is contained in Bickel, *Least*; See, also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge MA: Harvard University Press, 1980); See, Bruce Ackerman, "The Storrs Lectures: Discovering the Constitution", 93 *Yale Law Journal*, 1013 (1989); See, Barry Friedman, "The History of the Counter-majoritarian difficulty. Part one: The Road to judicial Supremacy", *New York University Law Review*, 73 (1998).

<sup>80</sup> See, Gewirtz, *Approaches*, 215.

equilibrium maintained by the constitution.<sup>81</sup>

The debate as to the limits of judicial review has become significant in Pakistan as it empowers the courts to interpret the constitution. Martin H. Redish states that the issue of judicial review and constitutional interpretation generates more debate amongst constitutional experts than on any other issue of constitutional law.<sup>82</sup> Due to the potential use of judicial power, Professor Schwartz cautioned that it should not be forgotten that no matter how we may gloss over it, judicial review is basically an undemocratic institution.<sup>83</sup> It may be argued that unrestricted judicial activism may impede the democratic process and hence jeopardize the rights of the people in the long run. For these reasons, Alexander Bickel considers the judicial review as a counter-majoritarian and judiciary a deviant institution.<sup>84</sup> It may be argued that in its misguided zeal of being the savior of the people, the courts may destroy the basic features of constitutional democracy, that is, each institution must remain within its constitutional limits.<sup>85</sup> Thus, it is proposed, the courts must save democracy from destroying itself by the excesses of its own power.<sup>86</sup>

Although the judiciary is mandated to maintain the supremacy of the constitution and to enforce basic human rights, but it is bound by the constitution. After all, the judiciary is the creation of the constitution that represents the ultimate will of the people. While performing its constitutional duty, the judiciary must be mindful of the will of the people that empower other organs of the state to legislate and make policies for the welfare of the people. In any case, the judiciary cannot damage constitutionalism while attempting to enforce the same.<sup>87</sup>

The next part would discuss how the judiciary can interpret the constitution in a balanced manner and protect fundamental rights of the people more effectively.

#### **6.4 A BALANCED APPROACH OF CONSTITUTIONAL INTERPRETATION**

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<sup>81</sup> Ibid.,

<sup>82</sup> See, Martin H. Redish and Mathew B. Arnould. "Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative," *Flare, La Review* Vol. 46, no. 6 (2012), 1485.

<sup>83</sup> See, R.C.S. Sarkar, "Judicial Review in the Framework of Indian Politics," (New Delhi, 1983), 101.

<sup>84</sup> See, Bickel, *Least*, 16, 18.

<sup>85</sup> See, Charles Evans Hughes, Proceedings in Commemoration of the 150<sup>th</sup> Anniversary of the First Congress, H.R. Doc. No. 212, 76<sup>th</sup> Cong., 1<sup>st</sup> Session, 32 (1939).

<sup>86</sup> Ibid.,

<sup>87</sup> See, *Friend v. Alberta*, 1998 1 SCR 493, Para.136.

The limits of judicial review are being contested since 1798.<sup>88</sup> The activist or liberal approach of judicial review termed as judicial activism and restrictive judicial review approach called judicial restraint are put in juxtaposition to find an equilibrium in constitutional interpretation. The judicial restraint is said to promote pro-majoritarian rule as a passive virtue. On the contrary, judicial activism is considered a kind of interpretive instrument through which the judiciary promotes its agenda at the cost of democracy and constitutionalism. Thus, judicial activism is considered a kind of threat to a democratic polity.<sup>89</sup> It may be argued that judicial activism challenges the constitutional separation of powers and democracy. Judicial restraint, on the contrary, is perceived to weaken the system of constitutional checks and balances.<sup>90</sup> Both the judicial approaches of review, seems to create a dilemma for the interpretation of the constitution and the protection of the basic rights. The constitutional theorists, thus, have always been in search of finding a balanced approach of judicial review maintaining a balance of powers between the state institutions and promoting constitutionalism.

Though it is challenging to find such a balanced approach of judicial review and constitutional interpretation,<sup>91</sup> yet this exercise may not be futile. There is always a way forward for reconciling two extreme positions such as judicial restraint and judicial activism. In this regard, prominent jurists like Jesse H. Choper,<sup>92</sup> John Hart Ely<sup>93</sup> and Greg Jones<sup>94</sup> have suggested three alternative approaches to find a balance in the constitutional interpretation through judicial review. While doing so, these theorists have dismissed the opposing notions of majoritarian or counter-majoritarian judicial review and justified their approaches on the basis of the principles of constitutional interpretation. These approaches have been thoroughly discussed in the previous chapter. Therefore, the next section focuses on the exercise of judicial review powers in Pakistan.

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<sup>88</sup> See, *Calder v. Bull*, 3 US 386, 1798.

<sup>89</sup> See, Redish, *Judicial*, 2.

<sup>90</sup> *Ibid.*,

<sup>91</sup> "It is misguided and undesirable to search for a theory of constitutional interpretation that will yield determinate results, right and wrong answers, to most constitutional questions. No such theory exists or ever will exist." (See, Erwin Chemerinsky, "Constitutional Interpretation for the Twenty-first Century," *The Journal of ACS Issue Groups* (2007), 25.

<sup>92</sup> See, Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court*, (Chicago: University of Chicago Press, 1980).

<sup>93</sup> See, Ely, *Democracy*.

<sup>94</sup> See, Greg Jones, "Proper Judicial Activism," *Regent University Law Review*, Vol. 14 (2001):141.

## 6.5 ANALYSIS OF THE JUDICIAL POWERS IN PAKISTAN

The analysis of cases in the following part would demonstrate how the judiciary has interpreted the constitution and used its judicial review power for the enforcement of fundamental rights. This analysis would help to appreciate the judicial approach of our courts regarding the protection of fundamental rights in Pakistan.

In the *Muhammad Nawaz Sharif v. President of Pakistan*, the President of Pakistan dissolved the National Assembly and dismissed the cabinet. Muhammad Nawaz Sharif challenged this order before the Supreme Court.<sup>95</sup>

The court observed that organizing a political party and then enjoying its consequential gains in terms of forming and running a democratically established government is protected under the constitution. A political party having more members in the National Assembly has the constitutional right to make the government.<sup>96</sup> The court declared the impugned order unconstitutional and violative of constitutionally protected fundamental right i.e. the freedom of association.<sup>97</sup> The court justified the use of power under Article 184(3) of the constitution and observed that the court has a duty to protect democracy and constitutionalism.<sup>98</sup>

By using a progressive interpretive approach<sup>99</sup> the court observed that the right to make political association under Article 17(2) also includes peripheral and consequential rights.<sup>100</sup> Everyone has a constitutional right to become a member of the national legislature and a political association has a fundamental right to form a government if it has such mandate.<sup>101</sup>

It seems that the court used judicial activism approach to decide a political issue

<sup>95</sup> See, *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473, 60-555.

<sup>96</sup> *Ibid.*,

<sup>97</sup> All the judges answered affirmatively of this question except Justice Sajad Ali Shah who delivered the contra judgment, with the majority view of 10 to 1 judges. The author of the judgment was Justice Shafiur Rahman. However, the agreeing judges except Justice Abdul Qadeer Chaudhry and Justice Fazal Elahi Khan, wrote also their own additional notes because of the significance of the constitutional concerns moved up in the case. However, as per view of Justice Shafiur Rehman the Articles 17(2) and 14 of the Constitution were violated.

<sup>98</sup> See, *Muhammad Nawaz Sharif v. Federation of Pakistan*, PLD 1993 SC 473, 735.

<sup>99</sup> See, Justice Shafiur Rehman, Justice Nasim Hassan Shah, Justice Ajmal Mian, Justice Muhammad Afzal Lone, Justice Saleem Akhtar, and Justice Saeed, in *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473, 572, 577, 674, 737, 811 and 845 respectively. For this approach reliance was made on *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416, 490, 511, 541-558; *Symbol's case*, PLD 1989 SC 66, 75; *Abul'la Maudoodi v. Government of West. Pakistan* (PLD 1964 SC 673, 692, 764; *Hurtade v. California*, 110 US 516. For all these references; See, *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473, 489, 557-559.

<sup>100</sup> See, *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473, 557, 558, 641.

<sup>101</sup> See, Nasim Hassan Shah the then CJP, and Justice Ajmal Mian in *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473, 559 and 673 respectively.

by exercising its extraordinary jurisdiction in the name of the protection of fundamental rights. No doubt the court has the power to review the actions of the executive<sup>102</sup>, however, the use of such power should remain within the constitutional limits.

Arguably, in the *Muhammad Nawaz Sharif* case, the court transgressed its constitutional powers. Osama Siddique contends that the court did not interpret the Constitution correctly and the relief granted to the petitioner was termed as a 'special relief'.<sup>103</sup> This judgment has been widely criticized by the bar and the civil society.<sup>104</sup> Such type of judicial populism, it is argued, may create a constitutional and political chaos and cause frustration among the citizens.<sup>105</sup>

The legal fraternity strongly criticized the judicialization of politics by the court. It may be argued that, in this case, the court protected political interests of the petitioner on the name of safeguarding the fundamental rights. The court could have adhered to the separation of power doctrine to promote democracy and constitutionalism in the country.<sup>106</sup> The adherence to the separation of powers helps in materializing the fundamental rights through a political process and judicial activism violates the essence and structure of the constitution.

In a suo-motu case, the court took notice as regards the pay of Industrial Home Teachers.<sup>107</sup> The salary of the teachers was five hundred who were teaching occupational training to the undergraduates; the pay was below even the lowest remunerations rewarded to alaborer. After hearing the arguments, the court asked the executive why the salary of these teachers had not been enhanced to a rational amount. The court ordered the executive to enhance the pay of the teachers to a sensible level which in line upholds their right to life. Apparently, the question of salary of government employees does not fall in the domain of the judiciary.

Likewise, in another suo-motu case, the court dealt with the issue of financial corruption in Hajj engagements.<sup>108</sup> The court heard the arguments in detail and observed that it will not let anyone to digest taxpayers' money. The court even transferred the public officials and observed that when the executive is transferring an

<sup>102</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416.

<sup>103</sup> See, Siddique, *Jurisprudence*, 80.

<sup>104</sup> *Ibid.*, 81.

<sup>105</sup> See, Khan, *Genesis*, 310 and 313.

<sup>106</sup> See, "Separation of Powers: asking a different Question Suzanna Sherry," accessed November 5, 2014, <http://heinonline.org>

<sup>107</sup> *Ibid.*

<sup>108</sup> See, *Regarding Corruption in Hajj Arrangements 2010*, PLC CS 1489.

honest person from his seat so that he could not complete investigation in corruption then such transfer can be interfered with by the court to fight corruption and save the fundamental rights of the people. Again, the matter of corruption in government schemes may be better resolved through political forums. The judiciary should not have intervened into the domain of the government.

In the *Abdul Raheem Ziaratwal v. Federation of Pakistan*, the Court dealt with embezzlement of development money, corruption in public welfare ventures as well the dearth of elementary facilities of life in Balochistan.<sup>109</sup> The Inquiry Committee formed on directions of the court undertook an inspection of fifty five projects and presented its findings to the court.

The report showed that the progress of development schemes was disappointing; the work was being done sluggishly despite the availability of considerable funds. No noticeable progress took place in proportion to the money in Balochistan; especially, as regards to the application of basic rights of the people i.e. clean drinking water, education, health, etc. The development funds had been misused owing to corruption and no action had been taken against the corrupt persons or authorities.

The court noted that as no public accounts committee was made to supervise development projects. Thus, the court directed that the Chief Minister and the Cabinet have the main responsibility to ensure the use of public funds for the welfare of the people as per law. The court ordered the executive to hold accountable those who have used public funds in a non-transparent manner.

