CONSTITUTIONALISM AND LIMITS OF INTERPRETATION: AN ANALYTICAL STUDY OF CASE LAW AND JUDICIAL POLICY IN PAKISTAN

A dissertation submitted in partial fulfilment of the requirements of the degree of Ph.D in law, Department of Law, Faculty of *Shari'ah* & Law, International Islamic University, Islamabad, Pakistan.

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NOVEMBER 22TH, 2024.

IN THE NAME OF ALLAH,

THE MOST MERCIFUL, THE MOST COMPASSIONATE.

DEDICATION

To my parents Malik Ashiq Hussain and Sughra Malik who tirelessly worked to enable me to reach where I am today and who remained anxious, more than me, regarding completion of this work.

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APPROVAL SHEET

This is to certify that we evaluated the thesis entitled "*Constitutionalism and Limits of Interpretation: An Analytical Study of Case Law and Judicial Policy in Pakistan*" submitted by Mr. Malik Muhammad Imran, Reg. No.119-SF/PHD Law/S-19 in partial fulfillment of the award of the degree of PhD (Law). The thesis fulfills the requirements in its core and quality for the award of the degree.

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DECLARATION

I, **Malik Muhammad Imran,** hereby declare that this dissertation is original and has not been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

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CONTENTS

ACRONYMS

ADSJs	Additional District and Sessions Judge
ASC	Advocate Supreme Court of Pakistan
ATC	Anti-Terrorism Court
BHC	Baluchistan High Court, Quetta (Baluchistan)
CEC	Chief Election Commissioner
CJ/JM	Civil Judge cum Judicial Magistrate
CJI	Chief Justice of India
CJP	Chief Justice of Pakistan
CJs	Chief Justice(s) of the High Court(s)
CMLA	Chief Martial Law Administrator
COAS	Chief of Army Staff
CP	Constitutional Petition
CPC	Civil Procedure Code, 1908
Cr.PC	Criminal Procedure Code, 1898
DSJs	District and Sessions Judge
ECP	Election Commission of Pakistan
FBR	Federal Board of Revenue
FIA	Federal Investigating Agency
HC	High Court
Hon'ble	Honourable
HRC	Human Right Cell (of Supreme Court of Pakistan)
ICA	Intra-Court Appeal
IHC	Islamabad High Court, Islamabad (ICT, Islamabad)
ISC	Indian Supreme Court
JC	Judicial Commission
JCP	Judicial Commission of Pakistan
JOs	Judicial Officer(s)
LFO	Legal Framework Order
LHC	Lahore High Court, Lahore (Punjab)
MLO	Martial Law Order

PCO	Provisional Constitutional Order
PHC	Peshawar High Court, Peshawar (KPK)
PIL	Public Interest Litigation
PPC	Pakistan Penal Code, 1860
PPSC	Punjab Public Service Commission
PTI	Pakistan Tehreek-e-Insaf
QSO	Qanoon Shahadat Order, 1984 (Act X of 1984)
SCI	Supreme Court of India
SCP	Supreme Court of Pakistan
SECP	Security and Exchange Commission of Pakistan
SHC	Sindh High Court, Karachi (Sindh)
SJC	Supreme Judicial Council
SMC	Suo Motu Case
TTP	Tehreek e Taliban Pakistan

ABSTRACT

Under tripartite system, Judiciary is empowered to interpret the constitution. U/Art.187 of Islamic Republic of Pakistan, 1973 the Supreme Court of Pakistan (SCP) being court of plenary jurisdiction has got ample powers to interpret the moot point before it. This power u/Art.187 surmounts technicalities hurdles and blocks that might be confronted by the court on its way to doing complete justice. Under this extraordinary jurisdiction, SCP is empowered to issue such orders as may be necessary for doing complete justice. Being the highest court SCP has not been left helpless and bound by mere technicalities of procedure. In fact, when it comes to domain of interpretation, SCP is not restrained by such technicalities.

However, it is to be noted that Art.187 is not the only litmus test to analyze the finding of SCP qua constitutional or legal matter. Rather, accessories of interpretation, such as legislative history, statement of objects, preamble of a statute and obstante/non obstante clause, which are harvests of long drawn jurisprudential expositions and judicial interpretation, are also to be juxtaposed in order to evaluate the appreciation by SCP qua its interpretation of matter before it.

No doubt that parliament is not above the constitution but the same equally holds good for judges of SCP. Everyone has its exclusive jurisdiction but all are under the constitution as per Art. 5. There is also no doubt that law is what the judges declare to be. However, the respective domains are to be honoured under concept of separation of powers. In *Nadeem Ahmed Adv. vs. FoP* (PLD 2010 SC 1165), while observing that CJP's role has been reduced to merely one vote as against *Al Jehad Trust* case (PLD 1996 SC 324), and the matter was referred to Parliament for reconsideration. This very reference was possible via Art.187 pertaining to execution of process of court and the same also testified that in certain

matters falling within its legislative domain exclusively, Parliament has its peculiar upper hand.

In *District Bar Association (Rawalpindi) vs. Federation of Pakistan* (PLD 2015 SC 401), it was said that court can review the substance of constitutional amendments. In this case SCP's thirteen out of seventeen judges held, for the first time, that if a constitutional provision repeals, alters or abrogates the salient features of the Constitution, as registered in its earlier judgments, the same could be struck down. It is, however, interesting to note that the SCP has never ever unambiguously clarified that it has this right to turn down a constitutional amendment. It is equally interesting that, on the converse, the Constitution clearly says that the courts have no jurisdiction to review constitutional amendments u/Art. 239 (5) and 239 (6) of the Constitution of Islamic Republic of Pakistan, 1973

However, there appear to be hidden axioms whereby power of interpretation takes place through unconstitutional constitutionalism which gives birth to unwritten judicial policy. Such an interpretation has the adverse effects associated with unregulated unconstitutional constitutionalism and unwritten judicial policy. Whereas the superior judiciary sometimes falls back upon an unwritten law in its functionality of advancing the cause of justice, it is necessary to believe that this trend has legality on a limited scale only. It is also suggested that it is necessary to take steps to regulate this form of parallel constitutionalism that is heterogeneous to the real mandate and true spirit of the constitution of the country. It is equally necessary to guard against otherwise ensuing illiberal constitutionalism emanating from unwritten judicial policy lest the latter should adversely affect our polity. It seems imperative for judiciary in Pakistan to confine itself to the mandate of law as is found in the written text of the constitution and the relevant law(s).

CHAPTER 1: INTRODUCTION

"(L)aws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends."[1]

1. Thesis Statement.

There seem to be hidden axioms founded upon unconstitutional constitutionalism based judicial policy in Pakistan which form the functioning of superior judiciary that has created a pseudo legal paradigm.

1.2. Introduction to Unconstitutional Constitutionalism and Unwritten Judicial Policy.

The fundamental rights enshrined in the written constitutions require the constitutional courts to analyze a piece of legislation on basis of the same. However, a question arises if an unwritten unconstitutional constitutional move is a right way on the part of constitutional courts to deal with questions that are political or which are beyond the domain of administrative law?[2] The doctrine of ultra vires and the right of interpretation do not provide any reasonable elucidation in this regard[3] as the power of interpretation is generally exercised by courts without any textual basis.[4] Another question is whether it is suitable to extend these doctrines to such areas on the strength of unconstitutional constitutional based judicial policy alone? Further, what about the deterioration of components of substantive constitutional democracy that might ensue at the cost of written

[1] Justice Felix Frankfurter (November 15, 1882 – February 22, 1965) was an Austrian-born American jurist who served as an Associate Justice of the Supreme Court of the United States from 1939 until 1962, during which he was an advocate of judicial restraint.

[2] Roznai, Yaniv, Clownstitutionalism: Making a Joke of the Constitution by Abuse of Constituent Power (August 25, 2023). 15 Jurídica Ibero (forthcoming), Available at SSRN: https://ssrn.com/abstract=4552436 or http://dx.doi.org/10.2139/ssrn.4552436, last accessed 20.08.2024.

[3] For debates over judicial activism and the role of the judiciary in the legislative process, *see*, Rohan Mandhani, Topic Interpretation of Constitution of India (April 16, 2023). Available at SSRN: https://ssrn.com/abstract=4419951 or http://dx.doi.org/10.2139/ssrn.4419951, last accessed 01.09.2024.

[4] Amal Sethi, When Should Courts Invalidate Constitutional Amendments? (January 3, 2024). 2024, Vienna Journal of International Constitutional Law (ICL Journal), Vol. 18, No 1, 25-57., Available at SSRN: https://ssrn.com/abstract=4682603, last accessed 01.09.2024

law or constitution?[5] Moreover, would not such a move force the legislature to abdicate its basic function in favour of judiciary which has a totally different job to perform?[6]

As such there seem hidden axioms founded upon unconstitutional constitutionalism based judicial policy in Pakistan which form the functioning of superior judiciary that has created a pseudo legal paradigm.[7] The judiciary in Pakistan has generated a parallel but illiberal constitutionalism, the absence of a suitable mechanism whereof necessitates demarking this pseudo legal paradigm. Equally important is to know the adverse effects of unconstitutional constitutionalism based judicial policy.

1.2.1. The Phenomena of Unconstitutional Constitutionalism and Unwritten Judicial Policy.

The word "Policy" has been defined as "the general policies by which a Government is guided in its management of public affairs."[8] Unconstitutional constitutionalism based judicial policy is one based upon unwritten law. The phenomena also denote the underlying idea of proceeding on the part of the court in disregard of written law or unstructured procedure as well as unregulated provisions of law and of Constitution.[9]

Constitutionalism, though seemingly very simple, is in fact a concept that is complex. Whereas it is attractive to the masses the ruling elite feels distasteful for they love to work in arbitrary manner.[10] It is because the institutions of any government and their functions and

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[5] Michel Rosenfeld, Illiberal Constitutionalism: Viable Alternative or Nemesis of the Modern Constitutional Ideal? (February 28, 2024). Gary Jacobson and Miguel Schor, eds., Comparative Constitutional Theory (2nd Edition), Cardozo Legal Studies Research Paper No. 2024-13, Available at SSRN: https://ssrn.com/abstract=4741850, last accessed 21.08.2024.

[6] Nadeem Ahmed Advocate and others vs. Federation of Pakistan and others, PLD 2010 SC 1165.

[7] Mark Van Hoecke, The Use of Unwritten Legal Principles by Courts, Ratio Juris. Vol. 8, No.3, December 1995 (248-60), 249.

[8] Black's Law Dictionary 7th Edition, Page 1178.

[9] Mark Van Hoecke, The Use of Unwritten Legal Principles by Courts, Ratio Juris. Vol. 8, No.3, December 1995 (248-60), 251-252.

[10] Zulfiqar Khalid Maluka, The Myth of Constitutionalism in Pakistan. Oxford University Press (1995), 23. According to Aristotle, the constitutionalism means "government must be responsible to the governed." *See also*, Encyclopaedia Britanica, Vol. 5, 84.

obligations against the requisite powers are defined under the written law whose relevant provisions are meant for establishing a limited government.[11]

It might appear paradoxical but the expression unconstitutional constitutional demonstrates that the unconstitutional acts of the constitutional judiciary would be reckoned as constitutional for the simple reason that they are the forum of declaration as to what the law is. However, as the same is not written in the Constitution in express and explicit terms, the practice and policy of the constitutional judiciary to take steps and moves in this regard, gives birth to unwritten unconstitutional constitutionalism as well as the phenomenon of unwritten judicial policy.[12] These steps and moves are taken on the basis of its right of interpretation.[13]

However, the scope of the phenomena of unwritten unconstitutional constitutional moves, on the part of superior judiciary, has still not been determined: If Articles 184(3) or 199[14] cannot be read as separate from other provisions of the constitution (pertaining to separation of powers), then which law gives power to the Supreme Court of Pakistan (SCP) to determine questions having a political character so as to exercise jurisdiction of other organs of the State?[15] Is it some unwritten law? If it is unwritten, who has validated the same and how and under what authority of which law? Is any such unwritten principle of law otherwise conceivable? If not, is it some unconstitutional constitutionalism based Judicial Policy that is at the helms of affairs? Who has validated this unconstitutional

[11] Ibid, 23,24. *Also see*, M.J.C. Ville, Constitutionalism and the Separation of Power, quoted in Wade & Phillips, Administrative Law, (1965), Longmans, Green and Co. Ltd., UK, 5.

[12] Craies on "Statute Law" (6th Edn.), "A second consequence of this rule is that a statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made....Although in construing an Act of Parliament the Court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at, it cannot add words to a statute or read words into it which are not there" and quoting Lord Parker, the author says thus:
Where the literal reading of a statute...produces an intelligible result...there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament.", at p. 70. *See also*, S.P. Gupta vs. Union of India, AIR 1982 SC 149, para 212.

[13] Richard Bellamy, "Constitutional Rights and the Limits of Judicial Review", in Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy, (Cambridge University Press, 2007), 15.

[14] Constitution of the Islamic Republic of Pakistan, 1973.

[15] Afreen Afshar Alam, The Theory of Checks and Balances (May 15, 2020). Available at SSRN: https://ssrn.com/abstract=4712245 or http://dx.doi.org/10.2139/ssrn.4712245, last accessed 03.09.2024.

constitutionalism based Judicial Policy? Is this phenomena of unwritten judicial policy entrenched in the very Constitution? Was it impliedly inserted so by the Framers of the Constitution? Do not the judges succumb to political and social pressures? What is worth of such judgments and authorities so rendered which are, even otherwise, binding on lower courts? Why does judiciary go beyond its constitutional role? Has this unwritten unconstitutional constitutionalism any adverse impacts on the even otherwise nascent and probationary democratic tradition of the country? Has some political activism contributed in development of such unwritten law or judicial policy?[16] Is this judicial functioning through unwritten law, a mere passing phase or a structural issue? Whether it was an unwritten law or judicial policy that helped endorse extra-constitutional experiments with the constitution? If it is unwritten, where, then, is the authority for the courts to exercise power in this regard? Has the resultant illiberal constitutionalism weakened the dispensation of justice in the country? These unattended questions, inter alia, have arisen since inception of the constitutional history of the country but have largely remained unaddressed.

In their article,[17] Rosalind Dixon and David Landau have discussed the doctrine of unconstitutional constitutional amendment which deals with constitutional amendments which are declared unconstitutional by the judiciary for they weaken basic structure of the existing constitutional order.[18] However, the phenomenon of unconstitutional constitutionalism denotes an act on the part of constitutional body which is done in an unconstitutional manner but the same pertains to and falls within domain of "constitutionalism" because the very constitution prescribes that it is to be taken either

[16] Swaraj Kumar Dey, and Shubhasis Dey, Identity, Social Media and Online Political Activism (January 23, 2024). Available at SSRN: https://ssrn.com/abstract=4703365 or http://dx.doi.org/10.2139/ssrn.4703365, last accessed 01.09.2024.

[17] Rosalind Dixon and David Landau, Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment, I.CON, vol.13, No. 3, (2015), 606-638, 606. This article was presented at the Inaugural Association of American Law Schools (AALS) Academic Symposium on January 5, 2014.

[18] Aharon Barak, Unconstitutional constitutional amendments, 44 Israel L. Rev. (2011), 321, 332-338.

substantially or primarily. This 'taking' might be in the form of constitutional seal. In case of Pakistan this seal is found, within scheme of Constitution in Art.189 where under SCP's decisions are binding on all the institutions and courts.[19]

The 'unconstitutionality' of this phenomenon of constitutionalism emanates from the very factum of absence of (written) mandate in the very constitution from where the court derives or asserts to be deriving its powers. And since it is not written in the said constitution, therefor it can be safely said to be giving birth to unwritten phenomenon. It follows, as a necessary corollary that this phenomenon, due to reason of its being unconstitutional and unwritten, culminates into what the scholar means by unwritten unconstitutional constitutionalism.

1.2.2. Right of Interpretation and Limits U/Art.187 of the Constitution.

In fact, when it comes to interpretation, SCP is not restrained by technicalities.[20] The provision of SCP Rules[21] is in line with this Art.187.[22] However, an independent proceeding cannot be initiated under this Article and the power is available in a case that is actually pending before the SCP.[23] It is because, even otherwise, Art.187 is subject to Art.175(2) of the Constitution[24] which says that no court shall have any jurisdiction save as is/ may be conferred on it by the constitution or by or under the law.[25] But ancillary or incidental power should not be confused with inherent jurisdiction of a Court.[26]

From this discussion two propositions emerge: Firstly, that the jurisdiction of the Courts is never established by themselves; it is established by an authority external to them,

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[19] Of the Islamic Republic of Pakistan, 1973.
[20] Martin Dow Marker Ltd., Quetta vs. Asadullah Khan, [2021 PLC 67; 2020 SCMR 2147], para 13.
[21] R. 6 of Order XXXIII of the Supreme Court Rules, 1980.
[22] Zulfiqar Ali Babu vs. Government of Punjab, PLD 1997 SC 11, para 10.
[23] Rashid Ahmed vs. The State, PLD 1996 SC 168, in concluding para 11-A.
[24] of Islamic Republic of Pakistan, 1973.
[25] Khalid Mehmood vs. Chaklala Cantonment Board, 2023 SCMR 1843, para 4.
[26] Sindh Employees' Social Security vs. Adamjee Cotton Mills, PLD 1975 SC 32, concluding para. *See also*, Ghulam Muhammad vs. Irshad Ahmad, PLD 1982 SC 282, para 9.

either in the Constitution or in law. Secondly, it is for the Constitution and subject to the Constitution, for the law to determine the nature and extent of the jurisdiction and the forum upon which it will be conferred.[27] In a case it was said that the principles of Common Law or equity and good conscience cannot confer jurisdiction on the Courts in Pakistan which has not been vested in them by law.[28]

Art.187 is a provision analogous to Order XXXIII of Supreme Court Rules.[29] However, it does not apply where matter stands finally decided and this provision cannot be used to reopen a finally determined issue. Army Chief's extension matter can be cited here as an example where it was settled that extension[30] cannot be granted to COAS[31] under the relevant laws[32] and regulations[33], on reaching age of superannuation. It was observed that legal regime[34] is totally silent about the tenure of a General.[35] To that extent the matter finally stood determined but even then Supreme Court went on to grant extension for six months without there being any written provision on that point.

Now if the power of the SCP extends to issue such directions or decrees for doing complete justice in any case or matter pending before it, the non-resorting to exercise of such power in *Pirzada Noor-ul-Basar* case shows that it is some unwritten law to which the SCP would have recourse in an appropriate case to avoid doing under the very same Art.187.[36]

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[27] Brother Steel Mills v. Ilyas Miraj PLD 1996 SC 543, para 12, per Fazal Karim, J.
[28] Hitachi Limited v. Rupali Polyester 1998 SCMR 1618, para 7, per AJMAL MIAN, CJ.
[29] of 1980.
[30] Regln. 255, Army Regulations (Rules), 1998 deals with for one further tenure (3 years in this case) beyond superannuation.
[31] Chief of Army Staff.
[32] S.8 (2), Pakistan Army Act (XXXIX of 1952).
[33] Regln. 19, Army Regulations (Rules), 1998.
[34] Pakistan Army Act, 1952 and the Pakistan Army Act Rules, 1954.
[35] Jurists Foundation through Chairman vs. Federal Government through Secretary, Ministry of Defence and others, PLD 2020 SC 1, para 30.
[36] Pirzada Noor-ul-Basar vs. Mst. Pakistan Bibi, 2023 SCMR 1072, para 6, per Sayyed Mazahar Ali Akbar Naqvi, J.

The respective domains are to be honoured under concept of separation of powers.[37] In *Nadeem Ahmed Adv.,*[38] while observing that CJP's role has been reduced to merely one vote as against *Al-Jehad Trust* case[39] the matter was referred to Parliament for reconsideration[40] as court could review the substance of constitutional amendments.[41] It is, however, interesting to note that the Constitution clearly says that the courts have no jurisdiction to review constitutional amendments.[42] In a case,[43] HC upheld the decision that a control order by Magistrate Court was invalid being based upon executive determination of criminality. This Australian case (*Totani*) can be juxtaposed with *Jurists Foundation* case. While former was concerned with institutional distortions within Constitutional framework, the latter did not keep that in view by. It would be beneficial to refer here to Julian Kings Case[44] wherein reliance was placed on *Codelfa* case pertaining to unwritten approach.[45]

1.2.3. Limits of Delegated Legislation under Written Law.

The question that seems important is whether any organ can assume function of legislation without having been so authorized. Issue becomes much important when such

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[37] Khawaja Salman Rafique vs. National Accountability Bureau PLD 2020 SC 456. For debate on trichotomy of powers and system of checks and balances *see*, Bakht Munir, Separation of Powers and System of Checks and Balances: A Debate on the Functionalist and Formalist Theories in the Context of Pakistan (June 30, 2020). Global Political Review, Summer 2020, Vol. V, No. III [11-23], Available at SSRN: https://ssrn.com/abstract=4916291 or http://dx.doi.org/10.2139/ssrn.4916291, last accessed 02.09.2024. That balance is to be struck between policies relating to security and civil liberties and Fundamental Rights of citizens, *see also*, Gulzar Ahmed vs. Province Of Sindh, PLD 2019 Kar 697.

[38] Nadeem Ahmed Adv.vs. Federation of Pakistan (FoP), PLD 2010 SC 1165, para 9.

[39] Al-Jehad Trust vs. Federation of Pakistan, PLD 1996 SC 324.

[40] *See also*, 9 page letter of J. Qazi Faez Isa of 25th of May 2022.

[41] District Bar Association (Rawalpindi) vs. FoP, PLD 2015 SC 401, para 35, per Asif Saeed Khan Khosa, J.

[42] Arts. 239(5), 239(6) of the Constitution of Islamic Republic of Pakistan, 1973.

[43] South Australia vs. Totani, 2010 HCA 39. Available at http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2010/39.html, last accessed 15th Dec. 2020. *See also*, Chapter III, s. 71 of the Commonwealth of Australia Constitution Act, 1901.

[44] Gerner vs. Victoria, 2020 HCA 48, Available at www.jade.io/?gclid=, last accessed 15th Dec. 2020.

[45] It was held that "it would be a distinctly unsound approach to the interpretation of constitutional text actually adopted by the framers to attribute to that text a meaning that they were evidently united in rejecting." *See*, Codelfa Construction vs. State Rail Authority of NSW (1982) 149 CLR 337, at 353, Available at www.jade.io/?gclid=, last accessed 15th Dec. 2020.

assumption is based on no law.[46] Admittedly, the legislature can confer power to make subordinate/delegated legislation. However, it cannot abdicate performance of the function assigned to it by the Constitution and set up a parallel legislative authority.[47] It follows, as a necessary corollary, that no other organ of state not even judicature can take over that function of legislature so as to bring forth a parallel system based upon unwritten constitutionalism.[48]

It is to be noted that these unconstitutional constitutional moves, on the part of the superior judiciary, superseding the legislature in its function and that too on the basis of unwritten law, constitutes a judicial policy. This has not been addressed but needs to be and is therefore, one of the purposes of this study. It is because unwritten unconstitutional constitutionalism based judicial policy has been being invoked in judicial functionality but has never been analyzed in constitutional debates. Confusion and uncertainty frequently result. This study would fill the gap in the literature by analyzing these phenomena.

1.2.4. Constitutional Vires, Checks and Balances, and Review Test.

The unconstitutional constitutionalism based judicial policy in Pakistan is founded upon unwritten law. Since this paradigm of unwritten constitutionalism has much to do with the 'vires', on the very outset it seems imperative to have an idea as to what is meant by this phenomena in addition to concept of 'constitutionalism'.

The term 'constitutionalism' stands for limited government which, in its turn, focuses upon constitutional supremacy. Constitutionalism is a thought process that has aims "consisting essentially in the limitation of public powers and the development of spheres of

[46] *See also*, Art. 10 of the Universal Declaration of Human Rights, 1948 *and* Art.14(1) of International Covenant on Civil and Political Rights, 1966.
[47] Jurists Foundation through Chairman vs. Federal Government through Secretary, Ministry of Defence and Others, PLD 2020 SC1, para 41, per Syed Mansoor Ali Shah, J.
[48] Richard Bellamy, "Constitutional Rights and the Limits of Judicial Review", in Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy, Cambridge University Press (2007), 38.

autonomy guaranteed by law."[49] The constitutionalism means going by Rule of Law. This concept often overlaps with other practices and ideals as to property rights as well as freedom of speech.[50] These practices and ideals create system of checks and balances. The creation of this system is hallmark of phenomenon of constitutionalism which is technically phrased as the doctrine of ultra vires.[51] The judicial scrutiny under the written constitution is commonly called judicial or constitutional review whereby an act beyond the granted jurisdiction is reckoned as *Ultra Vires*.[52]

Oliver Dawn describes certain ways which would bring the action of concerned functionary of state within the mischief of this rule.[53] Strictly speaking, a certain act may be intra vires, yet the performance might be in an unreasonable way. However, when it comes to deal with the actions of the members of judiciary, these ways, as pointed out by O. Dawn, are brushed aside.

The prime example can in this regard be the judicial appointments. *Ghulam Yasin Bhatti* case[54] can be cited here. The 18th and 19th Constitutional Amendments altered the appointment procedure for HC and SCP Judges via Art.175-A of the Constitution. In this case the petitioner challenged the vires of Rule 3(2) of the JCP Rules, 2010 under Art.8 and Art.25. However, the court dismissed the petition without considering potential institutional

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[49] Maurizio Fioravanti, Constitutionalism (Ch. 7) in: A Treatise of Legal Philosophy and General Jurisprudence, Vol. 10, Springer Dordrecht Heidelberg, New York (2009), p. 263.

[50] Cass R. Sunstein, The Rule of Law (March 30, 2023). Available at SSRN:http://dx.doi.org/10.2139/ssrn.4405238, last accessed 20.08.2024. in this Paper, Sunstein has beautifully discussed seven principles of Rule of Law which pertain to idea of constitutionalism: (1) clear, general, publicly accessible rules laid down in advance; (2) prospectivity rather than retroactivity; (3) conformity between law on the books and law in the world; (4) hearing rights; (5) some degree of separation between (a) law-making and law enforcement and (b) interpretation of law; (6) no unduly rapid changes in the law; and (7) no contradictions or palpable inconsistency in the law.

[51] Ahmad Omar Sheikh vs. Government of Sindh through Chief Secretary, 2022 YLR 217 (KAR).

[52] For concept of approach of Originalists towards constitutional interpretation, *see*, Smith, Michael L., Is Originalism Bullshit? (March 5, 2024). Lewis & Clark Law Review, Vol. 28, (Forthcoming 2025), Available at SSRN: https://ssrn.com/abstract=4749322, last accessed 20.08.2024.

[53] Oliver Dawn, "Is the Ultra Vires the Basis of Judicial Review?" In Judicial Review and the Constitution, University of Cambridge, Hart Publishing, 2000, 4.

[54] Ghulam Yasin Bhatti vs. Federation of Pakistan, PLD 2021 Lahore 605. On concept of exception less supremacy of an entity, *see*, Csongor István Nagy, The Rebellion of Constitutional Courts and the Normative Character of European Union Law (January 10, 2024). International & Comparative Law Quarterly, vol. 73, no. 1 (2024), Available at SSRN: https://ssrn.com/abstract=4689416, last accessed 21-08-2024.

changes that could be contemplated in order to prevent judgements[55] with so many "substantive and procedural failures" from being reached.[56] Even it was not considered that it was a major question that ought to have been settled more judiciously.[57]

In a case of *Mukhtar Ahmad Ali* [58] it was held that the Information Act, 2017[59] applies only to public bodies[60] but does not include the SCP. It was added that there was no law which attended to the SCP in this regard nor had it made any regulations in that regard.[61] The rule of *ultra vires*, according to Craig, pertains to factum that a certain body, public or private, should act while remaining within the powers granted under a certain statute.[62]

Crossing of these limits, even in the name of ground realities by the defacto powers, creates gap between the written law and its implementation.[63] Neil Walker seems to believe in rather a broad aspect when he says that constitutionalism is a set of beliefs associated with

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[55] *See for example*, Shumaila Salman Shah vs. Federation of Pakistan (PLD 2021 Sindh 476). This case pertained to Judicial Review of policy on conducting examinations during Covid-19. The National Command and Operation Centre (NCOC) Pakistan was formed to oversee and issue policy directives regarding Covid-19 and its management across the country. In 2021, the NCOC ordered that student sitting for O, A, and AS Level external Cambridge Examinations will have to sit for in-person exams, as opposed to getting grades based on the School Assessed Grades since the outbreak began in Pakistan. Concerned parents filed a petition challenging this order, arguing that mandating in-person exams during the third wave violates Articles 4, 8, 9 and 25 of the Constitution (right to be dealt in accordance with law; enforcement of fundamental rights; right to life; and right to equality respectively). Considering that the NCOC had also formulated stringent procedures for the in-person examinations, which had been shared with the British Council (responsible for conducting the exams), there was no violation of fundamental rights, and hence the Sindh High Court refused to interfere in governmental policy. This appears to be strange approach on the part of the Court keeping in view the death dance of Covid-19. Even the Courts were closed when any one of the Judge or his/her staff developed symptoms of the pandemic. However, the lives of the students were put at stake by this decision.

[56] Michal Bobek and David Kosar, Please, Disregard Us: When a Minority of the European Court of Human Rights Declares Its Own Court to Be Ultra Vires (May 22, 2023). (2023) 48 European Law Review 279, Available at SSRN: https://ssrn.com/abstract=4454987, last accessed 21.08.2024.

[57] For major questions doctrine, *see*, Wurman, Ilan, Importance and Interpretive Questions (March 7, 2023). Virginia Law Review, forthcoming, Arizona State University Sandra Day O'Connor College of Law Legal Studies Research Paper No. 4381708, Available at SSRN: https://ssrn.com/abstract=4381708 or http://dx.doi.org/10.2139/ssrn.4381708, last accessed 22.08.2024.

[58] Mukhtar Ahmad Ali vs. The Registrar, Supreme Court of Pakistan, Islamabad and another, PLD 2024 SC 192. A letter (dated 10 April 2019) was addressed to the Registrar of the Supreme Court through which the petitioner sought the information about the strength of the staff and number of vacancies etc.

[59] Right of Access to Information Act, 2017.

[60] As defined in section 2(ix) of the Act, ibid.

[61] Mukhtar Ahmad Ali vs. The Registrar, Supreme Court of Pakistan, Islamabad and another, PLD 2024 SC 192, para 17.

[62] P. Craig, Administrative Law, Sweet and Maxwell, 1983, 299.

[63] State vs. Irfan Nawaz Memon, District Magistrate, Islamabad, PLD 2024 ISBD 256, para 22.

the idea of constitutional government.[64] In fact, modern constitutionalism requires imposing limits on the power of government and adherence to Rule of Law.[65] In *DC Islamabad* case, IHC, Islamabad delineated that it was imperative to revisit the foundational principles that regulate the manner in which power and responsibility are to be assumed and exercised by public officials in a rule of law system.[66]

In Reference against Qazi Faez Isa J.[67] FBR was asked to conduct inquiry in assets beyond means. However, the Reference was quashed later on. What allowed the scrutiny and what factor necessitated the review and quashing of the Reference, both appear to have proceeded on the basis of unwritten judicial policy. This case can also be referred as prime example of unconstitutional constitutionalism.

Again, in a case involving the immunity of Constitutional Court(s)' Judges against Writ Petitions,[68] the SCP found that the word "person" as used in Article 199, did not include the SCP and the HC(s). By so observing, without there being any written command so directing in Art.199 the PHC overturned earlier decision of IHC, Islamabad.[69] The ever prevalent distinction between administrative and judicial functions was cast aside. Such findings generate unconstitutional constitutional identities.[70] In a case about which pertained to billboards' removal, LHC used suo moto powers to order petrol stations to refuse service to any rider not wearing a helmet. The SCP held that the HCs could not exercise judicial

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[64] Neil Walker, European Constitutionalism and European Integration, Pub. Law, Summer 1996, 266-267.
[65] Michel Rosenfeld, Introduction: Modern Constitutionalism as Interplay Between Identity and Diversity ,in Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives 3,3 (Michel Rosenfeld ed., 1994)
[66] State vs. Irfan Nawaz Memon, District Magistrate, Islamabad, PLD 2024 ISBD 256, para 19.
[67] Justice Qazi Faez Isa vs. President of Pakistan PLD 2021 SC 1.
[68] Taiz Khan Marwat vs. Registrar Peshawar High Court PLD 2021 SC 391.
[69] i.e., Ch. Muhammad Akram vs. Registrar, Islamabad High Court, and others (PLD 2016 SC 961).
[70] Tímea Drinóczi and Pietro Faraguna, The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States (august 01, 2022). European Yearbook of Constitutional Law 2022, Available at SSRN: https://ssrn.com/abstract=4287559 or http://dx.doi.org/10.2139/ssrn.4287559, last accessed 01.09.2024.

power when no dispute existed and they could not take up matters under suo moto powers.[71] Interestingly, it must be noted here that the only court expressly granted suo moto powers under the Constitution is the Federal Shariat Court.[72]

Under the constitutional scheme, a Judge of HC or SCP is the voice of Constitution;[73] however, when he crosses the limits defined by the written law the question arises as to "where will this stop?"[74] The fact remains that the existence of written constitution does not guarantee the existence of constitutionalism also.[75] This comment was meant to examine the controversy pertaining to reservations in the private educational institutions after the decision in *IMA* case[76] in the light of the freedom of any occupation under Art.15(5).[77] As the former was inadequately addressed by the court, "this comment goes into the availability of Article 19(1) (g) to juristic person(s) vis-à-vis the elevated status of Article 15(5) as a Fundamental Right and as part of the Basic Structure."[78]

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[71] Mian Irfan Bashir vs. Deputy Commissioner Lahore, PLD 2021 Supreme Court 571 (High Court's Suo Moto Powers. This case is an example of judicial overreach).

[72] Marva Khan report in 2021 Global Review of Constitutional Law, I.CONnect, at p. 268 in: Richard Albert and David Landau and Pietro Faraguna and Giulia De Rossi Andrade, The 2022 Global Review of Constitutional Law (October 30, 2023). The 2022 Global Review of Constitutional Law. ISBN: 978-1-7374527-5-1. Sponsored by the Constitutional Studies Program at the University of Texas at Austin. Published by EUT Edizioni Università di Trieste. ISBN: 978-88-5511-460-8 (EUT), U of Texas Law, Legal Studies Research Paper, Available at SSRN: https://ssrn.com/abstract=4617537 or http://dx.doi.org/10.2139/ssrn.4617537, last accessed 20.08.2024.

[73] Suchindran B.N., Vivian Bose and The Living Constitution: A Tribute, in 5 INDIAN J. CONST. L., at p.1. (2011), 1-25.

[74] Indian Medical Association vs. Union of India, 2011 (6) SCALE 86. [IMA]; AIR 2011 SUPREME COURT 2365. For knowing the modern legal perspective as to what kinds of reasons should matter in choosing an approach to constitutional or legal interpretation, *see*, Urbina, Francisco Javier, Reasons for Interpretation (February 9, 2024). Available at SSRN: https://ssrn.com/abstract=4722069 or http://dx.doi.org/10.2139/ssrn.4722069, last accessed 22.08.2024.

[75] Paul T. Babie and Arvind P. Bhanu, The Form and Formation of Constitutionalism in India, Laws 2022, 11, 33. https://doi.org/10.3390/laws11020033, at pp.1and 2. Available at: https://www.mdpi.com/journal/laws , last accessed 23.08.2024. *See also*, [Subhash Patil (2023); India's Constitutionalism: An Examination of its Historical Development and Current Issues, Int. J. of Adv. Res. 11 (Sep). 1434-1439], (ISSN 2320-5407). Int. J. of Adv. Res. 11 (Sep). 1434-1439] (ISSN 2320-5407). Available at: www.journalijar.com, last accessed 23-08-2024.

[76] Indian Medical Association vs. Union of India, 2011 (6) SCALE 86. [IMA]; AIR 2011 SUPREME COURT 2365.

[77] Of the Indian Constitution, 1949.

[78] Karishma D. Dodeja, Indian Medical Association vs. Union of India: The Tablet of Aspir(in)ation, in 5 INDIAN J. CONST. L., at p.209. (2011), 209-218. On the important role played by judicial interpretation in the development of constitutionalism, *see,* Robert M. Cover, Nomos and Narrative, 97 HARV. L. REV. 4 (Cover 1983); John V. Orth, John Gava, Arvind P. Bhanu, and Paul T. Babie, No Amendment? No Problem: Judges,

1.2.5. Criticism on Test of Review.

The doctrines of ultra vires and judicial review have undergone considerable criticism at the hands of different scholars. Paul Craig, for example, does not believe that doctrine of ultra vires stands in harmony with reality.[79] Moreover there is always a judicial attitude which keeps on changing.[80] We may recall here John Selden who, while talking about suo motu powers, said: "One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience."[81]

Furthermore, there are other critics like R. Bellamy, "the advantage of courts", according to whom, "lies in their focusing on the rights of specific individuals in particular cases".[82] However, devising a "collective policy on some abstract question of rights on the basis of a single case" can be misleading.[83]

1.3. Basis of Unconstitutional Constitutionalism and Unwritten Judicial Policy.

The unconstitutional constitutionalism based judicial policy has genesis in unwritten law which has two fold meaning and import. By this the scholar implies the working of the courts of law, especially the constitutional courts of the country on the basis of unwritten law. Another shade of meaning is finding, in the name of interpretation of law, a meaning into the same which is not there.[84] The basis of phenomena of unconstitutional constitutionalism

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"Informal Amendment," and the Evolution of Constitutional Meaning in the Federal Democracies of Australia, Canada, India, and the United States, 48 PEPP. L. REV. 341 (Orth et al. 2021).

[79] Paul Craig, "Ultra Vires and the Foundation of Judicial Review" (1998). Articles by Maurer Faculty. 2756, 67.

[80] Ibid, 67, 68.

[81] The Table Talk of John Selden, Compilation of Private Conversations of John Selden (Fredrick Pollock ed., 1927), 43.

[82] Richard Bellamy, "Constitutional Rights and the Limits of Judicial Review", in Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy, Cambridge University Press (2007), 30.

[83] Ibid.

[84] Cornelius, J., (as he then was) said in, Abdul Aziz v. Province of West Pakistan (P L D 1958 S C (Pak.) 499), at page 506:"If what is meant is that constitutional provisions may be stretched by interpretation with the object

based judicial policy, as such, in Pakistan owes its existence to principle of necessity as endorsed in *Dosso*.[85]

In *DBA (Rwp.),*[86] the SCP while dealing with Seventeenth Constitutional Amendment vis-a-vis basic structure of Constitution, did not consider its earlier decision of in *Pakistan Lawyers Forum.*[87] The SCP held to have neither jurisdiction to strike down the constitutional amendment on substantive grounds[88] nor the jurisdiction to remedy any infringement to the basic structure of the Constitution because in the words of Hamid Khan "the political process is comparably more dispositional for doing the needful."[89]

Without surprise, the court counted on basic structure doctrine by placing restrictions on the powers of Parliament to amend the Constitution. In fact, the scope of legislature's power to amend was defined by SCP.[90] The questions that come up for discussion here are: could judiciary be allowed to place such limits on the legislature?[91] It is to be noted that when it comes to Pakistan, the doctrine of basic structure was recognized only to the extent of identifying salient or fundamental features of the Constitution. It was held that said doctrine could not be made a ground to annul any amendment to the Constitution.[92] The SCP in *Fauji Foundation* case, after discussing series of Indian case-law on the subject of basic structure, held that "no provision of the Constitution can be ultra vires, because there is no touchstone

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of saving the validity of statutes which x facie contravene the Constitution, it must be said at once that this view cannot be accepted."

[85] The State vs. Dosso, PLD 1958 SC 533.

[86] District Bar Association (Rawalpindi) vs. FoP, PLD 2015 SC 401, para 56.

[87] Pakistan Lawyers Forum v Federation of Pakistan, PLD 2005 SC 719.

[88] Ibid, para 41.

[89] Hamid Khan, Constitutional and political History of Pakistan, 2nd ed., (Karachi: Oxford University Press, 2009), 501.

[90] DBA (Rwp.) vs. FoP, PLD 2015 SC 401, para 55, per Nasir-Ul-Mulk, C.J.

[91] Richard Albert, The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada, Queen's Law Journal (forthcoming 2016) (peer-reviewed), p.2. *Also see*, Richard Albert, Nonconstitutional Amendments, (2009) 22 Can. J. L. & Juris. 5; Also see Aharon Barak, Unconstitutional Constitutional Amendments, (2011) 44 lsr. L. Rev. 321. *See also*, Richard Albert, The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada, Queen's Law Journal (forthcoming 2016) (peer-reviewed), P.2. See also, Richard Albert, The Most Powerful Court in the World? Judicial Review of Constitutional Amendment in Canada (August 29, 2022). 110 Supreme Court Law Review (2d) 79 (2023), U of Texas Law, Legal Studies Research Paper, Available at SSRN: https://ssrn.com/abstract=4203008, last accessed 23.08.2024.

[92] District Bar Association, Rawalpindi vs. FOP, PLD 2015 SC 401, para 53.

outside the Constitution by which the validity of a provision of the Constitution can be judged."[93]

The case of *Sabir Shah* brings forth the position of Pakistani Judges' approach to the idea of unconstitutional constitutional amendment. In that case, Presidential Proclamation[94] was challenged. SCP did not accept the said argument by observing that the distinction made by the Indian Supreme Court between a bar of the jurisdiction provided by the original Constitution of India of 1949 and a bar of jurisdiction subsequently incorporated by amending the Constitution has not been pressed into service by the superior courts in Pakistan.[95]

The *Pakistan Lawyers Forum*[96] shows the underlying functioning of unconstitutional constitutionalism based judicial policy. It also shows that the scope of judiciary's powers has been further extended by falling back upon unwritten law and unwritten constitutionalism. The most important question that has remained unanswered is: when the constitution itself ousts the jurisdiction of the courts[97] to review constitutional amendment(s) under Art.239, why step is taken to review the same by the judiciary?

1.4. Unconstitutional Constitutionalism, Unwritten Judicial Policy and Democratic Tradition.

Since inception of country, the legitimizing of military dictatorships by Judiciary has marred the struggles of making a constitutional democracy. In the recent history of Pakistan

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[93] Fauji Foundation vs. Shamimur Rehman, PLD 1983 SC 457, paragraphs190 to 192.
[94] Issued u/Art.234 of the Constitution, 1973.
[95] Sabir Shah vs. Federation of Pakistan (PLD 1994 SC 738), para 10. *See also*, Mahmood Khan Achakzai vs. Federation of Pakistan, (regarding Eighth Amendment to the Constitution), PLD 1997 SC 426; Wukala Mahaz Barai Thafaz Dastoor vs. Federation of Pakistan PLD 1998 SC 1263; State vs. Zia-ur-Rehman, PLD 1973 SC 49. From Indian Jurisdiction see, inter alia, Kesvavanda Bharati vs. State of Kerala AIR 1973 SC 1461, and Raghonathrao Ganpatrao vs. Union of India (AIR 1993 SC 1267).
[96] Pakistan Lawyers Forum vs. Federation of Pakistan, PLD 2005 SC 719. It is worth noting that case of Syed Zafar Ali Shah vs.General Pervez Musharraf, Chief Executive of Pakistan (PLD 2000 SC 869) was not followed in *Pakistan Lawyers Forum* where this Court unequivocally refused to accept the argument of setting aside constitutional amendments on the touchstone of basic structure.
[97] Saeed Ahmed Khan's case, PLD 1974 SC 151, at 166.

the superior judiciary of the country has rendered itself less answerable and supra-constitutional.[98] In dismissing legal challenges to the amendments introduced by the dictatorial regimes, the SCP shirked its responsibility to protect constitutional rule.[99] However the fact remains that unwritten judicial policy (UJP) has been being invoked in judicial functionality but has never been analyzed in constitutional debates.

The principle of law is that if a thing is to be done in a certain way it is to be done in that way and in none other.[100] However, the question that needs redress is that if a thing is done in that way, is it still open to be reviewed as such on the ground that though the act is not ultra vires but the same has been done purportedly in an unreasonable or improper manner? As the question involves reviewing executive powers judicially, *Al-Arabia Sugar Mills* case answers the same. It was a case of assets beyond means. Court relied on *Brig. Rtd. Imtiaz Ahmad* case[101] to assess the limits of the HC when interfering with executive powers. The Court held that while the FIA had the authority to seek information from SECP, the latter ought to have acted as an independent authority as opposed to trying to meet the end goals of the federal government.[102] This shows that the act was prima facie intra vires but even then the LHC considered it appropriate to observe as such.

Simply speaking it is this very doctrine of ultra vires that helps contain the act in the manner in which power given to a certain body is to be exercised. Waldron says that these constraints are not justified because the enabling legislation may be only result of court's own

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[98] Reforming the Judiciary in Pakistan, B. Validating Military Interventions, in Asia Report No 160 by International Crisis Group, 16 October 2008, at p 09.
[99] Ibid.
[100] Hafeez Ullah Shahid vs. ASJ/JOP, 2024 MLD 951, para 12. Regarding initiation of action against delinquent Police official, LHC, Lahore said that where the offences were non-cognizable Police Complaints Authority could pass direction for action under S.155, Cr.P.C., for investigation with the permission of concerned Magistrate, or if they were scheduled offences of Anti-Corruption Establishment, reference could be sent to that department for further action. "Even otherwise it was trite that when a statute described or required a thing to be done in a particular manner, it should be done in that manner or not at all." *See also,* Muhammad Azhar Abbasi and Masood Ahmad Abbasi vs. Municipal Corporation, 2024 CLC 325 (LHR); Dr. Aftab Hassan Minhas vs. National Council For Homeopathy, 2024 PLC (CS) 84 (LHR); Salman Khan vs. University of Swat through Vice-Chancellor, 2023 PLD 40 (PESH), *and* Khurram Manzoor vs. Suriya Begum, 2022 PLD 68 (ISBD).
[101] Brig. Rtd. Imtiaz Ahmad vs. Government of Pakistan through Secretary Interior Division, Islamabad and 2 others, 1994 SCMR 2142.
[102] Al-Arabia Sugar Mills vs. FIA, PLD 2021 LHR 226, para 68.

interpretation and there may not be any need of such constraints.[103] This would be explained, in our context, by referring to letter of Justice Qazi Faez Isa addressed to the then CJP Bandial.[104] In the said letter, he raised serious questions over the composition of a larger bench to hear presidential reference[105] seeking interpretation and scope of Article 63 (A) of the Constitution. "After all, the adage - justice is not only be done but is also seen to be done."[106] The said adage is also incorporated in the Code of Conduct[107] which is to be observed by Judges of SCP and HCs. "Likewise, a Judge must avoid all possibility of his opinion or action, in any case, being swayed by any consideration of personal advantage, either direct or indirect."[108]

Justice Isa also objected to the appointment of a civil servant as SC Registrar.[109] In his opinion, his appointment was in clear violation of the Constitution which mandated complete independence of the judiciary and its separation from the executive.[110]

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[103] J.Waldron, 'The Core of the Case Against Judicial Review', in Yale Law Journal, 115 (2006), 1379-80.

[104] This letter was written by him (Qazi Faez Isa, J. as he then was) on 22nd March 2022. A copy of the letter was also sent to Attorney General for Pakistan (AGP) Khalid Jawed Khan and Supreme Court Bar Association (SCBA) President Muhammad Ahsan Bhoon along with all Advocate Generals and SC Judges.

[105] This reference was filed on behalf of the then President Arif Alvi by bypassing the law ministry. See daily Dawn dated 24th March 2022. This was with reference to seeking opinion of SCP/ larger Bench, headed by the CJP and comprising Justice Ijaz Ul Ahsan, Justice Mazhar Alam Khan Miankhel, Justice Muneeb Akhtar and Justice Jamal Khan Mandokhel, regarding applicability of Article 63 (A) of the Constitution of Islamic Republic of Pakistan, 1973 vis-à-vis floor-crossing and voting against party wishes and a petition of the Supreme Court Bar Association (SCBA) for restraining political parties from holding public meetings in Islamabad before voting on the no-confidence motion.

[106] Justice Qazi Faez Isa's letter dated 22-03-2022. See also Dawn of 23-03-2022.

[107] Article IV of the Code of Conduct, of 2nd September, 2009. Per 'No.F.SECRETARY-01/2009/SJC. ln exercise of powers conferred by Article 209(8) of the Constitution of Islamic Republic of Pakistan, 1973, the Supreme Judicial Council in its meeting on 8th August, 2009 approved the addition of a new Article No. XI in the Code of Conduct for Judges of the supreme Court and High Courts and in its meeting on 29th August, 2009 decided to publish the full text of amended Code of Conduct in the Gazette of Pakistan (Extraordinary) for information of all concerned as under:-

Code of Conduct for Judges of the Supreme Court and High Courts (Framed by the Supreme Judicial Council under Article 128 (4) of the 1962 Constitution as amended upto date under Article 209 (8) of the Constitution of Islamic Republic of Pakistan 1973). This Code regulates the conduct of the Judges of the Superior/Constitutional Judiciary of Pakistan.

[108]Justice Qazi Faez Isa's letter dated 22-03-2022. See also Dawn of 23-03-2022.

[109] Jawad Paul, was a BS-21 officer of Pakistan Administrative Service, (PAS, previously District Management Group (DMG)) who was posted as Additional Secretary, Prime Minister Office, before transfer. His services were placed at the disposal of Supreme Court of Pakistan, for his appointment as Registrar (BS 22), initially for the period of three years, under section 10 of the Civil Servants Act, 1973, with effect from August 1, 2021 vide Government of Pakistan, Cabinet Secretariat, Establishment Division, Notification No. PAF (735)/E-05/PAS dated 27th July 2021.

[110] Second last para of Justice Qazi Faez Isa's letter dated 22-03-2022; *See also*, Dawn of 23-03-2022.

1.5. Adverse Effects of Unconstitutional Constitutionalism Based Judicial Policy.

This study aims at exploring the adverse effects associated with such unregulated unconstitutional constitutionalism and unwritten judicial policy and also aims to suggest steps/processes to regulate this form of parallel constitutionalism that is heterogeneous to the real mandate and true spirit of the constitution of the country. It is also intended to suggest measures to guard against otherwise ensuing repercussions lest the latter should hold their sway in our polity. The adverse effects may be discussed under following heads.

1.5.1. Dilating Upon Non-Legal Questions.

According to Dworkin, three reasons stimulate the existence of judicial review.[111] However, question of rights qua test of review is invariably related to non-legal questions also. Political question doctrine is the rule that Constitutional courts will refuse to dilate upon a case if it presents a political question.[112] The doctrine is also referred to as the justiciability doctrine or the non-justiciability doctrine, but the justiciability doctrine[113] may involve other reasons for dismissing such a claim.[114]

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[111] R. Dworkin, Freedom's Law: The Moral Reading of the American Constitution, Oxford: Oxford University Press, 1996. The three reasons are: *First*, rights-based judicial review guards against majority tyranny and fecklessness; *Second*, the integrity of law is based upon rights, and *Third*, cerain rights are sid to be implied by the democratic process itself. *See also*, Richard Bellamy, "Introduction: Legal and Political Constitutionalism", in Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy, (Cambridge University Press, 2007), 15.

[112] Martin H. Redish, Judicial Review and the "Political Question", 79 Nw. U. L. Rev. 1031, (1985), 1039–43, (comparing "classical" interpretation of the political question doctrine, in which jurisdiction is withheld because the Constitution has textually committed the issue to another agency, and the "prudential" interpretation of the doctrine, in which rationales other than the text of the Constitution are used to justify judicial abdication). *See also*, Curtis Bradley, The Political Question Doctrine and International Law (November 19, 2022). U of Chicago, Public Law Working Paper No. 823, Available at SSRN: https://ssrn.com/abstract=4281825 or http://dx.doi.org/10.2139/ssrn.4281825, last accessed 24.08.2024.

[113] Baker vs. Carr, 369 U.S. 186, 198–99 (1962), (discussing difference between jurisdiction and "appropriateness of the subject matter for judicial consideration," known as "justiciability". In this case the Court listed six reasons why an issue might be treated as political.

[114] Massachusetts vs. EPA, 549 U.S. 497, 516 (2007).

The political question doctrine[115] is difficult to apply and is also controversial. The doctrine involves balancing the separate powers of each branch of government with the judicial review power of the courts which only apply the doctrine most sparingly.[116] This doctrine is closely associated to major questions doctrine which suggests that the courts should refrain from regulating questions of economic and political significance[117] and also with legal and political constitutionalism. The question with regard to the widespread historical view of the Indian Supreme Court as an unwavering advocate for economic, social and cultural rights has been dealt with by Amal Sethi. His analysis presents a nuanced perspective, recognizing the intricate interplay between judicial decisions and socio-political factors.[118]

However, when it comes to Pakistan, the situation is otherwise. In a case the PTI was deprived of its party symbol for not holding intra part elections according to dictates of the ECP. Instead of ensuring the rights of public at large are protected, the SCP stamped the decision of ECP against PTI.[119]

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[115] For discussion on how the evolution from idea to doctrine is affected by the search tools we use (tools that go beyond judicial decisions and no longer rely on just analogical reasoning), *see*, Allison Orr Larsen, Becoming a Doctrine, (March 1, 2023), William & Mary Law School Research Paper No. 09-467, Florida Law Review, Vol. 76, No.1, (2024), 1-57, p.6. Available at SSRN: https://ssrn.com/abstract=4374736 or http://dx.doi.org/10.2139/ssrn.4374736, last accessed 23.08.2024.

[116] Zivotofsky vs. Clinton, 566 U.S. 189, 195 (2012) (holding that courts lack authority to decide political questions when there is a commitment of the issue to another department or where there is a lack of judicially discoverable and manageable standards for resolving them) (citing Baker, 369 U.S. at 217).

[117] Thomas W. Merrill, The Major Questions Doctrine: Right Diagnosis, Wrong Remedy (May 3, 2023). Columbia Public Law Research Paper, Available at SSRN: https://ssrn.com/abstract=4437332 or http://dx.doi.org/10.2139/ssrn.4437332, last accessed 24.08.2024.

[118] Amal Sethi, The Justiciability Of Economic, Social And Cultural Rights In India (January 25, 2024). 2023, Angelika Nussberger and David Landau (eds), The Justiciability of Economic, Social and Cultural Rights, 483-503, Available at SSRN: https://ssrn.com/abstract=4706230, last accessed 24.08.2024.

[119] The Election Commission of Pakistan through Secretary and others vs. Pakistan Tehreek-e-Insaf (PTI) through Authorized person and others, PLD 2024 SC 295. For discussion on point that the courts should not change election rules close to an election, see, Purcell Principle emanating from *Purcell v. Gonzalez, 549 U.S. 1 (2006)*. *See also*, Josh Gerstein, The Murky Legal Concept That Could Swing the Election, POLITICO (Oct. 5, 2020, 7:58 PM), https://www.politico.com/news/2020/10/05/murky-legal-concept-could-swing-the-election-426604, last accessed 23-08-2024. *Also see*, F.N. 73 of Allison Orr Larsen, Becoming a Doctrine, FLORIDA LAW REVIEW, 76:1, (2024), 1-57, p. 17.

1.5.2. Unconstitutional Constitutionalism based Judicial Policy and Legal/Political Constitutionalism.

The discussion on phenomena of constitutionalism pertains to political as well as legal constitutionalism with much focus on the latter. Political constitutionalism focuses on factum that democratic process, democratic institutions and political activity are to be honoured.[120] As such, constraining of arbitrary rule, establishing rule of law, safeguarding of individual rights and upholding the constitution become important.[121] The advocates of both forms of constitutionalism come up with their respective cases. However, certain eminent jurists assert that the extraordinary judicial powers in the form of judicial review are hard to rationalise in a democracy.[122] Hirschl calls this factum as 'juristocracy'[123].

Lord Irvine, while referring to debate in America and Britain, about the powers of the courts in relation to the Constitution says that the same question is involved in both the places, that is: "how much power should the courts have over the other branches of government?"[124] This question is important because while interpreting rights, the Judges act as 'unelected' persons as compared to people living in a polity who participate through their elected and chosen representatives.[125] Governing with the Judges in this way can become governing like judges.[126]

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[120] Richard Bellamy, "Introduction: Legal and Political Constitutionalism", in Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy, (Cambridge University Press, 2007), 05. *See also*, Preface and Acknowledgements, viii.

[121] *See*, Cherie. Booth, 'The Role of the Judge in a Human Rights World', Speech to the Malaysian Bar Association, 26 July 2005. She said that the Judges are "afforded the opportunity and duty to do justice for all citizens by reliance on universal standards of decency and humaneness."

[122] *See* H.L.A. Hart, "American Jurisprudence Through English Eyes", in Essays in Jurisprudence and Philosophy, New York: Oxford University Press, (1983), 125.

[123] Ran Hirschl, Towards Juristocracy: The Origins and Consequences of New Constitutionalism, Harvard University Press, (2007), p.01.

[124] Lord Irvine, Sovereignty in Comparative Perspective: Constitutionalism in Britain and America, 76 N.Y.U.L. REV. 1, 4 (2003).

[125] A. J. McGann, The Tyranny of the Supermajority: How Majority Rule Protects Minorities, Journal of Theoretical Politics, 16 (2004), pp. 56-70. For debate on two broad varieties of constitutionalism: political versus legal/judicial constitutionalism, and procedural (liberal) and programmatic (substantive) constitutionalism, *see* Mark Tushnet who says that these varieties are continuums rather than sharply defined categories, of course: Mark Tushnet, Varieties of Constitutionalism (June 25, 2023). Harvard Public Law

American SC in a case involving Judicial Review of gerrymandering held that excessive partisanship in making districts leads to results that reasonably seem unjust because even if such gerrymandering is incompatible with democratic principles does not mean that the solution lies with the federal judiciary.[127] On the other hand, SC of UK, in a case involving that the legality of Prime Minister's advice to Queen to prorogue Parliament is justiciable held that although the courts cannot decide political questions the fact that a legal dispute concerns the conduct of politicians has never been sufficient reason for the courts to refuse to consider it.[128] Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. It was said that many constitutional cases in British legal history have been concerned with politics in that sense.[129]

1.5.3. Social Rights Guarantees and the Constitution.

Some scholars believe that social rights are not among the 'constitutional essentials'[130] but the fact remains that the idea of constitution survives because it simply has to. Factually, idea of fundamental rights, in its turn, gives birth to the idea of constitution. It is because no society can survive without constitution and the latter cannot be imagined without existence of such rights.[131] It does not necessarily imply, however, that a constitution always

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Working Paper No. 23-31, Available at SSRN: https://ssrn.com/abstract=4490965 or http://dx.doi.org/10.2139/ssrn.4490965, last accessed 21.08.2024.

[126] A. Stone Sweet, Governing with Judges: Constitutional Politics in Europe, Oxford: Oxford University Press, 2000, p.204.

[127] Rucho vs. Common Cause (588 U. S. (2019) (Majority View). Please also see (Minority View) which dissented and held otherwise in the same case. For crux of the case qua finding by the court, see Research Centre of Supreme Court of Pakistan's Quarterly Case Law Update. Vol. 1: issue 1 (July-September. 2019), at 3/4.

[128] Miller vs. Prime Minister, [2019] UKSC 41. For crux of the case qua finding of the court, see also Research Centre of Supreme Court of Pakistan's Quarterly Case Law Update. Vol. 1 issue 1 (July-september. 2019), at 3/4.

[129] Ibid, 4.

[130] Jhon Rawls, Political Liberalism, Columbia University Press, (1996), p.217.

[131] Kulwinder Singh Gill, and Ramandeep Singh Sidhu, The Living Constitution Theory and Inherent Rights: an Indian Perspective (October 19, 2023). CASIHR Journal on Human Rights Practice (JHRP) | Forthcoming,

has to be written. T What matters the most, instead, is that the democratic colour should not be missing from the constitution because otherwise the justification of constitution would be lacking in which case there cannot exist the concept of democratic polity for whose business the said constitution is to exist there.[132]

1.5.4. Expansion of Judicial Role vis-a-vis Unconstitutional Constitutionalism Based Judicial Policy.

Much of the annotation on judicial developments in Pakistan appears to be driven by an appraisal that judicial involvement in politics is problematic.[133] Admittedly role of judiciary has expanded to lay hands on areas such as political controversies, public policy and moral issues that hitherto were exclusively within the jurisdiction of the elected legislature.[134]

However, because it is not clear that in absence of written provision(s) of law authorizing the constitutional courts to build inroads into jurisdictions of other branches of government as well as organs of state, functioning of the courts as such appears to be based on unconstitutional constitutionalism based judicial policy with repercussions of resultant illiberal constitutionalism.

1.5.5. Deep Tension between Democratic Constitution and Unconstitutional Constitutional Amendment.

This brings us to the underlying deep tension existing between democracy's commitments and the procedure for constitutional amendment.[135] Though the constitutional

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Available at SSRN: https://ssrn.com/abstract=4606775, or http://dx.doi.org/10.2139/ssrn.4606775, last accessed 02.09.2024.

[132] Frank I. Michelman, Constitution, Social Rights and Political Justification, I.CON, vol.1, Number 1, (2003), pp.13-34, 31. Also available at https://watermark.silverchair.com/010013.pdf, accessed on May 14, 2020.

[133] Moeen H. Cheema, Two steps forward one step back: The non-linear expansion of judicial power in Pakistan, I•CON (2018), Vol. 16 No. 2, 503–526, at 524.

[134] Again scholars like R. Hirschl refer to this as 'judicialization of politics'. *See*, Ran Hirschl, The Judicialization of Mega-Politics and The Rise of Political Courts. Annual Review of Political Science, Vol. 11, 2008, pp.93-118, at p. 95

[135] Rosalind Dixon and David Landau, Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment, I.CON, vol.13, Number 3, (2015), pp.606-638, 606. This article

amendments are not introduced most frequently but whenever the needful is done it has to pass through the constitutionally prescribed and detailed procedure. Like the written constitutions of the world, our Constitution also encapsulates concepts of fundamental rights.[136] On the ground, however, the constitutional history of Pakistan has been "not smooth and sound."[137] Rather, "democracy in Pakistan has passed through several ebbs and flows."[138]

1.5.6. Socio Political Pressures and Judicial Restraint.

Fundamental rights are the basis of public interest litigation (PIL) which emanates from the belief that safeguarding said rights is the domain as well as obligation of the constitutional judiciary, members whereof do not have, and as such do not represent, constituencies. They are not under pressure from members of any such constituencies. It is, therefore, asserted that subjective factors may not be there. One wishes they ought not to be. However, they are there.[139] Extraneous factors like long standing at Bar, Bars' politics and relationships with Bar members and clients are the very constituencies that are potential factors that do generate pressures which have not been adhered to hereto before. As a matter of fact, "if it is not necessary to decide more, it is necessary not to decide more", well states its procedural aspect."[140]

This principle shows much about the underlying idea as to unconstitutional constitutionalism and unwritten judicial policy when said principle is not followed as a whole and also when, instead of stopping around the requisite point of discussion, the judges of

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was presented at the Inaugural Association of American Law Schools (AALS) Academic Symposium on January 5, 2014.

[136]Part II to IV of Constitution of the Islamic Republic of Pakistan, 1973. Also see Part VII of the Constitution ibid.

[137] Iram khalid, Role of Judiciary in the Evolvement of Democracy In Pakistan, in Journal of Political Studies, Vol. 19, issue. 02, 2012, 125-142, at p. 127.

[138] Ibid.

[139] Hongli Chu and Shengmin Sun, and Jian Wei, Fiscal Pressure and Judicial Decisions: Evidence from Financial Penalties for Official Corruption in China. Available at SSRN: https://ssrn.com/abstract=4333873 or http://dx.doi.org/10.2139/ssrn.4333873, last accessed 01.09.2024.

[140] Jurists Foundation through Chairman vs. Federal Government through Secretary, Ministry of Defence and others, PLD 2O2O SC 1, para 46. See also, N.S. Bindra, Interpretation of Statutes, 10th Edn. New Delhi: LexisNexis, 2007, pp. 397,398.

constitutional courts go on to cast aside the second part of this principle and proceed to decide "more" that is not necessary. When the 'more' is not required why Judges don't restrain themselves from meddling into affairs of public policy?[141] Certainly, such like questions, inter alia, need to be answered. This study would also focus on these hitherto unattended areas.

Jeremy Waldron is of the view that the normal legislative processes are better suited to tackle constitutional questions in a strong rights-based democracy for reasonable functionality of the latter.[142] Waldron challenges judicial review in view of fact that ordinary legislative processes can effectively replace this doctrine of judicial review.[143] To be specific, such an extraordinary power i.e., judicial review has no explicit mentioning in the US Constitution. Regarding *Marbury v Madison*[144] (the case marking the origin of judicial review). Alexander Bickel in his book *The least Dangerous Brach*, quotes John Marshall who observed in that case that it would be absurd to "allow those whose power is supposed to be limited to themselves to set the limits."[145]

"The function of a constitution is the grounding of validity."[146] A special tribunal is exclusively empowered to look into certain legislation.[147] Since constitutional rules are product of parliament, ordinary Judges' role being limited to apply the same, examining certain legislation on the constitutional touchstone would be justified only by an extrajudicial

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[141] J. Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?, Law and Philosophy, 21 (2002), 137-64

[142] Jeremy Waldron, The core of the Case against Judicial Review, 115 YALE L.J. (2006), 1346.

[143] Jeremy Waldron, The Crisis of Judicial Review (March 18, 2024). NYU School of Law, Public Law Research Paper No. 24-30, Available at SSRN: https://ssrn.com/abstract=4763558, or http://dx.doi.org/10.2139/ssrn.4763558, last accessed 03.09.2024.

[144] Marbury v Madison 5 U.S. 137 (more) 1 Cranch 137; 2 L. Ed.60;1803

[145] Alexander Bickel, The least Dangerous Brach: Supreme Court at the Bar of Politics, 2nd Ed., (1988), pp. 3-4.

[146] This is the last sentence of Kelsen's 'The Function of a Constitution', in R. Tur and W. Twining (eds.), Essays on Kelsen, 1986 (Oxford: Oxford University Press, 1986), 123- 147, at 147.

[147] Jose`Juan Moreso in "Kelsen on Justifying Judicial Review" available at https:/www.academia.edu/12050745/Kelsen on Justifying Judicial Review, accessed on April 23, 2020.

institution.[148] According to H. Kelsen, creation of such a forum to invalidate certain laws is inevitable as there is (every) possibility of creation of statutes that are contrary to the principled spirit of the constitution.[149] Certain important questions arise here: how would procedural authority be granted to such a forum and by whom to invalidate said laws? Moreover, isn't the absence in this regard quite intentional? Would not the underlying unconstitutional constitutionalism based judicial policy infringe the doctrine of separation of powers?[150]

1.6. The Limited Legality of Unwritten Law.

Customary Law is an important aspect of the legal system in the UK and many other countries. Developed over time, it refers to unwritten rules that have been established based on traditional practices. However, when it comes to Pakistan, the unwritten law and the working of the judiciary seems to be unregulated. However, on a limited scale the approach can be justified for the greater benefit of the general public. For example, in a case, it was held that the interim set-up could not hand over new incumbents to the new/incoming government. It was also said that the same was meant only to run the daily functions which power did not include the recruitment to even already advertised posts.[151]

Similarly, in a case, it was rightly observed by LHC that being transgender was not within the power of any person and PPSC was directed to consider the discriminated

[148] Hans Kelsen, "La garantiejurisdictionnel de la constitution, "Revue de Droit Public et de la Science Politique en France et a` l'etranger, (1928), 197-257, at 197.
[149] Ibid, at 223.
[150] Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 633, 640; *See also* Jon D Michaels, 'Privatization, Constitutional Conservatism, and the Fate of the American Administrative State' in Avihay Dorfman and Alon Harel (eds), Cambridge Handbook of Privatization (CUP 2021) 144; See also, Avihay Dorfman and Alon Harel, The Necessity of Institutional Pluralism (June 27, 2023). Oxford Journal of Legal Studies. Available at SSRN: https://ssrn.com/abstract=4337145 or http://dx.doi.org/10.2139/ssrn.4337145, last accessed 01.09.2024.
[151] Government of Balochistan vs. Abdul Rauf, PLD 2021 SC 313.

candidate.[152] Given the factum that reliance on unwritten law is indispensable, the search for thoughtful symmetry is essential in deciding whether to accept a certain way of constitutional interpretation.[153]

1.6.1. The Reasonability and Correctness, and Unwritten Judicial Policy in Pakistan.

The unconstitutional constitutionalism has generated unwritten judicial policy in Pakistan. The persistent but inconsistent approach by the constitutional courts of Pakistan shows that the powers emanating from unconstitutional constitutionalism based judicial policy degenerate into a mechanism empowering them to cast aside written provisions of the law of the land. The consequent enlargement of judicial over reach, due to conflict of interest has faded veracity of the constitution so as to cause constitutional under reach in the country.[154]

No doubt the Constitutions are made by 'men, not 'gods'[155] but when the constitution is there with provision(s) recognizing concept of amendment, and well defined and explicitly laid down procedure, the question arises whether a Constitutional amendment can be unconstitutional?[156] The question in itself appears to be self -contradictory. However the idea of unconstitutional constitutional amendment is there. In fact when it comes to reply the so called controversial question, what meets the eye is not necessarily true.

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[152] Faizullah v Punjab Public Service Commission PLD 2021 Lahore 284: Transgender Appointment Case. PPSC was also asked in this case to devise policy to give effect to the Transgender Persons (Protection of Rights) Act, 2018.
[153] Cass R. Sunstein, Experiments of Living Constitutionalism (January 13, 2023), at p.6. Forthcoming, Harvard Journal of Law & Public Policy, Harvard Public Law Working Paper No. 23-37, Available at SSRN: https://ssrn.com/abstract=4323957 or http://dx.doi.org/10.2139/ssrn.4323957, last accessed 21.08.2024.
[154] Lucian A. Bebchuk and Barak Medina, ביקורת שיפוטית על הרפורמה המשפטית Judicial Review of the Israeli Legal Reform (August 7, 2023). Tel-Aviv University Law Review Forum, Volume 48, September 2023, Available at SSRN: https://ssrn.com/abstract=4534293, last accessed 02.09.2024.
[155] Hanna Fenichel Pitkin, 'The Idea of a Constitution', 37 J. Legal Educ. (1987), 167.
[156] Gray J. Jacobson, An Unconstitutional Constitution? A Comparative Perspective, (2006), 4 Int'l J. Const. L. 46.

In a Canadian case[157] the SC observed that reasonableness review is methodologically distinct from correctness review.[158] Having said that a particular decision is not reasonable, prima facie, shows that the matter is over. However, the problem starts when the court does not stop there and goes on to decide what it would have made in place of that particular decision as correct. In the understanding of the scholar, this journey from 'what is', to 'what ought to have been', forms the basis of unwritten constitutionalism. The latter in its turn gives birth to unwritten judicial policy.

Dr. M. Munir, in his article has debated whether Judges make or create the law and has stated that this debate is at the center of any discussion about *stare decisis*. His debate centers around the fact that this issue has not been settled for good in Pakistan and the Judges are divided alongside declaratory and creative theories. This division also provides a window, via inconsistency and unreliability, to resort to unwritten law and unconstitutional constitutionalism based judicial policy.[159]

As a firm believer of judiciary's role in a constitutional setting, in his book *Law's Empire,* Ronald Dworkin asserts that just results are ensured of a good government due to existence of concept of judicial review. Therefore, he considers the same as essential for it. He is of the view that the United States would not have been a more just society than it is had its constitutional rights been left to the conscience of majoritarian institutions.[160] Dworkin's much concern is about the moral principles-based best interpretation generating the best results. So according to him, judicial review is crucial for a democracy as the same is not antidemocratic.[161]

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[157] Minister of Citizenship and Immigration vs. Alexander Vavilov, 2019 SCC 65 (Canadian Jurisdiction).
[158] Ibid.
[159] Dr. M. Munir, "Are Judges the Makers or Discoverers of the Law? Theories of Adjudication and Stare Decisis with Special Reference to Pakistan. Also available at: https://ssrn.Com/abstract=1792413, last accessed on October 2, 2020, 31.
[160] Ronald Dworkin, Law's Empire, (Harvard University Press, 1986), 356.
[161] Ronald Dworkin, Freedom's Law: The Moral reading of American Constitution, (Harvard University Press, 1996), 07.

Kelsen does not believe that while invalidating a law, the constitutional court in fact exercises a "negative legislative power" or a "negative act of legislation."[162] The basic premise of contemporary legal constitutionalism focuses on preventing the legislature from passing unconstitutional law. As such, not all the changes made by constitutional courts are inherently undesirable or destructive of a Constitution[163]

Richard H Fallon, Jr., in his article *Legitimacy and the Constitution* says that the legal legitimacy of the constitution depends more on its present sociological acceptance than on (questionable) legality of its formal ratification.[164] It is perhaps due to this reason that Mark Tushnet in his book, *Taking the Constitution Away from the Courts* holds that the constitutional law must not be reckoned as a primary domain of the courts because the Constitution is self-enforcing though political process. He argues that the legislature and executive are best suited to have the Constitution enforced in a better way than the courts do as the latter are outside the political processes.[165]

But we have got to consider what James E Fleming, while reviewing Tushnet, in his article, *Constitution outside the Courts* says, that is, "Tushnet fails adequately to elaborate how legislatures, executives and citizens can conscientiously interpret the constitution."[166] Tabatha Abu El-Haj has summed up the discussion as to constitutional interpretation and has

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[162] Hans Kelsen, "Judicial Review of Legislation: A Comparative Study of Austrian and American Constitution", The Journal of politics, 4 (1942), 183-200, at 187.

[163] Anujay Shrivastava, Mapping 'Unconstitutional Informal Constitutional Changes' by Constitutional Courts — A Comparative Study of Supreme Courts' in India, Bangladesh, Honduras and the USA (December 31, 2022). [2022] 7(1) Comparative Constitutional Law and Administrative Law Journal 42-94, Available at SSRN: https://ssrn.com/abstract=4315730, last accessed 01.09.2024.

[164] Richard H Fallon, Jr., Legitimacy and the Constitution, in Harvaard Law Review, Vol. 118, No. 6 (April, 2005) 1787-1853, also available at https://www.jstor.org/stable/4093285, accessed April 23, 2020.

[165] Mark Tushnet, Taking the Constitution Away from the Courts,(Princeton: Princeton University Press, 1999), available at https://www.degruyter.com/view/title/511917?tab_body=toc, accessed April 24, 2020.

[166] James E Fleming, Constitution Outside the Courts, 86, Cornel L. Rev. 215-249 (2000), at p 217. Also available at https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=3773&context=faculty_scholarship, last accessed April 23, 2020.

concluded that the Court's expertise is the strongest in matters of constitutional interpretation provided the same is explained through textual, structural and doctrinal arguments.[167]

While examining the legitimacy of judicial review, in his book, *Interpretation and Legal Theory,* Andrei Marmor maintains that the same cannot stand in consonance with the principles of democracy. The fact remains that judicial review is equally exposed to the procedural flaws of the legislatures. Andrei finds faults with the assertion that constitution is a legal document, for the same is only assumption based which is even otherwise doubtful.[168] The judicial review, according to Robert Justin Lipkin, is not incongruent with the idea of constitutional democracy.[169] This is an interesting proposition as the judicial review is often a basis of unconstitutional constitutionalism and unwritten judicial policy.

The phenomenon of constitutionalism in Pakistan has been expounded by Paula R. Newberg in her book. She is of the view that the state is reconstituted by judges and lawyers when the constitutions do not do the needful adequately for its citizens in meaningful terms.[170] She asserts that the judiciary should restrain itself from imposing, through verdicts, their will unilaterally.[171] It is an original study of the relationship between state and civil society in Pakistan wherein Paula Newberg demonstrates how, over the course of almost five decades, the courts have influenced the development of its constitutions and state structure. She considers how tensions within the judiciary and between courts and other state institutions, have affected the ways political society views itself, and explores the effects of these debates on the organization of political power.

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[167] Tabatha Abu El-Haj, Linking the Question: Judicial Supremacy as a Matter of Constitutional Interpretation, 89 WASH.U.L Rev., (2012), 1309, at p.1333.

[168] Andrei Marmor, Interpretation and Legal Theory. 2nd ed., (Oregon: Hart Publishing, 2005), 150.

[169] Robert Justin Lipkin, What's Wrong With Judicial Supremacy? What's Right About Judicial Review, Widener Law School. Legal Studies Research paper Series no. 08-85, at p. 09 Available at http://ssrn.com/abstract=1309757, accessed on April 25, 2020. *Also see,* Andrei Marmor, Interpretation and Legal Theory, 2nd Ed., (Oregon: Hart Publishing, 2005), 149.

[170] Paula Newberg, Judging the State: Courts and constitutional Politics in Pakistan, (Cambridge: Cambridge University Press. 1995), 31

[171] Ibid, 250.

1.6.2. Democratic Dispensation and Use of Widespread Judicial Powers by Minority.

In the *case of Qazi Faez Isa J.* it was held that SCP while exercising jurisdiction u/Arts.184 (3) & 187 (1) of the Constitution can issue directions which travel beyond the pleadings of the parties[172] and can also mould the relief in accordance with the facts and the circumstances that come to light during the proceedings. This shows that the use of widespread judicial powers by courts is a mechanism in the hands of minority.

The same idea was advocated by Bruce Ackerman in his essay.[173] He is of the view that the courts act as preservationist institutions under the dualist theory of constitutionalism and as such the democratic dispensation make them an integral part.[174] However it is still to be seen if resorting to unwritten judicial policy (UJP) by the constitutional arbiter is justified in fostering democracy? Also important is to see that does not the same move threaten the very foundations of the same?

In his article, scholars like Richard S. Kay have justified judicial review. Their approach is based upon concept of mixed governments.[175] The first of such agencies i.e., elected officials are directly answerable to public. The other having a fairly long term is composed of unelected officials. Modus operandi of functioning of the two is different when it comes to deal with idea of basic structure.

The oscillation from considering doctrine of basic structure to not considering the same can be seen in certain constitutional cases in recent constitutional history of Pakistan. For example, in a case[176] federation, parliamentary form of government and Islamic provisions were held to be the salient features of the Constitution as echoed through the

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[172] Justice Qazi Faez Isa vs. President of Pakistan, PLD 2022 SC119.
[173] Bruce Ackerman, "Constitutional Politics/Constitutional Law", 99 YALE L.J., 453-547 (1989).
[174] Ibid, at p. 465.
[175] Richard S. Kay, "Democracy, Mixed Government, and Judicial Review" (September 18, 2018). Law under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy (eds. L. Crawford, P. Emerton, & D. Smith, Hart publishing, 2019). Available at SSRN: https://ssrn.com/abstract=3260845, accessed on April, 25. 2020.
[176] Muhmood Khan Achakzai vs. Federation of Pakistan, PLD 1997 SC 426.

Objectives Resolution. The SCP further held that amendments could be made in the Constitution as long as said features are not violated.[177]

1.7. Written Constitutionalism or Illiberal Constitutionalism?

No doubt the recent few years have seen extension in the scope of judicial action to areas that usually fall within the domain of other branches or organs, of government or state, respectively. However, the Superior Judiciary in Pakistan, since its inception, has continuously kept on falling back upon unconstitutional constitutionalism based judicial policy and has been playing its role in shaping the socio-political structure of polity in Pakistan. The superior judiciary in Pakistan has proceeded, under the garb of 'implied mandate', beyond the patent jurisdiction conferred by the Constitution of 1973.

Factually, judiciary has played a pivotal role in legitimizing military dictatorships that marred the struggles at making the country a constitutional democracy. The Asia Report No 160 by International Group on Reforming the Judiciary in Pakistan implies that in the recent history of Pakistan the superior judiciary of the country has rendered itself less answerable and supra-constitutional.[178]

The written law does not speak about the doctrine of necessity but this was asserted in all cases pertaining to abrogation of the constitution.[179] Pakistan was made in the name of Islam which has been declared as state religion with its injunctions as laid down in Quran and Sunna as guiding and governing principles. Sharia upholds the idea of staying by one's

[177] Hamid Khan, Constitutional and political History of Pakistan, 2nd ed., (Karachi: Oxford University Press, 2009), 449.
[178] Reforming the Judiciary in Pakistan, B. Validating Military Interventions, in Asia Report No 160 by International Crisis Group, 16 October 2008, at p 09/42.
[179] i.e., The State vs. Dosso (PLD 1958 SC 533); Miss Asma Jilani vs. Govt. of the Punjab (PLD 1972 SC 139); Begum Nusrat Bhatto vs. The Chief of Army Staff (PLD 1977 SC 657); Syed Zafar Ali Shah vs. Federation of Pakistan (PLD 2000 SC 869); Watan Party vs. Chief Executive (PLD 2003 SC 74); Sindh High Court Bar Association vs. Federation of Pakistan (PLD 2009 SC 879).

words.[180] However, no one from the Bench(s) asked about abiding by the Oath which the Commander(s) of Armed Forces took and which pertains to allegiance as well as protecting the constitution concerned.[181]

1.8. Interpreting By Undemocratic Legitimacy.

The rights are needed in a polity because of 'circumstances of justice',[182] i.e., "the normal conditions under which human cooperation is both possible and necessary."[183] These conditions help promote the idea of rule of law. The judges determine the state of law in a given case who see attempts by politicians to contest or interfere with these powers as undermining the integrity of the legal system.[184] The politicians, on the other hand, associate the idea of rule of law with the right of a legally authorized government to pass the laws according to due formalities and have them obeyed.[185] However, the prime danger to consistency in the legal process comes, according to R. Bellamy, from courts aspiring to make the laws rather than simply applying them.[186]

In his article, Rahim Awan explains that unless a certain legislation or provision of law clearly violates fundamental rights as cherishing in the constitution, the Supreme Court of Pakistan could not strike it down.[187] Thereafter, he concludes that judicial activism becomes a desirable practice due to the very politico-socio-economic environment of

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[180] '*Wa awufo bil ahdi inn al ahda` kana mas`ula*.' (Quran) Sura' Bani Israel, V. 34. See also, Sura'al`Nahal,V. 91, 94; al`Ahzab, V.15; Sura'al`Mominun, V.8.
[181] Bakht Munir, Constitutionalism and Dilemma of Judicial Autonomy in Pakistan: A Critical Analysis. This is his unpublished PhD Law Dissertation. Also available at http://prr.hec.gov.pk/jspui/bitstream/123456789/11445/1/Bakht%20Munir%20Law%202019.pdf, accessed on May 06, 2020, see Chapter 03 (83-141).
[182] John Rawls, A Theory of Justice, Cambridge, MA: Harvard University Press, 1971, 126-130.
[183] Ibid.
[184] Lord Woolf, 'The Rule of Law and a Change in the Constitution', Squire Centenary Lecture, University of Cambridge, 4 March 2004.
[185] Richard Bellamy, "The Rule of Law and the Rule of Persons", in Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy, (Cambridge University Press, 2007), 52.
[186] Ibid.
[187] Muhammad Raheem Awan, "Judicial activism in Pakistan in commercial and constitutional matters: Let justice be done though the heavens fall", Journal of International Criminal Justice Research Volume 1-July, 2014, 22.

Pakistan.[188] Anyhow, as to the democratic credentials of judicial review, Rahim Awan does not give any acceptable answer in his article. The questions as to what actually is meant by violation of fundamental rights, and can the unwritten law be also used by the arbiter for interpreting the same, have been left unanswered by Rahim Awan. Moreover, what has not been brought to lime light is the invincible but ever existing unwritten judicial policy (UJP).

1.9. Significance of Study

That judicial review is a two-pronged weapon has been asserted by Bakht Munir in his dissertation. He says that while carefully guarding its constitutional autonomy judiciary also multiplies its own power. In this way, the trichotomy of powers has been eroded.[189] The said dissertation encapsulate the concept of judicial autonomy vis-a`-vis doctrine of constitutionalism. However, the present research is based upon unwritten unconstitutional constitutionalism with its foundations upon unwritten judicial policy of Pakistan. It also aims to provide a discussion that in the constitutional dispensation of the country how do the other organs of state stand effected and how do they respond to the greater role of judiciary which is founded upon unwritten unconstitutional constitutionalism and unwritten judicial policy (UJP)?

No doubt the recent few years have seen extension in the scope of judicial action to areas that usually fall within the domain of other branches or organs, of government or state, respectively. However, the superior judiciary in Pakistan, since its inception, has continuously kept on falling back upon unconstitutional constitutionalism based judicial policy and has been playing its role in shaping the socio-political structure. Critics like Lord

[188] Ibid, 23.

[189] Bakht Munir, Constitutionalism and Dilemma of Judicial Autonomy in Pakistan: A Critical Analysis. This is his unpublished PhD Law Dissertation, also available at http://prr.hec.gov.pk/jspui/bitstream/123456789/11445/1/Bakht%20Munir%20Law%202019.pdf, accessed on May 06, 2020, 163; *See also*, Mst. Aziza Naeem vs. Government Of Sindh through Secretary, Home Department, Karachi, PLD 2021 Kar 178; Muhammad Irshad vs. Government of Punjab and others, 2020 PCr.LJ 206.

Woolf hold that the courts in fact have remained engaged in determining substantive legal norms rather than giving effect to intent of parliament.[190] By falling back upon such a mechanism and using it as a tool, the superior judiciary in Pakistan has, most often than not, gone, under the garb of 'implied mandate', beyond the patent jurisdiction as conferred by the constitution of 1973. The unconstitutional constitutionalism and unwritten judicial policy in Pakistan have provided vast powers to the superior judiciary thereby tilting the balance of power in its favour as against other branches/ organs of the state. This study aims at exploring the adverse effects associated with such unregulated unwritten constitutionalism and unconstitutional constitutionalism based judicial policy and also aims to suggest steps/processes to regulate this form of parallel constitutionalism that is heterogeneous to the real mandate and true spirit of the constitution of the country as well as to guard against otherwise ensuing illiberal constitutionalism lest the latter should hold its sway in our polity.

1.10. Literature Review

In his article, A *Core Case against Judicial Review*, Jeremy Waldron is of the view that as a method for enforcement of rights, the normal legislative processes, being more democratic than courts, are better suited to tackle constitutional questions in a strong rights-based democracy for reasonable functionality of the latter.[191] Whereas the question whether this mechanism is democratic or otherwise is still open to discussion, another question also needs elaboration that when nothing is clear about (abstract clauses of a) legislation, then instead of referring it to its creator and proceeding to define the intent of legislature, is it not the unwritten law and unconstitutional constitutionalism based judicial policy that forms the basis for action of judiciary?

[190] Lord Woolf of Barnes, Droit Public-English Style, 1995 PUB. L. 57, 65-69.
[191] Jeremy Waldron, The core of the Case against Judicial Review, 115 YALE L.J. (2006), 1346.

It is to be appreciated in this respect JJ Moreso in "*Kelsen on Justifying Judicial Review*" has preferred limiting the role of Judges' to apply law only.[192] If we see it critically the judiciary in Pakistan is doing the same not only in the name of interpretation but also under the garb of unconstitutional constitutionalism. Remarkably, the court's exclusive power of interpretation of the constitution is the basis of unconstitutional constitutionalism which often is based upon unwritten law. The fact remains that judicial review is equally exposed to the procedural flaws of the legislatures. Therefore, the same should not be taken as a flawless process.

Andrei believes that the courts are not well-resourced to deal with rights-discourse due to their institutional constraints as the most constitutional decisions are based upon considerations that are both moral and political.[193] By this he implies that such affairs must be the domain of the ordinary legislatures and democratic institutions because the decisions of the latter are more cautious and representative. When judicial review is reckoned as the only instrument to uphold constitutional rights, the points raised by Andrei should be considered with more seriousness, especially when unwritten constitutionalism is the basis thereof.

The constitutional rights form the basis of legal constitutionalism. Judicial review's supporters postulate that judiciary is not only better equipped to adjudicate rights of the citizenry it also does not suffer from the democratic legislatures' adverse streak. The advocates of political constitutionalism on the other hand, reject this assertion; they repertoire that the rights' based discussion is part of political discourse. In his book *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy,* Richard Bellamy has brought the normative foundations of judicial review as a device to nurture

[192]Jose Juan Moreso in "Kelsen on Justifying Judicial Review" available at https:/www.academia.edu/12050745/Kelsen on Justifying Judicial Review accessed April 23, 2020. *See also*, Hans Kelsen, "La garantiejurisdictionnel de la constitution, "Revue de Droit Public et de la Science Politique en France et a` l'etranger, (1928), 197-257, at 197. *See also*, Hans Kelsen, "Judicial Review of Legislation: A Comparative Study of Austrian and American Constitution", The Journal of politics, 4 (1942), 183-200, at 187.
[193] Andrei Marmor, Interpretation and Legal Theory. 2nd ed., (Oregon: Hart Publishing, 2005), 150.

rights under a derisive criticism.[194] However, discourse on constitutional rights is under challenge which shows that the deliberations on the nature and scope of rights are ever continuing.

Robert Justin Lipkin, while differentiating between American style republicanism and majoritarian model of democracy, in his essay "*What's Wrong With Judicial Supremacy? What's Right About Judicial Review?"* says republicanism introduces system of checks and balances.[195] Robert implies that the judiciary should only inform the citizenry in making their reflective judgments instead of becoming a reflective judgment itself. This is an interesting proposition as the judicial review is often a basis of unconstitutional constitutionalism and unwritten judicial policy. It is evident, however, that the constitutionality of a particular law passed by the legislature or of any executive action cannot be questioned by the courts without constitutional apparatus.

The phenomenon of constitutionalism in Pakistan has been discussed by Paula Newberg in her book *Judging the State: Court and Constitutional Politics in Pakistan*. She has brought forth a valuable spectrum through which we can perceive the judiciary's major role in the polity and explain it keeping in view the functionality grounded upon unconstitutional constitutionalism based judicial policy.

However, the written law does not speak about the doctrine of necessity but this was asserted in all cases pertaining to abrogation of the constitution.[196] Instead, the court has kept on endorsing the same by falling back upon unwritten judicial policy. It continues to exercise

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[194] Richard Bellamy, Political Constitutionalism, 21.

[195] Robert Justin Lipkin, What's Wrong With Judicial Supremacy? What's Right About Judicial Review, Widener Law School. Legal Studies Research paper Series no. 08-85, at p. 09 Available at http://ssrn.com/abstract=1309757, accessed on April 25, 2020. *Also see*, Andrei Marmor, Interpretation and Legal Theory, 2nd Ed., (Oregon: Hart Publishing, 2005), 149.

