CONSTITUTIONAL SCRUTINY OF THE LEGISLATIVE PROCESS:

THE CASE STUDY OF PAKISTAN

A thesis submitted in partial fulfillment of the requirements for the Degree of Philosophy (PhD) Laws in The International Islamic University Islamabad.

By

Mumtaz Ali

3-FSL/PHDLAW/S-11

M.A. (Eng. Literature), LL. B, LL.M

Supervisor: Dr. Aziz-ur-Rehman, PhD, Assistant Professor of Law, IIUI

Department of law

FACULTY OF SHARIAH AND LAW

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FINAL APPROVAL CERTIFICATE

It is certified that we have evaluated the thesis "**Constitutional Scrutiny of the Legislative Process: The Case Study of Pakistan**" submitted by Mr. Mumtaz Ali, Registration No.3-SF/PHDLAW/S11, in partial fulfillment of the requirements of the degree of Ph.D Law at the International Islamic University, Islamabad. The thesis fulfills the requirements in its core and quality for the award of the degree of Ph.D Law.

COMMITTEE

Supervisor

Dr. Hafiz Aziz-ur-Rehman
Ex-Assistant Professor, Department of f Law
FSL, IIU, Islamabad

External Examiner-1

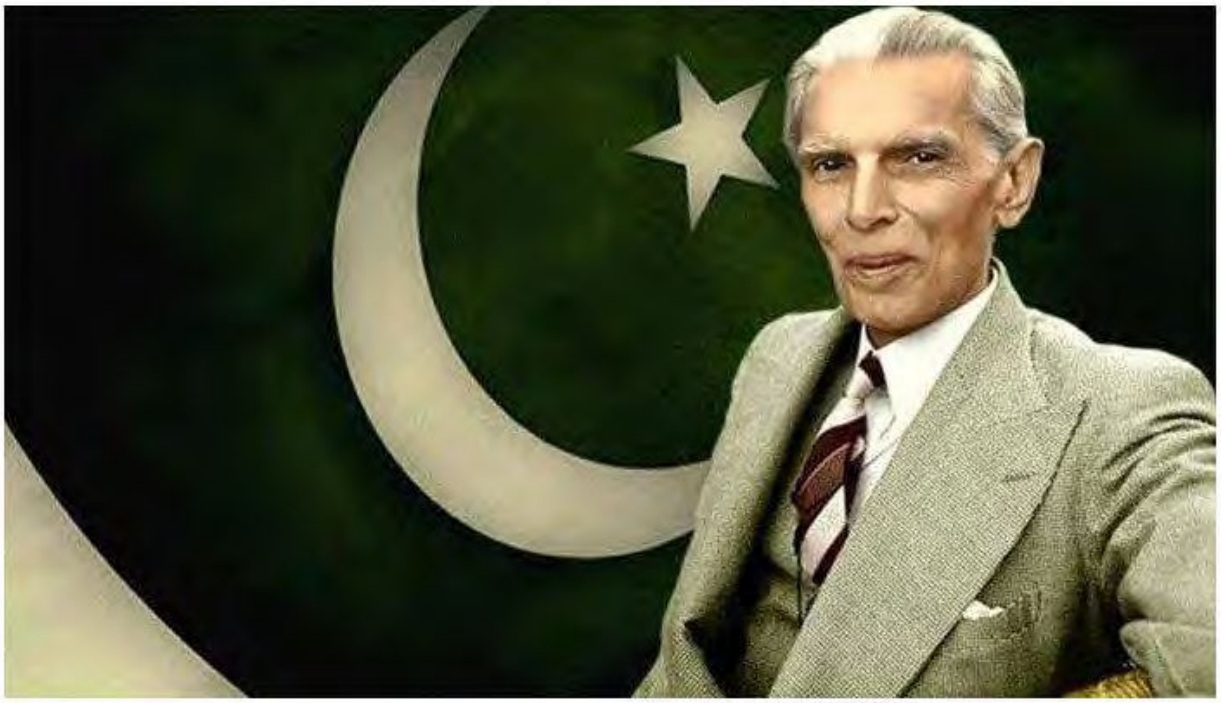
Dr. Muhammad Asif Khan
Associate Professor, Deptt. of Law,
NUST University, Islamabad

External Examiner-2

Dr. Shahbaz Ahmed Cheema
Assistant Professor Law,
Punjab University Law College,
The University of Punjab
Lahore

Internal Examiner

Dr. Aisha Tariq
Lecturer, Deptt. of Law,
FSL, IIU, Islamabad



Quaid-e-Azam Muhammad Ali Jinnah

The Founder of Pakistan

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DEDICATION

This thesis is heartily dedicated to all the students of LL. B, LL. M, and PhD, past, present, and future, at the Faculty of Shariah and Law, in The International Islamic University Islamabad, Pakistan.

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DECLARATION

I, Mumtaz Ali, do hereby declare that this dissertation is original and has never been presented in any other institution. I further declare that any secondary information used in this dissertation has duly been acknowledged.

MUMTAZ ALI

3-FSL/PHDLAW/S-11

ABSTRACT

Because of the concept of separation of powers, each organ of the State is independent; but unfettered procedural legislative supremacy, immune from constitutional scrutiny, out of the reach of ultimate judicial review of the legislative process, in all circumstances, on all grounds, is not the true constitutional position in Pakistan. The Parliament of Pakistan is not as supreme as the British Parliament is. There are limitations on the legislature in Pakistan not only from the perspectives of competence but also from the perspectives of procedure prescribed in the Constitution. Constitutional Scrutiny and ultimate Judicial Review of the Legislative Process are theoretically and practically not only possible but are also desirable under the Constitution. Such a constitutional scrutiny and judicial review of the legislative process are democratic which is known as **constitutional democracy**, benefiting people and their legitimate interests. So, in-spite of the Internal Proceeding Doctrine of the Parliament, constitutional scrutiny and if need be, judicial review of the legislative process is possible; however, the grounds may be different from the grounds of the challenge of the enacted law. Meaning thereby that **Article 69** of the Constitution is not an absolute bar to judicial review of the legislative-process.

CHAPTER ONE: GENERAL INTRODUCTION

Introduction: The thesis is an endeavour to explore competency of the Parliament of Pakistan regarding law-making from the perspective of process in the light of **Article 69** of the Constitution. The thesis has been divided in five chapters. **Chapter One** elaborates the concept of ruling from different angles and views. It is a truth universally acknowledged since the birth of nation-state that people saw so many manifestations of ruling. This chapter has drawn a picture of them. It has been shown that man has tried his level best to accumulate power by devising techniques through-out human known history and then has sheltered the same by devising further methods. To make essential concepts vivid, some preliminary inquiry has been made regarding the creation of Pakistan, and there-after, basic principles of government and constitution have been researched intensively. **Chapter Two** has explored the Legislatures in Pakistan and in particular, the Parliament under the Constitution. **Chapter Three** is about Rules of Business of the Parliament as without proper mechanics of exercise, the power cannot be utilized in the correct way. **Chapter Four** pertains to the power and independence of Parliament in the area of legislation. **Chapter Five** is the main chapter of this thesis for which the material concepts and ideas were collected in the earlier chapters. It is in respect of the puzzling resistance to judicial review of the legislative process in Pakistan. This thesis has shown and established that procedural

judicial review of the law-making power of the Parliament is not only competent but is desirable in order to ensure the principle of separation of powers.

1.1 THE SOURCE OF AUTHORITY FOR LEGISLATION

This is the age of information and awareness. Democracy cannot flourish without involvement of the governed in all aspects of political life. Like good citizens, a question comes to mind to ask whether Parliament of Pakistan is without any limitations in the area of legislation or are there constitutional limits in this regard.

Pakistan has a written Constitution which is the reservoir of all powers and jurisdiction. As such, the source of all powers and jurisdiction is the Constitution or law made by a competent law-making authority. It is, therefore, interesting to examine validity of the **law-making process** in **Pakistan**, and the possibility of **judicial challenge** to the **legislative process** in the light of **constitutional scrutiny** to ascertain as to whether the law by which the citizens are being governed and respect of which is obligatory[1] has validly been enacted strictly in accordance with the **constitutional provisions** and **constitutional requirements**.[2]

It is a truth to be acknowledged always that in-spite of the fact that there may be good law and bad law but **wisdom of the legislature** cannot be challenged. The only

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[1]Article 5 of the Constitution of the Islamic Republic of Pakistan, (1973) (Constitution); "[W]hat is the motto of a good citizen? To obey punctually; to censure freely" Jeremy Bentham, *A Fragment on Government* (London: Cambridge University Press, 1988), 10.

[2]Articles 70-77 Constitution.

jurisdiction left to the courts is to interpret the same. To say that "a thing is constitutional is not to say that it is desirable".[3]

Article 69 of the Constitution reads:

> Courts not to inquire into proceedings of … Parliament: - (1) The validity of any proceedings in … Parliament shall not be called in question on the ground of any irregularity of procedure. (2) No officer or member of … Parliament in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order in … Parliament, shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers. (3) … Parliament means either House or a joint setting, or a committee thereof.

Now suppose that proceeding of the Parliament is beyond scrutiny as apparently is the case under **Article 69** of the Constitution reproduced above, and a law has been legislated in contravention of the constitutional mandate and requirements, then what will be the remedy?

Here is a dilemma because it is the judicial approach not easily to strike down a law:

> [T]hat the law should be saved rather than be destroyed and the Court must lean in favour of upholding the constitutionality of legislation, keeping in view that the rules of constitutional interpretation is that there is a presumption in favour of the constitutionality of the legislative enactments unless ex facie it is violative of a constitutional provision.[4]

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[3] *Dennis v. United States*, 341 U.S.494 (1951); Robert F. Cushman and Susan P. Koniak, *Cases in Constitutional Law*, 7th ed. (New Jersey: Prentice Hall, 1989), 374-76.

[4] *Elahi Cotton Mills Ltd. v. Federation of Pakistan*, PLD 1997 SC 582.

So, the people cannot avoid a law unless the same is struck down by a competent court. Thus, they are surrounded here. The dilemma referred to above is that on the one hand, internal proceeding of the legislature seems to be beyond challenge and on the other hand, the product, that is, the enacted law is not to be struck down easily as presumption of constitutionality is attached to it. Let me recall **Shakespeare**: "When sorrows come, they come not single spies, / But in battalions."[5] How to avoid this dilemma without throwing challenge to the wisdom of the legislature in this age of democracy and awareness is the pricking question?

The only way out may be that on closer and deeper look, the Constitution mandates, under the **principle of check and balances**, that challenge to the **legislative process** shall be made promptly; otherwise, if the process ends in the product as law, it will do its damage unless repealed or struck down, and such striking down may take effect prospectively.

Put simply, it would amount to say that every law is a law whether just or unjust.

But here is the wise warning of **Sophocles**, the Greek playwright in the B. C about mundane law by saying, "Your law [is] Not the sacred law…."[6] As per the spirit of the **rule of law**, it is embedded in the very concept of **legalism** that the law should be prevented from becoming effective if it violates any provision of the Constitution while

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[5]William Shakespeare, *Hamlet* (London: Simon & Schuster, 2012), IV. v. 78.

[6]Sophocles (496-606 BC), *Antigone* (London: Simon & Schuster, n.d), 17; available also at https://ecommons.cornell.edu/bitstream/handle/1813/30557/3174Antigonebook.pdf [last accessed on 26.12.2015].

in the process of making. This is one aspect of the issue. The other aspect is reasonableness of the law.

Articles 141, 14, 18, among other provisions of the Constitution provide that "subject to the Constitution" the legislature can legislate, and sometime "subject to reasonable restrictions *imposed* by law", some activities are declared to be exercised as of right. It means that such law will itself be reasonable. But reasonable to whom standard"?

Reasonable is from 'reason' and it is not something ethereal. It is something 'natural'. The Roman lawyer, **Cicero** usefully identified the three main components of any natural law philosophy:

> True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting.... It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely.... [God] is the author of this law, its promulgator, and its enforcing judge.[7]

It is the reasonableness of a person of ordinary prudence. So, the legislature has no power under the Constitution to enact an unreasonable law because it represents the whole nation along with its diversity and different strata of the society. Thus, it may be said that **it is the collective deliberation which is the guarantee of fairness in the Parliament according to the constitutional provisions of law-making.**

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[7] Quoted in Raymond Wacks, *Philosophy of Law: A Very Short Introduction* (New York: Oxford University Press Inc., 2006), 3.

Under the Constitution there will be three readings of a Bill in the **Chamber** of **origination**, and similar readings in the other Chamber of the Parliament.[8] It also mandates that no major amendment will be made in the One-Chamber passed Bill otherwise it will not be considered as passed by the Chamber of origination. All these constitutional mandates and requirements cater to the fact of due deliberation in the legislature. If any step is omitted or deliberately not taken, the product, the law will become constitutionally invalid.

When the Constitution says that internal proceeding of the legislature will not be subject to challenge, it envisages an ethical conduct and behaviour on the part of the honourable members of the Legislature being so worthy persons. It does not give **blanket immunity** to do whatever they want according to whims and fancy because:

> That department of the science of ethics, which is concerned especially with positive law as it ought to be, is styled the science of legislation: that department of the science of ethics, which is concerned especially with positive morality as it ought to be, has hardly gotten a name perfectly appropriate and distinctive. Now, though the science of legislation (or of positive law as it *ought*

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[8] Article 67 (1) Constitution; The Rules of Procedure and Conduct of Business in the National Assembly, 2007, available at https://na.gov.pk/uploads/publications/rules_procedure.pdf [last accessed on 10.01.2014]; A Bill has to pass through three stages before it becomes an Act:- First Reading: Under rule 126, when a Bill comes up for consideration, the principles and general provisions of the Bill can be discussed, but the details of the Bill cannot be discussed beyond a point that is necessary to explain its principles. At this stage, amendments to the Bill are not moved. However, a member can move as an amendment that the Bill be circulated for the purpose of eliciting opinion, if any. On the conclusion of general discussion, the motion for consideration of the Bill is put to the House. Second Reading: If the Assembly adopts the motion for its consideration, the Bill is taken into consideration clause-by-clause. The amendments, if any, to a clause may be moved at this stage in accordance with the provisions of rule 130. Each clause, together with amendments, if any, is put to House and adopted by a majority vote. (Rule 133) Third Reading: After clause-by-clause consideration of the Bill, the member-in-charge of the Bill can move a motion that the Bill be passed. At this stage, the debate is confined to arguments either in support of the Bill or for its rejection, without referring to the details thereof. (Rules 137 and 138).

> to be) is not the science of jurisprudence (or of positive law as it i*s*), still the sciences are connected by numerous and indissoluble ties.[9]

An adage, ascribed to **Bismarck**, says that "people who like sausages and respect the law should never watch either being made".[10] But now time has changed. It is the age of **democracy** and **constitutionalism**. There will not only be a **rule of law** but also the law itself cannot be made or changed at the whims of the rulers. The shared understanding is as under:

> Changing law through a public and transparent process of legislation presents change as an appropriate focus for political action on the part of the public. It conveys the idea that law in some sense *belongs* to the members of the public, and for that reason they are entitled to participate, directly or through their representatives, in the debates and decisions that determine whether it will be changed. It is *their law*, not something to be imposed on them by a ruling clique; who are [as they think] better able than the people are, to determine how the law should change, and better able to do this when they are undistracted by public opinion or popular participation.[11]

The Constitution mandates that a Bill will be originated and enacted in a manner,[12] and by a body.[13] **But the question is that who will ensure, and how can compliance with the constitutional provisions and procedure be ensured**

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[9] John Austin, *The Province of Jurisprudence Determined* (Delhi: Universal Law Publishing Co. Pvt. Ltd., 2012 Indian Economy Reprint), 6. (Austin)

[10] Otto von Bismarck, quoted in Jeremy Waldron, "Legislating with integrity", 72 Fordham L. Rev. 373, 734n, (2003). (Waldron, 'Legislating with Integrity'). At https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3932&context=flr [last accessed on 30.12.2014].

[11] Waldron, 'Legislating with Integrity' at 380 (*italic* in the original).

[12] Articles 50-89, Constitution.

[13] Article 70, Constitution.

relating to law-making in the Parliament. The law-making activities of the legislators will not and should not be absolutely immune and non-justiciable.[14]

The **Parliament** of **Pakistan** is a **majoritarian institution**: that is, it makes its decisions by voting among its members.[15] This is so also in the Apex Court of Pakistan. But here is a distinction. In the Court procedure, the Judge who dissents with the majority is decipherable from the very judgment along with his view[16]; but in the case of the Legislature, nobody knows what the minority members' views were. The only way left is to pierce the curtain and look behind for such views in the minutes and journals of the Parliament.

In Pakistan, the principle of **separation** of **powers** is constitutionally recognized.[17] There is considerable divergence among judges in Pakistan to the idea that judges should review the **law-making process**, albeit judicial review of **statutory law** is taken for granted.

It has been shown through this research that judicial review of legislation pre-enactment is not prohibited by any constitutional provision. Judicial power continues to be existent for exercise by the Courts. Pakistan is a state where parliamentary sovereignty *under the Constitution* applies. This **thesis** is a humble endeavour establishing a case for **constitutional scrutiny** of the **legislative process** in

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[14] Articles 199, 184, 58(2)(b) now 58(2), Constitution.

[15] Article 55, Constitution: "Subject to the Constitution, all decisions of the National Assembly shall be taken by majority of the members present and voting….".

[16] Article 191, Constitution and the Supreme Court Rules, 1981.

[17] *Mehram Ali v. Federation of Pakistan,* 1998 SC 1445; There are separate chapters in the Constitution for the Executive, the Legislature, and the Judiciary.

Pakistan, and ultimately, if need be, a case for **judicial review** of the **legislative process**, so that to ensure compliance of the constitutional provisions pertaining to law-making keeping in view at the same time the principle of **separation** of **powers**. Let us clarify some relevant and necessary concepts and matters for this research.

1.1.1 Preliminary:

Pakistani have their own history and origin. The **Quaid** said, "The Story of Pakistan, its struggle and its achievement, is the very story of great human ideals, struggling to survive in the face of great odds and difficulties."[18] In historical terms, a colony means the establishment of a permanent settlement of foreign inhabitants in another country.[19] The struggle for freedom by the subjugated people led to the collapse of the colonial/ imperial system, in India as elsewhere.[20] The **Muslims** of the Indian sub-continent were not content only with independence from the **British Raj** as they wanted to explore the golden principles of Islam. The struggle of the Indian Muslims "was to chalk out an egalitarian society fully removed from the shackles of colonialism."[21] Father of the Nation Muhammad Ali **Jinnah** said:

> We have to fight a double-edged battle, one against the Hindu Congress and [an]other against the British Imperialists, both of them being capitalists. The

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[18] Quaid-e-Azam Muhammad Ali Jinnah: Founder of Pakistan, Address to the people in Chittagong, 23rd March, 1948. at https://islamabadtonight. wordpress.com/2010/12/25/quaid-e-azam-muhammad-ali-jinnah-founder-ofpakistan/ [last accessed on 26.12.2017].

[19] D. K Fieldhouse, *Colonialism 1870-1945: An Introduction* (London: The Macmillan Press, 1983), 4.

[20] *A Dictionary of Political Economy* (Moscow: Progressive Publishers, 1985), 49-50; *A Dictionary of Marxist Thought*, 2nd Ed, Tom Bottomore, ed. (Oxford: Blackwell Publishers Ltd, 2001), entries: 'Asiatic society', 36; 'colonial and post-colonial societies', 94; 'colonialism', 96; 'colonial liberation movements', 98.

[21] Syed Mansoor Ali Shah, 'Salvaging Democracy: Judiciary Our Last Hope', 1, (unpublished article) at http://www.supremecourt. govt.pk/Articles/17/1.pdf [last accessed 20.03.2015].