In the *Ch Nisar Ali Khan's case*<sup>110</sup>, the appointment of Chairman National Accountability Bureau without meaningful discussion with the opposition challenged in the court. The court observed that the discussion had to be purposeful as well as honest effort had to be made to reach an agreement between the President and the opposition leader.<sup>111</sup> The court emphasized that the first priority in any discussion had to be focused to develop a consensus between the consultees by discussing the qualities and drawbacks of under consideration nominees for the post.

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<sup>109</sup> See, *Abdul Raheem Ziaratwal v. Federation of Pakistan*, 2014 SCMR 873.

<sup>110</sup> See, *Ch Nisar Ali Khan vs federation of Pakistan*. PLD 2013 SC 568.

<sup>111</sup> Section.6 (b) (i) of the National Accountability Bureau Ordinance, 1999.

It may be argued that devoid of a real system of accountability of the executive, the fundamental rights of the people cannot be protected.<sup>112</sup> This case apparently demonstrates that the judiciary is fully cognizant as to its role for the protection of fundamental rights under the doctrine of the separation of powers. Arguably, such a judicial approach amounts to intervene in the domain of the government as the question of appointment of Chairman National Accountability Bureau is a political question and the judiciary should refrain from deciding such questions that may be better decided through a process of political consultation and the ultimate accountability by the people.

In the *Maulana Abdul Haque Baloch v. Government of Baluchistan*<sup>113</sup>, the court examined the legality of the grant of licenses to foreign companies<sup>114</sup> for the lease of mining on ground of unfair relaxation of rules, non-transparency, violation of laws, and a likely loss to public exchequer. Briefly, the Baluchistan Development Authority executed an agreement for the exploration of minerals<sup>115</sup> in *RekoDiq* area of Chagai, Balochistan.

The validity of the exploration agreement and its execution was challenged<sup>116</sup> at the HC of Balochistan. The HC dismissed the petition and the matter came before the SC.<sup>117</sup> The petitioners argued before the SC that the grant of lease to the foreign companies was against the national interest.<sup>118</sup> It was specifically argued that the Government of Baluchistan blatantly ignored the national interest while negotiating and determining the terms and conditions of the impugned agreement.

The respondents contested that terms of the agreement were valid and legal<sup>119</sup>; the judgment of HC passed in their favor barred the extraordinary jurisdiction of the SC; moreover, non-granting of the mining lease and the mechanism of international arbitration stipulated in the agreement bars the jurisdiction of the SC. In any case, the respondents argued, the agreement does not violate basic rights of the people or national

<sup>112</sup> See, *SuoMotu Case No.12 of 2011 SCMR 728*.

<sup>113</sup> See, Petitioners arguments at Para Nos. 11, 12, 15, 16 in *Maulana Abdul Haque Baloch v. Government of Balochistan*, PLD 2013 SC 641, 678-679 and 681-682.

<sup>114</sup> Civil Petition No. 796 of 2007; The foreign companies were 'Minerals Intermediate Exploration Inc.' (BHP) and Tethyan Copper Company (TCC).

<sup>115</sup> Chagai Hills Exploration Joint Venture Agreement (CHEJVA).

<sup>116</sup> See, Constitution Petition No. 892 of 2006 wherein the allegation was leveled as illegal, ultra vires, unconstitutional and *malafide*.

<sup>117</sup> Vide judgment dated 26-06-2002.

<sup>118</sup> *Ibid.*, 678.

<sup>119</sup> In view of the order dated 14-11-2011 passed by the licensing authority, and upheld on 03-03-2012 in Administrative Appeal. See, *Maulana Abdul Haque Baloch v. Government of Balochistan*, PLD 2013 SC 641, 766.

interest.<sup>120</sup>

The court held that there was no public advertisement regarding granting the lease of mines of *RekoDiq*, and thus it deprived the right of other investors to participate in the bidding process. Thus, it has adversely affected the national interest. The court further observed that the poor handling of such an important matter raised questions on the legality of the transactions and thus damaged the public interest.<sup>121</sup> The executive actions have no immunity from judicial review. As per the constitution, it is the prime function of the court to review the executive actions and interpret the law where the court finds any breach of basic rights.

The court pointed out many irregularities and lacunas in the agreement<sup>122</sup> and observed that the agreement has been made in contravention of the relevant laws and rules<sup>123</sup> regarding the *RekoDiq* project<sup>124</sup> and the agreement was invalid even otherwise. The court declared the agreement void and illegal.<sup>125</sup>

Though the issue was of public nature as the mineral resources in *RekoDiq* were the public property, however, the infringement of any specific fundamental right could not have been established before the court. Therefore, the court used a progressive interpretive approach to intervene in the domain of the executive and acted beyond its constitutional mandate. This judgment was strongly criticized by the legal fraternity. It is considered that the court failed to show judicial restraint in this case.<sup>126</sup>

In the presence of international arbitration clause in the agreement, the court could not have assumed its judicial review powers as the aggrieved parties had an alternate remedy to redress their grievances. Recently, the International Centre for Settlement of Investment Disputes awarded \$5.976 billion against Pakistan. It may be stressed that judicial review is premised on the constitutional doctrine of separation of

<sup>120</sup> See, *Maulana Abdul Haque Baloch v. Government of Balochistan*, PLD 2013 SC 641, 766.

<sup>121</sup> See, *Maulana Abdul Haque Baloch v. Government of Balochistan*, PLD 2013 SC 641, 710.

<sup>122</sup> Ibid.,

<sup>123</sup> See, The Mineral Development Act, 1948, The Mining Concession Rules, 1970, The Contract Act, 1872, and The Transfer of Property Act, 1882.

<sup>124</sup> See, *Maulana Abdul Haque Baloch v. Government of Balochistan*, PLD 2013 SC 641, 774-75.

<sup>125</sup> The Exploration License -5, Addendum No. 1 dated 04.03.2000, Option Agreement dated 28.04.2000, Alliance Agreement dated 03.04.2002 and Novation Agreement dated 01.04.2006.

<sup>126</sup> According to the Counsel for respondent, the judicial restraint "would be the best, clearest, fairest and most transparent approach, which would restore the confidence of foreign investors in Pakistan as a safe environment for their investments and there would be no conceivable allegations that the agreement was struck down after the discovery had been made. He urged that Pakistan should stand up for its commitments under the bilateral treaty read with ICSID clause, which the State of Pakistan has accepted voluntarily and freely, and that this Court should not put its prestige on the line." (See, *Maulana Abdul Haque Baloch v. Government of Balochistan*, PLD 2013 SC 641.)



powers, a core principle of constitutionalism<sup>127</sup> that ensures constitutional form of government.<sup>128</sup> In this case, the judiciary overstepped its constitutional power that caused heavy loss to the national exchequer and also damaged institutional reputation of the court.

In a suo-motu case<sup>129</sup>, the court dealt with the dissemination of public money by Ex-Prime Minister among the public representatives. The Prime Minister disseminated the money exceeding budgetary distribution of Rs.22 billion in his electorate by diverting the money from schemes of national significance. The court observed that the Prime Minister being a chosen representative was required to adhere to the law to show fair dissemination of the funds within the allocated budget.

The court noted that the workability of the schemes for which the money had been approved was not observed; that the funds were distributed without following any transparent system and the money was channeled from the ventures of general importance. The court directed the Accountant General of Pakistan to put up the facts as regards the development projects and restrained the executing agencies from the further release of the funds.

This case shows how the judiciary has exercised its judicial review powers for the enforcement of fundamental rights of the people by protecting the public fund from misuse. It may be argued that in this case the judiciary acted beyond its mandate to intervene into the policy making domain of the government.

In the *Farooq Ahmed Khan Leghari v. Federation of Pakistan*<sup>130</sup>, the proclamation of emergency<sup>131</sup> and order of suspending the implementation of the fundamental rights<sup>132</sup> were assailed before the court.<sup>133</sup> The petitioner argued that the executive had proclaimed the emergency and suspended the enforcement of fundamental rights without satisfying the requirements of Articles 232 and 233 of the constitution.

The respondents contested that the petition is not maintainable because of the

<sup>127</sup> See, Barendt, "Is there a U.K Constitution?" *Oxford Journal of Legal Studies* 17 (1997), 137; Eric Berend, "Separation of Powers and Constitutional Government," *Public Law* (1995), 599.

<sup>128</sup> See, E. Carolan, "The New Separation of Powers: A Theory of the Modern State," (Oxford: Oxford University Press, 2009), 18.

<sup>129</sup> See, Petition against Distribution of Development Funds by Ex-Prime Minister of Pakistan Raja Parvez Ashraf, 2013 SCMR 1017.

<sup>130</sup> See, *Farooq Ahmed Khan Leghari v. Federation of Pakistan*, PLD 1999 SC 57.

<sup>131</sup> The Order dated 28.5.1998 under Articles 232(1) and 233(2) of the 1973 Constitution.

<sup>132</sup> The Order dated 13.7.1998.

<sup>133</sup> See, Constitutional Petitions Nos. 10, 11, 12, 16 and 17 of 1998.

ouster clause of Article 236 (2) of the constitution; the implementation of basic rights and right to approach the court are suspended. The respondents further argued that the order of proclamation of emergency is passed after the satisfaction of the President, the joint meeting of the legislature has approved the order of proclamation, thus the same could not be assailed before the court and therefore the court has no jurisdiction in this case.

The court observed that the proclamation is not covered under Article 236.<sup>134</sup> The court relied upon the *Sabir Shah's* case wherein it was held that if a proclamation is without jurisdiction or mala fide, it did not come under Article 236; moreover, it was observed, the court has jurisdiction to review such a proclamation.<sup>135</sup>

The court further observed that the petitions are maintainable and the order of the proclamation of emergency was made as per the constitution.<sup>136</sup> Whereas the court declared the order of enforcement of suspension of fundamental rights illegal and unconstitutional. On it, Maryam S. Khan commented that the court examined the executive action and promoted constitutionalism as it declared the suspension of fundamental rights unconstitutional in the past, however, the martial laws and the proclamation of emergencies along with the suspension of fundamental rights were declared valid by the courts that destroyed the roots of democracy in the country.<sup>137</sup> The judicial restraint or abdication to perform the constitutional duty by the courts amounts to ignoring the doctrine of separation of powers.<sup>138</sup>

In the *Syed Zafar Ali Shah v. General Pervez Musharraf* case,<sup>139</sup> the issue of declaration of emergency by Pervez Musharraf was challenged before the court.<sup>140</sup> The petitioners blamed the respondent for destabilizing and politicizing the armed forces. The petitioner argued that all the instruments offended Article 2-A, the fundamental rights, and different provisions of the constitution. Moreover, it was argued that the suspension of fundamental rights was against the constitution.<sup>141</sup>

<sup>134</sup> See, *Farooq Ahmed Khan Leghari v. Federation of Pakistan*, PLD 1999 SC 57, 72.

<sup>135</sup> See, *Pir Sabir Shah v. Federation of Pakistan*, PLD 1994 SC 738.

<sup>136</sup> See, *Farooq Ahmed Khan Leghari v. Federation of Pakistan*, PLD 1999 SC 57, 65.

<sup>137</sup> See, Khan, *Genesis*, 314.

<sup>138</sup> See, Jonathan L. Entin, "Separation of Powers, the Political Branches, and the Limits of Judicial Review," accessed November 7, 2014, <http://heinonline.org>

<sup>139</sup> See, *Syed Zafar Ali Shah v. General Pervez Musharraf*, PLD 2000 SC 869.

<sup>140</sup> The Provisional Constitutional Order (PCO) 1999 and Oath of the Office of (Judges) Order, 2000 were challenged in this case.