[196] i.e., The State vs Dosso (PLD 1958 SC 533); Miss Asma Jilani vs Govt. of the Punjab (PLD 1972 SC 139); Begum Nusrat Bhatto vs The Chief of Army Staff (PLD 1977 SC 657); Syed Zafar Ali Shah vs Federation of Pakistan (PLD 2000 SC 869); Watan Party vs Chief Executive (PLD 2003 SC 74); Sindh High Court Bar Association vs Federation of Pakistan (PLD 2009 SC 879).

its greater role on basis of unwritten law under the garb of interpretation of constitution without due regard to polity's perception. The best illustration of greater role of judiciary vis-a-vis perception of citizenry is *State vs. Dosso*[197] wherein the issue of abrogation of Constitution was involved.[198] Relying upon Kelsenian theory of law, the SCP held that a victorious revolution or a successful coup d etat is an internationally recognized legal method of changing a constitution. Strangely enough no reference was made to Islam which is the state religion recognized under the said Constitution.[199] Moreover, the question was not answered that who authorized the court to say, and in which statute was it written, that test of efficacy of a revolution was its success?

No doubt the SCP has wide powers of interpretation of the Constitution but it has not restrained itself from fixing a political question even if it is at the cost of derogation of the idea of trichotomy in the constitution. Regarding political and nonpolitical questions, the SCP in *Muhammad Nawaz Sharif vs. Federation of Pakistan,*[200] held that it was not always easier to differentiate between them and that it must exercise its powers to preserve the Constitution. Such an argument fails to address equally important factum that addressing the political questions also causes under reach of constitution, especially when there is over reach of judiciary.

The ratification of doctrine of basic structure, in fact, serves as raw material for the Superior Courts to exercise power of interpretation thereby empowering them to (often) multiply their powers. This idea was conceived by SCP from Indian jurisprudence.[201] However, in India, this doctrine is said to have glimmered strong deliberations as the same

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[197] PLD 1958 SC 533.
[198] The constitution of 1956.
[199] Ibid.
[200] PLD 1993 SC 473.
[201] Kesavananda Bharati vs. Kerala, A.I.R. 1973 SC 1461 (India); Gandhi vs. Narain, A.I. R. 1975 S.C. 2299; Minerva Mills Ltd. vs. India, A.I.R. 1980 S.C. 1789.

amounts to taking away parliamentary sovereignty.[202] According to various scholars like Pran Chopra, it is considered to be against thrust of democratic disposition.[203]

Again in *Syed Zafar Ali Shah vs. Federation of Pakistan*[204], the SCP held that though military dictator could amend the constitution but not the basic structure of the Constitution. On the other hand, there have been judgments that hold otherwise. Example can be given of *FoP vs. United Sugar Mills Ltd*.[205] This case clarifies that SCP recognized that legislature has upper hand to introduce constitutional amendments. The doctrine of basic structure was not considered in that SCP held that it had no jurisdiction to turn down a constitutional amendment.

In *Jurists Foundation through Chairman vs. Federal Government through Secretary, Ministry of Defence and others*[206]*,* judicial restraint and judicial activism were held to be value-laden concepts. By resolving to honour the authority of elected branches while dealing with constitutional questions the matter was referred to Parliament to legislate the tenure/retirement of COAS despite the fact that the relevant Army Act[207] and Regulations[208] did not provide for the same.

Interestingly, in another case the SCP held that it has no jurisdiction to strike down the constitutional provisions on substantive grounds because the political process is comparably more dispositional for doing the needful.[209] Without surprise the court counted on basic structure doctrine by placing restrictions on the powers of parliament to amend the

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[202] Anil Kalhan, "Gray Zone Constitutionalism and Dilemma of Judicial Independence in Pakistan", Vanderbilt Journal of Transnational Law, Vol. 46 No.1, (2013), 74.
[203] Pran Chopra, The Supreme Court versus the Constitution, A Challenge to Federalism, Sage Publication India Pvt. Ltd. B-42, Panchsheel Enclave New Delhi, (2006) at p.36.
[204] PLD 2000 SC 869.
[205] PLD 1977 SC 397.
[206] PLD 2020 SC 1.
[207] Pakistan Army Act, 1952.
[208] Army Regulations (Rules), 1998.
[209] Hamid Khan, Constitutional and political History of Pakistan, 2nd ed., (Karachi: Oxford University Press, 2009), 501.

Constitution. In fact, the scope of legislature's power to amend was defined by SCP.[210] Cases like this show the underlying functioning of unconstitutional constitutionalism based judicial policy. It also shows that the scope of judiciary's powers has been further extended by falling back upon unwritten law and unwritten judicial policy

1.11. Research Questions /Legal Issues.

The research will be focused on the following issues:

Q. No.1. Are there any hidden axioms in the Pakistani legal system?

Q. No.2. Without considering the established system of sources can unconstitutional constitutionalism based judicial policy be regarded as source of law despite not having been incorporated in an act/ statute of Parliament (Majlis-e- Shoora)?

Q. No.3. Whether any court of country including superior court can be granted any right to apply not only written law but also the unwritten law under so called doctrine of implied (constitutional) mandate?

Q. No.4. Can the Court fill the gaps in the law/ act/statute? If so, is such filling warranted through general principles of law and principles of natural justice or so called unwritten unconstitutional constitutionalism or a judicial policy based thereupon?

Q. No.5. Whether in constitution or any legislation the constitutional courts have been designated as a separate and different class of legislature?

Q. No.6. Whether the constitutional courts have been protected against indiscriminate legislation under the garb of unconstitutional constitutionalism or/and doctrine of implied mandate?

Q. No.7. Are there any express/implied rules or even unwritten principles of law that pertain to resorting to the use of unconstitutional constitutionalism based judicial policy?

[210] PLD 2015 SC 401.

Q. No.8. Is the current mechanism of elevation of judges based upon unwritten law in consonance with mode of appointment of judges/ Qazis in Islam?

1.12. Research Methodology.

This is a doctrinal legal research wherein are taken into consideration certain Constitutional provisions as well as important constitutional case law to critically examine the phenomenon of unwritten law as basis for functionality of constitutional courts in the country. Qualitative research methodology is used as tool to analyze illiberal constitutionalism ensuing from unwritten unconstitutional constitutionalism based judicial policy in Pakistan. On the theoretical basis of legal as well as political constitutionalism, the debate will evaluate the inroads by constitutional judiciary into jurisdictions of other organs of state that is based upon the phenomena rooted in said judicial policy. This has, in its turn, given birth to illiberal constitutionalism in Pakistan. The (Constitutional) case law, of course, would be an inevitable part of this research. In addition to that, landmark books, renowned international journals, law reviews, articles and outcomes, based upon arguments by different scholars, would serve as raw material to come up with logical conclusion in this debate. The research would explore as to how (unwritten) unconstitutional constitutionalism has resulted in a judicial policy in Pakistan. At the end, certain measures and steps would also be suggested to define the four corners of such an unconstitutional constitutionalism based judicial policy so as to diffuse the repercussions emerging out of ensuing illiberal constitutionalism.

1.13. Synoptic Outlook of the Thesis.

Chapter One contains general discussion about idea of unconstitutional constitutionalism and Judicial policy based upon the unwritten law as well as the adverse effects thereof briefly. It discusses the right of interpretation and limits thereupon along with

allied concept of interpreting by undemocratic legitimacy. The deep tension between democratic constitution and unconstitutional constitutional amendment is also discussed. It also includes the idea of limited legality of unwritten law as well as the idea as to choice between written constitutionalism and illiberal constitutionalism.

The Second Chapter pertains to relationship between subordinate and superior judiciary to provide peeps into the working of unconstitutional constitutionalism based judicial policy in the court system of Pakistan. This chapter has been brought in for no other concept than the said inter-se relation best describes the working of the judicial system of the country. Back ground and evolution of judicial system of Pakistan with reference to composition of judiciary in Pakistan vis a vis their legitimate but forelorn expectation and the unwritten judicial policy have been discussed. This chapter also discusses the idea of directions at the cost of written law which are given to the district judiciary and the response of the superior judiciary thereto. It also discusses the concept of the unwritten and contradictory judicial policy of 'contested' cases. Unworkable decisions of the superiors and the precedential authority as well as the unwritten authority of the sub-silensio rule along with per incuriam precedents. Before conclusion this chapter also discusses the concept of right to interpret with reference to fundamental rights and obligation to observe the limits vis-a-vis unwritten judicial policy.

The Third Chapter pertains to expansion of unwritten unconstitutional constitutionalism and judicial policy based thereupon as in vogue in Pakistan. It discusses the sentencing policy, continuing flaws in civil and criminal law and the. The deliberate leftover anomalies in the constitution have also been dilated upon in this chapter. This has been done by resorting to the so called Islamic fabric of the Constitution of the Islamic Republic of Pakistan, 1973 and the principles of policy. The concept of rule by Ordinances has also been discussed in this chapter. The deliberate idea of putting aside the written law in place of

unwritten law has been discussed. This has been done with empirical examples of the military trials of the civilians. The concept of unstructured review power of the Supreme Court has also been dilated upon in this chapter.

Perhaps no other concept than the constitutional doctrines provide a ground to the superior courts for falling back upon unwritten law. Therefore Chapter Four deals with constitutional doctrines' based interpretation as well as the unconstitutional constitutionalism based judicial policy. The doctrine of basic structure of constitution and limits of powers of constitutional courts has been discussed here in addition to doctrine of implied mandate with reference to unwritten law. Doctrine of necessity with reference to unwritten constitutionalism has been discussed. The grundnorm in constitutional law and unwritten approach of the courts are also part of this chapter. This chapter also discusses the concept of the reliance on abstract principles as well as the constrained validity of the doctrines.

The working of unconstitutional constitutionalism based judicial policy finds its best expression in the idea of appointment to judicial seats in Pakistan. The notion of appointment to judicial seats in District and Constitutional Judiciary has been discussed in Chapter Five. It also discusses the appointment and elevation at the time of inception of country and under previous constitutions. The appointment and elevation under the incumbent constitution with reference to pre and post Eighteenth Amendment is also part of this chapter. While briefly discussing the appointment and elevation of judges/ qazis in Islamic law this chapter concludes with idea of limited validity of current mode of elevation.

The hitherto unstructured power of the suo motu cognizance and the judicial policy towards the same has been discussed in Chapter Six under head of 'String Stretching beyond Capacity or Not At All'. This chapter discusses the historical background of the concept. It goes to discuss the nature, scope and form of order u/ a.184 (3) alone with the concept of locus standi in suo motu cases. This chapter discusses the unchecked and inconsistent policy

of taking cognizance and the idea of intrusion into policy affairs with comparative study of other jurisdictions. This chapter concludes with the idea of limited legality of suo motu.

The thesis comes to an end with conclusions and recommendations in Chapter Seven. It discusses the grey areas and provides suggestions to resolve the anomalies. This has been done by giving concept of resorting to, and restoring, the written constitutionalism while holding that there is limited justification of unconstitutional constitutionalism. This also discusses about engaging law schools and law professors. In this regard it has been suggested to revisit elevation mechanism and (re)structure the suo motu initiative. It has also been suggested to revisit the scope of idea of review of judgment by the supreme court of Pakistan. Finally it is concluded that there is unwritten judicial policy at the helm of affairs in the working of the judicial system of Pakistan. Therefore it is suggested that it is high time to determine the precise scope of unwritten judicial policy.

CHAPTER 2: SUBORDINATE VERSUS SUPERIOR JUDICIARY AND UNCONSTITUTIONAL CONSTITUTIONALISM BASED JUDICIAL POLICY

"Without a sense of identity there can be no real struggle."[211]

2.1. INTRODUCTION

There are quite evident influences and inspirations from foreign doctrines, norms and practices in the form of courts structure, their hierarchy and the decision making process in our judicial system. However, courts are now more reliable and developed and people are more inclined to approach them for the resolution of their conflicts. This reflects the greater trust in the system.

This trust is also linked to sufficient information about the composition of the benches.[212] The courts are assigned to conduct trials according to their jurisdiction(s). Supreme Court and High Courts have dual jurisdiction and can also initiate suo moto action in certain matters.

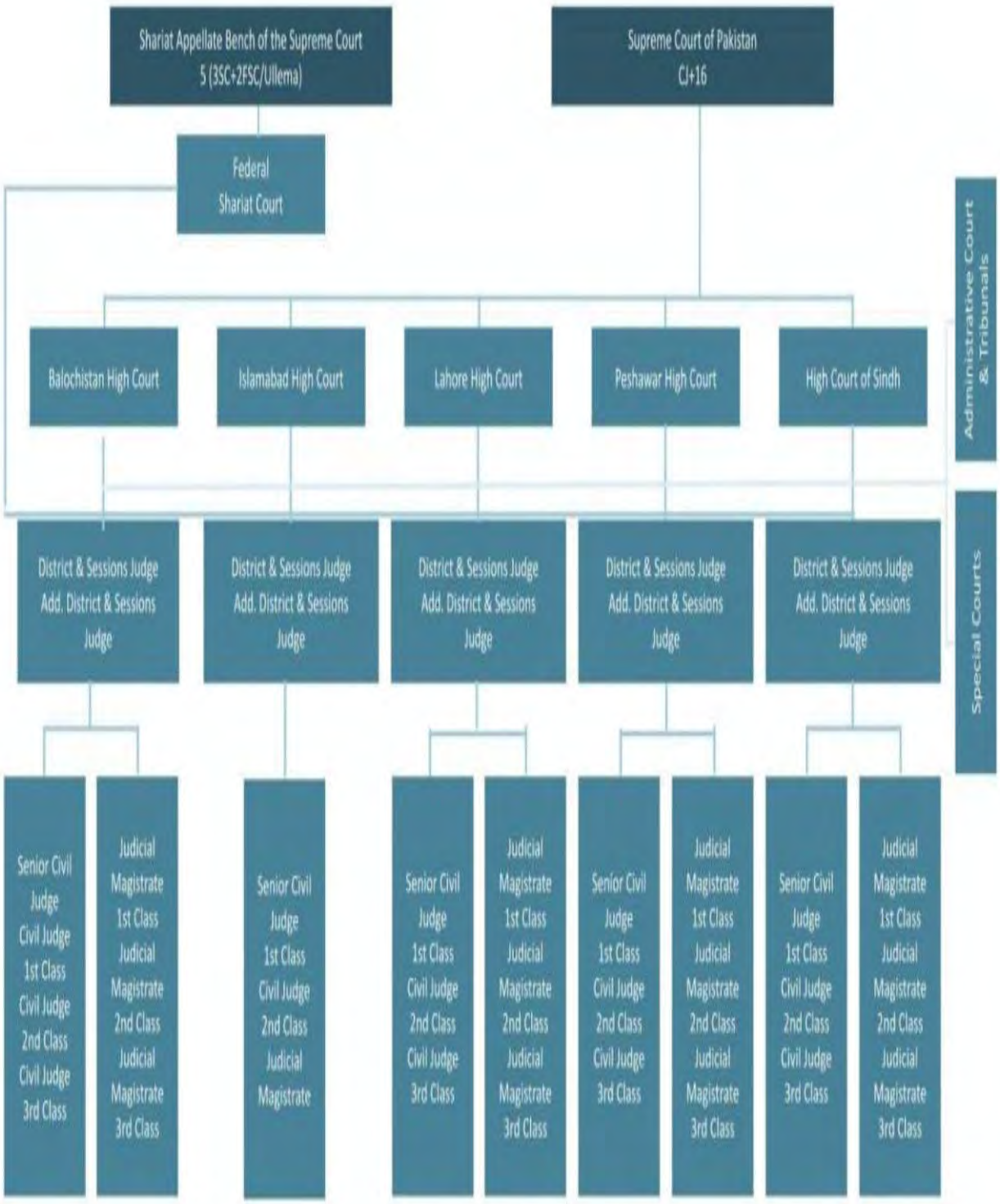
The concept of separation of powers speaks about exclusive roles for the legislature, executive and judiciary to ensure checks and balances. The first two constitutions were abrogated by military dictators and currently the third Constitution of 1973 is in vogue.

2.2. Composition of Judiciary in Pakistan and the Unwritten Judicial Policy.

Judicial Structure of Pakistan with respect to Subordinate Judiciary and the Civil and Criminal Courts at the Grass Root Level.

[211] Paulo Freire, Pedagogy of the Oppressed. The Continuum International Publishing Group Inc. (1968), at p. 68. (English translation published in 1970).
[212] Opeskin, Brian and Roach Anleu, Sharyn, Judicial Diversity in Australia: A Roadmap for Data Collection (September 26, 2023). Available at SSRN: https://ssrn.com/abstract=4583660, last accessed 26.08.2024.

The following diagram shows the judicial Structure of Pakistan:[213]



[213] https://rsilpak.org/resource-bank-pakistans-criminal-justice-system/overview-of-criminal-justice-system-cjs-

In our judicial system, the District Judiciary is also referred to as 'subordinate judiciary' and its judges are called Judicial Officers (Jos). This very addressing conveys the sense of inferiority and of being subservient to someone at the higher pedestal. The discourse and the judgments about independence of judiciary appear to relate and confined only to the superior judiciary exclusively.

2.2.1. Classes, Designations and Jurisdiction of Courts in Pakistani Judiciary.

The Constitution prescribes that for the promotion of social justice and eradication of social evils, the state shall ensure inexpensive and expeditious justice.[214] Regarding composition and jurisdiction of the courts, the Constitution of Pakistan promotes the concept of the "separation of judiciary from executive"[215] and the "independence of judiciary."[216] It also discusses the required qualifications of Judges, mode of appointment etc., and procedure for the removal of judges of the superior courts.

The Supreme Court is the apex court of the country, exercising original,[217] appellate and advisory jurisdiction.[218] The Court also exercises original jurisdiction for the enforcement

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in-pakistan/, last accessed on 19-02-2024. This diagram by Research Society of International Law is not in accordance with the ground realities to certain extent in certain respects. It is to be noted that under District and Sessions Judge in a civil District and Sessions Division there is not only one Additional District and Sessions Judge; rather, there are (always) more than one of them. Similarly the preparatory of this diagram does not seem to be aware of fact that there are no Judicial Magistrates in the District Judiciary belonging to second or third class; rather, the Judicial Magistrate is always Ist class from day one of his/her recruitment. This diagram seems to have been misled, pragmatically speaking, from the bare reading of the relevant provision of the Code of Criminal Procedure Act V of 1898.

[214] Article 37(d) of the Constitution of Islamic Republic of Pakistan, 1973.

[215] Art.175 of the Constitution of the Islamic Republic of Pakistan, 1973. See also, Senior General Manager, Pakistan Railways vs. Muhammad Pervaiz, 2024 PLC (CS) SC 508. Also available at http://www.plsbeta.com/LawOnline/law/SearchResultNotes.asp, last accessed 23.09.2024.

[216] Art. 2-A of the Constitution, ibid. On independence of judiciary *see also*, Competent Authority for Members of The Subordinate Judiciary vs. Rashid Iftikhar Hashmi, 2019 PLC (CS) 733 SC AJK. Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2019SCAJK2008, last accessed 22.09.2024.

[217] Art. 184 of the Constitution, 1973. The Court exercises original jurisdiction in the inter-governmental disputes, be that a dispute between the Federal Government and a provincial government or among provincial governments.

[218] Art. 186 of the Constitution, 1973. The Court has advisory jurisdiction in giving opinions to the Government on a question of law.

of fundamental rights where a question of public importance is involved.[219] It is the final arbiter of law and the Constitution.[220] Its decisions are binding on all other courts.[221] The Court consists of the Chief Justice and so many other Judges appointed by the President.[222] Sometimes, Ad hoc judges are also appointed. A person with 5 years' experience as a Judge of a High Court or 15 years as an advocate of the High Court is eligible to be a Supreme Court Judge. The Court appoints its own staff and determines their terms and conditions of service.[223] The Supreme Court Rules[224] provide procedure for the filing of petitions and appeals before the Court.

The Federal Shariat Court (FSC)[225] Judges are appointed by the President from amongst the serving or retired judges of the Supreme Court or a High Court or from amongst persons possessing the qualifications of a Judge of the High Court. Of the 8 Judges, 3 are to be Ulema who are well versed in Islamic law.[226] The Judges hold office for a period of 3 years and the President may further extend such period. Appeal against its decision lies to the Shariat Appellate Bench of the Supreme Court.[227] The FSC also exercises appellate and revisional jurisdiction in Hudood cases.[228] Its decisions are binding on the High Courts as well as subordinate judiciary.[229]

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[219] Art. 184 (3) of the Constitution, 1973.
[220] The SCP has appellate jurisdiction in civil and criminal matters.
[221] Art. 189 of the Constitution, 1973.
[222] The Supreme Court (number of Judges) Act, 1997 (Act XXXIII of 1997). This Act of Parliament has determined the number of Judges. The number fixed at the moment is 17. The standing practice is that the Chief Justice recommends a list of names to the President and the President selects Judges from the said list.
[223] Supreme Court (Appointment of Officers and Servant and Terms of Service) Rules, 1982. The Rules prescribe the qualification for and mode of appointment and promotion of staff together with penalties and procedure for disciplinary proceeding against them. On terms and conditions of services of judicial nature *see also*, Abdul Kabir Awan, Forest Protection Officer vs. Azad Government of The State Of Jammu and Kashmir, 2021 PLC (CS) N 19 (High Court AJK). Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2021HCAJK15001, last accessed 22.09.2024.
[224] The Supreme Court Rules, 1980.
[225] Art. 203 C of the Constitution, 1973. The Federal Shariat Court comprises of not more than eight (8) Muslim Judges including the Chief Justice.
[226] Art. 203 C (3A) of the Constitution, 1973.
[227] Art. 203 F (3) of the Constitution, *ibid*.
[228] Art. 203 DD of the Constitution, 1973.
[229] Art. 203GG of the Constitution, 1973.

There is one High Court in each Province, and one in the Federal capital, Islamabad.[230] Each High Court consists of a Chief Justice and other judges who are appointed by the President in consultation with the Chief Justice of Pakistan, Governor of the Province and (in case of judge of High Court) with the Chief Justice of the concerned High Court.[231] To be a judge of a High Court the candidate has to have certain qualifications.[232] The High Court's general authority is also laid out in the Constitution of Pakistan, 1973.[233]

The Code of Criminal Procedure, 1898 speaks about different classes of Criminal Courts. It says that besides the High Courts, there shall be two classes of Criminal Courts in Pakistan, namely, Court of Session[234] and of Magistrate. The latter has three classes.[235] The Code also describes Special Magistrates[236] in addition to Benches of Magistrates.[237] The procedure of a criminal trial(s) is set in motion by filing of First Information Report (FIR) as per guidelines set out in the Code.[238] This is followed by an investigation, after which an officer sends a report to the concerned Judicial Magistrate.[239]

Comparatively, Civil Procedure Code[240]only regulates the working of the civil courts but does not create them. District Court exists in every district of each province and has civil

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[230] They are Lahore High Court, Lahore (Punjab); Sindh High Court, Karachi, (Sindh); Peshawar High Court, Peshawar, (Khyber Pakhtunkhwa) and, Islamabad High Court, Islamabad (ICT).
[231] Art. 193 (1) of the Constitution, 1973. The standing practice for the appointment of judges is that initially the Chief Justice of the concerned High Court prepares a list of candidates which is submitted to the President through the Governor of the province and Chief Justice of Pakistan.
[232] Qualifications mentioned for the post of a Judge are 10 years' experience as an advocate of a High Court or 10 years' service as a civil servant including 3 years' experience as a District Judge or 10 years' experience in a judicial office.
[233] Article 199 of the Constitution, 1973.
[234] S. 9 of the Code (Act V of) 1898, speaks about Court of Sessions.
[235] S. 6 of the Code of Criminal Procedure, (Act V of) 1898.
[236] S. 12 and S. 14-A of the Code of Criminal Procedure, (Act V of) 1898.
[237] S. 15 of the Code, ibid.
[238] Section 154 of Cr.P.C, 1898. The criminal justice system spans over three phases: investigation by the police, the trial(s) by Courts, and the execution of Court's verdict by jail authorities.
[239] Cr.P.C. (Act V of) 1898 calls it 'Report' (u/s 173) whereas it is called 'challan' under (Punjab) Police Rules, 1934. Following the submission of police report, the Court starts the proceedings of a trial, which includes the establishment of the charges and the role of the prosecution. After the conclusion of a trial, in reference to the Pakistan Penal Code 1860 (PPC), the Court will award the subsequent punishment if it applies.
[240] The Civil Procedure Code (Act V of 1908).

as well as criminal jurisdiction.[241] Additional District and Sessions Judge(s) are under supervision of concerned District and Session Judges. The Civil Judge initially appointed is assigned the work and cases pertaining to jurisdiction of class III. Dr. Muhammad Munir, while describing the Civil Courts has not mentioned the Court of the Additional District Judge.[242] The Civil Courts Ordinance, 1962 prescribes that there would be three classes of Civil Courts besides the Court of Small Causes.[243] They have different layers of pecuniary[244] and the appellate jurisdictions.[245]

The subordinate judiciary[246] as such, may be broadly divided into two classes i.e., civil[247] and criminal courts.[248] In addition, there also exist other courts and tribunals of civil and criminal nature, created under special laws and enactments.[249] The decisions of such special courts are assailed before higher forums.[250]

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[241] The District and Session Judge has executive and judicial power throughout his district/sessions division. The Sessions Court is also a trial court for heinous offense such as murder, rape (zina), Haraba offences (armed robbery where specific amount of gold and cash is involved). When hearing criminal cases it is called the Sessions Court whereas while hearing civil cases, it is designated as the District Court.

[242] Dr. Muhammad Munir, Precedent in Pakistani Law, Oxford University Press (2014), 249.

[243] S. 3 of the West Pakistan Civil Courts Ordinance, 1962, (II of 1962). They are: the Court of the District Judges, the Court of the Additional District Judges and the Court of the Civil Judge. It then describes the three classes i.e., Civil Judge Class III, Civil Judge Class II and Civil Judge Class I.

[244] S. 7 of the Ordinance, 1962, ibid. The current limit of pecuniary jurisdiction of Civil Judge Class III is one million; of Civil Judge Class II is five million but that of Civil Judge Class I, is unlimited. The jurisdiction of District Judge in original civil suits is unlimited.

[245] The appellate jurisdiction of (Additional)/ District Judge(s) is up to fifty million. If the value exceeds this limit the appeal would be directly filed in the High Court except High Court of Sindh where the original jurisdiction starts from that exceeding thirty lac and District Courts at Karachi exercise jurisdiction up to thirty lac only per Ordinance XXX of 2002, dated 18-09-2022, PLJ 2002 Sindh St. 765. Also see Act III of 2011, PLD 2012 Sindh St. 17 where under the limit of District Courts at Karachi has been enhanced to fifteen million. Beyond that limit the jurisdiction would be exercised by High Court of Sindh.

[246] The provincial governments appoint the civil and criminal judges and their terms and conditions are regulated under the Provincial Civil Servants Acts/Rules. The High Court exercises administrative control over such courts. The civil courts consist of District Judge, Additional District Judge(s) and Civil Judge(s) Class I, II & III. Similarly, the criminal courts comprise of Session Judge, Additional Session Judge(s) and Judicial Magistrate(s) Class I, II & III. Appeal against the decision of civil courts lies with the District Judge and to the High Court, if the value of the suit exceeds specified amount.

[247] Established under the West Pakistan Civil Court Ordinance, 1962. This law (the Ordinance) has repealed all previous laws that is: Punjab Courts Act 1939; Sindh Courts Act 1926; NWFP Regulations 1931 and British Baluchistan Courts Regulation 1939.

[248] Created under the Criminal Procedure Code, 1898.

[249] To name a few: Service Tribunals**;** Income Tax Tribunals**;** Anti-Corruption Courts. Amongst the courts and tribunals mentioned herein before, all the judges must possess the qualifications of the District & Sessions Judges or of having same qualifications.

[250] On composition of Judicial Service in District Judiciary *see*, Mian Shahid Mehmood-II vs. The Registrar, Lahore High Court, Lahore, 2024 PLC (CS) 773 (Punjab-Subordinate-Judicial-Service-Tribunal). Also available

In every city or town there are many Civil Courts and Judicial Magistrates. A Magistrate of first class with the enhanced powers has the jurisdiction to hear all criminal matters other than those which carry the life imprisonment or death penalty (such as attempted murder, dacoity, robbery, extortion etc.) but may only pass a sentence up to 7 years imprisonment.[251]

The Family Courts exercise the jurisdiction under Family Courts Act.[252] These courts have exclusive jurisdiction over matters relating to personal status, marriage, divorce and dowry matters between the spouses.[253] The Guardian Courts deal with custody matters of the minors.[254] The Provincial Government establishes one or more juvenile courts for any local area within its jurisdiction.[255] However, not a single such court has been established separately and instead the High Court(s) have conferred status of the juvenile courts on the existing courts.[256] Besides, there also exist revenue courts.[257] The revenue courts may be classified as the Board of Revenue, the Commissioner, the Collector, the Assistant Collector of the First Grade and Second Grade.

The Constitution authorizes the federal legislature to establish administrative courts and tribunals for dealing with federal subjects.[258] Most of these Courts operate under the

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at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2024PSJST2005, last accessed 23.09.2024.

[251] Under Section 30 Cr.P.C, 1898. If the court thinks the accused deserves more punishment than seven years in jail then he must refer the matter to the higher court. Every Magistrate is allocated a local jurisdiction usually encompassing one or more Police Stations in the area and is designated as Area Magistrate who deals with police applications regarding physical and judicial remand, discharge requests, arrest, proclamations, search warrants and post arrest bail applications. Most Judicial Magistrates may hear civil suits as well if the civil work is also assigned by the District and Sessions Judge concerned.

[252] The West Pakistan Family Courts Act, 1964.

[253] Under the law, ibid, r/wThe West Pakistan Family Court Rules, 1965

[254] Guardian and Wards Act (VIII of 1890). The guardian law primarily deals with welfare of the minors and wards.

[255] In consultation with the Chief Justice of the High Court. *See*, S. 4 of Juvenile Justice System Act, 2018 (Act XXII of 2018).

[256] Per Notification No. SO (R&P) 10-38/08 (P), Dated 08-10-2018 of Home Department of Government of Punjab.

[257] Operating under the West Pakistan Land Revenue Act, 1967.

[258] Minhas Hussain vs. Government of Gilgit Baltistan, 2019 PLC (CS) 1429 (Gilgit-Baltistan Chief Court). Also availbale at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2019G2008, last accessed 22.09.2024.

Ministry of Law and Justice. However, certain courts also operate under other ministries/departments.[259] The Judicial Officers are appointed on deputation from the Judicial Service cadre. However, sometimes the lawyers are also appointed in these special courts.[260]

2.2.2. Background of Appointment in District Judiciary.

There are certain departments[261] and committees[262] that participate in the recruitment process. The legislative history vis-a-vis the unwritten judicial policy with respect to appointment of Civil Judges (CJs), Judicial Magistrates (JMs), Senior Civil Judges (SCJs), Additional District & Sessions Judges (ADSJs) and District & Sessions Judges (DSJs) in the province of Punjab is comprehensively discussed.

In 1962**, i**n pursuance of a Proclamation,[263] certain Rules[264] were made for the initial recruitment to the lowest grade of the Service.[265] This practice continued when in 1977 the advocates were allowed to appear in the examination of ADSJs.[266]

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[259] Such courts include Banking Courts; Special Court of Custom, Taxation and Anti-Corruption; Income Tax (appellate) Tribunal; Insurance Appellate Tribunal; Anti-Terrorist Courts; Consumer Courts; Drug Courts; Anti-Narcotics Courts and Labour Relations Courts etc.

[260] Per Notification No. SOEII(S&GAD) 1-183/2016 (P-1) Dated 12-02-2024 regarding appointment of three lawyers as presiding officers of Drug Courts at Bahawalpur, Multan and Lahore.

[261] The Services and General Administration Department, Government of the Punjab, Civil Secretariat, Lahore (S&GAD) is an administrative Department of the Government of the Punjab exercising its powers & functions under the provisions/Rules for such matters as the determination of the principles of control of the Government servants, including recruitment, conditions of service and discipline; co-ordinate the policy of all departments with respect to the services under their control for purposes of consistency of treatment, and administrative matters relating to Lahore High Court.

The Law & Parliamentary Affairs Department through its Secretary, Government of the Punjab, Civil Secretariat, Lahore is an administrative department of the Government of the Province of the Punjab exercising its powers & functions under the provisions of the Punjab Government Rules of Business 2011 with respect to the matters pertaining to substantive legislation; matters concerning delegated legislation, such as rules, regulations, and bye-laws, and the interpretation of substantive or delegated legislation. It is also significant to note that for the purposes of any proposed legislation, substantive or delegated, the S&GAD is to be consulted in accordance with the provisions contained the Punjab Government Rules of Business 2011.

[262] The Services Rules Committee (SRC), Government of the Punjab, Civil Secretariat, Lahore through its Chairman is duly constituted Committee for scrutiny of proposal of Service Rules/amendments, etc consisting of members from different Departments of the Government of the Punjab.

[263] Presidential Proclamation of the Seventh day of October, 1958.

[264] West Pakistan Civil Service (Judicial Branch) Rules, 1962.

[265] Notification No.S.O.XIX-1-13/594, dated 5th April, 1962.

[266] Notification No.CL-14-2/76, dated 28.09.1977.

In 1994**, i**n pursuance of an Act,[267] Punjab Judicial Service Rules, 1994 were made[268] where under sixty percent (60%) seats of ADSJs were to be filled by promotion from amongst the Civil Judges-cum-Magistrates having ten years' service by selection on merit with due regard to seniority on the recommendation of the Judicial Selection Board.[269]

In 2014**,** the Services Rules Committee (SRC) recommended certain amendments in Rules of 1994[270] whereby Civil Judges were permitted to appear in exam of ADSJs by initial recruitment [271] in that now the appointment to the posts of ADSJs was to be made to the extent of forty percent (40%) of available vacancies through initial recruitment form the members of the Bar or from the Senior Civil Judges and Civil Judges cum Judicial Magistrates with ten years' experience.[272]

Subsequent to the advertisement,[273] a Writ Petition (WP) was filed before the LHC, Lahore[274] seeking interpretation of the permission under Rule 5 (3) (b)[275] of the scope and meaning of ten years' service experience. It was prayed that Rule 5(3) (b) might be set-aside by declaring it discriminatory and ultra vires to the Constitution. The said writ petition was allowed in favour of the Civil Judges cum Judicial Magistrates.[276] Subsequently, few

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[267] The Punjab Civil Servants Act, 1974. *See*, S. 23 thereof.
[268] Notification No.S.O.R.III-2-17/83P, dated 31.03.1994.
[269] As per Rule 5(3) of the Punjab Judicial Service Rules, 1994.
[270] Vide Notification No.SOR-III(S&GAD)2-17/83P1, dated 9th May, 2014.
[271] Per advertisement No.1/2014/RHC/C-1 of LHC, Lahore. The remaining forty percent (40%) was to be by initial recruitment from members of the Bar with ten years standing as Advocates
[272] On resolving controversy of promotion qua seniority via date of appointment of SCJ and ADSJ *see*, Shafiq Ahmad Tanoli, D&SJ vs. The Registrar, PHC, Peshawar, 2020 PLC(CS) 1055 (Service Tribunal For Members Of Subordinate Judiciary Kpk). Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2020SJST2001, last accessed 22.09.2024.
[273] i.e., advertisement No.1/2014/RHC/C-1, *supra*.
[274] Writ Petition No.29163 of 2014 titled as Khurram Khan Virk etc., vs. Province of Punjab etc., 2015 PLC (CS) 485, LHR.
[275] Of the Judicial Service Rules of 1994.
[276] Order dated 28-11-2014 in Writ Petition No.29163 of 2014 titled as Khurram Khan Virk etc., vs. Province of Punjab etc., 2015 PLC (CS) 485, LHR, para 12 per Justice Syed Mansoor Ali Shah J. *See also* para, 10 thereof regarding permission by Administration Committee of LHC, Lahore.

aggrieved lawyers by two writ petitions challenged the amendments in Rule 5(3) and Rule 7 of the Rules of 1994.[277]

The petitioners[278] came to know from the decision of LHC, Lahore[279] that the Administrative Committee (AC) of the LHC, Lahore had made certain recommendations dated 12.11.2013. It also surfaced that on 11 and 12 June, 2010, National Judicial (Policy Making) Committee concluded that High Courts might consider the most deserving Civil Judges to apply for the post of ADSJs against the direct quota.

Reference of decision of National Judicial (Policy Making) Committee dated 11.06.2010 was also given by the Chief Secretary S&GAD in his comments in W.P.No.32289/2014.[280] In the Interim Order dated 27.01.2015 passed in W.P.No.32289/2014, the Registrar was directed to place the matter before the AC of the LHC, Lahore in its meeting on 30.01.2015.[281]

However, on May 13th, 2015, the amendment dated May 9th, 2014 was reversed.[282] On 22.05.2015, the Appointing Authority of LHC, Lahore, advertised appointment of 158 ADSJs

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[277] 1- Writ petition No.32289 of 2014 titled Shazia Izhaar, Advocate High Court etc. vs. Province of the Punjab etc and 2- Writ Petition No.32747 of 2014 titled Amjid Iqbal Khan vs. Government of Punjab. It was prayed that the said amendments allowing the Civil Judges and Senior Civil Judges to appear against the 40% initial recruitment of AD & SJ, from the members of the bar with 10 years standing as an Advocate be declared illegal and the same be struck down. It is also important to note that for adjudication of Writ Petition No.32289 a Full Bench of the Lahore High Court, Lahore, consisting of Mr. Justice Mansoor Ali Shah, Mrs. Justice Ayesha Malik and Mr. Justice Maqbool Mehmood Bajwa was constituted. However, the said Writ Petition was dismissed as withdrawn.

[278] i.e. in Constitutional Petition N.37/2015 titled as Muhammad Afzal Majoka and others vs. Province of the Punjab through Chief Secretary, Government of the Punjab, Civil Secretariat, Lahore, etc., filed before august Supreme Court of Pakistan. This Petition was filed by 85 Civil Judges of Lahore High Court Lahore posted at different stations in the Punjab Province. It is pertinent to mention here that Constitutional Petition N.40/2015 titled as Faisal Mehmood Meer and others was also heard along with the same in addition to Constitutional Petition N.2197/2015 titled as Asmat Ullah Wazir which was filed on Appeal against judjement of Peshawar High Court Peshawar dated 04-06-2015 in W.P. No. 3864-P of 2014.

[279] Dated 28.11.2014 passed in W.P.No.29163/2014. (unreported judgement).

[280] As per para (2) (iv) of the comments, submitted by the Chief Secretary S&GAD in W.P.No.32289/2014 before LHC, Lahore.

[281] Minutes of meeting of Administrative Committee of the Court dated 30.01.2015 are confidential. Therefore, despite scholar's efforts in this regard I could not have access to the same. It is worth noting that the W.P.No.32289/2014 was dismissed as withdrawn on 26.02.2015 on the request of learned counsel for the petitioners to first avail the administrative remedy of approaching the Lahore High Court by filing a representation through proper channel.

[282] Vide Notification No.SOR-III(S&GAD) 2-17/94(P), dated 13th May, 2015.

by initial recruitment[283] wherein advocates, public pleader, attorneys, prosecutors and other eligible government servants were affirmed as eligible by the Appointing Authority.

This is something eerie. Whereas attorneys etc. are eligible for appearance in written exam of ADSJs, the Judicial Officers having requisite experience are not allowed to sit in the exam. This approach is not only based upon unwritten law and unwritten judicial policy but the same is also against principles of Constitution and natural justice.[284]

2.2.3. District Judiciary and the Forlorn Legitimate Expectation.

The journey from Civil Judge Cum Judicial Magistrate leads through SCJ to ADSJ to DSJ. But then the elevation to High Court is blocked. The expectation remains forlorn despite the Constitutional mandate about appointment of Judges of District Judiciary as Judge(s) of High Court(s).[285] The written law is ignored for depriving the Judicial Officers. No doubt that appointment of lawyers is also conceived by the written provision of the same Constitution but only preferring one and ignoring other limb of the written provision of law, can be safely said to be an approach based upon unwritten law.

If members of District Judiciary challenge the discrimination and violation of the written law, the same would fail. For example, in 2015 a Writ Petition was filed by some Civil Judges cum Judicial Magistrates of LHC, Lahore.[286] The petitioners challenged the

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[283] Under Rule 4 of the Punjab Judicial Service Rules, 1994.
[284] Art. 4 and 25 of the Constitution, 1973.
[285] Art. 193 (2) (C) of the Constitution, 1973. On legitimate expectation for promotion *see*, Federation of Pakistan through Secretary, Ministry of National Health Services vs. Jahanzeb, 2023 PLC(CS) SC 336. Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2023S2013, lastr accessed 22.09.2024.
[286] Civil Judges namely 1. Ezet Negeen, 2. Zertashia Nawaz, 3. Saima Tabbasum, 4. Imran Nazir Chauhdhary, 5. Amber Gul Khan, 6. Sadaf Liaqat, 7. Neelam Ashraf, 8. Mughira Munawar, 9. Syed Ahsan Manzoor Shah,10. Sultan Asghar Chattah, 11. Wasim Sajjad, 12. Marzia Ali, 13. Uzma Ahsan, 14. Memona Lashari, 15. Uzma Aslam, 16. Faisal Rasheed Janjua, 17. Fahad Khan, 18. Ahmad Shahzad Gondal, 19. Irfan Rafique, 20. Manzar Hayat and, 21. Faheem Ul Hassan Shah were the Petitioners. 1. Province of the Punjab through the Chief Secretary, Government of the Punjab, Civil Secretariat, Lahore; 2. The Services Rules Committee (SRC) through its Chairman Government of the Punjab, Civil Secretariat, Lahore; 3. Services and General Administration Department Government of the Punjab, Civil Secretariat, Lahore, and 4. Law & Parliamentary Affairs Department Through its Secretary Government of the Punjab, Civil Secretariat, Lahore were the respondents in this Writ Petition under Article 199 Of the Constitution of Islamic Republic of Pakistan, 1973.

vires of (Judicial) Services Rules[287] about initial recruitment of ADSJs. The Petitioners asserted to be members of Civil Service under the Civil Servants Act[288] read with the Judicial Services Rules.[289] However, the same was dismissed where against which a Constitutional Petition was filed before Supreme Court of Pakistan[290] along with two other petitions.[291]

It is to be appreciated that the Constitution of Pakistan guarantees fundamental rights.[292] However, it was held[293] that mere advertisement for a post in newspaper would not confer vested right to agitate the matter. This line of reasoning is hard to follow for the simple reason that the process of recruitment starts with advertisement. On the other hand, the provision empowering the Bar members to violate the equal right of the Judicial Officers to compete on parity principle, is the Sub-Rule (3) of Rule 5.[294]

The method of appointment of ADSJs under said Rule is a clear example of discrimination.[295] If it is asserted that the sub-Rule (3) of Rule 5 is also a written provision of law, even then it cannot be denied that in case of two written provisions of two different enactments, the special one i.e., the Constitution would prevail. Moreover, of these two, is more sacred and all the laws are to be subservient to the Constitution.

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[287] Sub-Rule (3) of Rule 5 of Punjab Judicial Services Rules, 1994.
[288] Punjab Civil Servants Act, 1974,(Act VIII of 1974).
[289] Punjab Judicial Services Rules, 1994.
[290] Constitutional Petition N.37/2015 titled as Muhammad Afzal Majoka and others vs. Province of the Punjab through Chief Secretary, Government of the Punjab, Civil Secretariat, Lahore, etc. This Petition was filed by 85 Civil Judges of Lahore High Court Lahore posted at different stations in the Punjab Province.
[291] Constitutional Petition N.40/2015 of Faisal Mehmood Meer and others was also heard along with Constitutional Petition N.37/2015 in addition to Constitutional Petition N.2197/2015 of Asmat Ullah Wazir which was filed on appeal against judgement of Peshawar High Court Peshawar dated 04-06-2015 in W.P. No. 3864-P of 2014.
[292] *See*, Preamble of the Constitution of the Islamic Republic of Pakistan, 1973: "Therein shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality;….."
[293] On 08-10-2015 by full Bench of SCP which comprised Anwar Zaheer Jamali, Amir Hani Muslim and Umar Ata Bandial, JJ.
[294] Of the Punjab Judicial Services 1994.
[295] *See*, Articles 25 & 27) of the Constitution, 1973.

In *Mushtaq Ahmad Mohal* case, the Supreme Court discouraged against quota.[296] Therefore, the quota of the members of Bar for ADSJs, under Sub Rule (3) of Rule 5, by limiting the opportunities and legitimate expectation[297] of JOs to be considered for promotion, is clearly in violation of Articles 2-A, 25 & 27 of the Constitution, 1973.

Moreover, if this practice is allowed to continue, the fundamental right of life[298] of the Judicial Officers would continue to be infringed because the inhibition against deprivation of right of life extends to all those facilities by which life is enjoyed.[299] Even otherwise if the said Rule of 1994 is allowed to exist as such, the same would tantamount to impurity in administration of subordinate Judiciary; therefore, the same is liable to struck down as *ultra vires* to the Constitution. Said provision also creates an impediment to the guaranteed right of Civil Judges to be considered for promotion as ADSJs, then as DSJs and finally as Judges of the High Court. Therefore, such actions are also likely to affect good governance.[300]

There is a Latin maxim of natural Justice that no one should be prejudiced by act of authorities.[301] Since the rights of serving Judicial Officers are prejudicially affected, therefore, if this provision of Rules of 1994 is reconsidered, it would assure them that their fundamental rights would be protected. It would also enhance their belief in the law and written judicial policy.

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[296] Mushtaq Ahmad Mohal and others vs.The Honourable Lahore High Court, Lahore and others. (Constitution Petition No. 2 of 1996, decided on 31st March, 1997). 1997 SCMR 1043, in para 28.
[297] For discussion on 'legitimate expectation' see Chapter 7 in Part II of "Judicial Review of Administrative Action" by de Smith Woolf and Jawell, Sweet & Maxwell, 9th Edn. (2023), ISBN: 9780414111745.
[298] Article 9 of Constitution of 1973.
[299] In the matter of Contempt Proceedings against Chief Secretary, Sindh and Others, 2014 PLC (CS) SC 82, para 118, per Amir Hani Muslim, J. *See also*, Tariq Aziz ud Din case in Human Rights Cases Nos. 8340, 9504-G, 13936-G, 13635-P & 14306-G to 14309-G of 2009, decided on 28th April, 2010. 2011 PLC (C.S) 1130, in para 34. Also reported/cited as 2010 SCMR 1301.
[300] Case of Contempt Proceedings against Chief Secretary, Sindh (2013 SCMR 1752), para 144, at page 1855. It was also held as: "We also hold that all the re-employment/rehiring of the retired Civil/Government Servants under the impugned instruments being violative of the Constitution are declared nullity." (page 1868).
[301] i.e., Actus curiae nieminem gravabit (It is a well settled principle of administration and of natural Justice that an act of any authority should prejudice no one).

2.3. Directions at the Cost of Written Law.

The phenomena of directions can be dealt with under the following heads.

2.3.1. Directions for Compliance.

The Supreme Court of Pakistan (SCP) in tried to address the fundamental issues of the Criminal Justice System in Pakistan and passed fifteen directions including establishing a Universal Access Number (UAN) in police departments.[302] The order was not the first of its kind. Earlier in Suo Motu Case No.3 of 2001 the SCP had passed a similar order in which thirteen directions were passed,[303] mostly about jail reforms.

Besides the SCP, international non-governmental organizations (INGOs) have also attempted to study and examine the criminal justice system of Pakistan.[304] Likewise, eight different approaches have been followed with respect to legal and judicial reforms.[305]

The question of issuing directions to the executive also came before the Indian Supreme Court in *T.P. George* case. It was said that the direction to increase the age of superannuation is really the function of the legislature or the executive.[306]

Such directions are also addressed to the District Judiciary for the ultimate objective of reforming the collapsing justice system.[307] However, they are based upon unwritten law. In

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[302] Haider Ali and another vs. the DPO Chakwal, 2015 SCMR 1724. The Order was passed in the Civil Petition No. 1282 of 2014 on 4th September, 2015. The case was heard by three Membered Bench of the Supreme Court of Pakistan namely the then Chief Justice Jawwad S. Khawaja, Justice Dost Muhammad and Justice Qazi Faez Isa. The Order was authored by the Chief Justice Jawwad S. Khawaja himself. The Court also ordered the Attorney General of Pakistan to provide a report on the constitutionality of the new police laws passed by the Sindh and Balochistan provinces, in which, the Police Act, 1861 has been revived.

[303]PLD 2001 SC 1041. The First Annual Report of Pakistan Law Commission 2001 reproduced the Order passed by the Honourable Supreme Court of Pakistan in Suo Motu Case No.3 of 2001 on 10th August, 2001.The case was heard by two membered Bench comprising the then Chief Justice Irshad Hassan Khan and Justice Sh. Riaz Ahmed. The Order was authored by the then Chief Justice Irshad Ilassan Khan himself.

[304] Reforming the Criminal Justice System of Pakistan (Asia Report No. 196) by the International Crisis Group. Available at https://www.crisisgroup.org/asia/south-asia/pakistan/reforming-pakistan-s-criminal-justice-system, last accessed on 30-01-2024.

[305] Approaches to Legal and Judicial Reform in Pakistan: Post Colonial Inertia and the Paucity of Imagination in Times of Turmoil and Change, by Siddique, Osama (2011). Also available at http://lums.edu.pk/docs/dprc/DPRC-WP4-Siddique.pdf, last accessed on 30-01-2024.

[306] T.P. George vs. State of Kerala. MANU/SC/0662/1992; 1992 Supp. (3) SCC 191, (vide para 6).

[307]Muhammad Umar vs. State. PLD 2021 LHR 586. Available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2021L47, last accessed 22.09.2024.

the West, three most common bases for classification of large body of knowledge in the field of criminal justice have been identified.[308]

When the case of Pakistan is evaluated it appears that the classification has been organized around the components involved in the criminal justice system. Pakistan's criminal justice system has never been examined in the broader framework with respect to underlying theoretical assumptions and that is why the same has failed to yield results.[309]

2.3.2. Directions to District Judiciary and Not For Themselves.

The Constitution of Pakistan says that the State shall ensure free and expeditious justice. The broader underlying sociological framework of consensus conflict necessitates the analysis of the unwritten judicial policy in Pakistan. The responsibility of the State appears, however, confined to the District Judiciary.[310] The directions to the District Judiciary are, broadly speaking, of two types: general and special directions.

Under first category, the High Court directs to decide certain category of cases or cases falling within a certain time slot qua their institution date. The second category of cases is that whereby a special class of cases is directed to be decided. In both the cases certain time limit is given within which they the courts are to decide the same.

However, these directions tend to move away from the written law. This phenomenon takes place in two respects. Firstly, no provision of written law expressly empowers the higher courts to pass directions to the courts to decide certain category of cases in accordance

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[308] Conceptualizing Criminal Justice Theory, by Thomas Bernard and Robin Shepard Engel. Justice Quarterly, Vol. 18. No.1. March 2001, Academy of Criminal Justice Sciences, at P. 2. An earlier version of this paper was presented at the annual meetings of the American Society of Criminology, held in Toronto on November 17-20, 1999: "The three most common bases for classification are (1) type of organization within the criminal justice system (e.g., police, courts, corrections); (2) underlying theoretical assumptions (e.g., consensus, conflict); and (3) predictor variables (e.g., individual, situational, organizational, community)."

[309] Kamran Adil of Police Service of Pakistan, Theoratical Framework For Reforming The Criminal Justice System In Pakistan, PLD 2016 Journal Section, P. 13, at P.14. Also available at http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2016J13 , last accessed on 30-01-2024.

[310] Mst. Sabiha Laeeq vs. District and Sessions Judge West Islamabad, 2020 CLC 1282 ISLAMABAD. Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2020I223, last accessed 22.09.2024.

with their directions. Secondly, the non-compliance of these directions entails issuance of explanations and show cause notices. Both these aspects show that they are the result of approach of the superior Courts based upon a judicial policy founded upon unwritten law.

The approach of the superior courts towards non-compliance of their directions is not consistent either. On the one hand, the fear of earning an adverse Annual Confidential Report (ACR)/ Performance evaluation report (PER) at the hands of concerned District and Sessions Judge would be also in the making. This would have repercussions on JOs' job for the strictures would be placed on their Confidential Report (CR) Dossier. The ensuing mental agony, in its turn, would have adverse effects on the performance of the judge.

On the other hand, there are judicial opinions of the same superior courts on the fall out aspects of these directions. An appeal[311] was filed against judgment and decree dated 24.05.2016 passed by Banking Court No. III, Lahore whereby recovery suit was dismissed.[312] The Court set aside the order of closure of evidence as well as the decree passed thereupon.[313] An oxymoronic observation was made and regarding paucity of time qua the direction to conclude the trial, it was observed the appellants had been condemned unheard and that the trial Court should have requested for extension of time qua direction to decide the case before the date fixed.[314] On the other hand, there are judgements to the effect that an order issuing direction to a subordinate court to decide the matter within a particular timeframe is not mandatory and is directory only.[315]

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[311] R.F.A. No. 897 of 2016, u/s. 22 of Financial Institutions (Recovery of Finances) Ordinance, 2001 was heard on 1st June, 2022 by Lahore High Court, Lahore.
[312] The right was closed under Order XVII, rule 3, C.P.C, (Act V of) 1908.
[313] under Order XVII, Rule 3, C.P.C., 1908.
[314] Pervaiz Afzal and others vs. Sheikh Hussain Ali and another, 1994 CLC 951, LHR, para 5. *See also*, National Bank of Pakistan through Branch Manager vs. Data Laboratories (pvt.) Ltd. Through Chief Executive and 3 others, 2022 C L D 1374 (Lhr.), para 7 at P. 1380, per Muzamil Akhtar Shabbir J. This appeal was accepted and judgment and decree dated 30-05-1992 of learned trial court was set aside, and the suit was remanded to the trial Court for disposal afresh.
[315] Shams-ud-Din vs. Muhammad Sharif, PLD 1996 Lahore 210. It was again observed that where the trial court concerned finds that consistent with the demands of law and justice it was not possible to decide the case within the directed time limit, a request could be made for extension of time. In this case also the Court set aside the orders and remanded the matter to the trial court for decision afresh.

These cases of the superior courts show that their approach towards direction to the other courts is contradictory.[316] It is because in the absence of written law on the point, the direction on the administrative side cannot have precedence on the judicial aspect of the lis before the court. Secondly, the same is directed to the Court and is not addressed to the litigants, one of whom always wants to protract the case. However, without keeping in view the objective reality and written record of the trial court proceedings, the superior courts proceed on the subjective criteria.[317]

In sharp contrast to seeking compliance of their directions from the District Judiciary, approach of the superior judiciary sometimes appears to be really peculiar when it comes to ensure expeditious disposal of cases at their hands. In case of *Muhammad Iqbal*, it transpired that the concerned person had already died before the acquittal was handed down by SCP.[318]

It is to be noted that the law favours the decision on merits rather than technicalities. So many judgements of superior courts can be referred on this point.[319] Moreover, it is settled by now that every procedure that promotes the administration of justice is permissible unless

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[316] For debate on structural pressures operating on judges, *see*, Lee Marsons, Crossing the t's and dotting the i's: The turn to procedural rigour in judicial review (December 6, 2022). Lee Marsons, 'Crossing the t's and dotting the i's: The turn to procedural rigour in judicial review' [2023] (January) Public Law 29-38., Available at SSRN: https://ssrn.com/abstract=4295071 or http://dx.doi.org/10.2139/ssrn.4295071, last accessed 30.08.2024.

[317] For example, it was said that the judges of DB were sure that if opportunity to the defaulting party (plaintiff) had been given for some more days, "the plaintiff would have produced the witnesses as had been done on two earlier dates of hearing." *See*, Shams-ud-Din case, PLD 1996 Lahore 210, para 8.

[318] Cr.P.L.A 821-L/2014 titled as Muhammad Iqbal vs State. The notice was issued in this case on 06-04-2024 by Assistant Registrar of Supreme Court. *Similarly*, the case of Mazhar Hussain is also worth quoting here. The Supreme Court finally exonerated him after he was convicted of murder and handed down the death sentence by a Sessions Court in April 2004. But the acquittal had come two years too late as he had died of coronary failure about two years ago while still in incarceration. *See*, https://tribune.com.pk/story/1195917/sc-acquits-man-two-years-death, last accessed on 18-04-2024.

[319] Zohra Bibi and another vs. Haji Sultan Mehmood and others, (2018 SCMR 762); Mst. Bundi Begum vs. Munshi Khan and others, (PLD 2004 SC 154); Muhammad Anwar Khan and 5 others vs. Ch. Riaz Ahmad and 5 others, (PLD 2002 SC 491); Evacuee Trust Property Board through Assistant Director Evacuee Trust Properties, Gujrat vs. Muhammad Siddique alias Bandoo and others, (1995 SCMR 1748); Mir Mazar vs. Azim, (PLD 1993 SC 332); Master Musa Khan and 3 others vs. Abdul Haque and another, (1993 SCMR 1304); Manager, Jammu and Kashmir, State Property in Pakistan vs. Khuda Yar and another, (PLD 1975 SC 678) and Imtiaz Ahmad vs. Ghulam Ali and others,(PLD 1963 SC 382).

it is expressly prohibited.[320] However, the passing of direction on the administrative side at the cost of written law is only an interference with the independence of trial court.

The approach of the courts from the neighbouring jurisdiction, on the other hand, appears to be more logical and convincing. For example, in a case it was held that "it is well settled that a mere direction of the Supreme Court without laying down any principle of law is not a precedent."[321] Such an approach, even otherwise, appears to be in accordance with the written dictates of the law.

2.3.3. Judgment Writing Time and Adjournments: Directions at the Cost of Written Law.

"Access to Judgments carries with it access to law and access to justice, for lawyers, judges, academics and litigants, and all others interested in or concerned with any aspect of the law."[322]

It is clear that without judgements no justice system worthy of the name can exist.[323] It is therefore necessary that judgements are readily accessible[324] for the same is of

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[320] H.M. Saya and Co., Karachi vs. Wazir Ali Industries Ltd. Karachi and another, (PLD 1969 SC 65); Muhammad Ijaz Ahmad Chaudhary vs. Mumtaz Ahmad Tarrar and others, (2016 SCMR 1) and Zahid Zaman Khan and others vs. Khan Afsar and others,(PLD 2016 SC 409).

[321] State of U.P. and Ors. vs. Jeet S. Bisht and Ors.,MANU/SC/7702/2007, para 21 per Markandey Katju, J.

[322] Lord Neuberger, President of the Supreme Court of U.K., 'No Judgment - No Justice.' It was a First Annual British and Irish Legal Information Institute (Bailii) Lecture delivered on 20-11-2012. See, PLD 2014 Journal Section P.11, at P. 12. Also available at http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2014J11, last accessed on 20-01-2024.

[323] *See*, e.g., Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 HARV. L. REV. 1787 passim (2005) (discussing various concepts of legitimacy in the context of constitutional law). *See also*, Bassok, Or, Legitimacy without Legality (September 12, 2022). 68(1) St. Louis U. L.J. 47 (2023), Available at SSRN: https://ssrn.com/abstract=4217070 or http://dx.doi.org/10.2139/ssrn.4217070, last accessed 29.09.2024.

[324] Lord Neuberger, President of the Supreme Court of U.K., 'No Judgment - No Justice.' It was a First Annual British and Irish Legal Information Institute (Bailii) Lecture delivered on 20-11-2012. PLD 2014 Journal Section P.11, at P. 12. Also available at http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2014J11, last accessed on 20-01-2024.

fundamental importance.[325] Lord Neuberger explains that the duty to provide a reasoned judgment is a well-established function "of due process, and therefore of justice."[326]

A Judge has the duty to decide the cases expeditiously because of a known jurisprudential concept.[327] Such delay jeopardizes the rule of 'audi alteram partem' which is a salutary rule of natural justice[328] and postulates that if someone has been denied appropriate opportunity of hearing, any verdict given against such party shall not be laudable.[329]

Under Civil Procedure Code (C.P.C), 1908 a judgment has to be given by the Trial Court within 30 days, after the conclusion of hearing.[330] If the same is not done, the approach of the superior courts is that "disciplinary action could be taken against a judge who was found habitual in delaying his judgments beyond such period."[331]

On the other hand, if in the first appeal, only the oral submissions are addressed and no fresh evidence is being recorded, subject to additional evidence,[332] the announcement of decision has to be done by the judge within reasonable time. This reasonable time, according

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[325] R vs. Sussex Justices, Ex parte McCarthy [1924] 1 KB 256 at 259,' "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

[326] Flannery vs. Halifax Estate Agencies Ltd. [2000] 1 WLR 377, at 381-2.

[327]That is 'justice delayed is justice denied.' *See*, John Gasana and Margaret W. Gachihi and Herbert Misigo Amatsimbi and Etienne Ruvebana, Justice Delayed is Justice Denied: Examining the Role of Access to Justice Bureaus in Ensuring Timely Conflict Resolution in Rwanda. Available at SSRN: https://ssrn.com/abstract=4258656 or http://dx.doi.org/10.2139/ssrn.4258656, last accessed 29.08.2024.

[328] H.W.R. Wade & C.F. Forsyth, Administrative Law, 7th Ed. Oxford University Press (1994), at pp.391, 392. See also: Colquhoun vs. Brooks 21 QBD 52, at p.62; Humphrey's Executor vs. United States (1935) 295 US 602; Y.G. Shivakumar vs. B.M. Vijaya Shankar (1992) 2 SCC 207; AIR 1992 SC 952; Ram Krishna Verma v State of U.P. (1992) 2 SCC 620; AIR 1992 SC 1888; Indian Explosive Ltd. (Fertiliser Division), Panki, Kanpur v State of Uttar Pradesh (1981) 2 Lab LJ 159; Union of India v W.N. Chadha 1993 Cr LJ 859; 1993 Supp (4) SCC 260; AIR 1993 SC 1082; S.R. Bhupeshkar v Secretary, Selection Committee, Sarbarmathi Hostel, Kilpauk, Medical College Hostel Campus, Madras AIR 1995 Mad 383; Biswa Ranjan Sahoo v Sushanta Kumar Dinda (1996) 5 SCC 365, AIR 1996 SC 2552; Maneka Gandhi v Union of India AIR 1978 SC 597; (1978) 1 SCC 248. Mohinder Singh Gill vs. The Chief Election Commissioner, AIR 1978 SC 851; (1978) 1 SCC 405; Nazir Ahmad Panhwar vs. Government of Sindh through Chief Secretary Sindh 2009 PLC (CS) 161; Abdul Haque Indhar and others vs. Province of Sindh through Secretary Forest, Fisheries and Livestock Department, Karachi and 3 others 2000 SCMR 907 and Abdul Waheed and another vs. Secretary, Ministry of Culture, Sports, Tourism and Youth Affairs, Islamabad and another 2002 SCMR 769.

[329] Union of India vs. Tulsiram Patel, AIR 1985 SC 1416, at p.1460. See also: Qaim Hussain vs. Anjuman Islamia (PLD 1974 Lahore 346), at page 34.

[330] O.XX, R. 1(2), C.P.C, 1908. See also, Messrs MFMY Industries Ltd. and others vs Federation of Pakistan through Ministry of Commerce and others, 2015 S C M R 1550, at P. 1570, Per Mian Saqib Nisar, J.

[331] Messrs MFMY Industries Ltd. and others vs. Federation of Pakistan through Ministry of Commerce and others, 2015 S C M R 1550, at P. 1570, Per Mian Saqib Nisar, J.

[332] Order XLI, Rule 27, C.P.C. (Act V of) 1908.

to SCP, should not be more than 45 days as per case of *M/S MFMY Industries*. It is to be noted that the SCP enlarged the margin of 15 days (i.e. 30 days + 15 days) on the ground that the same Judges also act as Sessions Judges and have to conduct Session trials.[333]

However, when it comes to writing of judgment by the superior courts which, per chance, are bound to follow the same Civil Procedure Code of 1908, SCP reckoned 90 days' time for proper enunciation of law.[334] Thereby it read into the Constitution of Pakistan 1973 something which is neither written nor implied therein.[335]

It is noteworthy that as compared to disciplinary action against the Judge belonging to the District Judiciary, no such 'penalty' is determined for the Judges of the superior courts. However, the CPC, 1908 and also the Constitution of Pakistan, 1973 do not differentiate the Judges of all the tiers for writing judgments. Therefore, finding a meaning into any law not in there is nothing but venturing on the basis of unwritten law. The enunciation of law, on the other hand, within the meaning of Art, 189 or 201 of the Constitution, 1973 has always to be on the basis of written law and not the unwritten law.[336]

As such, the impression appears that the Judges of the Supreme Court need, for enunciating the law, more than 90 days' time. This means that to settle a proposition or coming up within a 'principle of law', the judges at the apex level need more than a quarter of a year. On the other hand, the mandate of the Judges' Code of Conduct,[337] as per their

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[333] Messrs MFMY Industries Ltd. and others vs Federation of Pakistan through Ministry of Commerce and others, 2015 SCMR 1550, at P. 1570, Per Mian Saqib Nisar, J.

[334] Article 201 of the Constitution of the Islamic Republic of Pakistan, 1973: "Subject to Article 189, any decision of a High Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all courts subordinate to it."

[335] Aqa Raza and Ghayur Alam, Theoretical Underpinnings of Copyright and Design Laws Post-Krishika Lulla and Godrej Sara Lee: Decisions of the Supreme Court of India (November 2022). Aqa Raza and Ghayur Alam, 'Theoretical Underpinnings of Copyright and Design Laws Post-Krishika Lulla and Godrej Sara Lee: Decisions of the Supreme Court of India' (2022) 27 (6) Journal of Intellectual Property Rights 434–441., Available at SSRN: https://ssrn.com/abstract=4337992, last accessed 31.08.2024.

[336] Messrs MFMY Industries Ltd. and others vs. Federation of Pakistan through Ministry of Commerce and others, 2015 S C M R 1550, para 8 at P. 1575.

[337] Code Of Conduct To Be Observed By Judges Of The Supreme Court Of Pakistan And Of The High Courts Of Pakistan (Supreme Judicial Council) Notification, Islamabad, the 2nd September, 2009. *See*, Art. X: "In this judicial work a Judge shall take all steps to decide cases within the shortest time, controlling effectively efforts made to prevent early disposal of cases and make every endeavor to minimize suffering of litigants by deciding

Oath,[338] provides for the shortest time to decide the cases. As such, the judges who do not decide cases quickly[339] to write timely judgments may be guilty of misconduct.

There is no concept of adjourning a case in the District Judiciary without fixing next date. On the other hand, in the High Courts and the apex Court, the cases are 'left over' which expression is as subliminal as illogical. The litigating parties must know as to what is next date of hearing of their case(s). However, in the superior courts the cases are adjourned 'date in office.'

Furthermore, the judicial policy of passing such directions is again not prudent as the superior courts pass these specific directions in specific cases which manifests that they favour the party which is rich enough to afford the fee of the counsel to appear in High Court or Supreme Court to seek such a direction. Secondly, this also shows that the superior courts fail to exercise their appellate powers.

In strong contradiction to the requirement from the District Judiciary is the unwritten approach of the superior courts of the country which is closely related to the concept of writing and signing the reserved judgement.

In a case,[340] the concerned office of Supreme Court noted that the petitions[341] were belatedly filed. The petitioner stated that they were filed within the prescribed period of sixty days,[342] as confirmed by the record. After they were uploaded on LHC website, the fresh applications for certified copies of the judgments were filed. Consequently, the noting was made by the AOC[343] on the impugned judgments.[344] The Blue Slip date confirmed that the impugned judgments were signed and announced on 31 March 2022. The SCP

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cases expeditiously through proper written judgments. A Judge who is unmindful or indifferent towards this aspect of his duty is not faithful to his work, which is a grave fault."

[338] As per Sched. III of the Constitution, 1973.

[339] Article 37 of the Constitution, 1973.

[340] Commissioner Inland Revenue, Lahore vs. Sui Northern Gas Pipeline Limited, Lahore, PLD 2023 SC 241.

[341] Civil Petition Nos. 1854-L, 1855-L, 1899-L and 1900-L of 2022

[342] Order XIII of the Supreme Court Rules, 1980.

[343] Administrative Office Coordinator of the High Court.

[344] i.e., 'Blue Slip verified 31/3/22 AOC'. It is to be noted that that blue slips are issued in respect of judgments which have been approved for reporting, as per practice of LHC, Lahore.

observed that considerable court time was wasted to ascertain the date of impugned judgments due to practice of not inscribing the date when the judgment was written[345]

The Code of Civil Procedure, 1908 (the Code) defines what a *judgment* is. It says that "judgment means the statement given by the Judge of the grounds of a decree or order."[346] Under Supreme Court Rules, an appeal is filed within thirty days.[347] As such, it would greatly facilitate matters if all judgments bore the actual date they are written,[348] signed and pronounced.[349] However, it would also be interesting to recall the observation in the case of *Mst. Ghulam Fatima* wherein it was said: "I have deliberately reopened the case so far as the arguments are concerned, because after such a long time the learned Judge cannot be expected to remember the arguments put forward and he may either not have any notes or may have destroyed the notes."[350]

In case of *Bashir Ahmad Khan*, delay even of a little over three months was not considered to be objectionable as its explanation was available.[351] Reliance in this case was placed upon a DB authority of LHC.[352] In the case of *Walayat Hussain*, there was delay of 08 months in announcing the judgment and it was held to be appropriate to rehear the

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[345] Commissioner Inland Revenue, Lahore vs Sui Northern Gas Pipeline Limited, Lahore, PLD 2023 SC 241, at 242-243.

[346] Section 2(9) of the Code of Civil Procedure, 1908. On the question of whether a judgment is required to be dated when it is written, signed and pronounced different provisions of the Code come to mind including Order XX, rule 1(2): "judgment should be pronounced in open Court, either at once or on some future day in respect whereof notice shall be given to the parties or their advocates"; Order XX, R. 3: "the judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it"; Order XX, R. 7: "The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree."; Order XLI, R. 30: "The court shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders", and Order XLI, R. 31: the judgment "shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein." There are other provisions of the Supreme Court Rules, 1980 as well.

[347] Order XII Rule 2 of the Supreme Court Rules, 1980. *See also*, Order XIII of the Supreme Court Rules, 1980, *and*, Order XXVI rule 2 of the Supreme Court Rules, 1980.

[348] Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973: 'Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan'.

[349] Mr. Abdul Razzaq DSJ/ the (then) Additional Registrar Judicial of SCP gave this suggestion. *See*, PLD 2023 SC 241, supra. *See also*, Order X, rule 1 of the Supreme Court Rules, 1980.

[350] Fatima vs. Sardara, (PLD 1956 (WP) Lahore 474), concluding para of the judgement, per Kaikaus, J.

[351] Bashir Ahmed Khan vs. Mumtaz Begum, (1979 CLC 114), para 6 of the Second Appellate Order.

[352] S. K. Lodhi vs. Claims Commissioner, Pakistan and others, (PLD 1968 Lah. 1311).

case.[353] However, there are also adverse consequences when there is inordinate delay in writing judgments as pointed out in the case of *Muhammad Ovais*.[354]

The unwritten policy of rehearing, and especially re-fixing the case after reserving it for a long time should not be seen with surprise as there have been findings by the superior courts to the effect that short order/order of the court was in fact the judgment of the Court and was valid even in the absence of supporting reasons.[355] However, the principles of natural justice are easy to proclaim, but their precise extent is far less easy to define.[356]

2.4. The Unwritten Judicial Policy of "Contested" Cases versus Codified Alternate Dispute Resolution Regime.

The written law of the land requires the State to ensure expeditious and speedy justice.[357] This seems to be in accordance with the requirement of a welfare State. The Islam has been declared as the State religion.[358] The clear and written directions of the law and the dictates of Sharia' give the concept of peace in society for ensuring which the concept of justice system is there. The purpose in either case is the decision of cases of the litigants coming to courts of law.

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[353] Walayat Hussain v Muhammad Hanif, (1989 MLD 1012). Dacca High Court, while dealing with identical circumstances, took a very serious notice of delay in the announcement of judgment in case of M.K. Zaman vs. Matiar Rahman, (1969 P.Cr.L.J. 361 Dacca). *See*, concluding para 4 of the judgement.

[354] Muhammad Ovais v Federation of Pakistan, 2007 SCMR 1587, p. 1590.

[355] District Bar Association, Rawalpindi and others vs Deration of Pakistan and others, PLD 2015 SC 401, para 71, per Sh. Azmat saeed, J.

[356] Paul Jackson, Natural Justice. Sweet & Maxwell. 2nd Edn. (1979), page 1. See also: Swadeshi Cotton Mills vs. Union of India AIR 1981 SC 818; Maclean vs. The Workers' Union [1929] 1 Ch 602; *Green vs. Blake*, Case No. 18-2247-EFM (D. Kan. Jun. 15, 2020); (1981) 51 Comp Cas 210 SC; (1981) 2 SCR 533; Abbott vs. Sullivan [1952] 1 KB 189; [1952] 1 All ER 226; [1929] 1 Ch 602; [1929] All ER Rep 468; [1948] IR 242; Denning, Lord: Constitutional Developments in Britian, as published in' The Fourteenth Amendment', [A Century in American Law and Life], Centennial Volume, Edited by Bernard Schwartz), New York University Press (1970), at p. 14.; Suresh Koshy George vs. University of Kerala AIR 1969 SC 198; (1968) 2 SCWR 117; Union of India v Col. J.N. Sinha AIR 1971 SC 40; (1971) 1 SCR 791; A.K. Kraipak v Union of India AIR 1970 SC 150; (1970) 1 SCR 457; (1969) 2 SCC 262; (1969) 1 SCA .605; (1981) 2 SCR 533; (1981) 51 Comp CAs 210 (SC), J.Mahapatra & Co. vs. State of Orissa AIR 1984 SC 1572; Smt. Maneka Gandhi v Union of India AIR 1978 SC 597; (1978) 1 SCC 248; AIR 1957 SC 232; Mohinder Singh Gill v The Chief Election Commissioner, New Delhi AIR 1978 SC 851; (1978) 1 SCC 405; S.L. Kapoor v Jagmohan AIR 1981 SC 136; (1980) 4 SCC 379; Union of India v Tulsiram Patel AIR 1985 SC 1416 and (1985) 3 SCC 398.

[357] Art. 37 of the Constitution of the Islamic Republic of Pakistan, 1973.

[358] Art. 2 of the Constitution of the Islamic Republic of Pakistan, 1973.

No court system requires the decision of the cases in a certain way as per policy of the authorities save in accordance with the written law and the Constitution. However, in case of Pakistani judicial system there appears an unwritten judicial policy to decide the cases in a certain way to assess the performance of the judges. This may be reckoned as unwritten in that the relevant enactments do not require that modus operandi of concluding the cases according to said requirement. Pakistani judicial diaspora is aligned instead alongside the policy of disposal of "contested" cases and giving judgments accordingly.

The requirement of contested cases deals with not deciding the case if it is going to be disposed of otherwise. It is, however, not to say that the courts are not to decide the cases which are not "contested". The fact remains that all other decisions come under uncontested category.

Broadly speaking, the disposal of cases at the level of District Judiciary is of two types: contested and uncontested. The "contested" cases are not those which are contested by the parties and where both the parties rebut the stances of the rivals. Factually, they are contested but are not reckoned as "contested" because the High Courts have devised criteria to consider a case as a "contested" one. Any other case, not fulfilling the criteria, is considered as "uncontested".

To be "contested" a case must be one, on the civil side, where the issues have been framed[359] and where evidence is led by both the parties and is also cross examined respectively. If a party contests his case by filing Written Statement[360] in response to Plaint,[361] then disappears and is proceeded against ex parte,[362] *in toto* compliance of CPC, 1908 by the concerned Civil Court would not earn him performance unit of contested case; rather, such a case would be reckoned as uncontested.

[359] Under Order XIV of Code of Civil Procedure, 1908 (Act V of 1908).
[360] Under Order VIII of Code, ibid.
[361] Under Order VI of Code, ibid.
[362] Under Order IX R 2 of Code, ibid.

If in response to a plaint, the defendant appears and files an application for rejection of plaint by contesting the plaintiff's suit and the court, after hearing arguments from both sides rejects the plaint on any of the four grounds,[363] even then the case fails to be categorized as a contested case. The approach of the High Courts extends so as to even not consider a case as a contested one where the defendant after cross examining the plaintiff and his witnesses disappears, or does not produce his evidence.

On the criminal side, the case would be a contested case where the evidence is recorded after framing of charge[364] and the judgement is passed after recording of statement of accused.[365] Similarly, if a petition is filed for acquittal on the ground that charge is groundless or there is no probability of conviction of the accused,[366] the case even then would fail to be contested one despite being contested by both the sides.

This aspect of the policy of contested cases also has a flipside to the amicable solution of the cases and is against the written law of the land on the point. When two parties fight, it is advisable to amicably bring them to terms and resolve the controversy in the Quranic sense.[367]

The custom and traditions of the subcontinent also show the concept of *Panchayet* and *Jirga.* Both of them are reformative in nature and are based upon ideas of arbitration and mediation under the written law.[368] The purpose is to resolve the controversy by bringing the parties to the negotiating table. The law of arbitration etc. is the written law passed by the legislature.[369]

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[363] Under Order VII R 11 of Code, ibid.
[364] S 233 of Criminal Procedure Code, 1898 (Act V of 1898).
[365] S. 342 of the Code, ibid.
[366] S. 249-A of the Code, ibid.
[367] Al-Quran, (49:10) and (4:114).
[368] R. 22.49; R. 22.59; R. 24.5 (2) of Police Rules, 1934. Also see APPENDIX No. 23-42 pertaining to Police Register No. X, of the Rules, 1934. APPENDIX No. 24-5(2) pertaining to cognizable offences triable by the *Panchayat* under Rules 1934 also discusses about this concept. CHAPTER XXVII, Prosecution and Court Duties, under Police Rules, 1934 also speaks about this concept of *Panchayat*.
[369] Alternate Dispute Resolution Act 2017, (Act XX of 2017). This Act is applicable to the extent of ICT, Islamabad, only.

It is to be appreciated that the legal regime speaks about the disposal of cases on basis of compromise and compound ability of the offences.[370] All of them come up with the concepts of reconciliation. Arbitration is also referred to and is promoted in the Quran.[371] The Sunna'h of the Prophet (SAW) also speaks about reconciliation.[372] As such, here has been recognized the need to take some of the load off the courts who are already overburdened. This has been done by introducing mediation domain.[373]

The practical approach of the High Courts on the ground, however, does not synchronise with the written law. The requirement from the District Judiciary, of disposal of cases by resorting to the "contested" policy on the part of the High Courts and National Judicial (Policy Making) Committee appears nothing but an unwritten and unconstitutional approach which is as ambiguous as it is contradictory. The regime of arbitration fails and the litigation goes on along the traditional lines, at the cost of energy, time and efforts of all the stake holders. The end result is as expected; the regime fails to ensure the inexpensive and expeditious justice to the real stake holder i.e., the litigant for whom this judicial system has been made by the State under the Constitution.[374]

Comparatively speaking, no such direction is given to higher courts' judges by the superior judiciary. This policy of contested cases also has another contradictory aspect to their extent. As mentioned in the above lines,[375] the Sindh High Court at Karachi deals with civil cases; however, there is no concept of contested cases when it comes to elevation of the concerned Judge of said High Court to SCP. This again shows the unwritten policy of contested cases is per se contradictory.

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[370] *See for example*, S.89-A (Act V of 1908). *See also*, S.10 (3) and S. 12 of West Pakistan Family Courts Act, 1964, (Act XXXV of 1964) respectively speak about pre and post-trial reconciliation between spouses by the court. *Also see*, Column No. 6 of Schedule 1 and S. 345, of Criminal Procedure Code, 1898 (Act V of 1898), *and* Art. 163 of Qanoon e Shahadat Order, 1984. (QSO). (P.O. No. X of 1984).
[371] Quran, 4:35.
[372] Abu Dawood, 4273.
[373] Alternate Dispute Resolution Act 2017, (Act XX of 2017). This Act is applicable to the extent of ICT, Islamabad, only.
[374] Art. 37 of the Constitution, 1973.
[375] Under head 2.3, supra.

2.5. Precedent and Un-implementable Decisions.

The pehnomena can be discussed as follows.

2.5.1. The Making of Decisions.

The final decision is of the highest court which also takes up the matter in revision or writ etc. The precedent in Common Law is an important source much like the statute, "if not, possibly, more."[376] So, it seems imperative to discuss briefly but comprehensively how the decision making is done by the superior courts. As regards making decisions for upholding the Rule of Law, the approach varies within different common law systems.[377]

It is worth noting that neither the Constitution of the USA nor the British law on the subject[378] provides for judicial decisions to be based on majority opinion. However, the Constitution of Pakistan accounts for judicial majoritarian rule.[379]

In the case of *Justice Qazi Faez Isa* dealt with under Art.209, a ten membered Bench quashed the presidential reference. In that case three members of the Bench had dissented with the majority.[380] Difference of opinion amongst the judges is not beyond comprehension; therefore, the concept of majority and dissenting opinions finds mentioning

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[376] Dr. Muhammad Munir, Precedent in Pakistani Law, Oxford University Press (2014), xxxi. See also, Rupert Cross and J.W. Harris, Precedent in English Law, Clarendon Press, Oxford 1991, reprinted 2004. Michael Zander, The Law Making Process, Butterworths, London, 1999. (The sixth edition was published by the same author in 2005). A.K. Brohi, Fundamental Law of Pakistan, Din Muhammad Press, Karachi, 1958, pp. 538-9. Precedent in Law, Laurence Goldstein (ed.), Clarendon Press, Oxford, 1987, reprinted 1991. Also see, Peter Wesely-Smith, Theories of Adjudication and Status of Stare Decisis, in Precedent in Law, Laurence Goldstein (ed.), Clarendon Press, Oxford, 1987, reprinted 1991. Edgar Bodenheimer, Jurisprudence: The Philosophy and Method of the Law, Harvard University Press, 1974, 2nd edn. Reprinted by Universal Book Traders, New Delhi, 1996.

[377] Mehak Zaraq Bari and Syed Akbar Hussain, , Judicial Decisions: Majoritarianism Rule, PLD 2021 Journal Section, P. 05. Also available at http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2021J5, last accessed on 24-01-2024.

[378] British Judicature Act, 1873.

[379] Art.209 (4) of the Constitution of 1973.

[380] i.e., Justice Maqbool Baqar, Justice Mansoor Ali Shah, and Justice Yahya Afridi.

in the Rules.[381] Additionally, there are several other laws in Pakistan that provide for judicial majority.[382]

Analysis of Pakistani case-law shows that the Supreme Court over rules previous precedents even if they were made by a full court. For example, in the Suo Motu case in the Constitution Petition No.127 of 2012, a full Bench of 5 judges overruled *Accountant General Sindh and others*[383] that was a full majority decision of three judges. Similarly, a full majority decision of *Tikka Iqbal Muhammad Khan's* Case,[384] which was affirmed by a thirteen membered SCP Bench, was overruled by a full majority decision in *Sindh High Court Bar Association.*[385]

2.5.2. The Unstructured Precedential Ensnare.

Regarding disadvantages of *stare decisis*, Dr. Muhammad Munir has said that even a wrong decision might be trailed by the lower courts.[386] They might flow not so much from the implementable decisions as from the wishful thinking of the Judge. Incidents in form of case law abound in Pakistan.

In a case, Bailiff recovered five persons from the police custody. While the electronic copy of their arrest was in the record, the manual copy was not maintained.[387]

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[381] Order X of Supreme Court Rules, 1980

[382] RR. 6(1) and 6(2) of Order XLVII of Civil Procedure Code (C.P.C.) 1908. *See also*, Section 98 of the C.P.C., 1908.

[383] Accountant General Sindh and others vs. Ahmed Ali U. Qureshi and others, PLD 2008 SC 522.

[384] Tikka Iqbal Muhammad Khan's case.The short order dated 23rd November, 2007 passed in Tikka Iqbal Muhammad Khan's case, reported as PLD 2008 SC 6, the detailed reasons in support of the aforesaid short order, reported as PLD 2008 SC 178, judgment dated 15th February, 2008 passed in Civil Review Petition No.7 of 2008 in the said case, reported as PLD 2008 SC 615.

[385] Sindh High Court Bar Association vs. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad, (PLD 2009 Supreme Court 879). Jermy Waldron observes that the rule of majority decision in courts is taken for granted. *See*, Jermy Waldron, A Majority In The Lifeboat, Boston University Law Review, Vol. 90:1043, at p. 1052. Also available at https://www.bu.edu/law/journals-archive/bulr/documents/waldron.pdf, last accessed on 21-01-2024. *See also*, Hannah Arendt, On Revolution, [1963, New York: Viking]. Penguin Publishing Group. ISBN 978-1-101-66264-9, at P. 164. Also available at https://www.jstor.org/stable/23955552, last accessed on 21-01-2024.

[386] Dr. Muhammad Munir, Precedent in Pakistani Law, Oxford University Press (2014), at p. xxxi.

[387] Rule 22.3 and 22.4, Chapter XXII of Police Rules, 1934.

The Court directed the Inspector General of Police, Punjab (IGP) to strictly follow the rule to guard against misdeeds otherwise committed by police officials.[388] In another case the court directed to ensure maintaining manual *Daily Diary* as per previous practice.[389]

These cases again show that use of IT in justice sector is the ultimate reality of the time and appear to be based on empirical reasons. It would be worthwhile to refer to Richard A. Posner who has opined that "much of law's social value lies not in resolving disputes but in preventing them by laying down the rules that people live by."[390]

The courts were constrained to make a choice between legitimizing the use of IT or to prevent abuse of police powers and protect fundamental rights.[391] The answer to public policy question of IT based Policing and justice sector appears to be in affirmative but it is also important to ensure that all the constitutional safeguards are implemented in letter and spirit.[392]

The best case on the point as to approach of the superior judiciary appears to be a murder reference along with allied appeals.[393] The court observed that admittedly

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[388] Muhammad Tariq vs. SHO Police Station Saddar Jampur, PLJ 2019 Cr.C. 131, at 135. On IT based policing, *see also*, Khatoon Bibi vs. The State, 2021 P.Cr.L.J 593 Lah.

[389] Mst. Asmat Parveen vs. the State (PLD 2021 Lhr. 105).

[390] Richard A. Posner, 'Neotraditionalism', Part V, Chapter 14 in, The Problems of Jurisprudence. Harvard University Press (1993). ISBN 9780674708761, p.423.

[391] Kamran Adil, Adjudicating IT Based Policing: Case of Maintaining Digital Daily Diary, PLD 2022 p.4. Also available at http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2022J4, last accessed on 21-01-2024. It is also to be noted that on 15th December, 2017, an amendment in Rule 22.4 of Police Rules was introduced in the wake of requirements of the modern era of information technology (IT).

[392] In 2017, through amendments in the Punjab Police Rules, efforts were made to digitalise the daily diary register by allowing the maintenance of the daily diary register both digitally and manually. However, this did not synchronise with the criminal justice system as there were often discrepancies between the two forms. This became a moot point in many judgements, such as Muhammad Tariq vs. SHO Police Station Saddar Jampur (PLJ 2019 Cr.C. 131), Khatoon Bibi vs. the State (2021 P.Cr.L.J 593 Lah), and Mst. Asmat Parveen v the State (PLD 2021 Lahore 105). Lately, in January 2024, Justice Ali Zia Bajwa of the Lahore High Court examined the issue in Jamila Bibi v the SHO (Writ Petition No. 49470-H/23) and held that the preference would be given to the manual record in case of any discrepancy between the two forms. To address this issue, the Punjab Police Rules were amended.

[393] Murder Reference No.164 of 2018, (The State versus Ali Ahsan alias Sunny) ; Crl. Appeal No.193932 of 2018, (Ali Ahsan alias Sunny versus The State, etc.) and Crl. Appeal No.206624 of 2018, (Muhammad Khalid versus The State, etc.) decided on 22-05-2023 by LHC, Lahore. An unreported judgement published in 2024 Pcr.L.J 82 (Lhr).

statement u/s.154 Cr.P.C.[394] of the complainant was incorporated in the register for FIR's. However, it was observed that the prosecution had not produced the said Computer Operator to whom dictation was given by *Moharrar* who had typed the FIR.

It is to be noted that in these circumstances, the scribe may be a person who signed it as a token of its correctness. Whole world has moved on to IT and AI but we are still pacing around traditional parameters of criminal investigation. If we go by the rationale of the learned Judge as to consideration of non-production of computer operator by the Prosecution, then extending the line of reasoning, the complainant, who brings a typed application to register the case, will also be required to produce the said computer operator as a witness.

The reply to any objection, as to conflict between manual and digital modes, is met when one resorts to Electronic Transaction Laws[395] as well as Qanoon-a- Shahadat Order' 1984.[396] Many judgements are available on the point that electric generated documents even need no signatures.[397] So, it is safe to say that the approach of the learned Judge was based upon some unwritten law.

Recently, the Government of Punjab, through office of Provincial Police Officer (PPO) has introduced[398] amendments in Chapter 22 pertaining to Investigation, in the Police Rules, 1934.[399]

The fact remains that there is a fine line difference between 'implementable' and 'wishful thinking'. This analysis in no way seeks to condone the decision itself. It was in fact, not good in law for being not based on the written law, or to be more specific, it proceeded on

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[394] This S.154, of Code of Criminal Procedure, 1898 (Cr.P.C), as in vogue in Pakistan, pertains to registration of First Information Report (FIR).
[395] Electronic Transaction Ordinance (LI of 2002).
[396] Article 164 of QSO,(X of 1984).
[397] United Bank Limited vs. Riaz Hussain, 2018 CLD 1476 (LHR), para 4. See also, Mst. Tasleem Fatima and others vs. Bank of Punjab and others, 2017 CLD 552 (LHR); The Bank of Punjab through, Branch/Chief Manager vs. Messrs Khan Unique Developers Pvt. Ltd. through Chief Executive Officer and 9 others, 2016 CLD 29 (LHR) and Habib Metropolitan Bank Limited vs. Mian Abdul Jabbar Gihlin, 2013 CLD 88(LHR).
[398] Under Art.112, of Police Order 2002, (C.E.O. No. 22 of 2002).
[399] Per Government of the Punjab, Provincial Police Officer Notification No. 14/exec-III, dated 02-01-2024. The amendments have been introduced in Rule 22.3, 22.45, 22.48, Rule 24.1, 24.5, Rule 25.18, 25.23, 25.53 and Rule 25.54 of Police Rules 1934, to bring the investigation rules in line with IT policing.

the basis of an unwritten law and judicial policy of keeping modern devices and gadgets at arms' length.

Recently, in a judgment the Islamabad High Court held that the marriage of girls below the age of 18 is illegal.[400] The decision sought to do away with much of the ambiguity regarding the age of marriage, despite the fact that existing societal norms appear to encourage such ambiguity, if not downright approve of it. This was done without regard to the personal law applicable.