> Muslims demand Pakistan where they could rule according to their own code of life and according to their own cultural growth, traditions and Islamic laws.[22]

As such, the unremitting struggle succeeded in the year 1947 by establishing the independent State known as Pakistan. **Jinnah** addressed the **Constituent Assembly** of Pakistan in these words:

> As you know, history shows that in England, conditions, some time ago, were much worse than those prevailing in India today. The Roman Catholics and the Protestants persecuted each other. Even now there are some States in existence where there are discriminations made and bars imposed against a class. Thank God, we are not starting in those days. We are starting in the days where there is no discrimination, no distinction between one community and another, no discrimination between one caste or creed and another. We are starting with this fundamental principle that we are all citizens and equal citizens of one State.[23]

But "[t]he constitutional and parliamentary history of Pakistan … is … thought-provoking … [as the people] are still far off the goal of instituting genuine democracy within the framework of Islam."[24] Failing in constituting state structure on merits, ruling

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[22] Qadar Bakhsh Baloch, 'Review and Views: The Idea of Pakistan', 1-19 (unpublished article) at http://qurtuba.edu.pk/thedialogue/The%20Dialogue/12/6The%20Idea%20of%20PakistanBook%20Rew.pdf [last accessed on 01.06.2015]; Stephen Philip Cohen, *The Idea of Pakistan* (Washington D.C: The Brookings Institution, 2004) at https://docs.google.com/file/d/0Be6qHPbxSdNTWV4UkhpZGZKVFk/_edit?resourcekey=0d69Hv5QC17xpGMlV_kAWuAg [last accessed on 02.12.2015]. Stephen Philip Cohen, *The Idea of Pakistan* (Lahore: Vanguard Books, 2005).

[23] Quoted in 'Pakistan Law on Human Rights', International Human Rights Observer, Islamabad.

[24] *Handbook for Parliamentarians* (Lahore: Provincial Assembly of the Punjab Secretariat, 2002), 1; Dr Syed Abul Hassan Najmee, *Punjab Assembly Decisions 1947-1999* (Lahore: Punjab Assembly Secretariat, 2001), xi, at https://www.pap.gov.pk/uploads/downloads/Decisions-of-the-Chair.pdf [last accessed on 20.05.2014].

class of the country took refuge in provisions of the Imperial Acts of eighteenth century and deprived people of the right to function as a sovereign nation.[25]

Pakistan's struggle for democracy began with the founding of the nation, and the struggle to achieve this goal has remained persistent as the vast majority of Pakistanis overwhelmingly support it.[26] They have continued their struggle to achieve genuine independence as intrinsically "man is by nature a political animal."[27] Such a 'genuine independence' is *through the democratic devices*. It has beautifully been alluded to that "[a] country does not have to be judged fit for democracy; rather it has to become fit through democracy."[28] Pakistan's destiny is democracy: "Democracy Should Continue to Grow in Pakistan".[29]

In this struggle, the people of Pakistan, in the year 1973, at last, reached a point where they were proud to say:

> [W]e the people of Pakistan, … dedicated to the preservation of democracy, achieved by the unremitting struggle of the people against oppression and tyranny; inspired by the resolve to protect our national and political unity and

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[25]A. Q. Sial, 'Sovereignty of People-Pakistan: A Case Study', South Asian Studies: A Research Journal of South Asian Studies, Vol. 26, No. 1, January-June 2011, 117-130.

[26]Sheila Fruman, *Will the Long March to Democracy in Pakistan Finally succeed?* (Washington D.C: United States Institute of Peace, 2011), 5.

[27]Aristotle, *Politics*, I, 2; *Politics of Aristotle* (Kitchener: Batoche Books, 1999), 5; *Politics of Aristotle,* translated by Benjamin Jowett (Kitchener: Batoche Books, 1999), 5 ("hence it is evident that the state is a creation of nature, and that man is by nature a political animal. And he who by nature and not by mere accident is without a state is either a bad man or above humanity; he is like the Tribeless, lawless, heartless one, whom Homer denounces: - the natural outcast is forthwith a lover of war; he may be compared to an isolated draught.")

[28]Nobel Laureate Amartya Sen, quoted in Nazeer Ahmad, *Political Parties in Pakistan: A Long Way Ahead* (Islamabad: Centre for Democratic Governance, The Network for Consumer Protection, 2004), cover page.

[29]The daily *Dawn,* May 16, 2010.

solidarity by creating an egalitarian society through a new order; Do hereby, … adopt, enact and give to ourselves this Constitution.

1.1.2 The past:

The **Quaid** said in 1947:

> If you … work together in a spirit that every one of you, no matter to what community he belongs … no matter what is his colour, caste or creed, is first, second and last a citizen of this State with equal rights, privileges and obligations, there will be no end to the progress you will make.[30]

The superior judiciary has shown glimpses of the road to be taken:

> We as the Pakistani nation should learn tolerance and inculcate the habit of appreciating the opposite point of view. Furthermore, our approach should not be short-sighted or prompted by expediency, but should be oriented with the object to promote Islamic, social and political justice … [so that] to achieve the [high] goal of [the] establishment of an egalitarian society.… [Such a society] cannot be attained unless we strive to strengthen the institutions…. [W]thout an independent judiciary neither there can be stability in the country nor the rule of law which are sine qua non for a progressive State.[31]

In the conception of **Voltaire**, a great philosopher: "What is tolerance? It is the consequence of humanity. We are all formed of frailty and error; let us pardon reciprocally each other's folly - that is the first law of nature."[32]

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[30]'Quaid-e-Azam Muhammad Ali Jinnah: Founder of Pakistan' at https://islamabadtonight.wordpress.com/2010/12/25/quaid-e-azam-muhammad-ali-jinnah-founder-of pakistan/ [last accessed on 26.12.2017].

[31]*Masroor Ahsan v. Ardeshir Cowasjee*, PLD 1998 SC 823.

[32]Voltaire, *Philosophical Dictionary* (June 12, 2006 [EBook #18569]), 132. At http://www.Morelightinmasonry.com/wp-content/uploads/2014/06/Philosophical-Dictionary-Voltaire.pdf [last accessed 04.11. 2014]. (John Locke's, Rousseau's and Voltaire's philosophies had played a prominent role in triggering the French Revolution, which changed the course of European history).

Historically, democracy did not have a smooth sailing in the world. It had to contend with Nazi, Fascist and totalitarian challenges which it eventually managed to overcome in 1945.[33] It was **legitimate hope** of the **people** of the **World** that "the norms of rationality, bureaucracy and institutionalized, impersonal authority, born in Western enlightenment and nurtured by the modern state, would eventually spread across the globe."[34]

History tells us that **Pakistan** was **conceived** as a **parliamentary democracy**; but it is strange to note that from the very inception, all the executive power was retained by the Governor-General. It was an unconscious mistake or it was a constraint: "The cabinet and other high political appointments reflected a paucity of talent among the politicians."[35] It was perhaps both.

Pakistan political history, after independence, is "a fruitless search for stability with frequent changes of Government and regime".[36] However, ultimately, the people of Pakistan **ordained** and **gave** to **themselves** the **agreed upon Constitution of 1973** to govern themselves. Let us explore for a while the concept of government.

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[33] See, Michael Geyer and Sheila Fitzpatrick, eds., *Beyond Totalitarianism: Stalinism and Nazism Compared* (Cambridge: Cambridge University Press, 2009).

[34] Subrata Kumar Mitra, Ed. *The Post-Colonial State in Asia: Dialects of Politics and Culture* (Lahore: Sang-e- Meel Publishers, 1998 rpt), 3.

[35] Hamid Yusuf, *Pakistan: A Study of Political Developments 1947-97* (Lahore: Sange-Meel Publications, 1999), 34.

[36] Ian Talbot, *Pakistan: A Modern History* (London: Hurst & Company, 2005), 4.

1.1.3 The concept of government**:**

There are many kinds of government: "*The History of the World is not intelligible apart from a Government of the World."*[37] In some of them, one person is the ruler. This ruler has great control over the lives of the people. One such kind of government is a **monarchy**.[38] The ruling person who inherits his or her title and position is called a monarch. Very often the monarch is a king or queen. Sometimes the monarch is called a shah or sheikh. Philosophically conceived, "Monarchy is that kind of constitution which does indeed unite the members of the body politic in the head of the government as in a point; but regards that head neither as the absolute director nor the arbitrary ruler, but as a power whose will is regulated by the same principle of law as the obedience of the subject."[39] If the monarch has a great deal of power,[40] the

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[37] G.W.F. Hegel, *The Philosophy of History* (Kitchener, Ontario: Batoche Books, 2001), title page, Trans, J. Sibree, quoting W.V. Humboldt, (*Italic* in the original). (at 51 "God governs the world; the actual working of his government - the carrying out of his plan - is the History of the World.")

[38] Ibid. Part IV: Section II: Ch III. 417, 'The Transition from Feudalism to Monarchy'. "Now Monarchy is that kind of constitution which does indeed unite the members of the body politic in the head of the government as in a point; but regards that head neither as the absolute director nor the arbitrary ruler, but as a power whose will is regulated by the same principle of law as the obedience of the subject." At 131.

[39] G.W.F. Hegel, *The Philosophy of History*, 131, op cit.

[40] Fred J. Hanna, et al, 'The Power of Perception: Toward a Model of Cultural Oppression and Liberation', Journal of Counseling & Development, fall 2000, Vol 78, 430-441. At https://www.academia.edu/12026198/The_Powerof_Perception_Toward_a_Model_of_Cultural_Oppression_and_Liberation [last accessed on 26.12.2015]; 'Many authors and historians (e.g., Brown, 1970; Douglass, 1845; Miller, 1986, 1991) have observed that the urge to power has a tendency to compromise a person's integrity. Even a cursory study of history (Garraty & Gay, 1981; Roberts, 1995) gives credence to the often-quoted observation by Lord Acton in 1887: "Power tends to corrupt and absolute power corrupts absolutely." In this article, we examine the nature and process of this corruption. Acton's observation is relevant to abusers of power in virtually any aspect of life - from fascists, tyrants, and despots to ruthless executives, abusive parents, and school yard bullies. The urge to power is a significant aspect of human interaction. Russell (1938) argued cogently that the urge to power, whether benign or malevolent, is the primary motivation of human beings. The will to power as the human being's primary urge was also a major theme in Nietzsche's (1901/1967, 1886/1989) philosophy, which in turn was influential on Adler in forming his popular concept of striving for superiority or perfection (Hergenhahn, 1986).' At 430.

government is called an **absolute monarchy**. The people have little to say about what kind of laws there should be.[41]

But nobody can deny that: "All humane things are subject to decay, / And when Fate Summons, Monarch's must obey…." [42] Absolute monarchy cannot be retained forever. If the country limits powers of the monarch, the government is called a **limited monarchy**.[43]

England has a history of monarchy: "As king of Scotland, **James I** was accustomed to full power, and believed in the Divine Right of Kings, that is, the king is divinely ordained to rule."[44] Here is a glimpse of the historical fact:

> It is quite important to note that parliaments, when called, agreed with Queen Elizabeth's views. She always remained in control, however; for example, when Parliament, fearful of the succession, begged her to marry so that she could produce an heir, she told them to mind their own business. Later, towards the end of her reign, when Parliament complained about the restrictions on free speech, the queen snapped, 'You have the right of free speech - you can say "Yes" or "No" to what I have decided.[45]

Even Office-holders in state and Church were required to take oath as set out in the Act of Supremacy 1559. The individual had to:[46]

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[41] John R. O'Connor and Robert M. Goldberg, *Exploring American Citizenship* (New York: Globe Book Company, Inc., 1980), 11.

[42] John Dryden, *Mac Flecknoe*, 1, (a poem). At https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/700/macflecknoe.pdf [last accessed 09.11.2014].

[43]John R. O'Connor and Robert M. Goldberg, *Exploring American Citizenship* (New York: Globe Book Company, Inc., 1980), 11. (O'Connor).

[44]Peter Moss, *Oxford History of Pakistan*: Teacher's Guide Three (Karachi: OUP, n. d.), 1.

[45] Ibid.

[46]Asma Said Khan, *Parliament and the Church of England: The Making of Ecclesiastical Law*, PhD Thesis, 2011, School of Law, Kings College London, 29.

> testify and declare in my conscience that the Queen's highness is the only supreme governor of this realm and of all other her highness' dominions and countries, as well in all spiritual or ecclesiastical things or causes as temporal, and that no foreign prince, person, prelate, state or potentate hath or ought to have any jurisdiction, power, superiority, preeminence or authority, ecclesiastical or spiritual, within this realm.

Now, in England, there is a "constitutional" or "limited" monarchy. For all practical purposes, the Queen is herself powerless. The business of government which is carried on in her name is done by her **ministers**. Her Majesty only acts upon their "advice" and **they** are **responsible** to **Parliament**.[47]

If a person gains control of a government without inheriting the title of monarch, People call the ruler a **dictator**. Such a government is called a **dictatorship**.[48] Few dares to oppose the dictator. A person's rights are those the dictator allows. He has no legitimacy to rule. It has rightly been said that "[d]ictators ride to and fro upon tigers which they dare not dismount … [a]nd the tigers are getting hungry."[49] There were dictators in Africa, South America, Asia, and Europe. In the 19th century several dictators gained total control over the countries they ruled. These governments are called **totalitarian**. In such totalitarian governments the ruler or rulers control the daily life of all the citizens. Totalitarian governments try to control not only economic and political conditions but also what people think, believe, and value. The government uses terror to force people to do what the ruler wants them to do. Adolf **Hitler** of Nazi

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[47] Phillip S. James*, Introduction to English Law*, 11th Ed (London: English Language Book Society/Butterworths, 1985), 122. (James).

[48] O'Connor, 11 op cit.

[49] Winston Churchill*, While England Slept*, quoted here from J.M. and M.J. Cohen, *The Penguin Dictionary of Quotations* (London: Penguin Books, 1960, reprint 1991), 111. (Cohen, *Dictionary*).

Germany and Joseph **Stalin** of Communist Russia were totalitarian dictators.[50] Theoretically, "[a]ll human beings are born free and equal in dignity and rights."[51] But practically, they are not so. That is why Jeans-Jacques **Rousseau** declaimed, "Man was born free and everywhere he is in chain."[52]

If a country is ruled by a small group of people, it is called an **oligarchy**. Sometimes the small group is made up of wealthy people who have inherited their titles. This kind of government is called an **aristocracy**. Present-day oligarchies in some countries really run totalitarian governments. These governments use force to control the people. There is no system by which the people are able to change their condition in an orderly manner.[53]

1.1.4 Democratic government**:**

A democratic government is different from an absolute monarchy, a dictatorship, or an oligarchy. In a democracy, the people as a whole decide how they will be ruled.[54]

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[50]O'Conner, 11, op cit.

[51]Article 1 of the Universal Declaration of Human Rights, 1948 (UDHR). At http://www. ohchr.org/ EN/UDHR/ Documents/60UDHR/bookleten.pdf [last accessed on 19.05.2015].

[52] Jean-Jacques Rousseau, *The Social Contract*, (1762), Bk. I, Ch.1, 2, at http://www.ucc.ie/ archive/ hdsp/Rousseaucontrat-social.pdf [last accessed on 31.12.2014].

[53]O'Conner, 12. Op cit.

[54] G.W.F. Hegel, *The Philosophy of History* (Kitchener, Ontario: Batoche Books, 2001), 274, ("In Democracy, the main point is that the character of the citizen be plastic, all "of a piece." He must be present at the critical stages of public business; he must take part in decisive crises with his entire personality - not with his vote merely; he must mingle in the heat of action - the passion and interest of the whole man being absorbed in the affair, and the warmth with which a resolve was made being equally ardent during its execution. That unity of opinion to which the whole community must be brought [when any political step is to be taken,] must be produced in the individual members of the state by oratorical suasion. If this were attempted by writing - in an abstract, lifeless way - no general fervor would be excited among the social units; and the greater the number, the less weight would each individual vote have. In a large empire a general inquiry might be made, votes might be gathered in the several communities, and the results reckoned up - as was done by the French Convention. But a political existence of this kind is destitute of life, and the World is ipso facto broken into fragments and

No present-day government is a **pure,** or **direct, democracy**. In a pure democracy, all the people vote on every problem that comes before them. Pure democracy is not possible when there are large numbers of people. "The form of … [the U.S. as well as Pakistan] government is called **representative democracy** [wherein] … people elect one of their number to represent them."[55] Basically, in **Mill**'s conception, "The meaning of representative government is, that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power, which, in every constitution, must reside somewhere."[56]

The Pakistani believe that "it is the will of the people of Pakistan to establish an order … wherein the State shall exercise its powers and authority through the chosen representatives of the people…."[57] This declaration "epitomizes the belief of every Muslim regarding the *true nature* of an Islamic polity with regard to the *extent of power* exercisable by them in their State as also the *mode* in which this power shall be exercised."[58] Under a constitutional set up, everything can only be done within the four corners of the same. In practical terms, this implies that even provisions of the Constitution can be corrected by suitably amending it; but no extraneous excuse can

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dissipated into a mere Paper-world. In the French Revolution, therefore, the republican constitution never actually became a Democracy: Tyranny, Despotism, raised its voice under the mask of Freedom and Equality.")

[55] O'Conner, 12-13, op cit (emphasis added by me).

[56] John Stuart Mill, *Representative Government 1861* (Kitchener, Ontario: Batoche Books, 2001), 57; John Stuar Mill, *Considerations on Representative Government* eBook, Ch V, available at file:///C:/Users/786-786/Downloads/Considerations%20on%20Representative%20Government,%20by%20John%20Stuart%20Mill.html [last accessed on 22.05.2015].

[57] Paragraphs 2-3 of the Preamble to the Constitution.

[58] *Hakam Khan v. Pakistan*, PLJ 1992 SC 591 [Emphasis added by me).

be sought for.[59] It is because "[a] constitution is a thing antecedent to a government, and a government is only the creature of a constitution"[60]

In an Islamic polity, the institution of vicegerency has a divine sanctity: "Allah has promised those among you who believe and do righteous good deeds, that He will certainly grant them vicegerency in the land…."[61] The people of Pakistan, being Muslims, believe in the collective and **collaborative existence**. Such a collectivity is called, in the Western dialect, as a republic.

1.1.5 Republic**:**

Let us think for a while over the word 'Republic'. Its conception is as under:

> [It is a] … system of government in which *the people hold sovereign power* and elect representatives who exercise that power. It contrasts on the one hand with a pure democracy in which the people or community as an organized whole wield the sovereign power of government, and on the other [hand] with the rule of one person (such as a king or dictator) or of an elite group (such as an oligarchy, aristocracy, or junta.)[62]

A **republican government** exercises **powers** of the people. It shall not derive power from an inconsiderable proportion or a favoured class of it.[63] It is to be distinguished,

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[59] This concept is called constitutionalism; There are basic wants for healthy existence, cf Jane Austin has written: "It is a truth universally acknowledged that, a single man in possession of a good fortune must be in want of a wife." *Pride and Prejudice*, Ch. 1, 1 (a Novel).

[60] T. Paine, *Rights of Man*, 36. At http://pinkmonkey.com/dl/library1/right.pdf [last accessed 07.06.2015].

[61] Al-Quran, Al-Noor, 24:55.

[62] *Black's Law Dictionary*, 8th ed. (St. Paul: West Publishing Co., 2004), 1330. (Emphasis added by me).