<sup>141</sup> See, the cases, *Muhammad Nawaz Sharif*, PLD 1993SC 473, *Farooq Ahmed Khan Leghari*, PLD 1999 SC 57 and *Sheikh Liaquat Hussain* PLD 1999 SC 504.

The respondent opposed the petitions and argued that the order of the proclamation of emergency and the provincial constitutional order barred the jurisdiction of the court to adjudicate the petitions. The court validated the order of the proclamation of emergency relying on the rule of state necessity. It is argued that the court legitimized extra-constitutional measures and the military coup<sup>142</sup> in utter disregard of constitutionalism, the fundamental rights and democracy.<sup>143</sup> The judiciary should show judicial restraint in government policy matters, however, in the case of executive transgression such as a military takeover, the court is obliged to uphold the constitution and the fundamental rights.<sup>144</sup>

The judiciary often abdicated from its constitutional duty and legitimized unconstitutional acts of the executive in Pakistan.<sup>145</sup> Such type of judicial restraint helps authoritarian governments and weakens the democratic process in the country.<sup>146</sup> The failure to uphold the constitution amounts to abdicating the authority of judicial review as per the doctrine of separation of powers.

In the *Ch. Muhammad Sadiq* case,<sup>147</sup> the petitioners assailed the vires of two laws prohibiting ostensible display and wasteful expenses in marriage ceremonies.<sup>148</sup> The petitioners submitted that the legislature could not make the impugned legislation as it is against the injunctions of Islam and thus the same is external to the legislative competence of the lawmaker. They further contended that the impugned legislation offends Articles 18 and 25 of the constitution.

The respondent contested that only the Federal Shariat Court has jurisdiction to examine any legislation on the ground of Islamic injunctions under Articles 203-D and 227 of the constitution; thus, the court lacks jurisdiction in this regard and could not invalidate the impugned legislation. They further contended that Article 25 of the constitution is not attracted as the petitioners have not been discriminated in any manner.

However, the court held that the petitions are maintainable as the issue affects

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<sup>142</sup> See, Khan *Genesis*, 316.

<sup>143</sup> *Ibid.*, 318.

<sup>144</sup> *Ibid.*, 91.

<sup>145</sup> *Ibid.*,

<sup>146</sup> See, "Human Rights in Pakistan," accessed November 8, 2014, <http://heinonline.org>

<sup>147</sup> See, *Ch. Muhammad Siddique v. Government of Pakistan*, P LD 2005 SC 1; Constitutional petition Nos. 23 of 1999 and 21 of 2004.

<sup>148</sup> The Marriage Functions (Prohibition of Ostentation Display and Wasteful Expenses) Ordinance, 2000 and the Punjab Marriage Functions (Prohibition of Ostentation Display and Wasteful Expenses) aCT, 2003.

the public. The question arises whether this matter comes within the jurisdiction of the court. It may be argued that such matters can only be challenged before the Federal Shariat Court.<sup>149</sup> So, this case should have been adjudicated by the Federal Shariat Court. In this case, the court seemingly overreached its constitutional domain and interfered into the domain of the FSC which negates the constitution.<sup>150</sup> Though this case, does not strictly fall in the debate of separation of powers within different organs of the state, yet, it may be discussed to show how the court sometimes used its judicial power in apparent disregard of the constitution even within its own sphere of power.

The issue of the privatization of a steel mill came before the court<sup>151</sup> in which the petitioners argued that the procedure of privatization of steel mill through promulgation of an ordinance was against the constitution.<sup>152</sup> The Workers Union<sup>153</sup> attacked the Ordinance<sup>154</sup> and argued that it violates the constitution.<sup>155</sup> The respondents opposed the petitions on the grounds that there was no infringement of the basic rights of the petitioners and that the petitioners did not avail the alternate remedy and the petitions are not maintainable.<sup>156</sup>

The respondent further maintained that interference by the court regarding the course of privatization of a steel mill would breach the concept of separation of powers between the three branches of the government.<sup>157</sup> The respondent further argued that Ordinance allowing privatization of the steel mill is protected under Article 270-AA of the constitution.<sup>158</sup> Thus, it cannot be reviewed by the court. However, the court held that it can review any act of the government if it conflicts with the fundamental rights.<sup>159</sup> The court further observed that though it has a policy not to interfere with policy matters of the government in normal circumstances, but there is an exception to it. In this regard, the court referred two cases titled *Balco Employees*<sup>160</sup>, *Delhi Science*

<sup>149</sup> See, Article 203-D of the 1973 Constitution, 1973

<sup>150</sup> See, George Rossman Chief Justice of the Supreme Court of Oregon, "The Spirit of Laws: The Doctrine of Separation of Powers," accessed November 7, 2014, <http://heinonline.org>

<sup>151</sup> See, Civil Petition No. 9 of 2006.

<sup>152</sup> The Privatization Commission Ordinance, 2000 was promulgated for the privatization of Karachi Steel Mill.

<sup>153</sup> Civil Petitions No. 345, 394 and C.M.A. 1190 of 2006.

<sup>154</sup> Certain provisions of this ordinance like 2, 3, 5, 6, 7, 9, 14, 16 & 22 are not in consonance with the Articles 153 and 154 of the Constitution, 1973.

<sup>155</sup> Even it was alleged for not having been approved by the CCI (See, *Wattan Party v. Federation of Pakistan*, PLD 2006 SC 697, 721).

<sup>156</sup> See, *Wattan Party v. Federation of Pakistan*, PLD 2006 SC 697, 718-19.

<sup>157</sup> *Ibid.*, 722.

<sup>158</sup> See, *Wattan Party v. Federation of Pakistan*, PLD 2006 SC 697, 726.

<sup>159</sup> *Ibid.*, 731.

<sup>160</sup> See, *Balco Employees Union (Registered) v. Union of India*, AIR 2002 SC 350.

*Forum*<sup>161</sup>, and *Messrs. Leah Cotton Mills*.<sup>162</sup>

In the *Balbo Employees*<sup>163</sup> case the court held that if any issue involves economic feasibilities, and it violates legal and constitutional bounds then the court must interfere in it.<sup>164</sup> This view was strengthened in a few other cases.<sup>165</sup> The court agreed that while using the power of judicial review, it must not express views on policy matters which require the expert knowledge.<sup>166</sup> However, the court distinguished the steel mill issue from policy matter and held that the court, in this case, is examining the transparency of the procedure of the privatization of the steel mill.<sup>167</sup>

The court scrutinized<sup>168</sup> and adjudicated<sup>169</sup> the actions of public functionaries regarding the privatization of steel mill on the criterion of the law, the constitution as well as internationally accepted principles, and found substantive and procedural violations in the process of privatization.<sup>170</sup> The court held that if law assigns power to an authority to do a particular work then the court must not direct the authority to do the same in a specific way; however, if the authority uses its power without following the law then the court can review illegal acts of the authority and rectify the wrong. If the court does not review such illegal acts then the court would fail to perform its constitutional duty.<sup>171</sup>

It may be argued that, in this case, the court went beyond its constitutional powers and disregarded the doctrine of separation of powers while declaring the procedure of the privatization of the steel mill as unconstitutional. Apparently, the review of the administrative policies of the government was without any solid piece of evidence and legality. Thus, the review of the administrative policies by the court, may not be defended on the principles of constitutionalism and limited government. If courts are allowed to review every act of the government that is strictly in its domain, then judicial review of such actions offends the theory of separation of powers. Ultimately,

<sup>161</sup> See, *Delhi Science Forum v. Union of India*, AIR 1996 SC1356.

<sup>162</sup> See, *Balco Employees Union (Registered) v. Union of India*, AIR 2002 SC 350.

<sup>163</sup> See, *Alco Employees Union (Registered) v. Union of India*, AIR 2002 SC 350.

<sup>164</sup> See, *Wattan Party v. Federation of Pakistan*, PLD SC 697, 725.

<sup>165</sup> See, *Nottinghamshire County Council v. Secretary of State*, 1986 1 All ER 199.

<sup>166</sup> See, Peter Cane, "An Introduction to Administrative Law", 2<sup>nd</sup> ed. (Clarendon Press, 1996).

<sup>167</sup> See, *Wattan Party v. Federation*, PLD 2006 SC 697, 739.

<sup>168</sup> The court look into the models of valuation internationally recognized to ascertain as to which out of them suits the sellers and buyers respectively. The Court looks into the World Bank Report. See, *Wattan Party v. Federation*, PLD 2006 SC 697, 748. The Court found the violation. (See, *Wattan Party v. Federation*, PLD 2006 SC 697, 751, 755)

<sup>169</sup> *Ibid.*, 749.

<sup>170</sup> See, *Wattan Party v. Federation*, PLD 2006 SC 697, 759, 760, 763, 765, 767, 768, 769, 770, 80 and 81.

<sup>171</sup> *Ibid.*, 755-756.

it leads to undermine rights of the people. As rights cannot be protected in any democracy which is incapacitated either by unconstitutional take overs or by judicial overreach.

Further, it may be argued that the judiciary is the sole custodian of the fundamental rights of the people. This assumption seems to be misconceived. The judiciary becomes custodian of fundamental rights when they are explicitly violated by two other branches of the government. The constitution confers the responsibility of the protection of fundamental rights on each organ of the state. In an eventuality, the judiciary and the executive may have different perspectives of a policy or approach to fundamental rights. In this situation, the judiciary may restrain itself and let the other branches function to realize the fundamental rights. It would promote constitutional balance of power as envisaged in the doctrine of separation of powers.

Thus, in the context of the steel mills case, it may be argued that the Ordinance was all-inclusive as it provided effective alternate remedy for the resolution of any dispute with respect to the process of the privatization of the steel mill and its impact upon fundamental rights. The judicial review of the procedure of privatization, thus, was not an appropriate and amounted to an overreach of judicial powers. The Ordinance had the potential to counter any misuse of the procedure of the privatization. It afforded an effective mechanism to enquire for any irregularity in the process of privatization. Thus, intervention of the court in this case was not required under the constitution.

The court should have allowed the government to resolve any issue relating to the privatization by available legal means under the relevant law instead of conducting its judicial review offending the principle of separation of powers. The parties could have been allowed to avail the judicial forum after availing the alternate remedy available under the law.

As a result of this judgment, the process of privatization of steel mill was halted and this issue remains unresolved. The mill has stopped its operation. Arguably, the interference of the court into policy matters of the government has caused a heavy loss to the state treasury. Therefore, the courts should review the acts of the executive within the constitutional limits adhering to the doctrine of separation of powers.

It appears that the court intruded upon the domain of other branches of the government violating the theory of separation of powers. This case has not come under the four corners of judicial review as the alternate remedy was available to the

parties.<sup>172</sup>This would have been the best way to fulfill the intention of the legislature for any irregularity to adopt the mechanism of investigation under the Ordinance instead of conducting judicial review of the executive action. This judgment politicized the judicial process and negated the concept of separation of powers.<sup>173</sup>

In the *Tika Iqbal Muhammad Khan's* case<sup>174</sup>, the petitioners challenged the proclamation of emergency.<sup>175</sup>The petitioners prayed for the restoration of deposed judges of superior courts and the fundamental rights. The petitioners pleaded that the proclamation of emergency amounts to a martial law. The actions of declaring emergency was thus illegal, ultra vires, without jurisdiction, mala fide, and liable to be set aside.