In relation to building violations across Karachi the SCP directed the demolition of Nasla Towers and Tejori Heights. Various authorities acted in implementation of such orders. However, just before his retirement, Justice Gulzar had passed another order as well, which had directed the razing of a Masjid, alleged to have been constructed illegally.[401] However, when there is an attempt to implement the law against the way of the wind, there is always the risk of non-implementation. The US Supreme Court faced similar issues in the *Board of Education* case, in which racial segregation was supposedly banished from public schools but it failed to be properly implemented for years.[402]

These decisions are illustrations of judicial decision-making which were not made to justify an existing ground reality; rather, they serve as a judicial application of mind to transform the circumstances through the reasoning of the court.

2.5.3. The Unwritten Authority: The Sub-Silensio Rule.

What is the principle of 'Sub Silentio' and what are its effects on the precedential value of a judgment? Is the unwritten authority not-taken-up and decided at all is binding on

[400] Mumtaz Bibi vs. Qasim and others, (PLD 2022 Isl. 228), para 39. See also Ahmed Bilal vs Khurram Javed, PLD 2023 Islamabad 83.
[401] Niamatullah Khan Advocate vs. Federation of Pakistan, 2022 SCMR 133, para 21. See also, Niamatullah Khan Advocate vs. Federation of Pakistan, 2022 SCMR 152; Niamatullah Khan Advocate vs. Federation of Pakistan, 2022 SCMR 171, *and*, Niamatullah Khan Advocate vs. Federation of Pakistan, 2022 SCMR 219.
[402] Brown vs. Board of Education case, 347 U.S. 483 (1954). When Brown's case and four other cases related to school segregation first came before the Supreme Court in 1952, the Court combined them into a single case under the name Brown vs. Board of Education of Topeka.

the lower courts.[403] These questions would be dealt with under this heading. In this regard it is worthwhile to appreciate whether such a decision is a `declared law'.[404] It is immaterial whether the Supreme Court gave the decision ex-parte or after a hearing. "But no law is laid down when a point is disposed of on the concession."[405] However, if the Supreme Court is satisfied it can take a different view notwithstanding the earlier judgments.[406]

The concept of sub-silentio has been explained in these words: "A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind."[407]

In *Sindh High Court Bar Association*[408] it was observed that there was no doubt that in *Iqbal Tikka's* case[409] the earlier decision of the larger Bench was noted but it was neither followed nor any attempt was made to distinguish it and in fact a counter view was taken to the one adopted by larger Bench in *Syed Zafar Ali Shah's* case.[410] Therefore, judgment of *Iqbal Tikka's* case was held to be liable to be reviewed.[411]

Regarding principle of 'Sub-Silentio', it is to be appreciated that when the particular point of law involved in the decision is not perceived by the Court or present to its mind, any

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[403] Haim Ginott (né Ginzburg; August 5, 1922 – November 4, 1973) was a school teacher, a child psychologist and psychotherapist and a parent educator. He said: "Teachers are expected to reach unattainable goals with inadequate tools. The miracle is that at times they accomplish this impossible task."

[404] Art.189 of the Constitution, 1973.

[405] Lakshmi Shanker Srivastava vs. State (Delhi Administration), (AIR 1979 SC 451), para 34. Also available at https://indiankanoon.org/doc/1252938/, last accessed on 27-08-2023.

[406] Lily Thomas etc. vs. Union of India and others, (AIR 2000 SC 1650), para 57.

[407] Professor P.J. Fitzgerald, Salmond on Jurisprudence, 12th edn. at p. 153. For debate on sub silentio and per incuriam being exception to precedent *see also*, Chaudhary Parvez Elahi vs. Deputy Speaker, Provincial Assembly of Punjab, Lahore, PLD 2023 SC 539. Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2023S44, last accessed 22.09.2024.

[408] Sindh High Court Bar Association vs. Federation of Pakistan, P L D 2009 Supreme Court 879. See para 35, per Ch. Ijaz Ahmed, J.

[409] Tikka Iqbal Muhammad Khan's case. The short order dated 23rd November, 2007 passed in Tikka Iqbal Muhammad Khan's case, was reported as PLD 2008 SC 6, the detailed reasons in support of the aforesaid short order, was reported as PLD 2008 SC 178, judgment dated 15th February, 2008 passed in Civil Review Petition No.7 of 2008 in the said case, was reported as PLD 2008 SC 615.

[410] Sindh High Court Bar Association vs. Federation of Pakistan, PLD 2009 Supreme Court 879, para 36. On point of decision given in ignorance or forgetfulness, see also: Nirmal Jeet Kaur's case [2004 SCC 558, at 565 para 21]; Cassell and Co. Ltd.'s case (LR 1972 AC 1027 at 1107, 1113, 1131); Watson's case [AELR 1947 (2) 193, at 196]; Morelle Ltd.'s case [LR 1955 QB 379, at 380], Elmer Ltd.'s case [Weekly Law Reports 1988 (3) 867 at 875 and 878]; Bristol Aeroplane Co.'s case [AELR 1944 (2) 293, at page 294] and Morelle Ltd.'s case [AELR 1955 (1) 708].

[411] Reliance was also made on State of Bihar's case, (AIR 1955 SC 661, at 672).

declaration cannot be deemed to be "declaration of law or authority of a general nature binding as a precedent."[412] It is a settled principle of law that "a judgment rendered on concession given by a counsel is not a law declared."[413]

It is to be noted that the Indian Supreme Court also decided a similar issue in *Gurnam Kaur* and held that "it is axiomatic that when a direction or order is made by consent of the parties, the Court does not adjudicate upon the rights of the parties nor lay down any principle."[414] However, the task of finding the principle is very difficult because without an investigation into the facts it could not be assumed whether a similar direction must or ought to be made.[415] It is to be appreciated that "mere casual expressions carry no weight at all."[416]

In a case about if a direction had been implemented, it was held to be obligatory for the Government to do the needful.[417] Similarly, the Bench was not persuaded to agree with the contention that the view point portrayed in paragraphs 193 and 194 of the judgment of *Khan Asfandyar Wali's* case[418] was mere expression of view and could be treated as suggestions.[419]

Decisions per incuriam do not constitute binding precedent. Such decisions are those which are given in ignorance of the terms of the Constitution or of a rule having the force of a

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[412] State of U.P's case, {1991 (4) SCC 139, at 163. *See also*, Lancaster Motor Co.'s case, {All ER 1941 (2) 11, at page 13}. *Also see*, State of Punjab vs. Baldev Singh etc., (AIR 1999 SC 2378). *See also*, Shama Rao vs. State of Pondicherry, AIR 1967 SC 1680, para 13. Available at https://indiankanoon.org/doc/679175/, last accessed on 26-05-2024.

[413] Ch. Zulfiqar Ali vs. Chairman, NAB and others, (PLD 2003 Lahore 593), para 17. *See also*, Abdul Aziz Memon vs. the State, P L D 2013 Supreme Court 594.

[414] Municipal Corporation of Delhi vs. Gurnam Kaur, [1989] 1 SCC 101; (AIR 1989 Supreme Court 38), para 11. Also available at https://indiankanoon.org/doc/327169/, last accessed 26-5-2024. Also see Bhadresh Kantilal Shah vs Magotteaux International And Ors., [2002]111 COMPCAS 220 (CLB), para 19. Also available at https://indiankanoon.org/doc/1334747/, last accessed 26-5-2024.

[415] Municipal Corporation of Delhi vs. Gurnam Kaur, [1989] 1 SCC 101; (AIR 1989 Supreme Court 38), para 14. Also available at https://indiankanoon.org/doc/327169/, last accessed 26-5-2024.

[416] The Divisional Controller vs. Mahadeva Shetty, AIR 2003 SC 4172, para 17. Also available on https://indiankanoon.org/doc/1863554/, last accessed on 26-05-2014.

[417] 2006 SC MR 1317.

[418] Khan Asfandyar Wali vs. Federation of Pakistan, (PLD 2001 SC 607).

[419] Sh. Muhammad Rafique Goreja vs. Islamic Republic of Pakistan, 2006 SCMR 1317. para 05.

statute.[420] Similarly, decisions sub silentio have no precedental value[421] and the question of judges' neutrality also comes into play.[422] Sometimes well considered obiter dicta of the Supreme Court is also taken as precedent "but every passing expression of a Judge cannot be treated as an authority."[423] As such, it is to be seen from the binding perspective.[424]

Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. In *Gurnam Kaur*, the Indian SC observed: "with all respect to the learned Judge who passed the order in *Jamna Das* case and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it."[425] The Indian SC so observed because in its view *Jamna Das* case[426] was wrong in principle and could not be justified by the terms of the relevant provisions.[427]

In *Arnit Das,* it was held that a decision not expressed or not accompanied by reasons could not be deemed to be a law declared to have a binding effect. "This is the rule of sub-silentio."[428] In *M.R. Apparao*, reliance was placed upon the judgment of *Lakshmi Shanker Srivastava.*[429] In that particular case the attention of the Court had been drawn to an earlier

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[420] For debate on courts' reasonable but wrong constitutional judgments as "treason to the Constitution", *see*, James Steven Liebman and Anthony Amsterdam, Loper Bright and the Great Writ: Will the New Constitutionalists End "Treason to the Constitution," Restore the Judicial Power, and Make the Law of the Land Supreme Again? [Forthcoming in Columbia Human Rights Law Review, 2024] (July 03, 2024). Available at SSRN: https://ssrn.com/abstract=4884616 or http://dx.doi.org/10.2139/ssrn.4884616, last accessed 31.08,2024.

[421] T.K.N. Rajgopal vs. T.M. Karnanidhi (1972) 4 SCC 267, 271. Also relied upon in Sh. Muhammad Rafique Goreja vs. Islamic Republic of Pakistan, 2006 SC MR 1317.

[422] Noah Feldman, The Court's Conservative Constitutional Revolution, N.Y. Rev. Books, Oct. 5, 2023; Herbert Weschler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959).

[423] Saiyada Mossarrat vs. Hindustan Steel Limited, Bhilai Steel Plant, (1989) 1 SCC 272, 278. Also see Municipal Corporation of Delhi vs. Gurnam Kaur, (1989) 1 SCC 101 and State of U.P. vs. Synthetics and Chemicals Ltd., (1991) 4 SCC 139.

[424] Art. 189 of the Constitution of the Islamic Republic of Pakistan, 1973.

[425] Municipal Corporation of Delhi vs. Gurnam Kaur, [1989] 1 SCC 101; (AIR 1989 Supreme Court 38), para 12. Also available at https://indiankanoon.org/doc/327169/, last accessed 26-5-2024.

[426] Jamna Das vs Ram Autar Pande, (1916) ILR 38 ALL 209; AIR 1916 ALLAHABAD 232.

[427] Municipal Corporation of Delhi vs. Gurnam Kaur, [1989] 1 SCC 101; (AIR 1989 Supreme Court 38), para 12. Also available at https://indiankanoon.org/doc/327169/, last accessed 26-5-2024. *See also*, State of U.P. vs. Synthetics and Chemicals Ltd., (1991) 4 SCC 139, para 2.03, Per R.M. Sahai, J. (Concurring). From English jurisdiction *see*, Gerard vs. Worth of Paris Ltd. (k). [1936] 2 All E.R. 905 *and* Lancaster Motor Co. (London) Ltd. vs. Bremith, Ltd. [1941] 1 KB 675. *See also,* Grard vs. Worth of Paris Ltd., (1936) 2 All ER 905 (CA), see para 12.

[428] Arnit Das vs. State of Bihar, AIR 2000 SC 2264, para23. See also State of U.P. vs. Synthetics & Chemicals Ltd. 1991 (4) SCC 138, para 41.

[429] Lakshmi Shanker Srivastava vs. State (Delhi Administration), MANU/SC/0114/1978 : 1979 CriLJ 207.

decision of *R.J. Singh Ahluwalia,*[430] on the question of validity of sanction. But the Court observed that the judgment proceeded on concession and as such the same was of no help.[431]

Reliance in this case (*M.R. Apparao)* was also placed upon the observations of the Court in *K.C. Ramachandran & Ors*.[432] In that case, reliance had been placed upon two earlier decisions.[433] Both these cases had dealt with the eviction. The Court, however, held that the general observations in those two decisions also will not apply.[434]

In *Jeet S. Bisht,* where a decision came under discussion wherein various directions had been given by the Indian Supreme Court, it was observed that that which was done "without any discussion as to whether such directions can validly be given by the Court at all. The decision therefore passed sub silentio."[435]

It is to be appreciated that until the time a judgment suffering from sub silentio factum is declared by the competent forum as such, the same would continue to be followed by the lower courts.[436] Such a move, up till that point of time, would be like proceeding on the strength of unwritten law handed down by the superior courts.

2.5.4. Unworkable Decisions of the Superiors: Per Incuriam Precedents.

In a case[437] a DB of IHC, Islamabad,[438] while reducing the rigorous punishment of ten years to five years, kept intact the punishment of *Diyat* awarded by the trial court. However,

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[430] R.J. Singh Ahluwalia vs. State of Delhi, MANU/SC/0061/1970: AIR1971 SC 1552: (1970) 3 SCC 451.
[431] Director of Settlements, Andhra Pradesh vs. M.R. Apparao, AIR 2002 SC 1598, para 262.
[432] Raval & Co. vs. K.C. Ramachandran & Ors., MANU/SC/0416/1973 : [1974] 2 SCR 629.
[433] Bhaiya Punjalal Bhagwanddin vs Dave Bhagwatprasad Prabhuprasad, 1963 AIR 120; 1963 SCR (3) 312; AIR 1963 SC120, *and* G.K. Construction Company vs Balaji Makan Samagri Stores, MANU/SC/0372/1962.
[434] Director of Settlements, Andhra Pradesh vs. M.R. Apparao, AIR 2002 SC 1598, para 12.
[435] State of U.P. vs. Jeet S. Bisht, (2007) 6 SCC 586. The principle of sub silentio has also been followed by the Indian Supreme Court in, State of U.P. and anr. vs. Synthetics and Chemicals Ltd. and Anr. MANU/SC/0616/1991 : (1991) 4 SCC 139; Arnit Das vs. State of Bihar MANU/SC/0376/2000 : (2000) 5 SCC 488; A-One Granites vs. State of U.P. and Ors. MANU/SC/0107/2001 : (2001) 3 SCC 537; Divisional Controller, KSRTC vs. Mahadeva Shetty and Anr. MANU/SC/0529/2003 : (2003) 7 SCC 197 and State of Punjab and Anr. vs. Devans Modern Breweries Ltd. and Anr. MANU/SC/0961/2003 : (2004) 11 SCC 26.
[436] Articles 189 and 201 of the Constitution of Pakistan, 1973.
[437] Unreported judgement, in re, Cr.Appeal No. 59/2021, titled as Idrees Khan vs. The State/ Cr. Revision No. 31/2021, titled as Shahid Mehmood vs. The State, heard on 28-03-2022.

it was said that in lieu of payment of *Diyat*, the convict was to undergo six months' simple imprisonment. It is to be noted that such a finding was patently against the dictates of Sharia as the *Diyat* is not like fine, failure to pay which entails further imprisonment in addition to substantive punishment/imprisonment.

The question which is intended to be dealt with under this sub heading is whether a subsequent co-ordinate or smaller Bench can declare an earlier judgment of the same court as 'per incuriam', or without so declaring can ignore the same? Correlative to this is the question if the subordinate courts are still bound by the same till delivery?[439] The questions would be dealt with by laying hands on the latest to the oldest case law.

Per incuriam literally means, through lack of care.[440] A judicial decision is made per incuriam if it is made in ignorance of a relevant statutory provision or a relevant and binding decision of court in the circumstances that the awareness of that earlier provision or decision would have led to a different result.[441] In practice, per incuriam is taken to mean per *ignoratium,* and is to be ignored if it is rendered in *ignoratium* of a statute or other binding authority.[442]

The ratio of certain judgments[443] was discussed in the *State of Bihar* case[444] by Indian SC to hold that once the court had come to the conclusion that judgment was delivered per-incuriam then it was not bound to follow such decision because the same deserved to be over-

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[438] The DB comprised Saman Rafat Imtiaz and Mohsin Akhtar Kiyani JJ. (The judgemnet was authored by the former).
[439] J.M. Coetzee, Disgrace, Vintage (1999), 219.
[440] For definition of 'per incuriam', *see*, Ballentine's Law Dictionary, Third Edition, at page 932. See also, [440] Black's Law Discretionary, 8th Edition, at page 1175.
[441] D. Varadarajan, `Words and Phrases', First Edition, Bharat Publishing House, (1999). *See also*, Municipal Corporation of Delhi vs. Gurnam Kaur AIR 1989 SC 38); Punjab Land Development and Reclamation Corporation Ltd. vs. Presiding Officer (1990) 77 FJR 17, and (1990) 3 SCC 682.
[442] Reported as: Sindh High Court Bar Association vs. Federation of Pakistan, PLD 2009 Supreme Court 879.
[443] i.e., Nirmal Jeet Kaur's case {2004 SCC 558, at 565, para 21), Cassell and Co. Ltd.'s case (LR 1972 AC 1027 at 1107, 1113, 1131), Watson's case {AELR 1947 (2) 193 at 1961, Morelle Ltd.'s case (LR 1955 QB 379 at 380), Elmer Ltd.'s case {Weekly Law Reports 1988 (3) 867 at 875 and 878), Bristol Aeroplane Co.'s case {AELR 1944 (2) 293 at page 294} and Morelle Ltd.'s case {AELR 1955 (1) 708).
[444] State of Bihar's case, AIR 1955 SC 661, at 672. This case was also referred in Sindh High Court Bar Association vs. Federation of Pakistan, PLD 2009 Supreme Court 879.

ruled at the earliest opportunity. In such situation, it was the bounden duty and obligation of the apex Court to rectify it.[445]

Similarly, the earlier judgment in *F. A. Khan case*[446] eluded the attention of Supreme Court (for whatever reason) while rendering the opinion in *Joydeb Agarwala case.*[447] It is important that the Supreme Court also hardly took into account any previous case law on the subject which was referred to in *F.A. Khan*'s case.

In case of *Maluvi Abdul Qayyum,* wherein the SCP was called upon to resolve the proposition about the application of the rule of merger in appeals and revisional jurisdiction, the two verdicts[448] came up for examination. The Supreme Court came held that the rule of merger shall be attracted to the case(s) of affirmation of decisions in appeal/revision.[449]

It is clear from the ratio of the judgments that an exception was taken to the law laid down in *Joydeb Agarwala,* and the law laid down in *F.A. Khan's case* was endorsed; rightly so, because in the *Joydeb Agarwala* case the earlier verdict and the settled law on the rule of merger (referred to and relied upon in *F.A. Khan*) was not taken into consideration[450] and therefore the said decision (*Joydeb Agarwala*) was reckoned as per incuriam.

The adverse effects of per incuriam finding were discussed in *Begum Nusrat Ali Gonda.*[451] In this case, regarding the proposition that as a vested right had been created in

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[445] Concept of judgment "per incuriarm" has been elaborately considered in, Province of Punjab vs. S. Muhammad Zafar Bukhari (PLD 1997 SC 351), Babu Parasu Kaikade vs. Babu AIR 2004 SC 754), *and* State vs. Nasimur Rehman (PLD 2005 SC 270).

[446] F.A. Khan vs The Government of Pakistan, PLD 1964 SC 520. The only question involved in this appeal (pertaining to Dismissal/Service matter) by special leave was as to the limitation for a suit challenging the validity of an order of dismissal, para.11, per B.Z. Kaikaus J.

[447] Joydeb Agarwala vs. Baitulmal Karkhana Ltd., PLD 1965 SC 37. The appeal pertained to matter of specific performance of contract (granted as prayed by trial court) entered into by a member of the Joint Family.

[448] F.A. Khan vs The Government of Pakistan, PLD 1964 SC 520, *and* Joydeb Agarwala vs. Baitulmal Karkhana Ltd., PLD 1965 SC 37.

[449] Maluvi Abdul Qayyum vs. Syed Ali Asghar Shah and 5 others, (1992 SCMR 241). Para 5, per Muhammad Afzal Lone, J.

[450] On rule of merger, *see also* C.P. No. D –27 of 2023, titled as Mst. Shja and Others vs. M. Zaman etc, decided on 01.11.2023. Available on https://caselaw.shc.gov.pk/caselaw/view-file/MjA0NzEyY2Ztcy1kYzgz, last accessed 31.08.2024.

[451] The adverse effects of per incuriam finding were discussed in Begum Nusrat Ali Gonda vs. Federation of Pakistan, PLD 2013 SC 829. This case pertained to pensionary benefits of the judges of superior courts from the date of their respective retirements. S*ee also*, Municipal Corporation of Delhi vs. Gurnam Kaur, (1989) 1 SCC

favour of the judges as to pension, on account of the judgment i.e., *Ahmed Ali U. Qureshi*[452] on the basis of the doctrine of *locus poenitentiae* and legitimate expectation, it was observed that as per the settled law, no perpetual right could be created in favour of a person which is against the law. The right to pension was founded upon *Ahmed Ali U. Qureshi*. Obviously, this right had to sustain and cease with the fate of the said judgement.[453]

Muhammad Ather Saeed, J. wrote his judgment in *Begum Nusrat Ali Gonda* and referred to Anwar Zaheer Jamali's judgement pertaining to his discussion with the concept and import of word 'per-incuriam' as discussed in the celebrated judgment of court in the case of *Sindh High Court Bar Association.*[454] However, it was very aptly noted that in the said judgment the Supreme Court had not discussed or given any finding as to what will be the aftereffects of overruling such per incuriam judgment and what will be the fate of any action which had been taken in pursuance of the judgment under Article 189 of the Constitution of Islamic Republic of Pakistan 1973.

Similarly, the vires of the law discussed in *Jamat-E-Islami* [455] were questioned vis-à-vis view of SCP in *Pakistan Lawyers Forum*[456] and the same was upheld as a good law. However, it was observed that the said judgment did not discuss, in the least, the genesis of law and its legal and historical background and merely followed the ratio in *Hussain Ahmad*[457] "which again suffers from proper consideration of principles of law and lack of application of judicious mind."[458]

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101. Also see, State of U.P. vs. Synthetics and Chemicals Ltd., (1991) 4 SCC 139, and Saiyada Mossarrat vs. Hindustan Steel Limited, Bhilai Steel Plant, (1989) 1 SCC 272, at P. 278.

[452] Accountant General Sindh and others vs. Ahmed Ali U. Qureshi, PLD 2008 SC 522.

[453] Begum Nusrat Ali Gonda vs. Federation of Pakistan, PLD 2013 Supreme Court 829. Para 04. Per Mian Saqib Nisar, J.

[454] Sindh High Court Bar Association. vs. Federation of Pakistan, PLD 2009 SC 879.

[455] Jamat-E-Islami through Amir and others vs. Federation of Pakistan and others, PLD 2009 SC 549. Present: Rana Bhagwandas, Javed Iqbal, Abdul Hameed Dogar, Sardar Muhammad Raza Khan, Muhammad Nawaz Abbasi, Faqir Muhammad Khokhar, Falak Sher, Mian Shakirullah Jan, and M. Javed Buttar, JJ.

[456] Pakistan Lawyers Forum vs. Federation of Pakistan, (PLD 2005 SC 719).

[457] Hussain Ahmad vs. Pervez Musharaf, (PLD 2002 SC 853).

[458] Jamat-E-Islami through Amir and others vs. Federation of Pakistan and others, PLD 2009 SC 549, para 29, per RANA BHAGWANDAS, J. Available at,

It is well settled by now that the ultimate responsibility of interpreting the law of the land is that of the Supreme Court.[459] The *obiter dictum* given with the intention of enunciating a principle would have binding force and cannot be ignored lightly.[460] It is because where ever there is found to be something directed by the judgment which is in conflict with the Constitution or law it would be the duty of the Court to unhesitatingly amend the error.[461]

In *Pak Turk Enterprises,*[462] court faced a situation whereby the Division Bench (DB) had specifically noted that in *Khan of Mamdot,*[463] *Australasia Bank*[464] was not cited, and in *Central Bank of India,*[465] only *Australasia Bank* was cited. From these apparent omissions, the DB concluded that the result had been some inconsistency which required reconciliation.[466] It was appreciated that principles involved were distinct and the reason for *Khan of Mamdot* not referring to *Australasia Bank* (in the relevant context), and *Central Bank of India* referring only to the latter and not the former at once became clear. It was held that the DB had proceeded on a miscomprehension of the judgments of the Supreme Court

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http://www.plsbeta.com/LawOnline/law/casedescription.asp?casedes=2009S52, last accessed on 26-05-2024. It is to be noted that due to imposition of emergency and the deposition of various Judges of the superior judiciary the minority view recorded by Mr. Justice Rana Bhagwandas, Mr. Justice Sardar Muhammad Raza Khan and Mr. Justice Falak Sher, could not be delivered to the PLD Publishers at the time of publication of PLD 2008 SC 30 which was sent after the reinstatement of Judges. The full judgment with the minority view was published later on as PLD 2009 SC 549.

[459] Art. 189 of the Constitution, 1973. *See also*, Malik Muhammad alias Malkoo vs. Jan Muhammad, 1989 CLC 776, para 11. Also see, Ali Muhammad vs. Mahmoodul Hassan, PLD 1968 Lah 329; Mubinul Haq vs. Muhammad Iqbal, PLD 1964 Lah. 23; Maroof Khan vs. Damsar Khan, 1992 MLD 21; Salahuddin vs. State, 1990 PCr.LJ 1221, and Abdul Ghaffar Khan vs. Saghir Ahmed Aslam, PLD 1987 Lah. 358.

[460] Faiz Bakhsh vs. Muhammad Munir, 1986 CLC 507. Para 14. See also, Muhammad Ismail & Sons vs. Trans-Oceanic Steampship Co., Ltd. PLD 1966 Dacca 296. Also see Indian cases i.e., Bimla Devi vs. Chaturvedi, AIR 1953 All. 613, and K.P. Doctor vs. State of Bombay, AIR 1955 Bom. 220.

[461] Lt.-Col. Nawabzada Muhammad Amir vs. the Controller of Estate Duty, Government of Pakistan, Karachi, PLD 1962 SC 335, para 3, per Cornelius, C. J. *See also*, The Province of East Pakistan vs. Sirajul Haq, PLD 1966 Supreme Court 854. Para 44, per Cornelius C.J. *Also see*, Young vs. Bristol Aeroplane Co., L R, (1946) AC 1963 (H. L.).

[462] Pak Turk Enterprises (PVT.) LTD. vs. Turk Hava Yollari (Turkish Airlines Inc.), 2015 CLC 1 [Sindh].

[463] Ifthikhar Hussain Khan of Mamdot vs. Ghulam Nabi Corporation Ltd. PLD 1971 SC 550.

[464] Muhammad Siddiq Muhammad Umar and another vs. Australasia Bank Ltd. PLD 1966 SC 685.

[465] Central Bank of India Ltd. vs. Taj ud Din Abdur Rauf and others 1992 SCMR 846.

[466] Pak Turk Enterprises (PVT.) LTD. vs. Turk Hava Yollari (Turkish Airlines Inc.), 2015 CLC 1 [Sindh]. Para 32, per Munib Akhtar J.

and had sought to resolve a perceived problem and reconcile an inconsistency that simply did not exist.[467]

It is to be noted that to answer the questions in *Pak-Turk* case, the *Holden* rule was also resorted to.[468] The Court of Appeal was there confronted with its own earlier decision[469] which had interpreted and applied House of Lords decision in *Myers*.[470]. The Court of Appeal concluded in *Holden* that the earlier Court of Appeal had misinterpreted and misapplied the House of Lords decision.[471]

Recently, in the *Mubarak Sani* case, the Supreme Court expunged contentious paragraphs from its Feb 6 and July 24, 2024 decisions[472] which had generated a controversy and prompted a malicious campaign against the CJP.[473] Instead of confining itself to the bail matter, the SCP went into detail by quoting different verses from the Holy Quran out of context. The judgement conveyed as if the *Ahmadi* community enjoyed the right to propagate their religion, even in private gatherings, when Section 298(C)[474] barred them from doing so.

Relevant to the unwritten and unconstitutional approach which shows the violation of otherwise trite law as to one voice and the doctrine of certainty, are also some cases from Indian jurisdiction. In the case of *Subhash Chandra,* DB held that the dicta in *S. Pushpa*

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[467] Pak Turk Enterprises (PVT.) LTD. vs. Turk Hava Yollari (Turkish Airlines Inc.), 2015 CLC 1 [Sindh]. Per Munib Akhtar J, para 35. English case Young vs. Bristol Aeroplane Co. Ltd., [1944] 2 All ER 293 was also considered by the learned judge in that case. See also, Abdul Razzak vs. Collector of Custom, 1995 CLC 1453 [Karachi]. *See also*, Dr. Muhammad Munir, Precedent in Pakistani Law, Oxford University Press, (2014), 144. See also, Multiline Associates vs. Adeshir Cowasjee, 1995 SCMR 362, 373, *and also*, Collector of Customs, Customs House Nabha Road, Lahore vs. Abdul Majeed, 2001 CLC 1461 [Lahore], para 18.

[468] Holden vs. Crown Prosecution Service [1990] 1 All ER 368.

[469] Sinclair Jones vs. Kay [1988] 2 All ER 611.

[470] Myers vs. Elman [1939] 4 All ER 484.

[471] Holden vs. Crown Prosecution Service, [1990] 1 All ER 368, at p.374. The same view was taken by the Court of Appeal in another case, Rickards vs. Rickards, [1989] 3 All ER 193. *See also*, Noble v. Southern Railway Co. [1940] AC 583, 598.

[472] Approved for reporting decision i.e., in Criminal Misc. Application No. 1113 of 2024 [For correction in judgment dated 24.07.2024], in Criminal Review Petition No. 2 of 2024. The Feb 6 decision of the court overturned the conviction of Mubarak Sani, who was accused of an offence under the Punjab Holy Quran (Printing and Recording) (Amendment) Act, 2021.The Supreme Court accepted the application of the federal government and ordered the erasure of paragraphs from the Feb 6 and July 24 judgements with a direction that these expunged paragraphs would not be used as precedence in future.

[473] i.e., J. Qazi Faez Isa. On Aug 19, 2024 a group of charged protesters even managed to reach the Supreme Court to demonstrate against the judgement in Mubarak Sani case. *See*, Dawn dated 23-08-2024.

[474] Of the Pakistan Penal Code, 1860.

case[475] was an *obiter* and did not lay down any binding ratio.[476] In *State of Uttaranchal,*[477] it was noticed that a three Judge Bench in *S. Pushpa* case relied on *Marri Chandra Shekhar Rao*[478] and *Action Committee*[479] cases and understood the ratio of those judgments in a particular manner. In the opinion of *State of Uttaranchal* Bench, it was held that it was not open to a two Judge Bench to say that the decision of a three Judge Bench was incuriam.[480]

In *Central Board of Dawoodi Bohra Community*, Constitution Bench following its earlier decision in *Raghubir Singh*[481] summed up the legal position as to bindingness of larger Bench in variety of situations.[482] The question also came up for consideration in *Dayanand* case wherein the necessity to maintain judicial discipline was reiterated.[483] The reference for larger/full Bench was reckoned to be proper course of action in *Pradip Chandra case* also.[484]

In said case it was observed that it was true that *Raghubir Singh's* case[485] was not referred to in any case other than *Chandra Prakash and Ors.* but in *Chandra Prakash and Ors,*[486] both *Raghubir Singh's* and *Parija's* were referred to and were considered and then

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[475] S. Pushpa and Others vs. Sivachanmugavelu and Others. AIR 2005 SUPREME COURT 1038 =2005 AIR SCW 977.
[476] Subhash Chandra and Anr. vs. Delhi Subordinate Services Selection Board and Ors., MANU/SC/1460/2009 = (2009) 15 SCC 458,para 46.
[477] State of Uttaranchal vs. Sandeep Kumar Singh, (2010)12 SCC 794, para 7.
[478] Marri Chandra Shekhar Rao vs. Dean, Seth G.S. Medical College and Ors. 1990 SCR (2) 843 = 1990 SCC (3) 130.
[479] Delhi Development Authority, N.D. & Anr. vs. Joint Action Committee,Allottee Of Sfs. AIR 2008 SUPREME COURT 1343 = 2008 (2) SCC 672.
[480] State of Uttaranchal vs. Sandeep Kumar Singh, (2010)12 SCC 794, para 7. See State of Maharashtra vs. Milind & Ors. AIR 2001 SC 393 = 2001 (1) Scc 4, where even doctrine of stare decisis was not followed. *See also,* India Cement Ltd. and Ors. vs. State of Tamil Nadu and Ors. MANU/SC/0226/1989 = (1990) 1 SCC 12, and Synthetics and Chemicals Ltd. and Ors. vs. State of U.P. and Ors. MANU/SC/0595/1989 = (1990) 1 SCC 109.
[481] Union of India vs. Raghubir Singh MANU/SC/0619/1989 = (1989) 2 SCC 754.
[482] Central Board of Dawoodi Bohra Community and anr. vs. State of Maharashtra and Anr. MANU/SC/1069/2004 = (2005) 2 SCC 673, para 12.
[483] Official Liquidator vs. Dayanand and Ors. MANU/SC/4591/2008 = (2008) 10 SCC 1, para 90. *See also*, State of Bihar vs. Kalika Kuer, AIR2003 SC 2443, para 10.
[484] Pradip Chandra Parija vs. Pramod Chandra Patnaik, AIR 2002 SC 296, para 6. From Pakistani jurisdiction *see*, Balqis Fatima vs. Najm-ul-Ikram Qureshi, PLD 1959 LHR 566, *and also,* Sayeda Khanam vs. Muhammad Sami, PLD 1952 LHR 113. *See also*, Munir, Dr. Muhammad, Precedent in Pakistani Law, Oxford University Press (2014), Foot Note at P. 245.
[485] Union of India vs. Raghubir Singh MANU/SC/0619/1989.
[486] Dr. Chandra Prakash & Ors vs. State Of U.P. & Anr. 2002 (10) SCC 710 = 2002 AIR SCW 5235.

Parija's case was followed. It was held that the view of the law taken in series of cases to which Parija's case belongs cannot be said to be per incuriam.[487]

In this regard it is to be noted that when the attention of the judge(s) deciding the latter case is not invited to the earlier available decisions, any such decision by a Bench of more strength cannot be overlooked to treat a later decision by a Bench of lesser strength as of binding authority.[488]

2.6. Right and Obligation to Interpret and Unwritten Constitutionalism.

The purpose of the interpretation of statute is to open the locks put by the Legislature. For such unlocking, keys are to be found out.[489] These keys may be termed as aids for interpretation and the canons and principles of interpretation. They form the limits of interpretation. The fact remains that the State governs its society through the different organs.[490] Each organ of the state has its defined responsibilities. The role of interpretation according to Ronald Dworkin is an external one.[491]

2.6.1. Limits of Interpretation.

The difficulty with judges is that they cannot say that they do not understand a particular provision of an enactment. They have to interpret in one way or another. This

[487] Central Board of Dawoodi Bohra vs. State of Maharashtra, AIR 2005 SC 752, para 7.
[488] N.S. Giri vs. The Corporation of City of Mangalore, AIR 1999 SC 1958, para 12. *See also*, A.R. Antulay vs. R.S. Nayak, AIR 1988 SC 1531, para 135.
[489] Nzube Udechukwu, THE LEGAL IMPLICATIONS OF MARGINAL NOTES, AND SCHEDULES PLACING RELIANCE ON CASE LAWS (November 2, 2023). Available at SSRN: https://ssrn.com/abstract=4621525 or http://dx.doi.org/10.2139/ssrn.4621525, last accessed 30.08.2024.
[490] Ilan, Wurman, Importance and Interpretive Questions (March 7, 2023). Virginia Law Review, forthcoming, Arizona State University Sandra Day O'Connor College of Law Legal Studies Research Paper No. 4381708, Available at SSRN: https://ssrn.com/abstract=4381708 or http://dx.doi.org/10.2139/ssrn.4381708, last accessed 30.08.2024.
[491] Professor John Austin (1790-1859), a nineteenth century British legal philosopher, while delivering lecture on 'Jurisprudence' said in the University of London, 1831. See "Law's Empire" (1986) by Ronald Dworkin, ISBN: 978-0674518360, at p. 48.

situation led to the birth of principles of interpretation which come into play only where clarity or precision in the provisions of the statute is found missing.[492]

Broadly speaking, the limits of interpretation qua tools of construction may be divided into two categories; namely, Internal (Intrinsic) and External (Extrinsic). The internal aids are those which are found within the statute. On the other hand, the external aids for interpretation are those which are not contained in the statute but are found elsewhere.[493] According to Michael Lobban, the canons of the statutory interpretation have three tiers: textual, substantive and deference.[494] The textual canons are rules of thumb for understanding the words of the text. Some of the canons are still known by their traditional Latin names.

The plain meaning rule of statutory interpretation should be the first rule applied by judges.[495] The leading statement in this regard was made by the Lord Chief Justice of common pleas.[496] The finding of the intent of Parliament is the first and foremost thing for construing the statutory provision.[497] The golden rule, on the other hand, permits the courts to depart from the plain meaning rule if the meaning leads to consequences it considers to be absurd or ambiguous.[498]

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[492] Friedrich Karl von Savigny, On the Vocation of Our Age for Legislation and Jurisprudence. ISBN. 0405065469, 9780405065460, 2nd edn. reprint, (1975), p. 168.
[493] Elmer Driedger, Construction of Statutes. ISBN-13: 978-0409828009 (1983), p. 1.
[494] Michael Lobban, The Common Law and English Jurisprudence 1760–1850. ISBN. 0198252935, 1st edn. Oxford: Clarendon Press, (1991).
[495] Ibid.
[496] Sussex Peerage Case [1844] Xi Clark & Finnellt, 86. Also see, 08 E.R. 1034. Also see Manchester, Salter, Moodie and Lynch, Exploring the Law: the Dynamics of Precedent and Statutory Interpretation, Sweet & Maxwell, 2nd Edn. (2000), 58.
[497] Manchester, Salter, Moodie and Lynch, Exploring the Law: the Dynamics of Precedent and Statutory Interpretation, Sweet & Maxwell, 2nd Edn. (2000), 58, 59. See also Craies on Statute Law, Sixth Edn., 66. Crawford, Earl Theodore: Statutory Construction. Thomas Law Book Company, (1940), pp. 256-257.
[498] *See*, Grey v Pearson (1857) 6 HLC 61, at P. 106. *See also*, Crawford on Statutory Construction, Interpretation of Law, page 258, Maxwell on the Interpretation of Statutes, Twelfth Edition, page 187 and Craies on Statute Law, Sixth Edition at pages 96 to 111, wherein the learned authors have dilated upon the principles of interpretation for resolving ambiguity and conflict in a statute. *See also*, Adler vs. George, [1964] 2 QB 7.

As regards the mischief rule, it is said that "a statute is to be so construed as to suppress the mischief and advance the remedy."[499] Regarding 'mischief rule', *Heydon's* Case can be referred from the English jurisdiction as to what was the common law before the making of an enactment.[500] It is also to be kept in view that the general does not detract from the specific. [501] However, when it comes to a national statute, the same must be construed so as not to conflict with international law.[502] The statutes do not violate fundamental societal values.

The Constitution of the Islamic Republic of Pakistan, 1973 categorically guarantees: "Laws inconsistent with or in derogation of Fundamental Rights to be void."[503] It also speaks about repercussions of the abrogation of state sovereignty and that it will amount to High Treason otherwise.[504]

The deference canons instruct the court to defer to the interpretation of another institution, such as an administrative agency or legislature.[505] In case of ambiguity with respect to the specific issue, the courts will defer to the agency's reasonable interpretation of the statute. This rule of deference was formulated by the US Supreme Court in *Chevron* deference case.[506]

If a statute is susceptible to more than one reasonable construction, courts should choose an interpretation that avoids raising constitutional problems. This is also referred

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[499] Elmer Driedger, Construction of Statutes. ISBN-13: 978-0409828009, (1983), p. 1. See also, Maxwell on Interpretation of Statutes 8th Edn., at P.48.
[500] Heydon's Case, (1584) 76 ER 637, at 638.
[501] "What is implied is as much a part of the instrument as what is expressed" (American Jurisprudence (2d.), Vol. 16, Lawyer's Co-operative Pub., 1979, pp. 251 & 258.
[502] Murray vs. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804), at 118.
[503] Article 8 of the Constitution of the Islamic Republic of Pakistan, 1973.
[504] Article 6 of the Constitution, ibid.
[505] Aqa Raza and Ghayur Alam, Theoretical Underpinnings of Copyright and Design Laws Post-Krishika Lulla and Godrej Sara Lee: Decisions of the Supreme Court of India (November 2022). Aqa Raza and Ghayur Alam, 'Theoretical Underpinnings of Copyright and Design Laws Post-Krishika Lulla and Godrej Sara Lee: Decisions of the Supreme Court of India' (2022) 27 (6) Journal of Intellectual Property Rights 434–441., Available at SSRN: https://ssrn.com/abstract=4337992, last accessed 31.08.2024.
[506] Chevron U.S.A., Inc. vs. Natural Resources Defense Council, 467 U.S. 837 (1984), at 866.

to as canon of constitutional avoidance.[507] It is to be kept in view that the legislature did not intend an absurd or manifestly unjust result.[508] It should be noted that the freedom of interpretation largely varies by area of law. Criminal law and tax law must be interpreted very strictly and never to the disadvantage of citizens.[509]

The canons give credence to the judges who want to construct the law a certain way, thereby imparting a false sense of justification to their otherwise arbitrary process.[510] In this regard it must be kept in view that the Constitution of Pakistan categorically states that in case of any inconsistency between federal and provincial laws, the federal law shall prevail.[511]

The interpretation of international treaties is governed generally by the Vienna Convention on the Law of Treaties. Here the rule is that the text of the treaty is decisive unless it leaves the meaning ambiguous or obscure or the result is absurd.[512]

2.6.2. Is Right to Interpret Fundamental Rights a Justification for Unwritten Constitutionalism?

It must be observed by the Courts that often a law, which was drafted with one particular situation in mind, will eventually be applied to quite different situations and that legislation is drawn up by legal draftsmen whose capacity to anticipate the future is

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[507] Daniel E. Walters, The Major Questions Doctrine at the Boundaries of Interpretive Law (February 4, 2023). Iowa Law Review, Vol. 109, No. 2, pp. 465-540, 2024, Texas A&M University School of Law Legal Studies Research Paper No. 23-68, Available at SSRN: https://ssrn.com/abstract=4348024 or http://dx.doi.org/10.2139/ssrn.4348024, last accessed 31.08.2024.

[508] N.S. Bindra, Interpretation of Statutes, 10th Edn. New Delhi: LexisNexis, (2007), p. 530. See also, Lalit Mohan Pandey vs. Pooran Singh, (2004) 6 SCC 626.

[509] Elmer Driedger, Construction of Statutes. ISBN-13: 978-0409828009. (1983), p. 1.

[510] Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed, 3 Vanderbilt Law Review 395 (1950), at 403. (Republished with permission in 5 Green Bag 297 (2002). Available at: https://scholarship.law.vanderbilt.edu/vlr/vol3/iss3/4, last accessed 27-05-2022.

[511] Article 143, of the Constitution of Islamic Republic of Pakistan, 1973. *See also*, N.S. Bindra, Interpretation of Statutes, 10th Edn. New Delhi: LexisNexis, (2007), p. 35.

[512] Articles 31 through 33 of The Vienna Convention on the Law of Treaties (VCLT), adopted on 22 May 1969.

limited.[513] However, it is equally important for a judge to keep in mind that legislation may contain uncertainties for a variety of reasons. Words are said to be imperfect symbols to communicate intent which may change in meaning over time.[514] A statute shall not be interpreted so as to be inconsistent with other statutes. For doing the needful there exist laws pertaining to interpretation which provide certain basic definitions.[515] I

It must also be kept in view that the legislatures are better placed to discuss prudential niceties pertaining to policy arguments. The Court's ability in matters of such interpretation is weakened.[516] For example, the doctrine of necessity marred the democratic process in Pakistan in the very inception and the same rested upon unconstitutional constitutionalism and unwritten judicial policy.

However, differences exist as to character of interpretation and what the solution should be. People may agree that rights are inevitable in a certain polity but they equally have serious disagreement as to the very nature and relations of these rights.[517] The case of Pakistan Tehreek-e-Insaf (PTI), under Civil Petition No. 42/2024,[518] merits discussion here. The facts of the case are that Election Commission of Pakistan (ECP) issued a notice to PTI to hold intra party elections which was followed by a show cause notice.[519]

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[513] Imran Ahmad Khan Niazi vs. Federation of Pakistan through Secretary, Law and Justice Division, Islamabad, PLD 2024 SC 102.Also available at http://www.plsbeta.com/LawOnline/law/SearchResultNotes.asp, last accessed 23.09.2024.

[514] Atif Sattar Arieen, Statutory Interpretation, PLD 2016 Journal Section P 15. Also available at: http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2016J15, last accessed on 13-01-2024.

[515] e.g., The General Clauses Act, 1897 and the interpretation clause contained in Article 260 of the Constitution of the Islamic Republic of Pakistan, 1973.

[516] Tabatha Abu El-Haj, Linking the Question: Judicial Supremacy as a Matter of Constitutional Interpretation, 89 WASH.U.L Re vs., (2012), 1309, at p.1333.

[517] Richard Bellamy, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy, Oxford University Press (2007), 21.

[518] Civil Petition No. 42/2024 titled as, Election Commission of Pakistan through Special Secretary, Islamabad Versus Pakistan Tehreek-e-Insaf, Islamabad through its authorized person and others, decided on 13-01-2024, (On appeal against the judgment dated 10.01.2024 passed by Peshawar High Court, Peshawar, in WP No. 6173-P/2023). The Bench comprised Justice Qazi Faez Isa, CJ, Justice Muhammad Ali Mazhar Justice Musarrat Hilali. PLD 2024 SC 267.

[519] Section 208 of Elections Act, 2017. Intra-party elections were stated to have been conducted by PTI on 8 June 2022. However, the ECP vide Order dated 13 September 2023 held that PTI had failed to hold transparent, just and fair intra party elections.

PTI assailed ECP's order before LHC.[520] WP No. 81171/2023 and 332/2023 remained pending in LHC whereas WP No. 6173-P/2023 was filed in the PHC. The said petition was allowed by setting aside the impugned order and judgment of the PHC, passed in WP No. 6173- P/2023. Resultantly, the order of the ECP dated 22 December 2023 was upheld.[521] The Court, despite having the power to do complete justice[522] and take judicial notice[523] of the socio-political atmosphere qua May 9th, 2023 incidents, did not consider ground reality regarding intra party election's venue. The question remained if the certificate[524] was to be tendered by each member of a political party or same was to be submitted by the head or the designated office bearer alone.[525] The impression appears that it was to be submitted by each member of the Political Party which line of reasoning, in its turn, appears to be based upon some unwritten law.

Yousaf Raza Gillani[526] is just another example where the same cognitive approach was observed. Here the judiciary positioned itself in juxtaposition to legislature to express people's will through designated organs of state. However, a question seems pertinent here viz. whether the Supreme Court is strong enough to undertake democratic work?[527] The answer comes from the fact that undertaking such a work is built upon some unwritten law and unwritten judicial policy (UJP).

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[520] Writ Petition No. 81171/2023 which was initially heard by a Single Judge but on PTI's request for constitution of a Full Bench it was listed for hearing before a five-member Bench together with WP No. 332/2023. While both these petitions were pending adjudication before the LHC, PTI contended that it had conducted its intra-party elections on 2 December 2023, but it did not withdraw WP No. 81171/2023.
[521] Election Commission of Pakistan through Special Secretary, Islamabad vs. Pakistan Tehreek-e-Insaf, Islamabad through its authorized person and others. PLD 2024 SC 267, concluding para 13.
[522] As per Art.187 of the Constitution of 1973.
[523] Art. 112 of QSO, 1984.
[524] ECP`s Form 65.
[525] See Chapter IX of the Elections Act, 2017, and Chapter XI of the Election Rules, 2017.
[526] Yousaf Raza Gillani vs. Assistant Registrar, PLD 2012 SC 466, para 24. On point that the functionaries of the State are fiduciaries of the people, see also, Yasin vs. Federation of Pakistan (PLD 2012 SC 132, page 163).
[527] David M. Golove, Democratic Constitutionalism, The Bickel-Ackerman Dialectic, Chapter 4 of 'The Judiciary and The American Democracy'. Alexender Bickel, the Counter Majoritarian Difficulty and Contemporary Constitutional Theory, edited by Kenneth D, Ward and Cecilia R Castillo, (State University of New York Press, Albany, 2005), at p. 87. Also available at https://books.google.com.pk/books?id=TvAJF, accessed on May 9, 2020. Regarding non-interference in executive domain by courts, *see also*, Vice-Chancellor Agriculture University, Peshawar vs. Muhammad Shafiq, 2024 PLC (CS) SC 323. Also available at http://www.plsbeta.com/LawOnline/law/SearchResultNotes.asp, last accessed 23.09.2024.

The court seized with interpretation of fundamental rights or lis before it must keep in view that the best limit is that when it is not necessary to decide more, it is necessary not to decide more lest the court should give birth to unwritten unconstitutional constitutionalism.

2.7. CONCLUSION

The current judicial system is a product of a hundred years of evolution, as it has passed through many ebbs and flows. These changes and developments contributed to the formation of the current judicial system. The concept of separation of powers in a democratic polity pronounces exclusive and distinct roles for different organs of the State. The framers of the 1973 Constitution tried their level best to cater the pluralistic needs of the multilateral strata of our country.

High Courts of the country exercise administrative control over and prefer to address the District Judiciary as 'subordinate judiciary.' The provincial governments appoint the judges for civil and criminal courts which are collectively referred to as the district or subordinate judiciary. In addition there also exist other courts and tribunals of civil and criminal nature, created under special laws and enactments which provide for their jurisdictions.

The dictates of the written law are brushed aside and for depriving the Judicial Officers the reliance is placed on unwritten judicial policy of preferring the lawyers for the judicial slots in the High Courts. Preferring one dominantly and ignoring other part of the relevant provision of law can be safely said to be none other than an approach based upon unwritten law. The decisions of the superior courts are binding on the lower courts under Articles 189 and 201 of the Constitution of Pakistan 1973. However, *per incuriam* decisions and those having been passed *sub-silentio*, are not binding on them. An unstructured approach to follow is based upon unconstitutional constitutionalism and

unwritten judicial policy. Regarding limits of interpretation, the courts must keep in view that when it is not necessary to decide more it is necessary not to decide more.

CHAPTER 3: REVIEW OF UNWRITTEN JUDICIAL POLICY IN PAKISTAN: THE CRIMINAL AND CONSTITUTIONAL PERSPECTIVES.

"Until you make the unconscious conscious it will direct your life and you will call it fate."[528]

3.1. INTRODUCTION

The phenomenon of unconstitutional constitutionalism finds its existence in the by-passing of written law. In this regard the uninterrupted approval of working of the courts under the auspices of the Superior Judiciary gives birth to new normal of unconscious acceptance of such a judicial policy. The real stake holder i.e, litigant reckons such a judicial exercise as normal practice which directs the lives of citizenry. The unconstitutional constitutionalism also emanates from the phenomena of continues abuse of process of law and of court. The same ranges from passing sentence against the patient-accused instead of treating him psychologically to recording the evidence in criminal cases twice in the same subject matter. The same phenomena also grow out of not challenging the approval of violation of principle of double jeopardy.[529]

On the constitutional side, the unwritten judicial policy forms itself by making the polity keep on running its business with continuous stop gap arrangements on the basis of written law which in fact provides for catering an otherwise emergency situation. It also includes continuing with deliberate left over anomalies in the Constitution, 1973. As such, the phenomena emanate from casting aside written law and rewriting the same by Judiciary in criminal and constitutional matters which orders life accordingly.[530]

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[528] Swiss psychiatrist and psychoanalyst, Carl Gustav Jung (26 July 1875 – 6 June 1961).
[529] S. 403 Cr.P.C (Act V of 1898).
[530] Alma Diamond, Subversion, Restoration, or Legislation? The Supreme Court and the Constitution (July 30, 2024). Available at SSRN: https://ssrn.com/abstract=4912404, last accessed 25.08.2024.

3.2. Sentencing Policy.

The determination of appropriate punishment and award of suitable sentence after the conviction of an offender is often a difficult question.[531] The question of sentence demands utmost care on the part of a court.[532] It also depends upon a variety of considerations.[533] The theories of punishment help ascertain the mitigating and aggravating circumstances for the purpose of sentencing.[534] These theories speak about the standard of care and the value that ought to be attached for underpinning both the guilt and innocence.[535] Every party has a right to know as to why and how a judge awarded him an increased or decreased sentence depending upon the aggravating or mitigating circumstances.[536] At present, the courts are ordinarily more inclined to consider all those rehabilitating factors which they believe to be mitigating, whether specified by the statute or not.[537] These mitigating factors often find support for decreased punishment.[538]

However, there has also been increased distrust in discretion of judges qua sentencing.[539] Due to that reason the punishments have been made more severe through legislative actions.[540] Hence, the divergent policy guidelines and statutory provisions have

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[531] R.1, Part A, Chapter 19, Vol.III of Lahore High Court Rules and Orders. See also Chapter 23 thereof.
[532] Nadeem alias Nanha alias Billa Sher vs. The State (2010 SCMR 949). See also Muhammad Ashraf vs. The State (2006 PCrLJ 1431).
[533] Mirza Hamayoon vs. State, 2022 PCrLJ 1648 (Kar). Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2022K3071, last accessed 25.08.2024.
[534] Carissa Byrne Hessick, Why are Only Bad Acts Good Sentencing Factors? (2008) 88 Boston University Law Review. 1109, 1127-29.
[535] ABA Guidelines for The Appointment and Performance of Defense Counsel in Death Penalty Cases (Revs. Ed. 2003), Hofstra Law Review, Volume 31, Issue 4 (2003), at PP.147-148.
[536] Muhammad Sher Abbas, Mitigating Sentencing in Various Jurisdictions: A Consideration For The Offender's Rehabilitative Potential. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3827676, last accessed on 29-01-2024. Also see PLD 2021 Journal Section, P. 8. Also available at http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2021J8, last accessed on 26-01-2024.
[537] Eddings vs. Oklahoma, 455 U.S. 104, (1982), 113–14.
[538] U.S. Sentencing Commission, Results of Survey of United States District Judges January 2010 through March 2010. Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/201006, last accessed on 30-10-2021.
[539] Colton Fehr, Reflections on the Supreme Court of Canada's Decision in R v Sharma (August 18, 2023). Alberta Law Review, Vol. 60, No. 4, 2023, Available at SSRN: https://ssrn.com/abstract=4545153, last accessed 24.09.2024.
[540] Dauglas A. Berman, Distinguishing Offense Conduct and Offender Characteristics", (2005) 58 Stanford Law Reviews 277, 279-80.

focused on making the courts reluctant to exercise their judicial discretion.[541] It is because the discretion based upon unwritten law has its role to play.[542] For example, one judge may regard one factor as mitigating and the other judge may also treat the same as aggravating one.[543]

If a judge finds a mitigating factor, he is entitled to appraise its value in juxtaposition with other available evidence.[544] It is a celebrated principle that only the quality of incriminating evidence of the aggravating or mitigating circumstances always prevails.[545] It is prerogative of prosecution to produce whatever number of witnesses it feels necessary to prove its case, and the nonproduction of a witness is not necessarily fatal to its case.[546] The policy of a lesser sentence emanates from the very concept that the punishment should be an exception and not the rule.[547]

However, the punishment based on unstructured rules is ostensibly in conflict with a paradigm shift of global society for more rational decisions with humane punishments based upon written law.[548] The discretionary sentencing policy is often a blending of the judicial as

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[541] Niharika Saxena, A Comparative Analysis of Criminal Justice Systems: Assessing the Impact of Sentencing Guidelines in reference to India, UK and USA (April 2, 2024). Available at SSRN: https://ssrn.com/abstract=4781702 or http://dx.doi.org/10.2139/ssrn.4781702, last accessed 24.09.2024.

[542] Adnan alias Adu through Senior Superintendent, Central Prison, Hyderabad vs. State, 2021 MLD 218 (KAR). Available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2021K2515. Last accessed 25.08.2024.

[543] Stephanous Bibas, The Machinery Of Criminal Justice, 1st ed. Oxford University Press, (2012), 3-6.

[544] Mills vs. Maryland, 486 U.S. 367 (1988), 380.

[545] For debate on aggravating and mitigating circumstances, see case study of more than five hundred fifty cases: Russell Stetler and Maria McLaughlin and Dana Cook, Mitigation Works: Empirical Evidence of Highly Aggravated Cases Where the Death Penalty Was Rejected at Sentencing (Dec. 24, 2021). Hofstra Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=4084060, last accessed 24.09.2024.

[546] Noor Ullah vs. The State , 2012 YLR 168 (Baluchistan), concluding para.

[547] James M. Doyle, The Lawyers'Art: "Representation in Capital Cases", (1996) 8 Yale Journal of Law and Humanities. 417, at p.425. The death sentence in a particular case, for example, can only be worthwhile when the accused turns out to be "less than human." *See*, Graig Hane, The Social Context of Capital murder: Social Histories and the Logic of Mitigation" (1955) 35 Santa Clara Law Review. 547, at p. 548. *See also*, Bruce Edwin Callings vs. James A. Collins, Director, Texas Department of Criminal Justice, 510 U.S 1141 (1994), para 4.

[548] Ralph Baze and Thomas C. Bowling, Petitioners vs. John D. REES, Commissioner, Kentucky, Department of Corrections, et al. 553 U.S. 35 (2008), 128.

well as legislative innovations.[549] For example, the New Zealand's Sentencing Act, 2002 enjoins upon the courts to take into account variety of considerations.[550] Pakistan's JJSA[551] may also be referred as another example to a certain extent. The diminished mental capacity and youthful age of the accused may be mitigating as well as aggravating factors.[552] Hence, a sentencing court may exceed thin range of discretion on the basis of facts of the case replicated in the verdict[553] but its findings must be authenticated through reasoning proven beyond doubt.[554]

The fact remains that the Pakistan Penal Code (PPC)[555] does not provide the details of the sentence; rather, the same provides limit of imprisonment of either description. That is, it does not specify, in specific breakdown, the details of the imprisonment and provides in certain cases the lower as well as the upper limits.[556] In such a situation Judge is not obliged to lay out the limits of imprisonment and devising the same by him is not warranted. Filling the so called gap in the name of interpretation is just an expression of unwritten judicial policy. Similarly, in constitutional matters *reflislation*[557] is not to be ventured, by which term scholar means legislation by the legislature on being referred to by the court through a direction, as was done in *Nadeem Ahmed case*[558] vis a vis 19th Constitutional Amendment whereby Art.175-A was almost copy pasted by the Parliament from said judgement.

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[549] David John Harvey, Background Information and Section 27 Reports for Sentencing – R v Berkland in the Supreme Court (December 28, 2022). Available at SSRN: https://ssrn.com/abstract=4320484 or http://dx.doi.org/10.2139/ssrn.4320484, last accessed 24.09.2024.
[550] Section 8 (1) of the Sentencing Act, 2002 of New Zealand. The Sentencing Act 2002 sets out the purposes and principles of sentencing (although it doesn't say that any particular purpose or principle is more important than any other, and still allows Judges discretion to decide the appropriate level of sentence in each case).
[551] Juvenile Justice System Act, 2018.
[552] Andrew Von Hirsch, The Sentencing Commission and its Guidelines, (Northeastern University Press). (1987), p.9.
[553] United States vs. Portman, 599 F.3d 633, (7th Cir. 2010), 637-38.
[554] Apprendi vs. New Jersey, 530 U.S. 466 (2000), 523, at n. 11.
[555] Act XLV of 1860.
[556] For example, SS. 392, 395 and 324 PPC, 1860. There are other provisions also in there.
[557] This term is coined by the scholar himself.
[558] Nadeem Ahmed Advocate and others Vs. Federation of Pakistan and others, PLD 2010 SC 1165.

On criminal side, the famous narcotics case[559] can also be cited as another example.[560] In said case the learned Judge delineated details of limits of punishment which could be awarded by the trial court. It was like interfering into the well-recognized discretion of the trial courts and binding them on the basis of unwritten law. No written law of the land, nor even the Constitution of Pakistan, 1973 authorized the learned Judge to venture into doing what could have been, but was not, done by competent Parliament. Such an inadequacy suggests misconceived approach on the part of the courts.[561]

Qua S. 9(a), (b) & (c) of the narcotics law[562] it was held that a court might depart from the prescribed norms after recording its reasons. The rationale was said to be the existence of some predictability of judicial response to community's actions or inactions.[563] The learned Judge seems to have sought uniformity and standardization of judicial response to similar legal situations. However, he was proceeding "not in aid of analysis of discussion by the Parliament but appears to be extending the interpretation right in an effort to give operational content to a complex set of legislation."[564] The concept of due process of law and power of interpretation revolve around the observation of those limits as well as the complementary concept of limitation on that power.[565] Obviously such a policy was based upon unwritten law and was a clear inroad into affairs of the Parliament.

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[559] Criminal Appeal No.284-J of 2008, decided on 27th March, 2009. (Ghulam Murtaza case).
[560] Before Asif Saeed Khan Khosa, Tariq Shamim and M.A. Zafar, JJ.
[561] Ronald J. Allen, Standards of Proof and the Limits of Legal Analysis (May 3, 2011). Los estándares de prueba y los límites del análisis jurídico, in Carmen Vázquez (ed.), Prueba científica y estándares de prueba, Marcial Pons, Madrid-Barcelona-Buenos Aires-Sao Paolo, 2012, Forthcoming., 2. Available at SSRN: https://ssrn.com/abstract=1830344 or http://dx.doi.org/10.2139/ssrn.1830344, last accessed 27-02-2024.
[562] Control of Narcotic Substances Act (XXVIII of 1997).
[563] Ghulam Murtaza vs. State, PLD 2009 Lahore 362, 365.
[564] Herbert L. Packer, The Limits of the Criminal Sanction, Stanford University Press, (1968), 73.
[565] John Griffiths, Ideology in Criminal Procedure or a Third Model of the Criminal Process, The Yale Law Journal, Vol. 79, No. 3 (Jan., 1970), pp. 359-417, at p. 392.

3.3. Continuing Flaws in Criminal Law.

The flaws in the criminal law in practice in Pakistani courts also show the working of un-constitutional and unwritten judicial policy. This idea can be discussed as follows.

3.3.1. Anomaly at Anti-Terrorism Regime.

Unconstitutional constitutionalism also owes its existence to judicial action which otherwise appears based upon written law but is undertaken on the basis of unwritten judicial policy. It is to be appreciated that terrorism,[566] especially in the wake of 9/11 incident in America, caught the attention of the world.[567] But Pakistan had started to respond to this menace in the 1990's,[568] much prior to the Americans.[569] However, it is to be appreciated that the Pakistan's anti-terrorism law[570] is fundamentally flawed. It has entangled the Anti-Terrorism Courts (ATCs) in trial of ordinary crimes exaggerated as acts of terrorism.[571]

Moreover, the regime also suffers from other flaws. To fill this gap, the Fair Trial law[572] was promulgated. During the past decade, a number of new offences of terrorism have emerged that are neither defined properly nor penalized adequately in the Act.[573] For punishing these acts, reliance is placed upon an outdated law.[574] What vitiates the law in

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[566] Firstly, word "terrorism" was used in the preamble of the Suppression of Terrorist Activities (Special Courts) Act 1975, which was promulgated to counter sectarian violence.
[567] Sahar F. Aziz, Race, Entrapment and Manufacturing 'Homegrown Terrorism' (April 18, 2023). 3 Georgetown L.J. 381 (2023), Rutgers Law School Research Paper, Available at SSRN: https://ssrn.com/abstract=4460486, last accessed 24.07.2024.
[568] Anti -Terrorism Act, 1997.
[569] See Chapter 2 of "Collection and Analysis of Evidence in Anti-Terrorism Cases: Comparative Study of India and Pakistan", unpublished LL.M Thesis of the scholar.
[570] Anti-terrorism Act, 1997.
[571] Junaid Razzaq, Reforming The Anti-Terrorism Law. PLD 2019 Magazine/journal Section, p.6. Also available at http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2019J6, last accessed on 13.01.2024.
[572] Investigation for Fair Trial Act 2013.
[573] Junaid Razzaq, Reforming The Anti-Terrorism Law. PLD 2019 Magazine/journal Section, p.6. Also available at http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2019J6, last accessed on 13.01.2024. *Also see*, Abdul Aziz alias Sadam vs. State, 2023 YLR 1821 (QUETTA). Also available at, http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2023Q4029. Last accessed 13.01.2024.
[574] Explosive Substances Act, 1908.

the first place is the very vague and expansive definition of terrorism in the statute.[575] Continuing with this broad and loose definition of terrorism in a law specially created to combat terrorism does not help the criminal justice system at all.[576]

3.2.2. Insensate Approach to Psychological Patients: The case of Penalising Suicide.

In both India and Pakistan, the unwritten judicial policy finds expression in trial of a patient-accused. Although Indian case of *P. Rathinam* was not approved by the full bench of the Indian SC in *Smt. Gian Kaur*[577] the same deserves much legal appreciation.[578] Indian SC held the offence of attempting to commit suicide to be unconstitutional.[579] However, with the change of time, presently even attempt to commit suicide is not a criminal offence.[580]

It is to be noted that the Indian mental health law has provided presumption of severe stress to the accused,[581] in case of attempt to commit suicide.[582] However, in Pakistan, although the mental health law suggests assessment "by an approved psychiatrist"[583] it does not diminish the aftermaths of arrest of the victim-cum-accused under section 325 of PPC, 1860. However, it is not to deny the gradual shift in judicial trend.[584]

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[575] Section 6 of the Anti -Terrorism Act, 1997. *See also,* Javed Iqbal vs. State, 2024 SCMR 1437. Also see, Faqeer Muhammad vs. State, PLD 2024 (KAR) 170.also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2024K16, last accessed 24.08.2024.

[576] Rai Akhtar Hussain, Defining 'Terrorism' in Pakistan (April 28, 2017). Available at SSRN: https://ssrn.com/abstract=4000140 or http://dx.doi.org/10.2139/ssrn.4000140, last accessed 23.01.2024.

[577] Smt. Gian Kaur VS. the State of Punjab, 1996 SCC (2) 648, AIR 1996 Supreme Court 1257.

[578] Ibid. Also see, AIR 1996 Supreme Court 1257, second last para. In the same case/para the decision of Maruti Shri Pati Dubal vs. State of Maharashtra, 1987 Crl. L.J. 743, by Bombay High Court was also held to be not correct in addition to P. Rathinam Vs. Union of India, (1994 AIR 1844).

[579] P. Rathinam vs. Union of India, 1994 AIR 1844; 1994 SCC (3) 394, para 109.

[580] *See*, Suicide Act, 1961 (of UK). *Also see*, Louis Bloom Cooper and Gravin Drewry, Law and Morality (1976), pp. 190 to 207. (These pages also contain the speeches made by the Lord Bishop of Carlisle and Lord Denning in the House of Lords during second reading of The Suicide Bill, 1961 in UK.)

[581] Akshath Indusekhar, IPC 309- An Anachronistic Colonial Remnant Incompatible With Modern Criminal Law? (October 1, 2023). Available at SSRN: https://ssrn.com/abstract=4589391 or http://dx.doi.org/10.2139/ssrn.4589391, last accessed 11.07.2024.

[582] Section 115 of the (Indian) Mental Health Care Act, 2017.

[583] Section 49 of the (Pakistani) Mental Health Ordinance, 2001.

[584] The courts appear to be taking attempt to commit suicide as mitigating circumstances. *See*, Muhammad Ayaz vs. State, 2023 YLR 1537 (LHR). Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2023L4068, last accessed 23.10.2024. See also, Asif Shahzad vs State, 2022 YLR 669 (LHR). In this case the appeal against conviction was allowed and the accused was acquitted by LHC.

In the backdrop of the anomalies continuing in substantive criminal law it appears appropriate to discuss a case[585] which is reminder of some, if not many, suffering at the hands of State through the police. The very genesis of section 325,[586] seen through the prism of socio legal history of British colonialism, appears enroot in the very foundation of serving the royal masters. The approach of dubbing a patient as an accused is insensate.[587] UTP's[588] challans[589] keep on perpetuating culture of State's role degenerating to searcher instead of affectionate protector, unattended by much needed psychological, reformatory and therapeutic treatment.[590]

At present in none of American States attempting to commit suicide is not an offence nor does any State make such an attempt a crime by statute.[591] It is because the punishment for an offence has to have a justification. It serves as deterrence for a healthy person and not for a mentally ill and disturbed one, who is rather in need of psychological treatment. His confinement is bound to worsen and cause further derangement.[592] The offences, like one u/s.325 PPC 1860, should be seen through glasses of "acute pain and emotional distress, and not through the repressive and retributive goggles."[593] It appears more expedient to remove

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[585] The State vs. Muhammad Ijaz, in Case/FIR No. 1700/21, U/S 325/337-A (i) PPC, 1860 registered at P.S Koral, Islamabad. This case was decided by the scholar as Judicial Magistrate Sec-30 Islamabad- East on 17-12-2022.

[586] Of PPC, (XLV of 1860). In Indian Penal Code, 1860 (IPC), the corresponding provision is S. 309.

[587] Stefanie Bock and Stuart P. Green, Defining the Victim in the Law of Homicide (February 14, 2023). Core Concepts in Criminal Law and Criminal Justice: Volume III (Cambridge U. Press) Forthcoming, Available at SSRN: https://ssrn.com/abstract=4338744 or http://dx.doi.org/10.2139/ssrn.4338744, last accessed 12.01.2024.

[588] Under Trial Prisoner(s). They are the accused facing trials who keep on appearing from jail and whose cases are remanded u/s. 344 Cr.P.C, 1898.

[589] Per S. 173 Cr.P.C, 1898 u/s. 325 PPC, 1860. The word *Challan* has been used in (Punjab) Police Rules, 1934. Under Cr.P.C. 1898, the expression 'Report U/S 173' is mentioned. It is in fact Charge Sheet against the accused comprising of Seven Columns in a format prescribed under Form 25.56 (1) and 25.57(2) of Police Rules, 1934.

[590] E. Lea Johnston, Imperfect Insanity and Diminished Responsibility (2024). 76 Fla. L. Rev. 553 (2024), University of Florida Levin College of Law Research Paper Forthcoming, Available at SSRN: https://ssrn.com/abstract=4696928 or http://dx.doi.org/10.2139/ssrn.4696928, last accessed 25.o9.2024.

[591] Catherine D. Shaffer, "Criminal Liability for Assisting Suicide", Columbia Law Review, Vol. 86 (March 1986), pp.348, 369-71.

[592] See Para 20 of DB's decision in Maruti Shri Pati Dubal vs. State of Maharashtra, (1987 Cr. L. J, 743) by Bombay High Court.

[593] Owen D. Jones and Jeffrey D. Schall and Francis X. Shen and Morris B. Hoffman and Anthony D. Wagner, Brain Science for Lawyers, Judges, and Policymakers (March 11, 2024). Jones, Owen D. and Schall, Jeffrey D. and Shen, Francis X. and Hoffman, Morris B. and Wagner, Anthony D., Brain Science for Lawyers, Judges, and

such a penal provision from the statute book.[594] By so doing, footprints would be left for the other countries to follow.[595] In view of these consideration and anomalies, while invoking *suo moto* power,[596] accused Muhammad Ijaz S/o Abdul Sattar was acquitted from the case.[597]

3.3.3. The Pinching Fork of S. 411 PPC, 1860: Continuing with Unwritten Law, the Practice of Police.

The Constitution clearly speaks prohibits against double jeopardy.[598] However, the courts in District Judiciary are wasting their precious time and by their practice are violating this Constitutional principle at the cost of unwritten judicial policy. The breakdown of a case, having been dealt with by the scholar is discussed which would elucidate the issue.[599]

Case/FIR No.156/21, police station (P.S) Industrial Area (I.9) Islamabad was registered regarding theft of motor bike. It is worth noting that FIR No. 156/21 was registered on 12.2.2021 whereas the said motorcycle had already been recovered by police of P.S Koral, Islamabad in case/FIR No. 47/21 when accused persons were arrested on 10.02.2021 u/s 550 CrPC.[600] Another aspect of prosecution case was that regarding theft of subject bike case/FIR No. 1804/20 dated 29.11.2020 had also been registered in

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Policymakers (March 13, 2024)., Vanderbilt Law Research Paper, Oxford University Press (2024) , Available at SSRN: https://ssrn.com/abstract=4757769, last accessed 24.09.2024.

[594] P. Rathinam vs. Union of India, 1994 AIR 1844. (Para 74). In this case Indian Supreme Court also refereed to Suicide Act, 1961 from the English Jurisdiction and observed that attempt to commit suicide is no more an offence there. To quote but one line: ‘‘Section 309 of the penal code deserves to be effaced from the statute book to humanise our penal laws.’’

[595] In India u/s. 115 of Mental Health Care Act, 2017, presumption of severe stress in case of attempt to commit suicide was provided to the accused. However, in Pakistan, S. 49 of Mental Health Ordinance, 2001, did not diminish the arrest of victim-cum-accused u/s.325 PPC, 1860.

[596] U/s. 249-A, Code of Criminal Procedure (Act V of) 1898.

[597] It is pertinent to clarify that right after decision by the scholar in this case i,e, (State vs. Muhammad Ijaz), the offence u/s.325 PPC, 1860 has been omitted on 23-12-2022 by the Parliament of Pakistan through Criminal Laws (Amendment) Bill 2022, though it was not in consequence of decision of the scholar in the said case.

[598] Art. 13 of the Constitution of Pakistan, 1973

[599] First Information Report (FIR) NO. 156/21, U/S 411 Pakistan Penal Code (PPC), dated 12.02.2021, Police Station (P.S) Industrial Area (I.9) Islamabad. The case was decided by the scholar on 21-12-2023 as Judicial Magistrate, P.S Industrial Area (I.9) Islamabad. In view of no probability of conviction, the accused Muhammad Ramzan was acquitted from this case U/s 249-A CrPC 1898. Accused was on bail. His bail bonds were discharged and surety was released. Case property was directed to be dealt with in accordance with law after expiry of period of appeal. It was also considered expedient to send the copy of this order to I.G, Islamabad with direction to circulate the same to the SHO’s/I.O’s concerned for guidance through SSP Investigation, Islamabad. File was consigned to record room after its due completion and compilation, by Ahlmad/Nauman Ilyas.

[600] Crimianl Procedure Code (Act V of 1898).

Rawalpindi.[601] Now if investigation of FIR No. 47/21 P.S Koral was being made by CIA Police Islamabad and recovery of subject bike was made during the course of said investigation, even then the registration of FIR U/s 411 PPC at P.S Industrial Area (I.9) Islamabad does not appeal to the logical mind. The prudence rather demands that the accused and subject bike should go back, under well-established procedure,[602] involving the office of CCPO,[603] DIG[604] or AIG[605] concerned, to the very police station where case of theft was first registered.[606]

As to case of the accused from whom the subject vehicle/bike has been recovered and against whom offence u/s. 411 PPC appears to be attracted, law has luckily not left the situation without remedy. Rules 25.3, 25.4 and 25.7[607] are very specific in this regard. The law does not say about "cancellation of FIR" but speaks about "cancellation of offence" registered in the police station.[608] This line of reasoning appears to be more logical and convincing in view of the wisdom of law as to double jeopardy.[609]

As such, it would be just another and independent case where a person is found in possession of subject bike/vehicle against whom a case/FIR u/s. 411 PPC is registered. There are, therefore, two categories of cases: first, those which are, loosely speaking, an offshoot of previous case/FIR u/s. 381-A or 392 PPC and second, those in respect of which no previous case/FIR appears to have been registered. The prudent mind prefers that these are two different and independent situations and must be dealt with accordingly.

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[601] u/s 381-A PPC at P.S Airport, Rawalpindi.
[602] The procedure involves getting issued a docket from the office of CCPO, DIG or AIG concerned, getting it forwarded from the office of District and Sessions Judge concerned within whose Session Division the incident of theft of bike/vehicle was reported first and where the FIR u/s 381-A PPC was originally registered, and getting the same (docket) endorsed from the District and Sessions Judge concerned, under whose auspices the Magistrate is working to whom is presented the same docket with application for transfer of accused as well as the shifting of subject bike or vehicle.
[603] Capital City Police Officer.
[604] Deputy Inspector General of Police
[605] Additional Inspector General.
[606] That is, FIR No. 1804/20 dated 29.11.2020 U/s 381-A PPC P.S Airport Rawalpindi.
[607] Of the Police Rules, 1934.
[608] Rule 25.7 of the Rules, ibid.
[609] Person once convicted or acquitted not to be tried for same offence. See, S.403 Cr.P.C, (Act V of) 1898.

The upshot of above discussion is that if the practice of the police is allowed to continue, the same would serve only to show sham performance of the police.[610] It would create considerable burden on the magisterial courts by keeping them engaged in doing the false requisite where the true requisite has already been done as in the other case/FIR. However, the silence of the high ups and those at the helms of affairs appears to be the result of unwritten judicial policy.

3.3.4. The Offshoot Offence U/S.13/20/65 AO and The Trial of So Called Second Case: The Unwritten Practice of Recording Evidence Twice Against The Same Accused.

There is no benefit in recording evidence twice in criminal matter. It amounts to absue of process of court and of law. Not arresting this trend by the Superior Courts in this regard gives vent to unwritten judicial policy.

It is to be noted that the Law of evidence[611] and Cr.P.C, 1898 provide in detail the manner of recording of evidence in inquiries and trials.[612] The relevant provisions of law are meant to further the Constitutional cause relating to expeditious justice.[613] In this regard to sensitize the District Judiciary, SCP came up with the idea of National Judicial Policy in 2009. The discussion here would centre on if policy could bypass the codified Procedure. When it comes to deal with expeditious disposal of criminal cases pending before District Judiciary, especially Magisterial 1st Class (MIC), this issue pops up on daily basis.

It pertains to First Information Report (FIR)[614] and the separate trial of the second category of case(s) u/s. 13.20.65 AO[615] in the Magisterial Courts. The adverse effects appear to include the repercussions flowing out from the proxy interrogation and prosecution in

[610] Nadia Banteka, Unconstitutional Police Pretexts (February 23, 2023). Wisconsin Law Review, Vol. 2023, No. 6, 2023, Available at SSRN: https://ssrn.com/abstract=4367576, last accessed 25.09.2024.
[611] Qanoon- a- Shahdat Order (Act X of) 1984.
[612] Chapter XXV (SS.353 through 365) of the Code of Criminal Procedure, (Act V of) 1898 deals with the procedural aspect of mode and manner of recording evidence in inquiries and trials.
[613] Art. 37 (d) of the Constituiton of the Islamic Republic of Pakistan, 1973.
[614] U/s. 154 Cr.P.C.(Act V of 1898).
[615] Offence u/s 13 of Arms Ordinance No XX of 1965. "13/20/65" is a legal jargon and is shortened as offence u/s 13.20.65 AO.

these cases.[616] The separate trial of second case[617] in the court of MIC[618] is nothing more but an implied way to just add to the already ever increasing pendency.

However, the set of Prosecution Witnesses (PWs) in second case u/s 13.20.65 AO is the same as in main case u/s 302, 392, 395, 396 or 324 PPC, 1860. Where they are not the same, at least the I.O and recovery witnesses are the same, generally. In this situation the same set of PWs has got to appear twice before the courts, once before DSJ[619] or ASJ or MS 30,[620] and then before MIC. There is no benefit of doing this. This seems in itself a useless activity that adds to nothing except contributing towards wastage of precious time of court. It also adds to the burden on police agency.

Moreover, once a case is decided the file is consigned to the Record Room[621] which in itself is a difficult sector to manage. The more the number of cases in each court, the more the space that is required to keep the files in Record Room. Instead of one file, two files are consigned to Record Room. This happens when the main case is decided finally and results either into acquittal or conviction.

However, there is another situation. Sometimes, the UTP[622] submits an application that till the decision of first/main case, the second case u/s 13.20.65 AO may be consigned to record room which would be decided after decision of first/main case. This practice of cosigning the second case till decision of main/first case is not in accordance with written law/procedure. The judicial file in such a case remains pending, not for days but for months

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[616] Deborah Davis and Iris Blandon-Gitlin and Hayley Cleary and Mark Costanzo and, Richard A. Leo and Stephen Margolis, Interrogation by Proxy: The Growing Role of Lay Interrogators in Eliciting Criminal Confessions (July 25, 2023). Univ. of San Francisco Law Research Paper, Criminal Law Bulletin, Volume 59, No. 4. Pp. 395-479, Available at SSRN: https://ssrn.com/abstract=4530797, last accessed 25.09.2024.

[617] This case is referred to as such because the main case is of murder u/s. 302 PPC, of grievous hurt/murderous assault u/s. 324 PPC, robbery u/s. 392 PPC, dacoity u/s. 395 PPC or dacoity cum murder u/s. 396 PPC, 1860.

[618] Magistrate 1st Class.

[619] For a murder trial case study *see*, Sara Qayum and Hussain Ahmad, The Right of an Accused to a Fair Trial in Criminal Administration of Justice: Testing the Fairness of a Murder Trial in Sessions Court in District Shangla of Khyber Pakhtunkhwa (March 1, 2022). Pakistan Journal of Criminology, Vol.14, No.3, July-September 2022 (101-114), Available at SSRN: https://ssrn.com/abstract=4380339, last accessed 25.09.2024.

[620] Judicial Magistrate Section 30 Cr.P.C 1898.

[621] It is specified room/place/hall where files decided by Judges are consigned. A person, Incharge of same is Custodian of the same and is responsible for the same.

[622] i.e., Under trial prisoner.

and sometimes two/three years, just for tracing out the original file/ challan of second case. The same is not traced out as the *Kuliya* number[623] is not known. Therefore, it takes considerable time in our system of administration of justice on criminal side for a Session trial u/s 302 PPC or MS 30 trial u/s 395 PPC to conclude due to mere issuing of Robkars for tracing the files.[624]

Trust deficit is bound to follow in this situation which is twofold.[625] Firstly, the lawyer and litigant know that the PWs would not appear as they are even otherwise too much engaged. The police witness knows that litigant or his lawyer would make submission or would file an application that PWs may not be summoned. The Presiding Officer knows that PWs would not appear in front of him before appearing in the Court of DSJ/ASJ/ MS30. Secondly, this practice is crime supportive. The fate of one case is associated with the other, mostly on the basis of institutional hierarchy and not on the basis of written law and jurisdiction.

Sometimes an argument is given that trying second case by Session Court or by an ASJ is like taking away a forum of appeal from accused. This argument is real problem that has produced more problems than ease for the accused and for system of administration of justice. A counter argument can be: where is the same forum for the complainant in case of acquittal in which case appeal is directly preferred before Hon'able High Court instead of Sessions court.[626]

Luckily, seven years after the suggestion of the scholar on these lines back in 2015 during pre-service judicial training (as Civil Judge cum Judicial Magistrate), at Federal

[623] Reference number assigned to a specific file/ decided case whereby it is easier to trace the same.
[624] Written/signed order(s) in the name of Ahlmad (Record Keeper attached to the Court.
[625] Arie Freiberg, Bridging Gaps, not Leaping Chasms: Trust, Confidence and Sentencing Councils (December 26, 2021). International Journal for Court Administration (2021), Monash University Faculty of Law Legal Studies Research Paper, Available at SSRN: https://ssrn.com/abstract=4120173, last accessed 25.09.2024.
[626] U/s. 417 Cr.P.C (ACT V of) 1898.

Judicial Academy, Islamabad,[627] the IHC grabbed the opportunity to endorse this suggestion,[628] though it did not directly flow from the said suggestion. However, in rest of the country the previous practice, based upon unwritten law and unwritten judicial policy, is still continuing.

3.3.5. The Issue of Compound ability and Non-compound ability of Offences and Islamic Injunctions.

Islam is State religion.[629] Admittedly, under *Sharia*, for the settlement of disputes, reconciliation is recommended and is considered to be the best way.[630] It is to be appreciated that forgiveness is Divine and this attribute finds honourable mention in the sacred texts.[631] However, the criminal law in vogue in the country is otherwise, though partly. It comes up with the concept of compoundable and non-compoundable category of offences.[632] Regarding compoundable categories of offences it qualifies the same before they are concluded.[633] The category of compoundable cases includes that of offence of murder also which is the most heinous of all the offences and is considered most detestable under the *sharia* and the secular law alike.[634] In view of this, it is strange to make the less heinous, less detestable cases non-compoundable. Even in the other category of heineous offences viz., rape cases, the

[627] This suggestion was given by scholar even during Pre Service Judicial Training at Federal Judcial Academy, Islamabad (FJA) in 2015. This was given by the scholar during essay competition arranged by the the FJA.
[628] Criminal Appeal No. 151/2020 titles as "Shehzad Khaliq vs. The State etc." IHC, Islamabad directed that second case(s) u/s. 13/20/65 AO would be heard and tried with main case under S.302 PPC. *See also*, letter No. 1546/Criminal dated 18.01.2022 where under now the second cases u/s 13.20.65 AO are being sent to the Sessions Courts by the concerned Magistrates, in Islamabad-WEST under letter No. 334/J-III dated 31-01-2022 of District and Sessions Judge Islamabad-WEST and in Islamabad-EAST under letter No. 161/DSJ (E) dated 21-01-2022 of District and Sessions Judge Islamabad-EAST.
[629] Article 2 of the Constitution, 1973.
[630] Al Quran (Verse No. 35 of Sura Al' Nisa (4) in Pa'ra Five Al' Mohsanat). This is on Family issue. There are many others on general concept of reconciliation and Sulah. See for example, Verse No. 09 of Sura' al Hujrat in Al Quran; al-Anfaal 8:1. *See also*, Abu Dawood, 4273; al-Tirmidhi, 2433.
[631] Mukhtar Ahmed etc. vs. State etc. PLJ 2011 FSC 109, para 14, at p. 115.
[632] *See,* S. 145 of Cr.P.C. 1898 and Column No. 06 of the 1st Schedule of the same.
[633] Sarfaraz Ahmed Khan, Restorative Justice Under the Criminal Justice System in India: With Special Reference to Plea Bargaining and Compounding Measures (March 22, 2011). RESTORATIVE JUSTICE IN INDIA - M.PHIL. DISSERTATION, WBNUJS, Available at SSRN: https://ssrn.com/abstract=2566126 or http://dx.doi.org/10.2139/ssrn.2566126, last accessed 25.09.2024.
[634] Bakht Munir, Exploring Islamic Injunctions on Remission of Sentences (December 30, 2020). Global Legal Studies Review, Fall2020, Vol. V, No. IV [01-09], Available at SSRN: https://ssrn.com/abstract=4916586 or http://dx.doi.org/10.2139/ssrn.4916586, last accessed 20.05.20024.

compounding is allowed despite the fact that the same is a non-compoundable offence and is considered as offence against the society at large.[635]

This practice of continuing with compoundable and non-compoundable categories is also related to the Alternate Dispute Resolution (ADR) regime in the country.[636] The same is applicable to the extent of ICT, Islamabad only. It deals with criminal cases also. It mentions the compoundable category of offences only and does not touch the other category. As such, the legal regime fails to do the needful.

There is no denial that sometimes some courts do not allow the cases to be compounded,[637] and proceed with the trial of cases and award sentence to the offenders. However, there are judgements which encourage compromise even in non-compoundable cases, as a restorative step.[638] Where compromise is effected it would be very difficult for the Court to convict the accused[639] on the ground that when complainant is not willing to prosecute the matter any further then it is not for the court to compel the parties to do so[640] as the saying goes "you can take the horse till water but you cannot make him drink."[641]

If the written law says that there are to be these two categories of cases then there ought not to be judgements to hold that the compromise may be allowed in non-compoundable cases. If it is to be so handed down, then there is no wrong in making all the

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[635] Ibid, para 12. See also Muhammad Arif vs. The State, 2002 YLR 3077, at p. 3084. *Also reported as,* 2003 SD 79, para 15. On compounding of rape case, *see also*, Zulfiqar ud Din vs. State etc., PLJ 2022 SC (Cr.C) 40.
[636] Alternate Dispute Resolution Act, 2017, (Act XX of 2017).
[637] Muhammad Ejaz Saeed vs. State, 2023 PCrLJ 1476 (Peshawar).
[638] Surbhi Singh, [Restorative Justice Under Criminal Law - a Study] (May 10, 2021). Available at SSRN: https://ssrn.com/abstract=3842800 or http://dx.doi.org/10.2139/ssrn.3842800, last accessed 25.09.2024.
[639] Dr. Muhammad Ramzan, Globalization of Prosecutorial Justice: An Appraisal (December 5, 2021). Global Political Review, VI (II), 67-78., 2021, Available at SSRN: https://ssrn.com/abstract=4013305, last accessed 21.05.2024. *See also*, Imamuddin vs. State, PLD 2022 KAR 359. Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2022K40, last accessed 23.02.2024.
[640] Dabere Monwe, The Offence of Compounding: A Guide; Not a Bar to Criminal Mediation in Nigeria (April 8, 2020). Available at SSRN: https://ssrn.com/abstract=3916982 or http://dx.doi.org/10.2139/ssrn.3916982, last accessed 25.09.2024.
[641] Mukhtar Ahmed and three others vs. the State, 1999 P. Cr. L J 1107, para 4. *See also*, Muhammad Akram vs. The State 1995 MLD 1826; Mst. Mussarat Elahi alias Bibi vs. The State 1997 PCr.LJ 1193, *and* Ghulam Ali vs. The State 1997 SCMR 1411.

cases compoundable to ensure that Constitutional obligation of expeditious justice is met and the purpose of legal and codified regime on ADR is fulfilled.

3.4. Peeping Beyond the Written Façade of the Constitution.

This unwritten judicial policy of silently proceeding with deliberated left over anomalies is discussed in the coming lines.

3.4.1. Deliberate Left Over Anomalies In The Constitution.

Constitution of a country is foundation head of all laws. A constitution has to be proactive and not static.[642] The Constitution should be "in such language that efflux of time will not change, dissipate or lose its meaning, import, relevance or significance."[643] But a scan through our constitution shows that there are certain inconsistencies. These may not be by design but may be by default or due to oversight.

The Constitution[644] is very particular about the procedure of elections to different offices, passage of Bills and resolutions etc. The expressions used in the constitution are "*by majority of the total membership", or "majority of the members present and voting*."[645] Art. 91(4) and Article 95 (4) dealing with the election of the Prime Minister and no confidence move, respectively also speaks on these lines.[646]

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[642] Yash Sinha, Constitutional Ecdysis: How and Why the Indian Constitution May Test Its Original Provisions (September 29, 2022). Available at SSRN: https://ssrn.com/abstract=4233661 or http://dx.doi.org/10.2139/ssrn.4233661, last accessed 25.09.2024.