[63] James Madison in 'The Federalist No. 39: Complete and Unabridged Text, including: United States Constitution, indexed to the Federalist Papers: 85 Federalist Papers: Articles of Confederation: Universal index to Federalist Papers, 105'. At http://freedom-school.com/law/federalist-papers-in-modern-language.pdf [last accessed on 06.11.2014].

on the one hand, from a monarchy with its grandiose claims of the divine right of kings to rule over men. On the other hand, in a **republic, popular sovereignty** is the **order** of **the day,** in which **laws** are **made** by **popularly-elected representatives.**[64] In the forensic arena, Justice **Munir** made his mark defending executive authority and Justice **Cornelius** offered notion of popular sovereignty and constitutional government.[65] They serve for specified limited terms and must stand for regularly scheduled elections. The principle is "fundamental that in every democratic constitution there must exist a provision for holding elections after a few years, so that the House may continue to be representative of the varying aspirations and needs of the people."[66] It has rightly been said with Keats' beauty, "[We] have … given [you] a republic, if you can keep it."[67]

That is why Preamble to the Constitution tells the purpose of such an order to be so much so "that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and happiness of humanity."[68]

Jeremy **Bentham** argued that people should maximize utility: "Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for

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[64] *Amiruz Zaman v. Crown*, PLD 1956 Dacca 119 at 125.

[65] Amanullah Shah, *Critical Study of the Factors Undermining Independence of the superior Judiciary in Pakistan,* PhD thesis, Gomal University, Dera Ismail Khan, 2008, 149.

[66] *Federation of Pakistan v. Moulvi Tamizuddin Khan*, PLD 1955 FC 240 at 255.

[67] Attributed to Benjamin Franklin, when at the end of the Convention, an onlooker asked him, "What have you given us?" Referred here from Fazal Karim, *Judicial Review of Public Actions* (Karachi: Pakistan Law House, 2006), Vol. I, 24. ('Fazal Karim').

[68] Para 12 of the Preamble to the constitution.

them [pain and pleasure] alone to point out what we ought to do, as well as to determine what we shall do."[69] Mark that Bentham refers to **'we'** ['people'] and not to **'they'** ['individuals'].

The individuals organize themselves through a **social contract** known popularly as the 'Constitution'.[70] Political sovereignty - particularly with the emergence of universal adult suffrage - lies with the people. This is either expressed or generally implicit in the various doctrines of the social contract promulgated by **Hobbes**, **Paine**, **Locke** and others. Just as the political philosophy of Thomas **Hobbes** was shaped by the politics of absolutism, so, that of John **Locke** (1632-1704) represented a response to experiments with republicanism. **Locke** wrote his *Two Treatises of Government* almost immediately after the **Glorious Revolution** of 1688[71] in which a corrupt, absolutist British monarch was replaced by **William** and **Marry** in a bloodless coup that established a constitutional monarchy. Constitution organizes the government and assigns to the different organs of the State their respective powers and duties.[72] Thomas **Paine** is to be referred here promptly: "Society is produced by our wants, and government by our wickedness; the former promotes our happiness *positively* by uniting our affections, the latter *negatively* by restraining our vices."[73]

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[69] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Kitchener: Batoche Books, 1781/2000 rpt), Ch. 1, Sec. 1, 14. (*Italic* in the original).

[70] *The Leviathan (1615*), *The Rights of Man (1791), The Treatises of Government (1690)*). Op cit.

[71] House of Commons Information Office, The Glorious Revolution, Factsheet G4, General series, August 2010, at http://www.parliament.uk/documents/commons-information-office/g04.pdf [last accessed on 20.11.2015].

[72] *State v. Zia-ur-Rehman,* PLD 1973 SC 49 at 66.

[73] Thomas Paine, *Common Sense'*, 2 'Of the origin and design of government in general with concise remarks on the English constitution' at https://www.learner.org/workshops/primarysources/revolution/docs/Common_Sense.pdf [last accessed 12.12.2017].

A written constitution is "the greatest improvement on political institutions."[74] The **fundamental institution** in **modern democracy** is the **constitution**. Let us adhere to and behave as the Constitution mandates and permits. Living under the Constitution may be the best option otherwise if the power reposed in the representatives is abused drastically, then a situation may arise where the citizens may feel to say that "the people have a right to act as supreme, and continue the legislative in themselves or place it in a new form, or new hands, as they think good".[75]

1.1.6 Constitutional government**:**

At the core of the new philosophy of government under the 1973 Constitution was the concept that the government could do certain things and could not do other things. To be acceptable to the people and to extract obedience from them, it must mirror their needs and aspirations: "Examined in isolation from the political, cultural and socio-economic forces at work in the society, a constitution seems drab and lifeless."[76] The Framers were in tune with the sentiments and attitudes then in vogue in the left-over Pakistan. The Constitution is the first place to look at when the task of legislative process begins.

The **Constitution** performs three functions: it expresses the consent by which the people actually **establish** the **State** itself; it sets up a definite **form** of **government**;

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[74] *Marbury v. Madison*, 5 US (1 Cranch) 137; Cushman, 7-11 op cit.

[75] John Locke, *Two Treatises of Government*, 213. At http://socserv2socsci.mcmaster.ca/econ/ugcm/3ll3/locke/government.pdf [last accessed 24.02.2015].

[76] K.C. Wheare, *Modern Constitutions* (Oxford: Oxford University Press, 1966), 98.

and it **grants** and at the same time **limits** the **power** which that government possesses.[77]

It is one of the universal principles that people have an inborn right to establish fundamental principles for their governance. It was judicially expounded by the U.S Supreme Court:

> This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments…. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, [because] the constitution is written. To what purpose are powers limited and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; that the legislature may alter the constitution by an ordinary act.[78]

The Pakistani do not believe in absolute power and authority because "[a]ny excuse will serve a tyrant."[79] Despotism, "[a] government by a ruler with absolute, unchecked power", [80] is alien to the people of Pakistan. Governmental authority is in fact a **delegated power** as "sovereignty over the entire Universe belongs to Almighty Allah

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[77] *Federation of Pakistan v. Moulvi Tamizuddin Khan*, PLD 1955 FC 240 at 254.

[78] *Marbury v. Madison*, 177 op cit; Cushman, 7-11 op cit.

[79] *Aesop's Fables* 'The Wolf and the Lamb', 3. At http://history-world.org/Aesops_Fables_NT.pdf [last accessed 27.06.2015].

[80] *Black's Law Dictionary*, 479 op cit.

alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust.[81] Here lies the concept of a **limited government** because "a written constitution seeks to formulate with precision the powers and duties of the various agencies that it holds in balance."[82] The **wordings** of the Constitution, the people's own **history** and their own **will**, are the reservoirs wherein to locate the power and no-where else.[83]

There may be some powers not mentioned expressly in the Constitution, but they must be reasonably implied there in the expressly given powers. For example, like the US Constitution, in Pakistan, it may be asserted that "we differ radically from [those] nations where all legislative power, without restriction or limitation, is vested in a Parliament or other legislative body subject to no restrictions except the discretion of its members."[84]

Pakistan-Constitution has judicially been interpreted as under:

> In view of the express provisions of our written Constitution detailing with fullness the powers and duties of the various agencies of the Government that it holds in balance[,] there is no room of any residual or enabling powers inhering in any authority established by it besides those conferred upon it by [the] specific words [of the Constitution].[85]

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[81] Para 1 of the Preamble to the Constitution.

[82] *Adegbenro v. Akintola,* (1963) 3 All ER 544 at 550 PC.

[83] See generally, G.W.F. Hegel, *The Philosophy of History* (Kitchener, Ontario: Batoche Books, 2001), 34 "The first glance at History convinces us that the actions of men proceed from their needs, their passions, their characters and talents; and impresses us with the belief that such needs, passions and interests are the sole springs of action - the efficient agents in this scene of activity." 34.

[84] *US v. Butler* 297 US 1.

[85] *M. Nawaz Sharif v. Federation of Pakistan*, PLD 1993 SC 473 at 566.

The Parliament of Pakistan does not enjoy the supreme status of an absolute legislature.[86] This has succinctly been enunciated by the **Supreme Court** of Pakistan:

> Legislature while enacting any law … has an obligation to show obedience to the Constitution and the law as lawgivers, like other functionaries, have taken oath under Article 65 of the Constitution to preserve, protect and defend the Constitution. Therefore, Legislature while legislating or amending the law is duty bound to strictly follow the Constitution because being the chosen representatives of the people, they have to act according to the will of the people of Pakistan who have established an order enabling the State to exercise its powers for the benefit of citizens. Such constitutional obligation clearly postulates that whatever law shall be enacted, it must have nexus with the welfare of the citizens and the Parliamentarians, being the trustees under the Constitution of the will of the people of Pakistan, have to watch the interests of the beneficiaries - the people of Pakistan.[87]

The Constitution is the **paramount law** and the authority which different organs created by it exercise is a derived authority, that is derived from the people through the instrumentality of the Constitution.[88] Chief Justice **Hamood-ur-Rehman** opined judicially, "It cannot … be said that a legislature under a constitution possessed the same powers of omnipotence as the British Parliament may possess. Its powers have necessarily to be derived from and to be circumscribed within the four corners of the written constitution."[89] In an extra-judicial writing with a slightly different context, it was pointed out that "[t]he greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more

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[86] *Federation of Pakistan v. Muhammad Saifullah Khan,* PLD 1989 SC 166.
[87] *Baz Muhammad Kakar v. Federation of Pakistan,* PLD 2012 SC 870.
[88] *Federation of Pakistan v. Saeed Ahmad*, PLD 1974 SC 151 at 165.
[89] *State v. Zia-ur- Rehman,* PLD 1973 SC 49.

imperative is the need to preserve inviolate the constitutional rights of free speech [and] free press".[90]

1.1.7 The separation of powers**:**

It was **Montesquieu** who introduced "the concept of separation of powers ... in the eighteen century."[91] It means simply that each Organ of the State should act independent of any other organ. This principle is recognized in Pakistan.[92] But the question is as to **who** will **check** one **Organ,** and particularly the **legislature** while **exceeding powers**?

It is misconception of **separation of powers** to be understood in the sense that one branch should never look into the affairs of the other branch. A philosopher has drawn the picture as follows:

> In a Constitution the main feature of interest is the self-development of the *rational*, that is, the *political* condition of a people; the setting free of the successive elements of the Idea [of human Will and Freedom]: so that the several powers in the State manifest themselves as separate - attain their appropriate and special perfection - and yet in this independent condition, work together for one object, and are held together by it - i.e., form an organic whole. The State is thus the embodiment of rational freedom, realizing and recognizing itself in an objective form. For its objectivity consists in this - that its successive stages are not merely ideal, but are present in an appropriate reality; and that in their separate and several working, they are absolutely

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[90] Sardar Muhammad Iqbal, 'The Constitution of Pakistan', PLD 1975 Journal, 77.

[91] Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional* Law, 5 Vol, 3rd ed. (St. Paul: West Group, 1999), vol. I. 393-4. (Rotunda).

[92] There are separate chapters for the legislature, the executive, and the judiciary in the Constitution; *The State v. Zia ur Rehman,* PLD 1973 SC 49.

> merged in that agency by which the totality - the soul - the individuate unity - is produced, and of which it is the result.[93]

It has judicially been observed that "[the] present-day trend is that emphasis is more on the **proper balance** between the co-ordinate branches rather than on complete division of authority between the three branches."[94] Under the concept of **separation of powers**, the Courts are competent to review:

> [B]ecause living under a written constitution, no branch or department of the government is supreme, and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government … have been exercised in conformity to the Constitution, and if they have [not been so exercised], to treat their acts as null and void."[95]

It is an established truth that a "State acts by its legislative, its executive or its judicial authorities. It can act in no other way."[96] Although concept of **checks and balances** is basic to the American constitutional structure, [97] but it is equally a norm of all systems based on the written constitutions.[98]

Distribution of powers was judicially explained in these words:

> The accumulation of all powers, legislative, executive and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. To ensure against such tyranny, the framers [of the American Constitution] provided that the Federal Government would consist of three distinct branches, each to

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[93] G.W.F. Hegel, *The Philosophy of History*, 62, op cit (*italic* in the original).
[94] *Fauji Foundation v. Shamimur Rehman*, PLD 1983 SC 457 at 617.
[95] *Kilbourn v. Thompson*, 103 US 168 at 199 (1881) = 26 L Ed. 377; Cushman, 55.
[96] *Ex-parte Virginia* 100 US 339 (1879); *Cooper v. Aaron,* 358 US 1 at 17.
[97] *Northern Pipeline Co*., 458 US 50 at 57-60.
[98] See the scheme of the Constitution of Pakistan providing separate chapters for each organ.

> exercise one of the governmental powers recognized by the framers as inherently distinct.[99]

In **Pakistan,** the principle of **check and balance** has judicially been recognized.[100] But at the same time and without contradiction, because of the well-recognized principle of separation of powers, none of the three organs shall exercise power of the other organ.[101] As such, each organ is "the master of its own assigned field under the Constitution."[102] It will be kept in mind that concept of separation of powers was not available in express words in the earlier constitution, position is the same with the present Constitution, but it was safely inferred judicially by holding that the Court must "look to the scheme of the Constitution which is based on the principle of trichotomy of power, meaning thereby that the power is divided between the executive, the legislature and the judiciary."[103]

Absolute immunity and non-justicialibity under the garb of **Article 69** of the Constitution will give the legislators free hands from all types of scrutiny. And then they will pay no attention to the welfare of the people while reading and voting in the legislature, albeit, as per the basic principle, "[i]t is the legislator's task to frame a society which shall make the good life possible."[104]

It is because judiciary has also shown reluctance to embark upon **judicial review of the legislative process** so that to ensure **constitutional scrutiny of the legislative**

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[99] *Northern Pipeline Co*., 458 US 50 at 58.
[100] *Registrar v. Wali Muhammad*, 1977 SCMR 141.
[101] Ibid at 154.
[102] *Mamukanjan Cotton Factory (M/s) v. The Punjab Province,* PLD 1975 SC 50.
[103] *Liaqat Hussain v. Federation of Pakistan*, PLD 1959 SC 504.
[104] Aristotle, *A Treatise on Government* (London: J N Dent & Sons Ltd., 1928), 3.

process. It has its own reasons. One of the reasons given is the fear of interference with the **independence** and **sovereignty** of the **legislature**, perhaps because of the [mis]conception of the principle of separation of powers. That is why it has been observed judicially that irregularities in procedure cannot be noticed by courts as parliamentary practice authorizes legislature to decide what it will discuss, how it will settle its internal affairs and what code of procedure it intends to adopt.[105] It has perhaps been forgotten that practice cannot over-ride constitutional provisions and rules.

If this is the position, as the prevalent view goes, then any piece of a document purporting to be an enactment will be treated as the legislated **will** of the **legislature** without any question from any quarter whatsoever. It will always be beyond question to ask as to whether the **Act** has really been legislated as per the **requirements** of the **Constitution**. Nobody will ask the meaning of **passing** of **law**, and the reality of **bicameralism** will remain just writing on a piece of paper. The **quorum, stages, duration, readings,** and **origination** of a **Bill** will be redundant concepts written in the Book of the Constitution and Rules only as pious sayings.

On the other hand, if **the legislative process can be constitutionally scrutinized and legitimately questioned judicially**, as is the position taken in this **thesis**, then the citizens, will be able **to keep an eye on the representatives to legislate for them.** The minority view in *Kesavananda* is thought provoking:

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[105] *Wasi Zafar v. Speaker Punjab Assembly*, PLJ 1990 Lah 507 = PLD 1990 Lah 401.

> Human freedom is lost gradually [:] imperceptivity and their destruction is generally followed by authoritarian rule. That is what history has taught us. The struggle between liberty and power is eternal. Vigilance is the price we like every other democratic society have to pay to safeguard the democratic values enshrined in our constitution.[106]

1.2 HYPOTHESES

- Any document signed by the Legislative Officer of the Parliament as a Bill will be conclusively presumed to have validly been engrossed.
- There will be no challenge to such a Bill in anywhere for defects in the legislative process.
- Internal proceedings of the Parliament are immune from scrutiny and judicial review.
- Constitutional scrutiny and ultimately judicial review of law-making are possible.
- There can be judicial review at different stages: the legislative process stage (the Bill); the end product stage (the Act); however, the grounds of challenge will be different.

I attempted to show, contrary to the yet accepted view, that the fourth and fifth hypotheses are true.

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[106] *Kesavananda v. State of Kerala,* AIR 1973 SC 1461 at 1629.

1.3 RESEARCH METHODOLOGY

The methodology of research was a combination of multiple approaches of legal scholarship, including legal-doctrinal approach, a comparative law approach, a jurisprudential and constitutional theory approach, an interdisciplinary approach that drew on political science, literature, philosophy, case law, both Pakistani and foreign, and several other disciplines. With qualitative research methodology, this research thesis examined both primary and secondary sources, which included a critical analysis of constitutional provisions - Pakistani, U. S, English - other legislative instruments, published research papers, text-books and judicial precedents, in order to theorize the concept of separation of powers in Pakistan and judicial check on the legislature so as to counter the apprehension of exploitation of the legislative authority in the Parliament of Pakistan.

1.4 NEED, RELEVANCE AND IMPORTANCE OF THE TOPIC IN PAKISTAN

There is a dire need to adhere to a form of government known as **constitutional democracy**. Because Pakistani were a **Nation**; are a Nation; and insha Allah will remain as a unified and integrated Nation forever. They have their own **identity** because of their **ideology**. Javid **Iqbal** says, “The ideology of a nation always reflects the state of people’s mind, their notions, hopes, aspirations, ideals or objectives and subsisting-will to realize them. The worth of any ideology depends on the extent of a people’s dedication to it and not its rational or scientific demonstration.”[107]

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[107] Javid Iqbal, *Ideology of Pakistan* (Lahore: Sang-e-Meel Publications, 1973), 1.

But unfortunately, this Nation saw so many unfortunate incidences since 1947. Just after independence, "relationships between the executive and legislatures in Pakistan came into profound conflict; these contests became paradigmatic for politics for the next several decades."[108]

The Constitution of 1973 was conceived and framed as a result of experiences of the Government of India Act, 1935, the Constitution of 1956 and the Interim Constitution of 1972. The people saw so many **Martial Laws** on one pretext or another.[109] General **Ayub**'s hostility toward political parties was evident when he levelled accusations against them of "bringing the country to its knees through their misuse of power, corruption and factional intrigue".[110] "Uproar in NA over Musharraf's 'Uncivilized jibs: **Musharaf** has insulted the entire nation by calling the Parliament uncivilized because both the houses represent the people of Pakistan."[111] The National Assembly was also dissolved under **Article 58 (2) (b)** of the Constitution.[112] All the unfortunate experiments proved abortive and miserably failed. The incidence of **abrogation** and **abeyance** of the Constitution was also seen. **Amendments in the Constitution by**

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[108] Paula R. Newberg, *Judging the state: Courts and constitutional Politics in Pakistan* (Cambridge: Cambridge University Press, 1995), 36-37. (Newberg).

[109] See PLD 1969 Central Statutes, 42; PLD 1977, Central Statutes 326; PLD 1981 Central Statutes, 183; *Khawaja Muhammad Sharif v. Federation of* Pakistan, PLD 1988 Lahore 725.

[110] Ian Talbott, *Pakistan: A Modern History* (New Delhi: Oxford University Press, 1998), 127.

[111] The daily 'The News', Wednesday, April 23, 2003.

[112] Osama Siddique, 'The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its Discontents', Arizona Journal of International & Comparative Law, Vol. 23, No. 3, 2006, 622-711; *Federation of Pakistan v. Moulvi Tamiz-ud-Din Khan,* PLD 1955 FC 240; *Moulvi Tamiz-ud-Din v. Federation of Pakistan,* PLD 1955 Sindh 102; *Dosso,* PLD 1958 SC 533 overruled in *Asma Jillani,* PLD 1972 SC 139; *Nusrat Bhutto,* PLD 1977 SC 657; *Zafar Ali Shah,* PLJ 2000 SC 1490.

a single man were also made[113] - a power and procedure never known to a civilized people.