The respondents objected to the maintainability of the petitions and argued that in view of the order of proclamation of emergency the court has no jurisdiction to enforce the suspended fundamental rights and that the constitution recognized the proclamation of an emergency.<sup>176</sup>

The court observed that it is empowered to review the vires of the proclamation of emergency. On the assurance of the executive that the fundamental rights will be restored<sup>177</sup>, the court held that in this regard no order was supposed to be called for.<sup>178</sup>

In this case, again, the court validated unconstitutional acts of the executive. This judgment has been severely criticized by the legal fraternity, civil society, and the media.<sup>179</sup>The judgment has been criticized for showing judicial restraint on important constitutional issues. Under the concept of separation of powers, the court has the authority to judicially review the unconstitutional orders of the executive and promote constitutionalism, the fundamental rights, and democracy. However, in this case, by showing undue judicial restraint on the extremely important constitutional question, the court legitimized unconstitutional acts of the executive and failed to perform its duty under the constitution.

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<sup>172</sup> Ibid., 739.

<sup>173</sup> See, William C. Banks, "Efficiency in Government: Separation of Powers Reconsidered," accessed November 6, 2014, <http://heinonline.org>

<sup>174</sup> Constitutional Petitions Nos. 87 and 88 of 2007.

<sup>175</sup> The emergency was declared on 03-11-2007, the Provincial Constitution Order No. 1 of 2007, and the Oath of Office (Judges) Order, 2007 under Article 184(3) of the Constitution. Articles 4, 5, 8, 9, 10, 15, 16, 17, 19, 25, 47, 48, 89, 90, 91, 209, 243, 244 and 245 of the 1973, Constitution, were argued to be violated through the declaration of emergency in the country by General Pervaiz Musharraf.

<sup>176</sup> Section 3 the Provincial Constitution Order No. 1 of 2007.

<sup>177</sup> Ibid., 291-92.

<sup>178</sup> Ibid., 92.

<sup>179</sup> See, Khan, *Genesis*, 332.

The court withdrew itself from a progressive interpretative approach and legitimized the illegal act of the *de facto* ruler on the ground of 'state necessity'.<sup>180</sup> The judicial restraint in such type of cases amounts to compromise on the supremacy of the constitution and the fundamental rights of the people.<sup>181</sup> When the judiciary abandons its constitutional role, it encourages other branches of the government to violate the constitution and basic rights of the citizens.

In the *Muhammad Azhar Siddiqui v. Federation of Pakistan*, the question of the implementation of *Dr Mobashir Hassan's* case<sup>182</sup> judgment came before the court.<sup>183</sup> The court had held the NRO<sup>184</sup> *ultra vires* the constitution and declared it void. The court had directed the executive to take all measures to pursue the revival of the requests, claims, as well as status withdrawn by the then-attorney General by communicating to concerned authorities of Switzerland with respect to bank accounts of the President. The government did not comply with the judgment. Therefore, the Court convicted the Prime Minister on the contempt of court as he failed to implement Order of the court.<sup>185</sup>

The petitioners argued that after the conviction of the respondent in the contempt proceedings, he was disqualified from the legislature and resultantly the office of premiership. The petitioners further submitted that the conviction of the Prime Minister *ipso facto* has become an issue of national importance causing the breach of their fundamental rights.<sup>186</sup>

The respondents objected to the maintainability of the petition and argued that no specific fundamental rights of the petitioners are violated and they have also come to the court with unclean hands. They have approached the court to score their political agenda and to gain public sympathy.

The court reaffirmed that the issue involved in the *Mobashir Hassan's* case was of public importance as the PM failed to execute Order of the court to restore civil

<sup>180</sup> The text of the judgment itself is self-explanatory (See, *Tika Iqbal Muhammad v. Pervez Musharraf*, PLD 2008 SC 178,204,205, 245,246,251,255, 267, 288,290,295); Khan, *Genesis*, 331-32.

<sup>181</sup> See, Jonathan L. Entin, "Separation of Powers, the Political Branches, and the Limits of Judicial Review," accessed November 7, 2014, <http://heinonline.org>

<sup>182</sup> See, *Dr. Mobashir Hassan v. Federation of Pakistan*, PLD 2010 SC 265.

<sup>183</sup> See, *Muhammad Azhar Siddiqui v. Federation of Pakistan*, PLD 2012 SC 774 (read with short order in PLD 2012 SC 660). Through Constitutional Petitions Nos. 40-47, 50 and C.M.A Nos. 2494 to 2496 of 2012.

<sup>184</sup> The National Reconciliation Ordinance (NRO), 2007.

<sup>185</sup> The Court passed the short order on 26-4-2012 for which the detail reasons were released on 8-5-2012.

<sup>186</sup> The breach of fundamental rights under Articles 5, 10-A, 14, 17 and 25 of the Constitution was alleged in this case.



proceedings regarding the alleged corruption of the President and his bank accounts in Switzerland, so the PM has become disqualified on the basis of his conviction from the court of law. Hence, the court held that a convicted Prime Minister cannot be restored to his office.

The court used its extraordinary jurisdiction under Article 184(3) of the constitution to decide a politically loaded constitutional question that entangled the state for months.<sup>187</sup> Some jurists argue that the court should have waited and left the implementation of its order on the executive to promote democracy in the country.<sup>188</sup> Second, the court cannot take away the constitutional immunity available to the President of Pakistan.<sup>189</sup>

It may be argued that the court was overzealous in pursuing judicial activism. The interference of the court in political issues was strongly condemned by the legal fraternity and the civil society. It was argued that such an exercise of judicial review hampers constitutionalism, democratic process and good governance.<sup>190</sup> Moreover, it creates a constitutional and political crisis in the country and violates the spirit of the constitution that is envisaged in the doctrine of separation of powers and a system of checks and balances that is built in the constitution.<sup>191</sup> Arguably, it is a fit case of judicial overreach both in the domain of the legislature as well as the executive. The superior courts should strongly adhere to the constitutional principle of the separation of powers for the promotion of constitutionalism and the fundamental rights.<sup>192</sup>

In the *I.A. Sharwani's case*<sup>193</sup>, the court examined the matter of pension of the petitioners. The petitioners alleged that they have been discriminated against in the payment of an enhanced pension under Article 25 of the constitution. The respondents argued that the petitions are barred by Article 212 of the constitution to bring this matter

<sup>187</sup> See, Khan, *Genesis*, 336.

<sup>188</sup> See, Shahid Javed Burki, "Gilani's Removal: A Step in the Right Direction," (Institute of South Asian Studies, National University of Singapore, 2012.

<sup>189</sup> See, Aziz-ud-Din Ahmad "On Judicial Activism," 2012 accessed July 10, 2019, <https://www.pakistantoday.com.pk/2012/08/10/on-judicial-activism-3/>

<sup>190</sup> See, Muhammad Zahid Jamil, "Exploring Political Questions Doctrine in Courts: A Comparative Study of United States and Pakistan's Judicial System," accessed July 10, 2010, <https://www.studocu.com/en-us/document/ivy-tech-community-college-of-indiana/understanding-colour/essays/essay-exploring-political-questions-doctrine-in-courts-a-comparative-study-of-united-states-and-pakistans-judicial-system-grade-b/724485/view>

<sup>191</sup> See, Qasim Nauman, "Pakistan Supreme Court Disqualifies Prime Minister," REUTERS, 2012, accessed August, 13, 2017, <http://www.reuters.com/article/2012/06/19/us-pakistan-gilani-idUSBR E8510KS20120619>

<sup>192</sup> See, Jeremy Waldron, "Separation of Powers in Thought and Practice," Accessed November 6, 2014, <http://heinonline.org>

<sup>193</sup> See, *I.A. Sharwani v. Government of Pakistan*, 1991 SCMR 1041.

before the court. The terms and conditions of service, the respondents argued, could not be challenged in the extraordinary jurisdiction of the court. Moreover, the petitioners were not discriminated against and treated as per the law.

The court held that the extraordinary jurisdiction should be exercised liberally, and held that the question involved is of public importance as it affects a large number of pensioners. While liberally interpreting the question of its extraordinary jurisdiction, the court declared the petitions maintainable.

The court further observed that the refusal to pay the pension was not a question of terms and conditions of the service of the petitioners, hence, their case is not barred under the constitution or the relevant civil service laws<sup>194</sup> and the petitioners have been discriminated, hence, they cannot be denied relief.

This case apparently pertains to civil service law. The civil service law provides effective remedy before the service tribunal for the resolution of all matters relating to the civil servants. Thus, it would have been better if the petitioner's availed the alternate remedy under the law and the service tribunal could have adjudicated the matter. Even Article 212 places express bar on the courts to entertain issues of civil service at the first instance. The law envisages effective alternate remedy for efficacious handling of service matters. Instead, the court stressed for exercising the original jurisdiction under Article 184(3). Does such an exercise of judicial review power not undermine the aim and objective of the Constitution—that is to maintain a constitutional balance between different organs of the state. When an alternative remedy was available before a quasi-judicial forum, should the court intervene in the powers of that forum that is specifically constituted for resolving the disputes of the executive branch of the government? The answer to these questions must be in negative, otherwise it will promote the trend of overlooking the procedural requirements to invoke extraordinary jurisdiction of the court. It might paralyze all other institutions and forums of the state. In this case, the court seems to have expanded its jurisdiction beyond the scope of Article 184 (3) of the constitution. Overstepping of institutional powers in any manner or form, in fact, violates separation of powers and undermines rights of the people.<sup>195</sup>

In a suo-moto case<sup>196</sup>, in an attempt to regulate the price of sugar, the court

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<sup>194</sup> The Civil Servant Act. 1974.

<sup>195</sup> See, David B. Frohnmayer, Volume 52 Oregon Number 3 Law Review, "The Separation of Powers: An Essay on the Vitality of a Constitutional Idea," accessed November 7, 2014, <http://heinonline.org>

<sup>196</sup> See, Suo-moto case No.10 of 2007 PLD SC 673.

claimed to have constitutional authority to review government policy if it violates fundamental rights. Indeed, this case created serious debate as to the powers of the judiciary and domain of the other state institutions vis-à-vis fundamental rights. This is an important case which establish the argument of this study that, sometimes, the courts have intervened in the policymaking domain while using judicial review power embedded in the theory of separation of powers.

The then-Chief Justice Mian Saqib Nisar created a national fund to collect public donations for the construction of a dam<sup>197</sup>; he restrained the Federal Board of Revenue and cellphone service providers from deducting withholding tax and other charges on mobile phone top-up cards<sup>198</sup>; he reduced private schools fee<sup>199</sup>, and visited hospitals and schools to ensure that proper standards are maintained by the government. Indeed, the judiciary has jurisdiction to protect the fundamental rights as provided in the constitution, but question arises what is the meaning, scope, import and extent of those fundamental rights? Can policy matters of the executive come under the definition of fundamental rights? It seems that Justice Saqib Nisar used a wide definition of fundamental rights occupying policy matters of the government.<sup>200</sup> The fundamental rights approach taken by the judiciary during the tenure of Justice Saqib Nisar can hardly be justified under the constitutional doctrine of separation of powers.

## 6.6 A WAY FORWARD FOR PAKISTAN'S JUDICIARY

The case law analysis in the preceding section shows that our judiciary has exercised both the judicial activism and judicial restraint to interpret the constitution and to protect the fundamental rights in Pakistan. By doing this, however, it attracted some criticism as to the use of its judicial review powers. The next section would examine how the judiciary can exercise judicial review power in a balanced manner.

The advocates of a balanced theory of constitutional interpretation focus on three constitutional features: the separation of powers, the fundamental rights and liberties, and federalism. These features collectively address the issues of judicial review while promoting the fundamental rights, constitutionalism, and democracy.<sup>201</sup>

<sup>197</sup> See, accessed on November 7, 2019 <https://www.dawn.com/news/1465737>

<sup>198</sup> See, accessed October 26, 2019 <https://www.dawn.com/news/14181275>

<sup>199</sup> See, accessed October 26, 2019 <https://www.dawn.com/news/1451207>

<sup>200</sup> See, accessed October 26, 2019 <https://herald.dawn.com/news/1398778>

<sup>201</sup> See, O'Brien, *Judicial*, 1058.