[643] Syed Nasir Ali Shah, Fault Lines, Ambiguities and Extra Baggage of the Constitution of the Islamic Republic Of Pakistan, 1973. PLD 2021 Magazine/Journal Section, p.7. Also available at http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2021J6, last accessed on 15-01-2024., last accessed on 15-01-2024. *Also see,* Martin David Kelly, The Loquacious Legislature: are statutes 'always speaking'? (July 31, 2021). Available at SSRN: https://ssrn.com/abstract=4738764, last accessed 20.01.2024.

[644] Constitution of the Islamic Republic of Pakistan, 1973.

[645] For instance proviso to Article 82 (2), relating to procedure relating to Annual Budget statement, provides for votes of "majority of the total membership of the Assembly".

[646] Tahir Sadiq vs. Faisal Ali, 2024 SCMR 775. *Also see*, Umar Aslam Khan vs. Election Commission of Pakistan, 2024 SCMR 553. Available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2024S796, last accessed 15.01.2024. It was observed in these cases that Articles 62 and 63 of the Constitution, 1973 read with Sections 231 and 232 of the Election Act, 2017 provide for qualification and disqualification of a candidate, which does not mention that a "proclaimed offender" (PO) u/s 87 of Cr.P.C.,1898 is disqualified from being elected or from being a member of Parliament. *Also see,* Articles 130 (4) and 136 which respectively deal with election of Chief Minister and no

As against these, Art.70[647] and Art.72 (4)[648] provide for *"majority of the members present and voting"* in the joint sitting. However, there is ambiguity which is hard to gauge in that paradoxically Art. 48(6), dealing with holding of referendum, neither provides for majority of the 'total membership' nor 'majority of the members present and voting.' It simply provides for referring the matter to a joint sitting of, and its approval by, the Parliament.

The Constitution of 1973 lays much stress on age and seems to be year-centric.[649] On the other hand, when it comes to judiciary, the things start getting vague. No doubt according to Art. 193(2) the minimum age limit for a Judge of High Court is forty five years and retiring age is sixty two years[650] but no minimum age limit for Judge of SCP has been provided. There is no minimum or maximum age limit of a Judge of Federal Shariat Court (FSC). Similarly no upper age limit has been provided for Advocate General.[651]

Article 185(2) (a) dealing with appeal to the Supreme Court, inter alia, provides "if the High Court has, on appeal, reversed an order of acquittal of an accused person"

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confidence move against Chief Minister provide for "majority of the total membership". Article 239 which deals with the amendment of the constitution also provides for "by the votes of not less than two third of the total membership of the House".

[647] Of Constitution, 1973 (relating to introduction and passing of Bills).

[648] Of constitution, ibid (dealing with procedure at joint sitting). In the same way, Article 75(2) and Article 116 which deal with President's and Governor's assent to Bills, respectively also speak about the votes of majority of the members present and voting. Similarly, proviso of Article 91 which provides for election of the Prime Minister where no member secures majority in the first poll also envisages "majority of the votes of the members present and voting."

[649] *See for example*, under the Constitution of Islamic Republic of Pakistan, 1973 compulsory education to all children of the age of five to sixteen years has been provided (Art. 25-A); the President shall not be less than forty five years of age (Art. 41); Governor shall not be less than thirty five years of age(Art. 101). A member of National Assembly shall not be less than twenty five years of age (Art. 25). A voter shall not be less than 18 years of age (Art. 51). A Senator shall not be less than thirty years of age (Art. 62). Maximum age limit of Auditor General is sixty five years (Art. 168). Maximum age limit of Chief Election Commissioner is sixty eight years (Art. 21). The maximum age limit of members of Election Commission is sixty five years (Art.218). On upper age limit of CEC, *see also*, Yasir Safeer Mughal vs. Azad Government of Azad Jammu And Kashmir, 2023 PLC (CS) N 39 (HIGH COURT AJK). Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2023HCAJK15002, last accessed 15.01.2024.

[650] Article 195, of the Constitution, ibid.

[651] Mazhar Rasool Hashmi vs. Government of The Punjab, 2023 CLC 1201 (LHR). Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2023L249, last accessed 15.01.2024.

and sentenced him to death or "transportation for life." Incidentally, sentence for 'transportation for life' is not provided under any statute.

As per the constitutional scheme, FSC has a slight edge over High Court as its decision is binding on the latter.[652] However, there is no mention of Judge of FSC in Articles 68 and 114 which provide that no discussion shall take place in Parliament and Provincial Assembly, respectively with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties.

Besides, Art. 228 dealing with the composition of Islamic Ideology Council, inter alia, provides that "not less than two of the members are persons each of whom is or has been judge of the Supreme Court or of a High Court". But there is no mention of a Judge of FSC in the said Article. This is really weird in that the concept of FSC shows, prima facie, as if other Courts are non-*Shar'ia*. But instead of specifically mentioning Judges of FSC in the Islamic Ideology Council, the Judges of Supreme Court or High Court have been included therein. It is also pertinent to mention that the qualification to be a Judge of FSC is, comparatively speaking, more Sharia compliant.

Article 207 provides that a Judge of SC or of a High Court shall not hold any other office of profit in the service of Pakistan. But no such bar is applicable to a Judge of FSC. Again, in terms of Art. 209 (8), a Code of Conduct has been provided for Judges of Supreme Court and High Courts. But no such Code of Conduct has been provided for the Judges of FSC.

The Constitution provides "that the President shall appoint the most senior of the others judges as Chief Justice of Pakistan".[653] But no such corresponding provision has been provided for appointment of Chief Justice of a High Court. The Constitution simply

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[652] Article 203-GG, of the Constitution, ibid.
[653] Article 180, of Constitution of Islamic Republic of Pakistan,1973.

provides that "one of the other judges to be appointed as Chief Justice".[654] Similarly, as per Article 175-A, Attorney General for Pakistan is a member of Judicial Commission of Pakistan for the appointment of Judges of Supreme Court but for the appointment of Judges of a High Court no such representation has been given to the Advocate General of the Province concerned whose duties and responsibilities are at par with the Attorney General for Pakistan. This appears to be strange and not understandable.

Within the contemplation of the Constitution one of the grounds for removal of a Judge under Art.209(5) (a) is that he may be incapable of 'properly' performing the duties. But in the report to be submitted by the Council under Article 209 (6) (i) the word 'properly' is conspicuously missing.[655]

The word 'Majlis-e-Shoora' gives an alien vibe as it appears to have crept into the Constitution as a foreign body. There is inundation of this expression which appears to have been used almost on 128 occasions. Interestingly and significantly on 14-08-1973[656] this word was alien to the Constitution. The Constitution augments the Islamic provisions.[657] Moreover, FSC can declare any law or provision of law as repugnant to the Injunctions of Islam.[658] As such, democracy having returned to the country, the term 'Majlis-e-Shoora' has lost its relevance and significance.[659] It is now an unnecessary appendage and extra gear of the Constitution which needs to be discarded.

In case of lack of consensus between Prime Minister and Leader of Opposition, regarding appointment of Chief Election Commissioner and the members of Election Commission, each shall forward separate lists to the Parliamentary Committee for

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[654] Article 196
[655] Syed Nasir Ali Shah, Fault Lines, Ambiguities and Extra Baggage of the Constitution of the Islamic Republic Of Pakistan, 1973. PLD 2021 Magazine/Journal Section, 6, at 8. Also available at http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2021J6, last accessed on 15-01-2024.
[656] Day of coming into effect of the Constitution, 1973.
[657] Part IX, comprising Articles 227 to 231, of the Constitution, 1973.
[658] Article 203-D, of the Constitution, ibid.
[659] Syed Nasir Ali Shah, Fault Lines, Ambiguities and Extra Baggage of the Constitution of the Islamic Republic Of Pakistan, 1973. PLD 2021 Magazine/Journal Section, 6, at 8. Also available at http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2021J6, last accessed on 15-01-2024.

consideration which may confirm any name. The Parliamentary Committee is evenly-composed. No way out has been provided in the Constitution to cater the situation where Parliamentary Committee fails to confirm any name. The country was confronted with such a situation in the recent past towards end of PTI government tenure in 2022-2023.

Regarding theory of basic structure, "the fundamental properties of the Constitution were factually given in an Accord about the Constitution of 20th October, 1972."[660] In the Federal Parliamentary System Government is answerable to the National Assembly.[661] The idea of creation of the Senate was to protect rights and interests of the provinces in legislation. This principle, or the basic feature, has been violated by the 18th Amendment by inserting the words `to the Senate' in clause (6) of Art. 91 of the Constitution. This clause now does not stand in consonance with the decision in the Accord of 1972 on Constitution that the Federal Parliamentary System of Government shall be answerable to the National Assembly.[662]

Comparatively, Senate of the United States used to have two Senators from each State chosen by the legislature of the State,[663] but through an amendment to the American Constitution, Article 17 was added afterwards which provided that the two Senators from each State shall be elected by the people of the State, instead of its legislatures. Thus, now the American Senators are also the representatives of the people like congressmen whereas Pakistani Senators are representatives of the provincial legislatures and not public representatives. However, these anomalies are continuing to exist even after passing of more than half century when the Constitution of 1973 was first promulgated.

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[660] Justice S.A. Rabbani, 18th Amendment to The Constitution of Pakistan, PLD 2011 Journal Section, P. 2. Also available at, http://www.plsbeta.com/Lawonline/law/contents.asp?CaseId=2011J2, last accessed on 12-01-2024.

[661] *See also*, Basu, Durga Das, Commentary on the Constitution of India. (Calcutta: S. C. Sarkar and Sons, Ltd. 3rd ed. Volume 1. (1955), at p. 459.

[662] Justice S.A. Rabbani, 18th Amendment to The Constitution of Pakistan, PLD 2011 Journal Section, P. 2. Also available at, http://www.plsbeta.com/Lawonline/law/contents.asp?CaseId=2011J2, last accessed on 12-01-2024.

[663] Section three of the original American Constitution.

3.4.2. Piercing the So Called Islamic Fabric.

In an article the authors have measured the use of constitutionalism in fifty six Muslim countries being members of the Organization of Islamic Cooperation (OIC).[664] The thirty characteristic clauses on which the marking of scores has been done is very interesting with respect to Pakistan.[665]

The model Islamic Constitution as developed by the scholars of Al-Azhar University, Cairo, Egypt in 1977 has been used as a template in a research. Of the general findings the most crucial one is that the Islamic Constitutions Index (ICI) will serve as a proxy for measuring prevalence of constitutionalism in Muslim countries. With respect to Pakistan it is important to note that this country is ranked fourth on the rankings among fifty six countries for the degree of Islamicity with a score of 16. Iran, Saudi Arabia and Maldives surpass Pakistan on ICI.[666] Constitution of 1973 shows traditionalist approach.[667] There is also existing concept of individual rights which can be equated with Islamic personal rights pertaining to personal law.[668]

A synoptic look on certain parts of the Constitution of Islamic Republic of Pakistan, 1973 would reveal the relationship of constitutionalism and Islam.[669] Its

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[664] Dawood Ahmed and Moamen Gouda, Measuring Constitutional Islamization: the Islamic Constitutions Index. Also available on https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2523337, last accessed on 31-01-2024.

[665] Kamran Adil, Islamic Constitutions Index and the Constitution of Pakistan. PLD 2015, Magazine/Journal Section, P.12. Also available at http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2015J12, last accessed on 31-01-2024.

[666] Kamran Adil, Islamic Constitutions Index and the Constitution of Pakistan. PLD 2015, Magazine/Journal Section, P.12. Also available at http://www.plsbeta.com/LawOnline/law/contents.asp?CaseId=2015J12, last accessed on 31-01-2024.

[667] Clark B. Lombardi, Designing Islamic constitutions: Past trends and options for a democratic future. I•CON Vol. 11 No. 03 (2013), 615–645, at p. 619. Also available at: https://ssrn.com/abstract=2258089, last accessed on 01.04. 2024. For a discussion of the logic of traditionalism, see Muhammad Qasim Zaman, The Ulama in Contemporary Islam: Custodians of Change, (2007), 38–59.

[668] On individual rights, *see*, Jeremy Waldron, The Core of the Case against Judicial Review, 115 Yale L.J. 1348, 1393 (2006).

[669] Baran Khan, Comparing the Fundamental Rights in Islamic Law and Pakistan Constitutional Law Perspective (July 07, 2021). Available at SSRN: https://ssrn.com/abstract=4512567 or http://dx.doi.org/10.2139/ssrn.4512567, last accessed 03.05.2024.

constitutional scheme privileges religion by specifically declaring a State religion.[670] The implication of this declaration however, is qualified in that the religion would be taken as per *fiqah* followed by a person. However, the state law should be consistent with *sharia*. "This is a principle with a long pedigree in Islamic political thought."[671] As such, the Constitution of Pakistan provides a 'repugnancy clause' and articulates that all existing laws of the country would be brought in conformity with the Holy Quran and Sunnah.[672]

The compliance in this regard could be shown by developing "an institution that will be able to check laws for consistency with Islam in a way that all citizens, or even a majority of them, would accept as legitimate"[673] However, in Pakistan, it has been done by establishing an institution by which the Islamic provisions and Islamic injunctions are interpreted. Constitution of Pakistan provides for an advisory body on law-making.[674] The Constitution provides even for an adjudicatory body[675] i.e., FSC as a parallel, rather a super parallel to the constitutional judiciary to examine the Islimicity of the laws. The Islamic Ideology Council and the FSC chapters have been inserted in the Constitution.[676] The FSC has jurisdiction to examine and review any law, including fiscal matters, on the touchstone of the injunctions of Islam.[677] In this regard even a petition qua non-justiciable rights in the Constitution i.e. Principles of Policy, before the FSC would be maintainable.[678]

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[670] Article 2 of the Constitution, 1973.
[671] Clark B. Lombardi, Designing Islamic constitutions: Past trends and options for a democratic future. I•CON Vol. 11 No. 03 (2013), 615–645, at p. 617. Also available at: https://ssrn.com/abstract=2258089, last accessed on 01st April, 2024. For a discussion of the logic of traditionalism, see Muhammad Qasim Zaman, The Ulama in Contemporary Islam: Custodians of Change 38–59 (2007).
[672] Article 227 of the Constitution, 1973.
[673] Clark B. Lombardi, Designing Islamic constitutions: Past trends and options for a democratic future. I•CON Vol. 11 No. 03 (2013), 615–645, at p. 621. Also available at: https://ssrn.com/abstract=2258089, last accessed on 01st April, 2024.
[674] Article 228 of the Constitution, 1973.
[675] Art.203-C of the Constitution, 1973.
[676] Articles 203-A to 212 of the Constitution, 1973.
[677] Under Articles 203-B(c), 203-D & 203-G of the Constitution of Islamic Republic of Pakistan, 1973.
[678] Messrs Farooq Brothers and others Vs. United Bank Limited and others, PLD 2023 Federal Shariat Court 47, 154.

Similarly, the power of Islamic review within the regular courts was given to special Benches but soon the authorities came to think that they were not a satisfactory choice.[679] Thus, in 1980, Gen. Zia relocated the power to a new forum i.e., FSC which was thought to be better poised to mediate between liberal and conservative designs and ensure that Pakistan's laws were mostly seen as consistent with Islamic law. However, the forum was to leave the said Military dictator's favorite laws intact.[680] The composition of the FSC's Judges was changed several times to raise its credibility among the competing Islamic factions. As finally composed, it included a majority of regular Judges supplemented by Islamic scholars.[681]

Regarding Islamic provisions in the constitution, 1973, the picture appears to be bleak regarding implementation.[682] It is to be noted that most of Pakistan's Constitutions made it obligatory on the State to frame laws "in accordance with Islamic law but denied courts the right to enforce that requirement."[683]

Example in this regard can be given of case of the prohibition on *Riba'*(interest). The relevant clause[684] of the Constitution, however, has not been enforced so far in Pakistan. *Riba* (interest) should be defined inclusively and not exclusively. It is to be noted that there are twelve (12) verses in the Quran which deal with the term *Riba*[685] which must be read and understood collectively. The fact remains that the prohibition of

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[679] Martin Lau, The Role of Islam in the Legal System of Pakistan, Martinus Nijhoff Publishers 2006. ISBN: 9-004. 14927-9, at pp.122–126.
[680] Pakistan Const. Art. 203(a)–(j). *See also*, Lau, supra note, at 127–130.
[681] Pakistan Const. Art. 203(a)–(j). *See also*, Charles H. Kennedy, Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan, 41 Int'l & Comp. L.Q. 769, 772–773 (1992).
[682] Amr Ibn Munir, The Rule of Law in Pakistan: A Myth or Reality? (October 24, 2023). Review of Human Rights, volume 10, issue 1, 2024 [10.35994/rhr.v10i1.258], Available at SSRN: https://ssrn.com/abstract=4611683 or http://dx.doi.org/10.35994/rhr.v10i1.258, last accessed 23.08.2024.
[683] See Martin Lau, The Role of Islam in the Legal System of Pakistan 7–8 (2006), Martinus Nijhoff Publishers 2006. ISBN: 9-004. 14927-9; cf. generally, Clark B. Lombardi, Can Islamizing a Legal System Ever Help Promote Liberal Democracy?: A View from Pakistan, 7 U. St. Thomas L.J. 649 (2011). Role of Islam in the Legal System of Pakistan Martin Lau, *Review by*: Asifa Quraishi in Journal of Law and Religion Vol. 22, No. 2 (2006/2007), pp. 625-628 (4 pages) published By: Cambridge University Press. Also See Lawrence Ziring, Pakistan at the Crosscurrent of History 163–182 (2003).
[684] Art. 38 (f) of the Constitution of Pakistan, 1973.
[685] See for example, Surah ar-R'um, 30:39; Surah al-Baqarah, 2: 276; Surah an-Nisa, 4: 160-161; Surah Aal-e-Imran, 3:130.

Riba is complete and absolute in all its forms and manifestations according to the Injunctions of Islam.[686]

However, the ground reality is that the *Riba* is continuing not only in banking in Pakistan but also the Courts of law in this Islamic country are passing decisions granting mark up in financial matters and also the higher courts are endorsing these decisions. As such, practically speaking, the *interest* is part and parcel of business of society in Pakistan.[687] Another example can be given of non-implementation of *Allah Rakha* case.[688]

3.4.3. The Unenforceable Restrictions on Means to Achieve Constitutional Goals.

It is to be appreciated that the Constitution of Pakistan, 1973 has a very elaborate scheme of Fundamental Rights[689] coupled with implementation mechanism.[690] Likewise, the Principles of Policy[691] are the guidelines for the executive to run the business of Pakistani polity. However, the Principles of Policy remain on the statute book as abstruse and unenforceable encouragements.[692] The fact remains that prior to Pakistan, India incorporated them in their Constitution of 1949 and at that time they were experimented in Irish

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[686] Messrs Farooq Brothers and others vs. United Bank Limited and others, PLD 2023 Federal Shariat Court 47, at P. 120. It is to be appreciated that the recently passed 26th Constitution (Amendment) Act, 2024 also includes factum of elimination of *Riba*/Interest. Vide S.3 of this 26th Amendment, 2024 the expression "as early as possible" in Art. 38 of the Constitution, 1973 has been replaced with "as far as practicable, by the 1st January, 2028".

[687] Muhammad Abdul Rehman Shah and Muhammad Irfan, Prohibition of Interest and Initiative of Islamic Banking: A Historical Review of Pakistan (December 31, 2022). Shah, Syed Muhammad Abdul Rehman, & Irfan, M. (2023). Prohibition of Interest and Initiative of Islamic Banking: A Historical Review of Pakistan. Al-'Ulūm Journal of Islamic Studies, 3(2), 1–21. Retrieved from https://alulum.net/ojs/index.php/aujis/article/view/96, Available at SSRN: https://ssrn.com/abstract=4385847, last accessed 23.09.2024.

[688] Qua s. 4 of Muslim Family Laws Ordinance, 1960. Allah Rakha vs State, PLD 2000 FSC 1. See also, Mst. Kalsoom Begum vs. Peran Ditta, 2022 SCMR 1352. Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2022S921, last accessed on 16.01.2024.

[689] Articles 8 to 28 of the Constitution, 1973.

[690] Under Article 184 (3), and Article 199 of the Constitution, 1973.

[691] Articles 31 to 40. See Part I, Chapter 2 of the Constitution of the Islamic Republic of Pakistan, 1973.

[692] Onyekachi Duru, The Justiciability of the Fundamental Objectives and Directive Principles of State Policy Under Nigerian Law (June 2, 2012). Available at SSRN: https://ssrn.com/abstract=2140361 or http://dx.doi.org/10.2139/ssrn.2140361, last accessed 19.05.2024.

Constitution.[693] The Constitution of Pakistan, 1973 fails to explain as to why the fundamental rights and the Principles of Policy have been structured as they are. The Fundamental Rights are the restrictions and limitations on the means to achieve the goals as set out in the Principles.[694] It depends on the scheme of constitutional framework as to what makes something a *right*, or a goal.[695]

The fact remains that the relevant provisions are not enforceable by any court.[696] However, it is the duty of the State to apply these principles in making laws. This is what the Constitution says in theory and this is what is written in there. However, what is unwritten there is that there is no liability on the part of government or person concerned if they fail to comply with the written duty to supply these guiding principles in doing the legislation.[697]

This unwritten policy is not only specific to Pakistan; rather, India has also failed to do the needful when it comes to apply the written principles against the unwritten prohibition of cow slaughter. In case of Pakistan, the responsibility of deciding, if any action of an organ or authority of the State or of a person performing functions on its behalf is in accordance with these Principles, lies with the same organ or person.[698]

If the observance of any particular Principle of Policy is dependent upon resources, the same shall be regarded as being subject to the availability of resources.[699] This shows that it is only cosmetic piece of legislation and has no dominant role qua the functioning of the

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[693] Gautam Bhatia, Directive Principles of State Policy: Theory and Practice (March 18, 2014). Oxford Handbook for the Indian Constitution, Oxford University Press, 2015, Forthcoming, Available at SSRN: https://ssrn.com/abstract=2411046 last accessed 19.05.2024.

[694] Kesavananda Bharati vs. State of Kerala, (1973) 4 SCC 225; Minerva Mills vs. Union of India, (1980) 3 SCC 625, para 76, per B Chandrachud, C. J. *See also*, Austin, Granville, The Indian Constitution: Corner Stone of a Nation (1999), Oxford University Press, at p. 50. *See also*, Dworkin, Taking Rights Seriously (Harvard University Press 1977), 22. Robert Nozick calls rights "side---constraints". Nozick, Anarchy, State and Utopia (Basic Books 1977), 31.

[695] Ben Nwabueze; Judicialism in Commonwealth Africa, (C Hurst & Company: London, 2017), p.143. see also, Israe Egbekunle l, Justiciability of the Fundamental Objectives and Directive Principle of State Policy Under Chapter Two of the 1999 Constitution: Lesson From Other Jurisdictions (July 10, 2023), p.50. Available at SSRN: https://ssrn.com/abstract=4801672 or http://dx.doi.org/10.2139/ssrn.4801672, last accessed 24.08.24.

[696] Articles 29 through 40 contained in Part I Chapter 2 of the Constitution, 1973.

[697] Article 30 (2) of the Constitution, 1973.

[698] Article 30 (1) of the Constitution, 1973.

[699] Art.29 (2) of the Constitution of 1973.

government/executive.[700] In an unwritten and roundabout way this shows that the government is not bound to make laws in accordance with these Principles when the requisite resources are not available to do the needful. As such, this Art.29 (2) of the Constitution of 1973 works as a proviso to give cover to the governmental action in not making laws according to the written facade of the Constitution.

The overall thrust of the Constitution, 1973, and also in case of Indian Constitution 1949, shows that these Principles are fundamental to the Fundamental Rights enshrined in the Constitution. For example, in a case, cow slaughter ban was challenged.[701] The Indian Supreme Court held that "a harmonious interpretation has to be placed upon the Constitution."[702] However, while interpreting the Court prefers the Fundamental Rights over the Principles[703] and not vice versa which means that these Principles are only good for the legislation.

Although the Principles of Policy are non-justiciable, each such Principle mentioned in the Constitution is binding upon the government and it is the responsibility of each organ of the State to act in accordance with these Principles of Policy.[704] The fact remains that the restrictions of the Principles of Policy fail to keep the government and State from rigouring out of their otherwise liability. When they are not binding and no action against State or its authority can be brought for failure to fulfill its obligation, there is no rationale in keeping them on the statute book. The written text of the Constitution, however, fails to provide answer if the nature of the obligation placed upon the State is legal or

[700] Lael K. Weis, Directive Principles and Constitutional Interpretation: A Global Survey (March 28, 2022). U of Melbourne Legal Studies Research Paper Forthcoming, Forthcoming chapter in: C Bernal, S Choudhry, & K O'Regan, eds, Research Handbook on Constitutional Interpretation (Edward Elgar) (28 March 2022), Available at SSRN: https://ssrn.com/abstract=4840930 or http://dx.doi.org/10.2139/ssrn.4840930, last accessed 19.05.2024.
[701] U/Art.19 (1) (g) of the Indian Constitution, 1949.
[702] Hanif Qureshi vs. State of Bihar, 1959 SCR 629, 648, per Das C.J.
[703] As per embargo under Article 8 (1) and (2) of the Constitution, 1973.
[704] Messrs Farooq Brothers and others Vs. United Bank Limited and others, PLD 2023 FSC 47, 63.

moral.[705] If it is moral, then no purpose is served to insert them in a document whose aim is to outline the basic legal contours of the Pakistani polity and set of its principal institutions. As such, these Principles are only 'political exhortations' to the legislature.[706] The unwritten and unchallengeable action of the executive authority and the government seem to blur the obligatory written façade of the Constitution.

In view of the Pakistani case law, it can be safely said that the Principles of Policy are not per se enforceable by the courts but they are to be read into the Fundamental Rights. Since *Benazir Bhutto* case[707] it has been consistently held that Article 2A read with the relevant clauses of the Objectives Resolution within the perspective of human rights, the Fundamental Rights, and the Principles of Policy, when all combined together, do provide "lawful vehicle for interpretation and enforcement of the fundamental rights enshrined in our Constitution."[708] The constitution of 1973 provides for advancing the cause of socio economic principles.[709] It is to be appreciated that they do provide for the ideal and a target to

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[705] David Kenny and Lauryn Musgrove McCann, Directive Principles, Political Constitutionalism, and Constitutional Culture: the case of Ireland's failed Directive Principles of Social Policy (March 1, 2022). European Constitutional Law Review (forthcoming), Available at SSRN: https://ssrn.com/abstract=4111139 or http://dx.doi.org/10.2139/ssrn.4111139, last accessed 19.05.2024.

[706] Seervai, Constitutional Law of India, Vol. II, 4th ed., Universal Law Publishing (2005), 1934-1940.

[707] Benazir Bhutto vs. FOP, PLD 1988 SC 416.

[708] In the matter of Human Rights Case No. 1 of 1992 (with other cases), decided on 22nd March, 1993. (1993 SCMR 2001). In this case although only gang rape and the property rights of females were in particular involved but Muhammad Afzal Zullah, CJ.observed that it also in general dealt with the rights conferred by the Constitution and the law on the female section of our society. Specific Articles dealing with the women and children in the Constitution amongst others were referred to, *including*:

1. Article 11(3);
2. Article 25;
3. Article 25(2) & (3);
4. Article 26(1) & (2);
5. Article 27(1);
6. Article 34;
7. Article 35;
8. Article 37(e);
9. Article 38(a); and
10. Article 38(d).

It was said that the fact is that some of the Articles fall within the scope of principles of policy but that would not make much difference when it came to deal with enforcement of Fundamental Rights within the domain of Principles of Policy. See also the cases of Darshan Masih alias Rehmatay vs. State (PLD 1990 SC 513) and Miss Benazir Bhutto vs. Federation of Pakistan (PLD 1988 SC 416).

[709] e.g., Articles 3, 37 and 38 of the Constitution, 1973.

be achieved with full vigour and force as they are "the conscience of the Constitution, as they constitute the main thrust of the commitment to socio economic justice."[710]

In *Rukhsana Mehdi* regarding matter involving the agrarian reforms vis-a-vis elimination of all forms of soico economic injustices it was held that the individual interests, being subservient to the collective rights of the society, are required to be adjusted accordingly.[711] It was added that the same could be done by removing the defects which were pointed out by SCP in *Qazilbash Wakf* cases[712] in the light of mandatory Injunctions of Islam.

In *Fiaqat Hussain* while tracing the history of different programs and the system of informal education since 1951 in the country, the responsibility of the State was discussed in the backdrop of 18th Constitutional Amendment incorporating Article 25A. Under this Article all the children aged between 5 to 16 years are entitled to receive free and compulsory education.[713] In this regard it is to be remembered that the SC, once already seized with the matter with regard to imparting higher education, which is to be regularized by the Higher Education Commission, had made an appropriate order in *Prof. G.A. Miana and others*.[714] It has been held that "the Directive Principles of State Policy have to conform to and to operate as subsidiary to the Fundamental Rights guaranteed in Chapter I, otherwise the protective provisions of the Chapter will be a mere rope of sand".[715]

Similarly, the Indian Supreme Court in the case of *Mohini Jain* held that "the Fundamental Rights and the Directive Principles, which are found in the governance of the country, cannot be isolated from the Fundamental Rights",[716] which are guaranteed under

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[710] Benazir Bhutto vs. FOP, PLD 1988 SC 416, para 68. Per M. Haleem CJ.
[711] Mst. Rukhsana Mehdi vs. Waryam and others. PLD 2006 SC 189, para 11.
[712] i.e., PLD 1990 SC 99, and 1993 SCMR 1697.
[713] Fiaqat Hussain and others. Vs. Federation of Pakistan through Secretary, Planning and Development Division, Islamabad and others. PLD 2012 SC 224.
[714] Prof. G.A. Miana and others vs. Federation of Pakistan, (unreported judgement in Constitution Petitions Nos.33 and 34 of 2011).
[715] Fiaqat Hussain and others. Vs. Federation of Pakistan through Secretary, Planning and Development Division, Islamabad and others. PLD 2012 SC 224, para 29 and 30.
[716] Mohini Jain vs. State of Karnatka (AIR 1992 SC 1858), para 10, per Kuldip Singh, J.

Part-III of the Indian Constitution, 1949.[717] In the case of *Unni Krishnan*, it was held that Fundamental Rights and Directive Principles are supplementary and complementary to each other and that the provisions in Part III should be interpreted having regard to the Preamble and Principles of the State policy.[718]

Under the Constitution of Islamic Republic of Pakistan, 1973 the Fundamental Rights are required to be enforced by the State.[719] It seems also safe to say that these Principles appear to be the fundamental rights and the Fundamental Rights are the targets in the nature of directive principles of policy which are to be achieved by the State. However, the unwritten seriousness to pursue the goal seems to have been foiled by the written provision of law whereby it has been held that "the validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy."[720]

3.4.4. Rule by Ordinances.

The obvious function of the legislature is to make laws which are interpreted by the judiciary and are implemented by the executive.[721] However, the stop gap arrangement has also been provided in the Constitution which speaks about issuance of Ordinance(s).[722] The same when promulgated by competent authority, would have same effect as an Act of legislature,[723] and shall be subject to like restrictions.[724] But every such Ordinance shall be

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[717] Khushi Pandya, Comparative Analysis of Directive Principles of Social Policy under the Irish Constitution and Directive Principles of State Policy under Indian Constitution (December 19, 2021). Available at SSRN: https://ssrn.com/abstract=3989021 or http://dx.doi.org/10.2139/ssrn.3989021, last accessed 19.05.2024.
[718] Unni Krishnan J.P. vs. State of A.P. (AIR 1993 SC 2178), para 38.
[719] See, for example: Mian Muhammad Nawaz Sharif vs. President of Pakistan (PLD 1993 SC 473), Shehla Zia vs. WAPDA (PLD 1994 SC 693), Ahmad Abdullah vs. Government of the Punjab (PLD 2003 Lahore 752), Imdad Hussain vs. Province of Sindh (PLD 2007 Karachi 116) and Suo Motu, Case No.13 of 2009 (PLD 2011 SC 619).
[720] Article 30 (2) of the Constituion of the Islamic Republic of Pakistan, 1973.
[721] Afreen Afshar Alam, The Theory of Checks and Balances (May 15, 2020). Available at SSRN: https://ssrn.com/abstract=4712245 or http://dx.doi.org/10.2139/ssrn.4712245, last accessed 20.05.2024.
[722] Art 89 speaks about power of the President to promulgate Ordinance whereas Art.128 is related to power of promulgation of Ordinance by the Governor of the Province.
[723] U/sub-paragraphs (i) and (ii) of paragraph (a) of clause (2) of Art.89 of the Constitution of 1973.

laid before the concerned Assembly, National or Provincial.[725] The Ordinance, unless extended, shall stand repealed at the expiration of one hundred and twenty (120) days in case of Federal Ordinance, and ninety (90) days in case of Provincial Ordinance, from its promulgation, or upon the passing of a resolution disapproving it whichever is earlier.[726]

The extension for a further period may be made only once and may be withdrawn at any time.[727] As such, the fullest term of the Federal and Provincial Ordinance, under Articles 89 and 128 of the Constitution respectively, with maximum two extensions under the Constitution is, loosely speaking, one (01) year and nine (09) months, respectively.

However, it is only by dint of some unwritten law that, despite the existence of Parliament as well as running of the same for one after the other term regularly, instead of passing full-fledged enactments, through proper and well defined procedure, the business of the society is run through different Ordinances.[728] Even in India there appears evidence of "weaponising the Constitution" against collective wisdom of Parliament by promulgation of these Ordinances.[729]

The Hudood law regime introduced during martial law of Gen. Zia was intended to implement *Sharia* and to bring Pakistani law in conformity with the injunctions of Islam by

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[724] Dr. Tariq Ahmed Shaikh vs. The Province Of Sindh through Chief Secretary, Government of Sindh, 2022 PLC (CS) 1304 (KAR). Also available athttp://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2022K2018, last accessed 16.01.2024.
[725] Art. 128 (3) of the Constitution, 1973.
[726] U/Art. 89 (2)(a) of the Constitution Of 1973, and Art. 128 (2) (a) of the Constitution, 1973, for Federal and Provincial Ordinance, respectively.
[727] Art.128 (2) (b) of the Constitution, 1973.
[728] *See for example,* The West Pakistan Regulation and Control of Loudspeakers and Sound Amplifiers Ordinance (II of 1965); The Criminal Law (Special Provisions) Ordinance(II of 1968); West Pakistan Tribunal of Inquiry Ordinance(II of 1969); Contempt of Court Ordinance(V Of 2003); The Prevention of Gambling Ordinances in the four Provinces of erstwhile West Pakistan i.e., Punjab Prevention of Gambling Ordinance,(VII of 1978); Sindh Prevention of Gambling Ordinance,(V of 1978); Baluchistan Prevention of Gambling Ordinance, (X of1978) and Khyber Pakhtunkhwa Province Prevention of Gambling Ordinance, (V of 1978). As regards the latter, the earlier Nomenclature "North- West Frontier" was substituted vide Constitution (Eighteenth Amendment Act); The Emigration Ordinance (XVIII of 1979); Exit from Pakistan (Control) Ordinance (XLVI of 1981); The Banking Companies Ordinance (W.P. Ordn. LVII of 1962); The W.P. Arms Ordinance (XX of 1965), and Financial Institutions (Recovery of Finance) Ordinance (XLVI of 2001).
[729] Anmol Jain, Democratic Decay in India: Weaponising the Constitution to Curb Parliamentary Deliberation (April 5, 2023). National Law School of India Review, Volume 34 Issue 1 (2022), Available at SSRN: https://ssrn.com/abstract=4411009, last accessed 20.05.2024.

enforcing punishments mentioned in the *Quran* and *Sunna'h* for *Zina* (extramarital sex)[730], *Qazf* (false accusation of zina)[731], *Sarqa* (theft)[732], and consumption of alcohol.[733] On level of economic and financial reforms in Islamic society, *Zakat* (Community Wealth Tax) and *Usher* (Agriculture Produce Tax) are the basic concepts. The Zakat and Usher have also been legislated through an Ordinance[734] but with feeble implementation.

These ordinances tend to show that Pakistan is one of the few democratic countries which have the dubious distinction of having the power to legislate by executive decree. In a classical democracy, legislation is the sole prerogative of the legislature but Pakistan has Constitutional provision(s) to authorise the executive to legislate.[735] Apparently, these provisions were meant to be used only under very extraordinary situations. But looking back at the circumstances in which Ordinances have been issued since the enactment of 1973's Constitution, hardly an Ordinance might be referred which could not wait for the convening of the next parliamentary Session.

Although India also has similar constitutional provisions regarding Ordinances, it has not used this provision with so much frequency and relish as has been witnessed in Pakistan. Since August 1973, Pakistan has promulgated 1,774 ordinances compared to only 533 by India, more than three Ordinances in Pakistan compared to one in India.[736] This data shows that military governments, on average, promulgated the highest number of Ordinances, more than 63 per year. Caretaker governments promulgated the next highest number, a little less than 59 Ordinances per year during their combined duration. Elected democratic

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[730] Offence of Zina (Enforcement of Hudood) Ordinance, (VII of 1979).
[731] Offence of Qazf (Enforcement of Hadd) Ordinance, (VIII of 1979).
[732] Offences Against Property (Enforcement of Hudood) Ordinance,(VI of 1979).
[733] Prohibition (Enforcement of Hadd) Order, (IV of 1979).
[734] Zakat and Ushr Ordinance, 1980 (XVIII of 1980).
[735] Anis Haroon vs. Federation of Pakistan through Secretary, Establishment Division, 2022 PLC (CS) 307 (KAR). Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2022K2005, last accessed 16.01.2024.
[736] Ahmed Bilal Mehboob, Ordinances over the Years, Dawn December 8th, 2019. Also available at https://www.dawn.com/news/1521058#:~:text=Article%2089%20of%20the%20Constitution,as%20the%20circumstances%20may%20require%E2%80%9D, last accessed on 05-02-2024.

governments, despite carrying the greatest burden of blame, issued relatively the least number, less than 29 per year, during their total duration.[737]

An overwhelming majority of the ordinances appears to have been promulgated out of convenience because the government of the day did not want to face parliament to debate and justify the proposed legislation. They appear to have become handy tools to bypass Parliament. Instead of engaging with the opposition and incorporating their ideas into the proposed legislation, the governments in Pakistan seem to have adopted the shortcut approach of Ordinances without sparing a second thought that the practice of promulgating them runs against the written and democratic facade of the Constitution.

3.5. Exercise of Personal Rights by Third Person.

In a *case,*[738] the presidential powers to commute, pardon and remit[739] were challenged. It is to be appreciated that u/Art. 2-A, Allah is the only Supreme Authority to pardon or commute in matters relating to death sentences and the President had no power to pass an order of commutation etc.[740] The Court accordingly held that the President had no power to commute the death sentence awarded in matters of Hudood, Qisas and Diyat Ordinance(s).[741] The power of pardon in such cases only vests with victim or heirs of the

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[737] Ibid. *See also,* Begum Nusrat Bhutto's case, wherein it was said that " the Chief Martial Law Administrator, having validly assumed power by means of an extra-constitutional step in the interest of the State and for the welfare of the people, is entitled to perform all such acts and promulgate ail legislative measures which have been consistent-ly recognised by judicial authorities as falling within the scope of the law of necessity….", PLD 1977 SC 657, at p.716.

[738] Hakim Khan and three others vs. Government of Pakistan, through Secretary Interior and others, PLD 1992 SC 595.

[739] Under Article 45 of the Constitution, 1973.

[740] *See also*, Abdul Samee Sohoo, A Comprehensive Study of Presidential Power to Grant Pardon in Pakistan (September 26, 2023). Duke Journal of Constitutional Law & Public Policy, Forthcoming, University of Pennsylvania Journal of Constitutional Law, Forthcoming, Available at SSRN: https://ssrn.com/abstract=4613633 or http://dx.doi.org/10.2139/ssrn.4613633, last accessed 15.09.2024

[741] Hakim Khan and three others vs. Government of Pakistan, through Secretary Interior and others, PLD 1992 SC 595, para 8. On President's power of remission u/Art.45 of the Constitution, 1973, *see also,* Gul Zameen vs. Government of Khyber Pakhtunkhwa PLD 2021 Peshawar 68. In this case, the Peshawar High Court clubbed together multiple petitions pertaining to President's power to grant remission in sentences under Article 45 of the Constitution. There were two notifications issued regarding presidential remissions on the occasion of Eid-ul-Adha 2013 and Pakistan's Independence Day, 2014. Both notifications entailed exceptions. The Court held that

deceased. The exercise of power by President may amount to misuse of power.[742] However the cases would be on different footings, if a person has been punished by way of *Tazir*. In such cases, the Head of the state has the power to pardon the offender and that too in public interest.[743]

The concept of compromise and compounding is also mentioned in the codified law.[744] S.345 (6) of Cr.P.C, 1898 (Code) appears to be contradictory as it mentions compounding of offence of uttering words etc. intended to wound the religious feelings of any person.[745] This offence has to be offence against the State in general as Islam has been declared as State religion.[746] Merely compounding of the same by just one person, most conceivably by the First Informant[747] does not appear to be logical especially when seen in juxtaposition with category of offences mentioned in S.345(2) of the Code. However, the practice continues in Pakistan. Even *Ta'zir* matters cannot be exempted from bar on exercise of power by the President and Premier. An offence committed with a citizen would not make the President, Premier or any other authority an affecttee or victim at the hands of the offender. As such, commuting sentences by President would be like exercising the personal right of forgiving or waiver of injured/victim by someone else.

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the President has unfettered power to grant remissions under Article 45. Furthermore, it was observed that the Courts could not amend the notifications, and had to apply them in totality unless it violated a law, or was found to be discriminatory. Relying on Nazar Hussain vs. the State (PLD 2010 SC 1021), the Peshawar High Court held that classification, when exercising presidential power to grant pardons, commute sentences, and offer remissions was permissible as long as it was based on "reason- able" or "intelligible differentia".

[742] Renata Treneska Deskoska, Pardon Power of the President of North Macedonia – Uses and Misuses (December 30, 2023). Perspectives of Law and Public Administration Volume 12, Issue 4, December 2023, Available at SSRN: https://ssrn.com/abstract=4679802, last accessed 21.05.2024.

[743] Under Art. 45 of the Constitution, 1973. See also Rule 15 of Rules of Business, 1973.

[744] S.345 of the Code of Criminal Procedure (Act V of) 1898. S.345 (2) of Cr.P.C speaks about compounding of offences mentioned in first two columns by the persons mentioned in the third column, but with the permission of the court.

[745] U/s 298 Pakistan Penal Code, 1860.

[746] Art. 2 of the Constitution, 1973.

[747] U/s. 154 of the Code of Criminal Procedure (Act V of) 1898.

3.6. Interpretative Vacillations to and from the Written and Unwritten Law: The Case of the Military Trial of the Civilians.

The unwritten judicial policy and unconstitutional constitutionalism find expressed at best in holding that civilians cannot be tried under law meant for the military exclusively and drifting away from such a finding at other time. In this regard, it is to be appreciated if arbitrary powers for suspending Fundamental Rights are conceded to the military courts, the dangers to human liberties are frightful to contemplate.[748] Such a concession to Government would lead to despotism.[749] But it is safe to say that no rule as to protection of laws can be formulated that will cover every case.[750]

However, one cannot subscribe to the view taken by the Indian Supreme Court[751] regarding suspension of these Rights during the continuance of emergency.[752] The approach of Pakistani courts is that only such Fundamental Rights can be suspended which have nexus

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[748] Hussain Ahmad and Sara Qayum, Civilians Trials in Military Courts in Pakistan vs. The International Fair Trial Standards on Military Justice. A Critical Analysis (2021). Pakistan Journal of Criminology 2021, Available at SSRN: https://ssrn.com/abstract=3984698, last accessed 22.05.2024.

[749] See Indian case, K.K. Kochunni vs. State of Madras, A I R 1959 S C 725, wherein at page 731, it was held: "An enactment may immediately on its coming into force take away or abridge the Fundamental Rights of a person by its very terms and without any further overt act being done. In such a case the infringement of the Fundamental Right is complete co instanti the passing of the enactment and, therefore, there can be no reason why the person so prejudicially affected by the law should not be entitled immediately to avail himself of the constitutional remedy under Article 32. To say that a person, whose Fundamental Right has been infringed by the mere operation of an enactment, is not entitled to invoke the jurisdiction of this Court under Article 32, for the enforcement of his right, will be to deny him the benefit of a salutary constitutional remedy which is itself his Fundamental Right."

[750] American Jurisprudence, Bancroft-Whitney Company / The Lawyers Co-operative Publishing Company (1958), Vol. 12, p. 409. *See also*, Tinsley vs. Anderson (171 U S 312). The American Supreme Court has even held that a State may make different arrangements for trials under different circumstances of even same class of offences. *See*, Graham vs. West Virginia (224 U S 616). *See also*, Hugh Evander Willis, Constitutional Law of the United States, The Principia Press, Bloomington, Indiana. (1936), P. 580.

[751] Mohammad Yaqub Etc vs. The State of Jammu & Kashmir, Equivalent citations: 1968 AIR 765, 1968 SCR (2) 227; AIR 1968 SUPREME COURT 765; (1968) 2 SCJ 914; (1968) 1 SCWR 793, 1968 SCD 930; (1968) 2 SCR 227; 1968 MADLJ(CRI) 793. The case of Ghulam Sarwar vs. Union of India & Ors. [1967 AIR 1335, 1967 SCR (2) 271, AIR 1967 SUPREME COURT 1335, 1967 2 SCR 271] was dissented in this case by Indian Supreme Court.

[752] By a petition under Art.32 of the Constitution, the petitioner challenged an order of detention passed against him under R.30(1)(b) of the Defence of India Rules, 1962. The order of the President passed on November-3, 1962 as amended on November 11th 1962 under Art. 359(1) of the Constitution, suspending the right to move any court for the enforcement of the fundamental rights conferred by the Indian Constitution was challenged in this case.

with the reasons leading to Proclamation of Emergency.[753] A satisfactory solution, therefore, can be if the power available to the President under the Constitution to proclaim emergency is exercised with the least encroachment upon the rights and liberties of the citizens.[754]

Regarding parallel military courts, despite having power to strike down any law,[755] being ultra vires to the Constitution or the fundamental rights,[756] the approach of Pakistani judiciary has been vacillating to and fro and then back to square one. Our Superior Judiciary has mostly preferred to allow the extra constitutional step on the basis of some unwritten law.

The rendering of judgment in *Sh. Liaquat Hussain,*[757] declaring Military Courts as ultra vires to the Constitution, resulted into a slanderous campaign against the judiciary launched by a former Prime Minister[758] registering his helplessness in the face of the Judiciary not allowing him to establish Military Courts as a mode of speedy justice. Even the telephones of the Judges of the superior courts and other personalities were tapped in spite of the law laid down by the Court in the case of *Mohtarma Benazir Bhutto.*[759]

The trial of civilians by the military courts, as such, has certain issues related to this factum.[760] In *Malik Ghulam Mustafa Khar and others,*[761] all the petitioners, (except those in writ petition No.659/86 (who were Ex-Army Officers), were sentenced by Special Military

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[753] Articles 232-237, Part X of the Constitution of 1973.
[754] Montesquieu, Spirit of Laws, (translated by Thomas Nugent), 1752, Batoche Books Kitchner, 2001, P. 566.*See also*, William Marbury vs. James Madison, 5 U.S. (1 Cranch) 137 (1803).
[755] Khalid Mehmood vs. Chaklala Cantonment Board, 2023 SCMR 1843. *Also see*, Zulfiqar Ali Bhatti vs. Election Commission of Pakistan, 2024 SCMR 997. Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2024S824, last accessed on 23.07.2024.
[756] Art. 8, Constitution of the Islamic Republic of Pakistan, 1973.
[757] Sh. Liaquat Hussain v Federation of Pakistan, PLD 1999 SC 504.
[758] i.e.,Mian Muhammad Nawaz Sharif.
[759] "Tapping of telephones and eaves dropping was immoral, illegal and unconstitutional." *See*, Mohtarma Benazir Bhutto vs. President of Pakistan, PLD 1998 SC 388, Paras 08, and 98. That phone tapping mechanism has persisted even after more than a quarter of century. *See for example*, IHC, Islamabad six Judges' letter of July 2024 which was addressed to SJC of Pakistan.
[760] On question of military tribunals *see*, Martin Baumgartner, Military Tribunals (December 19, 2021). Christina Binder, Manfred Nowak, Jane A Hofbauer, Philipp Janig (eds), Elgar Encyclopedia of Human Rights (2022, Forthcoming), Available at SSRN: https://ssrn.com/abstract=3990765, last accessed 22.05.2024.
[761] Malik Ghulam Mustafa Khar and others vs. Pakistan and others, PLD 1988 Lahore 49.

Courts[762] whose composition was challenged.[763] It is to be appreciated that in that case reliance was placed on *Ekbal & Co*[764] wherein the reliance was also placed on *Taff Vale Railway Company.*[765] However, it is to be noted that the Court observed that there was nothing in that precedent to render assistance in adjudicating upon the issue before them.[766]

However, as establishment of the Military Courts is not warranted by the Constitution, the mere fact that their establishment has contributed to some extent in controlling the law and order situation, or the factum of delay in disposal of the criminal cases by the regular Courts, provide no justification to uphold their validity. Therefore, the establishment of the Military Courts cannot be sustained on the ground of expediency or any doctrine.

It must be appreciated that the acceptance of the Doctrine of Necessity by SCP in *Dosso*[767] encouraged and caused the imposition of the Martial Law in this country more than once which adversely affected the democratic norms.[768] The same had also adverse effects on the judicial system of the country. For example, in *Sh. Liaqat Ali* it was observed that Martial Law regime was to remain in force till coming into force of Constitution of 1973.[769] However, it may be appreciated that the Constitution does not admit imposition of Martial Law in any form.[770] It is because the Armed Forces have to act within the scope of their Constitutional jurisdiction. Even the expression to call the Armed Forces `in aid of civil

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[762] Established under Presidential Order 2 of 1982 (C.M.L.A. Order I of 1982) r/w Chief Martial Law Administrator's M.L.O. No.4.

[763] In this case, it was argued that a Special Military Court should necessarily be comprised of three Army Officers and the Magistrate or a Sessions Judge could only be the 4th member u/s. 87 of the Pakistan Army Act, 1952, (ACT XXXIX of 1952) r/w para 5 of M.L.O. No.4 of 1982. For definition of officer *see*, section 8 (12) of the Act, ibid.

[764] Commissioner of Income Tax vs. Ekbal & Co., (A I R 1945 Bombay 316).

[765] Urban District Council vs. Taff Vale Railway Company, (1909 A. C. 253).

[766] Malik Ghulam Mustafa Khar and others Vs. Pakistan and others, PLD 1988 Lahore 49, at P. 114.

[767] State vs. Dosso and another, (PLD 1958 SC (Pak.) 533).

[768] Sh. Liaquat Hussain vs. Federation of Pakistan, PLD 1999 SC 504, para 25. In the *Liaquat Hussain* case wherein the vires of the 1998 Ordinance were under challenge on the ground that it is violative of a constitutional provision. The 1998 Ordinance was struck down as this Court concluded that trial of civilians by military courts would be violative of the Constitution.

[769] Sh. Liaquat Hussain vs. Federation of Pakistan, PLD 1999 SC 504, Concluding portion of Para 25.

[770] Article 237 of the Constitution, 1973.

power'[771] excludes the substitution of Civil Courts by the Military Courts. The Armed Forces should be kept in strict subordination and be governed by the civil power and the State.[772] As such, the Armed Forces cannot be permitted to substitute the ordinary Civil Courts while acting `in aid of civil power'.[773] This is also the foundation stone of Constitution of Pakistan as reflected through the Objective Resolution.[774] Reading relevant provisions[775] in juxtaposition vis-a-vis the case of *Mehram Ali,* it indubitably leads to the conclusion that the Military Courts envisaged under the Constitution tantamount to "establishment of parallel Courts."[776]

It would be pertinent to mention here that the SCP has separated the Judiciary from the Executive.[777] In this regard it was also held in a case that only because the authorised Army Officer could transfer any case in his discretion to the ordinary criminal Courts[778] did not improve the status of the ordinary Courts.[779] The latter may not be deciding the cases expeditiously due to variety of factors including fear of the terrorists. But even then the proper course is to take appropriate measures to do the needful. No necessity in this regard could justify the establishment of Military courts for trial of the civilians, as was also held qua the take-over by the COAS[780] as MLA[781] in *Begum Nusrat Bhutto's* case.[782] However, in the case of *Asma Jilani*,[783] SCP took the view that the acts of usurper may be condoned or validated by the application of the law of necessity. Viewed from this angle, any impugned

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[771] Article 245 of the Constitution, ibid.
[772] Article 243 of the Constitution, which provides that the Federal Government shall have the control and command of the Armed Forces.
[773] Syed Zafar Ali Shah and others vs. General Pervez Musharraf, Chief Executive of Pakistan and others, PLD 2000 SC 869, at p. 913.
[774] Article 2-A of the Constitution of Islamic Republic of Pakistan, 1973.
[775] Articles 175, 203 and 245 of the Constitution, 1973.
[776] Mehram Ali vs. Federation of Pakistan, PLD 1998 SC 1445, paras 3, 5 &12. From Indian jurisdiction, see also, Usmanbhai Dawoodbhai Memon and others vs. State of Gujarat (AIR 1988 SC 922), paras 15 and 16.
[777] Government of Sind v Sharaf Afridi, PLD-1994-SC-105.
[778] Proviso to section 3 of Act X of 1977.
[779] Darvesh M. Arbey, Advocate vs. Federation of Pakistan and 2 others, PLD 1977 Lah. 846.
[780] Chief of the Army Staff.
[781] Martial Law Administrator.
[782] Begum Nusrat Bhutto's case PLD 1977 SC 657, p.716 (last para extending to page 717).
[783] Asma Jilani. Vs. Government of the Punjab and another, PLD 172 SC 139.

piece of legislation aimed at justifying the trial of the civilians, which does not fall within the purview of Army Act. 1952 could not be validated even on the touchstone of State necessity.

The concept of independence of Judiciary is very near and dear to law but it is set at naught at the hands of powers to be. The Constitution of 1973 in its preamble declares that "the independence of the Judiciary shall be fully secured".[784] This concept means that every Judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without improper influences or pressures and has jurisdiction over all the issues of a judicial nature.[785]

The observations in *Iqbal Ahmad Khan* case are also relevant to the discussion. In this case it was said that in view of the impugned legislation,[786] having been held to be ultra vires and beyond scope of Art. 245 by Full Bench in *Darvesh M. Arbey* case, Military Tribunals stood devoid of jurisdiction to deal with cases transferred to them from ordinary criminal Courts.[787]

Regarding military trial of the civilians, the actions taken between 5-7-1977 and 29-12-1985, the Martial Law Order and rules etc., were held to be *coram non judice*.[788] Therefore, it was observed that immunity provided under the Constitution[789] would not save them completely from scrutiny of superior courts and therefore, Art. 270-A (2) did not provide a complete bar in respect of such actions.[790]

Regarding bar of jurisdiction, another case is relevant. It was held there that the "bar of jurisdiction provided in provision of cl. (2) of Art. 236, Constitution of Pakistan (1973) does not cover a Proclamation which is without jurisdiction, coram non judice or mala

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[784] Art. 2A of the Constitution, 1973.
[785] Sh. Liaquat Hussain vs. Federation of Pakistan, PLD 1999 SC 504, para 59.
[786] i.e., Act X of 1977.
[787] Iqbal Ahmad Khan case PLD 1977 Lah.337.
[788] Muhammad Bachal Memon and others vs. Govt. of Sindh Through Secretary Department of Food and 2 Others, (PLD 1987 Kar. 296).
[789] Art. 270 A (2) of the Constitution, 1973.
[790] Muhammad Bachal Memon and others vs. Syed Tanveer Hussain Shah and others, PLD 1987 Kar 297, (PLD 1987 Kar. 296), para 15, per Muhammad Zahoorul Haq, J.

fide."[791] Similarly, in another case it was held that "where interpretation of Constitutional instrument is involved, jurisdiction of High Court is unaffected."[792] In this regard it has also been held that no mala fide could be attributed to the Parliament as it was sovereign to legislate on any subject.[793]

The Court in *Syed Zafar Ali Shah*, was faced with an extra-constitutional situation inasmuch as, all the elements viz., inevitable necessity, exceptional circumstances, absence of remedy etc. were present and the Constitution provided no solution to meet the extraordinary situation prevailing on 12th October, 1999.[794] However, in the wake of 9th May, 2023 incidents,[795] there were no such circumstances but even then the Supreme Court allowed the trial of civilians by the military courts.

It is very strange that some writers have tried to justify these trials.[796] It is important to note that regarding civilians' trial in military courts, three kinds of civilians may be put on trial under the Army Act.[797] Persons in third category are those who claim or are known to belong to any terrorist group misusing the name of religion or a sect.[798] So, justification for civilians' trial falling under third category was no more available in cases of 9th May, 2023.

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[791] Manzoor Ahmad Wattoo vs. Federation of Pakistan, PLD 1997 Lah.38.
[792] Muhammad Anwar Durrani's case PLD 1989 Quetta 25.
[793] Federation of Pakistan and another vs. Malik Ghulam Mustafa Khar, PLD 1989 SC 26, 28. *See also*, Mehr Zulfiqar Ali Babu and others vs. Government of the Punjab and others, PLD 1997 SC 11, para 14.
[794] Syed Zafar Ali Shah and others vs. General Pervez Musharraf, Chief Executive of Pakistan and others, PLD 2000 SC 869, at p. 913.
[795] In the background of arrest of Pakistan Tehreek-a- Insaf (PTI) leader Imran Khan,
[796] Muhammad Hasnain Ali, A Jurisprudential Analysis: Constitutional and Legal Grounds Supporting Military Trials of Civilians in Pakistan (December 13, 2023). Available at SSRN: https://ssrn.com/abstract=4787820 or http://dx.doi.org/10.2139/ssrn.4787820, last accessed 22.05.2024.
[797] Section 2(1)(d)(i)(ii)(iii) of the Pakistan Army Act 1952. The relevant provision of Pakistan Army Act was protected through 21st Constitutional Amendment 2015. Thereafter, Amendment was made in 2017. The same was protected through Constitution 23rd Amendment Act, 2017 and the period of trial of civilians was extended for further two years commencing from 7th January 2017. This period ended on 07 January 2019.
[798] This third category was added through Pakistan Army (Amendment) Act 2015 (II of 2015) came into force on 01st January 2015 and that amendment was for two years and stood repealed on the expiry of two years on 06th January 2017. The first category is of those civilians who seduce or attempt to seduce any army person from his duty or allegiance to Government. In the second category fall those civilians who have committed an offence under the Official Secret Act 1923, in relation to any work of defence, arsenal, naval, military or air force establishment or station, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Pakistan. It means that if any person has done any offence with work of defence etc., and it is an offence under the Official Secret Act 1923, he may be put on trial under the Pakistan Army Act, 1952.

As regards procedure to be followed, before transfer of a case to a military court, it is to be seen if the criteria set by the Supreme Court in certain cases are fulfilled.[799] As per section 549(1) Cr.PC 1898, the Magistrate or the court is the first authority to decide the question of the jurisdiction.[800] The reason is that not providing opportunity of hearing is against the principles of natural justice.[801] As per section 549(1) Cr.PC, 1898 in proper cases, the Magistrate will deliver the accused to the commanding officer. In view of this it can be safely said that no fundamental rights can be protected by resorting to practice based on unwritten law or unwritten judicial policy.[802]

However, with the observation of continuation of trial of civilians in military courts qua 9th May 2023 incidents against the PTI supporters, this written law seems to have been pushed into oblivion. It is to be remembered that the Constitution Petition Nos. 24 to 28 and 30 of 2023 were filed to declare the trials of civilians under PAA, 1952 as violative of Constitution. The SCP bifurcated the thrust of the Constitution into two broader modes i.e., Peacetime and Wartime and finally held the impugned provisions[803] were ultra vires the Constitution and of no legal effect.[804] However, a six-member Supreme Court Bench, in 5-1

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[799] *See for example*, Brig. Retd. F.B. Ali and another vs. the State, PLD 1975 SC 506. Mehram Ali vs. Federation of Pakistan, PLD 1998 SC 1445; Sh. Liaquat Hussain vs. Federation of Pakistan, PLD 1999 SC 504, and District Bar Association Rawalpindi VS. FOP, PLD 2015 SC 401.

[800] Jawad S. Khawaja vs. FOP, PLD 2024 SC 337. Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2024S25, last accessed on 23.08.2024.

[801] On due process, see: Willoughby, Constitution of United States, Second Edition, Nabu Press (2012), Vol.II, at p. 1709.

[802] Muhammad Hasnain Ali, Comparative Analysis: Military Trials of Civilians Across Diverse Jurisdictions (January 20, 2024). Available at SSRN: https://ssrn.com/abstract=4787887 or http://dx.doi.org/10.2139/ssrn.4787887, last accessed 22.05.2024.

[803] i.e., clause (d) of subsection (1) of Section 2 of the Pakistan Army Act, 1952 (in both of its sub clauses (i) & (ii)) and subsection (4) of Section 59 of the Pakistan Army Act, 1952.

[804] Jawad S. Khawaja etc. vs. FOP, 2023 SCMR 1732. The SC verdict on the 9th May cases was a groundbreaking departure from historical patterns. Previous judgments challenging military interests, such as the *Asma Jillani case* against Yahya Khan, the declaration of Zia's dismissal of the Junejo government, the decision declaring Musharraf's emergency illegal, and the order for Musharraf's treason trial all came after the military's power had significantly diminished. In contrast, this verdict challenged military interests at their peak. *See also*, Jawad S. Khawaja vs. FOP, PLD 2024 SC 337. Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2024S25, last accessed on 23.08.2024.

majority, conditionally suspended[805] its Oct 23rd, 2023 unanimous decision[806] pending a final judgment. The order passed on a set of intra-court appeals (ICAs) challenging its previous ruling, stated that the military trials of 103 civilians would continue, claiming that the civilians were legally triable under PAA, 1952 as per *Brigadier F.B. Ali*.[807]

It would not be out of place to shed light on the internal unwritten working policy of the apex court by referring to matter of constitution of the Bench to hear military court matter. It is to be remembered that on December 11th, 2023, Justice Ijazul Ahsan, who was a member of the three-judge committee constituted to fix cases before different benches,[808] had objected to the Bench, saying it should be "deemed as not set up by the committee."[809] Such a practice of the SCP was based upon an unwritten law and unwritten judicial policy of observing silence before the powers to be.[810] The principles of natural justice were set at naught by the silence of the SCP in staying satisfied at the sight of civilians languishing in jail in the name of their military trials. The fluctuations of the superior courts, especially the apex court, show that the unwritten judicial policy is at the helms of affairs.

The SCP allowed the trial of the civilians by military courts after holding repeatedly that the civilians cannot be tried by the military courts. Had the Court gone by the written law the otherwise ensuing unwritten law based approach would not have surfaced. However, the approval of violation of written law is not confined only to issue of civilians' military trial; rather, it pertains to other areas including election matter also.

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[805] Order dated 13-12-2023 in Constitution Petition Nos.24, 25, 26, 27 & 28 and 30 of 2023 (Petitions to declare the trials of civilians under the Army Act, 1952 as violative of Constitution), *reported as* Jawad S. Khawaja etc. Vs. FOP, 2023 SCMR 1732.

[806] In Constitution Petition Nos.24, 25, 26, 27 & 28 and 30 of 2023. In unanimous ruling the apex court had declared that the accused would not be tried in military courts but in criminal courts of competent jurisdiction established under the ordinary or special law of the land.

[807] Brig. Retd. F.B. Ali and another vs. the State, PLD 1975 SC 506, para 24.

[808] Under the Supreme Court Practice and Procedure Act, 2023.

[809] Letter dated 11.12.23 of Ijaz ul Ahsan J. (as he then was) addressed to the Registrar of Supreme Court of Pakistan.

[810] Anthony Derron, Unwritten Administrative Law and the Regulatory Last Mile in Cooperative Federalism (August 10, 2024). 173 U. Pa. L. Rev. (forthcoming June 2025), U of Chicago, Public Law Working Paper No. 856, Available at SSRN: https://ssrn.com/abstract=4922177, last accessed 25.08.2024.

3.7. The Unwritten Approval of Violations of Written Law.

Recently, the phenomena of unconstitutional constitutionalism and unwritten judicial policy of Pakistan came to surface in the wake of general election of 2024 when the Election Commission of Pakistan (ECP) declared the intra-party elections of Pakistan Tehreek Insaf (PTI) dated June 10th, 2022, to be invalid[811] and declared it disentitled to election symbol.[812] However, the said ECP order was unprecedented on many counts. The questions arose if this order was meant to zero in on a single political party ahead of the general election, 2024 or, if a new paradigm had been established within the ECP and all political parties were to undergo similar scrutiny in the future. The ECP order retraced the history of PTI constitution[813] and the amendments in some detail.[814]

The PTI, at that point, presented a new constitution[815] which the ECP found unacceptable in the context of intra-party elections. The ECP requirements, instead, ranged from a certificate,[816] signed by the party head or his designated representative to the names, designations, addresses and terms of elected office-bearers, along with the votes obtained by each. Such an approach on the part of ECP and non-interference by the SCP, despite having the powers to ensure the protection of fundamental right of equality of law,[817] cannot be justified. This is also more peculiar under earlier finding of court as to not allowing anyone to

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[811] 12-page order of the Election Commission of Pakistan (ECP) announced on Nov 23, 2023 in Pakistan Tehreek-a- Insaf (PTI) Intra Party Election held on June 10, 2022.
[812] The Election Commission of Pakistan vs. Pakistan Tehreek-E-Insaf, PLD 2024 SC 295. *See also*, Election Commission of Pakistan through Special Secretary, Islamabad vs. Pakistan Tehreek-E-Insaf, Islamabad, PLD 2024 SC 267. Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2024S19, last accessed 24.07.2024.
[813] 105-page constitution of PTI of 2019.
[814] Ahmed Bilal Mehboob, (president of the Pakistan Institute of Legislative Development And Transparency (PILDAT)): Scrutinising Intra-party Polls, Dawn November 26th, 2023. Also available at https://epaper.dawn.com/DetailImage.php?StoryImage=26_11_2023_006_004, last accessed on December 13, 2023.
[815] 30-page constitution of PTI of 2022.
[816] ECP's Form 65.
[817] Under Articles 187 and 184(3) of the Constitution, 1973.

derail democracy.[818] The meaningful silence was not confined to intraparty election of a single party i.e, PTI; rather, the same also extended to fundamental rights of the common citizens/voters, all at the cost of written law.

3.8. CONCLUSION

The law of the land must be written and be followed accordingly. This has benefit in twofold respects: firstly, the things are transparent; secondly, the discretion of the minority i.e, of the Judges is less to sway against the opinion of the majority, the Legislature. In its wiser understanding if the legislature has not made a law a certain way there is absolutely no way to determine the one and no approach is justified in finding what is not written as such there. It is not to deny that the Courts can interpret the law as made by the Legislature; however, the interpretation has limits and within those limits the exercise ought to be so undertaken as to further the cause of common sense and of justice instead of thwarting the same. The courts of law should not fall prey to the technicalities in the name of interpretation. They should make effort to do substantive justice. The deliberately left over anomalies in the Constitution must be rectified and be so interpreted that the Legislature feels responsible to do its constitutionally assigned role. Beyond the apparent Islamic facade of the Constitution the spirit of the Sharia must be observed and the injunctions of Islam should be implemented in their true and fullest sense.

The practice of continuing with the rule by Ordinances instead of proper legislation is in full swing in Pakistan. The Legislature should be more meaningful and proactive to bring this practice of rule by Ordinances to an end. The superior courts should not fall back upon unwritten judicial policy and ought to be bound by their own decisions and must not keep on

[818] SCBAP vs. FoP through Secretary Cabinet Division, Islamabad, PLD 2024 SC 1.

vacillating to and from the written and unwritten approaches at the cost of confidence of the general public in the written law and judicial system of the country.

CHAPTER 4: CONSTITUTIONAL DOCTRINES BASED UNCONSTITUTIONAL CONSTITUTIONALISM AND UNWRITTEN JUDICIAL POLICY.

"A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institution's, no matter how efficient and well-arranged, must be reformed or abolished if they are unjust."[819]

4.1. INTRODUCTION

The constitutions are always promulgated keeping in view objective conditions and socio-economic as well as socio-political requirements of a particular polity. Specifically speaking, it may be as to what the basic structure is and what is allowed to be amended or not.

Normally, in every constitution a procedural provision is made for amendment of the same. However, if such a structure is specifically or impliedly recognized and is given effect in that polity is an independent, though closely associated, question. To answer the same, certain other questions also need to be answered: why the courts have so acted as to reduce the role of State's other organs through unwritten and unconstitutional constitutionalism? Can constitutional courts be allowed, in the name of interpretation, and as guardian, of the constitution, and of rights of the citizens of the polity, to fall back upon unconstitutional constitutionalism based judicial policy to create inroads into the respective jurisdictions of other pillars/organs of government/state, respectively? Of course such questions must not be left unattended for good. This chapter would focus on these unattended areas.

[819] John Rawls: A Theory of Justice, Oxford University Press, (1971), 3.

4.2. Doctrine of Basic Structure of Constitution and Limits of Powers of Constitutional Courts.

There is growing tendency among Judges to rely upon unwritten legal principles[820] when there are no statutory rules to allow a Judge to fill the gap in a certain way.[821] An important illustration of such a judicial policy is a doctrine which offers a good breakdown of this phenomenon through unconstitutional constitutionalism. The ratification of doctrine of basic structure serves as raw material for the Pakistani courts multiply their powers.[822] This idea was conceived by our constitutional Court(s) from Indian jurisprudence.[823]

Joel Colon-Rios questions the democratic legitimacy of this doctrine of basic structure.[824] However, there are also scholars like Sudhir Krishnaswamy who come up with defending legitimacy of basic structure doctrine, especially in the Indian perspective.[825] This doctrine basically restrains the legislature from adopting constitutional amendments when they are contrary to this doctrine.[826]

However, in India, this doctrine is said to have sparkled strong deliberations as the same amounts to taking away parliamentary sovereignty.[827] According to various scholars

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[820] Mark Van Hoecke, The Use of Unwritten Legal Principles by Courts, Ratio Juris. Vol.8. No.3. December 1995, (248-60), 250.

[821] Subramanya T.R, Seeking Jurisprudential Basis for Basic Structure An Assessment (Jan 12, 2024). Doctrine of Basic Structure: Revisiting Kesavananda Bharati Verdict on Its 50th Anniversary, Available at SSRN: https://ssrn.com/abstract=4840079, last accessed 23.03.2024.

[822] Amr Ibn Munir, Pakistan's Basic Structure Conundrum (December 24, 2023). Available at SSRN: https://ssrn.com/abstract=4674801 or http://dx.doi.org/10.2139/ssrn.4674801, last accessed 22.02.2024.

[823] See for example, Kesavananda Bharati Vs. Kerala, A.I.R. 1973 SC 1461. This is the landmark judgment on idea of basic structure of the constitution. *See also*, Smt. Indira Nehru Gandhi vs. Raj Narain AIR 1975 SC 2299 and Minerva Mills Ltd. vs. India, A.I.R. 1980 S.C. 1789. See also, Kinoshita, Masahiko, Book Review: 'Constitutional Statecraft in Asian Courts' (May 27, 2023). The American Journal of Comparative Law, Forthcoming, Available at SSRN: https://ssrn.com/abstract=4460915 or http://dx.doi.org/10.2139/ssrn.4460915, last accessed 23.02.2024.

[824] Joel Colon Rios, Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power (Abington, UK: Routledge, 2012), 67.

[825] Sudhir Krishnaswamy, Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine, (Oxford, UK: Oxford University Press, 2009), 164-229.

[826] R. Krishna Iyer, A Constitutional Miscellany, 2nd Edition. Eastern Book Company (2003), Reprinted 2007, at p. 15.

[827] Anil Kalhan, "Gray Zone Constitutionalism and Dilemma of Judicial Independence in Pakistan", Vanderbilt Journal of Transnational Law, Vol. 46 No.1, (2013), 74.

like Pran Chopra, it is considered to be against thrust of democratic disposition.[828] It also serves only as means to unconstitutional constitutional appropriation of parliamentary sovereignty.[829] The unwritten judicial policy as well as the, invincible but existing, spectacles of unconstitutional constitutionalism have facilitated the Supreme Court of Pakistan (SCP) to formally recognize this doctrine.

4.2.1. Principle of Basic Structure and the Accord to the Constitution.

It must be appreciated that "the basic features of the Constitution were in fact given in an Accord to the Constitution made on October 20, 1972 in the meeting of the parliamentary party leaders, called by the President of Pakistan."[830] In a case which was subsequently upheld by SCP in *Mahmood Khan Achakzai*[831] as well as in *Al Jehad Trust*'s,[832] it was held about basic structure of the Constitution that the same is "amply reflected in the Objectives Resolution."[833]

In a case SCP held that "the Constitution of Pakistan is the supreme law of the land and its basic features i.e. independence of judiciary, federalism and parliamentary form of government blended with Islamic provisions cannot be amended."[834] In Pakistan, the transactions are done in routine in *Riba*/interest which has been prohibited in unequivocal and

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[828] Pran Chopra, The Supreme Court versus the Constitution, A Challenge to Federalism, Sage Publication India Pvt. Ltd. B-42, Panchsheel Enclave New Delhi, (2006), at p.36.
[829] Gourab Das, Basic Structure Doctrine of Indian Constitution (March 3, 2023). Available at SSRN: https://ssrn.com/abstract=4377908 or http://dx.doi.org/10.2139/ssrn.4377908, last accessed 22.002.2024.
[830] Justice S.A. Rabbani, 18th Amendment to The Constitution of Pakistan, PLD 2011 Journal Section, P.2. Also available at, http://www.plsbeta.com/Lawonline/law/contents.asp?CaseId=2011J2, last accessed on 12-01-2024.
[831] Muhmood Khan Achakzai vs. Federation of Pakistan PLD 1997 SC 426.
[832] Al Jehad Trust's case, PLD 1997 SC 84.
[833] Abdul Mujeeb Pirzada's case 1997 SCMR 232, para 2. *See also*, In re; The Initiative and Referendum Act, [1919] AC. 935, Street's Doctrine of Ultra Vires, Sweet & Maxwell, (1930), p. 430, *and* Attorney General of Nova Scotia vs. Attorney General of Canada, [1951] S.C.R. 31, p. 49. Corpus Juris Secundum, Volume 16, paragraph 7 on the subject of "Constitutional Law", at p. 35.
[834] Syed Zafar Ali Shah vs. Federation of Pakistan, PLD 2000 SC 869, para 281. *See also*, Cooley: Constitutional Law, (4th ed.), Little, Brown and Company, (1878). Reprinted 2008, 2011 by The Lawbook Exchange, Ltd. ISBN-13: 9781584778783; ISBN-10: 1584778784., p.138. *See also*, Empress vs. Burah, 5 I.A., 177, 178.

unqualified manner in the basic written religious texts but the Courts are not enforcing the said written text by hiding behind abstract principles at the cost of written law.[835]

While referring to an Indian case[836] SCP held that the theory of basic structure is not consistently accepted in Pakistan. However, it was added that the same is pressed into service when an impugned Constitutional amendment tends to destroy any of the basic features of the Constitution,[837] without which the State could not have been run as was originally conceived by the framers of the Constitution.[838]

It is still to be seen what provision of the constitution allows and authorizes the constitutional court to confer the authority on dictatorial regime to amend the constitution? Whether there is any such power available to the constitutional courts under articles 199 or 189 or 184 (3)?[839] If yes, who says so and under what authority? If no, whence the same is inferred? The answers come to negative when we resort to written provisions of the law.

It would be worthwhile to appreciate that in *Zafar Ali Shah* under this so called doctrine the court was looking for surety at the hands of a dictator not to disturb the constitution so as to compromise the so called 'independence of judiciary.' On the other hand, there have been passed judgments that hold otherwise. For example in a case SCP recognized complete authority of the legislature to introduce constitutional amendments and did not consider the doctrine of basic structure.[840] Cases like this show that the SCP has not

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[835] Sura' al' Rum, 30:39; Sura al Baqarah, 02:275-279; Sura' al Nisa, 04:160-161 and Sura Aal e Imran, 3:130. *Also see*, Sahih Muslim 81: 1587; Bulugh al Maram 7: 833.
[836] S.P. Sampath Kumar vs. Union of India (AIR 1987 SC 386).
[837] *See also*, Rehan Abeyratne and Yaniv Roznai, Interpreting Unconstitutional Constitutional Amendments (September 1, 2023). Catherine O'Regan, Carlos Bernal & Sujit Choudhry (eds.), Research Handbook on Constitutional Interpretation (Edward Elgar Publishing, Forthcoming). Available at SSRN: https://ssrn.com/abstract=4559133, last accessed 23.02.2024.
[838] Wukala Mahaz Brai Tahafaz Dastoor vs. Federation of Pakistan and others, PLD 1998 SC 1263. Para 09, at P. 1297
[839] *See also*, Articles 32 and 131 of Indian Constitution, 1949.
[840] Federation of Pakistan vs. United Sugar Mills Ltd, PLD 1977 SC 397, para 32.

been consistent in towing the line of parliamentary sovereignty vis-a-vis doctrine of basic structure qua moves based upon unwritten unconstitutional constitutionalism in Pakistan.[841]

4.2.2. Oscillating Approach of Pakistani Courts towards the Basic Structure Doctrine.

In *Wukala Mahaz*[842] it was held that the provision of Art.63A is in consonance with the tenets of Islam and the same is not violative of any of the basic structures of the Constitution.[843] In addition to *Wukala Mahaz,* the question of 'jurisdiction' was also considered in other cases.[844] The question as to whether a court has jurisdiction in a particular matter is to be decided by the court itself.[845] For reaching this conclusion, the court referred to certain cases but instead of adopting the theory of basic structure the SCP pressed into service the rule that if there is a conflict between the two provisions, the provision which contains lesser right must yield in favour of a provision which provides higher rights.[846]

In another case concept of basic structure was pressed into service and it was maintained that the same was acknowledged by SCP in certain previous cases[847] but it did not

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[841] Hassan A. Niazi, Judging Constitutional Amendment: A Critique of South Asia's Basic Structure Doctrine (2018). Pakistan Law Digest, PLD 2018 Journal 56, Available at SSRN: https://ssrn.com/abstract=4400430 or http://dx.doi.org/10.2139/ssrn.4400430, last accessed 24.05.2024.

[842] In Wukala Mahaz, Ajmal Mian, C.J. by common judgment, disposed of two Constitution Petitions, which involved interpretation of Article 63A of the Constitution of the Islamic Republic of Pakistan, 1973 relating to disqualification on the ground of defection, incorporated by the Constitution (Fourteenth Amendment) Act, 1997 (Act XXVI of 1997), assented to by the President on 3-7-1997 and gazetted on 4-7-1997. Constitution Petition No. 24 of 1997 was filed on 25-10-1997 by Wukala Mahaz Barai Tahafaz Dastoor, Lahore, claiming to be a body of professional lawyers. It would be pertinent to note that the matter of floor crossing came up before Supreme Court in 1990, in the form of an appeal (with the leave of the Court) in the case of Humayun Saifutlah Khan vs. Federation of Pakistan (PLD 1990 SC 599), in which interpretation of section 8-B (2) of the Political Parties Act (Act XIII of 1962) was involved, but the case was remanded to the Peshawar High Court by the majority view for deciding the writ petitions.

[843] Wukala Mahaz Brai Tahafaz Dastoor vs. Federation of Pakistan and others, PLD 1998 Supreme Court 1263, para 13. *For legislative history relating to law of defection please see*, Humayun Saifullah Khan vs. Federation of Pakistan PLD 1990 SC 599; Khawaja Ahmad Tariq Rahim vs. The Federation of Pakistan PLD 1992 SC 646 and Pir Sabir Shah Shad Muhammad Khan, Member Provincial Assembly PLD 1995 SC 66.

[844] i.e., Mahmood Khan Achakzai v: Federation of Pakistan, PLD 1997 SC 426; State vs. Ziaur-Rehman, PLD 1973 SC 49, *and* Federation of Pakistan vs. Ghulam Mustafa Khar PLD 1989 SC 26.

[845] Wukala Mahaz Brai Tahafaz Dastoor vs. Federation of Pakistan and others, PLD 1998 SC 1263, para15.

[846] i.e., Al-Jehad Trust vs. Federation of Pakistan, PLD 1996 SC 324; Shahid Nabi Malik vs. Chief Election Commissioner, Islamabad and 7 others, PLD 1997 SC 32; Mahmood Khan Achakzai vs. Federation of Pakistan, PLD 1997 SC 426, *and* Hakim Khan vs. Government of Pakistan, PLD 1992 SC 595. *The court also referred to* Corpus Juris Secundum, Vol.16, p.97, *and* Halsbury's Laws of England, Fourth Edn., Vol.44, p.532.

[847] i.e., Mahmood Khan Achakzai vs. Federation of Pakistan (PLD 1997 SC 426); Syed Zafar Ali Shah vs. General Pervez Musharraf, Chief Executive of Pakistan, PLD 2000 SC 869, *and* Wukala Mahaz Barai Tahafaz

make it a touchstone to strike down a constitutional provision and considered that these judgments needed re-visiting.[848] In *Benazir Bhutto*, leave to appeal was granted to examine whether the decision of SCP rendered in *Begum Nusrat Bhutto*[849] was violated in promulgating the PCO of 1981[850] and RO of 1984.[851] However, it was added that "Objectives Resolution when read with other provisions of the Constitution reflects salient features of the Constitution."[852]

It is to be appreciated that the approach of the Pakistani Judges tends to show that the same keeps on oscillating from the Basic Structure Doctrine to that of Salient Features of the Constitution and back to the former to the latter and so on and so forth.[853] It is not settled.

As regards Pakistani case law, there are certain judgments in which the theory of basic structure has not found favour. In fact there are two approaches. Those who advocated the basic structure theory mainly relied on *Asma Jillani's case*[854] in which it was contended that the Objectives Resolution[855] was considered to be the grund norm of our Constitution. However, about Objectives Resolution it was maintained that "the grund norm was the doctrine of legal sovereignty accepted by the people of Pakistan and the consequences that flow from it."[856] In *Fouji Foundation*, it appeared difficult to court to follow what the Indian Supreme Court had held in *Smt. Indira Gandhi's* case[857] as the conclusion there rested

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Dastoor vs. Federation of Pakistan, PLD 1998 SC 1263. *See also*, Amr Ibn Munir, Pakistan's Basic Structure Conundrum (December 24, 2023). Available at SSRN: https://ssrn.com/abstract=4674801 or http://dx.doi.org/10.2139/ssrn.4674801, last accessed 22.02.2024.

[848] Constitutional Petitions Nos. 11-15, 18-22, 24, 31, 35, 36, 37 and 39-44 of 2010, C.M. Appeal No.91 of 2010, HRC Nos. 20492-P and 22753-K of 2010, C.M.As.1599, 1859, 1959 and 2681 of 2010 and Civil Petition No.1901 of 2010, decided on 30th September, 2010. (On appeal from the order of Peshawar High Court dated 16-6-2010 passed in W.P.No.1581 of 2010). *See also*, Nadeem Ahmed Advocate and others vs. Federation of Pakistan and others, PLD 2010 SC 1165, Para No. 11.

[849] Begum Nusrat Bhatto vs. The Chief of Army Staff, PLD 1977 SC 657.

[850] Provisional Constitution Order, (1 of 1981).

[851] Referendum Order (II of 1984).

[852] Mohtarma Benazir Bhutto and another vs. President of Pakistan and others, PLD 1998 SC 388, para 3.

[853] Hafeez-Ur-Rehman Choudhary vs. Federation of Pakistan, 2022 MLD 2066 (LHR). Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2022L2608, last accessed 24.12.2023.

[854] Asma Jilani. vs. Government of the Punjab and another, PLD 1972 SC 139.

[855] Art. 2-A of the Constitution of Islamic Republic of Pakistan, 1973.

[856] State vs. Zia-ur-Rehman, PLD 1973 SC 49, para 58, per Hamoodur Rahman, CJ.

[857] Indira Nehru Gandhi vs. Shri Raj Narain & Anr., AIR 1975 SC 2299.

eminently on the interpretation of the amending provision which had no Constitutional restrictions.[858] In another case it was held that the Parliament was not sovereign to amend the Constitution according to its likes and dislikes much less than changing the basic structure of the Constitution.[859] This opinion appears to be based on *Kesavananda* case[860] which again is subject to the same criticism which has been highlighted while reviewing *Smt. Indira Gandhi's* case. It is to be appreciated that "as to what the learned Judge refers to is a political question and a matter of policy for the Parliament. Such a question is also not justiciable."[861]

As regards the phrase political question, it is not easy to define the same. It is frequently used to designate all questions that lie outside the scope of the judicial power. However, "a political question encompasses more than a question about politics."[862] The phrase 'political question' has been defined as "a question, the determination of which is a prerogative of the legislative or executive branch of the Government, so as not to be appropriate for judicial inquiry or adjudication."[863] But the court should not adopt "political question doctrine" for refusing to determine difficult and knotty questions having political overtones which would amount to abdication of judicial power.[864]

In a case it was held that superior courts had an inherent duty to ascertain and enforce the provisions of the Constitution and that "the Court will not be deterred from performing its Constitutional duty, merely because the action impugned has political implications."[865] However, it is to be noted that the judiciary is not concerned, with political decisions on

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[858] Fouji Foundation and another vs. Shamimur Rehman, PLD 1983 SC 457, para 201. *See also*, i.e., Shankri Prasad vs. Union of India, AIR 1951 SC 458, and Sajjan Singh vs. State of Rajasthan , AIR 1965 SC 845.
[859] Darvesh M. Arbey vs. Federation of Pakistan, PLD 1980 Lahore 206, para 15, per Karam Elahee Chouhan, J.
[860] Kesavananda Bharati's case (AIR 1973 SC 1461).
[861] State vs. Zia-ur-Rehman, PLD 1973 SC 49.
[862] Corpus Juris Secundum, Vol. 16, p. 109. From Australian jurisdiction *see also*, Comcare vs. Michaela Banerji, 2019 SCMR 1553 (High Court of Australia). Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2019HCA701, last accessed 22.01.2024.
[863] James A Ballentine, (Compiler): Ballentines Law Dictionary. Indianapolis: The Bobbs-Merrill Company, [1916]. Reprinted 2005, 2016 by The Lawbook Exchange, Ltd. ISBN-13: 9781584774907/ISBN-10: 1584774908.
[864] Muhammad Nawaz Sharif vs. Federation of Pakistan PLD 1993 SC 473, para 18-A, Per Saad Saood Jan, J. *See also*, Corpus Juris Secundum, Vol. 16, p.110.
[865] Federation of Pakistan vs. Muhammad Saifullah Khan, PLD 1989 SC 166. See Mr. Fazlul Quader Chaudhry and others vs. Muhammad Abdul Haque, PLD 1963 SC 486, at p. 504.

questions of policy.[866] Its function is to enforce the Constitution and to see that the other organs of the State confine themselves within the limitations prescribed therein.[867] However, it has been consistently acknowledged that while there may be a basic structure to the Constitution, and while there may also be limitations on the power of Parliament to make amendments to such basic structure, such limitations are to be exercised and, enforced not by the judiciary but by the body politic, i.e., the people of Pakistan.[868]

Regarding debate on basic structure it is also to be noted that the factum of the President being subject to all the disqualifications contained in Art.63 was considered as having ignored the settled law on this point as discussed and upheld in *Qazi Hussain Ahmed*'s case.[869] It is also to be appreciated that this finding was also reached in other earlier cases by the superior courts of the country.[870] In *Zafar Ali Shah* case, on the strength of merely unwritten law, it was held that Art. 63(1) (d) was endorsed,[871] without giving thought to the fact that it was best example of vested legislation. Such an approach on the part of the courts of law shows sheer impotence of the law and judicial system which appear to be based upon an unwritten law and some unwritten judicial policy.[872]

Continuing to believe in such a judiciary is just like living in some other world when it comes to fall back on the concept of protection of fundamental rights. In fact, such a huge ask from the judiciary can never be termed as realistic in the Pakistani context. It is because

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[866] Fauji Foundation and another vs. Shamimur Rehman PLD 1983 SC 457, para 202. Also see Malik Ghulam Mustafa Khar and others Vs. Pakistan and others, P L D 1988 Lahore 49, at p.113.
[867] Ziaur Rahman's case PLD 1973 SC 49, para 67, Per Hamoodur Rahman, C.J.
[868] Pakistan Lawyers Forum and others vs. Federation of Pakistan and others, PLD 2005 Supreme Court 719, para 57.
[869] Qazi Hussain Ahmad, Ameer Jamaat e Islami Pakistan and others vs. General Pervez Musharraf, Chief Executive and others, PLD 2002 SC 853, para 78.
[870] *See for example*, Aftab Shahban Mirani vs. President of Pakistan (1998 SCMR 1863) which upheld the judgment of the Lahore High Court in the case reported as Muhammad Rafiq Tarrar vs. Justice Mukhtar Ahmad Junejo (PLD 1998 Lahore 414): The same view was also expressed in Muhammad Shahbaz Sharif vs. Muhammad Iltaf Hussain (PLD 1995 Lahore 541.
[871] Syed Zafar Ali Shah and others vs. General Pervez Musharraf, Chief Executive of Pakistan and others, PLD 2000 SC 869.
[872] City of Toronto vs. Attorney General of Ontario, 2021 SCMR 2019 (Supreme Court of Canada). Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2021SCC701, last accessed 23.12.2023.

the political, judicial and constitutional history of Pakistan show alike that our past has been one which is replete with precedents of capitulation existing in huge number which only degenerate to make it a norm when it comes to legitimize the extra constitutional steps by the dictators on the basis of some ultra-constitutional power vesting in the constitutional judiciary which is not written anywhere, if we are to go by laws made by the Parliament.

At this juncture, one would be right in believing that when such a law is not written, there might be some unwritten judicial policy to fall back upon such an ultra-constitutional step as was done in *Zafar Ali Shah*, supra. The underlying cause appears that the judges are mere mortals and are driven by ambitions, desires and fears.[873]

4.3. Comparative Study of Other Jurisdictions.

The comparative analysis is made in the coming lines under the following heads.