A **lawyer's** view in Pakistan is as under:

> It is important to keep in mind that Article 239 of the Constitution provides the one and only method of amending the Supreme Law. Parliament is the sole authority that can make amendments to the Constitution by a 2/3 majority of the total membership of both Houses of the Majlis-e-Shoora [Parliament]. No other person, howsoever high, can arrogate to himself the power to amend the Constitution.[114]

An editorial in the newspaper daily **Dawn** aptly summarizes the judiciary's role in paving the way for dictators to distort the Constitution and **turn parliament into a rubber stamp**:[115]

> In the case of Zia and Musharraf, the Supreme Court not only validated the takeover but also authorised them to amend the constitution - something grotesque, because the apex court was giving to them general powers which it did not possess. Once given legitimacy Ayub, Yahya, Zia and Musharraf proceeded to consolidate their hold politically. They mostly created a "king's party" - the name in each case was Muslim League - tailored politics for years, hounded and jailed those who refused to fall in line by issuing a series of decrees for which they had the court's authority, and then organised bogus elections.…While the collective guilt is here, there is no doubt the judiciary's initial legitimisation of the coup paved the way for others to follow.

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[113] Through Martial Law regimes; Article 63-A, Constitution also empowers practically the head of a political party to seek amendment in the Constitution through his influence.

[114] Zain Sheikh, "The Constitutional Path" Article (published in "The News", Sunday, May 11, 2008).

[115] Editorial, "Mr Ramday's Point," The daily *Dawn,* July 16, 2010.

In the year 1973, after losing East Pakistan, a consensus developed to a form of government recognized as **constitutional democracy**, which is also known as **parliamentary form of government** *under* **the written Constitution**. Mark the distinction: *parliamentary - under the written constitution; unlike, parliamentary - under unwritten constitution*. This Constitution requires the legislatures "to preserve the Islamic Ideology which is the basis for the creation of Pakistan."[116] That is why it is the right time to keep our eyes open to disprove the supposition that "We're surrounded! Imbecile! There's no way out there."[117] In fact, "a State is … well constituted and internally powerful, when the private interest of its citizens is one with the common interest of the State; when the one finds its gratification and realization in the other - a proposition in itself very important."[118] But the Supreme Court has to observe, "In our country during sixty years of its independence … to the misfortune of people, several times, the Constitutions … were desecrated. Sovereignty of people was not allowed to flourish and get deep-rooted in the polity of our country."[119]

The people of Pakistan have continued their collective commitment and struggle to achieve their rights. They cannot forget their history and the historical struggle for an independent State because history shapes their sense of the possible:

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[116] *Subhanuddin v. Pir Ghulam*, PLJ 2015 SC 190 at 197.

[117] Samuel Beckett, *Waiting for Godot*, Act II. Scene 7. ("The performance shows some moments in the lives of a pair of men, two tramps, who divert themselves while they wait expectantly and unsuccessfully for someone named Godot to arrive [to change their conditions of life]. To occupy themselves, they eat, sleep, talk, argue, sing, dance and contemplate suicide – anything to hold the terrible silence at bay." http://www.manzoniweb.it/files/WaitingForGodotGB0.pdf [last accessed on 23.11.2014]; Ishra Hansani Withanage, 'Waiting for Nothing: an Analysis of "Waiting for Godot" By Samuel Beckett', B.A thesis (2011), department of English, University Iceland.

[118] G.W.F. Hegel, *The Philosophy of History*, 39 op cit.

[119] *Sindh High Court Bar association v. Federation,* PLD 2009 SC 879.

> In 1858 the Muslims of India ceased to be rulers, and became a problem. During the next 82 years this problem and the means of solving it determined the course of [the] Indian politics. Several constitutional devices and arrangements were tried, and a series of reforms were enacted. Political parties were established to watch over Muslim interests, which claimed safeguards, separate electorates, weighted representation, quota in the public services and preservation of religious liberties and cultural values. Most of these demands were conceded [by the British rulers]. Yet, in the end, all shields and concessions failed to secure their future, and, in March 1940, the Muslim League was forced to adopt [a resolution for] the partition of India as its goal - belatedly, reluctantly, half-heartedly.[120]

After a long and persistent struggle under the leadership of Muhammad Ali **Jinnah**, Pakistan was achieved on 14th August, 1947. But thereafter, trouble after trouble was inflicted on the people by each and sundry with state power. Even in the garb of a parliamentary form of government, the ruling class diverted to a **collective dictatorship**. Mark the words "government" - all the three organs.

A parliamentary government has a lot of things to do apart from legislation, nay; legislation is a means to do the other things. But alas! "More than parliament, TV shows hold politicians, officers, businessmen, religious leaders and even the military, to account for their acts of commission and omission."[121] They, the parliamentarians, to use the words of **Shakespeare**, "… put an antic disposition on."[122] The perverse reasoning given is the so-called self-assumed supremacy of Parliament, and the analogy given is that of the supremacy of the **British Parliament**. The ruling classes

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[120] K. K Aziz, *A History of the Idea of Pakistan* (Lahore: Vanguard Books Ltd., 1987), Vol. I, xiii; see generally, G.W.F. Hegel, *The Philosophy of History*, op cit.

[121] Inayatullah, 'Pakistan's democracy moves ahead', the daily "The Nation", March 29, 2014.

[122] William Shakespeare, *Hamlet*, I. v. 172 op cit.

deliberately and fraudulently misguided themselves while knowingly forgetting that in Great Britain, there is no written Constitution and the British Parliament may be sovereign; but **in Pakistan,** there is an **agreed upon autochthonous written Constitution mandating constitutional democracy** wherein no Organ of the State is supreme except the Constitution.

Such a façade is not without reason. Let us recall once again William **Shakespeare**, the great Man of Letters, "Though this be madness, there is method in't."[123] it is too painful to tolerate the laws of pre-independence. They need immediate repeal and enactment of laws to suit the citizens after independence. The root-cause is that of habitat - Indian Muslims. **Hegel** has pointed:

> Only in a State cognizant of Laws, can distinct transactions take place, accompanied by such a clear consciousness of them as supplies the ability and suggests the necessity of an enduring record. It strikes every one, in beginning to form an acquaintance with the treasures of Indian literature, that a land so rich in intellectual products, and those of the profoundest order of thought, has no History; and in this respect contrasts most strongly with China - an empire possessing one so remarkable, one going back to the most ancient times. India has not only ancient books relating to religion, and splendid poetical productions, but also ancient codes; the existence of which latter kind of literature has been mentioned as a condition necessary to the origination of History - and yet History itself is not found. But in that country the impulse of organization, in beginning to develop social distinctions, was immediately petrified in the merely natural classification according to *castes*; so that although the laws concern themselves with civil rights, they make even these dependent on natural distinctions; and are especially occupied with determining the relations (Wrongs rather than Rights) of those classes

[123] Ibid, II. ii. 21.

> towards each other, i.e., the privileges of the higher over the lower. Consequently, the element of morality is banished from the pomp of Indian life and from its political institutions. Where that iron bondage of distinctions derived from nature prevails, the connection of society is nothing but wild arbitrariness - transient activity - or rather the play of violent emotion without any goal of advancement or development.[124]

But the people of Pakistan know that **it is the Constitution only which is supreme, and all the Organs have to perform their functions within the domain assigned to them by the Constitution**. The only salvation of the Nation is in strict adherence to each and every provision of the Constitution under the concept and rule of **check and balance**. Even, in the year 2014, the army Chief is "[r]eiterating commitment to strengthening of democracy and upholding supremacy of constitution".[125] But in Pakistan, there must be true democracy, not dictatorial democracy or oligarchy.

The form of the government, like the U.S government, is called **representative democracy**. Because there are so many people, groups of people elect one of their number to represent them. The people vote through their representatives. The representatives of the people make the laws of the country. There is no monarch. This kind of government is called a **republic**. Pakistan is a **republic**. The great philosopher, **Allama Iqbal** holds, "The republican form of government is not only thoroughly consistent with the **spirit of Islam**, but has also become a necessity in view of the new forces that are set free in the world of Islam."[126]

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[124] G.W.F. Hegel, *The Philosophy of History*,77- 78, op cit.

[125] The daily "The Nation" May 01, 2014.

[126] Allama Dr. Muhammad Iqbal, *The Reconstruction of Religious Thoughts in Islam* (Lahore: Ashraf Press, 1968), 125.

Of course, not all republics are democratic. Nor all democracies are republics. How can this be? In some republics the representatives can be chosen only from the rich or from those who inherit a position in the social life of the country. In other republics not all the adults can vote. In still others there is only one choice when it comes to selecting representatives. These are **undemocratic republics**.[127]

There is a need to discover another *Marbury*[128], this time of Constitutional Scrutiny and Judicial Review of the Legislative Process, so that the people of Pakistan in particular and people of the world in general will reap its fruits, as they have been reaping fruits of the first *Marbury*. Its relevance in the Pakistani context is greater than any other country: **Let the democratic forces get seriously engaged in the activities of the Nation Building.**

Let the legislature legislate under the **agreed upon autochthonous Constitution of the Islamic Republic of Pakistan.[129]** Let us dispel the feelings that, "Laws grind the poor, and rich men rule the law."[130] **Voltaire** says, "There is no good code in any country. The reason for this is evident; the laws have been made according to the times, the place and the need, etc."[131] By virtue of being human beings, there are inborn human rights. And one of such inborn human right is the right to ask for

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[127] O'Connor, 13 op cit.

[128] *Marbury v. Madison*, 137 op cit.

[129] Article 265 (1), Constitution: "This Constitution shall be known as the Constitution of the Islamic Republic of Pakistan."

[130] Oliver Goldsmith, *The Traveller*, quoted in Cohen, *Dictionary*, 383 op cit.

[131] Voltaire's *Philosophical Dictionary*, 78, at http://ir.nmu.org.ua/bitstream/handle/123456789/120323/8b3bf69872acfc76377101c2fb34779b.pdf?sequence=1&isAllowed=y [last accessed on 08.03.2015].

accountability of all and sundry, yes of course through peaceful and constitutional means.[132]

The Legislator must legislate, not at whims; but within certain confines, some of which have been identified by the great philosopher, **Cicero**:

> True law is right reason, harmonious with nature, diffused among all, constant, eternal; a law which calls to duty by its commands and restrains from evil by its prohibitions.... It is a sacred obligation not to attempt to legislate in contradiction to this law; nor may it be derogated from nor abrogated. Indeed, by neither the Senate nor the people can we be released from this law; nor does it require any but our-self to be its expositor or interpreter. Nor is it one law at Rome and another at Athens; one now and another at a later time; but one eternal and unchangeable law binding all nations through all time....[133]

The **Founder** of Pakistan said that "we learned democracy 1300 years ago …, democracy is in our blood. It is in our marrows. It will be a People's government."[134] There is a dire need to reaffirm the conviction and dedication: "And sovereignty/ Will belong to the people/ Which means You, I, and all of us."[135] it is wise to heed to the great poets like **Iqbal**, **Faiz**, **Faraz** and **Jalib** as "Poets are the unacknowledged

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[132] See also Article 19A, Constitution: "Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law."

[133] Cicero, *De Republica* quoted in Edward S. Corwin, 'The Higher Law Background of American Constitutional Law', Harvard Law Review, Vol. XLII, 1928, 149-85, at 157; David Fott, Skepticism about Natural Right in Cicero's De Republica', Etica & Politica / Ethics & Politics, XVI, 2014, 2, 233-52.

[134] Syed Sharifuddin Pirzada, *Evolution of Pakistan*, vol. II (Lahore: PLD Publisher, 1963), 415, 424.

[135] Faiz Ahmad Faiz, 'We will see' / 'Hum Dekhenge' From Wikipedia; A. Q. Sial, 'Sovereignty of People-Pakistan: A Case Study', South Asian Studies: A Research Journal of South Asian Studies, Vol. 26, No. 1, 2011, 117-130; G.W.F. Hegel, *The Philosophy of History*, 14-15, 50, op cit: "… the poet operates upon the material supplied him by his emotions; projecting it into an image for the conceptive faculty." "… by the term "Ideal," we also understand the ideal of Reason, of the Good, of the True. Poets, as e.g., Schiller, have painted such ideals touchingly and with strong emotion, and with the deeply melancholy conviction that they could not be realized.

legislators of the world."[136] It has philosophically been told that "it is the vastness of the imagination by which poetical genius proves itself".[137] And let the judiciary interpret the valid law objectively and consistently so that to insure fundamental right of fair trial and due process.[138]

Cicero makes his distinctive contribution by identifying "right reason with … [the] qualities of human nature".[139] He assigns the binding quality of civil law to its being in harmony with universal attributes of human nature. In the natural endowment of man "is to be found the true source of laws and rights"[140], he asserts and says, "We are born for justice, and right is not the mere arbitrary construction of opinion, but an institution of nature."[141] Hence justice is not mere utility, for "that which is established on account of utility may for utility's sake be overturned."[142] In the permanent elements of human nature itself is discoverable a durable justice which transcends expediency, and the positive law must embody this if it is to claim the allegiance of the human conscience.[143] Guidance may be taken from the great philosophers of the world as

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[136] P.B. Shelley, *A Defence of Poetry*, 5, quoted in Cohen, *Dictionary*, 364:19 op cit; 'a Defence of Poetry: Percy Bysshe Shelley', side-line 4 ("Poets, according to the circumstances of the age and nation in which they appeared, were called, in the earlier epochs of the world, legislators, or prophets: a poet essentially comprises and unites both these characters. For he not only beholds intensely the present as it is, and discovers those laws according to which present things ought to be ordered, but he beholds the future in the present, and his thoughts are the germs of the flower and the fruit of latest time.") available at http://www.Saylor.org/site/wp-content/uploads/2011/01/A-Defense-of-Poetry.pdf [last accessed on 16.11.2014].

[137] G.W.F. Hegel, *The Philosophy of History*, 82, op cit.

[138] Article 10A. Constitution: "For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."

[139] Cicero, *De Legibus* (Miller Ed) I, 7, 23, referred here from Corwin, 'The Higher Law', 157 op cit; Amy H. Kastely (1991), 'Cicero's De Legibus: Law and Talking Justly Toward a Just Community', Yale Journal of Law & the Humanities: V 3: I, Article 2.

[140]Cicero, *De Legibus* I, 5, 16 quoted in Corwin, 'The Higher Law', 158 op cit.

[141] Cicero, *De Legibus* I, 10, 28 quoted in Corwin, 'The Higher Law', 158 op cit.

[142] Cicero, *De Legibus* I, 15, 42 quoted in Corwin, 'The Higher Law', 158 op cit.

[143]Corwin, 'The Higher Law', 158 op cit.

well. Immanuel **Kant** says, "Two things fill the mind with ever new and increasing admiration and awe the more often and more enduringly the reflection is occupied with them: the starry **heavens above me and the moral law within me**."[144] Let us become, as a Nation, the embodiment of law. Let the executive implement such a valid law, so that the **People of Pakistan** obey the law with respect and enjoy security and fruits of the **Rule of Law.**

1.5 THE PROBLEM

The problem in Pakistan is that respect for law is not governing principle of the lives of all and sundry. The rulers are running affairs of the State on an ad hoc basis. With independence in 1947, the nascent nation adopted most of the laws from the **British Raj**; but they are no more compatible with the Constitution and needs of the people.[145] Independence was a fresh air of civilization requiring fresh institutions and laws. It has beautifully been said:

> In a state of high civilization, … it is in respect of laws and institutions which are felt to be just and desirable. This change of relation may … be designated the harmonization or reconciliation of objective and subjective intelligence. The successive phases which humanity has assumed in passing from … [the] primitive state of bondage to this condition of rational freedom [is called progress]. … Where mere nature predominates, no legal relations will be

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[144] Immanuel Kant, *Critique of Pure Reason*, Translated and edited by Paul Guyer and Allen W. Wood (Cambridge: Cambridge University Press, 1998), 1. (**emphasis** provided by me.)

[145]On 14th of August, 1947, the Pakistan (Provisional Constitution Order, 1947) and (Adaptation of Existing Pakistan Laws) Order, 1947 were promulgated. It, *inter alia,* defined existing Pakistani Law as Acts, Ordinances, Regulations, Rules and Orders, Bye-Laws and by virtue of section 3 thereof, all existing laws were adopted, subject to specified amendments made by the above Order. It was supplemented by the Adaptation of Central Acts and Ordinances Order 1949 (G-G Order No. 4 PLD 1949 Cen St, 1). This is how the laws framed by the British Parliament became part of our *corpus juris.*

> acknowledged but those based on natural distinction; rights will be inexorably associated with "caste." Where … spirit has attained its freedom, it will require a code of laws and political constitution, in which the rational subordination of nature to reason that prevails in its own being, and the strength it feels to resist sensual seductions shall be distinctly mirrored. … The goal … is … the self-realization, the complete development of spirit, whose proper nature is freedom - freedom in both senses of the term, i.e. liberation from *outward* control - inasmuch as the law to which it submits has its own explicit sanction - and emancipation from the *inward* slavery of lust and passion.[146]

There should be governance through laws, but the laws should also be made and enacted under the Constitution by following the steps envisaged therein for law-making. **Manto** says, "What are you shouting about…. What new laws and rights are you shouting about … [;] the laws are the same old ones…"[147] Most of the laws have been imposed either by the **Martial Law Regimes** or by the Parliament without having been legislated with the required procedural due process of law-making. Law should be the guiding principle:

> If men are to act, they must not only intend the Good, but must have decided for themselves whether this or that particular thing is a Good. What special course of action, however, is good or not, is determined, as regards the ordinary contingencies of private life, by the laws and customs of a State; and here no great difficulty is presented. Each individual has his position; he knows on the whole what a just, honorable course of conduct is.[148]

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[146] G.W.F. Hegel, *The Philosophy of History*, 9-11 (*italic* in the original) op cit.

[147] Saadat Hasan Manto, "New Constitution" in Khalid Hasan, Ed, *Bitter Fruit: The Very Best of Saadat Hasan Manto* (New Delhi: Penguin Books, 2008), 206 at 214; Oshiik Sircar, 'Spectacles of Emancipation: Reading rights Differently in India's Legal Discourse', (2012) 49 Osgoode Law Journal, 527-73.

[148] G.W.F. Hegel, *The Philosophy of History*, 43, op cit.

The **Founder** of Pakistan said:[149]

> We must work our destiny in our own way and present to the world an economic system based on true Islamic concept of equality of manhood and social justice. We will thereby be fulfilling our mission as Muslims and giving to humanity the message of peace which alone can save it and secure the welfare, happiness and prosperity of mankind.

The **Quaid** said in 1947, "I do not know what the ultimate shape of this constitution is going to be, but I am sure that it will be of a democratic type, embodying the essential principles of Islam."[150] At the same time all repel Martial law regimes; but have retained their laws: "To abhor the makers, and their laws approve, / Is to hate traitors, and the treason love."[151] The crucial factor in the situation, as pointed out by the great English historian Arnold **Toynbee** in a thoughtful analysis of the problems of emerging democracies in Asia and Africa, was "the tremendous dearth of able persons - a lack of experienced, able, and above all, honest and public-spirited citizens with a working knowledge of how to run a country on modern lines."[152] The same author writes: "The dearth of leadership in Pakistan since the death of Qaid-i-

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[149]Quaid-e-Azam's Address on the occasion of opening of State Bank of Pakistan (1st July 1948) at http://www.sbp.org.pk/ about/history/hmoments.htm[last accessed 25.03.2015].

[150]Broadcast to the people of the United States of America (February 1948), as quoted in Jehan Zeb Khan and Abdul Rashid Khan, 'Quaid's Vision of a Progressive Pakistan', *Pakistan Journal of History and Culture, Vol. XXXII, No.1 (2011),* 163 -79, 169.

[151] John Dryden, *The Hind and the Panther*, III. 706, at https://www.gutenberg.org/files/51652-h.htm#PART_III [last accessed on 25.03.2015].

[152]Arnold J. Toynbee, 'Communism & the West in Asian Countries', The Annals of the American Academy of Political and social Science, July, 1961, referred here from G. W. Choudhury, 'Democracy on Trial in Pakistan', Middle East Journal, Vol. 17, No. 1/2 (Winter - Spring, 1963), 4.