According to this perspective, judicial review is not an auxiliary precaution<sup>202</sup> but an opportunity to check prejudice and zeal of judges which could destroy the basic interest of democracy.<sup>203</sup> The three approaches of judicial review (thoroughly discussed in chapter five), promote an appropriate exercise of judicial review.<sup>204</sup> These theories boil down to a singular constitutional objective—that is the protection of fundamental rights applying the separation of powers in the judicial review jurisdiction.<sup>205</sup>

These theories have a direct bearing on Pakistan's judicial system. Our constitution features fundamental rights, the separation of powers, and federalism though these concepts were conceived and developed in foreign jurisdictions.<sup>206</sup> These theories are relevant for our courts as they often followed judicial activism while interpreting and enforcing the fundamental rights provisions of the constitution.

The following section, thus, focuses on the application of these theories of constitutional interpretation and judicial review in the constitutional context of Pakistan. This analysis will support the central argument of this study that implementing the constitutional doctrine of separation of power is challenging due to the complex institutional relationship between the legislature, the executive, and the judiciary. However, increased focus on constitutionalism including adherence to the constitutional doctrine of separation of powers protects the fundamental rights in Pakistan. It is argued that stretching of fundamental rights beyond the explicit terms of the relevant provisions, impedes the protection of fundamental rights through a democratic process.

### 6.6.1 EXERCISING JUDICIAL POWERS IN A BALANCED MANNER

The chief aim of a constitutional democracy is to safeguard the fundamental rights of the citizens against the tyranny of the government. So, since the emergence of

<sup>202</sup> See, James Madison, *The Federalist No. 51* (Clinton Rossiter ed., 1961), 322.

<sup>203</sup> See, C. Hughes, *Proceedings in Commemoration of the 150<sup>th</sup> Anniversary of the First Congress*, H.R. Document No. 212, 76<sup>th</sup> Congress, 1<sup>st</sup> Session, 32 (1939).

<sup>204</sup> See, O'Brien, *Judicial*, 1058.

<sup>205</sup> See, O'Brien, *Judicial*.

<sup>206</sup> Activist approach as emerged in second half of this century in USA, particularly during the tenure of Chief Justice Earl Warren (1935-69), seems to have been pursued by our Courts particularly during the period of 2005-2013 (For activism in Pakistan, See, Cheema and Gilani ed., *Politics*; See also Sanaa, Ahmed, "Supremely Fallible? A Debate on Judicial Restraint and Activism in Pakistan," *ICL Journal*, Vol. 9, 2 (2015); See, also Myram S. Khan, "Genesis and Evaluation of Public Interest Litigation in Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization," accessed November 20, 2016, <http://www.ideaspak.org/wp-content/uploads/2016/06/Public-Interest-Litigation-in-the-Supreme-Court.pdf>) and 2016-2018. The judicial policy of restraint of Pakistani courts may be traced in the pursuance of judicial jurisprudence developed by the judges of the Supreme Court of U.S.A including Oliver Wendell Holmes Jr. (1902-32), Louis Brandies (1919-39), and Flex Frankfurter 1939-62.

constitutional governments, constitutional theorists and the proponents of democracy have been struggling to devise a constitutional mechanism for the safety of individuals' rights and liberties. The judicial review of the legislative and the executive action is premised on the constitutional doctrine of separation of powers. The jurists have declared the separation of power theory as the basis of constitutionalism<sup>207</sup> and worldwide benchmark of constitutional government.<sup>208</sup> In other words, the doctrine of separation of powers is equated with constitutionalism and the rule of law.<sup>209</sup>

In the absence of the separation of powers between different organs of the state, a political state cannot claim to have a constitution.<sup>210</sup> The doctrine of separation of powers places a check on the powers of governments. It discourages the exercise of political power in an oppressive and arbitrary manner.<sup>211</sup> It holds governments responsible to the people. It contemplates an accountable government so that each institution remains in constitutional limits and basic rights of the people are not violated.<sup>212</sup> In case of concentration of political power in a single authority, the basic rights cannot be safeguarded.<sup>213</sup> Thus, the separation of powers promotes the rule of constitution, democracy, and the fundamental rights.<sup>214</sup>

Some constitutionalists like Geoffrey Marshall and Charles Manga consider this theory as imprecise<sup>215</sup> complex and ambiguous.<sup>216</sup> It is argued that scholars yet not agree as to the precise meaning of the doctrine of separation of powers.<sup>217</sup> So, there is a lack of consensus amongst jurists regarding the exact meaning and content of the concept of the separation of powers. This study, therefore, relied on a specific definition of the separation of powers proposed by M.J.C Vile. This definition postulates that to keep political liberties, it is constitutionally desired that the government power is divided in different organs of the state. Each organ has a corresponding role of

<sup>207</sup> See, Barendt, "Is there a U.K Constitution?" *Oxford Journal of Legal Studies* 17 (1997), 137; Eric Barendt, "Separation of Powers and Constitutional Government" *Public Law* (1995), 599.

<sup>208</sup> See, E. Carolan, *The New Separation of Powers: A Theory of the Modern State* (Oxford: Oxford University Press, 2009), 18.

<sup>209</sup> *Ibid.*, 302

<sup>210</sup> See, Article 16, Declaration of the Rights of Man and of the Citizen, (Fr.) (1789), accessed July 10, 2019. [https://avalon.law.yale.edu/18th\\_century/rightsof.asp](https://avalon.law.yale.edu/18th_century/rightsof.asp)

<sup>211</sup> See, *Myers v. United States*, 272 US 52 (1926), 293.

<sup>212</sup> See, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 US 579 (1952), 635.

<sup>213</sup> See, M. Judd Harmon, "Political Thought from Plato to the Present," (National Book Foundation, Islamabad, 2000), 281-282.

<sup>214</sup> See, Oxford, B. et.al. *Politics: An Introduction*, (Routledge, New York, 1997), 290.

<sup>215</sup> See, Geoffrey Marshall, *Constitutional Theory* (Oxford University Press, 1971), 124.

<sup>216</sup> See, Charles Manga Fombad, "The Separation of Powers and Constitutionalism in Africa: The Case of Botswana," 25 *B.C. Third World Law Journal*, (2005), 301.

<sup>217</sup> *Ibid.*, 301.

government. Every organ is confined to use its own power and not permitted to interfere into the domain of the other branches of the government. According to this definition, every organ should be enabled to protect its powers from other branches.

Despite the definitional difficulty, the doctrine of separation of powers has been considered useful for promoting rule of law, responsibility, efficiency, and accountability of the different state organs.<sup>218</sup> The doctrine is applicable with some modifications for both the presidential as well as the parliamentary form of government.<sup>219</sup> For example, in the presidential system, the executive is given more powers than other branches of the government. In a parliamentary form of government, the legislature holds the maximum power. Thus, this doctrine is worldwide recognized as a helpful tool in establishing good governance.<sup>220</sup>

The challenge comes in applying the doctrine of separation of powers while reviewing acts of the executive and the legislature. Pakistan's constitution of 1956, 1962, and 1973 provide the doctrine of separation of powers as political power is divided amongst the executive, the legislature, and the judiciary.<sup>221</sup> Our courts have occasionally been proactive and passive while employing this doctrine for constitutional interpretation as well as the protection of the fundamental rights.

The judiciary may avoid this criticism of following active and passive approaches simultaneously while appreciating its constitutional limitations. The courts have interpreted fundamental rights broadly, sometimes, going beyond the terms of the law i.e. the fundamental rights provisions.<sup>222</sup> In exercising judicial review powers,

<sup>218</sup> See, Gwyn, *Separation*, 127-28; William B. Gwyn, *The Separation of Powers and Modern Forms of Democratic Government*, in *Separation of Powers-Does it still work?* By Robert A. Goldwin and Art Kaufman eds., (Washington, D.C.: American Enterprise Institute for Policy Research 1986), 68-70.

<sup>219</sup> See, Gerard Carney, G. "Separation of Powers in the Westminster System," *Australasian Study of Parliament Group, Parliament House, Brisbane* (1993), accessed June, 22, 2018, <http://www.parliament.qld.gov.au/aspg/papers/930913.pdf>

<sup>220</sup> See, Resende, *Report*.

<sup>221</sup> See, Hamid Khan, "Constitutional and Political History of Pakistan," (Karachi: Oxford University Press, 2004), 4.

<sup>222</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416; *Dharshan Masih v. State*, PLD 1989 SC 533; *A Sharwani v. Government of Pakistan*, 1991 SCMR 1041; *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *Assad Ali v. Federation of Pakistan*, PLD 1998 SC 161; *Maulana Abdul Haque Baloch v. Government of Baluchistan*, PLD 2013 SC 641; *Ch. Muhammad Saddique v. Government of Pakistan*, PLD 2005 SC 1; *Watan Party v. Federation of Pakistan*, PLD 2006 SC 697; *Ifkhar Muhammad Chaudhry v. President of Pakistan*, 2010 SC 61; *Muhammad Azhar Siddique v. Federation of Pakistan*, PLD 2012 SC 774; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; *Vineet Narain and others v. Union of India and others*, AIR 1998 SC 889; *Vellore Citizen's Welfare Forum v. Union of India*, AIR 1966 SC 2715; *Veena Sethi v. State of Bihar* (1982) 2 SCC 583; *Upendra Baxi v. State of Uttar Pradesh*, (1983) 2 SCC 308; *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420; *Sheela Bansi v. Union of India*, (1988) 4 SCC 226; *SP Gupta v. Union of India*, 1981 Supp. SCC 87.

Pakistan's judiciary appears to adopt judicial activism while interfering in the domain of the legislature and the executive.<sup>223</sup> The jurists have criticized such an excessive exercise of judicial authority.<sup>224</sup> Their criticism is based on the concept of majority rule: that is, the judiciary lacks the representative character, thus, the judicial powers are subject to the will of the majority.<sup>225</sup> Therefore, the jurists have proposed different constitutional interpretive approaches for the protection of the fundamental rights.<sup>226</sup>

Jesse Choper proposes an approach of 'jurisdictional retrenchment', that the judiciary must not assume the cognizance of the controversies between the legislature and the executive of political nature. Greg Jones explains judicial activism into two categories: 'proper' and 'improper' judicial activism. He considers that the practice of judges of prohibiting policy options by other government organs is an improper exercise of judicial power.<sup>227</sup> Improper judicial activism demonstrates a belief that the judges must focus on constructing a decent world as per their subjective vision.<sup>228</sup> John Hart Ely proposes 'representation reinforcing theory' stressing a concern for constitutional scheme as a whole i.e. the separation of powers and the fundamental rights.<sup>229</sup> Pakistan's judiciary, therefore, may appreciate these three approaches of constitutional interpretation while exercising judicial review. It would promote adherence to the doctrine of separation of powers protecting the fundamental rights.

## 6.7 CONCLUSION

To conclude this chapter, the main points are summarized as follows:

Under the constitutional doctrine of separation of powers, the courts can

<sup>223</sup> See, Mohammad Waseem, "Judging Democracy in Pakistan: Conflict between the Executive and Judiciary," *Contemporary South Asia*, Vol.20, Issue 1(2012); Zia Ullah Ranjha, "Defining fundamental rights" (*The Friday Times*, 2018); Irfan Hussain, "Judicial Overreach," (*DAWN*, 2018); Babar Sattar, "Judicial imperialism," (*The News*, 2018); Reema Omer, "Suo motu action," (*DAWN*, 2018); Somnath Chatterjee, "Activism of Any Institution Has to Be First Directed to the Due Discharging of its Own Duties," (*The Indian Express*, 2007).