4.3.1. Approach of Supreme Court of India Vis-a-Vis *Kesavanda Bharti, Mst. Indra Ghandi* and Other Cases.

The doctrine of basic structure was approved by the Supreme Court of India in *Kesavanda Bharti*.[874] There is another case (i.e., *Sajjan Singh*) prior in time from the Indian Jurisdiction.[875] So, it can be said that the doctrine of basic structure was originally enunciated

[873] Reference is to the interview of November 2021 of Syed Naseem Hassan Shah, former CJP with Journalist Iftikhar Ahmed on GEO TV Show, *Jawab Do*.

[874] Kesavananda Bharti vs. State of Kerala, AIR 1973 SC 1461. Regarding vicissitude of Indian constitutional jurisprudence on basic structure *see*, Setu Gupta, Vicissitudes and Limitations of the Doctrine of Basic Structure (Nov 15, 2016). Setu Gupta, "VICISSITUDES AND LIMITATIONS OF THE DOCTRINE OF BASIC STRUCTURE" 110 ILI Law Review (2016). , Available at SSRN: https://ssrn.com/abstract=4398369, last accessed 23.03.2024.

[875] For historical perspective and analysis of the trends introduced by judgments of superior courts in India to identify the history of the struggle and conflict between the Judiciary and Parliament in India necessitating the development of the doctrine of basic structure, see Golak Nath vs. State of Punjab AIR 1967 SC 1643; Kesavananda Bharati vs. State of Kerala AIR 1973 SC 1461; Shankari Prasad vs. Union of India AIR 1951 SC 458; Sajjan Singh vs. State of Rajasthan AIR 1965 SC 845; Indira Nehru Gandhi vs. Shri Raj Narain AIR 1975 SC 2299; Minerva Mills Ltd. vs. Union of India AIR 1980 Supreme Court 1789; Waman Rao vs. Union of India AIR 1981 SC 271; I.R. Coelho vs. State of Tamil Nadu AIR 2007 SC 861.

by Justice Mudholkar in *Sajjan Singh*.[876] According to Sharif ud Din Pirzada Advocate, he (Justice Mudholkar) had borrowed it[877] from the decision of the SCP in *Fazlul Quader Ch*.[878] It is to be noted that *Fazlul Quader Ch.*, was not a case of amendment of the Constitution by the Parliament. However, the court applied the principle to the amendment of the Constitution on the basis of so-called basic structure.[879]

However, the first case in the series was *Kesavananda Bharti* which overruled *I.C. Gokalnath.*[880] It was held in there that the Indian Constitution did not enable Parliament to alter its basic framework and consequently the SC struck down part of the 25th Amendment to the Indian Constitution.[881]

Next case worth discussion is *Smt. Indira Gandhi.* In this case, the court struck down part of 39th Amendment which validated the election of the Indian Prime Minister after having been declared as void by the Court.[882] In *Minerva Mills*, the petitioners challenged

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[876] Sajjan Singh vs. State of Rajasthan, AIR 1965 SC 845. Following texts are useful for a critical commentary and historiography of the struggle of supremacy between the Parliament and the Courts leading to the development of the basic structure doctrine in India. Also see: Austin, Granville: Working a Democratic Constitution, Oxford University Press (2000); Austin, Granville: The Supreme Court and the struggle for custody of the Constitution", in "Supreme but not infallible: Essays in Honour of the Supreme Court of India", by B.N. Kirpal, p. 13. Also see "Courage, Craft and Contention: The Indian Supreme Court in the Eighties" by Professor Upendra Baxi (1985), Tripathi Pvt Ltd., Bombay: Book Review in Journal of the Indian Law Institute, Published By: Indian Law Institute, Vol. 28, No. 1 (January-March 1986), pp. 112-116, at 115.

[877] *See his opinion in*, Mahmood Khan Achakzai and others vs. Federation of Pakistan and others, PLD 1997 SC 426, para 29.

[878] Fazlul Quader Ch. vs. Muhammad Abdul Haq, PLD 1963 SC 486. For debate on concept of basic structure in India and Pakistan *see*, Hassan A. Niazi, Judging Constitutional Amendment: A Critique of South Asia's Basic Structure Doctrine (2018). Pakistan Law Digest, PLD 2018 Journal 56, Available at SSRN: https://ssrn.com/abstract=4400430 or http://dx.doi.org/10.2139/ssrn.4400430, last accessed 23.01.2024.

[879] For an exhaustive discussion on the issue as well as cases concerning the basic structure doctrine, *see*, generally, Sudhir Krishnaswamy, Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine (Oxford University Press 2010). *See also*, Manoj Mate, 'Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective' (2010) 12 San Diego International Law Journal 175, pp. 178-79.

[880] I.C. Golaknath vs. Punjab AIR 1967 SC 1643, para (V), PerWanchoo, Bhargava and Mitter, JJ. In this case 17th Amendment was challenged but was held to be valid.

[881] On activist approach, *See,* Upendra Baxi, 'The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In] Justice' in S. Verma and Kusum K. (eds.), *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Oxford University Press 2000). *See also,* SP Sathe, 'Judicial Activism: The Indian Experience' (2001) 6 Washington University Journal of Law & Policy 29.

[882] Smt. Indira Gandhi vs. Raj Narain, AIR 1975 SC 2299, para 691. *See also*, para 675. *See also*, Rehan Abeyratne and Son Ngoc Bui, Unconstitutional Constitutional Amendments as Constitutional Politics (November 11, 2021). The Law and Politics of Unconstitutional Constitutional Amendments in Asia (Rehan Abeyratne and Bui Ngoc Son, eds) (Routledge 2021), Available at SSRN: https://ssrn.com/abstract=4558300, last accessed 22.03.2024.

inter alia, the constitutionality of 44th Amendment to the Constitution. Article 31-C of the Indian Constitution which, prior to the Amendment, stated that no law meant to give effect to clause (b) or (c) of Article 39, which dealt with the directive principles of policy, shall be declared invalid on the grounds of inconsistency with Articles 14, 19 or 31 of Indian Constitution, 1949 pertaining to Fundamental Rights. [883]

Two other judgements from Indian jurisdiction, viz., *Kihota Hallohon* and *Raghonathrao Ganpatrao* are also worth referring here. In the former case 52nd Amendment, which banned floor crossing was challenged, but it was upheld. It, however, accepted the concept of "amendment" and followed the earlier view that the amending power is subject to the limitation that the amendment does not destroy the basic structure of the Constitution.[884]

4.3.2. Question of Basic Structure and Approach of Supreme Court of Sri Lanka.

Question of Basic Structure came up for consideration before the Supreme Court of Sri Lanka in the case of *Thirteenth Amendment to the Constitution*.[885] The question was whether there were certain basic principles or features of the Sri Lankan Constitution which could not have been altered. The reliance in this regard was placed on the decisions of the Supreme Court of India in *Kesavananda*[886] and *Minerva Mills Limited*.[887]

However, it is to be appreciated that those decisions of the Supreme Court of India were based on Article 368 of the un-amended Indian Constitution which provided that an

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[883] Minerva Mills Limited vs. Union of India, AIR 1980 SC 1789. *See also*, Yash Sinha, Constitutional Ecdysis: How and Why the Indian Constitution May Test Its Original Provisions (September 29, 2022). Available at SSRN: https://ssrn.com/abstract=4233661 or http://dx.doi.org/10.2139/ssrn.4233661, last accessed 23.03.2024.
[884] Shri Kihota Hallohon vs. Zachilhu, AIR 1993 SC 412, para 26. See also, Subramanya T.R, Seeking Jurisprudential Basis for Basic Structure An Assessment (Jan 12, 2024). Doctrine of Basic Structure: Revisiting Kesavananda Bharati Verdict on Its 50th Anniversary, Available at SSRN: https://ssrn.com/abstract=4840079, last accessed 23.03.2024. The same view was followed in latter case as well. *See*, Raghonathrao Ganpatrao vs. Union of India, AIR 1993 SC 1267, para 28, per Mohan J. For the role of SC in India's governance, See, Manoj Mate, 'The Rise of Judicial Governance in the Supreme Court of India' (2015) 33 Boston University Int'l Law Journal 169, pp. 186-96.
[885] In re, "the 13th Amendment to the Constitution and the Provincial Councils Bill", 1990, Law Reports of 24 Commonwealth, (1990 LRC 1).
[886]Kesavananda vs. State of Kerala (AIR 1973 SC 1461).
[887] Minerva Mills Limited vs. Union of India (1980) 2 SCC 591).

amendment of the Constitution may be initiated only by the introduction of a Bill before either House of Parliament.[888] Supreme Court of Sri Lanka, on the other hand, held that it would not be proper to be guided by concepts of amendment found in the Indian judgments which had not to consider the statutory definition of the word "amendment."[889]

4.3.3. Singaporean Approach to Basic Structure Issue.

In Singapore provisions of Internal Security Act (ISA)[890] were amended to limit scope of judicial reconsideration of decisions made or acts done in respect of preventive detention. However, while differentiating *Kesavananda* doctrine that Constitutional provisions could be amended by Parliament provided the basic foundation and structure of the Constitution remained unchanged, it was held that said case law did not apply to the Singaporean Constitution while observing that "none of the amendments complained of had destroyed the basic structure of the Constitution."[891]

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[888] For Survey of case-law from the Indian jurisdiction on the doctrine of "basic structure' limiting the powers of Parliament to amend certain salient features of the Constitution, *see*, Sankari Prasad vs. Union of India, AIR 1951 SC 458; Sajjan Singh vs. State of Rajasthan, AIR 1965 SC 845; Golak Nath vs. State of Punjab, AIR 1967 SC 1643; Kesavananda Bharati vs. State of Kerala, AIR 1973 SC 1461; Indira Nehru Gandhi vs. Raj Narain, AIR 1975 SC 2299; Minerva Mills Limited vs. Union of India, AIR 1980 SC 1789; Sanjeev Coke Mfg. Co. vs. Bharat Coking Coal Ltd. AIR 1983 SC 239; Shri Raghunathrao Ganpatrao vs. Union of India, AIR 1993 SC 1267; AR Kelu vs. State of Tamil Nadu, AIR 2007 SC 861 and State of West Bengal vs. Committee for Protection of Democratic Rights, AIR 2010 SC 1467.

[889] In re, "the 13th Amendment to the Constitution and the Provincial Councils Bill", 1990, Law Reports of 24 Commonwealth, (1990 LRC 1). However, it is to be noted that the Hon'ble Judges did consider the observation in Kesavananda but they distinguished Article 368 of Indian Constitution with Article 51 of Constitution of Sri Lanka of 1972. Moreover, while referring to Article 82(7) of the latter, they also differentiated the same qua definition of amendment which included repeal, alteration and addition under Sri Lankan law.

[890] Internal Security Act 1960 of Singapore.

[891] Chng Suan Tze vs. Minister of Home Affairs and others, (1988) 2 SLR(R) 525, 532. *See also*, Hinds vs. The Queen, (1977) AC 195 (Privy Council), at p.214. For debate on basic structure in Kenya and Israel *see*, Yaniv Roznai and Duncan Okubasu Munabi, Stability of Constitutional Structures and Identity Amidst Political Bipartisanship: Lessons from Kenya and Israel (September 26, 2022). Available at SSRN: https://ssrn.com/abstract=4229657 or http://dx.doi.org/10.2139/ssrn.4229657, last accessed 22.02.2024.

4.3.4. Malaysian Courts' Approach towards the Kesavananda doctrine.

Even the Malaysian Courts have declined to follow the Kesavananda doctrine.[892] In the case of *Loh Kooi Choon,* a Constitutional amendment was considered which had the effect of abridging a Fundamental Right. The amendment was effected qua section 354-A of Malaysian Act of 1976 which provided in effect that the right of an arrested person to be produced before a Magistrate within 24 hours[893] should not apply to arrests or detentions under the Restricted Residence Enactment. It was held that any provision of the Constitution could be amended under Art. 159 which were not subject to any provision making fundamental rights inviolable.[894]

4.4. Doctrine of Implied Mandate and Unwritten Law.

In *Jurists Foundation,* judicial restraint and judicial activism were held to be value-laden concepts. S. Mansoor A. Shah, J. held that the doctrine of judicial restraint urged judges to give deference to the views of elected branches while dealing with constitutional questions. While granting six months' time to the Parliament for making law to regulate the tenure/retirement of chief of army staff, despite the fact that the relevant Army Act[895] and Regulations/Rules[896] did not provide for the same.[897] This case shows the reliance on implied mandate by the court.

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[892] *See for example*, Loh Kooi Choon vs. Government of the Federation of Malaysia, (1977) 2 MLJ 187, at p. 193, *and* Phang Chin Hock vs. Public Prosecutor, (1980) 1 ML.J 70, at p.73.
[893] Under Art. 5 (4) of the Malaysian Constitution. The comparative provision in Pakistan is S.61 of Cr.p.c, 1898 and Art.10 (2) of Constitution of the Islamic Republic of Pakistan, 1973.
[894] Loh Kooi Choon vs. Government of the Federation of Malaysia, (1977) 2 MLJ 187, at p. 190, per Raja Azlan Sha J. *See also*, Masahiko Kinoshita, Book Review: 'Constitutional Statecraft in Asian Courts' (May 27, 2023). The American Journal of Comparative Law, Forthcoming, Available at SSRN: https://ssrn.com/abstract=4460915 or http://dx.doi.org/10.2139/ssrn.4460915, last accessed 23.02.2024.
[895] Pakistan Army Act, 1952.
[896] Army Regulations (Rules), 1998.
[897] Jurists Foundation through Chairman vs. Federal Government through Secretary, Ministry of Defence and others, PLD 2020 SC 1, paras 46,47, per Syed Mansooe Ali Shah, J..

4.4.1. *Zia Ur Rahman* Case and the Implied Mandate.

Zia Ur Rahman[898] pertained to Martial Law Regulations[899] and Jurisdiction of Courts (Removal of Doubts) Order.[900] The back ground of the case pertains to arrest of a number of journalists who were detained for trial by Military Court for offences under Martial Law Regulations No. 16 A and 89. Pending petitions[901] the journalists were convicted.[902] The objection was that the High Court had no jurisdiction.[903] The State counsel, while conceding that the usurpation of power by General Yahya Khan was unconstitutional, claimed that State necessity and submission by the people including the Courts, to the usurpation of power clothed all illegal and unconstitutional acts of the usurper with validity.[904] This argument, however, didn't find favour with the court.[905]

It is to be remembered that the Court was again moved through proper applications for firstly, suspension of sentence and bail and secondly, proceeding against the presiding officer of the Military Court for the Contempt of this Court. However, no contempt of court proceedings were initiated by the Bench in *Zia ur Rehman.* As regards the first question, the reference was made to *M. S. Khawaja.*[906] However, the questions that remain unanswered are: was the Court not competent to initiate those proceedings? Despite having the implied

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[898] Zia Ur Rahman Vs. The State, PLD 1972 Lahore 382.
[899] Martial Law Regulation No. 16 A, and Martial Law Regulation No. 89 read with Proclamation of Martial Law, of 1969.
[900] President's Order No. III of 1969.
[901] Petitions (habeas corpus) No. 403 and 404 of 1972.
[902] On right to fair trial, *see*, Bakht Munir, An Assessment of Right to Fair Trial under the Constitution of Pakistan, 1973: A Comparative Study of the US and Pakistan (December 30, 2020). Global Security & Strategic Studies Review, Vol. V, No. IV, Fall 2020, [31-39], Available at SSRN: https://ssrn.com/abstract=4916588 or http://dx.doi.org/10.2139/ssrn.4916588, last accessed 25.09.2024.
[903] As per barring provision of the President's Order No. 3 of 1969.
[904] The learned Advocate General was asked whether he could give an undertaking, as offered by him before the Supreme Court in Mukhtar Rana's case (Writ Petition No. 223/72 before SC of Pakistan. It is an unreported judgement) but after consulting some high authorities he came back with the reply that he was unable to give an undertaking in the instant case.
[905] Zia Ur Rahman vs. The State, PLD 1972 Lahore 382, at p.390. It is to be noted that an intruder is defined by Cooley Thomas M. in his, Treatise On The Constitutional Limitations Which Rest Upon The Legislative Power Of The States Of The American Union (also shortened as, Constitutional Limitations), (1st ed. 1868) Vol. 2, at p. 1357 as "one who attempts to perform the duties of an office without authority of law and without the support of public acquiescence."
[906] M. S. Khawaja vs. The State, PLD 1965 SC 287. (In this case it was held that it was well known that the law of estoppel and limitation did not apply to trial of offences committed by the civilians.)

mandate to protect and preserve the Constitution why did it feel content with raising "hope and desire" only and why did not it take concrete steps to teach lesson to the usurper and violator? The other question that is correlative to the first two is: was the Bench sharing the usurpation of civil and political power by the Martial Law regime? This, in its turn, gives birth to the impression of submission of the Courts to the illegal regime which fact is augmented from the fact that the Judges of the Superior Courts do take fresh oaths of office under the Martial Law regime.[907]

Comparatively, however, one cannot deny the substance of the decision in the case of *Malik Mir Hassan.*[908] However, when there is no denial, in unequivocal terms, of the extra constitutional step, the going otherwise can be only branded simply as siding with the Martial Law regime based upon unwritten law. It is because that was like running "contrary to the policy of the lawful sovereign."[909]

4.4.2. Preamble of the Constitution of 1973 and the Implied Mandate.

The Constitution has a Preamble which clearly states that the Resolution embodies the main principles which are always to form the basis of the written Constitution of Pakistan. There are several mandates in it.[910]

However, it is to be noted that despite the fact that constitutional judiciary of Pakistan has kept on pressing the idea of implied mandate emanating from the Oath taken by them, the same was not pressed into service in *Zia ur Rehman*, supra. If the fundamental rights are not protected there is no use in simply cherishing the Constitution only verbally. This implied mandate of protecting the constitution means and includes that whenever there is violation of

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[907] Per Schedule III of Constitution of Islamic Republic of Pakistan, 1973. [Articles 178 and 194, respectively].
[908] Malik Mir Hassan vs. State, PLD 1969 Lah 786.
[909] Privy Council, Stella Madzimbamuto Appellant vs. Desmond William Lardner-Burke and Frederick Phillip George Respondents, [1968] 3 W.L.R. 1229; [1969] 1 A.C. 645, 732. Also available online at http://www.uniset.ca/other/cs2/19691AC645.html, last accessed 02-06-2023.
[910] Art. 2-A, of the Constitution of Islamic Republic of Pakistan, 1973.

the fundamental rights or the violation of a court order in this regard the responsible person must be dealt with an iron hand.

4.4.3. Implied Mandate Vis-a-Vis Art.2-A of the Constitution, 1973.

As regards concept of implied mandate Art.2-A needs to be discussed. Historically speaking, Article 2-A was added to the Constitution, vide Presidential Order[911] whereby Objectives Resolution was made substantive part of the Constitution. The Objectives Resolution now occupies a pivotal position in the Constitution. The legality of some piece of legislation or, for that matter, some provision of certain enactment can be tested on the touchstone of Article 2-A. It is also to be appreciated that Objectives Resolution inter alia, guarantees independence of judiciary and while interpreting the Constitution its contents ought to be kept in mind. It is to be noticed that behind every constitutional document there are certain values adopted by the makers of the Constitution.[912]

While construing Article 270-A (1), it was held in a case that one provision of the Constitution cannot be struck down on the basis of another provision.[913] In another case, it was held that Article 2-A did not carry any interpretative constraint. Therefore, it was held that the validation of the legal measure contained in Article 270-A (1) was well within the competence of the Parliament.[914]

4.4.4. Judicial Reappraisal Vis-a-Vis a Provision Ousting the Jurisdiction of Supreme Court.

Constitutional Petitions Nos. 62, 63, 53, 57, 66, 64 of 1999 and 3 of 2000 were decided on 12th May, 2000. The basic question, which was discussed, was if the restriction

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[911] Presidential Order 14 of 1985.
[912] Malik Ghulam Mustafa Khar and others Vs. Pakistan and others, P L D 1988 Lahore 49, at p.113.
[913] Muhammad Bachal Memon vs. Govt. of Sind, (PLD 1987 Kar. 296), para 12, per Naimuddin, C. J. *See also,* Federation of Pakistan vs. Saeed Ahmed, PLD 1974 SC 151, at p. 166.
[914] Malik Ghulam Mustafa Khar and others Vs. Pakistan and others, P L D 1988 Lahore 49, at p.113.

imposed by the PCO 1 of 1999 on the jurisdiction of SCP does restrict it to interpret any provision of the Constitution or any other legislative instrument, even if that particular provision is a provision which seeks to oust the jurisdiction of Supreme Court.

The other contention in this case, relevant for the purpose of this study, was that if the Judges of the superior courts were bound to defend the Proclamation of Emergency and the said PCO as amended in that, the old Constitution had been replaced by a new revolutionary order on the basis of the verdict in case of *Begum Nusrat Bhutto*. However, this contention was held to be totally misconceived in that it was clearly stated in the said judgment that on no principle of necessity powers of the judicial review vested in the superior courts under Constitution of 1973 could be taken away.[915]

The fact remains that under the judicial power the superior Courts can strike down a law on the touchstone of the Constitution. The nature of judicial power and its relationship to jurisdiction are considered to be allied concepts and the same could not be taken away.[916] When the old Order was said to have been replaced by a new Order, it was reckoned as merely a case of "constitutional deviation for a temporary period."[917]

In *Syed Zafar Ali Shah's case,* regarding the implication of the Oath Order,[918] it was held that it "allows all the Courts to continue to function and exercise powers, which is a reiteration of what was earlier stated by the Oath of Office (Judges) Order, 1999 (Order 10 of 1999)."[919]

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[915] Begum Nusrat Bhutto case PLD 1977 SC 657. From Indian jurisdiction, *see*, Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) Third World Legal Studies 107.
[916] Zarak Arif Shah, Advocate High Court, Peshawar vs. The Government of Khyber Pakhtunkhwa, PLD 2021 Pesh. 45. Also availale at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2021P8, last accessed on 24.12.2023. *See also*, William Marbury vs. James Medison, (2 Law Ed. 60) wherein it was held that: "It is inherent in the nature of judicial power that the Constitution is regarded as the supreme law and any law or act contrary to it or infringing its provisions is to be struck down by the Court in that the duty and function of the Court is to enforce the Constitution."
[917] Syed Zafar Ali Shah and others vs. General Pervez Musharraf, Chief Executive of Pakistan and others, PLD 2000 SC 869, at p.1072.
[918] The Oath of Office (Judges) Order, 2000 (Order 1 of 2000), dated 25th January, 2000.
[919] Syed Zafar Ali Shah and others vs. General Pervez Musharraf, Chief Executive of Pakistan and others, PLD 2000 SC 869, at p.1073.

4.4.5. Principle of Minimal Recognition With Respect to Illegal Constitutional Change.

There is no doubt that the judicial power means that the superior courts can strike down a law on the touchstone of the Constitution.[920] However, it is to be appreciated that this consideration of 'higher public interest', in the sense of an obligation on the superior judiciary is nowhere written either in the Constitution or in any enactment by the Parliament of Pakistan. Perhaps, in so holding, the Constitutional Judiciary, under the implied mandate in this regard, proceeds to so hold on the consideration of extra ordinary power vis-a-vis an extra constitutional step by the dictator. However, such contemplation in the words of John E Finn would be rendering the constitution meaning less.[921]

Attention can also be drawn to an Indian case in which the Indian Supreme Court took the view that the Courts are not at liberty to declare an Act void under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument.[922]

Para 238 of judgement in *Syed Zafar Ali Shah,* supra*,* conveys much about venturing into unwritten notions on the part of superior judiciary which are obviously not in their domain, as far as the written law and Constitution go. In that case, while referring to case of *Shaukat Ali Mian,*[923] the court lamented over the decision of the former Prime Minister freezing foreign currency accounts, an area which obviously pertained to executive policy.[924]

In the back drop of discussion of economic policies and financial matters by the superior judiciary, (albeit sometimes this being not the moot point even), the reference to

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[920] Mehram Ali vs. Federation of Pakistan, PLD 1998 SC 1445. *See also*, Sh. Liaquat Hussain vs. Federation of Pakistan, PLD 1999 SC 504.
[921] Constitutions in Crisis, Political Violence and the Rule of Law, by John E. Finn, Oxford University Press (1991), ISBN: 0195057384, 9780195057386, at p.21.
[922] Goplan vs. State of Madras, AIR 1950 SC 27, para 37.
[923] Federation of Pakistan vs. Shaukat Ali Mian, (PLD 1999 SC 1026).
[924] From Indian jurisdiction, *See also*, SP Sathe, 'Supreme Court, Parliament and Constitution-I' (1971) Economic and Political Weekly 1821, p 1824. (By the First Amendment, the government added Article 31(A) and Article 31(B) to the Constitution. Article 31(A) placed all laws enacted for the purpose of abolishing the proprietary and intermediate interests in agricultural lands above challenge in the courts on the grounds that they violated any of the fundamental rights provisions of the Constitution. Article 31B insulated any laws placed in the Ninth Schedule of the Constitution from judicial review).

Writ Petition No.1137 of 2013[925] seems pertinent. It was argued that the bye-election of Punjab Assembly scheduled only 47 days before the date of such expiry offended the constitutional principle and ought not to have been upheld for it would be a waste of public money. The Court mentioned about that but allowed to hold the election for a general seat without any regard to burden on public exchequer.[926]

The superior judiciary in Pakistan has the implied mandate to proceed against the usurper of civil and political power. The Constitution, on the other hand, provides the concept of declaration of emergency,[927] and that too by the head of the State.[928] However, it appears that on the basis of some unwritten military policy the powers to be decided to impose Martial Law or mini Martial Law or situation like that, and similarly on the basis of some unwritten law or unwritten judicial policy the superior judiciary has decided to not proceed against the usurper under law of sedition despite availability of express mandate under original jurisdiction u/A. 184 (3) of the 1973 Constitution.

4.5. DOCTRINE OF NECESSITY AND UNWRITTEN CONSTITUTIONALISM.

In *Jurists Foundation* the court reckoned the necessity principle amounted to going against the law of the land to attend to some political or other goal.[929] It is to be noted that concept of abrogation of the Constitution in Pakistan originated when President Sikandar

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[925] Ashfaq Ahmad and others vs. Election Commission of Pakistan and others, PLD 2013 Lahore 711.
[926] *Ibid*, at p. 713. From Indian jurisdiction *see also*, AIR 1970 SC 564. (In this case, the SC invalidated the Bank Nationalization Act on the grounds that the Act provided only illusory compensation and constituted discrimination by imposing restrictions only on certain banks.) *Also see,* AIR 1971 SC 530. (Herein the SC invalidated the abolishment of privy purses, privileges, and titles guaranteed by articles 291, 362, and 366(22) of The Indian Constitution, respectively.)
[927] Art. 232 to 237 in Part X of the Constitution of Islamic Republic of Pakistan, 1973.
[928] Art. 41(1) in Chapter 1 of Part III of the Constitution of Islamic Republic of Pakistan, 1973.
[929] Jurists Foundation through Chairman vs. Federal Government through Secretary, Ministry of Defence and others, PLD 2020 SC 1, para 49, per Syed Mansoor Ali Shah, J. For scope of this doctrine, *see also*, Pakistan People's Party Parliamentarians (PPPP) vs. Federation of Pakistan through Secretary, Ministry of Law and Justice Islamabad, PLD 2022 SC 574. Available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2022S49, last accessed 29.07.2024.

Mirza did the adventure[930] qua his letter dated 7th October, 1958 addressed to the then premier Malik Feroze Khan Noon.[931] However, it appears that the foundation for the Martial Law was laid in this country by the departing speech of Field Marshal Muhammad Ayub Khan.[932] Whatever the legal value of this speech all courts were to continue to exercise their powers, as before the abrogation of the Constitution although a clear distinction was drawn qua the jurisdiction of the Military Courts. The fact remains that in Pakistan the idea of legalizing the extra constitutional steps by the military usurpers have flowed from the saying of Cicero that 'the welfare of the people is the supreme law', and of Henry de Bracton that 'what is not otherwise lawful, becomes lawful under necessity'.[933]

In Pakistani context, once the take-over is validated on the principle of necessity, then the CMLA would have the right to govern the country in any manner he thinks best.[934] This factum shows that the "judiciary failed to check an extra constitutional regime change in the case of Pakistan."[935] However, recently, this principle was resorted to for restoring the assembly dissolved vis-à-vis no confidence matter against the premier.[936]

4.5.1. Doctrine of Necessity and Factum of Martial Law.

Martial Law is the temporary government by military force and authority of territory "in which, by reason of the existence of war or public commotion, the civil government is

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[930] A.G. Chauhdry, The Constitutional History of Pakistan, Eastern Law Book House, Lahore (1995).
[931] Osama Siddiq, The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under Pakistani Constitution and its Discontents. Arizona Journal of International and Comparative Law, Vol. 23, No. 3, (2006) PP. 622-636, at 630.
[932] Proclamation dated 15th of March 1969, imposing Martial Law in the country.
[933] Leslie Wolf Phillips, Constitutional Legitimacy: A Study of Doctrine of Necessity, (1979), Third World Quarterly, 1(4) (October), at p. 98.
[934]Amr Ibn Munir, The Principle of Due Process of Law in Pakistan under the Martial Laws: The Docile Judiciary (July 28, 2023). Available at SSRN: https://ssrn.com/abstract=4523914 or http://dx.doi.org/10.2139/ssrn.4523914, last accessed on 14.04.2024.
[935] Keith Callard; Pakistan: A Political Study, Oxford University Press, (1968), at pp. 95-100. Also see, Khalid Bib Sayeed, The Political System of Pakistan, Lahore: National Book Service. (1983), at pp. 90-96.
[936] Pakistan People's Party Parliamentarians (PPPP) vs. Federation of Pakistan through Secretary, Ministry of Law and Justice Islamabad, PLD 2022 SC 574. Available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2022S49, last accessed 29.07.2024.

inadequate to the preservation of order and the enforcement of law."[937] It is also asserted that "the validity of Martial Law is always a judicial question."[938] Factually, judiciary in Pakistan has played a pivotal role in legitimizing military dictatorships that marred the struggles at making the country a constitutional democracy.[939] In the recent history of Pakistan the judiciary has rendered itself less answerable and supra-constitutional.[940] By placing personal survival over the rule of law and constitutionalism,[941] the judges have been allowing military dictators to implement sweeping changes that expanded the military's political power and hold over the state.[942] In dismissing legal challenges to the amendments introduced by the dictatorial regimes, the Supreme Court shirked its responsibility to protect constitutional rule.[943]

4.5.2. The Unwritten Law of the Canon of Necessity.

The written law does not speak about the doctrine of necessity but this was asserted in all cases[944] pertaining to abrogation of the constitution. Pakistan was made in the name of Islam which is a State religion. Sharia upholds the idea of staying by one's words.[945] However, no one from the Bench(s) ever asked about abiding by the Oath which the disrupter

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[937] Corpus Juris Secundum, Vol. 93, at p. 115.
[938] Salmond on Jurisprudence, 11th Edition, at p. 190.
[939] Liaqat Ali Khoso, Constitutional Development in Pakistan Some Significant Judgments if Supreme Court of Pakistan (October 2, 2021). Available at SSRN: https://ssrn.com/abstract=4603142 or http://dx.doi.org/10.2139/ssrn.4603142, last accessed 23.02.2024.
[940] The Asia Report No 160 by International Group on Reforming the Judiciary in Pakistan (2008), at p 07/42. Also available at: https://www.academia.edu/37293278/REFORMING_THE_JUDICIARY_IN_PAKISTAN, last accessed on 24-06-2023.
[941] For debate on constitutionalism, *see*, Yam Kumar, Constitutionalism: A Perspective of Constitutional Law (January 5, 2023). Available at SSRN: https://ssrn.com/abstract=4473282 or http://dx.doi.org/10.2139/ssrn.4473282, last accessed 17.07.2024.
[942] Reforming the Judiciary in Pakistan, B. Validating Military Interventions, in The Asia Report No 160 by International Group on Reforming the Judiciary in Pakistan (2008), at p 09/42. Also available at: https://www.academia.edu/37293278/REFORMING_THE_JUDICIARY_IN_PAKISTAN, last accessed on 24-06-2023.
[943] Ibid.
[944] i.e., The State vs. Dosso (PLD 1958 SC 533); Miss Asma Jilani vs. Govt. of the Punjab (PLD 1972 SC 139); Begum Nusrat Bhatto vs. The Chief of Army Staff (PLD 1977 SC 657); Syed Zafar Ali Shah vs. Federation of Pakistan (PLD 2000 SC 869); Watan Party vs. Chief Executive (PLD 2003 SC 74); Sindh High Court Bar Association vs. Federation of Pakistan (PLD 2009 SC 879).
[945] *Wa awufo bil ahdi inn al ahda` kana mas`ula*. (Quran) in Bani Israel: Verse. 34. *See also*, al`Nahal,VS. 91, 94; al`Ahzab, VS.15; al`Mominun, VS.8.

of legal continuity took and which pertains to allegiance as well as protecting the constitution Instead, the court has kept on falling back upon a judicial policy based upon unwritten law. The questions arise that do the courts decide abstract hypothetical and contingent questions only and give mere declaration in the air? Are the courts under duty to enter upon mere academic exercises? Is not it the duty of the courts to adjudicate upon real controversy? However, the judiciary continues to exercise its greater role on basis of unwritten law under the garb of interpretation of constitution without due regard to the polity's perception.[946]

The best illustration of greater role of judiciary vis-a-vis perception of citizenry is that of *Dosso*[947] wherein the issue of abrogation of constitution[948] was involved. Relying upon Kelsenian theory of law, the SCP held that a victorious revolution or a successful *coup d etat* is an internationally recognized legal method of changing a constitution. Strangely enough international mode of change was resorted to but no reference was made to Islam which was the State religion recognized under the Constitution of 1956. Interestingly, this case was reaffirmed in cases of *Mehdi Ali Khan*[949] as well as in *Bimal Bebari*.[950]

The question is who authorized the court to say, and in which statute it had been written that test of efficacy of a revolution was its success? Obviously, the answer to this question lies in the unwritten law and the unconstitutional constitutionalism based judicial approach to hold in a round-about way that might is right. This being so, the next question that arises is whether there remains any need of a judicial forum that has got to say so only without looking for the desires of the polity and the dictates of the governing religion? One more important question is whether this Kelsen's theory had any relevance where breach of legal continuity is purely of temporal nature?

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[946] Daniel Gosch, The Emergence of Constitutionally Conforming Interpretation (July 03, 2024). Graz Law Working Paper No. 03-2024, Available at SSRN: https://ssrn.com/abstract=4886202 or http://dx.doi.org/10.2139/ssrn.4886202, last accessed 01.08.2024.
[947] The State vs. Dosso, PLD 1958 SC 533.
[948] i.e., The Constitution of 1956.
[949] Province of East Pakistan vs. Mehdi Ali Khan, PLD 1959 SC 387.
[950] Bimal Bebari vs. Province of East Pakistan, PLD 1968 SC 185.

The tradition of endorsing the necessity principle does not owe its existence to *Dosso* exclusively. Even prior to that the Federal Court (FC) held the law[951] void on the ground that the Governor-General could not exercise legislative powers nor could he delegate such powers in the absence of Constituent Assembly. Subsequently, the Governor-General issued the Emergency Powers Ordinance (IX of 1955) and also sent a Reference to this effect to the FC who, on the doctrine of necessity, permitted validation for a limited period i.e. till the time the Constituent Assembly examines such laws.[952] Similarly, the position taken by the Advocate General, in *Zia Ur Rehman,*[953] was that although the abrogation of Constitution and promulgation of Martial Law was unconstitutional yet the then situation was covered by *Dosso's* case.[954] Enough evidence and sufficient material, in the understanding of *Zia ur Rehman* Bench, was however, not placed before *Dosso's* Bench for the purpose of giving a finding of fact that the so called revolution had by then succeeded. The facts were actually different in both the situations (in *Zia ur Rehman* and *Dosso*) in that no revolution was brought about by General Yahya Khan nor had it proved successful.[955]

For understanding the principle of 'state necessity', the following passage appears to be helpful: "In the case of measures promulgated by the usurper which are not so essential, and which have as their purpose to establish him in his unlawful possession, obedience is not to be rendered unless disobedience would involve grave danger."[956] However, it is to be noted that Lord Lloyd, while appreciating Hans Kelsen's theory, criticized that the basic norm is a

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[951] Emergency Powers Ordinance (IX of 1955).
[952] Usif Patel vs. The Crown, PLD 1955 FC 387, 391.
[953] Zia Ur Rahman vs. The State, PLD 1972 Lahore 382, at p.391.
[954] PLD 1958 S C (Pak.) 533. That doctrine of necessity is alien to rule of law, *see also*, Shahzada Sikandar ul Mulk vs. Capital Development Authority, PLD 2019 ISLAMABAD 365. Also available at http://www.plsbeta.com/LawOnline/law/casedescription.asp?Casedes=2019I15, last accessed 22.05.2024.
[955] Zia Ur Rahman vs. The State, PLD 1972 Lahore 382, at p.394.
[956] Grotius' De Jure Belli ac Pacis 1.4.15 (Kelsy's tr.). *See also,* Lorne Neudorf, The Judicialisation of Parliamentary Privilege in Canada: A Cautionary Tale (April 26, 2024). Lorne Neudorf, "The Judicialisation of Parliamentary Privilege in Canada: A Cautionary Tale" (2024) 13:3 Laws 26, Available at SSRN: https://ssrn.com/abstract=4746964 or http://dx.doi.org/10.2139/ssrn.4746964, last accessed 23.07.2024.

very troublesome feature of Kelsen's system for one is "not clear what sort of norm this really is, nor what it does, and where and how to find it."[957]

4.5.3. The Unwritten Judicial Policy and the So Called 'Law of Nature'.

As regards our (constitutional) jurisprudence, it is to be remembered that in the estimation of *Zia Ur Rehman* Bench, it could not be denied that the President's Order No. 3, which was said to have taken away the jurisdiction, was promulgated to neutralize the effect of the decision in *Malik Mir Hassan's* case.[958] It occurred to the Court that on the principle of State necessity it could not be upheld as valid law.[959]

It is not clear what prevents the superior judiciary from declaring the pure legal position and leaving the resultant confusion to be taken care of by those who are bound by their own mandate under tripartite system. State necessity as such, appears to be a concept devised by the Hon'ble Judges to perpetuate their jobs in the name of performance of their own so called obligations that courts have to examine the actions of the usurper brought before them.[960] Similarly, there is no requirement under any provision of the written law to construe, if some or other of reforms introduced by Martial Law regime, are in obedience to the mandates contained in the supra constitutional instrument, namely, the Objective Resolution. However, it is to be noted that in falling back upon their so called unwritten obligations, the Hon'ble Judges would also take support from the mandate of `social

[957] Lord Lloyd, Introduction to Jurisprudence, (Third Edition), at p. 269.
[958] Malik Mir Hassan vs. State, P LD 1969 Lah. 786
[959] Zia Ur Rahman vs. The State, PLD 1972 Lahore 382, at p.394. *See also American case*: Duncal vs. Kahanamoku, (1945) 327 U S 304, at p.330 wherein it was held that "power to declare Martial Law did not include the power to supplant civilian laws by military orders and to supplant Courts by military tribunals. where conditions were not such as to prevent the enforcement of the laws by the Courts."
[960] D. L. Keir, & F. H. Lawson, Cases in Constitutional Law, (Fifth Edition), Oxford: Clarendon Press, 1967, at p. 224.

justice'.[961] But at the same time they would forget to refer to the teaching of Islam that the usurper is not to be followed.[962]

4.5.4. Difficult Questions of Far-Reaching Constitutional Importance: The Case of *Madaimbamuto* from Southern Rhodesia, and *Begum Nusrat Bhutto.*

In *Begum Nusrat Bhutto,*[963] challenging detention of Z.A.Bhutto, the position was taken up regarding the legality of an effectual new regime. Reliance was also placed on the famous case from Southern Rhodesia[964] which bears some similarity with *Begum Nusrat Bhutto.* Madzimbamuto, the appellant before the Privy Council, questioned the legality of her husband's detention under an Emergency Regulation continued in force by the Rhodesian authorities after the declaration of independence. The court held that necessity required that effect should be given to the emergency power regulations and therefore, the detention of the appellant's husband was lawful.[965] It is to be appreciated that in coming to this conclusion the Rhodesian Bench appears to have been influenced, among others, by the opinion expressed by Sir Ivor Jennings.[966] Anyhow, on appeal to the Privy Council, Lord Reid, delivering the majority judgment, rejected Kelsen's theory of effectiveness.[967]

In the background of discussion made so far, to fully encapsulate the working of unwritten law and unwritten judicial policy at the hands of the superior court judges, an in-depth discussion of doctrine of necessity vis-a-vis allied concepts of de facto and de jure

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[961] Zia Ur Rahman vs. The State, PLD 1972 Lahore 382, at p.395.
[962] Bukhari: 7144 and 7142, *and* Muslim: 648, 1839 and 1847.
[963] Begum Nusrat Bhutto vs. Chief of Army Staff And Federation of Pakistan, P L D 1977 S C 657.
[964] Madaimbamuto vs. Lardner Burke and another, (1968) 3 All E R 561. It is to be noted that this case has also been mentioned in the case of Miss Asma Jillani vs. The Government of The Punjab and another, P L D 1972 S C 139, para 27, per Cornelius, J.
[965] Madaimbamuto vs. LardnerBurke and another, (1968) 3 All E R 561, 718. From Indian jurisdiction, *See also*, A. D. M. Jabalpur vs. Shiv Kant Shukla, AIR 1976 SC 1207. *See also*, Burt Neuborne, 'The Supreme Court of India' (2003) 1 International Journal of Constitutional Law 476, p 482.
[966] Ivor Jennings, The Law and the Constitution. University of London Press, (1938), at p. 76: "All revolutions are legal when they have succeeded and it is the success denoted by acquiescence which makes their Constitutions law."
[967] Appellate Division of the Rhodesian High Court (1968) 2 SA 284, at 324. *See also*, Oppenheim's International Law, Vol. I, at p. 127.

government seems imperative. This discussion is made in the coming lines. This aspect is seen through multi-dimensional prism of different writers and critics.

4.5.5. The Tug of War Between the de jure Constitution and Unwritten de facto Authority.

Regarding Southern Rhodesian case J. M. Eekelaar has analysed various judgments at some length and reached the conclusion that they have the effect of splitting the grundnorm between the de jure Constitution of 1961 and the de facto authority of Ian Smith who gave the 1965 Constitution.[968] In another Article, Claire Pally discussed the social backgrounds of the Judges as influencing the view they take by being reluctant to pronounce the validity of Smith regime, although they were willing to validate actions of the regime on the doctrine of necessity.[969] Regarding Smith regime, R. W. M. Dias observes that "the weight of judicial opinion was overwhelmingly against it, notwithstanding its effectiveness."[970]

Writers like Professor Harold Laski have not supported the proposition that de facto sovereignty becomes de jure by consent[971] and habitual obedience over a sufficiently long period of time.[972] Only then can it be claimed that de jure sovereignty has been acquired.[973]

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[968] J. M. Eekelaar, Splitting the Grundnorm, Modern Law Review, (1967), Vol. 30, Issue 2, pp. 156-175, at p. 160.

[969] Claire Pally, The Judicial Process: UDI and the Southern Rhodesian Judiciary, Modern Law Review, Vol. 30, Issue 3, 363-378, at p. 373. *See also*, Gerard Kennedy, De Jure Submission and De Facto Courteous Regard: Places for Two Types of 'Deference' Post-Vavilov (August 28, 2022). 106 Supreme Court Law Review (2d) 383, Available at SSRN: https://ssrn.com/abstract=4493456, last accessed 25.07.2024.

[970] R. W. M. Dias, Legal Politics: Norms Behind the Grundnorm, Cambridge Law Journal (1968), (Vol. 26), Issue 2, November 1968, pp. 233–259, at p. 241. Also available at: https://doi.org/10.1017/S0008197300088516, last accessed 02-06-2024.

[971] Harold Laski, J., The State in Theory and practice, ISBN-10: 1412808316, ISBN-13: 978-1412808316: 1st Edition, (2008) "who control the use of the Armed Forces of the State are in fact the masters of its sovereignty." (at p. 27).

[972] Dean Roscoe Pound, Jurisprudence, ISBN-10: 1584771194, ISBN-13: 978-1584771197, Lawbook Exchange Ltd, (2012). "In case of an ultimately successful insurrection the Courts deriving from it would uphold acts of the insurgents from the beginning and Courts of other countries would do the same." (Vol. 11, Part 3, page 305).

[973] Garner, James Wilford: Treaties on Political Science and Government, American Book Company, 1928, at p. 155. Regarding debate on de facto and de jure authority, *see also*, Gerard Kennedy, De Jure Submission and De Facto Courteous Regard: Places for Two Types of 'Deference' Post-Vavilov (August 28, 2022). 106 Supreme Court Law Review (2d) 383, Available at SSRN: https://ssrn.com/abstract=4493456, last accessed 27.09.2024.

4.5.6. The Question of Revolutionary Legality and the Unwritten Law Approach.

Eekelaar has attempted to enumerate the principles that may be relevant to a decision whether revolutionary activity should be given legal justification, so as to "salvage this area of investigation from total extinction by the operation of positivist dogmatism."[974]

Dias examines Kelsen's theory at some length, and, after discussing the concept of the grundnorm, he observes that "the new criterion of validity was able to command a minimum of effectiveness because it was thought to guarantee that measure of justice and morality which the previous criterion did not."[975]

As such it would be safe to say that the legality of a revolutionary regime is not independent of effectiveness. It must also be remembered that a British Court refused to recognise a case of divorce decree pronounced by a Rhodesian Judge who had not taken the Oath under the 1961 Constitution.[976] This shows that legality depends on the jurisdiction in which the matter is considered, quite apart from effectiveness. De Smith has discussed the problems posed by situations involving a breach of legal continuity, be it peaceful or accompanied by coercion and violence.[977]

Therefore, in view of above it is safe to conclude that trying to justify the idea of necessity on the strength of unwritten law is just an effort that can be said to be a persuasive rationalisation of the legal consequence of a successful revolution.[978]

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[974] J.M. Eeklaar, Principles of Revolutionary Legality (A.W.B. Simpson ed., Oxford Essays on Jurisprudence 42 (Second Series), (Oxford: Cleardon Press, 1973), at p.44. *See also,* R. W. M. Dias, Legal Politics: Norms Behind the Grundnorm, Cambridge Law Journal (1986), (Vol. 26), Issue 2, November 1986, pp. 233 – 259, at p. 246. Also available at: https://doi.org/10.1017/S0008197300088516, last accessed 02-06-2024.

[975] R. W. M. Dias, The Pure Theory in Legal Politics: Norms Behind the Grundmom, Cambridge Law Journal (1986), (Vol. 26), Issue 2, November 1986, pp. 233 – 259, at p. 247-248. Also available at: https://doi.org/10.1017/S0008197300088516, last accessed 02-06-2024.

[976] Adams vs. Adams, ((1970) 3 All E R 572).

[977] De Smith, Constitutional and Administrative Law. See Chapter III, under the heading "Ultimate Authority in Constitutional Law", Penguin UK; 8th edition (January 1, 1998), p. 323, 324.

[978] De Smith, Constitutional and Administrative Law. See Chapter III, under the heading "Ultimate Authority in Constitutional Law", Penguin UK; 8th edition (January 1, 1998), p. 324.

4.5.7. The Principle of Necessity: Comparative Study.

The principle of necessity rendering lawful what would otherwise be unlawful is not unknown to the English Law.[979] It is to be appreciated that there is a defence of necessity in criminal law, and in constitutional law the application of Martial Law is nothing but an extended application of this concept.[980] It can also be safely said that Kelsen's pure theory of law has not been universally accepted nor is it indeed a theory which could claim to have become basic doctrine of modern jurisprudence.[981] Regarding this issue, resort can be had to other cases from the English jurisdiction. In the *Crane Christmass & Co.*, about the novelty of the action, it was said by Lord Denning that "it has been put forward in all the great cases which have been mile-stone of progress in law and it has nearly always been rejected."[982] In *Prager*, it was observed that "the object of the common law is to solve difficulties."[983]

It was rightly observed in *Asma Jillani*'s case that Kelsen was propounding a theory of law as a mere jurist's proposition about law and was not attempting to lay down any legal norms which are the daily concern of Judges[984]

It follows, therefore, that the legal consequences of an abrupt political change must be judged not by the application of an abstract theory of law in vacuum only. Going otherwise, would be like falling back on unwritten law or unwritten judicial policy. It is also because all the actions of the de facto Government can be tested only when the said Government comes

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[979] R. vs. Bekker & Naude (1900) 17 SC 340, at p.355. *See also*, White & Tucker vs. Rudolph, 1879 Kotze 15, at p. 124: "Martial Law is nothing more nor less than the law of self-defence or the law of necessity."; Quin vs. Leathem , 1901 A C 495, at p. 497: "while considering a precedent, we must look at the hypothesis of fact upon which the case was decided", per Lord Halsbury.

[980] De Smith, Constitutional and Administrative Law. See Chapter III, under the heading "Ultimate Authority in Constitutional Law", Penguin UK; 8th edition (January 1, 1998), p. 325.

[981] A. Marmor, 'Professor Stone and the Pure Theory of Law: A Reply', Stanford Law Review, (1965), Vol. 17(6), 1128–1157, at p. 1139.

[982] Candler vs. Crane Christmass & Co. (1951) 2 KB 164, 167. Denning LJ delivered a dissenting judgment, arguing that a duty of care arose when making negligent statements. His dissenting judgment was later upheld by the House of Lords in Hedley Byrne & Co Ltd vs. Heller & Partners Ltd. [1963] 2 All ER 575.

[983] "The doctrine of agency of necessity doubtless took its rise from marine adventure". per McCardie, J. in Prager vs. Blatspiel, Stamp and Heacock Ltd. [I9241 1 K.B. 566, at 568]. Also see W. M. Gloag, Contract (2nd ed., 1929), at 335.

[984] Miss Asma Jillani vs. The Government of The Punjab and another, P L D 1972 S C 139, Para 80, per Hamoodur Rahman, C.J.

to an end and the old legal order is revived.[985]Another case may be also referred wherein it was held that once Martial Law is lifted the threat to the existence of the Civil Courts disappears who "can also call in question the acts of the military."[986]

Another instance wherein the principle of necessity was applied is the decision of the Supreme Court of Nigeria in the case of *Lakamni & Oala*. It was held that the rebellion did not amount to revolution and that the situation was distinguishable from that in *Dosso's* case in Pakistan where the President had issued a proclamation annulling the existing Constitution.[987] This factum finds further support from an Article to the effect that the Supreme Court had placed itself in the wrong by striking down a decree which was intended to forfeit stolen public money.[988] But this case of *Lakamni & Oala* from Nigerian jurisdiction does not apply to case law of Pakistani jurisdiction for the simple reason that there was rebellion in different parts of Nigeria which has never been the case in Pakistan.

In the case from the Cyprus jurisdiction a more or less similar situation had arisen owing to the difficulty of the Turkish members of the Cyprus Parliament participating for the passing of a law regarding the functioning of the Supreme Court itself. In a very elaborate judgment, after surveying the concept of the doctrine of necessity in different countries, the Court came to the conclusion that the Cyprus Constitution should be deemed to include the doctrine of necessity in exceptional circumstances which was an implied exception to particular provisions of the Constitution. It was further stated that "certain pre-requisites must be satisfied before this doctrine can become applicable."[989]

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[985] Salmond, on Jurisprudence, 11th Edition, page 25.
[986] Muhammad Umar Khan versus The Crown, PLD 1953 Lah 528, para 21, per Muhammad Munir C.J.
[987] Lakanmi & Kikelomo v Attorney-General (Western State) & others [1971] 1 UILR 201, 221, at 222.
[988] Abiola Oji, The Search for a Grundnorm in Nigeria---¬The Lakanmi's case, International and Comparative Law Quarterly, Volume 20 , Issue 1 , January 1971 , pp. 117 – 136, at p127. Also available at https://www.semanticscholar.org/venue?name=International%20and%20Comparative%20Law%20Quarterly, last accessed on 19-05-2024.
[989] The Attorney-General of the Republic vs. Mustafa Ibrahim and others (1964) 3 Cyprus L R 195, at 219. See also Para 5(B) of 'Held' part of the judgement.

A review of the concept of the law of necessity, prevailing in different jurisdictions as discussed above, clearly confirms the statement made in this behalf by Muhammad Munir, C. J. in *Reference by H. E. Governor-General* to the effect that an act which would otherwise be illegal becomes legal if it is done bona fide under the stress of necessity, the necessity being referable to an intention "to preserve the Constitution, the State or the society and to prevent it from dissolution."[990] This case provides a striking example of the invocation of necessity principle to validate certain extra-Constitutional measures dictated by the considerations of the welfare of the people and the avoidance of a legal vacuum owing to an earlier judgment of the Federal Court.[991]

4.5.8. Deviations from Begum Nusrat Bhutto and Zia Ur Rehman: Malik Ghulam Mustafa Khar and the other Cases.

In *Fauji Foundation*, it was held that "with political decisions or decisions on questions of policy, the judiciary is not concerned."[992] However, as there is no separate court to deal with political questions in the Constitutional scheme, the High Courts as well as Supreme Court of Pakistan have got to tackle those issues also notwithstanding the debate if the Constitutional Court should or should not have the jurisdiction to deal with such questions.[993]

In a case the ouster of jurisdiction of the Courts was challenged while relying upon *Begum Nusrat Bhutto* to urge that the Constitution of 1973 was the supreme law and that the

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[990] Reference by H. E. Governor General, P L D 1955 F C 435. Para 1 and para 75, Per Muhammad Munir, C. J. Also see the opinion of full bench of Muhammad Ummar Khan vs. The Crown (PLD 1953 Lah. 528) where Muhammad Munir, C. J., referring to the dicta of Willies J. in Phillip vs. Eyre (1870) LR 6 QB 1 (which is an English decision on the conflict of laws in tort.), said that the law of civil necessity and that of military necessity are both founded on a common principle. The nature and extent of the power of an Army Commander were fully discussed by him in that case.

[991] i.e., Usif Patel vs. Crown, PLD 1955 FC 387, para 75, per Muhammad Munir C.J. He also dilated upon Maitland's book: Constitutional History of England, 1950 Ed. wherein the author observes: "The King's power of summoning, proroguing and disssolving Parliament is very large." Munir C.J. also referred to Vol. I of Chalmer's "Opinions of Eminent Lawyers", wherein at pp. 271-272, it is stated the opinion of Ryder and Murray that the King has the prerogative right of dissolving a popular Legislative Assembly in a Colony.

[992] Fauji Foundation and another vs. Shamimur Rehman, PLD 1983 SC 457. This view has also been reiterated in Ghulam Mustafa Khar vs. Pakistan PLD 1988 Lah. 49. See paragraph 202 of the judgment at P. 113 thereof.

[993] The much debated (and controversial) 26th Amendment to the Constitution of Islamic Republic of Pakistan, 1973 carried the idea of establishing a Constitutional Court.

CMLA or, for that matter, the President was required to act in accordance therewith. However, as against *Zia Ur Rehman*, it was held that all legal measures mentioned in Art.270-A (l) of the Constitution, having been validated, could not be subjected to judicial review.[994]

Regarding authority of CMLA qua issuance of supra constitutional instrument like promulgation of PCO, 1981, the view of our Superior Judiciary is that "when Martial Law is in force in a territory, the Army Commander is the Supreme Authority and legislative, judicial and executive powers of the State vest in him."[995]

However, this rationale fails to appeal the judicious mind in view of the fact the courts are not subordinate to anybody. Of course, there is hierarchy of court system but outside the system every person, institute, organ, ministry, division, department, wing etc., is subordinate to the Court. If the finding is reckoned as it is, the same does not stand to logic as to how a grade 22 officer i.e., COAS be above a Court. As such, it is not the written law that provides power to the Court to hold as above. In absence of any such written law, it appears to be the unwritten judicial policy to validate the acts/omissions of the power to be, all at the cost of under reach of the written law and of the Constitution of the country.

It was not considered in *Malik Ghulam Mustafa Khar* that by promulgating PCO, 1981, the CMLA had not only enforced a new legal order but also had annulled the effect of *Begum Nusrat Bhutto's* case which was the source of validity of Martial Law Regime. *ZuIfiqar Ali Bhutto* case shows the court was speaking in dual tone. On the one hand, the court was of the view that it was not to sit as in appeal on authority of the dictator. On the

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[994] Malik Ghulam Mustafa Khar and others Vs. Pakistan and others, P L D 1988 Lahore 49, at p.115.

[995] Muhammad Umar Khan Vs. The Crown P L D 1953 Lah. 528. See also, Malik Ghulam Mustafa Khar and others vs. Pakistan and others, P L D 1988 Lahore 49, at p.85. Regarding approach of courts towards human rights during suspension of the Constitution by a military government in Nigeria, *see also*, Ibrahim Bello, Critical Review of the challenges in Suspension of Constitution and Human Rights in Nigeria's Military Regime (July 16, 2024). Available at SSRN: https://ssrn.com/abstract=4914795 or http://dx.doi.org/10.2139/ssrn.4914795, last accessed 18.08.2024.

other hand, it also asserted its authority of judicial examination of the impugned action.[996] These precedents further show that the Courts having the right to interpret law have to determine the nature and limitations of the ouster clause in each case.

The ouster clause is something most favourite with the usurper and finds mentioning in the supra constitutional instrument like MLO, LFO or PCO. "If the language used vividly demonstrates ouster of jurisdiction then the ouster must be absolute and even the acts performed without jurisdiction or mala fide, will not be open to judicial scrutiny."[997]

In a case, the validity of compulsory retirement made in contemplation of MLO No.23, in view of Article 15(2) of the PCO, 1981 was held unquestionable.[998] In another case, the vires of law,[999] on the basis of Article 15(1) of PCO, were not permitted to be challenged.[1000] The appellant before the court in *Akram Shah* case was reverted to lower position under Martial Law Instruction No.21 but the impugned order was declared immune from being questioned on account of Art.15(2) of PCO, 1981.[1001] In another case, Regulation No.52 was held not amenable to challenge because of Article 15 of the P.C.O.[1002] In *Abdul*

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[996] Zulflqar Ali Bhutto vs. The State, PLD 1978 SC 40, para 45, per Anwarul Haq, C. J. *Also see*, Khudaidad vs. The Martial Law Administrator, PLD 1978 Quetta 177. As to what is reasonable and what is not, *see also,* the observations made by Hamoodur Rahman, J. (as he then was) in the case of Abu A'la Maudoodl vs. The Government of West Pakistan, (PLD 1964 S C 673).

[997] The State vs. Zia ur Rehman and others (PLD 1973, SC 49, at p. 80). See also, Kotumal K. Rupani and another vs. The State, (PLD 1960 Karachi 15); and Inayat Ullah vs. Mian Ghulam Ahmad and others (PLD 1984 SC 369).

[998] Dr. Muhammad Elias Dubash vs. Punjab Service Tribunal, 1982 SCMR 562, at p. 563.

[999] Ordinance No. LXXII of 1979.

[1000] Shabbir Ahmad vs. WAPDA, (1982 SCMR 375), at p. 376.

[1001] The Province of the Punjab vs. Syed Muhammad Akram Shah, (PLD 1984 SC 409), second last para. *See also*, Govt. of Punjab vs., Saleem Hussain Gardezi, (1985 SCMR 443), concluding para.

[1002] Nazir Mohammad Khan vs. Pakistan (PLD 1986 Kar. 516), para 11. *See also*, Muhammad Haroon vs. District Food Controller and others (1982 SCMR 551), p. 556, per Dr. Nasim Hason Shah, J. The Sindh High Court was also fortified by Dr. Muhammad Elias Dubash vs. Punjab Service, Tribunal and others (1982 SCMR 562); Electric Lamp Manufacturers of Pakistan Ltd. vs. Additional comissioner, Karachi and 3 others (1993 SCMR 3105); The Province of the Punjab and others vs. Syed Muhammad Akram Shah (PLD 1984 SC 409); Government of Punjab and others vs. Saleem Hussain Gardezi (1985 SCMR 443); Major-General (Retd.) Tajjamal Hussaia Malik vs. Federal Government of Pakistan through Defence Secretary and 2 others (PLD 1981 Lah. 462); Sirajuddin vs. Larkana Municipal Committee (1982 CLC 1979), and Muhammad Anwar Khan vs. C.M.L.A. etc. (1984 CLC 706).

Ghaffar Lakhani case, issuance of writ in respect of COAS was refused on the basis of Article 199 (5) of the Constitution.[1003]

The above discussed case law shows that the approach of superior Judiciary to the ouster clause is that the same clearly debars the courts from pronouncing upon the constitutionality of the concerned legal measures.[1004] It would be worthwhile to appreciate that the courts exist to uphold the rule of law and they do not grant legitimacy to unwritten and unconstitutional form of Government.[1005] In this regard, it is also to be appreciated that the defect in the nature of legislative competence can only be cured through a constitutional measure.[1006] This approach has also prevailed in Pakistan in many cases in the past that legislative instrument could be tested with reference to the provisions of the Constitution.[1007]

[1003] Abdul Ghaffar Lakhani vs. Federal Govt., (PLD 1986 Kar. 525). See also, Saeed Ahmad's case (PLD 1974 S C 151) and Federation of Pakistan vs. Malik Ghulam Mustafa Khar, (PLD 1989 SC 26), on ouster clause. Also see Abrar Hassan v, Government of Pakistan, wherein Muhammad Yaqub Ali, C. J. observed as follows :-
"Article 199 (1) confers jurisdiction on High Courts to issue writs to persons performing, within their territorial jurisdiction, functions in connection with the affairs of the Federation, a Province or a local authority. A High Court cannot therefore issue a writ to a person performing functions in another province." at p. 332.

[1004] Muhammad Bachal Memon vs. Govt. of Sind, (PLD 1987 Kar. 296), para 18, per Naimuddin, C. J. See also Fauji Foundation vs. Shamimur Rehman (PLD 1983 S C 457), paras 158, 159, per Muhammad Haleem, C.J. *See also*, The I.T.O. Circle I Dacca and another vs. Suleman Bhai Jiwa, PLD 1970 SC 80.

[1005] Joseph Story, Commentaries on the Constitution of the United States. See paragraph No. 842, at p. 599. *See also*, the Corpus Juris Secundum, Volume 16 A, Para 421. On the issue of legitimacy vis-à-vis the Constitution, *See*, Richard H Fallon Jr., 'Legitimacy and the Constitution' (2004) 118 Harvard Law Review 1787. See also, Randy E Barnett, 'Constitutional Legitimacy' (2003) 103 Columbia Law Review 111 (…[A] legitimate lawmaking process is one that provides adequate assurances that the laws it validates are **just,** [therefore], every freedom- restricting law must be scrutinized to see if it is both necessary to protect the rights of others and does not improperly violate the rights of those whose freedom is restricted). *See* also, Mark Tushnet, 'How Different Are Waldron's and Fallon's Core Cases For and Against Judicial Review?' (2010) 30 Oxford Journal of Legal Studies 49 (Stressing on Fallon's remark that legislative action is more likely to violate fundamental rights than legislative inaction).

[1006] Malik Ghulam Mustafa Khar and others Vs. Pakistan and others, PLD 1988 Lahore 49, Para 33 of, at p.89. *See also*, Hawkins vs. Gathercole, S.C. 24 L.J. Ch. 332; (1855) 6 De G. M. & G. 1, 21). Also available at: https://vlex.co.uk/vid/hawkins-v-gathercole-804970993, last accessed on 07-06-2024. As to intent and meaning of Legislature in framing Acts of Parliament, from English case law *see also,* Bishop of Norwich vs. Pearse, 1868, L. R. 2 A. & E. 284; Garnett vs. Bradley, 1878, 3 App. Cas. 950; Ex parte Chick, 1879, 11 Ch. D. 740; Bradlaugh vs. Clarke, 1883, 8 App. Cas. 362; Seward vs. "Vera Cruz," 1884, 10 App. Cas. 68; In re Leavesley [1891], 2 Ch. 9; Eastman Photographic Materials Company vs. Comptroller-General of Patents [1898], A. C. 575.

[1007] *See for example*, Province of East Pakistan vs. Mehdi AU Khan (PLD 1959 SC 387); Muhammad Afzal vs. Commissioner Lahore Division (PLD 1963 SC 401); Tanbir Ahmad Siddiky vs. Province of East Pakistan (PLD 1968 SC 185) and Malik Mir Hassan vs. State (PLD 1969 Lah. 786).

In view of above it becomes clear that if the competency to make legislation by the competent authority could not be challenged, the same challenge could also not be thrown to the ousting of jurisdiction power.[1008]

4.6. The Unsettled Debate of Grundnorm in Constitutional Law and Unwritten Approach of the Courts.

Preamble to the Constitution could be seen as the embodiment of the nation's social contract.[1009] It is like an architectural plan which the people of Pakistan gave to their representatives in the National Assembly for the 'order' which they had chosen to construct for themselves. It is evident that the "relationship of the people with their instrumentalities was clearly contained in the Preamble to the Constitution."[1010] However, the fact remains that the debate qua Objective Resolution, if it is grundnorm, is not settled. Much owes in this regard to the unwritten approach of the Courts in Pakistan.

4.6.1. The Nature and Object of Art.2-A of the Constitution, 1973.

The Objective Resolution[1011] spells out broad principles for the governance of the country but it is also one of the leading and conspicuous tensions within the constitutional drapery of Pakistan at the cross roads of politics and faith. Constitution is an organic whole[1012] and all the Articles have to be interpreted in a manner that its soul or spirit is given

[1008] Bariyima Kokpan, Determining the Exclusivity of the Jurisdiction of Federal High Court of Nigeria in Aviation Causes and Matters through the Laws (November 15, 2022). Available at SSRN: https://ssrn.com/abstract=4572871 or http://dx.doi.org/10.2139/ssrn.4572871, last accessed 28.08.2024.
[1009] Rana Touseef Sami, Objectives Resolution In A Limbo (May 05, 2016). Rana Touseef Sami, 'Objectives Resolution In Limbo' (2016), available at https://courtingthelaw.com/2016/05/05/commentary/objectives-resolution-in-limbo/, Available at SSRN: https://ssrn.com/abstract=4202411 or http://dx.doi.org/10.2139/ssrn.4202411, last accessed 15.05.2024.
[1010] DBA Rwp vs. FoP, PLD 2015 SC 401, at 550.
[1011] Art. 2-A of the Constitution of Islamic Republic of Pakistan, 1973.
[1012] *See also*, Granville Austin, 'Which Road to Social Revolution?', in *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966).

effect in harmonizing various provisions.[1013] During the course of Pakistan's constitutional history, various arrangements have happened in an effort to strike the balance between the seemingly opposite forces. In this regard an amendment has made the Objectives Resolution as a substantive part of the Constitution.[1014]

After addition of Art.2A in the Constitution, the Holy Quran and Sunnah have become supreme law of Pakistan.[1015] The object of addition of Art.2-A within the Constitution 1973 is that the enforcement of Quran and Sunnah within the principles and

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[1013] Farough Ahmed Siddiqui vs. The Province of Sindh, PLD 1996 Kar. 267, para 44, per Nazim Hussain Siddiqui, J. *This point was also considered in following cases*: (1) Mirza Ghulam Hussain and another vs. Ch. lqbal Ahmad PLD 1991 SC 290; (2) Messrs Mumtaz Industries through Haji Karim Bakhsh and 2 others vs. Industrial Development Bank of Pakistan and another PLD 1991 SC 729; (3) Mst. Resham Bibi and 4 others vs. Mst. Elahi Sain and 8 others PLD 1991 SC 1034; (4) Messrs Macdonald Layton Constrain Limited, West Wharf, Karachi vs. Punjab Employees' Social Security Institution, Lahore and 2 others PLD 1991 SC 1055; (5) Mian Aziz A. Sheikh vs. The Commissioner of Income-tax, Investigation, Lahore PLD 1989 SC 613; (6) Ahmad vs. Abdul Aziz PLD 1989 SC 771; (7) Sardar Ali and others vs. Muhammad Ali and others PLD 1988 SC 287; (8) Miss Benazir Bhutto vs. Federation of Pakistan and another PLD 1988 SC 416; (9) Government of Pakistan through Secretary, Ministry of Religious Affairs, Islamabad and 3 others vs. Zafar rqbal and 3 others 1992 CLC 219 (Lahore); (10) Allah Ditta vs. The State PLD 1992 Lah. 45; (11) Muhammad Ashraf vs. National Bank of Pakistan and others 1991 CLC 1018; (12) The State vs. The Senior Superintendent of Police, Lahore and others PLD 1991 Lah. 224; (13) Ittefaq Foundry vs. Federation of Pakistan PLD 1990 Lah. 121; (14) Massu and 27 others vs. United Bank Limited 1990 MLD 2304 (Lahore); (15) Allah Banda vs. Mst. Khurshid Bibi and .2 others 1990 CLC 1683 (Lahore); (16) Malik Ghulam Mustafa Khar and others vs. Pakistan and others PLD 1988 Lah. 49; (17) Muhammad Sharif vs. Member (Revenue), Board of Revenue, Punjab Lahore and 2 others PLD 1987 Lahore 58; (18) Sindh High Court Bar Association, Karachi and another vs. The Islamic Republic of Pakistan through the Secretary, Ministry of Justice and Parliamentary Affairs, Islamabad and another PLD 1991 Karachi 178; (19) Tyeb vs. Messrs Alpha Insurance Co. Ltd. and another 1990 CLC 428 Karachi; (20) Abdul Mujeeb Pirzada vs. Federation of Islamic Republic of Pakistan and 87 others PLD 1990 Kar. 9; (21) Miss Farhat Jaleel and others vs. Province of Sindh and others PLD 1990 Kar. 342; (22) Saghir Ahmad Warsi vs. Industrial Development Bank of Pakistan 1989 MLD 968 (Lahore); (23) Jagan and others vs. The State PLD 1989 Kar. 281; (24) Aijaz Haroon vs. Inam Durrani PLD 1989 Kar. 304; (25) Messrs Yaseen Sons vs. Federation of Pakistan and another PLD 1989 Kar. 361; (26) Habib Bank Limited vs. Messrs Waheed Textile Mills Limited and 5 others PLD 1989 Kar. 371; (27) Sharaf Faridi and 3 others vs. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another PLD 1989 Kar. 404; (28) Shaukat Hussain vs. Mst. Rubina and others PLD 1989 Kar. 513; (29) Mirza Qamar Raza vs. Mst. Tahira Begum and others PLD 1988 Kar 169; (30) Bank of Credit and Commerce International vs. Messrs Ali Asbestos Industries Ltd. and 5 others 1988 MLD 2088; (31) Algements Bank Nederland N.VS. vs. Fort Super Pakistan Ltd. and 3 others 1989 MLD 1058 (Karachi); (32) The Muslim Commercial Bank Limited vs. Messrs Republic Industrial Corporation and 4 others 1987 MLD 2794 (Karachi); (33) Muhammad Bachal Memon vs. Government of Sindh through Secretary Department of Food and 2 others PLD 1987 Kar. 296; (34) Messrs Bank of Oman Ltd. vs. Messrs East Trading Co. Ltd. and others; (35) Irshad H. Khan vs. Mrs. Parveen Ajaz PLD 1987 Kar. 466; (36) Habib Bank Limited vs. Muhammad Hussain and others PLD 1987 Kar. 612; (37) Muhammad Salahuddin and others vs. Government of Pakistan PLD 1990 Federal Shariat Court 1; (38) Muhammad Sarwar and another vs. The State PLD 1988 FSC 42, and (39) Muhammad Naseer vs. The State PLD 1988 FSC 58.

[1014] President Order (P.O) 14 of 1985 dated 2nd March 1985.

[1015] Baran Khan, Comparing the Fundamental Rights in Islamic Law and Pakistan Constitutional Law Perspective (July 07, 2021). Available at SSRN: https://ssrn.com/abstract=4512567 or http://dx.doi.org/10.2139/ssrn.4512567, last accessed 22.08.2024.

provisions of the Resolution is the duty of court.[1016] However it is to be appreciated that by dint of unwritten judicial policy the interpretive approach of the courts, qua Art. 2-A, for assessing the veracity of a constitutional or ordinary piece of legislation, has kept on oscillating.

4.6.2. The Unsettled Judicial Interpretation of Article 2-A of the Constitution, 1973.

Since the Objectives Resolution has served as the preamble to each Constitution adopted by Pakistan and as a substantive part of the Constitution in 1985, it has remained subject of interpretation by the Courts. They have at different time assigned different roles and status to the Objectives Resolution and the debate has continued if it is supra-constitutional or not.[1017] Art. 2-A has been subject of discussion in plethora of case law in the constitutional and socio-political history of the country.[1018]

[1016] Bakht Munir, Legitimacy and Significance of Art. 2A in the Constitution of Islamic Republic of Pakistan, 1973 (June 30, 2021). South Asian Studies, Vol. 36, No. 1, January – June, 2021, [39 – 48], Available at SSRN: https://ssrn.com/abstract=4916574 or http://dx.doi.org/10.2139/ssrn.4916574, last accessed 22.08.2024.

[1017] Amir Ibn Munir, Pakistan's Basic Structure Conundrum (December 24, 2023). Available at SSRN: https://ssrn.com/abstract=4674801 or http://dx.doi.org/10.2139/ssrn.4674801, last accessed 22.02.2024.

[1018] Article 2A of the Constitution came up for consideration in one form or the other in different cases before the Suprem Court of Pakistan, e.g.:
(1) Mirza Ghulam Hussain and another vs. Ch. Iqbal Ahmad (PLD 1991 SC 290; (2)Messrs Mumtaz Industries through Haji Karim Bakhsh and 2 others vs. Industrial Development Bank of Pakistan and another (PLD 1991 SC 729); (3) Mst. Resharn Bibi and 4 others vs. Mst. Elahi Sain and 8 others (PLD 1991 SC 1034); (4) Messrs Macdonald Layton Constrain Limited, West Wharf, Karachi vs. Punjab Employees' Social Security Institution, Lahore and 2 others (PLD 1991 SC 1055); (5) Mian Aziz A. Sheikh vs. The Commissioner of Income .Tax, Investigation, Lahore (PLD 1989 SC 613); (6) Ahmad vs. Abdul Aziz (PLD 1989 SC 771); (7) Sardar Ali and others vs. Muhammad Ali and others (PLD 1988 SC 287); (8) Miss Benazir Bhutto vs. Federation of Pakistan and another (PLD 1988 SC 416).
In the Lahore High Court this Article 2A came up for consideration in the following cases:
(1) Government of Pakistan through Secretary, Ministry of Religious Affairs, Islamabad and 3 others vs. Zafar lqbal and 3 others (1992 CLC 219 (Lah.); (2) Allah Ditta vs. The State (PLD 1992 Lah. 45); (3) Muhammad Ashraf vs. National Bank of Pakistan and others (1991 CLC 1018); (4) The State vs. The Senior Superintendent of Police, Lahore and others (PLD 1991 Lah. 224); (5) Ittefaq Foundry vs. Federation of Pakistan (PLD 1990 Lah. 121); (6) Massu and 27 others vs. United Bank Limited (1990 Monthly Law Digest 2304 (Lah.)); (7) Allah Banda v, - Mst. Khurshid Bibi and 2 others (199() CLC 1683 (Lah.)); (8) Malik Ghulam Mustafa Khar and others vs. Pakistan and others (PLD 1988 Lah. 49); (9) Muhammad Sharif vs. Member (Revenue), Board of Revenue, Punjab, Lahore and 2 others (PLD 1987 Lah. 58).
This Article 2A came up for consideration before the High Court of Sindh in the following cases:-
(1) Sindh High Court Bar Association, Karachi and another vs. The Islamic Republic of Pakistan through the Secretary, Ministry of Justice and Parliamentary Affairs, Islamabad and another (PLD 1991 Kar. 178); (2) Tyeb vs. Messrs Alpha Insurance Co. Ltd. and another (1990 CLC 428; (3) Abdul Mujeeb Pirzada vs. Federation of Islamic Republic of Pakistan and 87 others (PLD 1990 Kar. 9); (4) Miss Farhat Jaleel and others vs. Province of Sindh and others (PLD 1990 Kar. 342); (5) Saghir Ahmad Warsi vs. Industrial Development Bank of Pakistan (1989 MLD 968); (6) Jagan and others vs. The State (PLD 1989 Kar. 281); (7) Aijaz Haroon vs. Inam Durrani

The insertion of Article 2-A reignited the debate that had been settled in the *Zia-ur-Rehman case***.**[1019] That Objectives Resolution has a supra-constitutional status, in *Hakim Khan case***,** while considering Objective Resolution in the *Zia-ur-Rehman case,* (that it was not in control of the Constitution because it was not a substantive part of it), the Court held that Art. 2A puts the provisions and principles of the Objectives Resolution at an equal footing with other parts of the Constitution.[1020]

It has been the view of the courts that Art.2A could not be taken as subordinating the provisions of Chapter 3-A of Part VII of the Constitution.[1021] It could not be adopted as a rule of repugnance for defeating the other Articles of the Constitution,[1022] and it could be utilised for correcting and reviewing the orders of judicial and quasi-judicial tribunals.[1023]

The High Court of Sindh has given contradictory judgments on the subject. For example in the cases of *M/s. Bank of Oman Limited*[1024] and *Irshad H. Khan*[1025] Art.2A was held to be supra-Constitutional. The diametrically opposite view fords expression in the cases

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(PLD 1989 Kar. 304); (8) Messrs Yaseen Sons vs. Federation of Pakistan and another (PLD 1989 Kar. 361); (9) Habib Bank Limited vs. Messrs Waheed Textile Mills Limited and 5 others (PLD 1989 Kar. 371); (10) Sharaf Faridi and 3 others vs. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another (PLD 1989 Kar. 404); (11) Shaukat Hussain vs. Mst. Rubina and others (PLD 1989 Kar. 513); (12) Mirza Oamar Raza vs. Mst. Tahira Begum and others (PLD 1988 Kar. 169); (13) Bank of Credit and Commerce International vs. Messrs Ali Asbestos Industries Ltd. and 5 others (1988 Monthly Law Digest 2088); (14) Algemens Bank Nederland N.VS. vs. Fort Super Pakistan Ltd. and 3 others (1989 Monthly Law Digest 1058 (Kar.)); (15) The Muslim Commercial Bank Limited vs. Messrs Republic Industrial Corporation and 4 others (1987 Monthly Law Digest 2794 (Kar.); (16) Muhammad. Bachal Memon vs. Government of Sindh through Secretary, Department of Food and 2 others (PLD 1987 Kar. 296); (17) Messrs Bank of Oman Ltd. vs. Messrs East Trading Co. _ Ltd. and others (PLD 1987 Kar. 404); (18) Irshad H. Khan vs. Mrs. Parveen Ajaz (PLD 1987 Kar. 466); (19) Habib Bank Limited vs. Muhammad Hussain and others (PLD 1987 - Kar.612).
It (Article 2A) also came up for consideration before the Federal Shariat Court in the following cases:
(1)Muhammad Salahuddin and others vs. Government of Pakistan (PLD 1990 Federal Shariat Court 1); (2) Muhammad Sarwar and another vs. The State (PLD 1988 FSC 42); (3) Muhammad Naseer vs. The State (PLD 1988 FSC 58).

[1019] The State vs. Zia-ur-Rehman PLD 1973 SC 49.

[1020] Hakim Khan and three others vs. Government of Pakistan, through Secretary Interior and others, PLD 1992 SC 595, para 1(i), per Shafi ur Rehman J.

[1021] Ahmed vs. Abdul Aziz, PLD 1989 SC 771, para 9.

[1022] Sardar Ali vs. Muhammad Ali, PLD 1988 SC 287. In this case the question involved arose out of pre-emption cases and the Supreme Court considered the effect of the judgment of the Federal Shariat Appellate Court in Malik Said Kamal's case (PLD 1986 SC 360). In the said case certain provisions of N.-W.F.P. and Punjab Pre-emption Act and Martial Law Regulation No.115 regarding the right of pre-emption of tenant were declared repugnant to the Injunctions of Islam. The decision was to take effect from 31-7-1986.

[1023] Mian Aziz A. Sheikh vs. The Commissioner of Income Tax Investigation, Lahore, PLD 1989 SC 613, para 27.

[1024] M/s. Bank of Oman Ltd. vs. M/s. East Trading Co. Ltd. and others, PLD 1987 Kar. 404.

[1025] Irshad H. Khan vs. Mrs. Parveen Ajaz, PLD 1987 Kar. 466.

of *Sharaf Faridi and 3 others*[1026] and *Abdul Mujeeb Pirzada.*[1027] LHC likewise held that no statute and no provision of the Constitution could be declared by the High Court to be ultra vires or struck down by reference to Article 2A of the Constitution.[1028]

It is also to be remembered that despite the dictum laid down by SCP in the cases of *Saeed Ahmad Khan*[1029] and *Fauji Foundation*[1030] that Judiciary being itself the creation of the Constitution cannot declare a provision of the Constitution as void, in *Bank of Oman* case the court held otherwise.[1031]

In another case the theory of basic structure was completely rejected.[1032] Even in the presence of Article 2A as substantive part of the Constitution, the Court cannot strike down any provision of the Constitution on its touchstone.[1033]

The constitutional status of the Objectives Resolution became relevant again in the *Elections Act* case.[1034] The petitioners challenged sections 203 and 232 of the Act[1035] and the omission of the proviso to Art. 5 of the repealed Order of 2002[1036] which provided that no person disqualified to be a Member of Parliament could serve as an office-bearer of a political party.[1037] In this regard the Court reckoned that morality was integral part of the

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[1026] Sharaf Faridi and 3 others, PLD 1989 Kar. 404.
[1027] Abdul Mujeeb Pirzada, PLD 1990 Kar. 9, at p. 132.
[1028] Massu and 27 others vs. United Bank Limited,1990 MLD 2304 (LHR). In this case it was said that Article 2-A is not a self-executing provision in the Constitution. It is to be rendered effectual by appropriate legislation to be made by the Parliament. (Per Para 26).
[1029] The Federation of Pakistan, through the Secretary, Establishment Division, Government of Pakistan Rawalpindi vs. Saeed Ahmad Khan and others, PLD 1974 SC 151.
[1030] Fauji Foundation and another vs. Shamimur Rehman, PLD 1983 SC 457.
[1031] M/s. Bank of Oman Ltd. vs. M/s. East Trading Co. Ltd. and others, PLD 1987 Kar. 404, at p. 445.
[1032] Mahmood Khan Achakzai vs. Federation of Pakistan, PLD 1997 SC 426, at p. 520. *Also see*, speech of Liaquat Ali Khan of Monday, the 7th March, 1949, when the Constituent Assembly of Pakistan met in the Assembly Chamber, Karachi at Four of the Clock in the evening to take up the motion, re: Aims and Objects of the Constitution. (*See,* Vol.V (1949), Official Report of the Fifth Session of the Constituent Assembly of Pakistan Debates).
[1033] Reference by the President of Pakistan under Article 162 of the Constitution of Islamic Republic of Pakistan, 1956, (PLD 1957 SC (Pak.) 219), at p.235. *See also*, Hakim Khan and three others vs. Government of Pakistan, through Secretary Interior and others, PLD 1992 SC 595, para 18, per Shafiur Rahman, J.
[1034] Zulfiqar Ahmed Bhutta and 15 others vs. Federation of Pakistan through Secretary Ministry of Law, Justice and Parliamentary Affairs and others, PLD 2018 SC 370, para 60 (7).
[1035] Elections Act 2017 (Act No. XXXIII OF 2017).
[1036] Political Parties Order 2002, (Chief Executive's Order No.18 OF 2002).
[1037] Zulfiqar Ahmed Bhutta and 15 others vs. Federation of Pakistan through Secretary Ministry of Law, Justice and Parliamentary Affairs and others, PLD 2018 SC 370, para 35.

Islamic ideology of Pakistan and it was included in the expression 'integrity of Pakistan'.[1038] To hold this, the court relied on the precedent set in *Benazir Bhutto.*[1039]

In *Asma Jilani* the court overturning the precedent *Dosso*[1040] held that if there is a grundnorm in Pakistan, it is in the Objectives Resolution as to sovereignty solely belonging to God.[1041] In another case it was categorically held that even if the Objectives Resolution was in fact the grundnorm, it was the Preamble to the Constitution.[1042]

The status of the Objectives Resolution was also discussed in the *Zaheeruddin case***.** The Court held that Article 2-A recognized the sovereignty of God as a substantive part of the Constitution.[1043] In that case, the question was whether the word "law" used in Article 20 of the Constitution was limited only to enacted law or included also those Islamic principles which had not been enacted.[1044] Therefore, it was held that by virtue of Article 2-A limitations on Article 20 could be those imposed by Islamic principles, not just by enacted law.[1045]

[1038] For explanation of expressions, integrity and/or sovereignity of Pakistan *see*, Abdul Wali Khan's case, (PLD 1976 SC 57), per Hamoodur Rahman, C.J., in his conclusions, at page 165.
[1039] Benazir Bhutto vs. Federation of Pakistan, PLD 1988 SC 416. Para 161, per Muhammad Haleem, C.J. *See also,* Islamic Republic of Pakistan vs. Abdul Wali Khan (PLD 1976 SC 57). For discussion on grund norm from Indian jurisdiction *also see*, Sakal Papers (P) Ltd. vs. Union of India (AIR 1962 S C 305).
[1040] The State vs. Dosso, PLD 1958 SC 533.
[1041] Asma Jilani vs. The Government of Punjab, PLD 1972 SC 139, para 48, per Hamoodur Rahman, C. J.
[1042] Hussain Naqi and another vs. The District Magistrate, Lahore and 4 others, PLD 1973 Lahore 164, para 7.
[1043] Zaheeruddin vs. State, 1993 SCMR 1718. See also Federation of Pakistan vs. N.-W.F.P. Government (PLD 1490 SC 1172), at page 1175. Regarding freedom of religion vis a vis equality of treatment qua special position of Church of England., see (The United Kingdom" by G.W. Keeton and D. Lloyd, pp.67-68). On extension of order passed by a Resident Magistrate see also: Mirza Khurshid Ahmad and another vs. Government of Punjab and others (PLD 1992 Lahore 1), at pages 14 to 16.
[1044] For the limited meaning which has been given to the expression "subject to law" used in Article 20 of the Constitution in the decisions of the Supreme Court, see: Jibendra Kishore Achharyya Chowdhury and 58 others vs. The Province of East Pakistan and Secretary, Finance and Revenue (Revenue) Department, Government of East Pakistan (PLD 1957 SC 9) at page 41); Messrs East and West Steamship Company vs. Pakistan (PLD 1958 SC 41), and Sarfraz Hussain Bokhari vs. District Magistrate, Kasur and others (PLD 1983 SC 172). On the question of vagueness of the law and the specious meaning that can be given to the expression "posing as a Muslim", see also: Crawford, Earl Theodore: Statutory Construction. Thomas Law Book Company, (1940) page 339; Haji Ghulam Zamin and another vs. A.B. Khondkar and others (PLD 1965 Dacca 156, at page 180); K.A. Abbas vs. The Union of India and another (AIR 1971 SC 481, at page 497) and State of Madhya Pradesh and another vs. Baldeo Prasad (AIR 1961 SC 293).
[1045] Jibendra Kishore Achharyya Chowdhury and 58 others vs. The Province of East Pakistan and Secretary, Finance and Revenue (Revenue) Department, Government of East Pakistan (PLD 1957 SC 9), at page 41. Also see: Pirzada, S. Sharifuddin: Fundamental Rights and Constitutional Remedies in Pakistan (1966 Edition), at pp.313-314 and 317. *See also*: Hamilton vs. Board of Regents of University of California, (1934) 293 US 245 and Comonwealth vs. Plaisted (1889) 148 Mass 375, from American jurisdiction.

In the *Kaneez Fatima case* which was heard in the same year when *Zaheeruddin* was decided, the court considered whether by virtue of Article 2-A, it had the authority to strike down laws due to inconsistency with Islamic injunctions. The five-member bench, however, unanimously answered the question in the negative.[1046] As such, where Article 2-A is in conflict with the other provisions, rule of **harmonious construction**[1047] has to be applied by the Judges while interpreting the provision in conflict.[1048] In another case it was held that the Objectives Resolution could be used to understand and interpret the Fundamental Rights in the Constitution.[1049]

In *Justice Khurshid Anwar Bhinder* case, it was held that the Objectives Resolution would not render any help to the case of the petitioners because its main purpose was the enforcement of Qur'an and Sunnah within the framework of the principles and provisions of the Objectives Resolution.[1050] The Objectives Resolution has been made a substantive part of the Constitution but it is considered as neither controlling

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[1046] Mst. Kaneez Fatima vs. Wali Muhammad, PLD 1993 SC 901, para 4, per Saleem Akhtar J. See also: Tank Steel and Re-Rolling Mills Pvt. Ltd. vs. Federation of Pakistan, PLD 1996 SC 77; Zulfiqar Ali Babu vs. Government of Punjab, PLD 1997 SC 11, and The Province of Punjab vs. National Industrial Cooperative Credit Corporation, 2000 SCMR 567.

[1047] N.S. Bindra, Interpretation of Statutes, 10th Edn. New Delhi: LexisNexis, 2007, p. 529. *Also see*, Corpus Juris Secundum, Vol. 16, page 97 where it has been observed that:"Although apparently conflicting provisions will be reconciled wherever possible, in case of a conflict in the provisions of the Constitution, if one or the other must yield, the one which under the law, is a lesser right, will yield." See also, Halsbury's Laws of England, 4th Edn., Vo1.44, page 532, where more or less similar observations have been made: "It is sometimes said that where there is an irreconcilable inconsistency between two provisions in the same statute, the latter prevails, but this is doubtful and the better view appears to be that the Courts must determine which is the leading provision and which is the subordinate provision, and which must give way to the other."

[1048] Reference by the President of Pakistan under Article 162 of the Constitution of Islamic Republic of Pakistan, PLD 1957 SC 219, at p.235. On rule of harmonious construction *see also,* Hakim Khan vs. Government of Pakistan, PLD 1992 SC 595, para 1(i), per Shafiur Rahman, J. See also Kaneez Fatima vs. Wali Muhammad, PLD 1993 SC 901; Zaheeruddin vs. The State, 1993 SCMR 1718; Al-Jehad Trust vs. Federation of Pakistan, PLd 1996 SC 324; Pakistan Lawyers Forum vs. Federation of Pakistan, PLD 2005 SC 719; Raja Muhammad Afzal vs. Government of Pakistan, PLD 1998 SC 92 and Wukala Muhaz Barai Tahafaz Dastoor vs. Federation of Pakistan, PLD 1998 SC 1263. From Indian Jurisdiction please see, Sri Jagannath Temple Managing Committee vs. Siddha Math and Others, AIR 2016 SUPREME COURT 564. See also: The Calcutta Gas Company (Proprietary) ... vs. The State Of West Bengal And Others : 1962 AIR 1044, 1962 SCR SUPL. (3) 1, AIR 1962 Supreme Court 1044, para 8.