Azam Mohammad Ali Jinnah and Liaquat Ali Khan (first Prime Minister) was a big factor in the political malady and confusion of the Country...."[153]

The **Pakistani** need **True Laws** to be legislated with **Due Deliberation** by the **Parliament** of **Pakistan** keeping in mind the **People** of **Pakistan** while **Debating** the **Bill** by going through **All** the **Stages Prescribed** by the **Constitution**. Thus, it is possible only that even the **process of law-making** can also be **constitutionally** and **judicially scrutinized** so that the citizens can **keep an eye** on their **representatives** as emergence of Pakistan on the world map as a State was a human reality and as such:

> The State, its laws, its arrangements, constitute the rights of its members; its natural features, its mountains, air, and waters, are their country, their fatherland, their outward material property; the history of this State, their deeds; what their ancestors have produced belongs to them and lives in their memory. All is their possession, just as they are possessed by it; for it constitutes their existence, their being.[154]

1.6 LITERATURE REVIEW

In Pakistan, apart from conflicting case law, there is no complete and comprehensive work on the problem of the possibilities of constitutional scrutiny and judicial review of the legislative process. However sporadic and divergent views of different authors, both judicially and extra judicially, may be pointed out.

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[153] Ibid.
[154] G.W.F. Hegel, *The Philosophy of History*, 68, op cit.

A. K. **Brohi**[155] has devoted reasonable space to this problem and has made a lengthy discussion based on decided cases from foreign jurisdictions and a few from the Pakistani jurisdiction. References have also been made to the Indian case law. However, the learned author has not given any conclusion regarding the best possible solution to the problem. Further, the differences in the Constitutions of Pakistan, India, the U.S.A and the unwritten Constitution of England have not deeply and thoroughly been discussed and analyzed. The overall impression is that internal proceedings of the legislature cannot, as per the learned author, be constitutionally scrutinized or judicially questioned. I doubt this impression of the learned author for the simple reason as being an unfounded generalization. Francis **Bacon** says, "If a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties."[156] Moreover, there are clues therein that further research is needed on the topic to reach some convincing conclusion. Further this book is on the Constitution of 1956 and has been written in the year 1958, so more than sufficient time has passed; it is the right time to engage in such like research, particularly having started believing in the **rule of law**. Rightly to be great is not to obey the law blindly; but to obey it whole-heartedly after having ascertained that it has really been passed by our representatives for our collective welfare. But if it is otherwise, then let us refer to Shakespeare's saying: "Rightly to be great/ Is not to stir

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[155] *Fundamental Law of Pakistan* (Karachi: Din Muhammadi Press, 1958), 152-56, 191-93, 535-61.

[156] Francis Bacon (1561-1626), *The Advancement of Learning (1605),* Para V: 8. at https://oll,libertyfund.org/title/bacon-the-advancement-of-learning [last accessed on 25.03.2015].

without great argument, / But greatly to find quarrel in a straw/ When honour's at the stake." [157]

Fazal Karim[158] has made serious effort to highlight the problem of constitutional scrutiny and judicial review of the legislative process in Pakistan. The learned author has made references to more than a dozen cases from the Pakistani jurisdiction with exhaustive excerpts. But the treatment, with due respect, is neither exhaustive nor critical. No analysis has been made. The learned author has not been able to reconcile the seemingly divergent and conflicting provisions of the Constitution. Different conflicting views of the learned judges from the Pakistani jurisdiction have been described but without any critical analysis. Some cases from India have also been quoted. Although it is not a comprehensive treatment of the subject, yet it is too useful to begin with.

Almost all the books of running commentary on the Constitution of Pakistan[159] have made cursory references to this problem; but none of them has given any serious and conscious attention to it, probably for lack of relevant sources and literature. In contrast, all these learned authors are pre-occupied with judicial review of the legislation - not with the process of legislation. Perhaps, the concepts of constitutional scrutiny and judicial review of the legislative process are not that much developed as

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[157] William Shakespeare: *Hamlet,* IV, iv, 53 op cit.
[158] Fazal Karim, 196-203 op cit.
[159] Mazhar Ilyas Nagi; M. Mehmood; Shabbar Raza Rizvi; Shaukat Mehmood, A.K Brohi; M. Munir etc.

the concepts of constitutional scrutiny and judicial review of the executive actions are developed in Pakistan.

1.7 LITERATURE REVIEW OF CASE LAW

In Pakistan, there is sufficient case law available;[160] but it is conflicting and contradictory. Even in some of the precedents, different learned judges have recorded dissenting judgments. For example, S.A. **Rehman** C.J of the Lahore High Court observed that "in a proper case the writ jurisdiction of the High Court could be legitimately invoked where for instance, the so-called proceedings in the Assembly are really outside the purview of the Constitution Act [(sic)]".[161] **Cornelius** J of the Supreme Court was of the view that this principle was "stated too broadly and was apt to lead to dangerous misconceptions".[162] In his separate note, in the High Court, M. R **Kayani** J observed:

> I cannot bring myself to hold that any provision in the Constitution was intended to divert the Court from the path of justice, equity and good conscience. The Constitution represents the will of the people, and the will of the people is to be construed in favour of justice, equity and good conscience. Of all Parliaments and Assemblies in the world, the privilege of practicing fraud and coercion, or acting with malice, was certainly not to be reserved for the Assemblies of Pakistan….[163]

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[160] *Federation of Pakistan v. Ali Ahmad Hussain Shah*, PLD 1955 FC 522; *Reference case*, PLD 1955 FC 435; *Ahmed Saeed Kirmani*, PLD 1956 (W.P) Lahore 807; *Ahmad Saeed Kirmani*, PLD 1958 SC (Pak) 397; *Fazlul Qauder Chowdhury,* PLD 1963 SC 486*; Mubin-ul-Haq Siddiqi*, PLD 1964 Lahore 23; *Zafar Ahmed*, PLD 1964 (WP) Karachi 149; *Fazlul Qauder Chowdhury v. Shah Nawaz,* PLD 1966 SC 106; *Farzand Ali*, PLD 1970 SC 98*; Mirza Tahir Ali Baig v. Kausar Ali,* PLD 1976 SC 504; *Muhammad Amwar Durrani*, PLD 1989 Quetta 25; *Vinkatagiri Ayyangar*, PLD 1949 PC 26

[161] *Ahmed Saeed Kirmani* **v. *Fazal Elahi, Speaker*,** PLD 1956 (WP) Lah 807.

[162] *Ahmed Saeed Kirmani v. Fazal Elahi, Speaker,* PLD 1958 SC (Pak) 397.

[163] *Ahmad Saeed Kirmani v. Fazal Elahi, Speaker,* PLD 1956 (W.P) Lahore 807.

The judiciary in Pakistan has observed that it is difficult to define as to what constitute "internal proceedings" of the Parliament. The judicial approach goes to say that it is not possible to attempt any extensive classification of the matters that may be comprised within the term "internal proceedings" of the Parliament but this much is clear that they do not extend to anything and everything done within the House. Thus as a general rule, a criminal act done in the House would perhaps be not outside the course of criminal justice.[164] The test indicated by Sir **Erskine May** is as to whether what is said or done forms part of a proceeding of the House in its technical sense, i.e., the formal transaction of business with the Speaker in the Chair or in a properly constituted committee.[165] It would be neither possible nor desirable , in the view of the Supreme Court of Pakistan, to attempt any extensive classification of the maters that may be comprised within the term 'internal proceedings' but it will be sufficient to indicate that whatever is not related to any "formal transaction of business" in the House cannot be said to be a part of its "internal proceedings".[166] In the Indian context, anything said during the course of business in the legislature was held to be immune from the proceedings in any court and no question arose whether what was said, was relevant to the business or not.[167]

In England *Bradlaugh* is an authority. In that case, **Stephen**, J said, "I think that the House of Commons is not subject to the control of Her Majesty's Courts in its

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[164] *Bradlaugh v. Gosset,* [1884], 12 Q.B.D 271 at 283; D. L. Keir and F. R. Lawson, *Cases in Constitutional Law* (London: Oxford University Press, 1968), 287-295. (Keir).

[165] See generally T. Erskine May, *Treatise on the Law, Privileges and Proceedings of Parliament,* 23rd ed (London: Butterworths, 2004).

[166] *Farzand Ali v. Province of West Pakistan*, PLD 1970 SC 98 at 130.

[167] *Tej Kiran v. Sanjiva Reddy*, AIR 1970 SC 1573.

administration of that part of the statute law which has relation to its own internal proceedings."[168] Stated simply, "What is said or done within the walls of Parliament cannot be inquired into in a court of law."[169]

In Pakistan, from the very beginning (1956), and then time and again, the learned judges have recognized the problem and have felt need for constitutional scrutiny and judicial review of the legislative process. But it is to be noted that the High Courts and the Supreme Court of Pakistan did not attempt to point out as to what matters fell squarely within the domain of internal proceedings of the Legislature so that to be outside the reach of constitutional scrutiny and judicial review. The judges, with due respect, have shunned their duty just by saying that the idea will "lead to dangerous misconceptions."[170]

It was not the right approach. Showing concern, and not finding the solution, tantamount to **Shakespeare**'s Hamlet: "To be or not to be: that is the question: / Whether 'tis nobler in the mind to suffer/ The stings and arrows of outrageous fortune, / Or to take arms against a sea of troubles, / And by opposing end them?"[171] The main thing which is lacking in the reasoning of the Supreme Court is **the question** as to **who will decide** that something is **internal matter** or **external matter** of the **legislature,** and **how can it be determined?**

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[168]*Bradlaugh v. Gossett* (1884) 12 QBD 271 at 278; D. L. Keir, and F. R. Lawson, C*ases in Constitutional Law* (London: Oxford University Press, 1968), 287-295 (Keir).

[169]Ibid, *Bradlaugh*, at 275 (Lord Coleridge).

[170]*Ahmed Saeed Kirmani v. Fazal Elahi, Speaker,* PLD 1958 SC (Pak) 397.

[171] William Shakespeare, *Hamlet*, III. i. 56 op cit.

Since the years 1956/ 1958, the problem is there, as was pointed out by the Courts. But strangely enough even the Supreme Court of Pakistan avoided to resolve it once for all and to provide guidance for the coming generations. The reasoning of **Cornelius** J is worth seeing for opening of our eyes about a strange logic:

> I do not propose to embark on the equally dangerous task of attempting to say in what cases, proceedings within an Assembly could possibly fall within the jurisdiction of the Court. The question is so intricate, and its resolution is fraught with such grave dangers with the internal structure of the Constitution of the country … that it must be left to be decided in relation to the facts of a dispute when arise[s], and then it must be decided upon a consideration not only of the wording of the Constitution but with a full comprehension of the phases of history which formed the background of that Constitution.[172]

These are the observations of a great judge in our history. And we see that these observations are not given while delivering a lecture to students in a university, or addressing some seminar extra judicially; these are the observations given in a concrete judicial case before the apex Court with facts and circumstances before a judge having full comprehension of the phases of history making the background of the written Constitution of Pakistan, 1956 envisaging a parliamentary form of government. The learned judge must have decided the case on merits with complete guidelines for the future application and guidance of the nascent Nation at that time. That is why, in the absence of constitutional principles, the Parliament of Pakistan was so many times dissolved either by Martial Laws or by the President of Pakistan. The legislators are equally responsible for such a disastrous dismantling of

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[172] *Ahmad Saeed Kirmani v. Fazal Elahi, Speaker,* PLD 1958 SC (Pak) 397 at 417.

constitutional governments as they somehow became collective dictators. It must be remembered that even a free and uncorrupted right of suffrage does not necessarily satisfy all the demands of liberty; constant vigilance is the soul of liberty. Some of the most menacing encroachments on individual liberty have been made in the name of democratic principles themselves.[173]

Nothing comes out of nothing. Hard work is a key to success. There is a need of a thorough and in-depth research to find out the governing principles for regulating the legislative process to **ensure constitutional democracy in Pakistan**.

1.8 FOREIGN JURISDICTION

From the foreign jurisdiction, there are so many scholarly articles from the academicians pointing out to the need for constitutional scrutiny and judicial review of the legislative process.[174] The point of view, they hold, is of **strengthening democracy** through such constitutional scrutiny and judicial review of the legislative process. It does not, they say, infringe upon the concept of **separation of powers**. They are also of the tentative view that it is not disrespect to the legislature. It is rather, according to the learned authors, to find out the actual will of the legislature. So, such a scrutiny supports the legitimacy and respect for the **co-ordinate branch**, the Legislature.

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[173] See generally the 'The First 10 General Elections of Pakistan: A Story of Pakistan Transition from *Democracy Above Rule of Law to Democracy Under Rule of Law: 1970-2013*' (Islamabad: PILDAT, Pakistan Institute of Legislative development and Transparency, 2013).

[174] See II-Table of Article-writers at the end of this thesis.

In a **doctoral thesis** from the foreign jurisdiction,[175] the learned scholar has done sufficient research, but the treatment is general and prima facie. The reasoning is excellent; however, the supporting material is deficient. The argument developed is attractive but leaves the reader in suspense and want to go further and research the topic to reach some logical conclusion. It is in the context of U.S.A and is useful for a comparative research: both States have written Constitutions. A **Master level thesis**[176] from the Canadian jurisdiction is also helpful.

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[175] Ittai Bar-Siman-Tov, *Separating Law-Making from Sausage-Making*: *The Case for Judicial Review of the Legislative Process*, unpublished SJD Thesis, Columbia University, 2011.

[176] Colette Mireille Langlois. *Parliamentary Privilege*: *A Relational Approach*, LL. M thesis, Faculty of Law, University of Toronto.

CHAPTER TWO: LEGISLATURES IN PAKISTAN

2.1 THE PARLIAMENT OF PAKISTAN

2.1.1 Composition of Parliament**:**

The Parliament consists of two Houses. The National Assembly being the lower house which has 342 members while the Senate being the upper house has 104 members. The two Houses consist of elected members and some reserved seats. The President of Pakistan is a part of the Parliament in the sense that the laws passed by the legislature are presented to him so that he may exercise his right of giving or with-holding his assent.[177] In **Hegel**'s view, "the supreme head of the State … in all his legislation has an eye to the health, wealth, and benefit of the whole."[178] Because of the mandate of **Article 75(2)** and **(3)**, such assent can be with-held for ten days and when the Bill is again passed in the joint session of the Parliament, the President "shall give his assent within ten days, failing which such assent shall be deemed to have been given." In the exercise of powers derived even from a statute, the President

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[177] Articles 50,51 and 69 of the Constitution; *Federation of Pakistan v. Moulvi Tamizuddin Khan*, PLD 1955 FC 240 at 286; *Moulvi Tamizuddin Khan v. Federation of Pakistan*, PLD 1955 Sindh 96; section 223A had been added to the Government of India Act, 1935 by the Constituent Assembly through a constitutional amendment in 1954 conferring original (writ) jurisdiction upon the High Court (Sindh Chief Court). The objection of non-assent of the Governor-General was turned down by the Sindh Chief Court making distinction between constituent function and legislative function and held that no assent was needed for function of constituent exercise of power of the Assembly having the status of a constituent assembly. But the Federal Court (Apex Court= Supreme Court overturned this holding by saying that such assent was necessary; See also *Liaqat Hussain v. Federation*, PLD 1999 SC 504.

[178] G.W.F. Hegel, *The Philosophy of History*, 130, op cit.

has to act on the advice of the Prime Minister or cabinet which has judicially been held to be binding.[179]

Articles 52 and 54(2) of the Constitution provide that "The National Assembly shall ... continue for a term of five years...." and "[t]here shall be at least three sessions of the National Assembly every year....". To have a correct understanding, let us have a view of the English Parliament.

The English Legislature is a trinity, composed of Queen, Lords and Commons. The period between the time when Parliament is summoned and its termination by dissolution or by lapse of time is called "*a parliament*". Each Parliament is divided into *sessions*, which is a formal thing, and is something like a little parliament. The Queen *summons* Parliament at the beginning of a session and *prorogues* it at the end. Prorogation affects both Houses, but either House may *adjourn* of its own motion during a session.

Parliament performs two original functions: i) no public money may be expended without the sanction of parliament, and ii) legislation. Besides, modern parliaments are the "watch-dogs" of the nation, having the power and duty of controlling the government. It is the principle of "*Responsible Government*". Therefore, the House is master of the government because there is constitutionally recognized Opposition Party ready to take advantage of its mistakes.[180] Parliament exercises its power of

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[179] *Shahid Orakzai v. Pakistan*, PLD 2011 SC 365; [179] *Mian Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 2009 SC 879.

[180] Phillip S. James, *Introduction to English Law*, 11th ed. (London: English Language Book Society/ Butterworths, 1985), 123.

control in two ways. First, a salutary check is kept upon the doings of ministers and departments during the daily "question time" in the House of Commons: an unsatisfactory answer, given due publicity in the Press, may have a material effect upon the popularity of a government. Secondly, debates, whether in the Commons or in the Lords, may show weakness in the administration. Debates are published - in particular in *Hansard's* Reports - and their substance is transmitted by the media to the nation; it is through debates that the electorate appraises political personalities and governments. [181] Members of Parliament are under constitutional obligation to shoulder the arduous responsibility of serving the people. In this regard, to charge them with such sense of responsibility, the device of oath is used. Let us understand the structure of the English Parliament for a comparison.

2.1.2 Oath of Membership:

Members of Parliament (M. Ps) are required to take oath before sitting in the legislature[182] whereby they are bound with the mandate of the Constitution.[183] Such an oath of office is administered in a solemn ceremony just to realize them of its sanctity. They will perform their functions honestly, to the best of their ability, faithfully

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[181] James, 123-124 op cit.

[182] Article 65 of the Constitution (a person entitled to a House shall not sit or vote until has made before the House oath in the form of set out in the Third Schedule of the Constitution; Comparative Table of Article 65 of the Constitution: Constitution of Pakistan 1962: Art. 106; Constitution of Pakistan 1956: Art. 48; Constitution of India 1950: Art. 99; Government of India Act 1935: Art.24); (Leading Cases on Article 65 of the Constitution: *Ihsanul Haq Piracha*, PLD 1988 SC 687; *Edulji Dinshaw Limited*, PLD 1990 SC 399; *Asif Ali Zardari v. Special Judge*, PLD 1992 Karachi 430; *Syed Masroor Ahsan v. Ardeshir Cowesjee*, PLD 1998 SC 823; *Asif Ali Zardari*, PLD 1999 Karachi 54).

[183] *Workers' Party Pakistan v. Pakistan*, 2012 SCMR 448; This requirement was always there in the Constitutions of 1956 and 1962; See *Asif Ali Zardari v. Federation of Pakistan*, PLD 1999 Kar 54.

and in accordance with the Constitution and law. While holding a constitutional office, the chosen representatives of the people have to remain true to their oath and must observe constitutional limits in all circumstances.[184] That is why the Constitution provides that "[a] person elected to a House shall not sit or vote until he has made before the House **oath** in the form set out in the **Third Schedule**."[185] However, it is to be remembered that the term of his office begins before taking oath for the reason that it is regulated by the Constitution and law.[186] Mark the words, protect, preserve and defend the constitution is the requirement of the oath once taken.[187]

Under the Islamic law, it is a very serious offence to break the constitutional oath as there is no expiation for the transgressors being not an individual oath for which there may be atonement. **One** who takes **oath** to **preserve** and **protec**t the Constitution **cannot break it to the detriment of the entire nation**.[188] Historically, in England, religious sanctity is attached to such an oath. The Act which required Members of the English Parliament, before voting in the House, to take abjuration oath in a form which concluded with the declaration that it was taken "on the true faith of a Christian" received a literal construction, which had the effect of excluding Jews from Parliament; notwithstanding that the history of the enactment showed that it was intended to test

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[184] *Watan Party v. Federation of Pakistan*, PLD 2011 SC 997.

[185] Article 65 of the Constitution.