<sup>224</sup> See, Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999) 99-102, 154.; Saikrishna B. Prakash and John C. Yoo, "The Origins of Judicial Review," *The University of Chicago Law Review*, Vol.70 (2003), 889.

<sup>225</sup> See, Martin H. Redish and Matthew B. Arnold, "Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative," *Flare. La Review* Vol. 46, no.6 (2012), 1485.

<sup>226</sup> See, Jesse H. Choper, "Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court," (Chicago, 1980).

<sup>227</sup> See, Lino A. Graglia, "It's Not Constitutionalism, It's Judicial Activism," *Harvard Journal of Law and Public Policy*, 19 (1996), 296.

<sup>228</sup> Archibald Cox, "The Role of the Supreme Court: Judicial Activism or Self-Restraint," *Maryland Law Review*, 47 (1987), 121-122.

<sup>229</sup> See, John Hart Ely, "Democracy and Distrust: A Theory of Judicial Review," (Cambridge MA: Harvard University Press, 1980).

examine the executive and the legislative action through judicial review and protect fundamental rights. The judicial review power was declared a basic structure of India's constitution and it was used proactively for the enforcement of fundamental rights.<sup>230</sup> In Pakistan, the courts followed judicial activism while interpreting the fundamental rights provisions progressively since 1980s. In the *Benazir Bhutto* case<sup>231</sup> judicial activism became popular as the court relaxed the procedural requirements for invoking the jurisdiction of the courts under Articles 199 and 184 of the 1973 Constitution. Iftikhar Muhammad Chaudhry<sup>232</sup> and Mian Saqib Nisar used judicial review power more aggressively.<sup>233</sup> It raised a hot debate in Pakistan as to the limits of judicial review power.

Some argue that while exercising judicial review power, the courts have protected fundamental rights in Pakistan. Others maintain that the courts occasionally ignored the doctrine of separation of powers and demonstrated judicial activism in the domain of public policy. The courts, for example, issued broad policy directions to other branches of the government without appreciating the constitutional distribution of powers. The stretching of fundamental rights provisions beyond its textual content and defined scope blurred the prescribed constitutional boundaries for each organ of the state. There are limits of judicial review. The judicial activism cannot be a substitute for government policy.<sup>234</sup> Interference in the domain of other branches hampers the actualization of fundamental through a democratic process.

The critics argue that judicial activism establishes a government by the judiciary<sup>235</sup> as while deciding judicial questions, the judiciary embarks on political questions.<sup>236</sup> It negates the concept of constitutionalism envisaged in the constitutional principle of the separation powers. Uncontrolled judicial review, thus, causes a counter-

<sup>230</sup> See, *Keshananda Bharti v. State of Kerala*, AIR 1973 SC 461.

<sup>231</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416

<sup>232</sup> See, Moeen H. Cheema and Ijaz Shafi Gilani ed., *The Politics and Jurisprudence of the Chaudhry Court, 2005-2013*. (Karachi: Oxford University Press, 2015).

<sup>233</sup> See, *Imran Ahmed Khan v. Muhammad Nawaz Sharif*, PLD 2017 SC 265; PLD 2017 SC 692; *Zulfiqar Ahmed Bhutta v. Federation of Pakistan*, PLD 2018, SC 370

<sup>234</sup> See, Werner Menski, Ahmad Rafay Alam and Mehreen Raza Kasuri, "Public Interest Litigation in Pakistan," (Pakistan Law House, 2000); Mansoor Hassan Khan, "The Concept of Public Interest Litigation and its Meaning in Pakistan," (PLD Journal, 1992) 84; Parvez Hassan, "Judiciary Leading the Way," (1998) 15(1) *The Environmental Forum* 48; Dr. Parvez Hassan and Azim Azfar, "Securing Environmental Rights Through Public Interest Litigation in South Asia," (2004) 22 *Virginia Environmental Law Journal* 215.

<sup>235</sup> See, Raoul Berger, "Government By the Judiciary," (Indianapolis Liberty Fund, 1997), accessed on July 11, 2019, <https://books.google.com.pk/books?isbn=0865971447>; See, Glazer, "Towards an Imperial Judiciary? *Public Interest* 41, (1975).

<sup>236</sup> See, J. A. De Tocqueville, eds. *Democracy in America* (New York: A.A. Knopf, 1945), 28.



majoritarian difficulty<sup>237</sup> shaking the foundation of constitutional governments.

Professor Schwartz cautioned that judicial review is basically an undemocratic institution.<sup>238</sup> An unrestricted judicial activism may impede the democratic process and hence undermine the rights of the people. Alexander Bickel considers judiciary a deviant institution.<sup>239</sup> It is argued that in its misguided zeal of being the savior of the people, the judiciary may destroy democracy, that provides constitutional limits for each organ of the state.<sup>240</sup> Thus, judicial activism is considered problematic.

Despite such problems, judicial activism has attracted some appreciation in Pakistan and other countries. It is argued that if the judiciary fails to maintain the supremacy of the constitution, it would be failing to meet its constitutional duty. The courts being delegates of sovereign authority are considered the agent of the people.<sup>241</sup> Failing to exercise judicial review would amount to compromise on the protection of basic rights which is the basic function of the courts.

The opponents of judicial activism, suggest an alternative approach of judicial restraint approach which is rooted in two strands of thought called 'judicial supremacy'<sup>242</sup> and 'popular constitutionalism'.<sup>243</sup> These schools of thought promote judicial restraint while interpreting or upholding the constitution. Judicial restraint requires that judges should hold unless they find that government action is manifestly against the constitution.<sup>244</sup> Wilkinson suggests that the judges must be moderate in their aspirations and overrule the results of the democratic course only where the constitution

<sup>237</sup> The famous statement of the 'Counter-majoritarian Difficulty' is contained in Bickel, *Least*: See also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge MA: Harvard University Press, 1980); See, Bruce Ackerman, "The Storrs Lectures: Discovering the Constitution", 93 *Yale Law Journal*, 1013 (1989); See, Barry Friedman, "The History of the Counter-majoritarian difficulty, Part one: The Road to judicial Supremacy", *New York University Law Review*, 73 (1998).

<sup>238</sup> See, R.C.S. Sarkar, "Judicial Review in the Framework of Indian Politics," (New Delhi, 1983), 101.

<sup>239</sup> See, Bickel, *Least*, 16, 18.

<sup>240</sup> See, Charles Evans Hughes, Proceedings in Commemoration of the 150<sup>th</sup> Anniversary of the First Congress, H.R. Doc. No. 212, 76<sup>th</sup> Cong., 1<sup>st</sup> Session, 32 (1939).

<sup>241</sup> Republicans' approach started in 1980 s from USA.

<sup>242</sup> This notion is argued by 'Federalists' as developed in American jurisprudence. They categorically discarded the suggestion that the public had any authority for interpreting the constitution. By the middle of 1790s, Federalists had appeared to hold a position similar to the one prevailing today: constitution entrusts the ultimate authority of interpretation to the judiciary, and thus they have developed the idea of 'judicial supremacy' for interpreting the constitution.

<sup>243</sup> This notion is advocated by the 'Republicans' as emerged in American jurisprudence concerning the constitutional supremacy. They have the idea that the people have the primary authority of interpreting the constitution, and it is properly exercised through their representatives which are legislature and executive.

<sup>244</sup> See, *Fletcher v. Peck*, 6 Cranch 87, 3L Ed. 162 (1810) wherein the Court held that judges should declared the legislation unconstitutional only when they "feel a clear and strong conviction" of unconstitutionality.

clearly demands it.<sup>245</sup> He suggests that the judges should never push a particular agenda of social, political, or economic nature while reviewing acts of the government.<sup>246</sup>

James Bradley argued that the judiciary should refrain from setting aside acts of the legislature whenever it is possible to do so, as the legislature is the ultimate sovereign in a political state.<sup>247</sup> He proposes that judges should not declare any act of the legislature and the executive unconstitutional unless it is manifestly clear even to an ordinary man of sense and reflection that such an act violates the constitution.<sup>248</sup> Oliver Wendell Holmes introduces a 'reasonable man' test to suggest that a specific action of other branches may not be declared unconstitutional unless a reasonable man could perceive that action as unconstitutional.<sup>249</sup>

The judiciary in Pakistan also has shown occasional reluctance in declaring actions of other branches as unconstitutional.<sup>250</sup> The courts even compromised in upholding the constitution while validating martial law regimes in Pakistan on the basis of doctrine of necessity.<sup>251</sup> Such an exercise of judicial restraint attracts criticism.<sup>252</sup>

The advocates of judicial restraint argue that it promotes democracy.<sup>253</sup> Fredric justifies judicial restraint on the basis of the judge's fallibility.<sup>254</sup> Those who know their scholarly limits refuse to carry out their privatenotion of the good on collective democratic conscious.<sup>255</sup> To them, democracy can resolve complex political issues and such issues cannot be left on judicial inventiveness.<sup>256</sup> It is argued that unrestricted judicial powers may discourage democratic initiatives.<sup>257</sup>

<sup>245</sup> See, Harvie Wilkinson III, "Of Guns, Abortion, and the Unraveling Rule of Law", *Virginia Law Review* 95 (2009), 253.

<sup>246</sup> Ibid..

<sup>247</sup> See, Bradley Thayer, *John Marshall* (Boston: Houghton Mifflin 1901), 109.

<sup>248</sup> Ibid., 36.

<sup>249</sup> See, Frederic Rogers Kellogg, "Oliver Wendell Holmes, Jr., *Legal Theory and Judicial Restraint*," (Cambridge University Press, 2006), 6, 110, 151.

<sup>250</sup> See, *State v. Dosso*, PLD 1958 SC 533; *Asma Jilani v. Govt. of Punjab*, PLD 1972 SC 139; *State v. Zia-ur-Rehman*, PLD 1973 SC 49; *Begum Nusrat Bhutto v. Chief of Army Staff*, PLD 1977 SC 657; *Syed Zafar Ali Shah v. Pervez Musharraf*, PLD 2000 SC 869; *Wasim Sajjad v. Federation of Pakistan*, PLD 2001 SC 233; *Tika Iqbal Muhammad Khan v. Gen Pervez Musharraf*, PLD 2008 SC 178.

<sup>251</sup> Rajshree, J. "Pakistan's Judicial Renaissance: A New Phase", *ISAS Insights*, 166 (2012), 1-7.

<sup>252</sup> Shemtob, *Following*, 1.

<sup>253</sup> See, Bickel, *Least*.

<sup>254</sup> See, Kellogg, *Oliver*, 6, 110.

<sup>255</sup> See, Shemtob, *Following*, 5.

<sup>256</sup> See, Wallace Mendelson, "The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter", *Vanderbilt Law Review* Vol. 31 (1978), 76.

<sup>257</sup> Justice Brandeis has repeatedly expressed such concern that, "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory." (See, *New State Ice Company v. Liebmann*, 285 US 262 (1932), 311.

However, judicial restraint also invites criticism. Martin H. Redish, for example, considers judicial restraint a faulty approach as its political and social costs outweigh its theoretical gains.<sup>258</sup> Gouverneur Morris said that judicial restraint means: let the constitution be put as an immeasurable value in the hands of idiots and insane men.<sup>259</sup> The critics argue that judicial restraint promotes conservative activism.<sup>260</sup> Carl Black, has finally suggested that judicial restraint must be discarded as a model of judicial review.<sup>261</sup>

While exercising judicial review the courts in Pakistan have occasionally followed judicial activism and judicial restraint. In both of these cases, the doctrine of separation of powers was violated and the fundamental rights of the people suffered.