[1049] Lahore Development Authority through D.G. and others vs. Ms. Imrana Tiwana and others, 2015 S C M R 1739, para 32.

[1050] Justice Khurshid Anwar Bhinder and others vs. Federation of Pakistan and another, PLD 2010 SC 483, para 48.

other provisions of the Constitution nor could other provisions of the Constitution be struck down on the ground that they came into conflict with it.[1051]

It is to be appreciated that the Objective Resolution is Pakistan's first major constitutional landmark.[1052] When it comes to interpret such a provision vis-a-vis other Constitutional provisions, it is to be remembered that "the rules of interpretation are not rules of law",[1053] and that "the rules of interpretation are not our masters, they are our servants."[1054] They are meant to assist the Court in advancing the ends of justice.

4.6.3. Is It Necessary to Consider Art.2-A While Interpreting Matters U/Art.184 (3)?

Art.2-A has been held to be a necessary consideration even in matters involving interpretation u/Art.184 (3) and that the interpretative approach should not be ceremonious observance of the rules or usages of the interpretation including the Objectives Resolution.[1055]

Constitutional order, as per Art 2-A appears to be resting on two fundamental precepts; firstly, that the exercise of authority shall be informed and circumscribed by the principles of Islam, and secondly, that the people of Pakistan shall play an integral role in the exercise thereof.[1056] However, for an outsider, "such a concept may appear to be enigmatic but the Muslims of Pakistan had no difficulty in understanding and applying such

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[1051] District Bar Association, Rawalpindi and others Vs. Federation of Pakistan and others, PLD 2015 SC 401, at p. 511.
[1052] Rana Touseef Sami, Objectives Resolution In A Limbo (May 05, 2016). Rana Touseef Sami, 'Objectives Resolution In Limbo' (2016), available at https://courtingthelaw.com/2016/05/05/commentary/objectives-resolution-in-limbo/, Available at SSRN: https://ssrn.com/abstract=4202411 or http://dx.doi.org/10.2139/ssrn.4202411, last accessed 28.07.2024.
[1053] Utkal Contractors & Joinery vs. State of Orissa, [1987] 3 SCR 317, at 330.
[1054] Maunsell vs. olins, [1975] 1 All ER 16.
[1055] Watan Party and others Vs. Federation of Pakistan and others, PLD 2012 SC 292, at P.312.
[1056] Workers' Party Pakistan through Akhtar Hussain, Advocate, General Secretary and 6 others Vs. Federation of Pakistan and 2 others, PLD 2012 SC 681, at P.712.

concept."[1057] In a case it was held that no provision of the Constitution could be interpreted in isolation for the Constitution had to be read organically and holistically.[1058]

The approach of the courts shows that the same is not consistent regarding the status of the Objective Resolution. This unwritten approach on the part of the courts seems to have reached at its peak in *Waseem Sajjad* case. Regarding extra-constitutional step of taking over the affairs of Pakistan by military, the revolutionary political change was held to be "not in derogation of the Objectives Resolution." [1059] It is rule of construction that "the interpretation that validated a provision/statute outweighed the one that invalidated the same."[1060] If this rule qua the underlying rationale is stretched a bit further and is applied to interpretation of the grundnorm, the divergent approach to Art.2-A of the Constitution, 1973 on the part of the Courts would appear to be due to following two different lines of reasoning. Under the one, this provision is taken at par with rest of the other constitutional provisions whereas in other cases it is held that it is to serve as touchstone for judging the others seems to be based on the understanding that Art.2 is in the nature of a supra constitutional provision in the Constitution 1973 and in it is to be read as an unwritten non obstante clause.[1061]

4.7. The Reliance on Abstract Principles and Constrained Validity of the Doctrines.

No doubt the SCP has wide powers to interpret the Constitution but it has not restrained itself from fixing a political question even if it is at the cost of derogation of the idea of trichotomy in the constitution. Regarding political and non-political questions, the

[1057] Ishaq Khan Khakwani and others Vs. Mian Muhammad Nawaz Sharif and others, PLD 2015 SC 275, 290.
[1058] District Bar Association RWP VS. FOP, PLD 2015 SC 401, at 525.
[1059] Waseem Sajjad Vs. FoP, PLD 2001 SC 433, at 497.
[1060] Panama Refining Company vs. Ryan 293 U.S. 388, 439 (1935).
[1061] Amr Ibn Munir, Could the Courts Declare a Statute to be Null and Void on the Touchstone of the Due Process of Law Clause under the 1956 Constitution? A Critical Appraisal (July 26, 2023). Available at SSRN: https://ssrn.com/abstract=4521360 or http://dx.doi.org/10.2139/ssrn.4521360, last accessed 18.07.2024.

SCP held that it was not always easier to differentiate between them but the Court must exercise its powers to preserve the Constitution.[1062]

Though the demarcation of political and non-political line is not an easier task but the fact remains that one tasked with the responsibility has to do the needful somewhere at some point of time.[1063] This is especially so in Pakistani perspective where the expectations from the law and those who deal with it serve as a mechanism both from the state itself and the powers to be. The pivotal practical question, especially in the context of doctrine of necessity and the allied concepts of implied mandate and reliance on abstract principles as well as the concept of basic structure is as to how the Courts should react to suspension of, or revolutionary changes in, the Constitution.

This brings one to the most important question, being the central point on which should rest whole of the judicial policy. This question, vis-a-vis the abstract principles and so called doctrines, is of crucial import, and is not alien to human understanding in any polity.[1064] For example, speaking about draft Article 32[1065] the principal architect of Indian Constitution said in the Constituent Assembly: "If I was asked to name any particular article in this Constitution as the most important, an article without which this Constitution would be

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[1062] Muhammad Nawaz Sharif v Federation of Pakistan, PLD 1993 SC 473, para 21 per Shafiur Rahman, J. regarding political question, see also: Powell vs. MeCormack (1969) 395 US 486 : 23 L Ed 2d 491, at p.532, per Chief Justice Warren. The plaintiff in that case Adam Clayton Powell Jr. was duly elected from a congressional district of New York as a member of the United States House of Representatives in 1968. One of the points raised before the Supreme Court of the United States of America was that the question involved was a political question and hence was not justifiable.

[1063] The doctrine of political question was examined in the year 1962 by the Supreme Court of the United States of America in Baker vs. Carr (1962) 369 UC 186 : 7 Led 2d 663, That was a civil action in which the complaint was that the plaintiffs and others similarly situated had been denied equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States of America by virtue of debasement of their votes by reason of unconstitutional division of their electoral area situated in the State of Tennessee. The District Court dismissed their claim on two grounds namely, lack of jurisdiction over the subject matter and that the action was a non-justifiable one. The Supreme Court of the United States of America reversed the judgment of the court below and remanded the case to the District Court to 'dispose ‘ of In the light of its decision. The Supreme Court held that the complaint of the appellants involved a Justifiable cause upon which they were entitled to a trial and a decision. See Brennan, J. observation on P. 691.

[1064] András Jakab, Determining the Content of (Austrian) Constitutional Principles (December 6, 2023). in: Christoph Bezemek – Michael Potacs – Alexander Somek (eds), Vienna Lectures on Legal Philosophy, Volume 3: Legal Reasoning (Oxford: Hart Publishing 2023) pp. 1-16, Available at SSRN: https://ssrn.com/abstract=4656353 or http://dx.doi.org/10.2139/ssrn.4656353, last accessed 16.06.2024.

[1065] Corresponding to Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973.

a nullity, I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it."[1066]

It appears from the analysis of case law supra with convincing clarity, that there are two basic types of court responses to constitutional break-down which can be classed as `necessity' cases and `Kelsen" cases respectively. It seems quite logical that the two types of judgments should be viewed in relation to two different types of political situations, and that a court's reaction might reasonably differ in the two.[1067]

4.8. CONCLUSION

There are some characteristic in every constitution which are embedded in the historical, religious and social background of the people for whom it is framed. It cannot be denied that every Constitution has prominent features, characteristics and picture-frame studded with public aspiration, historical inspiration, geographical recognition, political formulations and people's expectations. Pakistan owes its creation to ideological belief which is so manifestly reflected in the Objectives Resolution that it has always remained the Preamble of almost all our Constitutions and has been a source of guidance to all.

The provisions of the Constitution, though not rigidly encircled by it, always remained within its horizon subject to all such changes which manifest different shades of the same colour. A Constitution is the aspiration of the people. It is the experience of the past, the desires of the present nation and last but not the least a hope for the future. A constitution is a document for all times to come. It cannot be made rigid because such rigidity if confronted with the social and political needs of the time is likely to create cracks in it. The consistent view of the courts in Pakistan is more real and should be followed and maintained. Rigidity is

[1066] Dr. Ambedkar speech of 9th December, 1948 in Constitutent Assembly. See CAD debates, Vol. VII, p, 953.
[1067] Wolfgang, Peter Zingel, Stephanie Zingel & Lalemant Ave, Pakistan in the 80s" Law and Constitution, Lahore, Vanguard, (1985), p. 129.

one of the main features of a written Constitution. But this rigidity is often tuned to flexibility by the provisions of the Constitution itself as well as by the interpretation made by the courts. The unwritten approach on the parts of the Pakistani Courts, however, is based perhaps, on the understanding that the rigid Constitution may provoke violence.

CHAPTER 5: APPOINTMENT TO JUDICIAL SEATS IN PAKISTAN AND WORKING OF UNCONSTITUTIONAL CONSTITUTIONALISM BASED JUDICIAL POLICY

"Legislation should be written so that it is feasible for the ordinary person of ordinary intelligence and ordinary education to have a reasonable expectation of understanding and comprehending legislation and of getting the answers to the questions he or she has."[1068]

5.1. INTRODUCTION

In this chapter the different modes of appointment at different tiers of judicial system of the country would be would dealt with. Specifically, the written and unwritten modes and manners of recruitment and appointment to judicial seats at the level of District Judiciary would be analysed. It will be seen whether judges of District Judiciary are also considered, elevated and appointed to the constitutional judiciary?; If not, is it due to some unwritten judicial policy?; what is mode of nomination, elevation and appointment to judicial seats at the level of provincial High Court(s) (HC)?; how the judges of provincial High Courts are nominated and elevated to august Supreme Court of Pakistan (SCP?) Is there some unwritten law that is kept in view at the time of such elevation to constitutional judiciary?; whether such a mode of elevation carries any repercussions for the democratic and the constitutional traditions? Whether it has unquestioned validity for the better working and business of democratic polity? And what are criteria and mode of appointment of judges in Islam and whether the current mode of elevation has any consonance therewith? All the issues would be answered in the instant chapter.

[1068] Dennis Murphy, 'Plain English — Principles and Practice' (Paper presented at the Conference on Legislative Drafting, Canberra, 15 July 1992), 6. *See also*, Report of The Inquiry Into Legislative Drafting By The Commonwealth, House of Representatives Standing, Committee on Legal and Constitutional Affairs Australian Government Publishing Service Canberra. ISBN 0644 296070, (September 1993), 6.5.

5.2. Appointment to Judicial Seats in Pakistan.

It is to be appreciated that the appointment of Judges is governed largely by statutory law supplemented by the Constitutional (long standing) practice and conventions.[1069] As regards Pakistan, this phenomenon can be discussed under following two broader heads:

5.2.1. Appointment in District Judiciary and Working of Unwritten Law.

For appointment to judicial seats at the level of District Judiciary, technically the word used is 'recruitment'. It is the same phenomena that convey the idea of appointment to posts in civil services and also to those of armed services of the country. For appointment to District Judiciary, the posts of Civil Judges Cum Judicial Magistrates (CJ/JM) Basic Pay Scale (BPS-17) are there in addition to those of Additional District and Sessions Judges (ADSJs) BPS-20.[1070] To be a CJ/JM, one has not to be older than thirty five years of age. Moreover, the standing of two years at Bar is prerequisite which is to be counted from registration with a Bar Association and not from the enrollment with the concerned Bar Council.[1071] Similarly, to be an ADSJ the candidate has not to be more than forty five years of age with standing of ten years at the Bar.[1072] To be an ADSJ, one has to be on the other hand means to perform the judicial functions in capacity of appellate court in respect of all those matters that originally lie in the jurisdiction of CJ/JM(s) in every mode of their capacity as delineated above.[1073]

[1069] O. Hood Phillips and Paul Jackson, Constitutional and Administrative Law. Sweet & Maxwell, Eighteenth Edn. (2001), p. 431.
[1070] Muhammad Munir, Judiciary in Pakistan: Appointment, Recruitment, Promotion, Retirement, Removal and Dismissal of Judges from Service (November 16, 2021). Available at SSRN: https://ssrn.com/abstract=3964494 or http://dx.doi.org/10.2139/ssrn.3964494,last accessed 23.09.2024.
[1071] Para 7(1) of SOR/III-2(83)/P dated 31-03-1994, Administration Department, Government of the Punjab.
[1072] Para 7(2) of SOR/III-2(83)/P dated 31-03-1994, Administration Department, Government of the Punjab.
[1073] Age requirement of 45 years for ADSJ seems weird and anomalous in view of S. 15 of Constitution (26th Amendment) Act, 2024 where under a lawyer or Judicial Officer having 10 years standing and with only 40 years of age can be Judge of High Court. It means that for a lower post one has to be 45 years but for higher post one has to be younger.

Both CJ/JM and ADSJ along with DSJs are members of Provincial Judicial Service and are collectively referred to as 'District Judiciary.' At present there are seven provincial/state level judicial services in Pakistan.[1074] They are supervised by respective High Courts of the country. The latest one of them i.e. Islamabad Judicial Service was established[1075] after the establishment of Islamabad High Court in 2010 after amendment[1076] in Articles 175 and 175A of the Constitution, 1973. It has territorial jurisdiction confined to Islamabad Capital Territory only.[1077]

The phenomenon of unwritten law, so far as the District Judiciary is concerned, emanates from the very nomenclature. Regarding court system, the Constitution of Pakistan speaks about the Judicature[1078] which is divided into District Judiciary and Constitutional Judiciary, none of which nomenclature finds mentioning in the Constitution. By unwritten law the former is not reckoned as Constitutional product despite the fact that the Constitution, 1973 mentions about Judicial Office and supervision of courts by HC.[1079] The major laws regulating the procedure are CPC,[1080] Cr.P.C[1081] and the Constitution, 1973. They do not mention these expressions. The words used instead are "Judge", "Court" or "Magistrate" and

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[1074] They are Punjab Judicial Service; Sind Judicial Service; Khybar Pakhtun Khwa (KPK) Judicial Service; Balochistan Judicial Service; Gilgit Baltistan (GB) Judicial Service; Azad Jammu and Kashmir (AJK) Judicial Service and lastly, Islamabad Judicial Service. The erstwhile Federally Administered Tribal Areas (FATA) have been merged into Khybar Pakhtun Khwa (KPK) and now the members of KPK Judicial Service also have jurisdiction to entertain matters pertaining to those areas. After repeal of Art.246 and 247 of the Constitution of the Islamic Republic of Pakistan, 1973 and consequent merger of Federally Administered Tribal Areas (FATA) the jurisdiction of KPK District Judiciary automatically got extended thereto.

[1075] Per S.R.O. 391(1)/2011: In pursuance of S.6 of the Islamabad High Court Act, 2010 (XVII OF 2010) r.w. Art. 203 of the Constitution of the Islamic Republic of Pakistan and all other enabling powers in this respect the Islamabad High Court made " The Islamabad Judicial Service Rules, 2011" to regulate the establishment of subordinate judiciary i.e. 'The Islamabad Judicial Service' for its functioning. As per S.R.O. 656(1)/2024 'The Islamabad Judicial Service Rules, 2011' have been further amended. The latter S.R.O. was circulated to the members of the Islamabad Judicial Service vide letter No. F.No.142/Legis./IHC/609 dated 29/05/2024 by the Registrar of the Islamabad High Court, Islamabad.

[1076] S.66 of Eighteenth Constitution (Amendment) Act 2010, (ACT X of 2010).

[1077] S.6 of the Islamabad High Court Act, 2010 (XVII OF 2010) r.w. Art.203 of the Constitution of the Islamic Republic of Pakistan, 1973.

[1078] Part VII of the Constitution of Islamic Republic of Pakistan, 1973.

[1079] Art.175 falls under Chapter 1 of Part VII of the Constitution of Islamic Republic of Pakistan, 1973. The expression "[and a High Court for the Islamabad Capital Territory]", and the Explanation to sub- Art. 1 were inserted by S.66 of the Constitution (Eighteenth Amdt.) Act, 2010 (Act 10 of 2010). See also, Art. 193 of the Constitution, 1973. *See also*, Art. 193 of the Constitution, 1973.

[1080] Civil Procedure Code (Act V of) 1905.

[1081] Code of Criminal Procedure (Act V of) 1898.

they covey the meaning of designations and presiding officers of the courts only.[1082] The interesting thing to note is that no written law has specified the District Judiciary as 'Subordinate Judiciary', nor members thereof as 'Judicial Officers', nor a Judge of a HC or SCP as "Justice."[1083]

5.2.2. Appointment to Judicial Seats in Constitutional/Superior Judiciary and Unwritten Judicial Policy.

Appointment modes for District and Constitutional Judiciary are not the same as against other departments and services including Armed Forces in Pakistan. The matter of recruitment and appointment to the District Judiciary has been dealt with in Chapter 2 under head 2.1.2. Therefore, the discussion is confined here to the other limb.

The process of appointment of Judges of HC is not through recruitment in the manner that is prerequisite for the Judicial Officers (JOs) of the District Judiciary.[1084] The appointment is rather based upon unwritten judicial policy. This factum emanates from the fact that even the initial process is not transparent. This is not to be confused with the fact that a written provision of the Constitution is specifically mentioned therein.[1085] However, it is to be appreciated that only the idea of appointment is mentioned in written law and is relied upon for filling the seat in an unwritten manner.[1086] It only narrows down to Judges selecting Judges which is "an anti-thesis to democracy."[1087]

[1082] The expressions 'Judicial Officers' and 'Justice' find mentioning only in the High Court Rules and Orders which speak about the working of the courts in the country and have remained there as surviving evidence of the English era in the subcontinent and as such continue the traditions of the colonial English Masters at the cost of written law of the land i.e., the Constitution, that is even otherwise later in time.

[1083] This approach reminds one about Shakespeare who said, "The fault, dear Brutus lieth, not in our stars, But in ourselves, that we are underlings." It is a well-known quote found in William Shakespeare's history play, Julius Caesar. It can be found in Act I, Scene 2, and is spoken by Cassius.

[1084] Muhammad Munir, Judiciary in Pakistan: Appointment, Recruitment, Promotion, Retirement, Removal and Dismissal of Judges from Service (November 16, 2021). Available at SSRN: https://ssrn.com/abstract=3964494 or http://dx.doi.org/10.2139/ssrn.3964494,last accessed 23.09.2024.

[1085] Art. 175-A of Constitution of the Islamic Republic of Pakistan, 1973.

[1086] Part VII of the Constitution of Islamic Republic of Pakistan, 1973 comprising four Chapters, deals with appointment to Supreme Court, High Court and Federal Shariat Court.

[1087] Robert Stevens, The English Judges: Their Role in changing Constitution, Oxford: Hare publishing, 2005, 144. *See also*: Louis Fisher, Constitutional Dialogues: Interpretation as Political Process, Princeton Legacy

The functioning of Superior Judiciary in this regard creates hegemony in the name of interpretation.[1088] In a case the court held that the recommendations of CJ regarding judicial appointments would be binding.[1089] The term 'consultation'[1090] was interpreted to be purposive. In this way, it was held that the opinion of CJ is binding on the Executive and if the latter opted to differ, it was bound to record justiciable and confidence inspiring reasons.[1091]

5.3. Appointment and Elevation at the Time of Inception of Country.

The judicial history of Pakistan remains chequered with episodes "of independence and capitulations to the executive."[1092] Consequent upon partition in 1947, the institutions were also to be partitioned but Judiciary was more difficult task than the other institutes.[1093]

In the West Punjab, existing LHC and its Judges including CJ continued as such.[1094] East Bengal also became part of Pakistan. However, it had no HC as the Calcutta High Court had territorial jurisdiction in matters pertaining to this area. Accordingly, a new High Court at its capital Dhaka was established.[1095] The first Muslim Judges of Calcutta High Court and a Christian Judge (viz., Elis) preferred Pakistan.[1096]

Library, (Princeton University Press (2016)), at p. 135 on the subject of the "Appointment Process"; Vernon Bogdarior & S.E. Finer, and Bernard Rudden, Comparing Constitutions, Edition 2nd, Oxford University Press (1995), subheading "Judicial Independence", at p. 88; C.G. Weeramantry, 'Islamic Jurisprudence': An International Perspective, The Macmillan Press Ltd., London, (1988), on the subject of 'The Notion of the Supremacy of the Law', at p. 79, and Syed Abul A'la Moudoodi, Khilafat-O-Malokiat (1966), at p. 95.

[1088] Pratap Bhanu Mehta, 'The Rise of Judicial Sovereignty' (2007) 18 Journal of Democracy 70, p 80. In this regard, See also, Shubhankar Dam, 'Vineet Narain v Union of India: ''A court of law and not of justice''—Is the Indian Supreme Court beyond the Indian Constitution?', (2005) Public Law 239.

[1089] Al-Jehad Trust vs. Federation of Pakistan, PLD 1996 SC 324, at 363-67. (It is known as the Judges' case as well)

[1090] Mentioned in Articles 177 and 193 of the Constitution of Pakistan, 1973.

[1091] Hamid Khan, Constitutional and Political History of Pakistan, 2nd ed., (Karachi: Oxford University Press, 2009), 436. See also, Ghulam Hyder Lakho vs. Federation of Pakistan (PLD 2000 SC 179), at p. 196.

[1092] Hamid Khan, A History of the Judiciary in Pakistan. Oxford University Press, Karachi. 2016, p.1.

[1093] Ibid.

[1094] The High Court at Lahore thus became the successor court to the Lahore High Court established by the Letters Patent dated March 21st, 1919.

[1095] Muhammad Shahabuddin, Recollections and Reflections (Lahore: PLD, 1972), 100.

[1096] Hamid Khan, A History of the Judiciary in Pakistan. Oxford University Press, Karachi. 2016, p.1.

The predecessor of SCP i.e., Federal Court (FC) was located in Delhi. The appellate matters from the HCs of the nascent country could be adjudicated in Federal Court at Delhi. However, in 1949, Mian Abdul Rashid was appointed as the first CJP. He was previously heading LHC.[1097] However, at the time of inception of the country only seven, including CJ Mian Abdul Rashid, were left in LHC.[1098]

Bombay got separated from Sindh but a Judicial Commissioner's Court at Karachi had already been established in 1931. However, the same had been abolished with the establishment of Sindh Chief Court in 1941.[1099] The CJ of Sindh Chief Court at independence was Dodfrey Davis who opted for Britain on partition and was succeeded by H.B. Tayyebji. The six puisne Judges did not, however, move to India.[1100] The Judicial Commissioners' Court at Peshawar nad Quetta was working with two Judicial Commissioners each.[1101]

5.4. Appointment and Elevation under Previous Constitutions.

For SC Judges' appointment Art.149 of Constitution of 1956[1102] and Art.50 of Constitution of 1962[1103] said that the President would appoint CJ of SC. The other Judges used to be appointed by the President after consultation with the CJ. Consultative process was also there for HC Judges' appointment.[1104] Same was the situation under the

[1097] Hamid Khan, (Chapter 1: Judiciary at the Time of Independence) *in*, A History of the Judiciary in Pakistan. Oxford University Press, Karachi. 2016, p.13. Out of ten Permanent Judges, two were Muslims, five Hindu, two were English/Christian, and one was Sikh.

[1098] They were the CJ himself, five Muslim Judges namely, Abdul Rehman, Muhammad Munir, Muhammad Shrif, Atta Muhammad Jan and S.A. Rehman, as well as a Christian Judge---- A.R.Cornelius. These names have been taken by Hamid Khan from AIR 1947, Lahore Volume. *See Note 8, at P. 16*, Hamid Khan, *supra*.

[1099] See, Hatim Badruddin Tayyebji vs. The Chief Justice and Judges of the High Court of West Pakistan, PLD 1957 SC (Pak.) 272.

[1100] The other Judges were T.VS. Thandani, Hassanali G. Agha and M.R. Mehar, in addition to two Englishmen, Dennis O' Sullivan and George Constnatine. Their names have been taken by Hamid Khan from AIR 1947, Lahore Volume. See Note 11, at P. 16, Hamid Khan, supra.

[1101] Hamid Khan, A History of the Judiciary in Pakistan. Oxford University Press, Karachi. 2016, pp.13,14.

[1102] Part IX of the Constitution of Pakistan, 1956 dealt with Judicature.

[1103] Chapter 05 of Constitution of Republic of Pakistan, 1962 dealt with SC and HC Judges' appointment and matters ancillary thereto.

[1104] Art.166 of Constitution of 1956, Art.92 of Constitution of 1962 and Art. 195 of Interim Constitution of 1972 respectively dealt with HC Judges' appointment which was made by the President after consultation (a) with the

Interim Constitution of the Islamic Republic of Pakistan, 1972.[1105] These provisions of previous Constitutions of Pakistan show that there was no use of expression of 'meaningful consultation'; rather, the word "consultation" was used and the same continues to appear in the current Constitution of 1973. The coming lines would show that by dint of unwritten judicial policy and by going beyond the limits of interpretation, the meaning has been read into the Constitution which is not there.[1106]

For understanding how the elevation to judicial seats in HC used to be made,[1107] the incidents, unfolded by an ex-Judge of LHC, and later of SCP, in his autobiography, show that there was no written criteria to elevate a member of the Bar to HC. He has narrated that the then CJP Sajjad Ahmed came to seek his permission to ask the then CJ LHC Sh. Anwar ul Haq to propose his name to the then President Gen. Yahya Khan. The latter made him Judge LHC in July 1971.[1108]

The author has also mentioned how Dr. Naseem Hassan Shah was made Judge of LHC by President Ayub Khan. It is also interesting to note that the Dr. Javed Iqbal was also told by the then CJ Kiani of LHC that President Gen. Ayub Khan had asked to offer him Judgeship which he refused for non-fulfillment of requirements. To this said CJ LHC replied that if he was willing to become Judge it was not his headache to find the way out in that regard.[1109]

Chief Justice of the Supreme Court; (b) with the Governor of the Province concerned; and (c) except where the appointment was that of Chief Justice himself, with the Chief Justice of the High Court concerned.

[1105] Part VIII of the Interim Constitution of the Islamic Republic of Pakistan, 1972 dealt with the Judicature. Chapter 1 dealt with the Supreme Court of Pakistan whereas Chapter 2, with the High Courts. *See* Art.178 thereof.

[1106] *See also*, Union of India vs. Sankalchand Himatlal Sheth & Anr. Equivalent Citations: 1977 AIR 2328, 1978 SCR (1) 423, 1977 SCC (4) 193: "Consultation is different from consentaneity. They may discuss but may disagree; they may confer but may not concur." (at page 496, per Krishna Iyer, J.).

[1107] Muhammad Hamza Ali Qadir Khan, Critical Analysis of the procedure of appointment of Judges in the Superior Courts of Pakistan, Pakistan Journal of Criminal Justice,ISSN (P): 2958-9363 ISSN (E): 2958-9371, Volume 1, No.1, 2021, 40-51 also available at: https://journals.centeriir.org/index.php/pjcl, last accessed 02-02-2024.

[1108] Justice (Rtd.) Dr. Javed Iqbal, Apna Gariban Chaak, (Urdu auto biography), Sange Meel Publications, Lahore. Chapter 7, at pp.141, 142. This story of elevation is narrated in detail by him in his said autobiography.

[1109] Justice (Rtd.) Dr. Javed Iqbal, Apna Gariban Chaak, (Urdu auto biography), Sange Meel Publications, Lahore, at p. 125-126.

This shows that in the power circles sticking to written law of the then Constitution i.e., of 1962 was not considered necessary. Secondly, these incidents from his autobiography also tend to show that unwritten law prevailed with those at the helms of affairs.This goes to show that this practice of falling back on the unwritten law has made its way up to the present time and even continues to hold its sway on the basis of this unwritten legacy.

5.5. Appointment and Elevation under the Incumbent Constitution: Eighteenth and Twenty Sixth Amendment Set-Ups.

The phenomenon of unconstitutional constitutionalism and unwritten judicial policy is discussed under following heads:

5.5.1. Pre Eighteenth Constitutional Amendment Scenario.

The Superior judiciary of Pakistan also decides civil and criminal cases and has not to deal with constitutional matters exclusively.[1110] In the pre-Eighteenth Amendment era, the law and order was in the exclusive domain of the provinces and the criminal law, procedure and evidence, fell in the legislative competence of the provinces.[1111] On the appellate side, however, the leave to appeal to the SCP on exceptional legal grounds was provided in the Constitution coupled with powers of the President to exercise clemency powers.[1112] It is to be noted that the Constitution, 1973 deals with the Fundamental Rights that fortify the due process model.[1113] On the other hand, it has emergency provisions that provide strength to crime control in exceptional circumstances.[1114]

[1110] Vide S. 14 of Constitution (26th Amendment) Act, 2024, Art. 191-A has been inserted in the Constitution of Pakistan, 1973 whereby provision has been made for a Constitutional Bench in SCP. Now the matters u/Articles 184 to 186 of the Constitution, 1973 are to be dealt with exclusively by the said Bench.
[1111] Per item No. 01 of the defunct Concurrent List to the Fourth Schedule of the Constitution, 1973.
[1112] Article 45 of the Constitution of Pakistan, 1973.
[1113] *See for example*, the security of person u/Art. 9; safeguards as to arrest and detention u/Art.10; due process clause u/Art.10-A; prohibition against retrospective punishment u/Art.12; prohibition against double punishment u/Art.13(a); prohibition against self-incrimination u/Art.13(b) and dignity of man u/Art. 14 of the Constitution of Pakistan, 1973.
[1114] Article 238, 239 of the Constitution, 1973.

Providing peep into mode of elevation to HC before 18th Constitutional Amendment J. Javed Iqbal has mentioned how the then attorney General of Pakistan[1115] wanted the then CJ LHC namely Sardar Iqbal to make one of his friend a Judge which was refused by CJ using abusive language. This shows how the Judges were appointed in Pakistan. He has also mentioned how the Bhutto regime wanted to remove CJ Sardar Iqbal and to adjust Justice Yaqub Ali Khan in his place. He goes on to describe a strange law whereby Sardar Iqbal got retired as CJ LHC for not accepting posting in SCP after completion of four year tenure but Yaqub Ali Khan was accommodated as CJP even after suprannuation.[1116]

Incidents like these tend to clarify that the written law is often bypassed, ignored or pushed aside to accommodate the powers to be in Pakistan. The personal desires, caprices and whims weigh heavy against the written law of the land. The resultant approach is based upon an unwritten law, as the incidents about making of Judges mentioned above show the same is based upon some sinister motive to damage someone, not liked otherwise.

5.5.2. The effect of Nadeem Ahmed Advocate and Al-Jehad Trust cases.

The 18th and 19th Constitutional Amendments provided for the composition of JCP and Parliamentary Committee.[1117] It is to be remembered that in *Nadeem Ahmed Advocate,* SCP held all cases of fresh appointments of Judges shall be processed under Art.175-A.[1118]

After this case the JCP is to nominate a name for the appointment after evaluating requisite antecedents. The recommendations of the JCP are sent to the Parliamentary Committee which may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed. However, the Committee may not confirm the nomination for reasons to be recorded, by

[1115] Namely Yahya Bakhtiyar.
[1116] Justice (Rtd.) Dr. Javed Iqbal, Apna Gariban Chaak, (Urdu auto biography), Sange Meel Publications, Lahore. Chapter 8, Adal Gastari, at pp 151-153.
[1117] For composition of JCP and PC *see*, Art. 175-A of the Constitution of Pakistan, 1973.
[1118] Nadeem Ahmed Advocate and others vs. Federation of Pakistan and others, PLD 2010 SC 1165.

three-fourth majority and in such case the Commission shall send another nomination. Thereafter, the PM who shall forward the same to the President for appointment. However, it is to be appreciated that *Nadeem Ahmed* case stands in sharp contrast to earlier finding in *Al-Jehad Trust* wherein it was observed that "no direction can be issued to the Legislature to legislate a particular law."[1119] The findings in both these cases collectively show that unwritten considerations weigh heavier against written provisions.

5.5.3. Post Eighteenth Constitutional Amendment Set Up.

In certain constitutional petitions[1120] the vires of Art.175-A[1121] were discussed. It was contended that Art.175-A was violative of concept of independence of judiciary. It was contended that the Parliamentary Committee had been given veto powers against even a unanimous recommendation made by the JCP. The insertion of Art.175-A was said to be a product of mala fides which was likely not only to make the appointment process political but would also affect the structural insularity which was an essential element of judicial independence. However, the SCP, holding that the Court was mindful of the mandate of the Oath of office,[1122] deferred to the Parliamentary opinion qua appointment issue.[1123]

It is to be remembered that to further buttress this objective, appointment process[1124] and Judges removal[1125] has been kept insulated from legislature and opinions of CJP and CJs of High Courts were given weight which now stand judicially defined.[1126]

[1119] Al Jehad Trut through Habibul Wahab Al-Khairi, Advocate and 9 others vs. Federation of Pakistan, (also known as *Judges' case*)1999 SCMR 1379, para 25, at p. 1400.
[1120] Constitutional Petitions Nos. 11-15, 18-22, 24, 31, 35, 36, 37 and 39-44 of 2010, C.M. Appeal No.91 of 2010, HRC Nos. 20492-P and 22753-K of 2010, C.M.As.1599, 1859, 1959 and 2681 of 2010 and Civil Petition No.1901 of 2010 u/Art.184 (3) of the Constitution, 1973,were decided on 30th September, 2010. They arose on appeal from the order of Peshawar High Court dated 16-6-2010 passed in W.P.No.1581 of 2010.
[1121] As inserted by Constitution (Eighteenth Amendment) Act, 2010.
[1122] This Oath requires the Judges to do "right to all manner of people according to law, without fear or favour, affection or ill-will." Oath in Schedule III under the Constitution of 1973.
[1123] Nadeem Ahmed Advocate vs. Federation of Pakistan, PLD 2010 SC 1165, para 7. For debate on judicial hyper-activism and deference to courts, *see also*, Ran Hirschl, "Juristocracy"--Political, Not Juridical (2004) 13 The Good Society, at p. 6.
[1124] Under Article 177 of the Constitution, 1973.
[1125] Under Article 209 of the Constitution, 1973.

5.5.4. Collective Wisdom of the Chosen Representatives and Practice of the Court.

For appointment, the names of the recommendees are initiated by the CJP in consultation with the other members of the Commission (JCP) and in case of rejection of nomination by the Parliamentary Committee its reasons are reckoned to be justiciable. In this regard, the question of composition of the JCP and Parliamentary Committee, and veto power given to the latter came under discussion in *Nadeem Ahmed*, supra.

To ensure that the appointment process is in consonance with the concept of independence of judiciary, and to make it workable, Article 175A was directed to be amended in specified manner[1127] and the court made certain recommendations.[1128] It is also reckoned that making reference to the Parliament for re-consideration was in accord with the law and practice of this Court.[1129]

By making this unanimous reference the Judges appear to have taken the initiative to kep superiority of the Court intact. The reason for this conclusion is based on the unanswered question that why the matter was referred for reconsideration to the same Legislature for soliciting the same collective wisdom of the chosen representatives of the people from whom the same Amendment and procedure had been handed down? Even if we do not fathom deep to have a strong critique, it is easily discernible that right of constitutional interpretation helped SCP to enhance its domain by stretching the meaning of 'consultation'.[1130] Moreover,

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[1126] Al Jehad Trust vs. Federation of Pakistan, (PLD 1996 SC 324). *See also*, Article 68 of the Constitution, 1973.

[1127] Nadeem Ahmed Advocate vs. Federation of Pakistan, PLD 2010 SC 1165, para 13. *See also*, Richard H Fallon Jr., 'The Core of an Uneasy Case for Judicial Review' (2007) 121 Harvard Law Review 1693, p 1695.

[1128] Ibid. It was asserted that the number of judges in Judicial Commission be increased. It was stressed that the parliamentary committee should record its reasons for rejecting a nomination by the Commission. Moreover, finality of recommendations of judicial commission was also pressed.

[1129] Hakim Khan vs. Government of Pakistan, (PLD 1992 SC 595 at 621) was referred to by the SCP in this regard.

[1130] For comparative debate, *see also*, Guarneri Carlo and Patrizia Pederzoli, From Democracy to Juristocracy? The Power of Judges: A Comparative Study of Courts and Democracy, (English editor, CA Thomas) (Oxford University Press 2002), p 135. *See also*, Justice Carsten Smith, 'Judicial Review of Parliamentary Legislation: Norway as a European Pioneer' (2000) 32 Amicus Curiae 11. (In addition to the mentioned powers, judicial review also encompasses within it the power of constitutional courts to interpret the Constitution as well as issue writs in cases of violation of fundamental rights through governmental actions)

unfettered authority was arrogated by the superior judiciary itself in making judicial appointments thereby degenerating the role of Executive to a mere rubber stamp.[1131] Regarding Judges' appointment, *Al-Jehand Trust* case[1132] was also criticized as the same was based on unusual and hitherto unknown interpretations of constitutional provisions. This phenomena reminds about Tushnet who believes that balance of power is tilted in its favour by judiciary by virtue of power of interpretation.[1133]

It is to be remembered that the Eighteenth Amendment is hailed as a landmark turning point in the constitutional history of Pakistan. It transposed the balance of power in favour of the parliament as compared to its previous status vis-a`-vis Presidency.[1134] It also addressed the escalation between the federal and provincial powers.[1135]

It is to be remembered that in a case SCP, while referring *Zia-ur-Rehman's* case, held that "it is not the function of the judiciary to legislate or to question the wisdom of the Legislature in making a particular law".[1136] It is also to be appreciated that the SCP has consistently held in various cases that the wisdom or policy of the legislature is not open to question in the exercise of the power of judicial review.[1137]

On the strength of these authorities, it can be safely said that the speculation on the motives of the Legislature is a topic which Judges cannot profitably or properly enter upon

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[1131] *See also*, Munir Hssain Bhatti vs. FOP, PLD 2011 SC 407. In this case it was held that refusal to confirm JCP's nominations was justiciable matter.

[1132] Al Jehad Trust vs. Federation of Pakistan, PLD 1996 SC 324.

[1133] Mark Tushnet, Advanced Introduction to Comparative Constitutional Law (Edward Elgar Publishing 2014), p 1. On the difference between different forms of judicial review, *See*, Mark Tushnet, 'Alternative Forms of Judicial Review' (2002) 101 Michigan Law Review 2781. See also, Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press (2004).

[1134] 18th Constitutional Amendment, in the Constitution of Islamic Republic of Pakistan, 1973.

[1135] The Concurrent Legislative List that specified powers common to both Federal and Provincial legislatures and gave ascendance of powers of federation was abolished.

[1136] Pakistan Lawyers Forum v Federation of Pakistan, PLD 2005 SC 719, para 85.

[1137] For example *see*, The Punjab Province vs. Malik Khizar Hayat Khan Tiwana PLD 1956 FC 200 at 208; Federation of Pakistan vs. Saeed Ahmad PLD 1974 SC 151 at 165; Shirin Munir vs. Government of Punjab PLD 1990 SC 295 at 306; Zulfiqar Ali Babu vs. Government of Punjab PLD 1997 SC 11, at 26; and Zaman Cement Company (Pvt.) Ltd. vs. Central Board of Revenue 2002 SCMR 312, at 324. *See also*, Amalgamated Society of Engineers vs. Adelaide Steamship Co. Ltd., 28 CLR 129, at 148. *The golden/universal rule was initially settled in* Grey vs. Pearson, 6 HLC 61, at p.106. *See also*, Sussex Peerage Case 11 Cl. & Fin. 85, at p.143. *The same was also observed in well-known passages which are quoted by Lord Macnaghthen in* Vacher's Case (1913) A.C. 117, at pp.117-118.

but they venture to do the same by issuing direction and elevating favourite Judges in violations of their rulings and practices to regulate which Twenty Sixth Amendment was passed in 2024.

5.5.5. Post Twenty Sixth Constitutional (Amendment) Act 2024 and Unwritten Judicial Policy.

It is to be remembered that the Nineteenth Amendment[1138] was passed to address the hitch of Eighteenth Amendment. The assertion that JCP should have final say in judicial appointment was not accorded by Parliament.[1139] The year 2011 saw suspension of the decision of the Parliamentary Committee. The Court again agitated its control over judicial appointments and held that the Committee's decision was justiciable. In this way it again arrogated more powers regarding judicial appointments.[1140] The power of the legislature to amend the Constitution stood constrained by the SC by virtue of latter's right of interpretation which appears to be based upon unwritten law. Such an interpretation and functioning of the superior courts of the country appear to be part of judicial policy that has been preferred not to be made public.

This unwritten judicial policy came to more conspicuous forefront when it was decided to elevate Justice Muhammad Ali Mazhar of SHC to the SCP, bypassing four senior Judges. The Pakistan Bar Council (PBC) agitated this elevation. The fact remains that

[1138] 19th Constitutional Amendment, in the Constitution of Islamic Republic of Pakistan, 1973.
[1139] From Indian jurisdiction *see also*, Dr. Ambedkar speech in the Constituent Assembly (of India) in, Constituent Assembly Debates 1949, Vol. 8, p. 258.
[1140] Moeen H. Cheema, " The Chaudhry Court: Rules of Law or Judicialization of Politics?", in The Politics and Jurisprudence of Chaudhry Court 2005-2013, edited by Moeen H. Cheema and Ijaz Shafi Gillani, Karachi: Oxford University Press, (2015), 197. *See also*, Oliver Mendelsohn, 'The Supreme Court as the Most Trusted Public Institution in India' (2000) 23 South Asia: Journal of South Asian Studies 103.

elevation of said learned Judge of SHC was deferred in meeting of JCP[1141] on 13th of July 2021 but the meeting of the same body was again called within short span of fifteen days.[1142]

It appeared as if either the mode of elevation was unwritten or the working and functioning of the Commission was not based upon written law.[1143] The lawyers across the country observed strike on 28th July 2021[1144] against this elevation. The Bar Councils of the country passed a joint resolution for ignoring the seniority of four sitting Judges of SHC.[1145] It was emphasized that the seniority principle should be adhered to avoid arbitrariness and nepotism and the creation of bad blood and groupings within the judiciary.[1146]

The Constitution of 1973 envisages that the number of Judges of the SCP shall be determined by an Act of Parliament.[1147] In the light of this provision, an Act has been passed to determine that the number of the Judges other than the CJ shall be sixteen.[1148] However, after 26th Constitution Amendment the composition of JCP has again been changed.[1149] Now the upper hand has been provided to Parliamentary panel. As such, the situation has again gone reverted back to pre *Al Jehad Trust* case era when seniority was not the criteria and the appointment process was comparatively political.

[1141] The premier body of superior court judges in Pakistan. Its composition is described under Art.176 of Constitution of the Islamic Republic of Pakistan, 1973. Part VII of the constitution of 1973 deals with overall composition of Supreme Court of Pakistan.
[1142] Press release of Pakistan Bar Council dated 26th July 2021.
[1143] Judicial Commission of Pakistan (JCP). The JCP is responsible for approving the appointment of judges to the Supreme Court and five high courts of the country. The chief justice of Pakistan also heads the commission as its chairman. The body comprises four senior-most judges of the Supreme Court, a former judge, federal law minister, the attorney general for Pakistan and a senior advocate nominated by the Pakistan Bar Council. The provincial and Islamabad bar councils each nominate a representative as a JCP member.
[1144] Press release of Pakistan Bar Council dated 26th July 2021.
[1145] Press release of Pakistan Bar Council dated 05th August 2021.
[1146] Ibid. *See also*, Dawn, August 6th, 2021. Also available at https://www.dawn.com/news/1639052, last accessed August 9th, 2021.
[1147] Under Article 176 of the Constitution, 1973.
[1148] The Supreme Court (Number of Judges) Act, 1997.
[1149] Vide S. 7 of Constitution (26th Amendment) Act, 2024, Art. 175-A of the Constitution of Pakistan, 1973 has been amended to change the composition of the Commission (JCP). This has also provided for a Special Parliamentary Committee

5.5.6. Ad hoc Appointments in Superior Judiciary and Unwritten Judicial Policy.

Regarding elevation to SCP, in view of mounting pressure from the Bar and perhaps understanding that the matter may go to a blind alley, the meeting of JCP was again scheduled for 10th August 2021 to consider appointing the SHC's CJ Ahmed Ali M. Sheikh as an ad hoc Judge of the SC after nomination of Justice Muhammad Ali Mazhar who was fifth on the seniority list as a permanent Judge of SCP. Such an appointment as ad hoc Judge of the apex Court amounted to removing the Judge from SHC without due process of law,[1150] which was a violation of removal procedure under the Constitution.[1151]

This established a very bad precedent as a HC Judge could be invited to attend the sittings of the SCP with the "approval" of the president and with the "consent" of CJ concerned.[1152] It is to be appreciated that the meeting had also opposed the appointment of ad hoc Judges to the SCP and called upon the JCP to urgently frame transparent and objective criteria for the appointment of Judges to all courts.[1153]

The matter of elevation of fifth judge on seniority list of SHC had not settled down finally when it came to the forefront that for the first time in the country's history a woman Judge was to be elevated to the SCP.[1154] No doubt, prior to this, an invisible barrier of sorts existed for female Judges in the higher Judiciary but with the nomination to the SCP of Justice Ayesha A. Malik[1155] it appeared that this policy of judicial glass ceiling will finally be

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[1150] See also opinion of Rasheed A. Razvi Adv. in Dawn, August 9th, 2021. He is a former judge of High Court of Sind. He also remained President of Supreme Court of Pakistan Bar Association (SCBA) and four times president of Sind High Court Bar Association. He has remained among the leading lawyers of Pakistan. Also see, Editorial available at https://www.dawn.com/news/1637734, last accessed August 19th, 2021.

[1151] The proceedings of the SJC (Supreme Judicial Council) u/Art. 209 of the Constitution of Islamic Republic of Pakistan, 1973.

[1152] Pursuant to Article 182 (the appointment of ad hoc judge) of the Constitution of the Islamic Republic of Pakistan, 1973.

[1153] Dawn, August 9th, 2021. Also see, Editorial available at https://www.dawn.com/news/1637734, last accessed August 19th, 2021.

[1154] It seems pertinent to note here that Justice Miss. Aalia Neelum was made the first Female Chief Justice of LHC, Lahore vide Government of Pakistan, Ministry of Law and Justice Notification No.f.1(1)/2023-A.II(b). dated 10th July, 2024.

[1155] Of Lahore High Court, Lahore.

shattered.[1156] Much like the elevation of Justice Muhammad Ali Mazhar of the SHC, whose appointment was reckoned by the legal circles as having gone against the principle of seniority and had stirred controversy, Justice Ayesha's appointment, too had been questioned.[1157]

The issue of ad hoc appointment was not new but the unwritten mode of offering and effort to appoint CJ Ahmed Ali M. Sheikh was newer. It is to be appreciated that in the past eighteen (18) Judges of different HCs or the apex court of Pakistan had served the top court in their capacity as ad hoc Judges during different periods of time. After the end of their term as ad hoc Judges, some of them became permanent Judges of the apex court, whereas one was reverted to his parent HC and then again was elevated to the SCP as a permanent judge. A few SC Judges, after their retirement, became ad hoc Judges of the apex court. Many among the ad hoc Judges later became the CJP.[1158]

[1156] *See,* Anna Dziedzic, 'To Join the Bench and Be Decision-Makers': Women Judges in Pacific Island Judiciaries (March 1, 2022). In Melissa Crouch (ed.), Women and the Judiciary in the Asia-Pacific (Cambridge: Cambridge University Press, 2021), 29-65, Available at SSRN: https://ssrn.com/abstract=4242359 or http://dx.doi.org/10.2139/ssrn.4242359, last accessed 25.08.2024. though this Article pertains to empirical data about Pacific's nine states only, it examines how the criteria and processes for judicial appointment – including the distinctive use of foreign judges – affect the appointment of women to the judiciary.

[1157] Dawn, August 14th, 2021. Also available at http://www.epaper.dawn.com/authors/2677/editorials, last accessed August 14th, 2021.

[1158] Recently, J. Mandokhel and J. Tariq Masood were appointed in SCP as ad hoc judges in 2024. In the past, Justice S.A. Rehman, a judge of the then West Pakistan Lahore High Court, was appointed as an ad hoc judge of the apex court where he served from March 2, 1955 to May 23, 1955. He later became a permanent judge of the apex court where he served from April 2, 1958 to March 1, 1968. Justice Rehman also became the Chief Justice of Pakistan (CJP) during that period.

Likewise, Justice Waheeduddin Ahmed, the father of Justice Wajeehuddin Ahmed, was a permanent judge of the apex court from Sept 22, 1969 to Sept 20, 1974. He was then appointed as an ad hoc judge of the apex court for the period between May 23, 1977 and Feb 6, 1979.

Justice Nasim Hassan Shah was appointed as an ad hoc judge of the Supreme Court from the Lahore High Court (LHC) during the period between May 18, 1977 and June 14, 1979. During that period, he was also a member of the seven-judge bench which upheld the death sentence of former Prime Minister Zulfikar Ali Bhutto in a split verdict by four to three during the military regime of Gen Ziaul Haq, who had overthrown the Pakistan Peoples' Party (PPP) government in July 1977. Justice Shah was later appointed as a permanent judge of the apex court where he served from June 1979 to April 16, 1993 and also became the CJP.

Justice Shafi-ur-Rehman of the Lahore High Court (LHC) was appointed as an ad hoc judge of the apex court where he served from June 14, 1979 to July 29, 1981. He then became a permanent judge of the apex court and served from July 31, 1981 to Feb 15, 1994.

Justice Saad Saood Jan of the LHC served as an ad hoc judge of the apex court from Oct 5, 1986 to March 24, 1987 and then as a permanent judge from March 25, 1987 to June 30, 1996. During that period, he was appointed as an acting chief justice, but he was never made the CJP. He was later appointed as chief election commissioner, supervising the 2002 referendum to allow Gen Musharraf to continue serving as president of the country.

Justice Irshad Hasan Khan of the LHC was made an ad hoc Judge of the SCP from Oct 19, 1994 to May 29, 1995. He served as a permanent judge of the apex court from May 30, 1995 to Jan 25, 2000. Justice Hasan later became the CJP and validated the 1999 coup by delivering a judgment cited as *Syed Zafar Ali Shah* case.[1159] Justice Nasir Aslam Zahid, was made an ad hoc Judge of the SCP from Jan 28, 1991 to April 28, 1991. He was later reverted to the SHC and again elevated as a permanent Judge of the SCP where he served from April 18, 1996 to Jan 26, 2000. Justice Zahid was one of the few judges who refused to take the oath under the PCO.[1160]

Justice Ramday's appointment as an ad hoc Judge also led to a tussle between the Executive and the Judiciary. The standoff ended after a rare meeting between then Prime Minister Yousuf Raza Gilani and then CJP Iftikhar Chaudhry. The Prime Minister had

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Justice Karamat Nazir Bhandari of the LHC was made an ad hoc judge of the Supreme Court from Sept 7, 2002 to Dec 31, 2003 and after that he retired.
Justice Fakhruddin G. Ebrahim of the Sind High Court (SHC) was made an ad hoc judge of the apex court where he served from June 17, 1980 to March 25, 1981 before retirement.
Justice Mukhtar Ahmed Junejo of the SHC was made an ad hoc judge of the Supreme Court from Oct 19, 1994 to Feb 21 1995 and later as a permanent judge from March 31, 1996 to Feb 19, 1998.
Justice Mamoon Kazi of the SHC served as an ad hoc judge of the apex court from Feb 22, 1995 to April 14, 1996 and then as a permanent judge from Nov 4, 1997 to Jan 26, 2000.
Justice Hamid Ali Mirza, a judge of the SHC, was made an ad hoc judge of Supreme Court from Sept 14, 2005 to Sept 13, 2007 and then as a permanent judge from April 24, 2000 to Sept 13, 2005.
Justice Muhammad Bashir Jehangiri, a judge of the Peshawar High Court (PHC), was made an ad hoc judge of the apex court from Feb 22, 1995 to March 29, 1996. He became a permanent judge from March 30, 1996 to Jan 6, 2002 and also served as the CJP.
Justice Khalilur Rehman Ramday served as a permanent Judge of the SCP from Jan 10, 2002 until Jan 12, 2010. After his retirement, he was made an ad hoc judge of the apex court where he served from Feb 18, 2010 to Feb 17, 2011. Justice Ramday also headed a 13 Judges' SC Bench which reinstated Justice Iftikhar Muhammad Chaudhry as the CJP after he was deposed by Gen. Musharraf on March 9, 2007.
Justice Ghulam Rabbani served as a permanent judge of the Supreme Court from Sept 14, 2006 to Oct 19, 2009 and was then appointed an ad hoc judge till Oct 19, 2011.
Similarly, Justice Khilji Arif Hussain was a permanent judge of the apex court from Sept 9, 2009 to April 12, 2014 and after his retirement he was retained as an ad hoc judge from Dec 14, 2015 to Dec 13, 2016.
Justice Tariq Parvez served as a permanent judge of the Supreme Court from Oct 20, 2009 to Feb 14, 2013 and after his retirement he was made an ad hoc judge from Dec 13, 2015 to Dec 13, 2016. *See,* Dawn, August 19th, 2021. Also available at https://www.dawn.com/news/1641494/18-judges-served-on-ad-hoc-basis-in-sc, last accessed August 19th, 2021.

[1159] Syed Zafar Ali Shah vs. Federation of Pakistan, PLD 2000 SC 869.

[1160] The same was issued by military dictator Gen. Pervez Musharraf on 3rd N0vember 2007. *See,* http://www.pakistani.org/pakistan/constitution/post_03nov07/pco_1_2007.html, last accessed 13th of February 2022. The Provisional Constitutional Order, popularly known as PCO, is an emergency and extra-constitutional order that suspends either wholly or partially the Constitution of Pakistan— the supreme law of land. The PCO fulfills and acts as the temporary order while the constitution is held in abeyance or suspension. In the constitutional history of Pakistan, PCOs have been issued by the military regimes.

surprisingly reached a farewell dinner hosted in honour of Justice Ramday where he invited the CJP for a meeting the next day where the demand for appointment of Justice Ramday was accepted. However, the SCP later gave up its decision to extend the tenure of Justice Ramday for another term in view of the public uproar and criticism.[1161]

This data clearly shows that unlike case of Justice Ahmed Ali Sheikh of SHC, the only distinguishable feature is that none of the Judges was CJ of any HC when they were appointed to the SCP as ad hoc Judges. As such, whole of this story resonates the assertion of nepotism.[1162] The episode also clarifies that there are no written law and rules or they are sacrificed for the better option of unwritten principles of law when it comes to appointments to the judicial seats in constitutional courts of the country.[1163] This also goes on to show that CJP is all in all and has the final say in a stereotypical one man show in selection of Judges in the Superior Judiciary of the Country to curb which aspect 26th Amendment has been passed.

5.6. The Consultative Process in Appointment of Judges of Superior Judiciary.

Nowhere it is mentioned in the Constitution regarding appointment/ elevation as SCP Judge or HC Judge that the opinion of the consultee i.e., CJ concerned is binding on the President.[1164] The judiciary's role is only to interpret the law created by the legislature. It appears that in absence of well-defined precincts, Judiciary can leave aside Constitution's express provision(s) by grounding power of interpretation on phenomena of unwritten and unconstitutional constitutionalism in Pakistan. On the basis of some apparent word or

[1161] Dawn, August 19th, 2021. Also available at https://www.dawn.com/news/1641494/18-judges-served-on-ad-hoc-basis-in-sc, last accessed August 19th, 2021.
[1162] Press release of Pakistan Bar Council dated 26th July 2021. Also somewhat same assertion was made in another press release of Pakistan Bar Council. *See,* Press Release of Pakistan Bar Council dated 05th August 2021.
[1163] The expression 'constitutional courts' pertains to HC, FSC or SCP. It is pertinent to mention here that idea of Federal Constitutional Court (FCC) was conceived in 26th Constitutional Amendment 2024. However, the idea was replaced with idea of Constitutional Bench in SCP in the final draft thereof.
[1164] Articles 177 and 193 of the Constitution of Islamic Republic of Pakistan, 1973.

provision of law, unconstitutional constitutional assertions are made by the superior judiciary in the name of interpretation of the Constitution.[1165]

5.6.1. Principles of Natural Justice.

Rules of natural justice are principles ingrained into the conscience of men. They are not embodied rules. Being means to an end and not an end in them, it is not possible to make an exhaustive catalogue of such rules. The principles of natural justice are easy to proclaim, but their precise extent is far less easy to define.

`Natural justice' understandably means no more than `justice.' But what is `justice'? It is a question which has been asked for thousands of years by distinguished scholars. According to Socrates justice means "to do one's own business and not to be a busybody is justice."[1166] The phrase "natural justice" is not capable of a static and precise definition. Natural Justice was considered as that part of natural law which relates to the administration of justice.[1167] According to Lord Denning, "justice is what the right thinking members of the community believe to be fair."[1168]

The concept of natural justice is a combination of certain rules[1169] application whereof is to be decided by the court itself in accordance with applicable law. However, in exceptional cases, the application of the rules may even be excluded, as was done in

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[1165] Nadeem Ahmed Adv. vs. Federation of Pakistan (FOP), PLD 2010 SC 1165. For debate on an unwritten set of gap-filling principles *see*, Giancarlo Carozza, Originalism and the Problem of General Law (April 26, 2023). New York University Law Review, Vol. 98, Forthcoming, Available at SSRN: https://ssrn.com/abstract=4475845, last accessed 03.10.2024.

[1166] Plato, The Republic, Book 4, On Justice, Section 433a.

[1167] Paul Jackson, Natural Justice. Sweet & Maxwell; 2nd edition (January 1, 1979), ISBN-10: 0421247908, p. 1. Also available on https://www.abebooks.com/book-search/title/natural-justice/author/paul-jackson/, last accessed on 09-05-2024.

[1168] Per Lord Denning in "The Road to Justice" which prints collection of addresses given by Lord Denning while visiting Canada and United States of America as the guest of the Canadian Bar Associations and the American Bar Associations with the approval and consent of Lord Denning of it being published . Toronto: Canada. Carswell Co. (1955), PP. viii, 118.

[1169] i.e. `audi alteram partem' (nobody should be condemned unheard) and `nemo judex in re sua' (nobody should be a Judge in his own case or cause).

Khursheed Anwar Bhinder case.[1170] When there is principle of audi alterem partem, holding that it is not available to someone otherwise directly affected thereby shows that such a finding is based on unwritten and unstructured discretion.

5.6.2. The Bindingness of Consultation? The Written Absence in Law, the Creation of the Same qua Interpretation.

Regarding appointment of HC Judges, the factum that none other than the CJ can be the consultee,[1171] again *Justice Khurshid Anwar Bhinder* is a case on point. In this case it was observed that the persons, who were notified as Judges of SCP or of HCs, were held to have no *locus standi* to seek an order that they were validly appointed as Judges. It was added that their removal was justified as the notification of appointment had not been issued after consultation with the CJP.[1172] SCP observed that the court had deliberately withheld its comments lest it might prejudice the case of Judges in future before the SJC. Perhaps these comments were withheld because there was no justification to hold that the consultation with Justice Abdul Hameed Dogar was not proper consultation[1173] in the sense that the SCP had already sanctified the *coup d e'tat* of Gen. Pervez Musharraf where after it was not possible to say that actions taken in consequence of authority flowing from such sanctified entity were illegal or unlawful. As such, the doctrine of audi alteram partam could not be pressed into

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[1170] Justice Khurshid Anwar Bhinder and others vs Federation of Pakistan and another, PLD 2010 SC 483.

[1171] Art.193 of the Constitution of the Islamic Republic of Pakistan, 1973. *See also*, Supreme Court Advocates-on-Record Association vs. Union of India, AIR 1994 SC 268, at pages 272 and 273, per Kuldip Singh, J. (also see p. 442); 14th Report of the Law Commission (India) 1973. On independent Court qua right to fair trial, *See*, Willoughby: Constitution of United States. New York: Baker, Voorhis and Company (1910), Second Edition, Vol. II., at page 179.

[1172] Justice Khurshid Anwar Bhinder and others vs. Federation of Pakistan and another, PLD 2010 SC 483, at P. 45.

[1173] On consultation, *see*: Moulana Habib-ur-Rehman Usmani and Moulana Mufti Muhammad Shafi Sahib: Islam Main Mashwara Ki Ahmiat, published by Idara-e-Islamiat, Lahore, (2017), at page 47. Khadduri, Majid and Liebesny, Herbert, J.: Law in the Middle East', see the chapter on the subject of "Origin and Development of Islamic Law", at p. 52 about appointment of *Na'ibs*.

service which otherwise was held to be not universally recognized due to certain limitations.[1174]

In another case, while observing that CJP's role had been reduced to merely one vote as against *Al Jehad Trust* case,[1175] the matter was referred to Parliament for reconsideration.[1176] However, it is also to be noted that before the establishment of JCP, the Judges used to be appointed by the concerned government in consultation with CJP concerned. It is to be noted that this reference was for soliciting "the collective wisdom" of the same Parliament which had made the (earlier) amendment.[1177] Interestingly and most expectedly the Parliament of Pakistan copy pasted the appointment process to a larger extent the proposed amendment by the SCP.[1178]

It is to be remembered that in another case, the SCP annulled numerous appointments and came up with a criteria for appointment of HC Judges. It was held that the recommendations of the CJ regarding judicial appointments would be binding.[1179] The 'consultation' mentioned in Articles 177 and 193 of the Constitution was interpreted to be meaningful and consensus oriented and if the Executive opted to differ with the opinion of CJ, it was bound to record justiciable reasons.[1180]

[1174] Justice Khurshid Anwar Bhinder and others vs. Federation of Pakistan and another, PLD 2010 SC 483, at para 26.

[1175] Al-Jehad Trust vs. Federation of Pakistan (PLD 1996 SC 324).

[1176] Nadeem Ahmed Adv. vs. Federation of Pakistan (FOP), PLD 2010 SC 1165. For debate on 'constitutional supremacy' and the idea that the written constitution sits above everything else within the state, *see also*, Brian Christopher Jones, A (Brief) Case Against Constitutional Supremacy (April 20, 2023). BC Jones, 'A (Brief) Case Against Constitutional Supremacy' in R Johnson and Y Yi Zhu, Sceptical Perspectives on the Changing Constitution of the United Kingdom (2023), Available at SSRN: https://ssrn.com/abstract=4856658 or http://dx.doi.org/10.2139/ssrn.4856658, last accessed 03.11.2024.

[1177] Eighteenth constitutional amendment, per Act x of 2010.

[1178] Nadeem Ahmed Advs. vs. Federation of Pakistan (FOP), PLD 2010 SC 1165, para 10.

[1179] Al-Jehad Trust vs. Federation of Pakistan, PLD 1996 SC 324, at 363-67.

[1180] Hamid Khan, Constitutional and Political History of Pakistan, 2nd ed., (Karachi: Oxford University Press, 2009), p. 436. For the comparative study on practice of the U.S. Supreme Court consulting state laws or adopting state court doctrines to guide and inform federal constitutional law, *see*, Gerald S. Dickinson, A Theory of Federalization Doctrine (January 22, 2024). Dickinson Law Review, Vol. 128, p. 75, 2023, U. of Pittsburgh Legal Studies Research Paper No. 2024-02, Available at SSRN: https://ssrn.com/abstract=4702746, last accessed 04.10.2024.

The question remains if the opinion of the CJ of HC, proposing the names of lawyers for Justiceship, should also be binding on the CJP. However, the answer lies in the unwritten judicial policy that such an opinion is not binding and the CJP is at liberty to accept or refuse the names so forwarded by the CJ of the HC concerned. As such, the unstructured discretion of the CJP is grounded in the unwritten judicial policy where under the CJP requires and the case law, like for example *Judges' case* of 1994, endorses such a requirement of bindingness of opinion of CJP.

Riaz Ul Haq[1181] was a case pertaining to Constitutional Petition under Art. 184(3) of the Constitution wherein the appointment of Chairman and Members of Federal and Provincial Service Tribunals vis-a-vis procedure and its constitutionality with specific reference to concept of 'consultation' with the CJP or CJ of the respective HC came under consideration.[1182] It is to be appreciated that although none of the S.3 of the Service Tribunals Acts[1183], and the rules (regarding Service Tribunals)[1184] provide for consultation with the respective CJ. However, despite there being no written requirement about consultation in either of these enactments and rules,[1185] the "consultation" was read to be existing there by holding that since (Service) Tribunals established under Art.212 of the Constitution fell

[1181] Riaz Ul Haq vs. FOP, PLD 2013 SC 501.
[1182] Supreme Court in this case declared that SS.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 were void, ultra vires to the Constitution and unconstitutional being in derogation of Arts.2A, 9 and 175 of the Constitution.
[1183] S. 3 of Punjab Service Tribunals Act (IX of 1974), Balochistan Service Tribunals Act (V of 1974), Khyber Pakhtunkhwa Service Tribunals Act (I of 1974) and Sindh Service Tribunals Act (XV of 1973).
[1184] R.1 of Federal Service Tribunal (Chairman and Members) Service Rules, 1983 and R.2 of Service Tribunals (Qualifications of Members) Rules, 1974.
[1185] For structural argumentation vis-à-vis unwritten constitutional principles see, Andre Matheusik, Unfinished Business in Unwritten Justice: Unwritten Constitutional Principles After Toronto (City) v Ontario (Attorney General) (October 2, 2023). Alberta Law Review, Volume 61: Issue 4, Forthcoming, Available at SSRN: https://ssrn.com/abstract=4792876, last accessed 03.11.2024.

within the contemplation of Art.175 (3) of the Constitution, the requirement had to be adhered to while making requisite appointment.[1186]

This case shows that the finding of the court was based upon an unwritten law in the sense that no doubt there was resort to Art. 212 and 175 of the Constitution, 1973 but neither the Constitutional provisions nor the Service Acts nor the Service Rules provided for the consultation of CJ concerned, not to mention the 'meaningful consultation.' However, despite there being no written requirement in this regard, holding that the requirement for 'meaningful consultation' is to be deemed existing there due to the Service Tribunals being within the alleged contemplation of Art.175 (3) of the Constitution, 1973, *Riaz Ul Haq* appears to be a case where SCP read the meaning which was not only extraneous to either of them but was not written in there as well.

5.6.3. The Digging of Legislative Intention and the Limits of Interpretation.

A fundamental principle of constitutional construction has always been to give effect to the intent of the framers of the law and of the people adopting it. When the language of the statute plainly admits but one meaning, the task of interpretation can hardly arise.[1187] Therefore if the meaning of the language used in a statute is unambiguous and is in accord with justice and convenience, the courts cannot busy themselves with supposed intentions,[1188]

[1186] Riaz ul Haq Vs FOP, PLD 2013 SC 501, para 59. *See also*, Aaam Log Ittehad & another vs. The Election Commission of Pakistan & others, PLD 2020 Sind 616 Sindh, para 15.

[1187] State of UP vs. Vijay Anand Mohanaj, AIR 1963. SC 946; Ramsaka Singh vs. State of Biher (1992) 2 Pat. L.JR 598; State of Karmateka vs. Gopalkrishina Nelli, AIR 1992 Kant: 198, (1991) ILR Kant 2210: (1991) 2 Kant 11 270. Dayal Singh vs. Union of India (2003) 2 SCC 593 PUCL vs. Union of India (2005) 5 SCC 363. From the English jurisdiction, *see also*, Waugh vs. Middleton (1853) 8 Ex 352, p.356; Umadevi v Sundaram 1977 Ker LT 767. On purposive interpretation *see also*, Jacob Weinrib, The Essence of Rights and the Limits of Proportionality (January 10, 2023). The Promise of Legality: Critical Reflections upon the Work of TRS Allan (eds, Geneviève Cartier and Mark Walters), Forthcoming, Available at SSRN: https://ssrn.com/abstract=4321570, last accessed 19.09.2024.

[1188] N.S. Bindra, Interpretation of Statutes, 10th Edn. LexisNexis, (2007), at p. 458. See also, Mila Sohoni, The Major Questions Quartet (November 10, 2022). Harvard Law Review, Vol. 136, p. 262, 2022, San Diego Legal Studies Paper 22-026, Available at SSRN: https://ssrn.com/abstract=4274444, last accessed 31.07.2024.

however admirable the same may be because in that event they would be travelling beyond their limits.[1189]

But if the context of the provision itself shows that the meaning intended was somewhat less than the words plainly seem to mean, then the court must interpret. In that case primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself.[1190] They must, in general, take it absolutely for granted that the Legislature has said what it meant, and meant what it has said.[1191] If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone best declare the intention of the lawgiver.[1192]

The words of a statute must, prima facie, be given their ordinary meaning. Court must not shrink from an interpretation which will reverse the previous law.[1193] Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words.[1194]

At the same time, if the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation, court should avoid a construction which would reduce the legislation to futility and should rather accept the bolder

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[1189] Yates vs. United States, 1 L. Ed 2nd 1356, p 1387, per Harlan J: where the intention is clean there is no room for construction, no excuse for interpretation or addition; United States vs. Sphogue, 75 L. Ed 640. From the Indian jurisdiction, *see also*, Birla Jute Industries Ltd vs. Civil Judge, AIR 1993 Raj 73; Peerless General Finance and Investment Co. Ltd. Vs. Union of India (1987) 91 Cal WN 596; 5. Arul Nadar vs Authorised Officer, Land Reforms (1998) 7 SCC 157.

[1190] Maxwell, The Interpretation of Statutes' (12th Edition), at p. 286. *See also*, Salmond, On Jurisprudence, 12th ed. p. 132.

[1191] Earl Theodore Crawford, Statutory Construction. Thomas Law Book Company, (1940), pp.256-257. *Also see*, Maxwell on the Intemretation of Statutes, naves, 28 and 29.

[1192] Craies on Statute Law, at p. 66.

[1193] N.S. Bindra, Interpretation of Statutes, 10th Edn. LexisNexis, (2007), at p. 20.

[1194] Ibid, at p. 238. *See also*, Ryan Williams, Unconstitutional Conditions and the Constitutional Text (April 10, 2023). University of Pennsylvania Law Review, Vol. 172, 2024, Available at SSRN: https://ssrn.com/abstract=4414130, last accessed 23.09.2024.

construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.[1195]

These principles of interpretation show that when these limits are crossed it is like deciding more when it was not necessary to do.[1196] *Jurists Foundation* is a case where despite being aware of all these principles, the SCP did not observe that it was not necessary to decide more when it was not necessary to decide more.[1197] Such a finding was from a Judge whose legitimate expectation did not come true as of late[1198] to which aspect discussion would be made in the coming lines.

5.7. The Phenomena of Legitimate Expectation.

In his autobiography, Javed Iqbal J. has mentioned the incident of offer given to him to become CJ of LHC. This incident is directly related with issue of legitimate expectation of Judges to be elevated to the higher slot. He has narrated that he refused being at fourteenth number on the seniority list saying the thirteen Judges senior to him would be hurt as they had the legitimate expectation of becoming CJ(s). He has also narrated as how, on his refusal, Justice Aslam Riaz, eighth on the seniority list was elevated as CJ.[1199] This story also speaks about the other correlative issue i.e. consent. In the coming lines both these aspects are dilated upon.

[1195] N.S. Bindra, Interpretation of Statutes, 10th Edn. LexisNexis, (2007), at p. 247. *See also*, The Commissioner of Income Tax, vs. Sri J.H. Gotla, Yadagiri. Equivalent citations: 1985 SCR SUPL. (2) 711; AIR 1985 SC 1698; 1985 (4) SCC 343; 1985 TAX. L. R. 1443; (1985) 156 ITR 323; (1986) 1 APLJ 2; (1985) 48 CURTAXREP 363. For importance of marginal notes, *see*: Craies on 'Statute Law' (sixth Edn.), p. 197. *On catch words*, *see*: Thakurain Balrai Kunwar vs. Rae Jagatpal Singh (1904) 31 IA 132, 142.

[1196] Daniel E. Walters, The Major Questions Doctrine at the Boundaries of Interpretive Law (February 4, 2023). Iowa Law Review, Vol. 109, No. 2, pp. 465-540, 2024, Texas A&M University School of Law Legal Studies Research Paper No. 23-68, Available at SSRN: https://ssrn.com/abstract=4348024 or http://dx.doi.org/10.2139/ssrn.4348024, last accessed 31.08.2024.

[1197] Jurists Foundation vs. FOP, PLD 2020 SC 1.

[1198] Senior Puisne Judge of SCP Syed Mansoor Ali Shah's legitimate expectation doomed by dint of 26th Constitutional Amendment, 2024. Yahya Afridi J. was appointed as CJP despite being 3rd on the seniority list.

[1199] Justice (Rtd.) Dr. Javed Iqbal, Apna Gariban Chaak, (Urdu autobiography), Sange Meel Publications, Lahore. Chapter 8, at pp.152-154.

5.7.1. Consent and Legitimate Expectation.

It seems in order at this stage, to first deal with *consent* before discussing the idea of *legitimate expectation* because the latter seems to be flowing out of the former. The elevation of SHC Judge to SCP in 2021 made many among national intelligentsia raise eyebrows and also put SCP in embarrassing situation. The notification of ad hoc elevation of CJ SHC, supra, was unambiguously u/Art.182 (b). This shows two things: *firstly*, the provision did not envisage that a CJ could be invited to attend the apex court's sittings as an ad hoc judge; *secondly*, without prejudice to the argument, if at all one makes the submission that the CJ also is included in the definition of a Judge[1200] his consent will still be required because although he is a Judge he is also the CJ.

Consent, therefore, seemed to be essential. Even if it was not a matter that the court was dealing with on judicial side, it was undeniably closely associated with and squarely fell within the domain of the judicial policy of the country. However, as a result of this unwritten judicial policy the real stake holder i.e. litigant remained suffering as such because the lawyers boycotted legal proceedings in the superior and subordinate judiciary in Karachi as well as Hyderabad.[1201] This showed that authorities opted to go beyond the clearly defined limits.[1202] On the other hand, with the elevation of Justice Mazhar, the Supreme Court had attained its sanctioned strength of 17 and therefore it was decided that SHC's CJ be appointed as an ad hoc judge of the apex court.

An ad hoc appointment is made where there are no proper arrangements for permanent incumbent against the post and the sanctioned strength is not complete. This

[1200] Under Article 260 of Constitution of Islamic Republic of Pakistan, 1973.
[1201] Islamabad District Courts were no exception. The Notice of Islamabad District Bar Association was received regarding observing strike. The scholar still remembers there was near to no appearance in his Court as was also the case with courts of fellow Judges at District Courts, F-8 Markaz, Islamabad, in protest against the proposed appointment of Sindh High Court's Chief Justice Ahmed Ali M. Shaikh as an ad hoc judge of the Supreme Court. *See also*, Dawn, August 11th, 2021 https://www.dawn.com/news/1639995/sindh-lawyers-boycott-courts-over-ad-hoc-judge-Controversy, last accessed August 11th, 2021.
[1202] Art. 182 of (the Constitution of Islamic Republic of Pakistan, 1973) regarding Appointment of ad hoc Judges.

happens sometimes in government departments and the reason can be lack of time, existing exigency of the situation, non-availability of the requisite funds to do the needful etc. It would be pertinent to mention here that the District Judiciary usually remains understrength but there is no concept of appointing ad hoc Judges in District Judiciary of Pakistan.[1203] However, when it comes to Constitutional Judiciary, the law unambiguously clarifies that there are two eventualities which would necessitate the ad hoc appointment of a person to SCP; that are, lack of quorum and any other reason.[1204]

As regards the former, it is to be noted that in its history, SCP has never stopped functioning due to lack of quorum. So far as the second eventuality is concerned, however, the same was not mentioned while appointing CJ Sheikh of SHC. Rather, the initiation of the move appears to be motivated by power of the CJP who happened to be the Chairman of JCP also, based upon some unwritten law or at least at the cost of written law. The important aspect of the matter which brought the issue to an interesting twist was that the then CJ SHC dispelled the impression that he had at any stage accorded consent to attend SCP as an ad hoc Judge[1205] and therefore he would have no objection if he was elevated as the permanent Judge of SCP.[1206] Perhaps it was happening for the first time in the constitutional and judicial history of Pakistan and the reason was that either there were no written principles in what was

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[1203] As per Append. A U/R. 4 of Islamabad Judicial Service Rules, 2011, the total Strength of Islamabad Judicial Service is as: District and Sessions Judges (BPS 21& 22) are to be 15 but at the time of writing these lines on (01-06-2024) the working number is only 6 whereas 5 are on deputation from KPK and Punjab Judicial Services; Add. District and Sessions Judges (BPS 20) are to be 30 but only 11 are working whereas 12 are on deputation from Sindh and Punjab Judicial Services; Senior Civil Judges cum Magistrates (BPS 19) are to be 06 but at the time of writing these lines the working number is only 5 whereas 1 seat has been left as vacant for last two years (since 2022) despite availability of competent candidate(s); Civil Judges cum Magistrates (BPS 18) are to be 50 but at the time of writing these lines the working number is only 32 whereas 15 are on deputation from Sindh and Punjab Judicial Services.
It is pertinent to mention that vide Notification No. 82(10)/Conf./IHC/3053 dated 02/07/2024 three (03) ADSJs of IJS were promoted by IHC, Islamabad as DSJs (BPS-21). Similarly, vide Notification No. 82(11)/Conf./IHC/3079 dated 10/07/2024 five Senior Civil Judges of IJS were promoted by IHC, Islamabad as ADSJs (BPS-20).

[1204] Art.182 of the Constitution, 1973.

[1205] Through his letter of August 5, 2021 to the Judicial Commission of Pakistan (JCP). These letters were written by CJ Sheikh of SHC on August 05, 06 and 10, 2021. *See*, Dawn of August 17, 2021.

[1206] Dawn, August 9th, 2021. Also available at https://epaper.dawn.com/DetailNews.php?StoryText=09_08_2021_001_005 , last accessed August 9th, 2021.

happening or it was due to the fact that the written principles as handed down in judgments on the point were not being adhered to.[1207]

Strangely, notification requiring Mr. Sheikh, CJ SHC at that time, to attend sittings at SCP as an ad hoc Judge was issued.[1208] However, once again he refused. Rather, the said notification was considered by Justice Sheikh to be without any lawful authority and of no legal effect.[1209] Whole of this story created a state of constitutional fiasco. This all was at the cost of written principles of law. No doubt there was no litmus test on the judicial side where against this issue of elevation of CJ SHC could have been tested, being relatively new. However, the same could have been avoided had the authorities stuck to the written principles of law and SCP would have been within its mandate in following the precedents of *Nadeem Ahmed Adv*. and *Al Jehad Trust.*[1210]

Whereas appointment process has been continuously linked to independence of judiciary in different judgments[1211], the closely related natural and psychological aspect of *legitimate expectation* has not been adhered to with the due weightage. In the meeting of JCP dealing with elevation of Justice Mazhar and appointing CJ SHC as ad hoc Judge of SCP, it was discussed that seniority cum fitness principle did not apply here except in civil service and armed forces [1212] but the presumption came with seniority that there was legitimate expectation of the senior most person.[1213]

[1207] Press release of Pakistan Bar Council dated 26th July 2021. For the impact of these "constitutional silences" on the Kenyan legal system, *see also*, Victor Kiptoo Chumba, Interpreting the Unwritten: Kenyan Courts and the Voices of Constitutional Silence (May 20, 2024). Available at SSRN: https://ssrn.com/abstract=4869322 or http://dx.doi.org/10.2139/ssrn.4869322, last accessed 03.10.2024.
[1208] Notification No. F. 2(1)/2021-A of August 16, 2021.
[1209] *See*, Dawn of August 17th, 2021.
[1210] Nadeem Ahmed Adv. vs. Federation of Pakistan (FOP), PLD 2010 SC 1165.
[1211] *See*, Nadeem Ahmed Advs. vs Federation of Pakistan (FOP), PLD 2010 SC 1165; Mahmood Khan Achakzai vs. Federation of Pakistan (PLD 1997 SC 426); Syed Zafar Ali Shah vs. General Pervez Musharraf, Chief Executive of Pakistan (PLD 2000 SC 869); Wukala Mahaz Barai Tahafaz Dastoor vs. Federation of Pakistan (PLD 1998 SC 1263) and Malik Asad Ali vs. FOP (PLD 1998 SC 33).
[1212] Dawn, August 15th, 2021.
[1213] Minutes of meeting of Judicial Commission of Pakistan (JCP). They were published in the Express Tribune of August 15th, 2021. Also available on https://www.tribune.com.pk/story/2313628/why-jcp-didnt-choose seniorhcjudges?_gl=1*1xewfmj*_ga*yw1wlu03dffhchn0ynnhn01tm0rzufdrq0fwa1vwy3nyrhatuus1z1ldttlnu0u 3n2rarwdon0hwazi3tvvlm0nsnew, last accessed on 15-08-2021.

This is precedent where under the collective wisdom of the elected representatives of the citizenry of Pakistan subdued to the 'super collective wisdom' of the unelected few whereby the Parliament amended Art.175-A without any reservation.

No doubt Art.182 of the Constitution, 1973 was not framed as such, but it carries the element of *legitimate expectation* within its fold. This expectation flows from the idea of *consent* as mentioned in clause (b) thereof. The said legitimate expectation appears to be two fold. Firstly, it is the expectation of the incumbent CJ of the concerned HC to be elevated as permanent Judge of SCP. Secondly, it is the legitimate expectation of the senior puisne Judge of that HC that he would be becoming the CJ of the HC after elevation of the predecessor to SCP. It seems appropriate to discuss the issue of such *legitimate expectation* vis-a-vis unwritten judicial policy.

5.7.2. Legitimate Expectation of Members of Judiciary and Unwritten Judicial Policy.

The concept of legitimate expectation is a concept not specific to the members of Constitutional Judiciary, though it is generally confined to them only. In fact, there is other side of this concept i.e., District Judiciary regarding which a Senior Advocate SCP says that "it should be kept in mind that the subordinate courts are as corrupt as they are allowed to be by the High Courts."[1214] It is not only the Bar heads that have generally branded them as such without proving the assertion, the Judiciary's heads are also found towing the same line. Regarding nominees from the cadre CJP Qazi Faez Isa shared his personal experience as CJ of BHC recalling that a case of promotion of a JO came before him. He was informed that he did not write the judgments by himself but his stenographer did that.[1215]

[1214] Hamid Khan, A History of the Judiciary in Pakistan. Oxford University Press, Karachi. 2016, p.7.
[1215] Express Tribune, March 05th, 2022. Also available at https://tribune.com.pk/story/2346575/jcp-panel-meets-on-march-9-to-discuss-criteria-of-appointments?amp=1, last accessed March 26th, 2022.

It is really unfortunate that such a view is of a person who is none other than the Ex-CJ of a HC, and then CJP. Such an approach of hearing the advocates and developing perception of general public against a member of District Judiciary, at the cost of principle of natural justice[1216], is quite common. When he/ Qazi Faez Isa, CJ heard this about a Judge subordinate to him, by all cannons of applicable law and dictates of justice and professional ethics and morality, he was bound to hear the other side against whom the decision was taken. As such the Judge suffered on two counts: *firstly*, not being elevated to High Court despite the legitimate expectation, and *secondly*, his image was tarnished, despite the fact that he might have been a very committed, professional and dedicated Judge.

Inter se seniority of eligible DSJs, for being elevated to Constitutional Judiciary, also gives birth to *legitimate expectation.* However, it is to be noted that once the case of such a member has been considered, it means, for all practical purposes, that all the pros and cons of his case, including but not limited to seniority and merit as well as fitness are also evaluated. If such a person is not considered and his/her name is dropped, should he be again considered with the same case and allied eventualities? For that to happen should the seat be again advertised? However, answers to these questions are not available as by virtue of unwritten law the seats in Constitutional Judiciary are not advertised.

Anyhow, in any situation, the next eligible candidate ought to be considered. However, by sheer working of some unwritten law and judicial policy things do not happen like that in our part of the world. The process is repeated and meeting of JCP is called again to consider the name of such a person again. There are cases of persons whose case could not see the light of days for more than once and at the end of the day he was finally elevated.[1217] For how many times he or she is to be considered after having not been elevated? Should the

[1216] i.e., *audi altrem partem.*
[1217] Case of J. Sohail Nasir/ ex- DSJ Islamabad West is one such case. He failed to sail through for thrice. Lastly in May 2021 he was elevated by including his name at the eleventh hour in the list of proposed candidates.

process of being considered continue till the case of such a person succeeds? Again the unwritten judicial policy screens the answers of these questions.

When it comes to legitimate expectation of a member of District Judiciary at the time of his elevation to HC, the things are settled by dint of working of unconstitutional constitutionalism,[1218] all at the cost of written law.[1219] For example, in *Asad Ali,*[1220] the appointment of Sajjad Ali Shah as the CJP was under consideration. Since concept of legitimate expectation of other Judges was involved, it was held that it was a very much live controversy requiring authoritative determination by SCP for good.[1221] It was held that since the decision in *Al-Jehad Trust case*[1222] was rendered by a SC Bench, presided over by Justice Sajjad Ali Shah therefore it could not effectively decide the controversy relating to the validity of his appointment as the CJP. In support of this reasoning, it was also asserted that the unconstitutional appointment of Sajjad Ali Shah as the CJP "gave rise to a recurring cause of action."[1223]

[1218] That there can be no unwritten bodies of law that judges ascertain and apply just as they do written law *see*, Tyler B. Lindley, Interpretive Lawmaking (February 2, 2024). Virginia Law Review, Vol. 111, (forthcoming 2025), Available at SSRN: https://ssrn.com/abstract=4714692 or http://dx.doi.org/10.2139/ssrn.4714692, last accessed 28.07.2024.

[1219] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2005) 115 Yale Law Journal 1346. Richard Bellamy, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy (Cambridge University Press 2007). John Smillie, 'Who Wants Juristocracy' (2005) 11 Otago L. Rev. 183. On the issue that entrenchment of any rights are incompatible with democratic ideals, *See*, Jeremy Waldron, Law and Disagreement (Oxford University Press 1999), pp 221-22.

[1220] Malik Asad Ali vs. FOP (PLD 1998 SC 33). It was a short order which was reported as such. It disposed of Constitutional Petition, No. l -P of 1997, Akhunzada Behrawar Saeed vs. Mr. Justice Sajjad Ali Shah and others; Constitutional Petition No.248-Q of 1997, Malik Asad Ali vs. Federation of Pakistan and others and Constitutional Petition No.55 of 1997, Nihal Hashmi vs. Federation of Pakistan and others, all three petitions filed under Article 184(3) of the Constitution of Islamic Republic of Pakistan challenging directly the appointment of Mr. Justice Sajjad Ali Shah as the Chief Justice of Pakistan, and a Miscellaneous Application No.992 of 1997 in Constitutional Petition No.140-Q of 1996, Munir Ahmed vs. Barra Khan and others, attacking collaterally the validity of the appointment of Mr. Justice Sajjad Ali Shah, as the Chief Justice of Pakistan.

[1221] Malik Asad Ali vs. FOP (PLD 1998 SC 33), para 7. For a detailed discussion on the test of proportionality, *See*, Kai Möller, 'Proportionality: Challenging the Critics' (2012) 10 International Journal of Constitutional Law 709, pp. 711-16. For debate on legitimate expectation vis-à-vis good governance *see*, Apoorwa Nanayakkara, Evolution and Application of the Doctrine of Legitimate Expectation in Administrative Law: A Comparative Analysis (April 20, 2020). Available at SSRN: https://ssrn.com/abstract=4532073, last accessed 23.09.2024.

[1222] Al Jehad Trust vs. Federation of Pakistan PLD 1996 SC 324.

[1223] Al Jehad Trust vs. Federation of Pakistan PLD 1996 SC 324. On high degree of comity amongst the Judges, see, Malik Asad Ali vs. FOP (PLD 1998 SC 33), at page 327, see also para 33 of Sindh High Court Bar Asspciation case (PLD 2009 SC 879).

This appointment was also said to be contrary to the decision of the SCP in *Al-Jehad Trust case.* Accordingly, SCP declared the same as invalid, unconstitutional and of no legal consequence.[1224] The substantive rationale why appointment of S.A. Shah was declared as such basically pertained to this concept of legitimate expectation. Even the professional comity among senior Judges and resultant acquiescence were said to be not an 'insurmountable hurdle' in that regard. As against the proclaimed authoritative determination by SCP, the matter, stricto sensu, continues to remain 'unsettled', all at the cost of written law.[1225] This legitimate expectation on the part of a JO is not something extraneous to written law. The constitution of Pakistan[1226] prescribes different modes of elevation to a High Court.[1227] It is to be noted that in computing the relevant period during which a person has been an advocate of a HC or held judicial office, any period shall also be included during which he has held judicial office after he became an advocate or, if the case so required, the period during which he has been an advocate after having held judicial office as well.[1228]

This written provision of law is pressed into service so as to give vent to unwritten law by way of some unwritten judicial policy. On the face of it this seems to be oxymoronic as to how an approach can be unwritten when it proceeds on basis of some written provision of law. The fact, however, remains that the approach is contradictory. It appears as such

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[1224] Malik Asad Ali vs. FOP (PLD 1998 SC 33). Mr. Justice Sajjad Ali Shah was restrained by the Quetta Bench of Supreme Court through an interim order passed in Constitutional Petition No.248-Q of 1997 from performing any judicial or administrative function as Chief Justice of Pakistan, on 26-11-1997. This order was re-affirmed by the Quetta Bench on 28-11-1997 after hearing the petitioner's counsel, the learned Attorney-General and Mr. S.S. Pirzada, the learned amicus curiae. Subsequently, the Full Bench also adopted and re-affirmed the order passed by Peshawar Bench on 28-11-1997 through its order dated 2-12-1997. Therefore, all orders passed by Mr. Justice Sajjad Ali Shah on or after 26-11-1997 in his capacity as the Chief Justice of Pakistan were held to be without lawful authority and of no legal effect. However, any orders passed or action taken by him prior to 26-11-1997 was held not be open to be challenged on the principle of exercise of power by Mr. Justice Sajjad Ali Shah as the de facto Chief Justice of Pakistan.

[1225] Louis Fisher, American Constitutional Law, Vital Speeches, No.24, Vol. XIX, P.761 (Oct. 1, 1953). *Cf.* Ran Hirschl, 'Epilogue: Courts and Democracy between Ideals and Realities' (2013) 49 Representations 361. In this context, *See also*, Lorraine Weinrib, 'The Postwar Paradigm and American Exceptionalism' in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press 2007), p 85.