[186] *Ihsanul Haq Piracha v. Chief Election Commissioner of Pakistan*, PLD 1988 SC 687 at 690; Senate (Election) Act (LI of 1975) S. 82.

[187] Similarly Judges of the superior Courts take oath but judges of the sub-ordinate courts do not. Why? Because, the Constitution has danger from the persons with power.

[188] *Mohtarima Benazir Bhutto v. Federation of Pakistan*, PLD 2010 FSC 229.

the loyalty, not the religious creed, of the member.[189] In Pakistan, such an oath represents both loyalty as well as religious creed. It begins with the name of Allah, refers to loyalty and again ends with the prayer that Allah may help the oath-taker. All this signify the seriousness of the job of being a legislator after having been elected by the people. The Constitution does not permit an elected person to start to function instantly just by having been elected. Being elected is one step: he is member-elect and to become full member of the legislature, he must expressly voice his inner integrity to the Constitution. It shows that a legislature is bound by the Constitution while performing his function as a Member of Parliament. He will constantly and continually remain accountable to the people during his tenure. He cannot claim to do anything after such oath and nobody would ask any question. His action and non-action may be constitutionally scrutinized and if need be, may be judicially challenged. In reality, such a member is twice liable: one as a citizen and second as having taken oath of the Constitution. The task of legislation is too serious one. It needs sufficient deliberation with devotion. That is why there is two-chambers legislature at the federal level.

2.1.3 The Significance of Bicameralism**:**

The legislature at the Centre is bicameral and in the Provinces unicameral.[190] It is basically an essential characteristic of the American Constitution. The object of

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[189]*Miller v. Salomons* (1853) 7 Ex. 475: *Salomons v. Miller* (1853) 8 Ex. 778 referred in P. St. J Langan, edit, *Maxwell on Interpretation of Statutes* 12th ed. (London: Sweet & Maxwell, 1969, rpt National Book Foundation of Pakistan, n. d), 30. (*Maxwell*).

[190]Fazal Karim, 175 op cit.

bicameral requirement is "that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials."[191] It is the right and duty of the elected members to legislate; the **President of Pakistan** is not a part of the elected part of the legislature; he is part of the Parliament only in the sense that the laws passed by the legislature are presented to him that he may exercise his right of giving or with-holding his assent.[192] In the U.S, if the President fails to sign the Bill within 10 days of **presentment**, it will nevertheless become law without his signature, provided congress is in session. The U.S President may allow a Bill to become law without his signature when he neither wants to veto nor wants to affirmatively approve the law.[193] In Pakistan, **Article 75(1)** provides that "the President shall, within ten days assent to the Bill; or … return the Bill to … Parliament with a message requesting that the Bill, or any specified provision thereof, be considered and that any amendment specified in the message be considered." As per sub-Article (2) of the same, "the President shall give his assent within ten days, failing which such assent shall be deemed to have [been] given." It means that the President of Pakistan can prevent a Bill from becoming law for a total period of twenty days, however his message for reconsideration and amendment is not binding on the legislature. Earlier Martial Law Regime had changed it to the effect that if a returned "bill is again passed with or without amendment, the President shall not with-hold assent therefrom."[194]

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[191] *INS v. Chadha*, 462 US 919, 949 (1983).

[192] Such a constitutional requirement is called the 'Presentment Clause'; *Federation of Pakistan v. Moulvi Tamizuddin Khan*, PLD 1055 FC 240. *Liaqat Hussain v. Federation*, PLD 1999 SC 504.

[193] Rotunda, vol 2, 108 op cit.

[194] Presidential Order (P.O. No. 14) of 1985, Gazette of Pakistan, Extraordinary, Part I, 2nd March 1985.

Under Article I Section 7 of the U. S Constitution, every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it. Now, the difference lies in the fact that once the U. S President objects to a Bill, then it will have to be passed by two thirds of each House in separate sessions while in Pakistan, the returned Bill will have to be passed by simple majority in a joint-sessions. It means that Parliament is more powerful and independent in Pakistan as compared to the U. S Congress.

Here is a glimpse of the debate in the Constitutional Convention on the need for a bicameral legislature in the United States:

> Despotism comes on mankind in different shapes. Sometimes [it comes] in [the shape of] an Executive, sometimes in [the shape of] a military, one. Is there a danger of Legislative despotism? Theory and Practice both proclaim it. If the Legislative authority be not restrained, there can neither be liberty nor stability; and it can only be restrained by dividing it within itself into distinct

> and independent branches. In a single house there is no check, but the inadequate one, of the virtue and good sense of those who compose it….[195]

The division of the Two-Chambers Legislature assures that the legislative power would be exercised only after opportunity for full study and debate in separate sittings. A prime reason for **bicameralism** "is to insure mature and deliberate consideration of, and to prevent precipitate action on [the] proposed legislative measures."[196] In this regard, it is essential to understand the very nature of legislative power.

2.2 NATURE OF LEGISLATIVE POWER

Legislation has been defined as the process of making or enacting a positive law in written form, according to some type of formal procedure, by a branch of government constituted to perform this process.[197] It also termed *law-making*, or *statute-making*. Legislation has also been known to the final product in the form of an Act as primary legislation or statutory rules as secondary legislation.[198] It is undeniable that of the functions which are conferred by a written constitution, the legislative function is by far the most important one.[199] Generally, the power to legislate may be described to make, alter, amend and repeal laws, and it includes such powers as may be necessary to carry out the Constitution into effect.[200] But the question is that which type of laws can be made or if any and all type of laws can be made?

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[195] James Wilson quoted in INS v. Chadha, 462 US 919 at 949 = 77 L Ed. 2d 317.
[196] *Reynolds v. Sims*, 377 US 533 (1964); Cushman, 138-44 op cit.
[197] *Black's Law Dictionary*, 8th ed, (St. Paul: West Publishing Co., 2004). 918.
[198] K.J. Aiyer, *Manual of Law Terms and Phrases*, 7th ed. (Karachi: Union Book Stall, 1974), 416.
[199] *Sobho Gyanchandari v. Crown*, PLD 1952 FC 29.
[200] Earl T. Crawford, *Crawford's Statutory Construction* (Karachi: Pakistan Law House, 1998), 15.

Hamood-ur-Rehman, J observed: "if the subject-matter is within the competence of the legislature then it can certainly legislate in any one of the generally accepted forms of legislation...."[201] This does not inform about anything. The question is as to what subject-matter is and what subject-matter is not within the competence of the legislature? **Cornelius**, CJ emphasizes that of the functions which are conferred by a written Constitution, the legislative function is by far the most important one.[202] **Blackstone** saw "the science of legislation the noblest and most difficult of any".[203] Once constitutionally enacted, then the will of the Legislature contained in the enacted law must be carried out into operation by the executive and other agencies.[204] It is important to remember that "it is not the function of the judiciary…to question…wisdom of the legislature."[205] When the process of legislation has culminated in the end product - the enacted law, then retrospectively, *mala fides* cannot be attributed to the legislature.[206] Under the Indian jurisprudence, a law cannot be invalidated on the grounds that in making the law (including an Ordinance), the law-making body did not apply its mind[207] or was prompted by some improper motive.[208] Then what is left; the process of legislation on procedural defects besides

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[201]*Province of East Pakistan v. Siraj-ul-Haq Patwari*, PLD 1966 SC 854 at 943.

[202]*Sobho Gyanchandari v. Crown*, PLD 1952 FC 29.

[203]1 B l Comm 9 quoted here from Walter J Kendall III, 'Adam Smith's Lectures on Jurisprudence: Justice, Law, and the Moral Economy' ICL Journal, Vol 8: 4/2014, Articles, 367-92 at 372.

[204]*Vasanlal v. State* AIR 1961 SC 4 at 7.

[205]*State v. Zia-ur-Rehman*, PLD 1973 SC 49.

[206]*Fauji Foundation v. Shamimur Rehman*, PLD 1983 SC 457.

[207]*Nagaraj K. v. State of A.P.*, AIR 1985 SC 551, paras 31, 36.

[208]*Rehman Shagoo v. State of J & K*, AIR 1960 SC 1 at 6.

competency is the possible route to reach to the end to have a valid law on the Statute Book.

So, in a scenario when our Parliament does not enjoy the supreme status,[209] then not only the substantive competence but the **intra-Articles** competence is also to be explored.[210] The activities of the legislators inside the Legislature is meant and intended by the Constitution to be for the welfare of the people; otherwise, utility and efficacy of the representative institution would be defeated by the internal dissentions and fractions, persistence and scandalous horse-trading for political gain and furtherance of personal interest, corrupt practices and inducement in contravention of the Constitution and the law resulting in a failure to discharge substantive legislative functions.[211]

Pakistani Parliament cannot do certain things. The **Supreme Court** has stated in unambiguous terms "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 altered even by the Parliament."[212] It means that the Parliament lacks competency in certain matters. In those matters where it has competency, it would still follow all the constitutional steps to complete the legislation. In this regard, a quick comparison with the U.S relevant constitutional provision is needed.

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[209] *Sharaf Faridi v. Federation* PLD 1989 Kar 404.
[210] Articles.55 and 130, Constitution.
[211] *Ahmad Tariq Rahim v Federation of Pakistan*, PLD 1992 SC 646.
[212] *Zafar Ali Shah,* PLD 2000 SC 869 at para 6 of the Short Order.

2.2.1 Article I US Constitution and Article 50 Constitution of Pakistan**:**

A **Comparison:** Section 1 - The Legislature: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." This is crucial, when it refers to "all legislative powers", which means that no other federal entity has any power to make law. U. S has Presidential form of government. A legislator cannot become minister. In a parliamentary system, "all legislation is passed in parliament by simple majorities."[213] It has a cabinet consisting of the elected persons. Under this system, the cabinet formulates "the general policy of the government and is collectively responsible to the Parliament for that. Apart from the general function of co-ordination and leadership, it exercises actual executive and legislative functions."[214] While in a presidential system, like the US, the executive and the legislature are two separate entities.

While Pakistani has adopted the principle of ministerial responsibility to the Parliament, it has not adopted the English doctrine of absolute supremacy of parliament in matters of legislation. There is no parliamentary supremacy rather constitutional supremacy in Pakistan. In America, notwithstanding the representative character of the institutions, the limitations imposed by the U. S Constitution upon the actions of the government, both legislative and executive, are essential to the preservation of public and private rights. Such limitations serve as a check upon the

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[213] Bernard Schwartz and HWR Wade, Legal Control of Government: Administrative in Britain and the United States (Oxford: Clarendon Press, 1972), 11.

[214] *Benazir Bhutto v. Pakistan*, PLD 1988 SC 416 at 515-16.

despotism of the majority. The U.S Supreme held that a government "which held the rights, the liberty and the property of its citizens, subject at all times to the absolute despotism and unlimited control of even the most democratic depository of power, is, after all but a despotism."[215] Precisely stated, the essence of the position of the legislature under a written constitution is that "the legislature has the whole law-making power except so far as the words of the Constitution expressly or impliedly withhold [from] it."[216] The **Supreme Court of Pakistan** has succinctly clarified the position:

> Our constitution envisages democracy as ethos and a way of life in which equality of status, [and] of opportunity … obtain. It has its foundation in representation; it is not a system of self-government, but a system of control and ... limitations ... [on] government. A democratic polity is ... identified by the manner of selection of its leaders and by the fact that the power of the government functionaries is checked and restrained. In a democracy[,] the role of the people is to produce a government and therefore the democratic method is an institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote....[217]

The Constitution envisages trichotomy of powers between the organs of the State, namely, the legislature, the executive and the judiciary. In this political set-up, the power to legislate is vested in the Parliament[218] but subject to the Constitution to be watched by the independent judiciary. That is why the Constitution has excluded

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[215] *Hurtado v. The People of California*, 110 US 516 (1884), 537.
[216] Fazal Karim, 25 op cit.
[217] *Benazir Bhutto v. Pakistan*, PLD 1988 SC 416 at 515-16 (Muhammad Haleem CJ).
[218] *State v, Zia-ur-Rehman*, PLD 1973 SC 49 at 66; *Govt of Punjab v. Ziaullah*, 1992 SCMR 602 at 612.

judiciary from the definition of State as defined in Article 7 so that to ensure impartiality and independence of judiciary. So, Pakistan constitutional set up is neither U.S nor British. On the one hand, the Parliament, unlike the U.S. Congress, does not possess all the legislative power, and on the other hand, it again is not as supreme as the British Parliament is. The parliament is supreme in the domain of law-making strictly in accordance with Articles 141 and 142 of the written Constitution. Since Pakistan has parliamentary form of government, i.e. the same person is the legislator and at the same time the executive, as such, he cannot legislate whatever he needs to carry out his purpose being the executive; he will have to follow the strict procedure contained in the Constitution for getting a law legislated by the majority of the Parliament after due deliberation. For this purpose, the very nature of legislative power needs to be understood. The powers of legislation and executive are distinct. The executive will exercise only those power which the legislature grants it through law.

2.2.2 Distinction of Legislative Power from Judicial and Executive Powers**:**

Judicial power is to declare what the law is;[219] legislative power is the power to declare what the law should be.[220] To distinguish it from an executive act, it may be kept in mind that a legislative act creates a general rule of conduct; an administrative act is the adoption of a policy and issue of a specific direction. **Dr. Johnson** gave an answer of enduring validity, namely, “Laws are not made for particular cases but for men in

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[219] Articles 189 and 202, Constitution.

[220] *Ohio Casualty Insurance Co. v. Welfare Finance Co.,* 295 US 734 (1935).

general."[221] A particular act even of a legislature cannot be a legislative act, although, it may be under the colour of legislative power.[222] The idea may be conceived as under:

> In the first place, every measure duly enacted by Parliament is regarded as legislative. If land is acquired by means of a private Act of Parliament or a Provisional Order Confirmation Act, the Acquisition is deemed to be a legislative act; though if the acquisition is effected by means of a compulsory purchase order made under enabling legislation, it will usually be classified as an administrative act.…[223]

It means that the executive cannot get a law legislated at its whims. If it wants to do something, it will get the power from the legislature which is the representative body of the nation. In this sense, our Parliament is supreme to make a law if that is within its competence as per the federal legislative list and then by adopting all the legislative steps given in the Constitution. If any such step is omitted and some material procedural irregularity is committed, then the enacted law be invalid because of such defect in the process of legislation. Such an invalid law cannot confer power on the executive. But see the machination in Pakistan which has validated such invalid and illegal executive acts through passing validating Acts.

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[221] James Boswell, *Boswell's Life of Johnson*, Charles Grosvenor Osgood, ed. (Pennsylvania: The Pennsylvania State University, 2012), 280.

[222] *Shamim-ur-Rehman v. Pakistan*, PLD 1980 Karachi 345.

[223] De Smith, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995), 1006.

2.2.3 Legislative Power to Validate:

Legislation is the *making of law*, but in pre-independence era, it has judicially been held to include validation as being ancillary and incidental to the power to legislate.[224] In pre-independence Pakistan, the Court passed a validating order by giving the following reasons:

> It is true that 'validation of executive order' or any entry even remotely analogous to it is not to be found in any of the three Lists; but I am clear that legislation for that purpose must necessarily be regarded as subsidiary or ancillary to the power of legislating on the particular subjects in respect of which the executive orders have been passed.[225]

A replica of the same phenomena in post-independence Pakistan can be seen time and again.[226] The legislatures in Pakistan are not far behind in such like validation.[227] The Supreme Court has declared such a validation to be competent to nullify an earlier decision of the Supreme Court with retrospective effect.[228]

The Constitution has prohibited enactment of substantive law with retrospective effect.[229] The very idea of retrospective legislation is against the clear prohibitory provisions of the Constitution. In fact, **Validating Acts** are by their very nature intended to act upon past transactions and are, therefore, necessarily retrospective.[230]

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[224]*Piare Dusadh* case, AIR 1944 FC 1 at 10*; Piare Dusad h v. The King Emperor*, (1944) F.C.R. 61.
[225] *The United Provinces v. Atiqa Begum*, AIR FC 16 at 26.
[226]*Muhammad Din v. State*, PLD 1977 SC 52; *State v. Zia-ur-Rehman*, PLD 1973 SC 49.
[227]Articles 269-A, 270, 270-A, 270-B, Constitution; Validation of Laws Act, 1975 (LXIII of 1975).
[228]*Muhammad Yousaf v. Chief Settlement & Rehabilitation Commissioner*, PLD 1968 SC 101 at 108.
[229]Article 12 of the Constitution expressly bars ex-post facto legislation.
[230]*Sukribai v. Pohkalsing*, AIR 1950 Nag 33 = ILR (1950) Nag 196 (DB).; affirmed by a Full Bench of the same High court in *Kasubai v. Bhawan*, ILR (1955) Nag 210 (FB).

However, the judicial view is “that a legislature cannot validate an invalid law if it does not possess the power to legislate on the subject to which the invalid law relates [;] the principle being that validation being itself legislation [,] you cannot validate what you cannot legislate upon.”[231]

Progressively, in Pakistan, the approach is now quite different. The judicial attitude tends to greater scrutiny of such like measures. It was held judicially that no amount of blanket wrapping of any administrative acts or legislative measures could ever render such like acts and measures [Judges (Compulsory Leave) Order, 1970] as an absolute protected and they would be always subject to review by the competent courts. The Supreme Court declared Judges (Compulsory Leave) Order, 1970, which purported to give unbridled powers to the executive to require a superior Court Judge to proceed on leave because a reference had been made by the President calling upon the Supreme Judicial Council to enquire into the capacity or the conduct of such a Judge, as ultra vires to the Constitution and as a consequence, the legislative measure in the form of the Order of 1970, which was empowering the President to send the Chief Justice on compulsory leave till submission of the report to the Supreme Judicial Council and the President's executive order thereon were held unconstitutional, illegal and of no legal effect.[232] Because, the Constitution envisages and guarantees independence of Judiciary, the separation of powers, constitutionalism, no man rule but constitutional rule, *a fortiori*, the Constitution

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[231] *Usuf Patel v. Crown*, PLD 1955 FC 387 at 392.

[232] *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan*, PLD 2010 SC 61.

envisages and guarantees a parliamentary form of government which is of the people, by the people and for the people. As such, the Constitution would not tolerate that a single man, for his personal wishes, would abuse the constitutional power in a colourable manner so that to: "By indirections find directions out."[233]

2.2.4 Presiding Officer of the National Assembly:

The Constitution mandates that a presiding officer shall chair the House. In Pakistan, the directing authority is established in the Constitution. The National Assembly and its constitutionally defined office of the speaker is our own model of legislature.

The speakership is the final achievement of a political career. Beyond the maintenance of order, the speaker takes no part in debate and remains impartial at all times and he has no vote except in the case of a tie. He has three options: to continue the debate; to abstain from voting on an important bill on the ground that it lacks a majority for passage; or to cast vote.

It is impossible for the speaker to preside continuously over the House while it is in session. To assist the speaker there is a deputy-speaker who takes chairing debates. Once selected, the presiding officer of the House decides all questions of procedure and order. The speaker is an impartial person and is firm in enforcing the rules.

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[233] William Shakespeare, *Hamlet*, II. i. 66 op cit; Alan Nordstrom, 'Shakespeare's Take on Human Wisdom', 1 ('Polonius [the Character] "wisdom" here amounts merely to devious cunning.... [Albeit] wisdom is the capacity to realize what is of value in life, for oneself and others.' At http://www.wisdompage.com/ShakespeareOnWisdom.pdf [last accessed on 31.03.2015]; (Sophocles, *Antigone*, [442 BC] 1040: "There is no happiness where there is no wisdom; No wisdom but in submission to the gods. Big words are always punished, And proud men in old age learn to be wise." at https://mthoyibi.files.Wordpress.com/2011/05/ antigone_2.pdf [last accessed on 08.05.2015].