For example, in the *Maulana Abdul Haque Baloch* case<sup>262</sup>, the court held that as there was no public advertisement regarding granting the lease of mines to a foreign company, it deprived the right of other investors to participate in the bidding process. The court reviewed act of the executive though no fundamental right of the petitioner was violated as such. Despite express bar as to the court's jurisdiction, it went on to decide the case while exceeding its constitutional powers.

In the *Syed Zafar Ali Shah* case, the court validated the order of the proclamation of emergency relying on the rule of state necessity. In this case, the court compromised on its constitutional duty and showed undesired restraint while violating the separation of powers and the fundamental rights. In a suo-motu case, the issue of the privatization of a steel mill came before the court. The court declared the procedure of the privatization of the steel mill as unconstitutional. In this case, again, the court went beyond its constitutional powers and disregarded the doctrine of separation of powers.

The analysis demonstrates that the judiciary, occasionally, ignored to follow the constitutional doctrine of separation of powers in a judicial zeal to protect fundamental rights. In doing so, however, the judiciary intervened into the policymaking domain of the government and impeded the materialization of fundamental rights through the political process. Sometimes, the courts compromised on its constitutional role and

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<sup>258</sup> See, Redish, *Judicial*. 1033.

<sup>259</sup> Ibid..

<sup>260</sup> See, Richard Garnett, 'Citizens United and 'Conservative Judicial Activism', *National Law Review*, accessed June, 20, 2018, <https://www.nationalreview.com/.../citizens-united-and-conservative-judicial-activism->

<sup>261</sup> See, Carl Black, Jr., "*The People and the Court: Judicial Review in a Democracy*," (New York: Macmillan 1960), 203; Rostow, *Sovereign*, 39, 179.

<sup>262</sup> See, Petitioners arguments at Para Nos. 11, 12, 15, 16 in *Maulana Abdul Haque Baloch v. Government of Balochistan*, PLD 2013 SC 641, 678-679 and 681-682.

validated unconstitutional orders of other branches of the government. So, in both of these ways, the courts failed to adhere to the constitutional doctrine of separation of powers at the cost of fundamental rights of the people.

Thus, while interpreting the constitution and enforcing the fundamental rights provisions, the courts need to exercise judicial review powers in a balanced manner. In this regard, the courts may consider appropriate to follow Jess H. Choper's theory of 'jurisdictional retrenchment' that stresses to avoid intervening in political issues, Greg Jones's suggestion as to 'proper' exercise of judicial activism, which requires that the judiciary should consider the overall scheme of the constitution while reviewing acts of other branches, and finally, John Hart Ely's proposal for following constitutional scheme i.e. the constitutional doctrine of separation of power as a supreme feature of constitutional government. Appreciating these approaches of constitutional interpretation will increase focus on constitutionalism promoting adherence to the constitutional doctrine of separation of powers and protection of fundamental rights in Pakistan through institutionally multi-dimensional process. With this conclusion, the hypothesis of the thesis is approved.

## CONCLUSION

The analysis of literature and judgments pertaining to the constitutional doctrine of separation of powers and judicial review of the executive and the legislative action shows that the superior judiciary has protected fundamental rights in Pakistan. In doing so, however, it occasionally intervened into the policymaking domain of the government. For example, while enforcing the fundamental right to life, the judiciary has extended the meaning of word 'life' to include environment, corruption, public health and education standards, commodity of prices, and imposition of tax etc. within its fold. Clearly, these areas belong to the policy domain of the legislature and the executive. Thus, such an exercise of judicial review generated a heated debate in Pakistan as to the separation of powers between the executive, the legislature, and the judiciary.

Pakistan is a parliamentary democracy and follows a common law system. The first Constituent Assembly debated the utility of the distribution of the state power between the state institutions and its importance for the provision of fundamental rights. The outcome of this debate is reflected in the Objectives Resolution, 1949, which provides for the independence of the judiciary and the fundamental rights. The doctrine of separation of powers and fundamental rights were also embodied in Pakistan's 1956, 1962, and 1973 constitution.<sup>1</sup>

The apex court pronounced the constitutional doctrine of separation of powers first in the *Moulvi Tameezuddin* case in 1956 reviewing the action of the Governor-General who dissolved the first Constituent Assembly. This case raised important questions about the domain of the executive, the legislature, and the judiciary. Thereafter, as discussed in the previous chapters, the courts reviewed acts of the legislature and the executive in cases relating to the enforcement of fundamental rights. The debate of constitutional separation of powers and the protection of fundamental rights continues.

Based on the analysis in this study, it is proposed that the courts should strongly adhere to the constitutional doctrine of separation of powers allowing the realization of fundamental rights through institutionally multi-dimensional process i.e. the political process. It is observed, in chapter six, that judicial activism violates the scheme and the structure of the constitution—that is—the distribution of power between the legislature,

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<sup>1</sup> See, Hamid Khan, "Constitutional and Political History of Pakistan." (Karachi: Oxford University Press, 2004), 4.

the executive, and the judiciary. Judicial activism, in fact, challenges the doctrine of separation of powers and amounts to interference into the policy-making domain of the government. Judicial restraint, on the other hand, amounts to compromise on the supremacy of the constitution, the independence of the judiciary, and the protection of fundamental rights.<sup>2</sup> Thus, there is a need for a balanced approach of judicial review.

To protect fundamental rights, the constitutional theorists such as James Bradley and Alexander M. Bickel propose judicial restraint in government policy. They argued that restrictive use of judicial review power would help to promote constitutionalism including the fundamental rights. Constitutionalists like Jesse H. Choper, John Hart Ely, and Greg Jones opposed both approaches of judicial review: judicial restraint and judicial activism. They suggested new theories to interpret the constitution. Jesse H. Choper proposed a theory of jurisdictional retrenchment (that judiciary should restrain from interfering with matters of political nature as such matters can be better resolved through political forums like legislature). John Hart Ely coined a theory of process-oriented review (that judges should interpret the constitution considering the overall scheme and structure of the constitution).<sup>3</sup> Greg Jones presented a theory of structural activism (that judiciary should adhere to the constitutional doctrine of separation of powers that is the supreme feature of any constitution). Greg Jones places judicial activism into two categories: 'proper' and 'improper' judicial activism. He considers that disallowing policy-making choice to the legislature is an improper exercise of judicial power.<sup>4</sup> Improper activism demonstrates a belief that judges can build a good society according to their subjective vision of the law.<sup>5</sup> Considering the turbulent constitutional history of the separation of powers in Pakistan, this study suggests to follow a balanced approach of judicial review as proposed by these three constitutional theorists.

While making original contribution, this study traces the constitutional *link* between the doctrine of separation of powers and the protection of fundamental rights in Pakistan. Second, it makes an assessment of the superior courts' *practice* of judicial review regarding the protection of fundamental rights in Pakistan. Across these two

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<sup>2</sup> See, "Human Rights in Pakistan," accessed November 8, 2014, <http://heinonline.org>

<sup>3</sup> See, John Hart Ely, "Democracy and Distrust: A Theory of Judicial Review," (Cambridge MA: Harvard University Press, 1980).

<sup>4</sup> See, Lino A. Graglia, "It's Not Constitutionalism, It's Judicial Activism," *Harvard Journal of Law and Public Policy*, 19 (1996), 296.

<sup>5</sup> See, Archibald Cox, "The Role of the Supreme Court: Judicial Activism or Self Restraint," *Maryland Law Review*, 47 (1987), 121-122.

domains it also makes two claims: First, it argues that though the doctrine of separation of powers is not expressly stipulated in Pakistan's constitution it has valid constitutional basis as it is envisaged *implicitly* in the constitution. Second, while exercising judicial review, the superior courts have *applied* this doctrine to safeguard the fundamental rights; sometimes, however, our courts have overstepped their constitutional domain and *weakened* fundamental rights.

It specifically argues that while interpreting the constitution including the fundamental rights provisions, the courts need to appreciate constitutional limitations allowing *the realization of fundamental rights through a political process*. Such a balanced exercise of judicial review powers has risks, as the executive might ignore adequate protection of fundamental rights, but despite these risks such an approach would promote constitutionalism and fundamental rights in Pakistan, enabling the people to hold the executive accountable for its failure through an electoral process.

The study appreciates that the doctrine of separation of powers and fundamental rights are essential features of any written constitution. These features collectively address the issues of judicial review while promoting fundamental rights.<sup>6</sup> Pakistan's constitution features the concepts of fundamental rights and the separation of powers as well, though modern conception of these concepts were initially developed in other jurisdictions.<sup>7</sup> It is noted, however, that the separation of power and fundamental rights existed in the early Islamic state of Madina and have been present throughout in traditional and modern Islamic states.

These concepts have become even more significant in Pakistan as the judiciary has shown occasional tendency of judicial activism. Some theorists consider that judicial review is not merely an auxiliary precaution<sup>8</sup> but an opportunity to check or promote prejudice and misguided zeal of the judiciary which could destroy or save the

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<sup>6</sup> See, O'Brien, *Judicial*, 1058.

<sup>7</sup> Activist approach emerged in second half of this century in U.S.A, particularly during the tenure of Chief Justice Earl Warren (1935-69); it seems to have been pursued by our Courts particularly during the period of 2005-2013 (For activism in Pakistan, See, Cheema and Gilani ed., *Politics*; See also Sanaa, Ahmed, "Supremely Fallible? A Debate on Judicial Restraint and Activism in Pakistan," *ICL Journal*, Vol. 9, 2 (2015); See, also Myram S. Khan. "*Genesis and Evaluation of Public Interest Litigation in Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization*," accessed October 20, 2019. <http://www.ideaspak.org/wp-content/06/Public-Interest-Litigation-in-the-Supreme-Court.pdf>) and 2016-2018. The judicial policy of restraint of Pakistani courts may be traced in the pursuance of judicial jurisprudence developed by the judges of the Supreme Court of U.S.A including Oliver Wendell Holmes Jr. (1902-32), Louis Brandies (1919-39), and Flex Frankfurter (1939-62).

<sup>8</sup> See, James Madison, *The Federalist No. 51* (Clinton Rossiter ed., 1961), 322.

basic interest of democracy.<sup>9</sup> Therefore, scholars presented different arguments promoting an appropriate exercise of judicial review.<sup>10</sup> These arguments boil down to a singular constitutional challenge, that is also the focus of this study: the protection of the fundamental rights while adhering to the doctrine of separation of powers.<sup>11</sup>

The implementation of the doctrine of separation of power is challenging due to the complex institutional relationship between the legislature, the executive, and the judiciary. However, increased focus on constitutionalism including adherence to the doctrine of separation of powers protects the fundamental rights in Pakistan. It is further contended that stretching of fundamental rights provisions beyond the explicit terms of the constitution, restricts the democratic process while disturbing the constitutional balance between the state institutions.<sup>12</sup>

The study explores that since the emergence of constitutional governments, experts have been struggling to devise a constitutional mechanism for the protection of fundamental rights. They have declared the doctrine of separation of power as the essence of constitutionalism<sup>13</sup> and universal criterion of constitutional government.<sup>14</sup> The separation of powers theory places an effective check on the powers of any government. It precludes the exercise of arbitrary governmental power.<sup>15</sup> It makes governments responsible and accountable so that each institution remains in constitutional limits.<sup>16</sup> In fact, there could be no liberties if powers of the state concentrated in a single authority or institution.<sup>17</sup> Therefore, the study finds that in Pakistan as well, the separation of powers between different branches of the government protects democracy, that in turn, ensures the protection of the fundamental rights.<sup>18</sup>

This study refutes criticism on the theory of the separation of powers. Geoffrey

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<sup>9</sup> See, C. Hughes, *Proceedings in Commemoration of the 150<sup>th</sup> Anniversary of the First Congress*, H.R. Document No. 212, 76<sup>th</sup> Congress, 1<sup>st</sup> Session, 32 (1939).