[1226] Of 1973

[1227] A.193 of the Constitution of Islamic Republic of Pakistan 1973. It relates to appointment of High Court Judges.

[1228] Explanation to A.193 (2) of the Constitution of Islamic Republic of Pakistan 1973.

because this provision of law is pressed into service to the extent of, and in as much as it favours, the members of the Bar.

However, when it comes to deal with case of a JOs the same provision of law appears to have become redundant, or as if the same has been repealed, or for that matter, has gone off the statute book.[1229] When considering for elevation to Constitutional Judiciary, the case of member of Bar is reckoned on the touchstone of this provision of law but the case of a JO is not so tested on the touchstone of that very provision of law. It is inculcated into minds of young lawyers that members of District Judiciary are incompetent.[1230] Specifically speaking, this is not about Art.193 (2) (b); rather, it is a case of the applicability of Art.193(2) (c) that needs to be revaluated.

This very notion and image serve many-fold purposes. Firstly, it would be helpful in building superior image of the Bar in the minds of young lawyers as against the District Judiciary. Secondly, it would pave way for member of the Bar as against the member of District Judiciary to be better and superior contender for HC slot. Thirdly, the young lawyer would easily fall prey to towing the line of otherwise aggressive lawyer(s) who would be having big name and become prominent among lawyers' community. This prominence and big name would weigh much when it comes to garner votes for a slot within cabinet of District Bar Association, High Court Bar Association or provincial Bar Council. The successful election to a Bar would further make it easier that the name of the returned candidate is proposed as Judge of HC. This practice is in vogue on the basis of unwritten law since long but came to lime light only after the Black Coat movement for restoration of superior judiciary.[1231]

[1229] *See also*, Ronald Dworkin, 'The Judge's New Role: Should Personal Convictions Count?' (2003) 1 Journal of International Criminal Justice 4, pp. 11-12. (Judges are supposed to do nothing that they cannot justify in principle, a responsibility which both, politicians and priests can evade).

[1230] Hamid Khan, A History of the Judiciary in Pakistan. Oxford University Press, Karachi. 2016, p.7.

[1231] The scholar had just started law practice then. This movement started from Lahore Bar Association after the then CJP Iftikhar Muhammad Chaudhary was made defunct by the military dictator Pervez Musharraf. PCO was

The propaganda that members of District Judiciary are incompetent finds its place at the time of consideration for elevation. This works so as to give benefit to the Bar, potential member whereof gets smooth sailing. However, the fact remains that such propaganda is wholly baseless and emanates from mala fide. The only answer to this lies in the fact that if this is true how and why the concerned DSJs are confirmed as Judges after elevation. The reality is that incompetency as well as competency lies on both sides equally. If a member of the Bar is not confirmed should one say that whole of the concerned Bar is incompetent? The answer is obviously in negative. That being something obvious, scales must be settled equally and justly when it comes to proceed on basis of written law.

5.8. Appointment of Judges in India: Comparative Study.

The Chief Justice of India and the Judges of the Supreme Court are appointed by the Indian President.[1232] Appointment to the office of the Chief Justice of India (CJI) is to be of the senior most Judge of the Supreme Court of India (SCI). The Union Minister of Law, Justice and Company Affairs seeks the recommendation of outgoing CJI for the appointment of the next CJI and for a Judge of SC. Whenever there is any doubt about the fitness of the senior most Judge to hold the office of CJI, consultation with other Judges would be made for appointment of the next Chief Justice of India.[1233] After receipt of the recommendation of the CJI, the Union Minister of Law will put up the recommendation to the Prime Minister who will advise the President in the matter of appointment.[1234]

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brought into being but certain judges refused to take oath under the said PCO. Resultantly a large number of judges of Superior Judiciary were removed by the Musharraf regime. This movement was to restore these Judges back to their judicial seats.

[1232] Under clause (2) of Article 124 of the Indian Constitution, 1949. Regarding appointment of acting CJI, *see* Article 126 of the Constitution, 1949.

[1233] As envisaged in Article 124 (2) of the Constitution, 1973.

[1234] Memorandum of procedure of appointment of Supreme Court Judges, last updated: 11-08-2021. Available on (https://doj.govs.in/memorandum-of-procedure-of-appointment-of-supreme-court-judges/, last accessed on 06/11/2023.)

The CJI would ascertain the views of the senior most Judge SC who hails from the HC from where the person recommended comes but if he does not have any knowledge of his merits and demerits, the next senior most Judge in the SC from that HC is to be consulted. Each members of the collegium must transmit his opinion.[1235]

After receipt of the final recommendation of the CJI, the Union Minister will put up recommendations to the Prime Minister who will advise the President in the matter of appointment. On approval, the Secretary to the Government of India in the Department of Justice will inform the CJI and obtain from the person selected a certificate of physical fitness signed by a Civil Surgeon or a District Medical Officer. After signing of warrant of appointment by the President, the Secretary will announce the appointment and issue the necessary notification.[1236]

In case of need to fill the quorum of SC Judges, the CJI may, with the previous consent of the President and after consultation with the CJ of HC concerned, request a Judge of that HC to attend the sittings of the SCI.[1237] The CJI may, similarly, request a retired Judge of SCI to sit and act as a Judge of the SC.[1238] However, it is to be noted that the criticism on appointment of SC's Judges in India is almost the same as in Pakistan with the major difference of separate Collegium system for each Superior Court.[1239] Such a system has also not gone without criticism of converting itself into Judges' club and nepotism, all at the cost of written law.[1240]

[1235] Ibid.
[1236] i.e., in the Gazette of India.
[1237] Article 127 of the Indian Constitution, 1949.
[1238] Under Article 128 of the Constitution of India, 1949.
[1239] For comparative study of Judiciary and Executive affairs, *see also,* Dr. Ambedkar speech in the Constituent Assembly (of India) in, Constituent Assembly Debates 1949, Vol. 8, p. 258.
[1240] Sohail Anjum, How the Chief Justice and Judges are appointed in India? VOA, 23.10.2024. Also available at,https://www.urduvoa.com/a/how-are-judges-appointed-in-india-23oct2024/7835581.html, last accessed 28.10.2024. See also, O. Hood Phillips, and Paul Jackson, Constitutional and Administrative Law. Sweet & Maxwell, Eighteenth Edn. (2001), at p. 432.

5.9. Appointment and Elevation of a Qazi (Judge) under Islamic Law.

The appointment of a *Qazi* (Judge) has certain qualifications and conditions to hold the office under Islamic Law. The procedure of appointment in vogue shows that the written law does not carry the conditions and qualification of Islamic classical law. Under Islamic law some jurists have mentioned ten conditions of serving as a Judge.[1241] However, it is to be appreciated that requisite qualifications for appointment of *Qazi* are not specified even in a single Qur'ānic verse or Hadith of the Prophet (SAW). Hence the conditions of a *Qazi* mentioned by jurists are mostly dependent on inferences and deductions.[1242]

Faith is considered to be the basic foundations of every act and *Qaza'* is deemed to be like the legal guardianship. Therefore, a non-muslim cannot be a guardian for a muslim.[1243] The *Qazi* should be a major and a prudent person as his job requires wisdom and sagacity for deciding the litigation.[1244] A person who is rich and belongs to a noble family should be appointed as Qazi because he who is rich does not desire the wealth of other people. Moreover, he doesn't fear the consequences of his decisions.[1245] Much wisdom is contained in this saying but in the present era no guarantee can be given that the rich people are immune from temptation and devoid of avarice.

The jurists have disagreement on whether a female can be appointed as a Judge. Those who oppose her posting as such rely upon a saying of the Holy Prophet (S.A.W)[1246] in

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[1241] Tabsirat Al-Hukkam, 1/26. See also Al-Mawsu`ah Al-Fiqhiyyah, 33/295. The ten conditions are: being a Muslim; being of sound mind; being male; being free (not a slave); being an adult; being of good character; having knowledge; being one person (i.e., you cannot have two judges at the same time); not being blind or deaf, and not being mute or non-verbal.

[1242] Dr. Hassan Ibrahim Hassan Tareekhul Islam, (Urdu Transl.) 4 Vol, Darul muneef (2018), at p. 292.

[1243] Al Quran, Sura' Nisa, V.141. *See also,* Sura' Al Maidha, V.51.

[1244] "And the ruler is the guardian of the one who does not have a guardian." *See*, Sahi Abu Daud: 2083 *and*, Sunan Abu Daud: 4402. *Also see*, Al-Shawkānī, Muḥammad bin 'Alī, *Nayl al-Awṭār*, vol. 8 (Maṭba'ah Muṣṭafā al-Ḥalabī, 1961), 263.

[1245] Al' Wasaiq Ad'dauria Alma'niya Bihaqooq al Insan, Voulme 2, at p. 313.

[1246] "People ruled by a lady will never be successful." *See*, Sahi Al Bukhari, Kitab al Maghazi: 4163.

addition to an argument from Qur'ānic verse.[1247] The jurists have narrated that there is no such evidence that proves that a woman was given the responsibility of justice in the life time of the Holy Prophet (S.A.W.) or during the reign of al-Khulafā'al-Rāshdīn (*Righteous Caliphs*) and even after that period.[1248] According to the *Hanafi* point of view, a woman is eligible for holding the office of *Qazi* in cases where her evidence is acceptable as single evidence. Her evidence is acceptable in *T'azir* matters but not in *Hadood* cases.[1249] In *Hadood* and *Qisas* matters woman's decision is not valid and in other cases if her appointment has been made by the ruler, the decisions in those cases would be followed but the maker (ruler) would be sinful.[1250] Commentator of Quran Ibn Jarir Tabri (RA) is said to have considered making woman as Judge. However, Allama A'lusi (RA) has said that ascribing the decree in this regard to Ibn Jarrir Tabri (RA) is not correct.[1251]

It is asserted from the other side that in Islam women enjoy equal rights with men.[1252] The injunctions to men and women are similar in *Qur'ān* and *Sunnah* as their reward and punishment.[1253] However, in this regard the counter argument is that the Holy Prophet (S.A.W.) explained that the defect of intelligence is clear from the fact that the evidence of two women requires support from the evidence of men and the defect in *Dīn* (religion) is that sometimes the women don't have to offer prayer or to keep fasts.[1254]

[1247] "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means." *See*, Al Quran, Sura' Nisa, V. 34.
[1248] See: Wilaayat al-Mar'ah fi'l-Fiqh al-Islami (p. 217-250). It is unpublished Master's Thesis by Muhammad Anwar. See also, Al Quran, Sura' Al Baqara, VS.282.
[1249] Bidaayat al-Mujtahid (2/531); al-Majmoo' (20/127); al-Mughni (11/350).
[1250] Radd ul Mukhtar, Vol. 4, p.395.
[1251] Allama A'lusi, Rooh al Ma'ni, Vol. 19, p. 189.
[1252] Sajida Ahmed Chaudary, Conditions and Qualifications for Being a Judge in the Light of the Islamic Law. AL-BASEERA 7 (Vol.4 - Issue. 1) JUN-2015. Also available at: https://www.numl.edu.pk/journals/subjects/156102660914-AL-BASEERA%207%20(Vol.4%20-%20Issue.%201)%20JUN-2015.pdf, last accessed on 11-06-2024, pp. 39-58, at 47. *See also*, Al Quran, Sura' Al' Nisa, Verse No. 34 and.58. *Also see*, Sura' Toba, V. 67.
[1253] Al Quran.
[1254] Sahi Al Bukhari, Kitab al Maghazi: 4163. *See also*, al-Bukhaari: 4425).

One of the conditions upon which the Muslim jurists have disagreed among themselves is being knowledgeable and capable of interpretation.[1255] It is to be appreciated that the philosophy of administration of justice is to resolve people's matters amicably.[1256] The rationale behind suggesting condition of Ijtihād for a *Qazi* (Judge) is to empower him to pronounce his own opinion as what ought to be, and is the law. However, this concept is quite different from the modern concept of Judge who interprets law and makes it. In Pakistan, the opinions of SCP are binding on the lower courts of the country.[1257]

5.10. Limited Validity of Current Mode of Elevation.

Ex-CJP Umar Ata Bandial once emphasised that while elevating Judges to HCs, the presence of a "particular expertise" among them vis-a-vis needs of the courts to which they are appointed should be kept in mind.[1258] He said so in view of dearth of Judges in particular fields, civil and criminal, in different HCs. However, competence in this regard should be assessed with respect to written criteria and there ought to be some limits on working of courts otherwise based upon unwritten judicial policy, all at the cost of written law i.e., Constitution, 1973.

It is to be noted that one cannot justify the nomination of a junior Judge to the SCP from a HC by asserting, but without proof, that neither the CJ nor any of the senior Judges of

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[1255] It was narrated by Buraydah that the Holy Prophet (S.A.W) said: "Judges are of three types, one of whom will go to Paradise and two to Hell. The one who will go to Paradise is a man who knows what is right and gives judgment accordingly; but a man who knows what is right and acts tyrannically in his judgment will go to Hell; and a man who gives judgment for people when he is ignorant will go to Hell."Sahih Ibn e Ma'ja: 1887.

[1256] Al-Shawkānī, Fataḥ al-Qaḍīr, vol. 5, 453, Ibn Rushd, Bidāyah al-Mujtahid wa Nihāyah al-Muqtaṣid, vol.2 (Beirut: Dār al-Ma'rifah li al-Ṭabā' wa alNashr), at p. 449. Regarding assigning Mujtahid with the task of Justiceship, *see also*, Ibn Farḥūn, Ṭabṣirah al-Ḥukkām, vol. 1, at pp. 24-25.

[1257] Art.189 of the Constitution, 1973. U/Art. 201 of the Constitution the decisions of HC are binding on the courts under administrative control of the concerned HC.

[1258] He made the observation during a meeting of the Judicial Commission of Pakistan's Rules Committee which was held on March 9 and was also attended by Justice Maqbool Baqar, former Justice Sarmad Jalal Osmany, Attorney General for Pakistan (AGP) Khalid Jawed Khan and Pakistan Bar Council representative Akhtar Hussain. During the same meeting Justice Osmany recalled the criteria evolved by the English for appointment of judges under which "a judge should be a gentleman first and a gentleman last and the rest will follow." *See,* Dawn March 23rd, 2022. Also available at https://www.dawn.com/news/1681361/expertise-needs-of-courts-should-dictate-judges-elevation-cjp, last accessed 24th March 2022.

that HC wanted to be appointed to the SCP. It is to be appreciated that eagerness for appointment is not an endearing quality; rather the same may constitute a disqualifying factor.[1259] Example in this regard can be given of CJP Gulzar Ahmed who also bypassed the CJ of the SHC and senior Judges, saying that they did not meet the merit test, without having first established the criteria and the methodology to judge the merit. However, a few weeks later, the same CJP proposed the same Judge for appointment on ad hoc basis to the SCP. The question that remains unanswered to this day is whether he miraculously passed the elusive merit test by then? Incidentally, the requirements for appointment as a permanent Judge[1260] and as an ad hoc Judge[1261] of the SCP are identical and both categories of Judges exercise the same powers and do exactly the same work.

When there is no written law any move based upon some unwritten law or unwritten judicial policy could lead to functional anomaly of the very procedure involved.[1262] The controversy of Judges' appointment to SCP by elevation from respective HCs came to forefront with joint letter of SCP Judges when one third of Judges to SC were to be elevated from HCs.[1263]

Imagine all this happening within the top Court of the country and none other than the sitting and retired Judges indulging into acrimonious controversy for just elevating their favourite Judges from HCs to SCP. The Judges and SCP seemed to be failing and the State seemed to be no exception. In a country like Pakistan, such a fiasco seems to support the

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[1259] Article 206 (2), of the Constitution of Pakistan, 1973.
[1260] Article 177 of the Constitution, 1973.
[1261] Article 182 of the Constitution, 1973.
[1262] For comparative study of the role and function of "unwritten constitutional principles" in Canadian constitutional law and finding that these principles cannot, on their own power, invalidate state action as unconstitutional *see*, Brian Bird and Kristopher Kinsinger, Constitutional Exegesis, Animating Principles, and City of Toronto (March 1, 2023). (2023) 110 SCLR (2d) 38, Available at SSRN: https://ssrn.com/abstract=4391051, last accessed 03.10.2024.
[1263] Justice Isa and Justice Tariq Masood addressed the joint letter to Justice Umar Ata Bandial, Chief Justice of Pakistan, Justice ljazul Ahsen, member Judicial Commission of Pakistan (JCP), Justice Syed Mansoor Ali Shah, JCP member, Justice Sarmad Jalal Osmany, JCP member, Azam Nazeer Tarar, Federal Minister for Law and Justice, JCP member, Ashtar Ausaf Ali, Attorney-General for Pakistan and Akhtar Hussain, representative of Pakistan Bar Council, JCP member and Supreme Court Bar Association, through its president. *See also*, https://www.thenews.com.pk/amp/991752-two-sc-judges-say-cjp-undermined-judicial-commission, last accessed September 16, 2022.

interests of the status quo powers. The Judges of HC(s) are allowed to be elevated directly from the Bar without any written test. The arbitrary and unstructured power of the CJP, in proposing and trying to get his nominees through the process, is all at the cost of written constitutionalism.[1264]

The practice on the part of JCP is not only based upon unwritten judicial policy but is also illogical. It goes straight against the overall thrust that equals must be treated equally. A Judge and Bar member/ lawyer are not equal. They are obviously on different footings. Two members of the Bar elevated as Judges of HC would be equal and should be treated equally. Similarly, two DSJs elevated as such to constitutional judiciary are equal and should be seen through the same prism. The practice of reverting DSJ(s) to same post on being not confirmed brings a bad name to the institution and also weakens the very basis of HC.[1265]

There is another flipside of current mode and manner of elevation of Judges. The Constitution says that all persons are equal before the law. Article 36 of the Constitution provides protection to minorities, as well as their right to a proper representation within provincial and federal authorities, according to which the State will protect legitimate rights and interests of minorities.[1266] However, those lawyers who belong to minority section of society are mostly ignored and are not considered when it comes to elevation of members of Bar as Judges. The Constitution provides equal opportunity to citizens in every sphere of life, saving a few.[1267] The founding statement for the formation of Pakistan also clarified about this aspect that the minority in Pakistan would be considered equally when it came to

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[1264] Letter dated 27-12-2021 written by J. Qazi Faez Isa to the then CJP/Chairman of JCP namely Umer Ata Bandial.
[1265] Julian Rivers, 'Translator's Introduction', in Robert Alexy, A Theory of Constitutional Rights (English Tr. Julian Rivers) (Oxford University Press, USA 2010), p xviii.
[1266] Art. 36 of Constitution of Islamic Republic of Pakistan, 1973.
[1267] Art. 25 of the Constitution, 1973. For debate that each court has a clear constitutional mandate to create a law of constitutional characterization in Indian perspective *see also*, Claus, Laurence, The Law of Constitutional Characterization (2021). 33 National Law School of India Review 476 (2021), San Diego Legal Studies Paper No. 23-022, Available at SSRN: https://ssrn.com/abstract=4433760, last accessed 03.11.2024.

protection of political, administrative and other rights.[1268] Even the founder of Pakistan said so more than once.[1269]

However, the fact remains that in all the HCs of the country as well as in SC, not a single person belonging to Christianity, Judaism, Hinduism, Sikhism etc. is a Judge of Constitutional/Superior Judiciary at present. It is despite the fact that people belonging to these religions do form part of the Pakistani diaspora.[1270] Moreover, women have not been given due representation in the superior/Constitutional Judiciary in Pakistan as per their proportion in the population. It is also worth remembering that the superior Bars of the country approached the SCP requesting that Rule 3[1271] regarding discretionary powers of CJP in the Judges' appointment should be restructured.

5.11. CONCLUSION

The usefulness of current mode of elevation is not beyond suspicion. It suits those powerful bodies who in fact want to wield power and want to show their muscles on each and every incident where the obedience to law is required. The Judges are directly elevated from the Bar who in turn support the same and feel pride in holding that despite being on the bench they are still the advocates.[1272]

A wholesome approach must be adopted in order to reach a just and systematic mechanism for appointment of Judges. However, when there is an inevitable situation where it has become necessary to appoint judges from the bar for a special field the needful can be

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[1268] Hamid Khan, Constitutional and Political History of Pakistan, 2nd Edn. Karachi, Oxford University Press, (2009), p. 34.
[1269] *See*, Speeches and Writings of Mr. Jinnah, collected and edited by Jamil-ud-Din Ahmad, Volume II, pages 20-21, 24, 27-28, 31, 256-257, 259-260 and 389-290.
[1270] It is to be noted that A. R. Cornellious and Bhagwandas have graced the Constitutional Benches in the past. But at present no non-Muslim Judge is on the Bench in any of the High Court as well as the Supreme Court of Pakistan.
[1271] Of the Judicial Commission of Pakistan Rules, 2010.
[1272] This is with reference to Manzoor Malik, ex-Judge of LHC, and later of SCP. He in a meeting with Bar members in Karachi Shuhada Hall, at LHC said so in 2015.

done again with the consultative and participatory process. For example where there is no one on the Bench having expertise to deal with tax matters, a competent member of the bar doing tax practice can be taken on board.

In order to ensure that the confidence and trust of the general public remain reposed in the justice system, no one is allowed to take any move that has its genesis in unwritten law or unwritten judicial policy. Whatever is done by any one, be that the CJP, the action must be based in some written law and if what he does is to be done by having resort to unwritten law, that unwritten law must be written somewhere so that people should know the same and should have right to criticize it through their chosen representatives in the legislature before being bound by the same. To conclude the discussion it is safe to say that the unwritten judicial policy has transformed the Judges' elevation system into Judges' club.

CHAPTER 6: TO BE OR NOT TO BE: THE UNSTRUCTURED SUO MOTU JURISDICTION

"If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both."[1273]

6.1. INTRODUCTION

In the constitutional scheme the judiciary in Pakistan is entrusted with an optimistic role to protect and ensure enforcement of fundamental rights.[1274] However, during the different constitutional experiences of Pakistan confronting Martial Law regimes, proclamations of emergency and suspension of fundamental rights, the SCP of Pakistan (SCP) has kept on struggling to make it possible to protect and enforce the fundamental rights.

The Judicial system in Pakistan at the different tiers throughout has confronted numerous challenges in order to redress the grievances of the litigant public. For the judiciary it always remained an uphill task to make justice accessible to the people. In this chapter, it would be seen as to how law has been employed vis-a-vis unwritten judicial policy by the Superior Judiciary of Pakistan as a tool of change for undoing and correcting the injustices and restoring balance in our society. The changing and ever demanding needs of our society undoubtedly require a new dispensation of justice on urgent basis. However, it would be also illustrated that there has been no sticking to written principles of law; rather, an inconsistent and incoherent policy has been being pursued by the superior judiciary.

[1273] Packer vs. Packer [1954] P. 15, at 22, per Lord Denning.
[1274] Conferred by Chapter-1 of Part-II of the Constitution of the Islamic Republic of Pakistan, 1973.

6.2. The Suo Motu Cognizance and Unwritten Judicial Policy.

Law making is an inherent and inevitable part of the judicial process. In interpretation of statutes there is considerable scope for the Judge to develop and mould the law to give it a shape and direction.[1275] It is this significant and constructive role by which a Judge can advance the interests of the society by catering to its needs.[1276] However, at times, "there has been witnessed a drift away from the written law on the part of the superior judiciary."[1277]

The public interest litigation as a legal action (PIL) is initiated for the enforcement of public interest in which case public or class of the community have some interest by which their legal rights or liabilities are affected.[1278] PIL provides opportunity to the citizens to have inviolable access to justice for enforcement of fundamental human rights. The Superior Judiciary in Pakistan, during the past many years has been dealing with manifold problems of the society by resourceful action in human rights cases of public importance.[1279] However, the unstructured power in this regard seems to be based on unwritten law and unwritten judicial policy.

[1275] Schwartz and Wade, H.W.R., Legal Control of Government: Administrative Law in Britain and the United States, Oxford University Press (1972), at page 354. "Adding to the plain and unambiguous words of the provision in the pretext of interpretation cannot be the permitted course of action." Sanjay Mehra vs. Sharad Mehra & Ors. on 10 April, 2023. 2023 DHC 2550. Also available at https://indiankanoon.org/doc/168350780/, last accessed 11.11.2024.

[1276] Adrian Vermeule proposes an alternative to the two dominant schools of constitutional interpretation in the United States: originalism and "progressivism" (i.e., "living constitutionalism"). Against these approaches, he argues courts (and other institutional actors) should explicitly interpret the text of the Constitution, statutes, and administrative decrees with an eye to promoting the "common good" as understood in what he calls the classical tradition. *See*, Brian Leiter, Politics by Other Means: The Jurisprudence of 'Common Good Constitutionalism' (January 3, 2023). University of Chicago Law Review, Vol. 90, Autumn 2023, Available at SSRN: https://ssrn.com/abstract=4318904, last accessed 11.11.2024. *See also,* Walters, Daniel E., The Major Questions Doctrine at the Boundaries of Interpretive Law (February 4, 2023). Iowa Law Review, Vol. 109, No. 2, pp. 465-540, 2024, Texas A&M University School of Law Legal Studies Research Paper No. 23-68, Available at SSRN: https://ssrn.com/abstract=4348024 or http://dx.doi.org/10.2139/ssrn.4348024, last accessed 31.08.2024.

[1277] Mr. Justice Dr. Nasim Hasan Shah, President, SAARC Law, Public Interest Litigation as a Means of Social Justice, Pakistan. [5th February, 1993], PLD 1993 Journal 31.

[1278] Black's Law Dictionary Revised 4th Ed.-88, at P.1393. *Also see*, Russel vs. Wheeler, [439 P.2d 43 (Colo. 1968). That the regulation of the interfaces of private and public interests is a central and recurrent issue of modern law vis- a-vis Public Interest Litigation, *see*, Poul F. Kjaer, Five Variations of Transformative Law. Beyond Private and Public Interests (October 17, 2023). Available at SSRN: https://ssrn.com/abstract=4604722 or http://dx.doi.org/10.2139/ssrn.4604722, last accessed 11.11.2024.

[1279] Article 184 (3) of the Constitution of Islamic Republic of Pakistan, 1973.

6.3. Historical Background and Evolution in Pakistan.

The evolution of the subject vis-a-vis the case law can be divided into three phases. **First** phase was prior to the introduction of public interest litigation when juristic standing was strictly insisted.[1280] **Second** phase was with the advent of public interest litigation, when juristic standing was not strictly enforced.[1281] **Third** phase can be categorized as the modern phase of suo motu jurisdiction, when in respect of public interest litigation the SCP does not require the locus standi whereas previously the standing test was strictly applied.[1282]

In the **initial** phase superior courts in Pakistan adopted somewhat liberal approach to the standing requirement[1283] and the term "aggrieved party" u/Art.199 was judicially defined to mean either a personal or sufficient interest,[1284] the expertise of an individual or of an

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[1280] *See*, Fazal Din vs. Lahore Improvement Trust, PLD 1969 SC 223, wherein it was held that the right considered sufficient is not necessarily a right in the strict juristic sense but it is enough if the petitioner discloses that he had a personal interest in the performance of the legal duty which if not performed or performed in a manner not permitted by law would result in the loss of some personal benefit or advantage or the curtailment of a privilege or liberty or franchise. There is thus, a departure from the earlier rigid notion of a legal right to exist as a pre-condition for maintaining the application for constitutional redress.

[1281] In Muhammad Boota and 77 others vs. Commissioner, Sargodha Division PLD 1973 Lah. 580, reliance was placed on a principle stated in para 5 of the judgment. This case relates not to the violation of any present right by an Executive action but merely an apprehension of a future injury. This decision does not, however, take note of the fact that where the vires of the enactment itself are impeached on the ground that it is void as it contravenes the Fundamental Rights of an individual, the superior Courts have a duty to enquire into the alleged violation of the Fundamental Rights. This case is, accordingly, distinguishable on this score. *See also*, Hakim Muhammad Anwar Babri vs. Pakistan PLD 1973 Lah. 817, where it was held that as there was no order of the Central Government of Pakistan recognizing Bengladesh, no writ could issue at taht stage as the matter was premature and it was only when "some legal or constitutional question presents itself for judicial determination" that the power of judicial review could be exercised This case was also of no help as the stage was premature and the right was inchoate. See also, National Steel Rolling Mills vs. Province of West Pakistan, 1968 SCMR 318, where there was no present injury but a mere anticipation of a penal action by the Government, and hence it was held that this did not constitute a cause of action for invoking the writ jurisdiction of the Court as the proper opportunity would arise only when prosecution commences and it would be then that the petitioner, by way of defence, can challenge the vires of the Notification.

[1282] Province of Balochistan vs. Murree Brewery Company Limited, PLD 2007 SC 386, para 7. For conceptof "aggrieved party", see: Anjuman Araian, Bhera vs. Abdul Rashid, PLD 1973 Lahore 500; Hussain Bakhsh vs. Settlement Commissioner, PLD 1970 S C 1; Doaba Goods Forwarding Agency Ltd. vs. Province of Punjab (1971 S C M R 527); Messrs Associated Cement Companies Ltd. vs. Pakistan, through the Commissioner of Income Tax, Lahore Range, Lahore and 7 others, PLD 1978 SC 151.

[1283] Muhammad Aslam Saleemi vs. Pakistan Television Corporation, PLD 1977 Lahore 852. See also, Pir Bakhsh vs. Chairman, Allotment Committee (PLD 1987 SC 145), at page 160 of the reportwhere it is observed: "too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the prope in development of the law".

[1284] Halsbury's Laws of England, Volume 25, Third Edition, p. 389.

NGO.[1285] It is to be noted that in the **third** or modern phase the standing requirement has almost been abolished with regard to public interest matters. SCP also acted suo motu for instance upon receiving a letter from a group of citizens and converted it into a constitutional petition.[1286] However, in certain cases SCP has held that the High Court cannot act suo motu.[1287] But the HCs have been exercising suo motu powers.[1288] Comparatively speaking, the Indian Constitution provides ample jurisdiction to the HCs to take suo motu notice of infractions of fundamental rights.[1289]

6.3.1. *Benazir Bhutto* Case of 1988.

This case is reckoned as the basic judgement on PIL. It was held there that Art.184 (3) does not say "as to what proceedings should be followed."[1290] The court observed that no specific proceeding for the enforcement of the Fundamental Rights was provided and that it would be for SCP to lay down outlines in order to regulate the proceedings of group or class

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[1285] Mian Fazal Din vs. Lahore Improvement Trust, PLD 1969 SC 223, para 19; Multiline Associates vs. Adeshir Cowasjee, 1995 SCMR 362, and Adeshir Cowasjee vs. KBCA, 1999 SCMR 2883.

[1286] Shehla Zia vs. WAPDA, PLD 1994 SC 693, at p700. In another case inhabitants of two villages had written to the CJ LHC protesting about the effluents being discharged by a chemical factory, which was treated as a constitutional petition. *See*, Allah Ditta vs. D.C.O, 2009 CLD 825, (LHR)), para 1, at p. 826.

[1287] *See for example,* Shahnaz Begum vs. Judges of the High Court of Sindh and Balochistan, PLD 1971 SC 677; Behram Khan Achakzai vs. State, 2004 PCr.LJ 653 *and* Ali Muhammad vs. Chief Settlement Commissioner, 2001 SCMR 1822.

[1288] *e.g.*, Abdul Qaddus Mughal vs. Federal Government through Secretary Finance, Islamabad, 2010 YLR 360. In pursuance of head-line in daily Jang, Lahore dated 13-8-2009 to the effect that billions of rupees had been earned by the market players due to escalation in sugar price with the active connivance of the political dignitaries suo motu proceedings were initiated by LHC, Lahore. *See also*, State vs. Inspector-General of Police, Punjab, PLD 2010 Lahore 326. See also Allah Ditta vs. D.C.O., (2009 CLD 825, (LHR)). In this case the Press-clipping appeared in daily " Nawa-e-Waqt" in its print dated 26-7-2008 that respondent's project emits dangerous emissions and has made the water of the drain and also of the River Chenab poisonous, which has caused diseases in the inhabitants of the locality and has proved fatal to the animals. The Hon'ble LHC, Lahore took action on mercy petition and warned about discharge of effluents beyond permissible limits.

[1289] Article 226 of Constitution (of India), 1949. *See*, VS. N. Shukla, Constitution of India, 9th Ed, Lucknow: Eastern Book Company, 1996 reprint, at p. 550. *Also see*, Basu, Durga Das, Commentary on the Constitution of India, 8th Edition, Nagpur: Butterworths Wadhwa, (2010), vol. 6, p. 6826.

[1290] Miss Benazir Bhutto Vs Federation of Pakistan and Another, PLD 1988 SC 416, para 59, per Muhammad Haleem, C.J. *See also*, Copen vs. Foster, 12 Pick 485-488, where the view expressed in relation to right of political franchise was held to be applicable to its interpretation to the extent of religious freedom. For comparative study from Bagladesh jurisdiction *see*, Muhammad. Ibrahim Khalilullah, Liberalization of Locus Standi and the Development of Public Interest Litigation in Bangladesh: From Kazi to Mohiuddin and Beyond (September 6, 2023). Available at SSRN: https://ssrn.com/abstract=4564100 or http://dx.doi.org/10.2139/ssrn.4564100, last accessed 12.11.2024.

from case to case.[1291] In this leading judgment court also quoted from the pioneering Indian case on public interest litigation[1292] where SCI also observed that through purposive interpretation it succeeded in reaching its objective of bringing justice within the easy reach of the people as class action[1293] by doing away with the traditional rule of locus standi.[1294] However, such a rationale could not be made basis for action because otherwise it would not be possible for the court to reach out a just conclusion. Secondly, flood gates of very complex litigation would be opened. For example, in matter of removal of a law Professor or Judge, one can expect students of law colleges and lawyers/Judges bringing petitions to become party for there is no need to satisfy if every litigant entering the court room has locus standi or not. Such a course of action would definitely be at the cost of written law handed down through the legislation and judge made law.[1295]

6.3.2. Darshan Masih, Shehla Zia and Other Cases.

In the case of *Darshan Masih* cognizance of violation of fundamental rights was taken on a telegram by some brick-kiln bonded labourers regarding their illegal detention. It was reckoned a fit case of enforcement of fundamental rights u/Art.184 (3) and ultimately the necessary relief was granted.[1296]

[1291] Miss Benazir Bhutto vs. Federation of Pakistan and Another, PLD 1988 SC 416, para 59 per Muhammad Haleem, C.J. See also, Manzoor Elahi vs. Federation of Pakistan P L D 1975 S C 66, at p. 145; Waris Meah vs. The State, PLD 1957 SC 157. See also, Messrs Fast and West Steamship Company vs. Pakistan, PLD 1958 SC 41 which follows the same principle as laid down in Jibendra Kishore Achharyya Chowdhury and others vs. The Province of East Pakistan P L D 1957 S C 9, at p.167.

[1292] S.P. Ghupta vs. President of India and ors., (AIR 1982 SC 149), para 17 and 18. *See also,* Municipal Council, Ratlam vs. Shri Vardhichand & Ors. Equivalent citations: 1980 AIR 1622; AIR 1980 SCP 1622; 1981 SCR (1) 97, at p. 74.

[1293] In *Benazir Bhutto's* case supra, it was observed as follows: "The plain language of Art. 184(3) shows that it is open-ended. The Article does not say as to who shall have the right to move the SCP nor does it say by what proceedings the SCP may be so moved or whether it is confined to the enforcement of the Fundamental Rights of an individual which are infracted or extends to the enforcement of the rights of a group or a class of persons whose rights are violated."

[1294] Miss Benazir Bhutto vs. Federation of Pakistan and Another, PLD 1988 SC 416, para 10, at P. 418.

[1295] For unwritten approach of courts *see also*, Mazhar Rasool Hashmi vs. Government of The Punjab, 2023 CLC 1201 (LHR). Also available at http://www.plsbeta.com/Lawonline/law/casedescription.asp?Casedes=2023L249, last accessed 14.11.2024.

[1296] Darshan Masih vs. The State, PLD 1990 SC 513. In another case SCP opted to hold an inquiry into the issue of student politics. Taking note of disturbance caused to other students' activities it banned political activities in

In the case of *Shehla Zia,* the SCP took cognizance through a letter regarding violation of fundamental rights indicting her grievance regarding presence of high voltage transmission lines at the grid stations posing health threats. The court treated it a violation of fundamental rights and granted the appropriate relief in the public interest.[1297] The reliance by the Court on the un-conclusive scientific evidence shows that the Court felt content with unwritten dictates of law. It at the same time gives a strange impression in that the SCP keeps on directing the lower courts to follow the written law and enjoins to proceed on the basis of evidence in the lis before them but does not feel itself bound by the same dictates. Such an unwritten approach fails to convince the relevant forums who are only ensnared by bindingness of its decisions.[1298]

In a case it was held that the petitioners had locus standi to lodge petitions u/Art. 199 as the constitutional question raised were of great public importance as to working of the Judiciary as an independent organ of the State.[1299] In another case it was held that trappings and constraints envisaged in Art. 199 on the exercise of powers by the HCs were not applicable on the SCP u/Art.184 (3).[1300] Therefore while dealing with a case u/Art.184(3) the SCP was held competent to issue direction or order which may be necessary for doing complete justice in the case.[1301]

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the universities while converting the proceedings from adversarial to inquisitorial as a matter of public interest litigation. *See*, Ismail Qureshi vs. M. Awais Qasim, 1993 SCMR 1788.

[1297] Shehla Zia vs. WAPDA, PLD 1994 SC 690, para 12. *See*, Oxford Dictionary, which was referred to in para 13 of this case. *See also*, Black's Law Dictionary, at p. 1073. The SCP held that the right to life is not limited to mere physical existence but encompasses a wider range of human experiences, including the right to a healthy environment and protection against potential hazards. The Court emphasized the principles of prudence and precaution, stating that authorities should take proactive measures to prevent potential dangers to human life and the environment, "rather than waiting for conclusive scientific evidence". This decision has had a significant impact on environmental jurisprudence in Pakistan, ensuring that the right to life includes the right to a safe and healthy environment.

[1298] Art.189 of the Constitution, 1973.

[1299] Al-Jahad Trust vs. Federation of Pakistan, PLD 1996 SC 324, para 12.

[1300] Malik Asad Ali and others vs. Federation of Pakistan, PLD 1998 SC 161.

[1301] It has also been held that the applicant u/Art.184 (3) need not necessarily be an aggrieved person. *See*, Justice Khurshid Anwar Bhinder and others vs Federation of Pakistan and another, PLD 2010 SC 483, para 25. For elaboration of expression "aggrieved person" s*ee also*, H.M. Saya & Co., Karachi vs. Wazir Ali Industries Ltd. Karachi and another, PLD 1969 SC 65 and Khan Muhammad vs. Anjuman Islamia, 1987 CLC 1911. For contra view see also: Fahmida Khatoon's case, PLD 1975 Lahore 942 *and* Qaim Hussain vs.

6.4. Meaning, Nature and Scope of Order u/Art.184 (3) of the Constitution, 1973.

For understanding the unwritten approach of the constitutional courts it seems imperative to analyze the meaning and import of this Art, 184 (3).

6.4.1. Meaning of 'Public Importance.'

The term 'public importance' could be defined as the question which has its repercussions on the public at large and it also includes a purpose and aim.[1302] The word 'public importance' is not capable of any precise definition but it is settled that public importance must include a purpose or aim in which there is general interest of the community.[1303]

As to the question of what is of great public importance, sole determination in all cases, according to the peculiar features of each, is within the domain of the court. In some cases there may be an adequate remedy at law, but not speedy.[1304] In some instances, it is

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Anjuman Islamia, PLD 1974 Lahore 346, at p. 34. Vide S. 13 of Twenty Sixth Constitutional (Amendment) Act, 2024 now the SCP has been prohibited from passing any order which is not specifically prayed in the petition

[1302] Bisma Naureen/Ameer Jehan vs. Federation of Pakistan through Secretary, Ministry of Finance Pakistan, Islamabad, 2023 CLC 2038 (KAR). Also available at http://www.plsbeta.com/Lawonline/law/casedescription.asp?Casedes=2023K252, last accessed 15.11.20204.

[1303] For meaning of word 'public', 'public purpose' and 'public importance' etc, *see the interpretation in the cases of* Manzoor Elahi vs. Federation of Pakistan, PLD 1975 SC 66, at p. 145, Shahida Zaheer Abbasi vs. President of Pakistan, PLD 1996 SC 632 and Syed Zulfiqar Mehdi vs. Pakistan International Corporation, 1998 SCMR 793. *Also see*, Dr Tahir UL Qadri vs. FOP, PLD 2013 SC 413, para 26.

[1304] Regarding matter of public importance requiring the enforcement of any of the fundamental rights contained in Chapter I of Part II of the Constitution, 1973, reference may be made to numerous judgments including All Pakistan Newspapers Society and others vs. Federation of Pakistan and others, PLD 2004 SC 600; Ch. Muhammad Siddique and 2 others vs. Government of Pakistan through Secretary, Ministry of Law and Justice Division, Islamabad and others, PLD 2005 SC 1; Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A. and others vs. Federation of Pakistan through Secretary Ministry of Interior and others, PLD 2007 SC 642; Thal Industries Corporation Limited through Legal Manager vs. Government of the Punjab through Chief Secretary, Punjab and 10 others, 2007 SCMR 1620; Jamat-e-Islami through Amir and others vs. Federation of Pakistan and others, PLD 2009 SC 549; Munir Hussain Bhatti, Advocate and others vs. Federation of Pakistan and another, PLD 2011 SC 407; Watan Party and others vs. Federation of Pakistan and others, PLD 2012 SC 292; Muhammad Azhar Siddique and others vs. Federation of Pakistan and others, PLD 2012 SC 660; Baz Muhammad Kakar and others vs. Federation of Pakistan through Ministry of Law and Justice and others, PLD 2012 SC 923; Dr. Muhammad Tahir-ul-Qadri vs. Federation of Pakistan through Secretary M/o Law, Islamabad and others, PLD 2013 SC 413; Abdul Wahab and others vs. HBL and others, 2013 SCMR 1383 and Imran Ahmad Khan Niazi vs. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan/Member National Assembly, Prime Minister's House, Islamabad and 9 others [(Panama Papers Scandal), PLD 2017 SC 265.

apparent on the face of the pleadings and record.[1305] The essential requirement in this regard to initiate an action is it involves a question wherein the general public is interested.[1306]

6.4.2. The Nature and Scope of Art.184 (3).

Regarding scope of Art.184 (3) it was explained in a case that the court's "approach should not be ceremonious observance of the rules or usages of interpretation" but regard should be had to their purpose so as to "achieve democracy, tolerance, equality and social justice according to Islam."[1307]

It must be recalled that in *Darshan Masih* it was said that this was a first case of its nature and procedural and other elements thereof were very likely to come under discussion. Sending of a letter/telegram formed the basis for moving the law machinery. In the same case it was also said that other forms of taking cognizance of a matter u/Art. 184 (3) will depend

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[1305] Watan Party case PLD 2012 SC 292, paras 28 & 31. SCP had undertaken exercise to define this phrase in the cases of Manzoor Elahi vs. Federation of Pakistan, (PLD 1975 SC 66); Miss Benazir Bhutto vs. Federation of Pakistan,(PLD 1988 SC 416), Maqbool Ahmad vs. Pakistan Agricultural (2006 SCMR 470); Mian Muhammad Shahbaz Sharif vs. Federation of Pakistan (PLD 2004 SC 583) and Shahida Zaheer Abbasi vs. President of Pakistan (PLD 1996 SC 632). In the Indian case of State of Jammu and Kashmir vs. Bakshi Ghulam Mohammad (AIR 1967 SC 122) some of the actions of Bakshi Ghulam Mohammad (the then Chief Minister) were challenged before the High Court and the High Court expressed the view that such acts would have been acts of public importance if he was in office but they ceased to be so, as he was out of office. In the case of Sohail Butt vs. Deputy Inspector General of Police (2011 SCMR 698) it was held inoara 4 that the word 'public importance' can only be defined by a process of judicial inclusion or exclusion because the expression public importance is not capable of any precise definition and has not a rigid meaning, therefore, each case has to be judged in the circumstances of that case as to whether the question of public importance is involved.

[1306] Paul M. Hebert, Obtaining Certification in SCP of Ohio: Cases of the Public or Great General Interest. Western Reserve Law Review, 1966, Vol.18, Issue 1, Article 5, pp. 32-39, at p.33. Also available at https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=4445&context=caselrev, last accessed on 01-05-2024. In the case of Muhammad Azhar Siddiqui vs. Federation of Pakistan, PLD 2012 SC 774, SCP has held that it retains the discretion to deny petitioners who approach the Court after undue delay or with unclean hands and the question as to whether a particular case involves the element of public importance is to be determined by the Court with reference to the facts and circumstances of each case. In the case of Dr. Akhtar Hussain Khan vs. Federation of Pakistan (2012 SCMR 455), SCP after relying upon the judgment of the Indian SCP in the case of Air India Ltd. vs. Cochin International Airport Ltd. [(2002) 2 SCC 617] has held that in the event of some irregularity in the decision making process, the Court must exercise its discretionary power of judicial review with circumspection and only in furtherance of public interest and not merely for making out a legal point. It should always keep the larger public interest in mind to interfere or not to interfere. See also Dr. Muhammad Tahir-Ul-Qadri vs. Federation Of Pakistan through Secretary M/o Law, Islamabad and others PLD 2013 SCP 413, para 23.

[1307] Benazir Bhutto vs. Fderation of Pakistan, (PLD 1988 SC 416), para 49, per M. Haleem J.

upon the nature and importance thereof.[1308] As such it is clear that since inception of country in 1947 the law of taking cognizance qua suo motu has remained unwritten and the judicial policy also seems to have remained unwritten when it comes to the form of initiating the action on the strength of said provision of law.

As to how far the said principle could be extended, it is clear that the Bench was referring to the allied principle of propriety with special focus on enforcement of the Fundamental Rights in the said case. However, the opportunity was not grabbed to determine the nature of the order that could be passed under suo motu jurisdiction and the Bench felt content to hold that the same will depend upon each case. As such again the law and the policy remain unwritten.

The justification quite conceivably came from resorting to the principle of the inherent jurisdiction.[1309] As a necessary corollary it was added that when this power is exercised the Court will have the necessary additional power to "issue such directions, orders or decrees as may be necessary."[1310] Obviously the rationale was that where the question of fundamental rights was involved the SCP has jurisdiction, power and competence to pass all proper/ necessary orders as the attending facts could justify.

While making discussion on understanding the nature of Art.184 (3), it was said in a case that “this provision confers power on the SCP to consider questions of public importance which are refer able to the enforcement of any Fundamental Rights guaranteed by the Constitution and enumerated in Chapter 1 of Part II.”[1311] In another case petitions filed by individual users and Car dealers of Public Transport Scheme being aggrieved of various

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[1308] Darshan Masih vs. State, (PLD 1990 SC 513). *See also*, Sindh High Court Bar Association through its Secretary and another vs. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others, PLD 2009 SCP 879, para 170.

[1309] Sindh High Court Bar Association through its Secretary and another vs Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others. PLD 2009 SCP 879, para 170.

[1310] Art. 187 of the constitution of Islamic Republic of Pakistan, 1973.

[1311] Muhammad Nawaz Sharif vs. President of Pakistan, PLD 1993 SCP 473, at p. 805. Comparing it with Art.199 of the Constitution, it was also the view of the Bench that this power is without prejudice to the provisions of Art.199 which confer similar power, with certain restrictions, on the HC.

policies of the Government invoked the constitutional jurisdiction of the SCP u/Art.184(3). The SCP held that the case involved a question of public importance.[1312]

Where the matter needs evidence, non-recording the same could not be justified on the basis of this provision. In *Shehla Zia*, one could not say that grid station was hazardous to residents of the locality without scientific evidence. Proceeding as such was but a challenging act as the same demanded, by its very nature and peripheral potentials, conclusive assessment qua the community concerns. The fact remains, on the other hand, that the grid station was installed by CDA even after this unwritten approach on the part of the Court qua its proceeding and decision on the basis of no conclusive evidence vis-a-vis factum of life.[1313]

Same view has been expressed in some other cases of Indian jurisdiction.[1314] In the *Olga Tellis* case[1315] right to life under the Constitution was held to mean right to livelihood. In the other example referred[1316] the definition has been extended to include the "quality of life' and not mere physical existence.[1317] Thus, apart from the wide meaning given by US Courts, the SCI seems to give a wider meaning which includes the quality of life, adequate nutrition, clothing and shelter and cannot be restricted merely to physical existence.

In India, part of land of zoological garden was given to Taj Group to build a five-star hotel. This transaction was challenged in the HC without success. However, SCI held that "the Court may interfere in order to prevent a likelihood of prejudice to the public."[1318] In another case the Court on petition filed by a citizen taking note of the fact that the municipal sewage and industrial effluents from tanneries were being thrown in River Ganges whereby it

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[1312] Syed Wasey Zafar vs. Government of Pakistan, (PLD 1994 SC 621).
[1313] For concept of life, from Indian jurisdiction *see also*, Kharak Singh vs. State of UP, AIR 1963 SC 129. Art. 21 of the Indian Constitution, 1949. *See also*, Francis Corgi vs. Union Territory of Delhi, AIR 1981 SC 746.
[1314] See for example, Olga Tellis and others vs. Bombay Municipal Corporation (AIR 1986 SC 180) and State of Himachal Pradesh and another vs. Umed Ram Sharma and others (AIR 1986 SC 847).
[1315] Olga Tellis and others vs. Bombay Municipal Corporation (AIR 1986 SC 180).
[1316] State of Himachal Pradesh and another vs. Umed Ram Sharma and others (AIR 1986 SC 847).
[1317] Ibid, para 11.
[1318] Shri Sachidanand Pandey and another vs. The State of West Bengal and others (AIR 1987 SC 1109), para 15. Also available at: https://indiankanoon.org/doc/497388/, last accessed 21-06-2024.

was completely polluted. The tanneries were closed down.[1319] The question is why does not the concerned department come to pursue the matter? The answer lies in unwritten law only.

In fact by now it is well-settled that if there is violation of Fundamental Rights of a class of persons who collectively suffer due to such breach and there does not seem to be any possible relief being granted from any quarter due to their inability to seek or obtain relief, they are entitled to file petition u/Art.184 (3). However, the dispute should not be mere an individual grievance, but a collective grievance which raises questions of general public importance.[1320] In any case it appears futile to insist on unwritten approach to Constitutional interpretations which serves to allow the courts to meddle into policy matters while bypassing the procedural requirements.

6.4.3. The Procedural Requirements and Jurisdiction U/Art.184 (3).

In a case the court said that it was neither bound by the procedural trappings of Art.199 nor by the limitations mentioned in the said Article for exercise of power by the HC.[1321] The provisions of Art.184 (3) were reckoned to be self-contained regulating the jurisdiction of SCP in order to ascertain the violation of a fundamental rights.[1322]

[1319] M.C. Mehta vs. Union of India (AIR 1988 SC 1115), para 4 at P. 1117.

[1320] Employees of the Pak. Law Commission vs. Ministry of Works, (1994 SCMR 1548, at page 1551). *See also*, Charles S. Rhyne, World Peace Through Law Conferences, The American Journal of International Law, Cambridge University Press, Vol. 56, No. 4 (Oct., 1962), pp. 1001-1010, at p. 1003.

[1321] Watan Party vs Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others, PLD 2006 SC 697, para 21.

[1322] *See also*, K.K. Kochunni vs. State of Madras, AIR 1959 S C 725, wherein at page 731, it was held: "An enactment may immediately on its coming into force take away or abridge the Fundamental Rights of a person by its very terms and without any further overt act being done. In such a case the infringement of the Fundamental Right is complete on the passing of the enactment and, therefore, there can be no reason why the person so prejudicially affected by the law should not be entitled immediately to avail himself of the constitutional remedy u/Art. 32. To say that a person, whose Fundamental Right has been infringed by the mere operation of an enactment, is not entitled to invoke the jurisdiction of this Court u/Art. 32, for the enforcement of his right, will be to deny him the benefit of a salutary constitutional remedy which is itself his Fundamental Right."

The judgment in *Benazir Bhutto* also laid the principle that when faced with cases of public interest the procedural requirements were to be relaxed,[1323] in contrast to the dictum laid down in the case of *Ch. Manzoor Elahi* that ordinarily the forum of the court in the lower hierarchy should be invoked first.[1324] In a case it was laid down that the law cannot stand still nor can the Judges become mere slaves of the precedents and that the rule of stare decisis does not apply with the same strictness in criminal, fiscal and constitutional matters where the liberty of the subject is involved.[1325]

In order to combat delay in the disposal of PIL, procedural rules in enforcement of fundamental rights may be treated flexibly. But it must not be on the basis of unwritten judicial policy centered on the ground that the Art.184 (3) did not specify any procedure to be followed; rather, nature of the procedure should be judged in light of the purpose.

Regarding concept of procedural requirements it has been held that in human rights cases procedural trappings, restrictions, precondition of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the Court.[1326] Art.184 (3) empowers the court to make order of the nature mentioned in Art.199. This is a guideline for exercise of jurisdiction under this provision without restrictions and restraints imposed on the HC. It rather "enlarges the scope of granting relief which may not be exactly as provided u/Art. 199."[1327] The scope of discretion of the court u/Art.184 (3) provides a direct access to the

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[1323] Miss Benazir Bhutto Vs Federation of Pakistan and Another, PLD 1988 SC 416, para 58. Regarding non consideration of hypothetical or contingent questions, see also McGabe v . Atchison (1914) 285 U S 151; S.P. Gupta and others vs. President of India and others A I R 1982 S C 149; Standard Vacuum Oil Company v , Trustees of the Port of Chittagong PLD 1961 Dacca 289; Saeed Khan vs. Chairman, District Council of Bannu PLD 1967 Pesh. 347; Asma Jilani vs. Government of the Punjab PLD 1972 SC 139; Muhammad Boots and 77 others vs. Commissioner, Sargodha Division PLD 1973 Lah. 580; Hakim Muhammad Anwar Babri vs. Pakistan PLD 1973 Lah.817; National Steel Rolling Mills vs. Province of West Pakistan 1968 SCMR 317; Fauji Foundation vs. Shamimur Rehman PLD 1983 SC 457; Abanindra Kumar Maity vs. A.K.Majumdar AIR 1956 Cal. 273; Fazal Din vs. Lahore Improvement Trust PLD 1969 SC 223; K.K. Kochunni vs. State of Madras AIR 1959 SC 725; Jibendra Kishore vs. Province of East Pakistan PLD 1957 SC 9; Messrs East and West Steamship Company vs. Pakistan PLD 1958 SC (Pak.) 41 and Waris Meah vs. The State PLD 1957 SC (Pak.) 157.

[1324] Ch. Manzoor Elahi vs. Federation of Pakistan, PLD 1975 SC 66, qua findings/observations at pp.79, 144 and 159.

[1325] Miss Asma Jilani vs. Government of the Punjab, (PLD 1972 SC 139).

[1326] General Secretary vs. Director Industries, (1994 SCMR 2061).

[1327] General Secretary vs. Director Industries, 1994 SCMR 2061, at page 2071).

highest judicial forum for the enforcement of fundamental rights and to ensure expeditious remedy for their protection from legislative and executive interference. It appears to emanate from idea that "it is the 'remedy' that makes the right real."[1328]

However, what needs special emphasis in the observation of Judges is that the exercise of power is in conformity with the terms of the Constitution from which the power derives and this principle inevitably is followed in the case of written constitutions. Geoffery Marshall while critically examining this case speaks about two features in this regard. "Recognition of the value of judicial security of tenure and the need to immunize judges from improper influence has been almost universally applauded in liberal societies."[1329]

In this regard certain principles of constitutionalism and limits of interpretation were laid down in *Ardeshir Cowasjee* wherein it was said that Pakistan has a written Constitution, which is an organic document intended to cater to the needs for all times to come.[1330] However, the approach while interpreting a Constitutional provision should be dynamic but must not be oriented with the desire[1331] based upon unwritten judicial policy to meet the situation. The fact is that the old individual rights have now assumed a secondary place and instead social rights have come to the fore. These rights may be equated to Civic Justice. To enforce these new social rights, the State is required to play a more active role and if it has provided procedural limits the same must be followed by all including the Judiciary and should not be bypassed through unwritten approach on their part.[1332]

[1328] Asad Ali vs. Federation of Pakistan, PLD 1998 SC 161, at p. 294. *See also*, Piare Dusadh and others vs. Emperor (AIR (31) 1944 Federal Court 1. *Also see*, Geoffrey Marshall, Constitutional Theory, Oxforsd University Press (1980), ISBN: 9780198761211, pp. 119 and 120.

[1329] Geoffrey Marshall,Constitutional Theory, Oxforsd University Press (1980), ISBN: 9780198761211, p. 123. It is equally important to remember that it is not the function of the judiciary to legislate or to question the wisdom of the legislature in making a particular law if it has made it competently without transgressing the limitation of the Constitution. See, Corpus Juris Secundum, Vol. XVI, para. 144.

[1330] Masroor Ahsan vs. Ardeshir Cowasjee, PLD 1998 SC 823, at p. 1005.

[1331] Ibid.

[1332]Mr. Justice Dr. Nasim Hasan Shah, President, SAARC Law, Pakistan, Public Interest Litigation as a Means of Social Justice, [5th February, 1993], PLD 1993 Journal 31, at 32, 33.

Due to unstructured and unwritten judicial policy the questions of procedural nature relating to the entertainment of proceedings u/ Art.184 (3) would depend upon the facts and circumstances of each case and nature and importance of public interest involved. However, due to the same unwritten law and working of such a judicial policy the things are not settled in that cognizance is taken on letters and news clippings but at the same time "it is not considered as an appropriate and proper method of initiating proceedings. Sometimes it leads to embarrassment."[1333]

6.5. The Concept of Locus Standi in Suo Motu Cases.

The unwritten judicial policy and unconstitutional constitutionalism find expression in the phenomena of locus standi in class actions. It is said that in suo motu matters there is no concept of locus standi but sometimes it is held that the person coming to court has not shown any injury to justify initiation of class action.

6.5.1. Adversarial Justice System and the Satisfaction of *Locus Standi*.

Since decades adversarial justice system is being earnestly pursued in Pakistan at all tiers of the judicial hierarchy despite being mindful of the changes in new societal development necessitating a march towards gradual shift from mechanical justice to human welfare social justice.[1334] In the cases of public importance, our superior courts have been earnestly guarding the long standing concepts of 'other adequate remedy provided by law' and 'aggrieved person' while assuming the extra ordinary jurisdiction to issue Writs and Orders u/Art.199 and 184(3) of the Constitution.[1335] The concept of traditional locus standi is crucial

[1333] Benazir Bhutto Case,PLD 1988 SC 416. *See also*, Darshan Masih alias Rehmatay and others vs. The State. PLD 1990 SC 513, at P. 544.
[1334] For analysis if law is a social phenomenon *see*, Amr Ibn Munir, Roscoe Pound's Theories of Interests and Sociological Jurisprudence: A Critical Appraisal (April 29, 2023). Available at SSRN: https://ssrn.com/abstract=4433213 or http://dx.doi.org/10.2139/ssrn.4433213, last accessed 15.11.20204.
[1335] Abdul Sattar Asghar, (Ex) Registrar, Lahore High Court, Public Interest Litigation, A Tool to Protect Fundamental Rights, It was the Paper under this title which was read by him at National Judicial Conference,

in the administration of justice.[1336] This is sine qua non to the very existence and regulatory mechanism of the justice system.[1337] For example, in a case, the HC made reference to judgments including a judgment of SCI wherein it was said that "no one except those whose rights are directly affected by a law can raise the question of the constitutionality of that law."[1338]

In the constitutionally governed States, judiciary is provided pivotal role of protection and enforcement of the fundamental human, constitutional and statutory rights. Therefore, the Judge ought to keep in view the specific fact that his observation based upon unwritten provision of law would be having the force of law.

Islamabad, 2011. PLD 2011 Journal Section, p. 26. Also available at http://www.plsbeta.com/Lawonline/law/contents.asp?CaseId=2011J25, last accessed on 12-01-2024.

[1336] See Mauro Cappelletti and Bryant Garth, (editor/s), Access to Justice Vol. III: Emerging issues, Giuffrè Milano, Editore/Alphen aan den Rijn, Sijthoff/Noordhoff, 1979, (Third edition) [European University Institute]. The Florence Access-to-Justice Project. Also available at: https://hdl.handle.net/1814/21415, last accessed 21-062024: "The traditional doctrine of standing (legitimatio ad causam) attributes the right to sue either to the private individual who 'holds' the right which is in need of judicial protection or in case of public rights, to the State itself, which sues in courts through its organs.", at page 520. Also see: Smith, S.A. de: "Judicial Review of Administrative Action.", at page 403.

[1337] For concept of 'aggrieved person' *see*, Ahmed and 2 others vs. Additional Secretary, Food and Agriculture, Government of Pakistan and 3 others 1979 SCMR 299; [also reported in 1979 SCMR 389]; Mst. Noor Jehan Begum vs. Dr. Abdus Samad and others 1987 SCMR 1577; Muhammad Rafiq vs. Ataullah and others 1985 SCMR 1226; Inayatullah vs. Sh. Muhammad Yousaf and 19 others 1997 SCMR 1020; The Postmaster General Northern Punjab and AJ&K), Rawalpindi vs. Muhammad Bashir and 2 others 1998 SCMR 2386; Muhammad Naseer vs. Mir Azhar All Talpur 2001 SCMR 4; Khurshid Ahmad Naz Faridi vs. Bashir Ahmed 1993 SCMR 639; Arwinder Singh Bagga vs. State of U.P. and others AIR 1995 SC 117; Rueful Shah vs. State of Bihar AIR 1983 SC 1086, Bhim Singh Mill vs. State of Jammu and Kashmir AIR 1986 SC 494; M.C. Mehta vs. Union of India AIR 1987 SC 1086, and Akhtar Iqbal vs. Muhammad Ali Bilal and others 2006 SCMR 1834; Messrs Associated Cement Companies Ltd. vs. Pakistan, through the Commissioner of Income Tax, Lahore Range, Lahore and 7 others PLD 1978 SC 151; Nisar Ahmed and 2 others vs. Additional Secretary, Food and Agriculture, Government of Pakistan and 3 others 1979 SCMR 299; Anjuman Araian Bhera vs. Abdul Rashid and others 1982 PSC 888; Mst. Noor Jehan Begum vs. Dr. Abdus Samad and others 1987 SCMR 1577; Mian Muhammad Nawaz Sharif vs. Federation of Pakistan through Secretary, Ministry of Defence, Government of Pakistan, Islamabad and 8 others 1994 CLC 2318 and Dalmia Cement Ltd. vs. District Local Board, Karachi and 2 others PLD 1958 (W.P.) Karachi 211.

[1338] Dalmia Cement Ltd. vs. District Local Board, Karachi and 2 others PLD 1958 (W.P.) Karachi 211. *See also*, Chiranjit Lal Chowdhuri vs The Union of India and Others, Equivalent citations: 1951 AIR 41; 1950 SCR 869; AIR 1951 SCP 41; 1964 MADLW 47. Para 8, per Das J. *This principle has also been very clearly stated by Huges J. in* McCabe vs. Atchison, (1914) 235 U.S. 151. *It is worth noting that the Judicial Committee of the Privy Council approved the exception to the strict rule of standing in* Durayappah vs. Fernando [1967] 2 All ER 152 (PC): [1967] 2 AC 337. *In United States of America also, though the exception has been recognised and the strict rule of standing has been liberalised in the interest of justice, it has been attenuated later on in some of the cases vide* (1) Data Processing Service vs. Camp 367 US 150 : 25 L Ed. 2d 184; (2) Flast vs. Cotton 392 US 83 : 20 L Ed. 2d 947 (1968); (3) Office of Communication of the United Church of Christ vs. FCC US App DC 328; (4) U.S. vs. Richardson 418 US 166; and (5) Worth vs. Seldin 422 US 490. On locus standi, from Malaysian jurisdiction, also see, Muhammad Bin Ismail vs. Tan Sri Haji Othman Saat, 1982-2 MLJ 133.

Malik Asad Ali[1339] is just another example of unwritten law.[1340] CP No.248-Q of 1997 was taken up and admitted for the regular hearing by a Quetta Bench of SCP. At the time of admitting this CP the Quetta Registry passed an ad interim order on 26-11-1997 with notice for 28-11-1997 on the miscellaneous application filed in the petition suspending the notification, dated 5th June, 1994 appointing Mr. Justice Syed Sajjad Ali Shah as the CJ of Pakistan. The judicial order passed by the Quetta Bench was suspended on the same day in the evening by Mr. Justice Sajjad Ali Shah through an administrative order wherein he observed that it had been brought to his notice that a Constitutional petition u/Art. 184(3) of the Constitution had been filed at Quetta Registry by one Malik Asad Ali in which three respondents had been impleaded including him as respondent No.2. In the attending circumstances of the case it was said that the order shall be deemed to have not taken effect for the reason that proper procedure had not been followed.[1341]

It is to be observed that a novel principle of unwritten law came to surface in this case, that is, a judicial order was suspended through an administrative order. Whereas SCP Rules were referred, the learned Judge did not consider celebrated principle of law of natural justice.[1342] Next senior most Judge ought to have been allowed to enter on board and deal with the matter for it pertained directly to the (then) CJP himself. Surprisingly the Judges of Quetta Registry did not know if proceeding with a matter u/Art.184 (3) of the Constitution at Provincial Registry was not the right course of action. The very proceedings show that

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[1339] Malik Asad Ali and others vs. Federation of Pakistan through Secretary, Law, Justice and Parliament Affairs, Islamabad and others. PLD 1998 SC 161. Saiduzzaman Siddiqui, J. authored the judgement for the Bench.

[1340] Constitutional Petitions Nos.248-Q, 1-P, 55 with Civil Miscellaneous Application No. 992 of 1997, were heard on 2nd to 5th, 10th to 12th, 15th to 19th, 22nd and 23rd December, 1997. The brief facts of the case that form the background of this case are that Constitution Petitions Nos.248-Q of 1997 and I-P of 1997 were taken up by two separate Benches of SCP, then functioning at Quetta and Peshawar, respectively. On the other hand, Constitution Petition No.55 of 1997 was initially presented by the petitioner, a practicing Advocate, at Karachi Registry but the concerned office declined to entertain it. The petitioner, accordingly, sent this petition to the Principal Seat, where it was registered.

[1341] Malik Asad Ali and others. vs. Federation of Pakistan through Secretary, Law, Justice and Parliament Affairs, Islamabad and others, PLD 1998 SC 161.

[1342] i.e, that no one should be judge in his own case.

without considering those rules, notifications and directions etc., referred by Syed Sajjad Ali Shah the Judges of Quetta Registry proceeded on the strength of some unwritten law and unwritten judicial policy. The judicial decisions are upheld, modified and are also set aside but for a Judge of SCP to not know the basic procedure of dealing with a certain matter sounds really strange. As such it would be safe to say that these proceedings were at the cost of written law of the land.

6.5.2. The Question of Delay in Disposal of Cases and Exercise of Jurisdiction on Basis of the Law Commission's Report No. 22.

The perusal of Pakistan Law Commission's Report[1343] formed the basis for initiating action in respect of SMC No.3 of 2001[1344] regarding delay in the disposal of civil and criminal cases due to several reasons.[1345] While considering the matter as of great public importance larger Bench of the SCP was desired to be constituted by the CJP and meanwhile notices were directed to be sent to all concerned.[1346]

Despite this being an SMC, SCP did not join administration of ICT Islamabad despite the fact that this federally administered district has its own Advocate General and Inspector General of Police. Whereas the focus was on newly created districts in the Provinces, no thought was spared to have some words for the district created in 1960[1347] that has remained without an independent jail even after lapse of forty one (41) years till the time judgement was being written while sitting in Islamabad. The unwritten policy and procedure applied had

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[1343] Pakistan Law & Justice Commission's Report No.22 on Criminal Justice System.
[1344] Suo Motu Case No.3 of 2001. PLD 2001 SCP 1041.
[1345] Ibid, para 8.
[1346] The Advocates General of the Provinces, Interior Secretaries, Chief Secretaries of the Provinces, the Home Secretary and the Inspectors-General of Police of the Provinces were also directed to appear personally and assist the Court in the resolution of the issues identified by the SCP.
[1347] S.3 of The Capital Administration Ordinance, 1960 (XXIII of 1960) (CDA Ordinance, 1960). See The Schedule annexed therewith regarding the limits of the Capital site and the limits of the specified areas, per S.2 (P) of (CDA Ordinance, 1960). The said Ordinance (XXIII of 1960) is dated 27th June 1960. A closely related and relevant provision in this regard is, The Pakistan Capital Regulation under Notification No. 615/60 pertaining to Martial Law Regulation by Chief Martial Law Administrator, Pakistan No.82, dated 16th June 1960. This Regulation was published in the Gazette of Pakistan, Extra Ordinary, Karachi, dated 24th June 1960 at PP. 927-929.

no space to include even a passing remark, not to speak of any specific and special reference to this district.[1348] Despite this, the directions are regularly sent to the learned trial courts concerned from the superior forums for deciding the specific case(s) within the direction period.[1349]

6.5.3. Two unwritten Conditions for Exercise of Jurisdiction and the Persisting Confusion.

On 3rd November, 2007, Gen. Pervez Musharraf issued Proclamation of Emergency and PCO No. 1 of 2007 and held the Constitution in abeyance.[1350] It was in this back drop that the CP Nos. 9 and 8 of 2009 were decided on 31st July, 2009.[1351] SCP observed that the exercise of suo motu powers had been dealt with at length by the superior Courts of Pakistan in a large number of cases.[1352] In this regard *Watan Party*[1353] was also a case where concept of locus standi qua PIL came under consideration vis-a-vis privatization of Pakistan Steel Mills Corporation.[1354] In this case it was contended that to invoke jurisdiction of court u/Art.

[1348] The requisite jail is under construction for last many years. Till the time of submission of this work, ICT Islamabad has not got its independent functional Jail.

[1349] As Judicial Magistrate of territorial limits of three police stations Koral, Nilore and Kirpa of Islamabad and dealing with criminal cases pertaining to these Police Stations, the scholar has personal experience of facing agony of scarcity of time due to production of under trial prisoners (UTPs) from Central Prison, Adiala District Rawalpindi Punjab, Pakistan in the later court hours.This jail is in Rawalpindi District of Punjab. The correct nomenclature is Central Prison Rawalpindi. Since it is situated on Adiala Road, it is commonly known as and referred to in official correspondence as Adiala Jail. UTPs pertaining to both the Civil Districts and Sessions Divisions, East and West of ICT, Islamabad are kept there under make shift arrangement till completion of construction and functionality of Islamabad's independent jail. *See also,* Letter/ Notification No. MIT/U.C/4495, dated 07-05-2019 of IHC, Islamabad. Under this Notification the requirement of Contested Cases etc. has been conveyed to the District Judiciary Islamabad for purposes of counting Units in terms of Institution and Disposal of Cases.

[1350] Art.2 of PCO No. 1 of 2007.

[1351] Reported as: Sindh High Court Bar Association through its Secretary and Another vs Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others. PLD 2009 SCP 879.

[1352] Reference is to the cases which were referred in this case: Darshan Masih vs. State, PLD 1990 SC 513; Muhammad Nawaz Sharif vs. President of Pakistan, PLD 1993 SCP 473; Shehla Zia vs. WAPDA, PLD 1994 SC 693; Employees of the Pak. Law Commission vs. Ministry of Works, 1994 SCMR 1548; General Secretary vs. Director, Industries, 1994 SCMR 2061; Asad Ali vs. Federation of Pakistan, PLD 1998 SC 161; Masroor Ahsan vs. Ardeshir Cowasjee, PLD 1998 SC 823; Wukala Mahaz Barai Tahafuz Dastoor vs. Federation of Pakistan, PLD 1998 SC 1263; Al-Jehad Trust vs. Federation of Pakistan, PLD 1996 SC 324 and Watan Party vs. Federation of Pakistan, PLD 2006 SC 697. On the point of jurisdiction vis-a-vis locus standi *see also*, General Secretary vs. Director Industries, 1994 SCMR 2061.

[1353] Watan Party vs. Federation of Pakistan PLD 2006 SC 697, at p. 717.

[1354] Under the Privatization Commission Ordinance, 2000 Ordinance No. LII, 2000.

184(3) two conditions were required to be fulfilled namely, infringement of the Fundamental Rights and absence of alternate remedy.[1355] Moreover, it was contended that the facts of *S.P. Gupta* case,[1356] relied upon by the petitioner (*Watan party*), were not applicable because thereafter the SCI in the case of BALCO Employees[1357] had explained the scope of PIL.

Regarding question of locus standi in public interest cases, it is to be appreciated that the SCP does not seem to be clear qua the same. As is usual in matters where the law is not written, or written but not appreciated, in this case too, the court was not proceeding with fixing and determining this point. Therefore, there will be no question of locus standi of the petitioners particularly in view of certain judgments.[1358] Instead of first determining if the person coming to the court even had locus standi, the same point was settled on the basis of certain hearings of the case and not on the basis of written principles of law or judgements. As such the SCP proceeded on the basis of unwritten law and unwritten judicial policy.

In another case it was held that only when the element of public importance is involved, the SCP can exercise its power to issue the writ while sub. Art.1 (c) of Art.199 of the Constitution has a wider scope as there is no such limitation.[1359] In another case it was held that the "question of locus standi is relevant in a High Court but not in the Supreme Court when the jurisdiction is invoked u/Art.184 (3) of the Constitution."[1360]

The SCP has held that the requirement of the locus standi in the case of pro bono publico has extended scope.[1361] Regarding pure policy matters SCP held that unless the

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[1355] It was asserted by lawyer of Commission that under the scheme of Privatization Commission Ordinance No. LII, 2000, two alternate remedies were available in terms of section 27 and section 28 of the Ordinance.
[1356] S.P. Gupta vs. Union of India AIR 1982, SC 149.
[1357] BALCO Employees Union (Regd.) vs. Union of India, AIR 2002 SC 350.
[1358] Multiline Associates vs. Ardeshir Cowasjee, PLD 1995 SC 423, *and* Masroor Ahsan vs. Ardeshir Cowasjee, PLD 1998 SC 823.
[1359] Benazir Bhutto vs. Federation of Pakistan, PLD 1988 SC 416, para 47.
[1360] Al-Jehad Trust vs. Federation of Pakistan, PLD 1996 SC 324, para 12. *See also*, Malik Asad Ali vs. Federation of Pakistan, PLD 1998 SC 161.
[1361] Multiline Associates vs. Ardeshir Cowasjee, PLD 1995 SC 423, para 29. *See also*, Wukala Mahaz Barai Tahafuz Dastoor vs. Federation of Pakistan, PLD 1998 SC 1263. On question of public importance with reference to enforcement of any of the Fundamental Rights *see also*, Dr. Muhammad Tahir-ul-Qadri vs.

policy itself is shown to be against law the courts "normally" will not interfere nor impose opinion in the matter.[1362] It is very strange that despite having observed a matter to be pure policy matter it simply dealt with the same. However, a cushion was reserved by the use of word 'normally' which was further strengthened by observing that the court would interfere in the matter, be that a policy issue. This sort of interpretation is not only contradictory but is all meant to strengthen the court itself, only on the basis of unwritten approach.[1363]

In a case the SCP declined to accept the plea of the petitioner with regard to unconstitutionality of certain amendments made in certain Ordinances[1364] and for declaring the constitution of Election Commission to be illegal. The relief was declined on the ground that petitioner invoked the jurisdiction of the Court u/Art. 184(3) of the Constitution without alleging any infringement of his Fundamental Rights for the enforcement of which he sought to invoke the jurisdiction of the Court.[1365]

In *Al-Jehad Trust*[1366], the appointment of the CJP and Judges of superior judiciary was challenged. The relief was granted as the court found that the petitioner's right of "access to justice for all" enshrined in Art.25 was violated.[1367] In another case relief was granted to the petitioner on the ground that the petitioner had locus standi as his right[1368] to have free access to an independent tribunal was violated.[1369]

Federation of Pakistan through Secretary M/o Law, Islamabad and others, PLD 2013 SC 413. (Challenging the composition of Election Commission of Pakistan), para 12.

[1362] Watan Party vs. Federation of Pakistan, PLD 2006 SC 697, at p. 737.

[1363] Faisal Daudpota, An In-Depth Study of Pakistan's Contempt of Court Law (September 27, 2022). Available at SSRN: https://ssrn.com/abstract=4231671 or http://dx.doi.org/10.2139/ssrn.4231671, last accessed 13.11.2024.

[1364] Delimitation of Constituencies Ordinance, 1988, *and* Representation of People Ordinance, 1988.

[1365] Muhammad Saifullah Khan vs. Federation of Pakistan, 1989 SCMR 22. *See also*, Yasmin Khan vs. Election Commission of Pakistan, 1994 SCMR 113.

[1366] Al-Jehad Trust vs. Federation of Pakistan, PLD 1996 SC 324.

[1367] Ibid. para 14. *See also*, Registrar, High Court of Baluchistan v Abdul Majeed & Others, PLD 2013 Quet. 26, *and* Mst. Banori vs. Jilani, PLD 2010 SC 1186, para 4.

[1368] U Art. 9 and 25 of the Constitution of the Islamic Republic of Pakistan, 1973.

[1369] Asad Ali vs. Federation of Pakistan, PLD 1998 SC 161. *See also*, Al-Jehad Trust case, PLD 1996 SC 324, at p. 528. "When a person is not competent to take cognizance of an offence, the entire proceedings before him would be void and coram non judice." Muhammad Ayub Khuhro vs. Pakistan, PLD 1960 SC 237, at 251. At p. 248 of the report, it was observed that "a judgment is void if it is pronounced by an incompetent Tribunal." On violation of Fundamental Rights of the petitioners u/Art. 9 and 25 *see also*, Wattan Party vs. Federation of

The fact remains that confusion still exists in what cases and at what appropriate stage the court would take the initiative. This becomes clear from the incident of allegation of meddling in judicial proceedings by the intelligence apparatus of the country. The matter was brought to the forefront by letter of IHC's six Judges and the approach thereupon by the then CJP Qazi Faez Isa.[1370] He was not moved initially but when the Bar Associations and especially the said six Judges gave vent to their intention to file petition u/Art.184 (3) he took the Suo Motu notice and fixed the case. This shows that the suo motu initiative depends on the sweet will of one person and it all depends on how the incident is perceived by that person notwithstanding the importance of the same as regards the general public and democratic tradition. The fact remains that time was ripe for the SCP to restate its position on the written law but the opportunity fell prey to certain expediencies listed on the unwritten judicial policy of the country.

6.5.4. The Concept of *Locus Standi* and the Sufficient Interest.

It is to be appreciated that the concept of locus standi[1371] has been whittled down inasmuch as the expression "sufficient interest", inter alia, includes civic, environmental and

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Pakistan, PLD 2006 SC 697 *and* Sindh High Court Bar Association vs. Federation of Pakistan, PLD 2009 SC 879. On de facto officer, *also see,* Thomas M. Cooley, Treatise On The Constitutional Limitations Which Rest Upon The Legislative Power of The States of The American Union, (also shortened as, Constitutional Limitations), (1st ed. 1868) Vol. 2, p. 1355.

[1370] This letter was addressed on 25th March, 2024 by Mohsin Akhtar Kiani, Tariq Mehmood Jahangiri, Sardar Ijaz Ishaq Khan, Babar Sattar, Arbab M. Tahir and Saman Raffat Imtiaz JJ. to the Supreme Judicial Council.

[1371] *See* Raoul Berger, Standing to Sue in Public Actions: Is It a Constitutional Requirement?, 78 YALE L.J. 816 (1969); David P. Currie, Misunderstanding Standing, The SCP Review Vol. 1981 (1981), pp. 41-47.; Kenneth C. Davis, Standing to Challenge and to Enforce Administrative Action, 49 COLUM. L. REVS. 759 (1949); Kenneth C. Davis, Standing to Challenge Governmental Action, 39 MINN. L. REVS. 353 (1955); William A. Fletcher, The Structure of Standing, 98 YALE L.J. 221 (1988); F. Andrew Hessick, Standing, Injury in Fact, and Private Rights, 93 CORNELL L. REVS. 275 (2008); Louis Jaffe, Standing to Secure Judicial Review: Private Actions, 75 HARVS. L. REVS. 255 (1961) [hereinafter Jaffe, Private Actions]; Louis Jaffe, Standing to Secure Judicial Review: Public Actions, 74 HARV L. REVS. 1265 (1961) [hereinafter Jaffe, Public Actions]; Gene R. Nichol, Jr., Injury and the Disintegration of Article III, 74 CAL. L. REVS. 1915 (1986); Richard J. Pierce, Jr., Is Standing Law or Politics?, 77 N.C. L. REVS. 1741 (1999); Nancy C. Staudt, Modeling Standing, 79 N.Y.U. L. REVS. 612 (2004); Ann Woolhandler & Caleb Nelson, Does History Defeat Standing Doctrine?, 102MICH. L. REVS. 689 (2004) ; Bradley S. Clanton, Standing and the English Prerogative Writs: The Original Understanding, 63 BROOK. L. REVS. 1001 (1997); Jonathan Levy, In Response to Fair Employment Council of Greater Washington, Inc. vs. BMC Marketing Corp.: Employment Testers Do Have a Leg to Stand On, 80MINN. L. REVS. 123, 128 (1995); *See also*: Steven L. Winter, The Metaphor of Standing and the

cultural interests.[1372] In the case of KBCA[1373] the petitioner had succeeded in proving a violation of Art. 25 as construction of high rise buildings was allowed on an amenity plot in a park. The focus was on the expression "sufficient interest." It was said that general approach to the concept of locus standi is to be evaluated within the context of "sufficient interest."[1374] It is also to be remembered that not only SCP in certain cases[1375] but the SCI also in *S.P. Gupta,* have laid down a rule that by showing sufficient interest anyone can maintain an action "for judicial redress of public injury arising from breach of the public duty."[1376]

It seems that the SCP feels more powerful under Art.184 (3) than under other provisions of the Constitution. Perhaps it is due to this reason that it numbers a civil petition under suo motu regime i.e., SMC u/Art.184 (3). The rationale for this assertion lies in the fact that in absence of written procedural requirements and the consequent liberty from the technical rigours, the SCP feels more confident in proceeding with the case. This provision also helps an incumbent CJP to show his judicial muscles. For example, in Civil Appeal No. 82-K of 2015 while dealing with this as a civil appeal the court could still have exercised the

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Problem of Self-Governance, 40 STAN. L. REVS. 1371 (1988); Cass R. Sunstein, Standing and the Privatization of Public Law, 88 COLUM. L. REVS. 1432, 1436-38 (1988) [hereinafter Sunstein, Standing and Public Law]; Cass R. Sunstein, What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III, 91 MICH. L. REVS. 163 (1992) [hereinafter Sunstein, What's Standing?]; Maxwell L. Stearns, Standing at the Crossroads: The Roberts Court in Historical Perspective, 83 NOTRE DAME L. REVS. 875, 889 n.61 (2008) (describing as insulation thesis as "once novel" and "once revisionist"); William A. Fletcher, The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions, 78 CAL. L. REVS. 263, 272 n.45 (1990); Tracey E. George & Robert J. Pushaw, Jr., How is Constitutional Law Made?, 100 MICH L. REVS. 1265, 1276 (2002) (book review); Robert J. Pushaw, Jr., Justiciability and Separation of Powers: A Neo-Federalist Approach, 81 CORNELL L. REVS. 393, 458-9 (1996); Maxwell L. Stearns, Standing and Social Choice: Historical Evidence, 144 U. PA. L. REVS. 309, 366 (1995); Maxwell L. Stearns, Standing Back from the Forest: Justiciability and Social Choice, 83 CAL. L. REVS. 1309, 1327 (1995); Mark Tushnet, The Degradation of Constitutional Discourse, 81 GEO. L.J. 251, 306-7 (1992); Robert J. Pushaw, Jr., Methods of Interpreting the Commerce Clause: A Comparative Analysis, 55 ARK. L. REVS. 1185, 1198 (2003), and Steven L. Winter: The Meaning of "Under Color of Law", 91 MICH. L. REVS. 323, 332 (1992).

[1372] de Smith, Woolf and Jawell: Judicial Review of Administrative Action, Sweet & Maxwell, (2023), 9th Edn. ISBN: 9780414111745, at p. 27.

[1373] Ardeshir Cowasjee and 10 others vs. Karachi Building Control Authority (KMC), Karachi and 4 others, PLD 1995 SC 2883.

[1374] Ardeshir Cowasjee and 10 others vs. Karachi Building Control Authority (KMC), Karachi and 4 others, 1999 SCMR 2883, para 12.

[1375] i.e.,Cases of Multiline Associates, *and* Ardeshir Cowasjee, *supra*.

[1376] S.P. Gupta vs. Union of India, AIR 1982, SC 149, para 970. See also, S.M. Thio,'Locus Standi in Relation to Mandamus' in public Law, edited by J.A.G. Griffith, Singapore University Press, 1971, at page 133; Lord Denning: 'The Discipline of Law', London: Butterworths, 1979, page 144, and H.W.R. Wade, Administrative Law. Clarendon Press; 4th edition (January 1, 1977), page 493.

authority and was equally potent to issue direction to do complete justice.[1377] As such, there was no need to re-register this case under suo motu domain. This shows by that time it was not settled as to which matter was to be taken u/Art.184 (3).[1378]

However, in the judicial history of SCP, the exercise of jurisdiction under 184 (3) has not been left solely to the presiding Judge(s); rather, the power has also trickled down to someone else. Human Rights Cell (HRC) was established in the SCP. HRC No.18877 of 2018 seems to be a case on the point which pertained to the matter of deduction of taxes and other charges by mobile companies in Pakistan. Ijaz ul Ahsan J. in his dissenting note[1379] observed that the HRC was a cell of SCP charged with the responsibility of sifting through hundreds of complaints and letters for bringing those matters that prima facie met the criteria of Art.184 (3), to the notice of the CJP who in that capacity decided whether or not the matter should be fixed in Court before a bench for appropriate orders.[1380]

The assertion that the SCP did not have jurisdiction u/Art.184 (3) in matter of collection of taxes was reckoned to be misconceived. It was observed that SCP in another case held that sales tax imposed by the Federal Government was unlawful as it fell within the domain of Parliament.[1381] This, did not however automatically meant that the power u/Art.184(3) could only be exercised against a tax imposed by the executive and not the legislature, particularly when the Constitution itself did not draw any such distinction.[1382] It

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[1377] u/Art.187 of the Constitution of Islamic Republic of Pakistan, 1973.
[1378] Suo moto case No. 19 of 2016 which pertained to an anonymous complaint. In this case the SCP undertook inquiry proceedings u/Art.184 (3) of the Constitution.
[1379] Human Rights Case No.18877 of 2018. Paragraph No.7 (vi) of the lead judgment cited as PLD 2019 SC 645.
[1380] PLD 2019 SC 645, para 3. *See also*, application by Mst. Bibi Zahida for arrest of accused of murder of her daughter Waheeda). In the matter of Human Rights Case No.19526-G of 2013, decided on 24th July, 2013, 2014 SCMR 83. *See also,* application by Abdul Rehman Farooq Pirzada, PLD 2013 SC 829.
[1381] Engineer Iqbal Zafar Jhagra and another vs Federation of Pakistan and others, 2013 SCMR 1337, para 22. See also para 29, at page 1363.
[1382] Ibid, para 48(V), at page 1381. On adjudging any legislative and/or administrative action of the State, see also, Abdul Wahab and others vs. HBL and others, 2013 SCMR 1383, para 8, and Baz Muhammad Kakar and others vs. Federation of Pakistan through Ministry of Law and Justice and others, PLD 2012 SC 923, para 35.

was said that no distinction had been drawn between executive and legislative actions related to tax or otherwise.[1383]

6.5.5. The Phenomenon of Absence of Challenge to the Exercise of Jurisdiction u/Art.184 (3).

The factum that the jurisdiction invoked by SCP was neither questioned nor challenged, as the original jurisdiction had been invoked, it is necessary that the Bench should ensure that it was done in accordance with the Constitution.[1384] The Judges are under the Constitution, but the Constitution is what they say it is.[1385] Jurisdiction u/Art.184 (3) may be invoked by the SCP if two preconditions are met. Firstly, the matter must be one of public importance. Secondly, it must pertain to the enforcement of any of the Fundamental Rights. The term public importance however is not defined in the Constitution.[1386]

[1383] PLD 2019 SCP 645, para 6. *See also*, All Pakistan Newspapers Society and others vs. Federation of Pakistan and others (PLD 2004 SC 600); Ch. Muhammad Siddique and 2 others vs. Government of Pakistan through Secretary, Ministry of Law and Justice Division, Islamabad and others (PLD 2005 SC 1); Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A. and others vs. Federation of Pakistan through Secretary Ministry of Interior and others (PLD 2007 SC 642); Thal Industries Corporation Limited through Legal Manager vs. Government of the Punjab through Chief Secretary, Punjab and 10 others (2007 SCMR 1620); Jamat-e-Islami through Amir and others vs. Federation of Pakistan and others (PLD 2009 SC 549); Munir Hussain Bhatti, Advocate and others vs. Federation of Pakistan and another (PLD 2011 SC 407); Watan Party and others vs. Federation of Pakistan and others (PLD 2012 SC 292); Muhammad Azhar Siddique and others vs. Federation of Pakistan and others (PLD 2012 SC 660); Baz Muhammad Kakar and others vs. Federation of Pakistan through Ministry of Law and Justice and others (PLD 2012 SC 923); Dr. Muhammad Tahir-ul-Qadri vs. Federation of Pakistan through Secretary M/o Law, Islamabad and others (PLD 2013 SC 413); Abdul Wahab and others vs. HBL and others (2013 SCMR 1383), and Imran Ahmad Khan Niazi vs. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan/Member National Assembly, Prime Minister's House, Islamabad and 9 others (Panama Papers Scandal) (PLD 2017 SC 265). On public interest involving number of Fundamental Rights of citizens *see also*, Marva Khan report in 2021 Global Review of Constitutional Law, I.CONnect, at p. 264 *in*: Richard Albert and David Landau and Pietro Faraguna and Giulia De Rossi Andrade, The 2022 Global Review of Constitutional Law (October 30, 2023). The 2022 Global Review of Constitutional Law. ISBN: 978-1-7374527-5-1. Sponsored by the Constitutional Studies Program at the University of Texas at Austin. Published by EUT Edizioni Università di Trieste. ISBN: 978-88-5511-460-8 (EUT), U of Texas Law, Legal Studies Research Paper, Available at SSRN: https://ssrn.com/abstract=4617537 or http://dx.doi.org/10.2139/ssrn.4617537, last accessed 20.08.2024.