In Pakistan, the Speaker is always from the ruling party. He/she cannot dissociate from the party. In the case of the then Prime Minister Gillian, the Speaker did not remain impartial and failed to perform the duty imposed by the Constitution.[234]

The nature of the directing authority depends on the history , traditions and evolution of a legislature.[235] All legislatures empower a presiding officer whose primary responsibility is to supervise and regulate the plenary (floor) debate. In the United Kingdom, the speaker's office has evolved but is not authorized by a constitution or a specific piece of legislation. The speaker of the House of Commons has evolved from an appointed office of the crown to the current role in which a member of parliament is chosen to act as a nonpartisan officer of the House. Originally the monarch appointed the speaker to act as the crown's agent in parliament. In 1641, Speaker Lenthall broke with tradition by informing King Charles I that he was a servant of the House ant of the crown. Further solidifying the break with the crown were the actions of speaker Richard Onslow who held office for 33 years in mid-1700s. Onslow set a historic precedent by acting independently of the crown and establishing the impartiality of the speaker. In the late 1800s, disturbances in the Parliament led to according the speaker wide-ranging powers to control debate. Impartiality and the ability to control debate remain characteristic of the speaker's office today.[236]

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[234] *Suo Motu Case No. 4 of 2010*, PLD 2012 SC 553; Article 190, Constitution.

[235] 'Presiding Officers: Speakers and Presidents of Legislatures', National Democratic Institute for International affairs, at https://www.ndi.org/files/031wwpresiding0.pdf [last accessed on 06.12.2015].

[236] Andrew Adonis, *Parliament Today* (New York: Manchester University Press, 1993), 82-83.

Historically, the office of speaker in the United Kingdom was claimed by the majority party in parliament. Breaking with tradition, in 1992 the House of Commons chose a member of the opposition party to be speaker. Betty Boothroyd was the woman speaker of this powerful position in the history of the House of Commons.[237]

The chief characteristics of the speaker are impartiality and authority. Although elected under a political party label and functioning as an elected Member of Parliament representing the interest of constituents, the speaker is expected to operate with complete impartiality. The speaker's impartiality is protected in several ways.[238] In the U.K the speakership is always the crowning finale of a political career, not a stepping stone to higher political office. Beyond the maintenance of order, the speaker takes no part in debate and remains impartial at all times. He has no vote but he or she can vote in the event of a tie. He has three options: One option is to continue the debate; another option is to abstain from voting on an important bill on the grounds that it lacks majority for passage. When the vote is on an amendment to a bill, the speaker will vote to keep the bill in its original form. The decisions made and rules followed by the speaker during the course of the speaker's tenure are precedent setting. The speaker's rulings are significant. He interprets and applies the House of Commons' standing orders and establishes precedents on matters such as whether a member's speech is relevant to the subject under discussion, whether amendments

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[237] See David M. Olson, *Democratic Legislative Institutions* (Armonk, New York: M.E. Sharpe, 1994).

[238] Danuta Lukasz and Wieslaw Staskiewicz, eds., *Rules of Procedure and Parliamentary Practice: The Proceedings of the International Conference on Parliamentary Rules of Procedure and Parliamentary Practice, Rultusk, 8-11 May, 1994* (Warsaw, Poland: Sejm Publishing Office, 1995), 24.

proposed to a draft law conform to the rules and are “in order”, and whether certain issues can be properly raised during a Parliamentary Question.[239]

It is impossible for the speaker to preside continuously over the House of Commons while it is in session. Assisting the speaker are three deputy speakers who take turns chairing debates. When chairing sessions, the deputy speakers are subject to the same constraints as the speaker. Once selected, the presiding officer decides all questions of procedure and order. The speaker is required by the Rules “to be impartial, nonpartisan, and as firm in enforcing the rules against the Prime Minister as against the humblest opposition backbencher.”[240]

In Pakistan, speaker is always from the ruling party. In the case of Prime Minister Gillani, the Supreme Court had to observe that firstly, it could not have been held by the speaker that after the contempt judgment dated April 26, 2012 convicting the Prime Minister, no question of disqualification of the prime minister, under **Article 63(1)(g)** of the Constitution had arisen, because the judgment itself raised the issue that the prime minister was likely to be disqualified under the said article for ridiculing judiciary. Secondly, ruling of the speaker was wrong because by not sending the disqualification case/reference of the prime minister to the Election Commission of Pakistan for decision, she had made “an attempt to overrule the judgment” of the Supreme Court in the contempt case. Thirdly, once a competent court convicts a member of parliament, the role and discretion of the speaker or chairman and Election

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[239] Ibid, 23.

[240] Eugene A. Forsey, *How Canadian Govern Themselves* (Ottowa: Minister of Supply and Services, 1991), 36.

Commission of Pakistan is limited to enforcing the judgment of the court by sending the disqualification case/reference and issuing disqualification decision.[241]

2.3 DISQUALIFICATIONS OF MPS

Two questions may arise as far as disqualification of Members of Parliament (MPs) is concerned: one pre-election and two post-elections. Both can be challenged through a writ of *quo warrant* as the disqualification is a continuing one.[242] But the Parliament "shall have power to act notwithstanding any vacancy in the membership thereof and any proceedings in the House shall not be invalid on the ground that some persons who were not entitled to do so sat, voted or otherwise took part in the proceedings."[243]

2.3.1 Members of National Assembly**:**

A question arose under **Article 111** of the 1962 Constitution relating to the bar to the jurisdiction of the Courts in a case where the dispute related to the decision of the Speaker on the point as to whether a particular member had or had not resigned his seat. It was held by the Supreme Court that the real question related more to the constitution of the Legislative Assembly itself "in so far as the point raised is whether … a sitting member's seat has become vacant or not…."[244] While holding that the High Court has jurisdiction under Article 98 (now 199), the Supreme Court of Pakistan elaborated constitutional jurisprudence:

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[241] Faisal Siddiqi, 'Judicial democracy', daily "Dawn", July 13, 2012.
[242] *Farzand Ali v. Province of West Pakistan*, PLD 1970 SC 98.
[243] Article 67, Constitution.
[244] *Fazlul Qaudir Chaudhry v. Shah Nawaz*, PLD 1966 SC 105.

> The Constitution contains a scheme for the distribution of powers between various organs and authorities of the State, and to the superior judiciary is allotted the very responsible though delicate duty of containing all other authorities within their jurisdiction, by investing the former with powers to intervene whenever any person exceeds his lawful authority. Legal issues of the character raised in this case could only be resolved in case of doubt or dispute by the … [superior] Court[s] exercising judicial review functions assigned to them by the fundamental law of the land, viz. the Constitution which must override all other sub-constitutional laws. The Judges of the High Court and of … [the Supreme] Court are under a solemn oath to 'preserve, protect, and defend the Constitution' and in the performance of this onerous duty they may be constrained to pass upon the actions other authorities of the State within the limits set down in the Constitution not because they [the superior Courts] arrogate to themselves any claim of infallibility but because the Constitution itself charges them with this necessary function in the interest of collective security and stability. In this process extreme and anxious care is invariably taken by the Judges to avoid encroachment on the constitutional preserves of other functionaries of the State and they are guided by the fullest and keenest sense of responsibility while adjudicating on such a matter. The action taken by the Speaker … [is] clearly not sacrosanct in this case and its legality … [is] open to challenge under Article 98 [now 199] of the Constitution.[245]

Now the question is: if a member, who was later found to be disqualified participated and voted on some Bill, whether such a process is valid? The answer is that such a proceeding will be valid on the principle of **de facto** doctrine.[246] Before judicial verdict,

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[245] *Fazlul Qaudir Chaudhry v. Shah Nawaz*, PLD 1966 SC 105.

[246] Article 67, Constitution: Rules of procedure, etc - (1) Subject to the Constitution, a House may make rules for regulating its procedure and the conduct of its business, and shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the House shall not be invalid on the ground that some persons who were not entitled to do so sat, voted or otherwise took part in the proceedings. (Comparative Table of Article 67 of the Constitution of Pakistan, 1973: Constitution of Pakistan 1962, article 110; Constitution of Pakistan, 1956, article 55; Constitution of India, 1050, article 118; Government of India Act, 1935, section 38.)

such a member can participate in the proceeding of the legislature.[247] The judicial reasoning is as under:

> There is … [a] principle which can be invoked in aid for holding that in such … proceedings the acts of de facto members cannot be invalidated but must be treated as being equivalent to or as good as the acts of de jure members. This principle was first enunciated in … the House of Lords … that a rate for the relief of the poor which was lawfully made in other respects, could not be rendered invalid by the circumstance that some of the vestrymen who concurred in making it, were vestrymen only de facto and not de jure. Lord Chancellor St. Leonard's enunciated the principle thus: 'With regard to the competence of the vestrymen, who were vestrymen de facto but not vestrymen de jure, to make the rate, Your Lordships will see at once the importance of that objection, when you consider how many public officers and persons there are charged with very important duties, and whose title to the office on the part of the public cannot be ascertained at the time [of the objection]. You will at once see to what it would lead if the validity of their acts, when in such office, depend[s] upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most destructive kind. It would create uncertainty with respect to the obedience to public officers, and it might also lead to persons, instead of resorting to the ordinary legal remedies to set right anything done by the officers, taking the law into their own hands.' I think, therefore, that the principle laid down by the learned Judges, as the principle of law, is one that is in conformity with public convenience with reference to the discharge of the duties connected with the office.[248]

But it does not apply where the "Legislature illegally adds to its members and the persons so added took part in discussion and voting, the laws passed by it are void."[249] In Pakistan, an Act was passed known as the Increase of Seats Act, 1949 whereby

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[247] *Farzand Ali v. Province of West Pakistan*, PLD 1970 SC 98 at 127.
[248] Ibid, 98.
[249] *Federation of Pakistan v. Ali Ahmad Hussain Shah*, PLD 1955 SC 522.

six members were added to the membership of the Assembly. No assent had been sought for or given by the then Governor General of Pakistan. It was the stand of the Government that the Act was invalid and the legislation passed by the Assembly after such addition was also invalid. The de facto doctrine was held to be not applicable.[250] The **de facto** doctrine cannot be made a shelter deliberately to cover illegal and **unconstitutional activities**. It applies where the offices have been exercised by persons later on held not to have lawfully occupied them, as "[t]he central requirement for the operation of the doctrine is that the person exercising the office must have been reputed to hold it."[251]

Care should be taken not to entertain each and every supposed challenge to the Assembly proceedings, like the one where a Speaker when removed wished to challenge the resolution of the Assembly. The Court did not entertain the grievance by saying that the proceedings fell fairly within the meaning of the expression "internal proceedings" of the Assembly. It was a case under **Article 111(1)** of the 1962 Constitution which provided that "[t]he validity of any proceedings [in the Assembly] shall not be questioned in any Court."[252] However, when the very composition of the Assembly is questioned, then the matter is not the 'internal' one. The Court held:

> [The question of composition of the Assembly] ... is not a question which can possibly be barred from inquiry by the courts under Article 111 of the Constitution [of 1962]. This is not a matter which pertains either to the regulation of the procedure of the House or the conduct of its business or the

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[250] *Reference case*, PLD 1955 FC 435.
[251] *Coppard v. C&E Commissioners*, (2003) 3 All ER 351.
[252] *Mobin-ul-Haq Siddiqui v. Muhammad Iqbal*, PLD 1964 (W.P) Lahore 23.

maintenance of order in the Assembly or affecting any of its privileges. This is not a question which relates ... to the 'internal proceedings' of an assembly. Clause (1) of Article 111 bars the courts only from inquiring into the validity of proceedings in the assemblies in the formal sense [of legislation] and nothing more."[253]

Text-book writers are of the view:

> In one class of cases there is a long-standing doctrine that collateral challenge is not to be allowed; where there is some unknown flaw in the appointment or authority of some officer or judge. The act of the officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no power at all.[254]

The concept of 'collateral proceedings' is broad enough and includes almost every proceeding short of removing the judge or officer concerned but is an attack upon the decision itself.[255] The classic reference in this regard is **Cooley**:

> No one is under obligation to recognize or respect the acts of an intruder, and for all legal purposes they are absolutely void. But for the sake of order and regularity, and to prevent confusion in the conduct of public business and in security of private rights, the acts of officers de facto are not suffered to be questioned because of the want of legal authority except by some direct proceeding instituted for the purpose by the State or by someone claiming the office de jure, or except when the person himself attempts to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be. In all other cases the acts of an officer de facto are as valid and effectual, while he is suffered to retain the office; as though he were an officer by right and the same legal consequences will flow from them for the

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[253] *Farzand Ali v. Province of West Pakistan*, PLD 1970 SC 98. Quoted in Fazal Karim, 198 op cit.

[254] H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 8th ed. (London: Oxford University Press, 2002), 291-2.

[255] A. Rubinstein, *Jurisdiction and Illegality: A Study in Public Law* (Oxford: Clarendon Press, 1965), 204

> protection of the public and of third parties. This is an important principle, which finds concise expression in the legal maxim that the acts of officers de facto cannot be questioned collaterally.[256]

In contrast to collateral proceeding, direct challenge can be thrown in the nature of quo warrant under **Article 199** of the Constitution. It has been held judicially that "a de facto Judge's title or right to the office can be determined … in quo warranto proceedings or information in the nature of quo warranto…."[257] In such a situation the burden of proof (persuasion) lies on the applicant to establish that the appointment is without lawful authority.[258]

It is to be noted that the principle of collateral challenge is not an absolute rule. The Privy Council has taken a different view. It remanded the case for investigation into the question whether the persons who sat as Judges in the trial court were qualified to so sit. The principle enunciated is: "If it appears to an appellate court that an order against which an appeal is brought has been made without jurisdiction, it can never be too late to admit and give effect to the plea that the order is a nullity."[259]

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[256] Thomas M. Cooley, *A Treatise on the Constitutional Limitations*, 8th ed. (Boston: Little, Brown, and Company, 1910), Vol. 2, 1357-8.

[257] *Abrar Hussain v. Government of Pakistan*, PLD 1976 SC 315 (Muhammad Yaqoob Ali Khan, CJ); Articles 199 and 184(3), Constitution.

[258] *Masood-ul-Hassan v. Khadim Hussain,* PLD 1963 SC 203 at 207.

[259] *Chief Kwame Asante v. Chief Kwame Tawia*, PLD 1949 PC 45.

2.3.2 Significance of Defection:

Defection "is known by different nomenclatures: such as 'floor-crossing,' 'carpet crossing,' party-hopping,' 'dispute,' and 'waka [canoe] jumping.'"[260]

In Pakistan, anti-defection provisions in the form of Article 63A were added in the Constitution for the first time in the year 1997.[261] It reads as under:

> If a member of a Parliamentary Party defects, he may by notice in writing … be called upon to show cause … as to why a declaration … should not be made against him. … A member … shall be deemed to defect from a political party if he … commits a breach of a party discipline which means a violation of the party Constitution, code of conduct and declared policies, or … votes contrary to any direction issued by the Parliamentary Party … [,] or…abstains from voting in the House against party policy in relation to any Bill.

A forensic dispute arose, wherein, *inter alia*, the duty of the legislators was also discussed. The case is popularly known as *Zafar Ali Shah's case*.[262] In another case the Supreme Court elaborated the point in the following terms :

> No doubt it is the privilege of the public representatives to side with their party in power, but it does not absolve them of their responsibility and look at the degree of responsibility that the 13th and 14th amendments were bulldozed, and nobody raised his little finger against the proposed legislation. These amendments pertained to the Constitutional changes and were not germane to the ordinary law. A Constitutional amendment requires sane thinking, deliberation and composition, which were totally absent and none took it

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[260] G.C. Malhotra, *Anti-Defection Law in India and the Commonwealth* (New Delhi: Metropolitan Book Co. Pvt. Ltd., 2006), 15.

[261] Article 63A was added through 14th Amendment Act No. XXIV of 1997 w.e.f. 4th July, 1997 published in The Gazette of Pakistan, Extraordinary, Islamabad, Friday, July, 1997.

[262] *Zafar Ali Shah*, PLD 2000 SC 869.

> seriously. In fact, what was practised in those years was nothing but parliamentary dictatorship. A whim of the party leader in the House could not have become a substitute for the will of the people or their representatives in the Assemblies.[263]

It was substituted in the year 2002:[264]

> If a member of a Parliamentary Party … joins another Parliamentary Party; or … votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party … in relation to … election of the Prime Minister …, or a vote of confidence or a vote of no confidence; or … a Money Bill; he may be declared … to have defected …: … the head … shall provide … an opportunity to show cause.…

It was again substituted in the year 2010:[265]

> If a member of a Parliamentary Party … joins another Parliamentary Party, or … [v]otes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party … in relation to … election of the Prime Minister … or a vote of confidence or a vote of no-confidence … or … a Money Bill or a Constitution (Amendment) Bill, [h]e may be declared … by the Party Head to have defected …: [T]he Party Head shall provide [him] … an opportunity to show cause ….

Now, the last amendment has given practically exclusive authority to the head of a political party, a single person, to say what shall be the future constitution of the republic; a contradiction in itself! It is the same thinking as that of the Roman monarch,

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[263] *Pakistan Muslim League (Q) v. Chief Executive of the Islamic Republic of Pakistan*, PLD 2002 SC 994.
[264] See The Legal Framework Order, 2002.
[265] See the Constitution (Eighteenth Amendment) Act, 2010.

Scipio **Nasica**: “Romans, pray be silent; for I know better than you what is good for the republic.”[266]

The questions of defection immediately reached the Courts. It was judicially held that conduct outside the House would not amount to defection. The reason given is that a penal provision should be construed strictly and its scope should not be extended unless it is so required by the clear language used therein or by necessary intendment.[267]Although floor crossing was judicially recognized to be a menace; but jurisdiction of the Courts was held to be available to the MPs in the case of an order being without jurisdiction, coram non judice or *mala fide*.[268] There is representative democracy in Pakistan.[269] As such, MPs are responsible to their constituencies and not to their Party. Edmund **Burke** has summed up the duty of a parliamentarian: ‘“Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion”’.[270]

In the context of Pakistan, it may be defined as “a group of citizens organized to seek and exercise power within a political system.”[271] It has judicially been recognized that the Legislators do not represent a Party but rather all the voters of the area.[272] Within a democracy, how people are represented will change according to context and be

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[266]Edward Gibson, *The Decline*, Ch III, 87 op cit.

[267] *Wukala Mahaz Barai Tahafaz Dastoor v. Pakistan*, PLD 1998 SC 1263.

[268] Ibid, at 1314 and 1426 at 1314 and 1426.

[269]Preamble of the Constitution.

[270]Edmund Burke, *Speeches to the Electors of Bristol*, quoted in Kartik Khanna and Dhvani Shah, ‘Anti-Defection Law: A Death Knell for Parliamentary Dissent?’ 5 NUJS L. Rev. 103 (2012), 103-127 at 121.

[271]Nazeer Ahmad, *Political Parties in Pakistan: A Long Way Ahead* (Islamabad: Centre for Democratic Governance, The Network for Consumer Protection, 2004), 3.