<sup>10</sup> See, O'Brien, *Judicial*, 1058.

<sup>11</sup> See, O'Brien, *Judicial*.

<sup>12</sup> See, Bruce G. Peabody" John D. Nugent, "Toward a Unifying Theory of The Separation of Powers," accessed November 7, 2014, <http://heinonline.org>

<sup>13</sup> See, Barendt, "Is there a U.K Constitution?" *Oxford Journal of Legal Studies* 17 (1997), 137; Eric Berendt, "Separation of Powers and Constitutional Government" *Public Law* (1995), 599.

<sup>14</sup> See, E. Carolan, "*The New Separation of Powers A Theory of the Modern State*," (Oxford: Oxford University Press, 2009), 18.

<sup>15</sup> See *Myers v. United States*, 272 US 52 (1926), 293.

<sup>16</sup> See, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 US 579 (1952), 635.

<sup>17</sup> See, M. Judd Harmon. "Political Thought from Plato to the Present," (National Book Foundation, Islamabad, 2000), 281-282.

<sup>18</sup> See, Oxford, B. et.al, *Politics: An Introduction* (Routledge: New York, 1997), 290.



Marshall, for example, states that this theory is imprecise.<sup>19</sup> Charles Manga considers it a complex and ambiguous theory.<sup>20</sup> He states that modern scholars yet not agree with what exactly this theory means.<sup>21</sup> So, according to these critics, there appears to be a lack of consensus amongst the jurists as to the meaning, content, and definition of the theory of separation of powers. On the contrary, it may be argued that the theory of separation of powers presents a clear scheme of the division of power between different organs of the state. It has a viable definition: that provides for the division of power and assignment of a specific function i.e., making of the law, execution of the law, and interpretation of the law to specific state institutions. This definition further states that these institutions should perform a defined function remaining within its allotted domain of power. They must also be given required measures to protect their respective domain from any encroachment from the other institutions.

The study concludes that despite such challenges, the doctrine of separation of powers is useful for promoting the rule of law and balancing of interests between the state institutions.<sup>22</sup> The doctrine of separation of powers is applicable to both the presidential as well as the parliamentary form of governments and recognized as an effective tool for the protection of fundamental rights.<sup>23</sup>

In Pakistan, the courts occasionally interpreted fundamental rights provisions broadly going beyond the textual content of the fundamental rights.<sup>24</sup> In doing so, they interfered into the domain of the legislature and the executive.<sup>25</sup> Jurists criticize such

<sup>19</sup> See, Geoffrey Marshall, *Constitutional Theory* (Oxford University Press, 1971), 124.

<sup>20</sup> See, Charles Manga Fombad, "The Separation of Powers and Constitutionalism in Africa: The Case of Botswana," 25 *BC Third World Law Journal*, 301 (2005), 301.

<sup>21</sup> *Ibid.*, 301.

<sup>22</sup> See, Gwyn, *Separation*, 127-28; William B. Gwyn, *The Separation of Powers and Modern Forms of Democratic Government*, in *Separation of Powers-Does it still work?* by Robert A. Goldwin and Art Kaufman eds., (Washington, DC: American Enterprise Institute for Policy Research 1986), 68-70.

<sup>23</sup> See, Resende, *Report*.

<sup>24</sup> See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416; *Dharshan Masih v. State*, PLD 1989 SC 533; *A Sharwani v. Government of Pakistan*, 1991 SCMR 1041; *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *Assad Ali v. Federation of Pakistan*, PLD 1998 SC 161; *Maulana Abdul Haque Baloch v. Government of Baluchistan*, PLD 2013 SC 641; *Ch. Muhammad Saddique v. Government of Pakistan*, PLD 2005 SC 1; *Watan Party v. Federation of Pakistan*, PLD 2006 SC 697; *Ifthikhar Muhammad Chaudhry v. President of Pakistan*, 2010 SC 61; *Muhammad Azhar Siddique v. Federation of Pakistan*, PLD 2012 SC 774; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; *Vineet Narain and others v. Union of India and others*, AIR 1998 SC 889; *Vellore Citizen's Welfare Forum v. Union of India*, AIR 1966 SC 2715; *Veena Sethi v. State of Bihar*, (1982) 2 SCC 583; *Upendra Baxi v. State of Uttar Pradesh*, (1983) 2 SCC 308; *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420; *Sheela Barsi v. Union of India*, (1988) 4 SCC 226; *SP Gupta v. Union of India*, 1981 Supp SCC 87.

<sup>25</sup> See, Mohammad Waseem, "Judging Democracy in Pakistan: Conflict between the Executive and Judiciary," *Contemporary South Asia*, Vol. 20, Issue 1(2012); Zia Ullah Ranjha, "Defining fundamental rights," (*The Friday Times*, 2018); Irfan Hussain, "Judicial Overreach," (*DAWN*, 2018); Babar Sattar, "Judicial imperialism," (*The News*, 2018); Reema Omer, "Suo motu action," (*DAWN*, 2018); Somnath

use of judicial review power.<sup>26</sup> Their criticism is premised on the principle of majority rule and theory of constitutionalism: that is, the judiciary lacks the representative character, thus, the judicial powers are subject to the will of the majority and the constitution that represents the will of the people.<sup>27</sup> Therefore, they have proposed various constitutional interpretive approaches for the protection of constitutionalism and the fundamental rights.<sup>28</sup>

As discussed in chapter six, the ex-chief justices, namely, Iftikhar Muhammad Chaudhry and Mian Saqib Nisar used judicial review powers to enforce a broad understanding of the fundamental rights producing tension between the judiciary and the executive. As a result of this proactive use of judicial review powers, the *limits* of judicial power to define and enforce fundamental rights have become a critical topic of constitutional debate in Pakistan.

Iftikhar Muhammad Chaudhry was used to censure state actors in the public eye. He interpreted the phrase ‘fundamental rights’ very broadly entering into the realm of policy-making. He attempted to regulate even the price of the commodities of daily usage such as the price of sugar. However, he confined himself to his courtroom. Mian Saqib Nisar extended the meaning and scope of fundamental rights further. He left the courtroom to visit hospitals and water filtration plants. He even collected funds and donations from Pakistan and abroad while being Chief Justice of the Supreme Court of Pakistan. He abolished tax on the use of mobile phone cards. At the same time, he *insisted* that the judiciary is working *within* its constitutional mandate and boundaries.

These two examples demonstrate that the judiciary, sometimes, overstepped its constitutional powers while interfering with the constitutional domain of other branches of the government and expanded the scope of fundamental rights beyond the *explicit* terms of the fundamental rights provisions. It is observed that due to the excessively active use of judicial review powers, the constitutional distribution of powers between the three organs of the state is disturbed. Such a use of judicial review

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Chatterjee, “Activism of Any Institution Has to Be First Directed to the Due Discharging of its Own Duties,” (*The Indian Express*, 2007).

<sup>26</sup> See, Mark Tushnet, “Taking the Constitution Away from the Courts,” (Princeton University Press 1999) 99-102, 154; See, Saikrishna B. Prakash and John C. Yoo, “The Origins of Judicial Review,” *The University of Chicago Law Review*, Vol. 70 (2003), 889.

<sup>27</sup> See, Martin H. Redish and Matthew B. Arnold, “Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a “Controlled Activism” Alternative,” *Flare. La Review* Vol. 46, no. 6 (2012), 1485.

<sup>28</sup> See, Jesse H. Choper, “Judicial Review and the National Political Process A Functional Reconsideration of the Role of the Supreme Court,” (Chicago, 1980).

amounts to assume the role of the executive that incapacitates other branches of the government.

More specifically, this study appreciates that Article 184 (3) of the Constitution states that if the SC considers that a question of public importance with reference to the enforcement of any of the fundamental rights is involved, it can make an appropriate order. A bare reading of this article informs that the judiciary has a constitutional mandate to enforce fundamental rights. However, the challenge remains in defining the *limits* of judicial power to enforce these rights.

As for as the enforcement of fundamental rights is concerned, there is no doubt that the courts have a constitutional authority to enforce these rights being custodians of the rights of the people. While performing its constitutional duty, however, the judiciary need to appreciate the constitutional separation of powers.<sup>29</sup> To promote constitutionalism and protect the fundamental rights, it is submitted, the SC has to clearly distinguish the domain of fundamental rights and government policy.

It is discussed in the previous chapters that the judiciary should protect fundamental rights without interfering in the policymaking powers of the government. The judiciary must show and observe a clear link between the fundamental rights provisions (Articles 8–28) and court orders for the fundamental rights protection. For example, the judiciary should explain the link between the right to life (Article 9) -that prohibits the deprivation of life save in accordance with due process of the law—and judges visit to hospitals to inspect healthcare standards.

If the judiciary continues using its judicial review power without any constitutional restraint or without defining the boundaries for the application of fundamental rights provisions, this will damage the separation of powers in Pakistan. It would create conflict between the executive, the legislature, and the judiciary which would result in the weakening of democracy and fundamental rights. Therefore, it is to be appreciated if the judiciary maintains constitutional balance of power and provides a clear definition of fundamental rights.<sup>30</sup>

In this regard, two questions are extremely important: what is a ‘fundamental right’ and when can fundamental rights become a question of public importance?

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<sup>29</sup> See, Perfecto V. Fernandez, “Separation of Powers as Juristic Imperative,” accessed on 7 November, 2014, <http://heinonline.org>

<sup>30</sup> See, Zia Ullah Ranjha, “Defining Fundamental Rights,” (The Friday Times, 8 February 2019). <https://www.thefridaytimes.com/defining-fundamental-rights/>

Article 184(3) empowers the SC to take up fundamental rights issues of public importance. The challenge remains in determining the 'definition' of fundamental right and 'question of public importance' for the enforcement of these rights objectively.

The SC should appreciate the constitutional separation of powers as well while maintaining its appreciation for the enforcement of fundamental rights. The domain of fundamental rights, public policy, and public importance needs to be defined by the SC more clearly. There is a perception that Justice Nisar's vast definition of 'fundamental rights' traded short-term popularity for a long-term constitutional imbalance between the state institutions. Some argue that such an exercise of judicial power incapacitated the other branches of the government. A bare reading of our constitution reveals that the legislature and the executive are responsible for making and executing the government policy. The judiciary ensures that the *government policy is implemented* in letter and spirit and fundamental rights are protected. Amidst these debates, once again, Chief Justice Gulzar Ahmed observed that the court is concerned with the *quality of services* being provided to the coronavirus patients in the country and expressed dismay over the state of affairs at different government-run quarantine centers with pathetic toilets, and lack of sufficient water.<sup>31</sup> The court even ignored plea to get experts opinion on COVID-19 for gauging real threat level and ordered opening of businesses and shopping malls throughout the country. Such as expanding jurisdiction of the courts challenges the constitutional doctrine of separation of powers.

In short, if the legislature, the executive, and the judiciary work within their respective domain as illuminated by the constitutional doctrine of separation of powers, it would promote democracy and protect fundamental rights in Pakistan. The institutional struggle for securing their respective constitutional domain is a continuous phenomenon. Thus, the students of constitutional law need to remain updated as to the practice of judicial review and its impact upon the protection of fundamental rights. A vigilant eye would help to promote rule of law, constitutionalism, and fundamental rights of the people in Pakistan.

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<sup>31</sup><https://www.dawn.com/news/1558424/sc-ignores-plea-to-get-experts-views-on-pandemic> accessed 20 May 2020

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