[1384] Art. 175 (2) r.w. Art. 187 of the Constitution, 1973.

[1385] Eric J. Segall, The Constitution Means What the SCP Says It Means, 129 Harvs. L. Revs. F. 176. See also, José Luis Aragón Cardiel, Amanda Davis & Lauranne Macherel, Modern Self-Defense: The Use of Force Against Non-Military Threats, Columbia Law Review. Issue 49.3., p.201).

[1386] PLD 2019 SCP 318.

Every citizen has the fundamental right to access "information in all matters of public importance."[1387] The President may "obtain the opinion of the SCP on any question of law which he considers of public importance."[1388] Appeals from a judgment, decree, order or sentence of an Administrative Court or Tribunal lie to the SCP if it, "involves a substantial question of law of public importance."[1389] The provisions, like Art.184(3) of the Constitution, use the word "public" in conjunction with the word "importance", meaning thereby that the mere importance of a matter isn't sufficient to invoke jurisdiction. The matter must be one of public importance and must also involve the rights of the public.[1390]

It must be noted that Art.184 has also been used by the SCP for tackling the issue of environmental pollution.[1391] There is another case on the point pertaining to Balochistan.[1392] The SCP, having noticed in newspaper[1393] that nuclear or industrial waste was to be dumped in Balochistan coastal belt which was in violation of Art.9 of the Constitution, ordered the office to inquire from Chief Secretary of Balochistan about that.[1394] In another while referring to Art.7 of the Universal Declaration of Human Rights in Islam, and the concept of Dignity of man, the SCP held that the public hanging of even the worst criminal "appears to violate the

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[1387] Art. 19- A of the Constitution, 1973. New Article 19-A ins. by the Constitution (Eighteenth Amdt.) Act, 2010 (X of 2010), s. 7.
[1388] Art.186 of the Constitution, 1973.
[1389] Art. 185 (2)(f) of the Constitution, 1973.
[1390] Benazir Bhutto vs. Federation of Pakistan, PLD 1988 SC 416, para 49. On what is meant by public importance *see also*, Manzoor Elahi v Federation of Pakistan, PLD 1975 SC 66. *See also*, SMC No.7 of 2017 (Regarding Rawalpindi-Islamabad Sit-in/*Dharna*), PLD 2019 SCP 318; Sohail Butt vs. Deputy Inspector-General of Police (North) National Highway and Motorway Police, 2011 SCMR 698 *and* Watan Party and others vs. Federation of Pakistan and others, PLD 2012 SC 292. From Indian jurisdiction *see also*, Hamabai Franjee Petit vs. Secretary of State for India-in-Council, ILR 39 Bomb. 279, para 15.
[1391] In re: Pollution of Environment Caused by Smoke, Emitting Vehicles, Traffic Muddle, H.R. Case No. 4-K of 1992, decided on 1st November, 1993 by Saleem Akhtar, J. Muhammad Fareed vs. The State. (Suo Motu case against Smoke Emitting Vehicles in Karachi). 1996 SCMR 543, para 2(d). The SCP also directed the Provincial Government to appoint the Honorary Magistrates with the approval of the CJ, SHC for associating with the checking team and if Special Traffic Magistrates (S.T.Ms.) are not available, the Honorary Magistrates shall try and dispose of summary cases at the time of checking.
[1392] In re: Human Rights Case (Environment Pollution In Balochistan), Human Rights Case No.31 IC/92(Q), decided on 27th September, 1992. Present: Saleem Akhtar, J. PLD 1994 SCP 102.
[1393] This news item was reported by APP published in daily Dawn dated 03. 07. 1992, entitled "N Waste to be dumped in Balochistan?"
[1394] PLD 1994 SCP 102.

dignity of man and constitutes therefore, a violation of the fundamental right contained in Art.14 of the Constitution."[1395]

These cases show that the issue of locus standi in a matter u/Art.184 (3) is still not settled.[1396] For example, in a case where Additional Judges of the HC (petitioners) were not confirmed as Permanent Judges it was said that they failed to establish infringement of any Fundamental Right. Therefore, they could not also claim an extension of their term as of Constitutional right and that when the JCP as a whole was not in favour of recommending petitioners for an extension of their term, the latter could have no reasonable ground to entertain a legitimate expectation to be confirmed as Permanent Judges.[1397]

6.6. Unchecked and Inconsistent Policy of Taking Cognizance.

The unchecked and inconsistent policy of taking cognizance suo motu expresses the phenomena of unconstitutional constitutionalism and unwritten judicial policy. Admittedly, from the perspective of debate on constitutionalism, any discussion about expression of people's will forms the basis of circumstance of politics. So, there are certain questions which need to be answered: is it the constitutional court[1398] or the legislature that expresses the will

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[1395] CP No. 9 of 1991 cited as 1994 SCMR 1028, para 4. The SCP also referred to "Universal Declaration of Human Plights in Islam", prepared by a number of leading Muslim Scholars and published in London on April 12th, 1980: "God will inflict punishment on those who have inflicted torture in this world."

[1396] *See*, KESC Labour Union vs. Federation of Pakistan through Cabinet Secretary, 2023 CLD 718 (KAR). It was said that "any individual or small group of persons, in the garb of Public interest litigation, cannot be allowed to invoke the constitutional jurisdiction of High Court under Art. 199 of the Constitution, on mere allegation of mala fide in respect of any decision of the executive authority, whereas, Courts are required to exercise restraint, and should ensure that unless there is a matter of Public interest or enforcement of fundamental rights, only then its discretion under Art. 199 of the Constitution should be invoked and exercised by the Courts." *See also*, Syed Mohsin Shah vs. Federation of Pakistan through Secretary Law and Justice, Islamabad, 2023 PLC(CS) 1467 (ISD). Also available at http://www.plsbeta.com/Lawonline/law/casedescription.asp?Casedes=2023I2022, last accessed 15.11.20204.

[1397] Abdul Sattar and 2 others Vs The Judicial Commission of Pakistan and others, PLD 2023 SC 32, para 5. This aspect of the constitutional jurisdiction of the Court was also explained in the case of Al-Jehad Trust and another vs. Lahore High Court (2011 SCMR 1688): "11.The mere importance of a matter, without enforcement of any fundamental right or reference to a fundamental right without any public importance, will not attract the jurisdiction of this Court u/Art. 184(3) of the Constitution."

[1398] Prior to 26th Constitutional Amendment, 2024 there was no concept of exclusive constitutional court in Pakistan as all the HCs and SCP were reckoned as such. However, vide s. 14 of 26th Constitution (Amendment) Act, 2024 concept of Constitutional Bench has' en put forth by inserting Art.191-A in the Constitution, 1973.

of the people? Should not the representative role of the legislature be different from courts' same role which is limited to parties whose cases are under examination before them? Is not there any difference between elected representatives of people and unelected judges? Does not the constitution clearly distinguish among the jobs of different organs of the state? If yes, are the Art.199 and Art.184 (3) of Constitution of 1973 only good on a piece of paper? Is it that the superior judiciary infers its (other/additional) powers from writings of scholars in addition to provisions of the constitution? If so, what about findings of scholars like Jeremy Waldron whose verdict is in favour of the participatory role of legislatures as to deliberations on questions having bearing on people's will? And most importantly who would answer these questions or at least initiate a debate on them? The answers to all these questions lie in the unwritten judicial policy of the superior courts of the country.

6.6.1. Intrusion into Policy Affairs.

For knowing as to how the self-escalated role of one organ gives rise to a complex conundrum as it creates inroads into jurisdictions of others, *Yousaf Raza Gillani* presents a pertinent illustration. It also brings forth as to how unwritten unconstitutional constitutionalism degenerates to unwritten judicial policy in Pakistan. In this case the SCP held that the functionaries of state must conform to people's will and be responsible to them as there is a fiduciary correlation between the two. In fact, the underlying assertion was that both the government and the court have got to serve people in line with their will. Thereby, the Court happened to raise the slogan that the will of people is expressed by the people through it.[1399]

As such, the judiciary appears to have acquired, through unwritten judicial policy, a new role of reflector of people's will in the name of working under principle of checks and

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These Benches are to be established in all the HCs and SCP. The first of such Bench was constituted comprising seven Judges of SCP headed by Justice Amin ud Din Khan, as per SCP/JCP Press Release dated 5th Nov. 2024.

[1399] Yousaf Raza Gillani vs. Assistant Registrar, PLD 2012 SC 466.

balances. Since it dispels the roles ascribed to State's other organs, the questions that arise here are: whether legislature/ executive can claim that they have a role to adjudicate as per the same will of the same people because the system of checks and balances is the same under the same constitution? Moreover what remains of the role assigned to the chosen representatives of the people if under the garb of this newly acquired role the judiciary goes on to undertake legislature's job of making laws?

In *Jurists Foundation*[1400] it was held that Judges were to defer to the views of legislature while dealing with constitutional questions. Interestingly, it directed the Parliament to make law to regulate the tenure/retirement of COAS, despite the fact that the relevant Army Act[1401] and Regulations/Rules[1402] did not provide for the same. Question remains as to why the constitutional courts have reduced the role of state's other organs through unwritten unconstitutional constitutional functioning based judicial policy to create inroads into the respective jurisdictions of other pillars of state? Why is there growing and fascinating tendency among judges to rely upon unwritten legal principles[1403] when there are no statutory rules to allow a Judge to fill the gap in a certain way?

Of course such questions have not been averted to and have, as such, remained unanswered. The courts of law, especially at the upper level, have remained content with the practice of reliance upon unwritten procedure. It is time tested principle of law and of natural justice that the institutional practice followed continuously and consistently by an institution for a considerable period of time may be used to resolve a controversy, in the absence of the law. However, instead of responding to this factum, the SCP granted extension to the COAS

[1400] Jurists Foundation through Chairman vs. Federal Government through Secretary, Ministry of Defence and others, PLD 2020 SC 1, para 47.
[1401] Pakistan Army Act, 1952.
[1402] Army Regulations (Rules), 1998.
[1403] Mark Van Hoecke, The Use of Unwritten Legal Principles by Courts, Ratio Juris. Vol.8 No.3 December 1995 (248-60), at p. 250.

and judicially stamped the future practice for succeeding Generals to seek extension,[1404] all at the cost of written law and the rights of the long line of the serving officers who had legitimate expectation to be promoted to the next rank.

6.6.2. The Shadow Dockets qua Transparency and Consistency.

The shadow docket[1405] is the use of emergency orders and summary decisions by the SCP of the United States without oral argument. It pertains to a break from ordinary procedure. The process generally results in short unsigned rulings. However, this practice has been criticized for various reasons including bias, lack of transparency, and lack of accountability. The transparency comes with consistency However, when we look at the role of the constitutional courts of Pakistan there appears unchecked and inconsistent policy of taking cognizance which is at the same time unwritten.

Two recent incidents would be sufficient in this respect. As the former premier[1406] tried foil the vote of no-confidence the succeeding events brought to the fore the constitutional courts' shadow dockets. The SCP was opened at midnight on Saturday, April 9, 2022 and the exercise of thwarting the no confidence could not be allowed. The opening of the court close to midnight on a Saturday was really an anomaly.

The other incident pertained to ruling of deputy speaker[1407]whereby he did not conduct voting on resolution of no confidence against PM Imran Khan. SCP adjourned the matter for three dates and the emergency was tackled accordingly. Even if the Premier had

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[1404] Jurists Foundation through Chairman vs. Federal Government through Secretary, Ministry of Defence and others, PLD 2020 SC 1. The repercussions started to flow in 2024 when by rubber stamped Parliament extension to Armed Services Chiefs was got approved by passing Amendment in Acts pertaining to Armed Forces on 4th Nov. 2024.

[1405] The term was coined in 2015 by University of Chicago law professor William Baude.

[1406] It was the then Prime Minister Imran Khan who tried to allegedly foil the vote of no confidence in April 2022.

[1407] Qasim Suri was the then deputy speaker of National Assembly of Pakistan (2022). He referred to Art. 5 of the Constitution of Islamic Republic of Pakistan 1973 and by referring to letter gate qua Asad Majeed's (Pakistani ambassador to USA) cable, held that as a foreign hand (USA) was involved in conspiracy of throwing out the elected government of Pakistan, the conducting of no confidence voting would amount to endorsing interference into sovereignty and internal affairs of Pakistan.

intended or for that matter had removed the COAS such an emergency could have been responded to or tackled during the working hours of the courts as well. In either case there was no need to resort to what came to be known on social media as midnight justice. This shows how the constitutional courts of Pakistan, and especially the SCP, wield their suo motu powers. However, such an act cannot be justified save as part of unwritten judicial policy.[1408]

6.6.3. Unstructured Discretion of Fixing of Cases, Constituting Benches and Reckoning of Public Importance.

Not so long ago, a well-known Pakistani lawyer referred to something he coined as the 'Gulzar doctrine'.[1409] According to him, institution of the case and fixing it before a Bench were contingent on whether the resolution of the case in one way or the other and the same might jeopardise powerful interests.[1410]

SMC No. 17 of 2016[1411] pertained to vires of S.25 (a) of NAB Ordinance.[1412] SCP noticed that the NAB authorities suggest to the accused that they may opt to offer voluntary return of the amounts acquired or earned illegally by them. Alarmingly, on payment of certain portion of the amount, such person is given clean chit by NAB to rejoin his job. The frequent exercise of powers u/s.25 on one hand multiplied the corruption in addition to usurping the jurisdiction of the F.I.A. and Anti-Corruption agencies and defeated the object of the Ordinance on the other hand.[1413] Though it was a good step to lay hands on matter of public importance yet this case shows that there has been an inconsistent and unchecked policy of exercising jurisdiction under suo motu regime as the cases kept on popping up.

[1408] Adeel Wahid, Shadow docket, published in Dawn, April 24th, 2022. Also available https://www.dawn.com/news/amp/1686542, last accessed April 24th, 2022.
[1409] Reference is to Justice Gulzar , an ex -CJ of the SCP.
[1410] Adeel Wahid, Shadow docket, *supra*.
[1411] Anwar Zaheer Jamali, HCJ, Amir Hani Muslim and Ch. Azmat Saeed, JJ. decided this SMC on: 24.10.2016.
[1412] National Accountability Ordinance (No. XVIII of 1999).
[1413] Suo Motu case No.17 of 2016, The State through Chairman NAB vs. Hanif Hyder and another, (2016 SCMR 2031). In this case report was also submitted as C.M.A. No. 6376 of 2016 pertaining to persons who had offered voluntary return of the monetary gains that they had acquired through corrupt practices and such offer was accepted by the Chairman, NAB.

In a case CJP was pleased to take notice u/Art.184 (3) along with the submitted complaints[1414] which added to the allegations made in the earlier anonymous complaint. SCP said that as no one had questioned jurisdiction u/Art.184(3) there could be no doubt that SCP had the jurisdiction vested in it.[1415]

It would be imperative to recall that although the SCP's order regarding the announcement of date to hold general elections of 2023 in the two provinces had been partially implemented to the extent of Punjab, it was reported that the certified copies of Feb 23, 24 and 27, 2023 orders of the complete order sheet were not received by the SC office till the time the case landed in the SCP.[1416]

Interestingly, the Feb. 24 order was signed by nine members of the larger Bench after a week. Two judges namely Justice Ijazul Ahsan and Justice Sayyed Mazahar Ali Akbar Naqvi did not give reasons about why they were recusing from the Bench.[1417] It was claimed that there was no final order of the court and it was expected that several things would come to the surface in the detailed judgement.

Surprisingly, there prevailed confusion if the March 1, 2023 decision was given by four to three judges and if it was not three to two judges.[1418] The fact, as such, remains if the purpose of the suo motu proceedings is to shift the supremacy from one section of the superior judiciary to the other. It must be also remembered that the suo motu proceedings in the matter had exposed a severe rift within the SC judges, all due to invincible but existing unwritten judicial policy.[1419]

[1414] CMA No. 7135 of 2016 and CMA No. 172-K of 2017.
[1415] Suo moto case No. 19 of 2016, (2017 SCMR 683), para 20.
[1416] https://tribune.com.pk/story/2404625/order-sheet-in-sc-suo-motu-case-still-awaited, by Hasnat Malik, March 06, 2023, last accessed March 7, 2023.
[1417] The former was dismissed even after having resigned by SJC whereas the latter resigned timely to avoid facing SJC in 2024.
[1418] https://tribune.com.pk/story/2404625/order-sheet-in-sc-suo-motu-case-still-awaited, by Hasnat Malik, March 06, 2023, last accessed March 7, 2023.
[1419] Ibid. The Supreme Court (Practice and Procedure), Act 2023 was passed to curtail the suo motu powers of CJP. Vide S. 26th Constitution (Amendment) Act, 2024

6.7. Comparative Study of Other Jurisdictions.

For better understanding of unwritten judicial policy vis-à-vis Public Interest Litigation comparative study is undertaken in the coming lines.

6.7.1. Public Interest Litigation (PIL) in USA.

PIL is a new concept in the administration of justice.[1420] The traditional rule that the person seeking a legal remedy should have a legally protected interest has been relaxed in cases where issues of public interest are raised. This innovation had its origin in the United States of America "as a distinctive phase of socio legal development."[1421] The main reason for the growth of PIL was the failure of administrative agencies to protect public interest.[1422]

One of important cases on PIL in USA is Guantanamo Bay case which was filed by detainees in 2002. It was dismissed in 2004 but on appeal the case was won in 2008. In the case of *SCRAP* an environmental group of law students agitated that the inter-state commerce commission' decision to increase the rail-roads' rates would affect the shipment of the garbage adversely and the same would thereby disturb the environmental balance around Washington. The prayed relief was granted by the court.[1423]

[1420] Public Interest (Litigation) involves a legal action initiated in a court of law for the enforcement of public interest or that in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected. *See*, Black's Law Dictionary Revised 4th Ed.88, at P.1393. See also: State vs. Crockett, 206 P. 816,86 Okla. 124,1922 OK 157. Also available at: https://case-law.vlex.com/vid/state-v-crockett-13069-929529563, last accessed on 12-06-2023.

[1421] Prof. Syed Mushtaq Hussain, Public Interest Litigation, PLD 1994 Journal 5, at p.6. *See also*, Rachel Bayefsky, Public-Law Litigation at a Crossroads: Article III Standing and 'Tester' Plaintiffs (September 7, 2023). Virginia Public Law and Legal Theory Research Paper No. 2023-64, New York University Law Review Online, Available at SSRN: https://ssrn.com/abstract=4565291 or http://dx.doi.org/10.2139/ssrn.4565291, last accessed 15.11.2024.

[1422] James E. Pfander, Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement for a Partisan World (April 19, 2023). Fordham Law Review, Vol. 92, 2023, Northwestern Public Law Research Paper No. 23-25, Available at SSRN: https://ssrn.com/abstract=4424076, last accessed 13.11.2024. The initiative in USA owes its existence to poverty and as a means to bring about social reform. It has been so and remains integral to an all-inclusive social change policy. *See also,* Helen Hershkoff & David Hollander, Rights into Action: Public Interest Litigation in United States, Chapter 3 of Ford Foundation case Studies: 'Many Roads to Justice', (2000), ISBN 0-916584-54-2, at P.89.

[1423] United States vs. SCRAP, 412 US 660 (1973).

6.7.2. Lord Denning on Public Interest Litigation in Great Britain.

The credit for PIL's development in Great Britain largely goes to Lord Denning. However, the scope and purpose of this development is the same as followed by the courts in the USA. With regard to competency to file an action in an English court rule, that plaintiff should be an aggrieved party, has been modified when the case involves enforcement of a public duty against a public authority. It is enough that the plaintiff is a member of the public having sufficient interest in the subject matter. This rule was based on public policy to avoid multiplicity of actions which would have resulted had each sufferer been allowed to file a suit. In Denning's view subject to certain procedural limitations which could be dispensed with in appropriate cases a member of the public who in common with thousands of other citizens is offended or injured by transgressions of law by public authorities can come to Court and seek to have the law enforced.[1424] This is a phenomenal change in the concept of traditional litigation based on adversary system in which the legal contest is between two contending parties, one pressing its claim and the other opposing it.[1425]

6.7.3. Public Interest Litigation in India.

It is to be appreciated that although the powers to issue writs granted to the High Court u/Art.226 of the Indian Constitution were not dependent on the existence of an aggrieved person or party but in India strict juristic standing test was also applied.[1426]

[1424] Attorney General vs. Independent Broadcasting Authority (1973), All England Law Reports, Vol. I, p. 689. In Raymond vs. Greater London Council, (1976) 3 All England Law Reports, p. 184.) Lord Denning referred to the case of Attorney General, supra to hold that in fit cases the courts in their discretion can grant whatever remedy is appropriate.

[1425] *See also*, Ibrahim Obadina, Nigerian Supreme Court's Stealth Relaxation of Locus Standi in Environmental Litigation: Redirecting Judicial Approach to Public Interest Litigation (July 30, 2021). Journal of Private and Business Law 2021, Usman Danfodiyo University, Sokoto, Available at SSRN: https://ssrn.com/abstract=4021515 or http://dx.doi.org/10.2139/ssrn.4021515, last accessed 12.11.2024.

[1426] Janata Dal vs. H.S. Chowdhary, AIR 1993 SC 892, para 70. For applicability of 'aggrieved person' rule in pro bono publico, *See also*, Haji Adam vs. Settlement and Rehabilitation Commissioner (PLD 1968 Kar. 245); Muhammad Ismail Shah vs. Mst. Jaferi Begum (1969 S C M R 34).

However, in India the concept of PIL is of recent origin.[1427] It seems that the question of locus standi in a matter of public interest was considered for the first time in *S.P. Gupta*. In that case the Union Ministry of Law issued a circular requiring an undertaking to be obtained from the Additional Judges of the State HCs that they could be transferred to other HCs. The question of locus standi of the petitioner-advocates came under consideration. They were held to have sufficient interest to challenge the constitutionality of the offending letter by a writ petition coming within the domain of public interest litigation.[1428] With regard to PIL the SCI has evolved certain rules the object of which is to make available the benefit of the legal process to those who by reason of social disadvantages cannot approach the courts for redress of a legal wrong or injury caused to them in violation of any constitutional or legal provision or without written authority of law.[1429]

In India, however, expression "Public Interest Litigation" has been changed with more indigenous label 'Social Action Litigation.'[1430] The objectives of this innovative legal process in India and Pakistan are quite different. Therefore, there is much justification in change of nomenclature as has been done in India. Under the aforesaid circumstances, a person or the society could espouse a common grievance by filing a petition in the HC[1431] or in the SCI.[1432]

[1427] Art. 32 Constitution of India, 1949 is equivalent to Art.184 (3) of the Constitution of Islamic Republic of Pakistan, 1973.
[1428] S.P. Gupta vs. Union of India, AIR 1982, SC 149.
[1429] Jaipur Shahar Hindu Vikas Samiti ... vs State Of Rajasthan Tr.Chief Sec.& Ors. Equivalent citations: 2014 AIR SCW 3142, 2014 (5) SCC 530, AIR 2014 SC (SUPP) 1949, (2014) 2 WLC (SC) CVL 125, (2014) 5 SCALE 200. Also available at https://indiankanoon.org/doc/147290012/, last accessed 12.11.2024.
[1430] Khushi Pandya, Public Interest Litigation- Important Pillar for Rule of Law: Indian Perspective (January 24, 2022). Available at SSRN: https://ssrn.com/abstract=4016063 or http://dx.doi.org/10.2139/ssrn.4016063, last accessed 12.11.2024. *See also*, 25 Chained Inmates in Asylum Fire in Tamil Nadu Vs. State of T.N. MANU/SC/0081/2002, *and* Rajeshwar Singh vs. Subrata Roy Sahara and Ors. MANU/SC/1321/2011.
[1431] U/Art. 226 of the Constitution of India, 1949. Article 226 of the Constitution of India, 1949 is equivalent to Art. 199 of the Constitution of Islamic Republic of Pakistan, 1973. On concept of social justice, *see also*, In re; the inhuman conditions in 1382 Prisons, (2017) 10 SCC 658, also available on https://indiankanoon.org/doc/25022714/, last accessed on 09-11-2023.
[1432] U/Art. 32 of the Constitution of India, 1949.

A case pertained lawyers observing strike(s).[1433] The SCI observed that despite its decisions in previous cases[1434] and the warnings by the courts time and again, the lawyers went on strikes and it appeared that the message had not reached. SCI took suo moto cognizance and issued notices to the Bar Council of India and all the State Bar Councils to suggest the further course of action.[1435]

How far the line of PIL could be stretched was the moot question in *Pragati Mahila Mandal, Nanded*. In that case the SCI discussed the mode and manner of exercising suo motu jurisdiction. It was observed that though the courts entertaining PIL enjoy a degree of flexibility unknown to the trial of traditional court litigation but the procedure adopted by it should be known to the judicial tenets and adheres to established principles of a judicial procedure employed in every judicial proceeding in the process of adjudication. However, it was added that minor deviations are permissible here and there in order to do complete justice between the parties.[1436]

It is worth appreciating that SC, under its inherent jurisdiction, can pass any order or issue any decree which it considers expedient to advance the cause of justice as well as ensuring that complete justice is done between the parties.[1437] However, it is to be noted that every action on the part of court has its basis in some written provision of some law and if the same is based on some unwritten law that unwritten law must have some backing in some written provision of law. As such, reasoning of the Court in this regard could not be legally

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[1433] Special Leave Petition (Civil) No. 5440 of 2020 @ Diary No. 1476 of 2020, decided on: 28.02.2020. Present/Hon'ble Judges/Coram: Arun Mishra and M.R. Shah, JJ. District Bar Association, Dehradun Vs. Ishwar Shandilya and Ors. MANU/SC/0235/2020.

[1434] Ex-Capt Harish Uppal vs. Union of India, (2003) 2 SCC 45.; Common Cause, A Registered Society vs. Union of India, (2006) 9 SCC 295, *and* Krishnakant Namrakar vs. State of M.P. (2018) 17 SCC 27. Also available on www.indiankanoon.org, last accessed on 08-11-2023.

[1435] District Bar Association, Dehradun vs. Ishwar Shandilya and Ors. MANU/SC/0235/2020, para 07. *See also*, Devika Biswas vs. Union of India (UOI) and Ors. MANU/SC/0999/2016.

[1436] Pragati Mahila Mandal, Nanded Vs. Municipal Council, Nanded and Ors. MANU/SC/0132/2011.

[1437] Nilima Rohidas Garud @ Mrs. Nilima W/O vs. State Of Maharashtra Thr. Sec. Tribal. On 1 November, 2023. Also available at https://indiankanoon.org/doc/154028009/, last accessed 14.11.2024. *See also*, Art. 187 of the Constitution of the Islamic Republic of Pakistan, 1973.

upheld nor a seal of approval to such a procedure could be granted as the same would lead to an anomalous situation not akin to law.

The SCI also was alive to the flip side and said that there was no denial that the PIL had been misused or that occasionally the court had exceeded its jurisdiction. But the court tried to justify that factum by emphasizing that wherever the court exceeded its jurisdiction, it had always been in the interest of the people prompted by administrative mis-governance. In Pakistan, "individual rights have now assumed a secondary place and instead social rights have come to the fore."[1438] The judiciary has to play its full part to assist the citizens to obtain these rights.

6.8. The Limited Legality of Suo Motu Action.

The observations of J. Dr. Nasim Hasan Shah can be of much help in determining the direction for the future development of the judicial initiative in the field of PIL beyond the narrow mandate of Art.184 (3) of the Constitution, 1973.[1439] He has cited ten examples of human rights cases where SCP passed remedial orders.[1440] A careful study of the subjects cited would disclose significant fact that the cases discussed did not involve violations of Fundamental Rights as contained in Chapter 1 of Part II of the Constitution but were matters related to human rights. Thus the jurisdiction exercised by the SCP in said cases was not essentially confined to enforcement of Fundamental Rights within the meaning of Art.184 (3) but was a much wider exercise of judicial discretion to provide social justice to the citizens.

In Pakistan the subject of pro poor litigation was briefly touched upon in the SCP judgment in *Miss Benazir Bhutto*'s case.[1441] A petition u/Art.184(3) had been filed by her as

[1438] Mr. Justice Dr. Nasim Hasan Shah, President SAARC LAW Pakistan , Public Interest Litigation As a Means of Social Justice", (P.31 Journal section, PLD March, 1993 Part and continued at p.33 of April Part).
[1439] Prof. Syed Mushtaq Hussain, Public Interest Litigation, PLD 1994 Journal 5, 7.
[1440] Mr. Justice Dr. Nasim Hasan Shah, President SAARC LAW Pakistan , Public Interest Litigation As a Means of Social Justice", (P.31 Journal section, PLD March, 1993 Part and continued at p.33 of April Part).
[1441] Benazir Bhutto vs Federation of Pakistan, PLD 1988 SC 416.

Co-Chairperson of the Pakistan People's Party to challenge certain amendments made in the Act of 1962[1442] on the ground that they violated certain Fundamental Rights. The conclusion reached by the Court was that there was no legal bar to a person acting bona fide for the enforcement of the fundamental rights of a group or class of persons. This is what PIL or class action undertakes to achieve as it goes further to ease the rule on locus standi so as to include a person who bona fide makes an application for the violation of any Constitutional right of class of persons whose grievances go unnoticed. The initiation of the proceedings in this manner will ensure meaningful protection of the rule of law given to the citizens.[1443] The other case in which some aspects of pro poor litigation were deliberated is *Darshan Masih* u/Art.184.[1444] This being the first case of its nature SCP thought it necessary to clarify certain procedural and other aspects of PIL. By extending the principles an informal way, in the form of a letter, was reckoned as valid for action u/Art.184 (3).

The process of pro poor litigation in Pakistan is yet in a very early stage of evolution.[1445] The question is whether it is possible to enlarge the sphere of PIL beyond the scope of Art.184 (3) of the Constitution so that it may be possible to redress grievance of a class arising from disregard of statutory duty, misuse of power or any other legal wrong committed by some government entity and the nature of the wrong is such that the provisions of Art. 184 (3) are not attracted.

In view of above it would be safe to say that the exercise of suo motu jurisdiction has its validity to a limited extent. There are always other bodies who are being borne by the country through public exchequer. The exercise of the jurisdiction under the garb of suo motu should be sparingly used lest it becomes the order of the day. It can have, when exercised

[1442] Political Parties Act, 1962.
[1443] Art.4 of the Constitution, 1973.
[1444] Darshan Masih vs. State, PLD 1990 SC 513.
[1445] Prof. Syed Mushtaq Hussain, Public Interest Litigation, PLD 1994 Journal 5, 7.

frequently, the marring and adverse effects when it comes to delivery of results and performance by the other bodies in the society.

However, all is not bad. The exercise of this regime turns out to be blessing in certain respects. It is when the power is exercised in view of non-availability of the efficacious and matching remedy. The example can be quoted of civil review petition No.193 of 2013.[1446] In this case[1447] it was said that as a result of existing cumbersome and prolonged processes of seeking relief from the administration or Service Tribunal,[1448] the honest, efficient and law-abiding civil servants are frequently left with a helpless situation. Their victimization at the hands of the administration and political executive tremendously affect their morale, character and even their prospects of touching the pinnacle of career.[1449]

Since 1973 in a total of 94187 cases, power u/Art.184 (3) was invoked and the larger number of such cases started appearing in the SCP after 1988's *Benazir Bhutto* case was decided, and more especially since 1990's *Darshan Masih* case. Since 1990 "the SCP decided a total of 930 cases invoking Art.184 (3), out of which most were found maintainable."[1450] Encouraged by appreciable example set by the SCP, the SHC also followed the suit and started taking action on telegrams sent by the deprived persons who could not bear the expenses of lawyer. Such telegrams were converted into Constitutional petitions.[1451]

Moreover, the Constitutional relief was previously circumvented by falling back upon requirements prescribed by rigid law as well as the formal approach for a relief in many cases and justice was delayed. Emergence of PIL has softened these procedural steeplechases and

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[1446] CRP of 2013 in Constitutional Petition No.71 of 2011. Nasir-ul-Mulk, C.J., Amir Hani Muslim and Ijaz Ahmed Chaudhry, JJ., took up this matter U/A. 184 (3) of the Constitution, 1973. It pertained to service matter.
[1447] Ali Azhar Khan Baloch and others vs. Province of Sindh and others, (2015 SCMR 456).
[1448] S. 4(i) (a) of the Service Tribunals Act, (Act IX of 1974).
[1449] Ali Azhar Khan Baloch and others VS. Province of Sindh and others, (2015 S C M R 456), para 252.
[1450] Shayan Manzar, A Concoction of Powers: The Jurisprudential Development of Article 184 (3) & Its Procedural Requirements, LUMS Law Journal 2021: 8 (1), 6-26, at p. 21.
[1451] Rashid Akhtar Qureshi, Public Interest Litigation, Prospects & Problems, PLD 1994 Journal 95, at 97.

blockades. Pleasure in taking prohibited and unlawful actions by the public functionaries and excesses of the police have, in fact, given birth to the idea of PIL.[1452]

However, it must be appreciated that as the PIL increases, it will create some problems also.[1453] The most important point is that such litigation occupies much of the precious time of the court which is likely to create backlog of work. For example, in its recent history the SCP devoted one day a week, Thursday, for PIL and hence normal work was cut by one day.[1454] It is also significant to note that court seized with the inquisitorial kind of proceedings has to be careful while examining the matter placed before it lest it should cause injustice or prejudice to any of the parties and may make reference of the material/documents or circumstances which are not disputed between them.

The other problem will be volume of frivolous applications. Still further, another problem is that if relief is given to the litigants by a mere telegrams and letters, it would be very likely to create some unrest amongst the young lawyers, as it may slash much of their work. Since it is an extraordinary remedy accessible at a comparatively inexpensive cost it ought not to be allowed as a substitute for ordinary ones or as a means to file frivolous complaints.[1455]

6.9. CONCLUSION

The changing and ever demanding needs of our society undoubtedly require a new dispensation of justice. U/Art.184 (3) of the Constitution, 1973 Judiciary has responded to the

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[1452] Thomas M. Cooley, Treatise on The Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union, (also shortened as, Constitutional Limitations), 1st ed. (1868) Vol. 1, at p. 393 (discussing "arbitrary" police regulations). *See also,* Charles W. Mccurdy, The Problem of General Constitutional Law: Thomas McIntyre Cooley, Constitutional Limitations, and the Supreme Court of the United States, 1868–1878. The Georgetown Journal of Law & Public Policy [Vol. 18:1], (2020), at p. 3.

[1453]Michael Morley and F. Andrew Hessick, Against Associational Standing (August 14, 2023). University of Chicago Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=4540176, last accessed 14.11.2024.

[1454] Rashid Akhtar Qureshi, Public Interest Litigation, Prospects & Problems, PLD 1994 Journal 95, at p.96, 97.

[1455] Ivneet Kaur Walia, Public Interest Litigation: An Expression of Voice for the Sufferers of Silence (November 20, 2009). Available at SSRN: https://ssrn.com/abstract=1510271 or http://dx.doi.org/10.2139/ssrn.1510271, last accessed on 01-05-2024.

demands of the society and played a positive role for alleviating the sufferings of the masses by expounding the applicable law. There were matters which involved also the violations of Human Rights and directions were issued accordingly. The needful was done under suo motu jurisdiction.[1456]

Art.184 (3) read with Art.199 empowers the SCP to pass any appropriate order for the enforcement of the Fundamental Rights conferred by Chapter 1 of Part II of the Constitution. Broad outlines for taking such an initiative were laid down by the SCP in the cases of *Benazir Bhutto* and *Darshan Masih* where it was held that SCP could exercise its powers to issue the writ when a question of public importance is involved and the formal rule of locus standi is thereby done away with.[1457]

However, before an order is made it would be appropriate if the SCP identifies the public importance of the matter and the fundamental rights. Every possible care should be taken before making an order u/Art.184 (3) since there is no right to appeal against such an order.[1458] Moreover, the frequent use of this power would make things quite casual. There is apprehension that addressees would not bother to implement the orders and this would cause eroding of confidence of the people in the SCP. The judgements rendered after much labour and consumption of time and energy of the Judges would become a laughing stock when the same fail to be implemented.

[1456] Suo Motu Constitutional Petition No. 09 of 1991 qua Public Hanging, heard on 06th February, 1994, 1994 SCMR 1028, para 4; *In re*, Abdul Jabbar Memon and others, HRC Nos.104 (i to iv) of 1992 and 1993 heard on 06th March 193, 1996 SCMR 1349,(interim order), para 2; Tariq Aziz ud Din case in HRCs Nos. 8340, 9504-G, 13936-G, 13635-P & 14306-G to 14309-G of 2009, decided on 28th April, 2010, 2011 PLC (C.S) 1130, *also reported/cited as* 2010 SCMR 1301; SMC No.18 of 2016, decided on 13th March 2017 regarding eligibility of Chairman and members of Sindh Public Service Comission, 2017 SCMR 637, para 24; *In re*, (Environment Pollution In Balochistan), HRC No.31 IC/92(Q), decided on 27th September, 1992, PLD 1994 SC 102, para 3. From Indian Jurisdiction *see also*, Attorney General of India vs. Lachma Devi and others, (1986 (1) R.C.R. (Cr.) 424), para 01.

[1457] Mr. Justice Dr. Nasim Hasan Shah, Public Interest Litigation as a Means of Social Justice, [5th February, 1993], PLD 1993 Journal 31, at 32.

[1458] It is worth noting that now vide S. 14 of 26th Constitution (Amendment) Act, 2024 the exercise of jurisdiction u/Art. 184 would be exercised by a constitutional Bench established under the newly inserted Art. 191-A under the said Amendment.

It is worth appreciating that the results gained through the use of this technique have been quite encouraging but the full potential of this powerful technique has still to be realized and it must be kept in view at all times that falling back upon unwritten principles of law through the medium of unwritten and unconstitutional constitutionalism might undermine the authority and jurisdiction of the legislature.

CHAPTER 7: CONCLUSION AND RECOMMENDATIONS

"The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become."[1459]

7.1. INTRODUCTION

This work is an effort to show that when there are no written principles the courts resort to unwritten principles. The unstructured power and discretion gives birth to unconstitutional constitutionalism. This phenomena is not only confined to resorting to unwritten principles by the courts; rather, when there are written principles about taking the initiative or doing a thing in a certain way but they are not followed, stricto sensu, or when the same are followed but in an unstructured manner or unregulated and unorganized way, the practice undertaken on the part of the courts give birth to unwritten judicial policy. Such an unwritten judicial policy is in full swing in Pakistan and expresses itself not only in awarding of punishment in criminal cases but also in appointment of Judges and taking suo motu initiative on the Constitutional side. The adverse effects do ensue at the cost of written law and confidence of the general masses in the judicial system of the country. Therefore following recommendations and suggestions are advised to arrest this axiomatic trend.

7.2. Resorting to and Restoring the Written Constitutionalism.

The Constitution is a social contract which creates a balance of powers by placing limitations upon different organs. Overstepping of such limitations by any organ may destroy the social contact itself and may make the system collapse, leading to anarchy. The Constitution of 1973 clearly recognizes the Parliament as a legislative as well as a constituent body as it expressly allows it to amend the Constitution without any restriction. The

[1459] Oliver Wendell Holmes, Jr., *The Common Law*, (1881).

Constitution also expressly ousts the jurisdiction of the Judiciary from entertaining any challenge against an amendment of the Constitution brought about by the Parliament in accordance with the prescribed procedure. In view of such explicit and unequivocal constitutional mandate any intervention in the matter by the Judiciary would have the effect of tearing down the constitutional system on basis of unwritten law and unwritten judicial policy. It is, thus, not surprising that in many cases it was emphatically declared that the courts in Pakistan deriving their authority and jurisdiction from a written Constitution, 1973 have no jurisdiction to strike down any provision or amendment of the Constitution, except on the ground of some express internal requirement as opposed to any judicial assumption.[1460]

Regarding written Constitution what was in the 1950's still continues to hold good, that is, "no one is willing to die for the preservation of the Constitution in Pakistan."[1461] When the 18th Constitutional Amendment was passed it was claimed that the Constitution was brought in its original shape "but the fact is that the said amendment deviates, at many places, from settled principles given as basic features of the Constitution."[1462] Pakistani Courts, for some time, hesitated in following the basic structure theory given by Indian Courts about their Constitution but ultimately the basic structure theory was accepted. As per the Accord on Constitution our courts found four basic features of the Constitution, viz., Islamic Provisions, Parliamentary Federal System, Fundamental Rights and Independence of Judiciary.[1463]

[1460] Zia-ur-Rahman (PLD 1973 SC 49); Sabir Shah vs. Federation of Pakistan (PLD 1994 SC 738); Federation of Pakistan vs. Saeed Ahmad Khan and others (PLD 1974 SC 151); Islamic Republic of Pakistan vs. Abdul Wali Khan, MNA (PLD 1976 SC 57); Dewan Textile Mills, FOP vs. United Sugar Mills (PLD 1977 SC 397); Fauji Foundation vs. Shamimur Rehman (PLD 1983 SC 457); Hakim Khan case (PLD 1992 SC 595), and Syed Zafar Ali Shah case (PLD 2000 SC869).

[1461] Keith B. Callard, Political Forces in Pakistan (New York: Institute of Pacific Relations, 1959), 8.

[1462] Justice S.A. Rabbani, 18th Amendment to The Constitution of Pakistan, PLD 2011 Journal Section, P.2 Also available at http://www.plsbeta.com/Lawonline/law/contents.asp?CaseId=2011J2, last accessed on 12-01-2024.

[1463] Ibid.

The interpretation of the constitutional provisions necessitates as a tool to look into the background of the speeches, discussions and accords when a law is made, more so in case of the Constitution. However, the difference in the approach of the Judges with respect to invoking and implementing Objective Resolution[1464] seems to emanate from the fact that there is an unwritten policy of bringing Judges on the Benches who are not given pre posting training and as such no fundamental and written initiatives are impressed upon them. It must be remembered that a written constitution is also the absolute rule of action which must control until it is changed by the establishing authority.[1465]

7.3. Limited Justification of Unconstitutional Constitutionalism.

The rights-based constitutionalism has allowed courts in Pakistan to adjudicate even those issues which do not fall completely within their domain. It has allowed the judiciary to spread its wings under the garb of judicial review. For example, it was said in a case that the question if this was a case of enforcement of Fundamental Rights had not been raised.[1466] But, different Rights were reckoned as applicable to the case.[1467] Gone is the old order of prerogative writs; we now have the heady domain of suo motu. By widening the ambit of judicial review, the courts have caused the judicialisation of politics. The judiciary keeps juggling competing contestations of power which results in a difficult balancing act, with competing elites advocating their own positions of power and respective outlooks.[1468] In theory, it appears that SCP being a Constitutional court is to judge any of such contestations, especially in an age where every political drama's last scene seems to be aired out in the

[1464] U/Art.2-A of the Constitution1973.
[1465] American Jurisprudence 2d Volume 16 (Constitutional Law), Lawyer's Co-operative Pub., 1979, para 56, at page 227).
[1466] Sindh High Court Bar Association vs. Federation of Pakistan, (PLD 2009 SC 879). See also, Darshan Masih vs. State, (PLD 1990 SC 513. Its page 544 was referred in para 170 of Sindh High Court Bar Association.
[1467] Article 11, 14, 15, 19 and 25 were discussed.
[1468] *See*, https://www.dawn.com/news/1739913 , last accessed 16.11.2024. Reference to tug of war resulting into promulgation of 26th Constitutional Amendment can also be made in this regard.

Court Room No.1 for the resolution of grievances of political nature by those who are not elected representatives.

7.4. Engaging Law Schools and Professors.

We need to sensitise ourselves that law professors can mould and transform imparting skills that can end up making craftsmen out of the law students.[1469] The unwritten judicial policy seems to be in force when one considers critically the factum that lawyers are allowed to teach part time in morning and evening classes but the law professors and lecturers are not allowed to practice. They are not considered for elevation either. Both these situations are not justified. Further it is the law professors who are capable of inculcating in their students the real glimpse and vision of law.[1470] The law professors with serious scholarship and a professional commitment to teaching are rarely cited by our Superior Courts as expert academics. The gap between the intellectual atmosphere of the universities and the harsh reality exiting in the courts can be bridged by the law students and law clinics. These law students are the nurseries for recruitment and elevation to different tiers of judicial seats.

In these clinics the students being supervised by attorney-professors are allowed the opportunity to represent real clients, of course with consent of the latter who may be indigent with no possibility of access to the courts otherwise. The students may gain valuable and practical experience in the process. Such an experience comes to young lawyers belatedly in our country, who in return for no to meager subsistence allowance, are merely allowed to be

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[1469]Learned Hand paid homage to his professors, saying: "From them I learned that it is as craftsmen that we got our satisfaction and our pay." He gave his famous Holmes Lectures at the Harvard Law School in 1958. These Lectures proved to be Hand's last major critique of judicial activism, a position he had first taken up in 1908. They included a controversial attack on the Warren Court's 1954 decision in Brown vs. Board of Education of Topeka, 347 U.S. 483 (1954). Also available at https://hollisarchives.lib.harvard.edu/repositories/5/archival_objects/1194891, last accessed on 16-01-2024.

[1470] American SCP Justice Antonin Scalia (CAS '57) address dated 16-05-2015, a question-and-answer session in the Hart Auditorium in Georgetown University Law Center's (GULC) McDonough Hall, 360 with first-year law students. Also available at https://thehoya.com/justice-scalia-addresses-first-year-law-students/, last accessed on 16-01-2024.

spectators in the courtrooms with much focus of all the stake holders as well as of presiding officers of courts on their seniors.

7.5. Revisiting Elevation Mechanism.

The system of appointments of Judges, their elevation and the process of selection has been subject to variety of criticisms. The extensive involvement of CJP, the political process, the doing away with seniority principle as well as the legitimate expectation, the partisan way, the reliance on secret whispers from Bar and intelligence agencies---each of them favours the appointment of similar type of people and the same is potentially discriminatory to the women and minorities. As such the higher Judiciary does not reflect the composition of the community and more specifically of the District Judiciary. In fact whole of it has culminated into Judges' club.

In recent judicial history, a disagreement appeared with the JCP's approval, by a 5-4 majority vote which caused the elevation of Justice Muhammad Ali Mazhar to the SCP in 2022. The Judge was fifth on the seniority list of SHC and the decision had to face a severe reaction from the bodies of the lawyers across the country who maintained that the JCP was violating the criteria of seniority as the regulatory and guiding principle for the elevation. It was further contended that the said criterion was set by the apex court itself through its judgements.[1471]

In recent years, however, seniority principle has been disregarded more than once. One of the Judges who was superseded was the late CJ Peshawar HC Waqar Seth who headed the special court that found Gen Pervez Musharraf guilty of high treason. Justice Seth had even filed a petition that in view of his seniority he had a valid expectation to be elevated to the apex court. It is to be noted that the law as established and handed down by the

[1471]Al-Jehad Trust vs. Federation of Pakistan, PLD 1996 SC 324, *and* Malik Asad Ali vs. FOP, PLD 1998 SC 33.

constitutional courts has a binding force.[1472] Of course their judgements and the rules made thereby are followed as rules of law and when followed over a period of time become judicial customs as well as constitutional conventions having the force of law.[1473] It is worth noting that senior Judges have been strongly advocating appointments to the SCP on the basis of the seniority principle in the absence of objective criteria.[1474]

Certainly, seniority as a criterion for promotion in any sphere is problematic. Merit based appointments are the gold standard. However, Pakistan also has a history of machinations by the Executive against the Judiciary, including the way CJPs Sajjad Ali Shah, Saeeduzzaman Siddiqui and Iftikhar Chaudhry were removed.[1475] However, the appointment process must also be transparent. If seniority is to be discarded as the guiding principle, then objective criteria to assess merit must be framed.

It would be safe to say that current mode of elevation to Superior Courts has ceased to be worth reliance. In fact the same has never been according to the spirit and nature of justiceship. Multiple factors should be taken into consideration for performance evaluation of HC Judges, some of which may be mathematically determined on the basis of available data while other factors would be informed by general evaluation and perception. These could

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[1472] Per Art. 189 and 201 of the Constitution of the Islamic Republic of Pakistan, 1973.

[1473] Sir W. Ivor Jennings: The Law and the Constitution, 1959: 81–82. See also: A-VS. Dicey, An Introduction of the Study of the Law of the Constitution (1885), at p. 321.; K.C. Wheare: The Statute of Westminster and Dominion Status, Oxford University Press; 4th edition (January 1, 1949); K.C. Wheare: Modem Constitutions, Oxford University Press : Oxford Paperbacks University Series,. Second Edition, 1966; Professor Colin R. Munro, Studies in Constitutional Law, Oxford University Press, U.S.A.; 2nd edition (13 Jan. 2005); SCP Advocates-on-Record Association vs. Union of India AIR 1994, SC 268; Constitutional Conventions--The Rules and Forms of Political Accountability by Geoffery Marshall, Oxford University Press, 1987; Rodney Brazier, Constitutional and Administrative Law, Sixth Edn., Penguin Books, 1989; Abdur Rahim, M.A., The Principles of Muhammadan Jurisprudence 1968 Edn.; Pakistan and others vs. Public-at-Large and others, PLD 1987 SC 304 and Pakistan vs. Public-at-Large PLD 1986 SC 240. O. Hood Phillips, Constitutional and Administrative Law, Sweet & Maxwell Ltd; 7th edition (October 1, 1987), at page 56. For definition of word "convention", see Students English-Arabic Dictionary. Second Edition- printed by Catholic Press at Beirut, at p. 108.

[1474] J. qazi Faez Isa, (as he then was) wrote letter on May 25th, 2022 to the then CJP Umer Ata Bandial, chairman of Judicial Commission of Pakistan (JCP), to follow the long standing practice of observing seniority principle. He also explained the advantages of the appointment of chief justices of high courts as SC judges. See Express Tribune of 28th May, 2022. Also available on https://tribune.com.pk/story/2358748/justice-isa-urges-jcp-to-appoint-high-court-cjs-on-vacant-seats, last accessed on 31st May, 2022.

[1475] *See also*, Justice (Rtd.) Dr. Javed Iqbal, Apna Gariban Chaak, (Urdu autobiography), Sange Meel Publications, Lahore. Chapter 7, at pp.141, 142.

include reputation and public perception about integrity, independence and impartiality, health condition, length of service, number of cases heard and judgments delivered, number of cases heard but judgments not delivered, average duration between final hearing and delivery of judgement, commitment to constitutional values and fundamental rights, range and diversity of work, expertise in a particular area, command over language, temperament and demeanour towards colleagues, the bar and the litigants etc. Moreover, JCP's meetings should be open to everyone instead of holding them in-camera -- as is currently the practice -- to ensure transparency in the appointment of the superior judiciary.[1476] In order to ensure transparency such a practice could be adopted so that general public, media and lawyers' bodies do not criticize the elevation and repose confidence in the elevation mechanism.

It is also to be noted that there were instances where a lawyer did not advance his arguments even if the case was very good. However, the court goes on to decide the case and passes a very good judgement. The credit of such a judgment cannot be given to the lawyer. Similarly, in some instances, a lawyer advances very good arguments in a weak case, which is ultimately dismissed. In such a case it would be logical to hold that the lawyer should not be at a disadvantage because of that. In either of these two eventualities the competence of an advocate could not be judged by the verdicts passed in their cases as the judgments reflected the competence of a Judge and not of a counsel. Fortunately such an issue is not without solution. For example, one solution to this issue is that the lawyer's pleadings be shared with the JCP if it was to assess the lawyers' professional competence for elevation. In this regard it is also worth consideration that a Judge might write very good judgments.

However, if he took a lot of time and was unable to decide a sufficient number of cases then his competence could not be judged on the basis of his good judgments. It is because the judgments do not show how much time a Judge has taken to arrive at the

[1476] Express Tribune of February 13th, 2022. Also available at https://tribune.com.pk/story/2346575/jcp-panel-meets-on-march-9-to-discuss-criteria-of-appointments?amp=1, last accessed March 26th, 2022.

controversy between the parties. Even disposal of cases by a Judge does not accurately show his competence.

It needs to be pointed out that there is always some test, examination and interview for every position all over the world. The mechanism could be developed in this regard. For example if there were more than one candidate before it, the Commission could place a proposition before them and ask them to write a judgment. Such a practice was necessary to assess the candidate as to whether he was logical, sequential and had considered the principles of law. The appointments based on such a mechanism would not only ensure that the Judge was disposing of cases quickly but was also making correct decisions. It is safe to claim that, given the confusion regarding appointment and elevation to superior judicial seats, most of the intellectuals as well as JCP members would agree that if there is no solid reason otherwise, then HCs' CJs should be considered for appointment as SCP Judges, otherwise there will be a perception of "court packing."[1477]

It is to be noted that the longstanding practice was to appoint HCs CJs to the SCP because through their tenure in office, they had gained cherished judicial experience covering a multitude of legal subjects. As such, they would also be well conversant with the multifarious issues and problems of judicial administration. However, this longstanding practice was discarded by two ex-CJPs, Mian Saqib Nisar and Gulzar Ahmed.[1478] Now this (wrong) practice has been put into 26th Constitutional Amendment, 2024. It is worth realizing that the Constitution did not stipulate creating an artificial polarity i.e, seniority versus merit.

It is worth appreciating that if competent but junior Judges are appointed to the SCP before they are ready, it would neither serve their interest nor that of the institution. Moreover, these junior Judges would be deprived of the opportunity to serve as CJs of their

[1477] This expression was used by J. Maqbool Baqar in JCP's meeting dated 06th January, 2022. The expression is, "that there is a court packing going on." See paragarph 06, page 16 of the Minutes of the JCP's meeting dated 06th January, 2022.

[1478] This is also the view of Justice Isa. See his letter dated 25th May 2022.

respective HCs and resultantly would not acquire the rich experience gained after having held this office. Consequently, when the CJs and senior Judges are bypassed, a public perception is developed that they are not competent which undermines both their credibility and that of the institution. On the other hand natural human feelings of despondency and dejection are set in amongst those who are bypassed without good reason which adversely affects their desire to work and the quality of their decisions. A feeling of powerlessness and comfort, in Russellian sense, appears which is easily observable.[1479]

However, just by virtue of some unwritten judicial policy those at the helms of affairs are not brought to book within the judicial circles. For example, CJP Saqib Nisar had sought to justify the nomination of a junior Judge to the SC from the SHC by asserting without proof that neither the CJ nor any of the senior Judges wanted to be appointed to the top court. But the senior Judges who were bypassed said that they were not informed that a junior Judge was to be nominated and that they had not declined and had balked as a matter of courtesy to their CJ.[1480]

J. Saqib Nisar's logic and so called justification is not supported from the Constitution. Rather the stance is negated when seen in juxtaposition to Article 206(2) of the Constitution which stipulates that: "A judge of the high court who does not accept appointment as a judge of the SCP shall be deemed to have retired from his office." Therefore, to assert (and to do so without proof) that they had declined was disingenuous on the part of ex-CJP. However, neither during his service nor after his retirement he was asked for his specious and fallacious move.

Ex-CJP Gulzar Ahmed had also bypassed the SHC CJ and senior Judges by saying that they did not meet the merit test. He did this without having first established the criteria

[1479] B. Russell, Conquest of Happiness, (first published in 1930). Part II: Causes of Happiness. Chapter10: Is Happiness Still Possible? p 28.
[1480] Justice Isa's letter dated 25th May 2022.

and the methodology to scale merit. However, a few weeks later CJP Gulzar Ahmed proposed the name of the same SHC CJ for appointment as an ad-hoc judge to the SCP as if, within just few weeks, he had miraculously passed the elusive merit test, which perhaps existed invincibly in the mind of Gulzar J.

It is to be noted that the Parliament amended the Constitution and introduced seven different Judicial Commissions to select Judges of the five HCs, FSC and of the SCP and now again their composition has been changed under 26th Constitutional Amendment, 2024. The Constitution has now done away with the hitherto pre-eminent role of the respective CJs in selection of Judges and role of the CJ has reduced to being only the Chairman of the Commission. This process has also been made inclusive and it has provided for the participation of different stakeholders, apparently only.

By making the CJ of the each Constitutional Court as Chairman of the Commission, neither the Constitution nor the framers of the same meant that he would have a solo flight. Rather, he was to supervise the process by involving the input of these different stakeholders as the process was a consultative one and it was never intended to make one man show in fact. Moreover, the impression that any outsider or extraneous consideration determines who should or should not be appointed as a Judge should be dispelled. It is of utmost importance in order to ensure that general public keeps on reposing trust in the judiciary.

However, it should be ensured that no elevation or appointment of a Judge is done in an arbitrary manner, and seniority must be considered as one of the major principles. For the safe administration of justice, Bench and Bar ought to discharge their duties vigilantly and make maximum efforts for a transparent, credible and vibrant justice system. It must be remembered that the SCP is an important Constitutional institution. Thus its respect and stature should be maintained with high standards of dignity but not at the cost of written law.

The SCP has ruled that public appointments made behind closed doors raise eyebrows since they encourage the possibility of partisan intervention and patronage. An open selection process for offices like the chairperson and members of the Council of Complaints (CoC) of PEMRA prioritises competition and helps discover best possible candidates.[1481] In this case the advertisement was required to ensure transparency for getting the competent candidate. However, the same must stand true to the constitutional judiciary when it comes to appointments and elevation to judicial seats. No doubt no law nor even the Constitution of 1973 requires the advertisement for the appointment/elevation as Judge in any HC but the same principle must also be implemented to put the house in order and to make things transparent and above board. When it comes to appointment in constitutional Judiciary, all the bench marks must not be forgotton at the cost of written law.

It is high time that the Federal Government must consider certain points: (i) clear criteria for the selection of Bar representatives as well as members of District Judiciary, which might include a mix of expertise, professional backgrounds, demographic diversity and geographic representation; (ii) announce the opportunity to serve on the Constitutional Bench(es) through various channels, such as newspapers, websites, social media and community organizations. This will help attract a diverse pool of applicants; (iii) set up an application process that requires interested individuals to submit their credentials, relevant experience and a statement explaining their motivation for serving on the Constitutional body i.e., High Court. This information will be used to evaluate the suitability of each applicant; (iv) establish an independent selection forum composed of representatives from different sectors, e.g. Constitutional and District Judiciary, media, academia, civil society, to review applications and recommend candidates. The reconstituted forum should ensure a transparent and impartial selection process; and (v) provide the members, once appointed, with training

[1481] Pakistan Electronic Media Regulatory Authority (PEMRA) through its Chairman & another Vs M/s ARY Communications Private Limited (ARY Digital) through its Chief Executive Officer & another. Civil Petition No.3506 of 2020 (Against the order of the High Court of Sindh, dated 11.11.2020, passed in M.A. No.45/2020).

and orientation on regulation, court management, ethics and relevant laws as well as stress management. This will help them make informed and well versed decisions and effectively contribute to justice system. The inclusion of diverse diaspora in this manner, can contribute to greater transparency, diversity and public trust in the failing justice sector.

Comparatively speaking, changes have been made in the recent years in the appointment process in Britain.[1482] For example, since 1994 appointments to circuit Judges are filled by open competition following advertisements. Similarly, since 1998, High Court Judges may be appointed on application following advertisement or invitation. For example out of 19 High Court Judges appointed between February 1998 and May 2000, eight had applied for appointment and 11 were invited to accept appointment.[1483] Judicial big heads in Pakistan can also follow the suit to leave the foot prints for others to follow.[1484]

7.6. Restructuring Induction Method in Judicial Service.

It is a core requisite of constitutional and administrative law that legislative and executive actions must not be arbitrary and should be based upon valid principles which are not discriminatory. Sub Rule (3) of Rule 5 of Punjab Judicial Service Rules, 1994 is against fundamental rights guaranteed by the Constitution of Pakistan and consequently, ought to be struck down and be declared *ultra vires* u/Art.8 of the Constitution, 1973. It is also due to the fact that the said Rule of 1994 is beyond the true letter and spirit of the enabling Civil Servants Act of 1974, and consequently, has transgressed the rights of members of the Judicial Service by exercise of excessive executive authority. As such, the judicial cadre at the District level should be restructured as follows.

[1482] O. Hood Phillips & Paul Jackson, Constitutional and Administrative Law. Sweet & Maxwell, Eighteenth Edn. (2001), 432.
[1483] H.C. Deb. Vol. 350, col. 458W, May 23, 2000.
[1484] "The system needs overhaul and democratization. If wars cannot be left to generals alone, judicial administration cannot be left to the 'robed brethren' alone." *See,* R. Krishna Iyer, A Constitutional Miscellany, 2nd Edition. Eastern Book Company (2003), Reprinted 2007, at p. 5.

i. **Initial Recruitment to the post of Civil Judge(s).**

The recruitment to the post of Civil Judges must be from the Bar. It must be without any experience.

ii. **Appointment to the Posts of Additional District and Sessions Judge(s) (ADSJ).**

The slot of ADSJ must be bifurcated into two modes for appointment to the same. It must be 50% through promotion from SCJs and the remaining 50% from Bar through open competition. However, the Judicial Officers must also be allowed to sit in the competitive exam and they must be allowed to prove their mettle.

iii. **District and Sessions Judges (DSJs) To Be Only From the Judicial Officers.**

The promotion to the slot of DSJ must be by 50% from normal promotion and remaining 50% through internal exam from within ADSJs having minimum service of 10 years. The criteria of ten years appear logical as the maximum age at present for appointment to the post of ADSJ is 45 years where after the potential candidate would be of 55 years which would be the maximum age of a candidate joining as ADSJ at the maximum age of 45 years. After serving for five years he/she would be superannuating on attaining the age of 60 years and if he/she is among the senior most DSJs, would be eligible to be considered for elevation to the High Court concerned.

iv. **Selection of High Court Judges.**

It must be 30% direct from the Bar members and remaining 70% from the Service members. The Candidates for selection as Judges of High Court concerned should be short listed through written Exam and also be interviewed. The current mode of ratio of 40% (from Service) and 60% (from the Bar) is not logical. The JOs appointed through the initial recruitment come after sifting process of full-fledged written exam and interview as well as psychological test. The cases in High Courts are murder reference, writs, review and revisions, on both the civil (including family matters) as well as criminal side, tax matters,

corporate and Constitutional cases. The ADSJs and DSJs, on the other hand deal with civil, criminal, rent and family matters.

As such it would be in the fitness of things to induct only those candidates from the Bar who practice on special side i.e. tax, corporate and Constitutional cases. The major chunk of litigation in High Court is bail matters, civil, rent, family and criminal appeals, along with murder references, reviews, revisions and writs. As such, save for tax, corporate and Constitutional matters 30% quota directly from the Bar would be sufficient. This line of reasoning is logical in the sense that the current era is of specialty and in the situation of those having experience of major chunk of litigation pending adjudication in High Courts, in the form of DSJs, that which would be left, not being dealt with DSJs, the expertise from the Bar would be catering and would be helpful to do the needful.

It must be also declared that pursuant to Articles 2-A, 3, 8, 9, 25 and 27 of the Constitution, any appointments of ADSJs under Rules of 1994 is in violation of the Constitution and the same should be declared as ultra vires. It must be remembered that when the expectations and collective memory fails to align the way power is structured and used, the relations between the state and society weaken the Constitution and the institutions created by it.[1485] Accordingly, in order to ensure that the resultant due deference to Judiciary is not to further decline,[1486] the judiciolitics[1487] and unwritten judicial policy of the coveted Judges' Club must come to an end when it comes to making appointments and elevations of near and dear ones of the members of the Club.

It appears as if there are certain aspects which the Framers of the Constitution forgot to jot down but pragmatically they do find place in certain invincible ways. They correlate to written qualifications but are, in fact, disqualifications as far as the unwritten law goes. When

[1485] Paula R. Newberg, Judging the State, Courts and Constituional Politics in Pakistan. Cambridge University Press, (1995), p.1.
[1486] Zulfiqar Khalid Maluka, The Myth of Constitutionalism in Pakistan. Oxford University Press (1995), 316.
[1487] By this term the scholar means the judicial politics, that is, the politics by the judicial heads.

a quota has been fixed and the written provision of the Constitution clearly speaks in that respect, there is no reason, save for some unwritten judicial policy, to not consider eligible DSJs for elevation to HC. There have been intakes when among the elevated souls not even a single DSJ was reckoned as competent and lucky one. This was all at the cost of written law. Not considering the potential DSJ for elevation is illogical, illegal and unlawful. If the reasoning is that he is incompetent, he would not be confirmed, quite logically. This is not something unprecedented. If he is not confirmed he would be sent back to the cadre. However this perceived and supposed factum of incompetency cannot be stretched to out rightly reject their names from being considered. It is because when a member of the Bar is not confirmed after elevation he is also sent back to the Bar. When one can be sent back to the original place, the other can also.

7.7. Retructuring the Suo Motu Initiative.

The Judicial system in Pakistan at the Federal, Provincial and District level throughout has confronted numerous challenges in order to redress the grievances of the litigating public. For the judiciary in Pakistan it always remained an uphill task to make justice accessible to the people the majority of whom being illiterate are ignorant of their Fundamental Rights. The legal fraternity in Pakistan therefore has not been able to provide ample services to the poor segments of the society as compared to those having power to make the system respond to their advantage.

Since decades an earnest effort has been made to pursue adversarial justice system in Pakistan at all tiers of the judicial hierarchy despite being mindful of the changes in new societal development necessitating a march towards gradual shift from mechanical justice to human welfare social justice. In cases of infringement of Fundamental Rights, even involving a question of public importance, our superior courts have been earnestly guarding the long

standing concepts of 'other adequate remedy provided by Law' and 'aggrieved person' while assuming the extra ordinary jurisdiction to issue writs and orders under Articles 199 and 184(3) of the Constitution, 1973.

Bare survey of the case law on PIL in Pakistan makes it crystal clear that object of co-terminus Articles 199 and 184 (3) requires enforcement of Fundamental Rights in the matters of public importance through Judicial Review of the public actions. Therefore, it may be noted that in exercise of jurisdiction conferred under both the Articles the paramount consideration before the HCs and the SCP should remain the redressal of the grievances of the unprivileged and weaker sections of the society instead of protecting vested interests of the privileged classes having power and resources to attract the flow of justice in their favour in the garb of PIL which is a valued form of litigation to protect the fundamental human, social and economic rights.

However, for doing and ensuring the needful, no provision of the Constitution authorizes the courts to fall back upon unwritten law or unwritten judicial policy. Some might refer, at this stage, to Art.187 of the Constitution to counter the argument. There is no doubt that under said provision the SCP is competent to pass such orders as may be necessary for doing complete justice in any matter pending before it.[1488] There is also no denial of the fact that SCP is not bound by the technicalities of procedure which are always meant for advancing the cause of justice than to thwart the ends of justice.[1489] However, it is to be noted that under this provision the SCP would sparingly use its jurisdiction but not in a case where a legal remedy is available to a party praying for exercise of such a power.[1490] Secondly, it is to be noted that the Constitution makers have conferred the powers under Art.187 on SCP

[1488] S. A. M. Wahidi vs. Federation of Pakistan, 1999 SCMR 1904, last para, at p.1906. *See also*, Muhammad Khalil vs. Muhammad Abbas, 2000 SCMR 502, second last para, at p.503.
[1489] See, Mst. Amatul Begum vs.Muhammad Ibrahim Shaikh, 2004 SCMR 1934. (The case was remanded to Sindh High Court).
[1490] Sheikh Khurshid Mehboob Alam vs.Mirza Hashim Baig, 2012 SCMR 361, para 5.

and not on the HCs of the Country. This constitutional intent is significant and has to be kept in view by the HCs.

The discussion of the case law shows that there are frequent and exalting references to the Fundamental Rights. However, beyond the threshold inquiry as to whether any of the Constitutional rights are implicated the substance and form of judicial review essentially resembles the writ jurisdiction of the HCs u/Art.199. Furthermore, despite the broad and permissive wording of article 184(3) the SCP has largely confined itself to issues of administrative propriety and procedural legality by grounding key principles of its administrative law jurisprudence in the Rights provisions of the Constitution. The judicial policy is largely unwritten and taking the initiative under suo motu regime has remained unstructured till the passing of SCP Practice and Procedure Act, 2023. Even after the passage of the same, the needful has not been done as the one man show continues to be backed by the unwritten judicial policy in Pakistan.

SCP has been liberal in entertaining Constitutional petitions which involved questions of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II of the Constitution. However, it is to be appreciated that no purpose is left if suo motu jurisdiction is assumed but the hearing or the final hearing takes place after years as happened in HRC in CP No. 9 of 1991 (Suo Motu), which was heard on 6th February, 1994. Another example can be of Service matter in civil review petition No.193 of 2013 which was decided in 2015.

There is no doubt that SCP cannot, as a matter of course, entertain a CP u/Art.184 (3) and allow a party to bypass a HC which has jurisdiction u/Art.199 of the Constitution, inter alia, to enforce the Fundamental Rights under clause (2) thereof. Under SCP (Practice and Procedure) Act, 2023 the concept of Committee comprising of CJ and next two senior most Judges of SCP has been given but much needs to be done to make it more transparent. It is to

be remembered that recently on Dec. 12, 2023 Justice Ijaz ul Ahsan wrote a letter to the CJP Qazi Faez Isa about changes in the minutes of meeting regarding composition of Bench regarding civilians' trial by military courts.

Indeed SCP ought to be discreet in selecting cases for entertaining u/Art.184(3) and only those cases should be entertained which in fact involve questions of public importance with reference to the enforcement of any of the Fundamental Rights. It is high time that a balanced, consistent and indiscriminate policy should be evolved by SCP. Individual grievance or grievance of a group of persons cannot be agitated under the said provision of the Constitution in the absence of a question of public importance affecting the public at large.[1491]

7.8. Consistency in Policy Initiative.

For no written law framed by the Legislature is in field therefore, if running the HRC of SCP for doing justice to the under privileged and the poor is a policy, it must be got written, at least the way *Nadeem Ahmed Advocate* case paved the way for the Nineteenth Constitutional Amendment, 2011. On the converse, if it is not a policy, it must be replaced with the written law and the same must be processed under a structured procedure. In either case it must be written and not left unwritten.

The reason why it should not be unwritten is twofold; firstly, the things would not be processed consistently. Secondly, the taking of cognizance would not be transparent for the human element at the staff level would be involved, even if one does not disbelieve the intention of the highest authority one after the other. Moreover, the question of continuity is also there which is of fundamental importance for two reasons; firstly, if it is good, it must

[1491] It would be beneficial in this regard to remember what Prof. K.B. Scott has said in this respect: "The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a Spector which haunts the legal literature, not the court room." Prof. K.B. Scott, Standing in the SCP: A Functional Analysis. (1973), 86 Harvard Law Review 645-675, at p. 649. *See also*, Halsbury's Laws of England (4th Edn.), Vol. I, (2006 Reissue), Para 28, page 32.

continue. Secondly, if it is not, the same ought not to have been initiated and continued. Furthermore, if the same is operated under written law or as a written policy, the same would continue and would not start and break down with the change of CJP and as per his unwritten judicial policy.

Moreover, when it comes to deal with Legislature's power to legislate, the courts must adopt a consistent policy and show restraint so as not to interfere in others' domains. Enlightenment from the neighbouring country can be obtained. The view of the Indian SC about (First Amendment) Act, 1951, has been discussed in *Shankari Prasad*.[1492] There was unanimous verdict of five Judges. The Court held that the Parliament had power to amend any provision of the Constitution including the provision of Part III and that such power emanated from Article 368 of the Constitution of India.[1493] This view prevailed in SCI up to 1965.

However, in *Sajjan Singh*,[1494] while considering the validity of the Constitution (Seventeenth Amendment) Act, 1964, the court thought fit to comment on *Shankari Prasad's* case. Again in *Golak Nath*,[1495] said decision was reconsidered. The Court held by a 6 to 5 majority that a Constitutional amendment is a legislative process and is law within the meaning of Article 13 (2). Parliament has, therefore, no power to amend the provisions of Part III of the Constitution so as to take away or abridge any of the Fundamental Rights contained therein. Another judgment of the SCI on the subject is *Kesavananda*[1496] which related to Constitution (Twenty-Ninth Amendment) Act, 1972. The approach of the Indian SC in this regard can be seen through the prism of *Nadeem Ahmed Advocate* case qua Eighteenth and Nineteenth Amendments in Pakistan.

[1492] Shankari Prasad vs. Union of India, AIR 1951 SC 458.
[1493] Ibid, para 3 & 4. *See also*, H. W. R. Wade, Annual Survey of Commonwealth Law, 1967, London, Butterworths, at p. 39.
[1494] Sajjan Singh vs. State of Rajasthan, AIR 1965 SC 845.
[1495] Golak Nath vs. State of Punjab, AIR 1967 SC 1643.
[1496] Kesavananda Bharati vs. State of Kerala, AIR 1973 SC 1461.

7.9. Revisiting the Review of Judgment Scope.

Under both Constitution of India[1497] and Pakistan[1498] the paramount consideration and constitutional intent is common, that is, the doing of complete justice. These powers are complementary to those which are specifically conferred by the constitution of the country. These powers remain undefined so that the court could cater to the attending situation and could even mould the relief. But this must be on the basis of some written law. As such this power should not be misconstrued to pass an order which is against the letter of law or is against specific constitutional provisions.

There can be no denial that the SCP is not precluded from recalling its earlier order suo motu on coming to know that some miscarriage of justice had accrued due to the court having proceeded on the wrong premises.[1499] It happens where the judgment of the SCP is based on erroneous presumption in which case it becomes a fit case of suo motu review by the SCP. In any case there must be defined, stricto sensu, some scope of action under suo motu jurisdiction especially when it comes to deal with revisiting the already handed down judgments by the SCP for this practice of proceeding on the basis of unwritten law and unwritten judicial policy would enable any powerful elite or power to be to get revisited any judgement in their favour. *Zulfiqar Ali Bhutto*'s death sentence matter was reviewed after more than forty years appears to be illogical and it served no purpose at all.[1500]

It is also to be appreciated that Art.187 of the Constitution, 1973 and Order XXXIII[1501] are not applicable where the matter stands finally adjudicated by the judgment of SCP. In this regard it would be worthwhile to note that applicability of two provisions cannot

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[1497] Art. 142 of the Constitution of India 1949.
[1498] Art. 187 of the Constitution of Pakistan 1973.
[1499] Shahid Orakzai vs. Pakistan Muslim Leage (Nawaz Group), 2000 SCMR 1969, para 7. See also, Fida Hussain vs. Secretary, Kashmir Affairs and Northern Affairs Division, PLD 1995 SC 701 and, The State vs. Muhammad Nawaz, PLD 1966 SC 481.
[1500] Murder Reference No. 01/2011 decided on 06.03.2024.
[1501] Of SCP Rules, 1980.

be extended to reopen the past and closed transactions or to re-agitate the matter which stood finally determined by SCP.[1502] Therefore, it is suggested that in order to streamline and enhance the utility of the public interest litigation the SCP may consider for addition of appropriate rules of procedure relating to public interest litigation in the SCP Rules, 1980.

7.10. Structuring the Discretion in Sentencing Matters.

The structuring of the discretion means regularizing or organizing it, so that decision could achieve the quality of justice. "The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure."[1503] In our context, the wide-ranging discretionary powers, without framing requisite rules to regulate its exercise, is taken as enhancement of the power. It gives that impression but where the authorities fail to rationalise and regulate it by rules or written policy, the courts have to intervene.

There may be an unflinching and irresistible motivation that those responsible for initiating prosecutions, defending the criminal charges, formulating sentencing guidelines, administering justice, and enacting statutory provisions should not only be guided by the theories of punishment. Their focus must also extend to the rehabilitating features of mitigating sentencing inasmuch as such a holistic approach is as important as is imperative to release an innocent. Any skepticism to achieve the goal of analytical reduction of sentence with rehabilitating prospects may thwart the courts to allay the sufferings of others and also may deprive the offender of an opportunity to reform himself for the wellbeing of himself as well as all those he is concerned about.

[1502] Saeed Akhtar vs. The State 2000 SCMR 383, para 7.
[1503] Kenneth Culp Davis, the Administrative Law Text, West Publishing (1972), at p. 94.

Wherever wide-worded powers conferring discretion exist, there remains always the need to structure the discretion.[1504] It is a well-settled proposition of law that the discretion is to be exercised fairly and justly and not arbitrarily or in a fanciful manner.[1505]As such there is need to structure the discretion. There is no doubt that the discretion based upon unwritten law has its role to play, too. For example, an accused with a moderated intellectual capacity may be awarded a shorter term due to a lesser degree of blameworthiness by a Judge with retributive outlook but a utilitarian Judge, on the other hand, may deem a longer sentence to be more appropriate for the same person in order to rule out repetition of an offence due to the same diminished intellectual outlook. Given the proposition, one Judge may regard one factor as mitigating and the other Judge may treat the same factor as an aggravating one, instead.

There has also been a procedural bifurcation in all the jurisdictions having capital punishment in their penal laws with a view to granting consideration for weighing the mitigating evidence against aggravating incriminating material. The Judges must become familiar with the mitigating circumstances in evidence adduced before them which may help rehabilitation through a reduced sentence.

Our courts need to devise a mechanism to provide more information to the public. For instance, the courts may disclose information as to how many cases are being instituted in a year after the regular timings of the courts, the causes of action invoked, the litigants and lawyers involved, and the outcomes in those cases. Revelation of data can adequately absolve or, alternatively, inculpate the courts.

[1504] Al Jehad Trust vs. FOP, PLD 1996 SC 324, para 51. See also: Levy, Leonard W.: Encyclopaedia of the American Constitution, 2nd Edn., Macmillan Reference USA(2000), at page 66.

[1505] Aman Ullah Khan and others vs. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others (PLD 1990 SC 1092); Chairman, Regional Transport Authority, Rawalpindi vs. Pakistan Mutual Insurance Company Limited, Rawalpindi (PLD 1991 SC 14), and Inamur Rehman vs. Federation of Pakistan and others (1992 SCMR 563).

Similarly, for fixing cases before a Bench, the courts may provide a record, on a regular basis — quarterly, biannually or annually — of how many cases are being instituted, by whom, the nature of those cases, the number of adjournments and hearings, and the relief sought and given. Patterns only emerge when there is information. Without information, there are only speculations, doubts and rumours which, even if they cannot be proven, cannot be disproven either. As a non-elected, non-representative branch of the government, it is only through its credibility, moral high ground and neutrality that the judiciary can exercise the powers that it does. It must be remembered that perception plays a huge role.

7.11. Reforming the Criminal Justice System.

It is commonly observed that the habit of registering second case u/s 411 PPC, 1860 has tended to mushroom, at a fast and furious speed, in the Police (investigation) department and it is high time to arrest the same if the precious time of the courts, especially at Magisterial level, is to be saved to be utilized in other cases, comparatively much genuine. The courts are overburdened, much to the credit of IOs and working of their high-ups as well as Public Prosecution Department who feel satisfied in simply forwarding the same to ultimately tax the already heavy board of the Magistrate. It must, however, be kept in mind that practice cannot bypass the procedure. Merely because a practice has developed over the years is no ground and no justification that this concept of second case should be kept going. If there is no forum for complainant there must not be one for accused. Rather taking away of this forum of appeal would be a blessing in disguise for all the stake holders for system of administration of justice.

It is already high time to go ahead. Legacy of both India and Pakistan is the same. Instead of following others we must lead. It must be remembered that once opium eating was no offence. The moment it was made an offence by legislatures around the world it became

an offence from simple opium eating and from use by way of traditional knowledge and customary treatment. Instead of following we must have the courage to leave the footprints for others to follow.

Similarly the Anti-terrorism Act, 1997 need to be overhauled. In the wake of Tehreek-e-Taliban Pakistan (TTP) resurgence in 2024, Pakistan needs to reform its whole anti-terrorism legal regime in order to effectively deal with the menace of terrorism. The starting point has to be the ATA, 1997. The law must be revisited and re-assembled. In its present form, it is an ill-organized piece of legislation. It needs first of all to be divided into different chapters on general definitions, definition of offences with penalties, financing of terrorism, federal offences, proscription, persons under watch, rules of procedure and evidence, investigation, prosecution, trial, protective measure for witnesses, prosecutors, and Judges, and schedules.

It is desirable to distinguish, while punishing an offender, between possessing an illegal weapon for self defence and possessing a weapon for proven intent of committing an act of terrorism. In the process of re-assembling the law, it is imperative to make the anti-terrorism law a self-contained piece of legislation with a minimum reliance on other statutes for investigation, prosecution and trial of acts of terrorism.

However, the anti-terrorism law needs to be overhauled. The new law should also cover recoveries made in cases of terrorism such as weapons, and explosives, and provide for penalties in line with the seriousness of an act of terrorism. It will help the state to focus precious energy precisely where it is required, relieving the ATCs of the burden of trial of cases that do not attract their jurisdiction. It will improve the quality of investigation and trial of cases of terrorism. Moreover, the redefining of terrorism and the terrorist acts as exclusively and narrowly as possible would essentially give right direction to Pakistan's policy response to terrorism.

The fact remains that there should be only one category of cases pertaining to arms i.e. u/s. 13/20/65 AO that ought to be dealt with by MIC concerned. It should be, naturally and logically, the cases registered on recovery of weapon from an accused on spy information or on personal search of accused. The second case should be dealt with and tried by the same court of MS30 or the Sessions Judge dealing with the main case.

7.12. Doing Away With the Unwritten Law of Law Making.

The spirit of democracy demands that preferably the Constitution be amended to out rightly omit the provision of Ordinances so that the route of legislation should pass only through the parliament. In the meantime, awareness should be created among the people that the promulgation of Ordinances is a highly undesirable practice in a democracy so that voters hold such a practice against any government which resorts to excessive promulgation of Ordinances rather than going for more inclusive legislation in parliament. In presence of well-defined and written procedure of law making, the process should not be sacrificed at the hands of those preferring an unwritten law, and that too, at the cost of burden on the public exchequer.

7.13. Structuring the Discretion qua Constitution of Benches etc.

The law laid down by a Constitutional court in a decision delivered by a Bench of larger strength is to be honoured as it is binding on any subsequent Bench of lesser or co-equal strength. It must be appreciated that a Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a larger Bench. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the CJ and request for the matter being placed for hearing before a larger Bench. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a larger Bench.

These above mentioned rules, however, are subject to two exceptions. The above said rules do not bind the discretion of the CJ in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength. If the matter has already come up for hearing before a larger Bench and that Bench itself feels that the view of the law taken by a Bench of lesser quorum needs correction or reconsideration then by way of exception and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference to CJ constituting the Bench. The passing of the SCP (Practice and Procedure) Act, 2023 in Pakistan is a good step in the right direction. It also provided for establishing a transparent process for the formation of Benches for hearing crucial constitutional issues.[1506]

However, even after coming into being of this law, the discretion ought to be structured as was done in *Raghubir Singh and Ors.* and *Hansoli Devi and Ors.* in India. It is worth appreciating that in our constitutional set up every citizen is under a duty to abide by the Constitution. Those who take oath to act in accordance with the Constitution and uphold the same, have to set an example by exhibiting total commitment to the Constitutional ideals. This principle is required to be observed with greater rigour by the members of judicial fraternity who have to adjudicate upon important Constitutional and legal issues, and protect and preserve rights of the individuals and society as a whole. If the courts command others to act in accordance with the provisions of the Constitution and rule of law, it is not possible to countenance violation of the constitutional principles by those who are required to lay down the law. As such, they must leave the foot prints for others to follow.

[1506] Vide 26th Constitutional Amendment, 2024 provision for the Constitutional Bench to be nominated/designated by JCP has been made.

7.14. Liimits of Interpretation to Be Observed By the Courts.

In order to guard against the working of unwritten judicial policy certain principles must be applied and considered by the court when striking down or declaring a legislative enactment as void or unconstitutional: (i) There is a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute was placed next to the Constitution and no way could be found in reconciling the two; (ii) where more than one interpretation was possible, one of which would make the law valid and the other void, the court must prefer the interpretation which favoured validity; (iii) a statute must never be declared unconstitutional unless its invalidity was beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid; (iv) court should abstain from deciding a Constitutional question, if a case could be decided on other or narrower grounds; (v) court should not decide a larger Constitutional question than was necessary for the determination of the case; (vi) court should not declare a statute unconstitutional on the ground that it violated the spirit of the Constitution unless it also violated the letter of the Constitution; (vii) court ought not to be concerned with the wisdom or prudence of the legislation but only with its Constitutionality; (viii) court should not strike down statutes on principles of republican or democratic government unless those principles were placed beyond legislative encroachment by the Constitution; (ix) mala fides should not be attributed to the Legislature,[1507] and (x) it must be remembered that when it is not necessary to decide more, it is necessary to not decide more.[1508]

[1507] Lahore Development Authority through D.G. and others vs. Ms. Imrana Tiwana and others, 2015 SCMR 1739.
[1508] Jurists Foundation through Chairman vs. Federal Government through Secretary, Ministry of Defence and others, PLD 2020 SC 1.

It is pertinent to mention here that the initial presumption is that an absurdity is not intended by the law-maker.[1509] In case of doubt as to the intention of Legislature, an interpretation which leads to manifest absurdity should be avoided.[1510]

Widespread agreement exists on the appropriateness of some other techniques of interpretation. It is that the language of the Constitution, the intent of its Framers, and the decisions of earlier courts are placed squarely within the area of constitutional protection. In any case it is settled that the law abhors going beyond the settled limits and also dislikes a vacuum created thereby.[1511] "It is illegitimate for the judiciary to go beyond the enforcement of policy choices to the making of policy choices, at least, it is illegitimate unless the judiciary is authorised to do so by the legislative and executive branches."[1512]

7.15. No Unwritten Judgmement.

The judgment must be written. There is no concept of unwritten or oral judgmenet or orders. The rights and obligations of the parties have got to flow from the judgement, more specifically from the reasons given by the Judge. The question of limitation to assail and impugning the same is just another connected and correlative issue. Therefore, SCP is required to impinge upon the Judges that the judgments have to be dated. Moreover, they must be made to append and sign the certificate at the end of the judgement that the case was heard on such date and the judgement is being announced on same/later date specifically.

[1509] Sheikh Abdul Majid and others vs. Bhudar Chandra Ghosh and others, PLD 1964 Dacca 756, para 27, per Murshed, J.; Masud Ahmad vs. The State, PLD 1962 Lah. 878, para 5. See also, Maxwell on "Interpretation of Statutes", 9th Edition, at page 236.

[1510] Muhammad Ahsan Ullah Khan vs. Muhammad Sami Ullah Khan, (PLD 1964 Lah.101, para 18); AZAD J & K Government vs. Sher Baz (PLD 1966 Azad J&K)38). See also, Mian Iftikhar-ud-Din etc. vs. Muhammad Sarfraz and others (PLD 1961 Lah. 842) and Mian Iftikhar-ud-Din vs. Muhammad Sarfraz (PLD 1961 SC 585). See also, Macmillan vs. Dent (1907) Ch.107, at p.120; and River Wear Commissioner vs. Adamson (1877) 2 A C 743, at p. 763.

[1511] *See*, Ghazala Tariq vs. Federation of Pakistan; 2005 PLC (C.S.) 271, at 273; Mumbar and another vs. Ijaz Hussain and others; 2007 SCMR 533, at 536; Air League of PIAC Employees vs. Federation of Pakistan; 2011 SCMR 1254, at 1279 *and* Sarfraz Saleem vs. Federation of Pakistan and others; PLD 2014 SC 232, at 235.

[1512] Michael J. Perry, Morality Politics and law 1988 Edn., at p. 129.

Such a practice would have certain benefits. It would bring the practice in line with the written law. Moreover, it would greatly facilitate matters if all judgments bore the actual date that they are written, signed and pronounced. The personnel of SCP waste considerable time in determining whether an appeal, or as the case may be, a petition for leave to appeal has been filed within time when the impugned judgment does not inscribe the date on which it was written, signed and pronounced. If in all judgments, the dates were inscribed when they were written, signed and pronounced, the difficulties arising from this self-created problem would be avoided and the precious time of all courts, wherein judgments are assailed, would not be pointlessly wasted in trying to ascertain something which should have been expressly stated. The law also prescribes that if a judgment is to be pronounced later, notice thereof must be given.[1513]

The pronouncement of a judgment does not simply mean the result of the case but also the reasons thereof. Simply announcing the result of the case, after hearing it but before it is written, does not constitute a valid decision. A judgment explains how and why the court decided a case in a particular manner. This is also what Art.189 of the Constitution, 1973 states.

Not inscribing the date when a judgment is written, signed and pronounced is connected with the belated writing of judgments. It must be impressed that a judgment must be written within a reasonable time of the case being heard. Any impression that Judges want to escape criticism or accountability by not inscribing the date on a belatedly written judgment must be assiduously dispelled. The SCP must lead by example and do away with the practice of not inscribing the date when a judgment is actually written, signed and pronounced. The SCP holds Judges of other courts to account. Therefore, it is all the more incumbent upon it to abide by the same standard.

[1513] Order X, Rule 1 SCP Rules, 1980.

7.16. No Yes for 'Reflislation'.

The parliament, which itself is a creation of the Constitution, has been given powers to amend the Constitution by the Constitution makers but it does not mean that the they have delegated their full powers in this regard to the Parliament which they had acquired from the people of the country in the capacity of a constituent assembly. The powers to amend the Constitution, given by the Constitution itself, have therefore a narrower scope than the powers of the constituent assembly itself. The parliament is, therefore, bound by the basic principles given by the Constitution makers. As such, the parliament never gave power to the judiciary to refer the matter for legislation to the Parliament. Loosely speaking, it might be other way round, viz., the reference by the President of Pakistan qua advisory jurisdiction under Art.186 of the Constitution of 1973. As such, there is no scope for 'reflislation' by which term scholar means the legislation via reference by the Supreme or High Court of the country to the Legislature, the way it was done in case of 19th Amendment to the Constitution of Pakistan in 2011 under the *Nadeem Ahmed Advocate* case.

So it is imperative for the Parliament to closely and continually scrutinize the Constitution and whenever and wherever necessary introduce amendments to make it in congruence with the changed situations. A Parliamentary Committee comprising members of all political parties should be formed to ponder over such matters and suggest remedial amendments to make the Constitution more vibrant and workable.

7.17. CONCLUSION

The unconstitutional constitutionalism on the part of the Constitutional courts based upon unwritten law has given birth to the unwritten judicial policy (UJP) in Pakistan. The persistent but inconsistent approach by the Constitutional courts shows that the powers emanating from unwritten judicial policy degenerate, most often than not, into a mechanism

empowering the Constitutional courts to cast aside the written provisions of the law of the land. The consequent enlargement of judicial over reach, under the garb of and in the name of interpretation of Constitution, has faded the very veracity of the Constitution, 1973 so as to cause constitutional under reach in the country. It is already high time to define the concept of unwritten law based upon unconstitutional constitutionalism and therefore to demarcate the four corners of unwritten judicial policy (UJP) in Pakistan.

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AIR

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