[272]*Davids v. Akers*, 549 F.2d 120 at 124-25 (9th Cir. 1977).

shaped by the processes of authorization and accountability that define the representative's role. These processes delineate the ways and degree to which representative agents act in the interests of and respond to their principals, as well as the extent to which they stand 'as' or 'for' the people by virtue of being themselves in some way or other 'of' them. They also structure how far representatives can be deemed to do so in a democratic manner by virtue of being authorized by democratic means or being held accountable for their pursuit of democratic ends. Thus, representatives who are subject to strict instructions from the electorate, and subject to recall should they diverge from their mandate, act literally as their voters direct. Here the difference between selecting decision-makers and making decisions is negligible. The representatives would stand 'for' the people and act 'as' them being sufficiently similar to them to be representatives of their interests and ideas. Politicians have to take too many decisions, many of which are unforeseeable or involve technical expertise, for them to be subjected to too tight a mandate. Likewise, the people of modern democracies are so diverse along so many dimensions, that sortation offers a haphazard way of selecting representatives who could stand 'for' the people, while sampling begs the question of what features 'of' people should be politically represented.[273]

Scholars on parliamentary democracy are of the view that "[i]t has crippled free expression, since it provides that MPs voting against '*any direction*' of their Party are

[273] Richard Bellamy & Cristina E. Parau, 'Introduction: Democracy, Courts and the Dilemmas of Representation' 257, at http://www.tandfonline.com/doi/pdf/10.1080/ 00344893.2013.830479 [last accessed on 21.01.2015]

liable to disqualification from the legislature."[274] Democracy will show its fruits when there are 'de-whipped' legislators. The true spirit of a parliamentary democracy lies in the fact that the legislator is seen to perform her functions free of extraneous factors like political dynamics and Party position. It can then be said that "[t]he legislator acts as legislative representative of her constituency which is a true manifestation of her constitutional position."[275] G.W.F. **Hegel** says, "In a democracy it is a matter of the first importance, to be able to speak in popular assemblies - to urge one's opinions on public matters. Now this demands the power of duly presenting before them that point of view which we desire them to regard as essential."[276]

Constitutional democracy envisages separation of powers an essential component of governance. It also visualizes independence, integrity and responsibility of the elected representatives.[277] This constitutional theory is the starting point of the Constitution of Pakistan, that is why there are **separate chapters** in the Constitution for each organ of the State which demonstrate this fact.[278] Each Organ has its own rules of business also.[279] **Anti-defection** law is in violation of the principle of separation of powers in the context of representative democracy as Parliament would be declaimed as a

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[274]Shalaka Patil, 'Push button parliament–why India needs a non-partisan, recorded vote system, 167 at http://www.anuariocdi.org/anuario2011/5SPatil.pdf (Patil, 'Push button parliament').

[275]Patil, 'Push button parliament', 168, op cit.

[276] G.W.F. Hegel, *The Philosophy of History* (Kitchener, Ontario: Batoche Books, 2001), 287-88.

[277] Geoffrey Marshall, *Constitutional Theory* (London: Oxford University Press, 1971,), Ch. V.

[278] Constitution: Articles 50-61, Chapter 2, Part III for *the Parliament*; Articles 90-100, Chapter 2, Part III for *the Federal Government*; and Articles 175-212, Chapters 1, 2, 3, 3A, 4, Part VII for *the Judiciary*.

[279] Federal Government Rules of Business 1973; National Assembly Rules of Procedure and Conduct of Business; Senate Rules of Procedure and Conduct of Business and the Supreme Court Rules, 1980.

machine for registering decisions arrived at elsewhere.[280] It is strange to note that a Constitution having been framed by the Constituent Assembly can be amended on the will of a single person, the party head. A Constitution must envisage the inherent value of "protection of necessary autonomy of the House, its members and the executive."[281] That is why the Constitution grants certain privileges to legislators. Logically it is for the purpose of bold and free discussions and debates in the Parliament. If an MP is already in fear of disqualification in case he speaks or votes against the wishes of the head of the political party, then what for the privileges are? It simply means that the MP is a free and responsible person for representation in the Parliament according to his view of life.

On closer look, the anti-defection clause in the Constitution is the exact replica of the machination used by the British Ruler in the pre-independence era. All powers were practically used by the Executive with colour and pretext of the councils just to camouflage the reality from the Indians. It was there provided in the Indian Councils Act, 1892 that "[t]he local legislature of any province … may … with the previous sanction of the Governor-General … repeal or amend … any law or regulation made … by any authority in India …" but at the same time "[n]othing in this Act shall distract from or diminish the powers of the governor-General in Council at meetings for the purpose of making laws and regulations."[282] So simple: get the unwanted laws of the

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[280] See H.J. Laski, *A Grammar of Politics* 4th ed. (London: Allen and Unwin, 1937); Paul Q. Hirst, *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis, and H.J. Laski* (London: Routledge, 1993).

[281] Ross Carter, *Parliament: Caucuses, Article 9, and Open Government- If Not, Why Not?* 18 NZULR 99

[282] See Section 5 of the Indian Councils Act, 1892, Great Britain Laws, *The Indian Councils Acts 1861 and 1892, and Rules and Regulations for the Council of the Governor General at meetings for the Purpose of Making*

Indian Council through the local legislature, and if need be, the unwanted laws of the local legislature through the Indian Council; and further get wanted laws through the local legislature, and if need be, through the Indian Council. And a further precaution that the 'previous sanction of the Governor-General' is always there. This is called a Rule *by* law; not a Rule *of* Law.

2.4 PRIVILEGES OF MEMBERS

2.4.1 Freedom of Speech in Parliament**:**

Pakistan has a chequered history in respect of debating and voting in the Parliament which became later on severe forensic battles.[283] Most of the time, this nation debated in Courts instead of in the Assemblies. The story of **legalism** will continue but with a different vision and perspective. Now as sovereign citizens, we have the right to know how our elected representatives perform in the Parliament: after all, why an Act passed by parliament is law. If we say that it is because the Constitution says so, then it is a logical **fallacy**; because "No statute can confer this power upon Parliament, for this would be to assume and act on the very power that is to be conferred."[284]

Laws and Regulations (London: Forgotten Books, 1898/2013), 3 at www.ForgottonBooks.org. [last accessed on 06.03.2015].

[283]See *Moulvi Tamizuddin v. Federation of Pakistan,* PLD 1955 Sindh 96; *Federation of Pakistan v. Moulvi Tamizuddin*, PLD 1955 FC 240; *Muhammad Sharif v. Federation of Pakistan*, PLD 1985 Lah 725; *M. P Bandara v. Federation of the Islamic Republic of Pakistan*, PLD 1988 MLD 2869; *Federation of Pakistan v. Muhammad Saifullah Khan*, PLD 1989 SC 166; *Ahmad Tariq Rahim v. federation of Pakistan*, PLD 1991 Lah 78; *Ahmad Tariq Rahim v. Federation of Pakistan*, PLD 1992 SC 646; *Abdul Mujeeb Pirzada v. Pakistan*, 1997 SCMR 232; *Benazir Bhutto v. Pakistan*, 1997 SCMR 353; *Mahmood Khan Achakzai v. Pakistan*, PLD 1997 SC 426; *Benazir Bhutto v. Pakistan*, PLD 1998 SC 338; *Zafar Ali Shah v. Pervaiz Musharraf, Chief Executive of Pakistan*, PLD 2000 SC 869; *Wasim Sajjad v. Pakistan*, PLD 2001 SC 233.

[284]P. J. Fitzgerald, ed., *Salmond on Jurisprudence* (London: Sweet & Maxwell, 1966/ 1985), 111.

There is no proper record maintained of the debating and voting in the parliament to check properly the past. Our representatives have been given absolute freedom of expression to speak for us in the Parliament under the Constitution.[285] When Members of Parliament (MPs) are dominated by the will of the Party, they "[do] not view legislating or 'policy-making' as their primary function at all, instead they … [use to spend] a lot of time in their constituency even when Parliament … [is] in session."[286]

Independence of legislature was recognized in **Article 9** of the (English) Bill of Rights 1688 which reads, "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." It was a time when there was need for the protection of legislative independence from the Monarch. This privilege later on became a hallmark of the concept of separation of powers. In this regard, Article I, section 6 of the US Constitution has a direct link with Article 9 of the (English) Bills of Rights of 1688 and 1689.[287] The Constitution of Pakistan finds mention in Articles 67-69 of the same independence of the legislature as well. Its rationale is well established in England. Lord **Browne-Wilkinson** has stated the scope of Article 9 as under:

> It ensures the ability of democratically elected members of Parliament to discuss what they will [freedom of debate] and to say what they will [freedom of speech]. …In my judgment, the plain meaning of art. 9, viewed in the historical background in which it was enacted, was to ensure that members of Parliament were not subject to any penalty, civil or criminal, for what they said

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[285]Articles 19 and 66, Constitution.
[286]Patil, 'Push button parliament' 166 op cit.
[287] Rotunda, vol. I., 709. Op cit.

> and were able, contrary to the previous assertion of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed.[288]

The vice to which Article 9 of the (English) Bill of Rights is directed is the inhibition of freedom of speech and debate in Parliament that might flow from any condemnation by the Queen's courts, being themselves an arm of government, of anything there said.[289] There is no denial that each organ will remain in its own domain, and will not interfere in the independence of the other organ of the State. This position has judicially been recognized in England:

> [T]here is a long line of authority which supports a wider principle of which Article 9 is merely one manifestation viz that the courts and Parliaments are both astute to recognize their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in the performance of its legislative functions and protection of its established privileges….[290]

It is to be remembered that "[n]o discussion shall take place in [Majlis-e-Shoora (Parliament)] with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties."[291] Ant-defection law was never meant to tame MPs at the hand of the party head. It can never be so if we look at the Constitution in its totality. **Alexander Pope** has sung: "'Tis not a *Lip* or *Eye* we Beauty call, / But the joint Force and full *Result* of *all.*"[292] The Constitution protects the MPs

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[288] *Pepper v. Hart*, (1993) 1 All ER 42 at 67.
[289] *Hamilton v. Al Fayed,* (1999) All ER 317 at 332.
[290] *Prebble's* case (1994) 3 All ER 407 at 413.
[291] Article 68, Constitution.
[292] Alexander Pope, *An Essay on Criticism,* Part II, Lines 245-46 at http://www2.hn.psu.edu/faculty/jmanis/ a~pope/criticis.pdf [last visited 31.12.2014]

from liability for expressing their views as per their conscience in the Parliament. But anti-defection provisions of the Constitution may be used to deter them from acting in accordance with their conscience.

2.4.2 Article I of the US Constitution**:**

It provides that "[t]he Senators and Representatives shall … be privileged for any speech or debate in either House, and they shall not be questioned in any other place." It means that "[t]hey may not be questioned (by the executive, the courts, or state officials) about anything they have said in Congress." [293] The judicial interpretation has succinctly been stated by the US Supreme Court as under:

> This formulation of [the Bill of Rights] of 1689 was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudors and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature…. In the American governmental structure, the clause serves the additional functions of reinforcing the separation of powers so deliberately established by the Founders.[294]

This protection is from criminal and civil proceedings. Text book writes are of the view that, "[t]hat is not to say that there are no restraints on the conduct of federal

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[293]O'Connor, 405 (parenthesis in the original).

[294]*United States v. Johnson*, 383 U.S. 169 at 178; John E. Nowak, Ronald D. Rotunda and J. Nelson Young, *Constitutional Law*, 3rd Ed. (St. Paul: West Publishing Co., 1986), 129.

legislators[;] for application of the privileges of the clause has been limited through narrow judicial interpretation."[295]

In *Kilbourn*[296], it was held that '"the House of representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature judicial."'[297]

Acts do not become legislative simply because they have been performed by the members of the legislature. It has judicially been stated:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committees and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.[298]

2.4.3 Independence of Legislature in Pakistan:

Independence of Legislature in Pakistan has been ensured in different Articles which are scattered throughout the Constitution. **Article 66** of the Constitution provides:

> Subject to the Constitution and to the rules of procedure of …Parliament, there shall be freedom of speech in … Parliament and no member shall be liable to any proceedings in any court in respect of anything said or any vote given by him in ... Parliament, and no person be so liable in respect of the publication

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[295]Rotunda, Vol. I, 709 op cit.

[296] *Kilbourn v. Thompson*, 103 US 168 (1880).

[297]Cushman, 55 op cit.

[298]*Gravel v. U.S*, 408 US 606 at 625 = 33 L Ed 2d 583 (1972); (Article I, Section of the U.S Constitution provides that Speech and Debate power to the legislators.)

by or under the authority of … Parliament of any report, paper, votes or proceedings.

There is constitutional protection so that to ensure free and bold speech and debate in the Parliament. However, this protection is not meant for abuse but to be used for the purpose of the betterment of the people.[299] That is why superior Courts of Pakistan have held that speeches of the Members of the National Assembly enjoy only qualified privilege and are amenable to contempt of Court proceedings under **Article 204** of the Consitution.[300] The Constitution restricts even the legislator that "[n]o discussion shall take place in … Parliament with respect to the conduct of any Judge of the Supreme Court or a High Court in the discharge of his duties."[301] It does not mean that the judicial organ is superior, rather it is a co-ordinate branch. The superior Courts do not claim supremacy but at the same time it is their constitutional duty to uphold independence of judiciary and the rule of law.[302] It is because that the privilege under **Article 66** is "subject to the Constitution" and the Constitution contains also **Article 68** prohibiting discussion about the conduct of judges. So, M. Ps are not expected to make indecent expressions and disparaging remarks against the judiciary or whimsically attack conduct of judges.[303] However, where anything which is in the exclusive domain of the legislature and is not subject to any other provision of the Constitution, the Courts do not entertain any petition against the legislature in order

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[299] Osama Siddiqui, 'The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its discontents', Arizona Journal of International & Comparative Law, Vol. 23, No. 3. 2006. 622-711, fn 106.

[300] *Karachi Bar Association*, PLD 1988 Karachi 309; *M.A. Rashid v. Pakistan*, PLD 188 Quetta 70.

[301] Article 68, Constitution.

[302] *Shamshad v. Federal Board of Intermediate and Secondary Education*, PLD 2009 SC 75.

[303] *Masroor Ahsan v. Ardeshir Cowasjee*, PLD 1998 SC 823.

to respect independence of the legislature.[304] it is of the essence of parliamentary democracy that people's representatives should be free to express themselves without fear of legal consequences. But it is not tenable to say that what they say is only subject to the rules of Parliament, the good sense of the members and the control of proceedings by the Speaker.[305]

[304]1999 MLD 2411; PLJ 1998 Lahore 1523.
[305]*Tej Kiran Jain v. N. Sanjiva Reddy,* AIR 1970 SC 1573.

CHAPTER THREE: RULES OF BUSINESS

Introduction: The very credibility of legislature as an institution is intimately related to the performance of its members. Within the House, they are expected to adhere to rules and maintain decorum and dignity. Outside the House, their conduct should not bring disgrace and dishonour to them and to the high institution to which they have been elected. It, therefore, becomes essential for them to bring their professional conduct within the ambit of established parliamentary traditions, conventions and the prescribed Rules of Procedure. A thorough understanding about the rules in not only important for the parliamentarians to ensure their efficiency and effectiveness as law-makers but also to enable them to intervene and speak on issues of public importance.[306]

3.1 RULES OF PROCEDURE

Articles 67 and **127** of the constitution empower Parliament and provincial Assemblies respectively to make rules for regulating their procedure and conduct of their business. It has been shown that such rules are not having that sanctity as a provision of the Constitution is having, and they can also be tested on the touchstone of the constitution so that to keep the legislature within the four corners of the

[306] H.L.A. Hart, *The Concept of law*, 2nd ed. (New York: Oxford University Press Inc., 1994), 77-79.

Constitution.[307] The concept and function of rules of procedure is a serious matter. Their compliance or non-compliance does matter. Besides, the body of legal norms that govern human conduct includes, for example, non-enacted principles like "[n]o man shall profit from his own wrong-doing." [308] Rulemaking power is held judicially to be in the nature of delegated power, as such, cannot be exercised to be inconsistent with the parent law.[309]

Article 67 of the Constitution reads as follow:

> Subject to the Constitution, a House may make rules for regulating its procedure and the conduct of its business, and shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in the House shall not be invalid on the ground that some persons who were not entitled to do so sat, voted or otherwise took part in the proceedings.

Position in India is taken from a different angel. It was observed judicially by the Indian Supreme Court:

> Article 118 [of the Indian Constitution] is a general provision conferring on each House of Parliament the power to make its own rule of procedure. These rules are not binding on the House and can be altered by the House at any time. A breach of such rule is not subject to judicial review in view of article 122.[310]

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[307] *Zain Noorani v. Secretary of the National Asembly of Pakistan*, PLD 1957 SC (Pak) 46.

[308] Ronald Dworkin, *Taking Rights Seriously* (Massachusetts: Harvard University Press, 1986), 14. 22-28.

[309] *Malik Asad Ali v. Federation of Pakistan*, PLD 1998 SC 161 at 229; *Prem Chand v. Excise Commissioner*, AIR 1963 SC 996 at 1003.

[310] *Sub-Committee of Judicial Accountability v. Union of India*, AIR 1992 SC 320 at 353.

It was also held that proceeding of the Houses cannot be challenged in a court on the ground that they have not been carried on in accordance with the rules of procedure or that the House deviated from the rules. It was held:

> It is well known that no writ, direction or order restraining the Speaker from allowing a particular question to be discussed, or interfering with the legislative processes of either House of the Legislature or interfering with the freedom of discussion or expression of opinion in either House can be entertained.[311]

In fact, a Court is not a court of appeal or revision against the Legislature or against the ruling of the Speaker, who, as the holder of an office of the highest distinction, has the sole responsibility cast upon him of maintaining the prestige and dignity of the House. It was held by the Allahabad High Court held:

> This Court is not, in any sense whatever, a court of appeal or revision against the Legislature or against the ruling of the Speaker who, as the holder of an office of the highest distinction, has the sole responsibility cast upon him of maintaining the prestige and dignity of the House…. This Court has no jurisdiction to issue a writ, direction or order relating to a matter which affects the internal affairs of the House.[312]

But immunity from judicial interference is confined only to the matters of 'alleged irregularity of procedure' as distinguished from 'illegality of procedure'.[313] What

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[311] *Raj Narian Singh v. Atmaran Govind Kher*, AIR 1954 Allahabad 319; *Hem Chandra Sen Gupta v. Speaker West Bengal Legislative Assembly*, AIR 1956 Cal. 378; *C. Shrikishen v. State of Hyderabad*, AIR 1956 Hyderabad 186.

[312] Ibid; *State of Bihar v. Kameshvar Singh*, AIR 1952 SC 252; *Saradhakar v. Orissa Legislative Assembly*, AIR 1952 Orissa 234; *C. Shrikishan v. State of Hyderabad*, AIR 1956 Hyderabad 186; *Hem Chandra Sen Gupta v. Speaker of Legislative Assembly of West Bengal*, AIR 1956 Calcutta 378; *Godavaris Misra v. Nandakishore Das*, AIR 1953 Orissa 111; *Ram Dubey v. Government of Madhya Bharat* 5.

[313] *State v. R. Sudarsan Babu*, ILR (Kerala) [1983], 661-700.

amounts only to 'irregularity of procedure' and what does not amount to such 'irregularity of procedure' need to be explored and understood as it has aptly been said: "One cannot incorrigibly use a term, let alone preach about it, unless it is known what that term refers to?"[314]

In the context of Pakistan, the word "business" has been defined as all work done by the Federal Government which includes both executive and legislative work.[315] Two aspects in this regard are important to be understood: One, validity of such rules vis-à-vis the Constitution, and two, the binding nature of such rules. [316]

It is to be noted that the evidence law of Pakistan envisages production of parliamentary proceedings in a court of law.[317] It means that **record-keeping** of legislative process is recognized by statutory law. The proceedings of Parliament fall under the second or fourth of the categories of **Article 89** of Qanun-e-Shahadat Order, 1984. The legislatures to which the second category refers are intended to include all the legislatures which have the powers to make laws for the whole of Pakistan or any part thereof. Therefore, "the volumes of the official parliamentary

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[314] Plato, *Early Socratic Dialogues* (City Indecipherable: Penguin Classics, 1987), 217.

[315] *Mustafa Impex, Karachi etc.* v. *The Government of Pakistan*, PLD 2016 SC 808, para 6; C A No. 1428 to 1436 of 2016, decided by Supreme Court on 24.05.2016, at www.supremecourt.gov.pk/web/userfiles/File/C.A.14282016.pdf [last accessed on 17.06.2019].

[316] Rules of Procedure and the Conduct of Business in the National Assembly, 2007 and Rules of Procedure and the Conduct of Business in the Senate of Pakistan, 2012 op cit.

[317] Article 89, Qanun-e-Shahadat Order, 1984.

debates afford adequate legal proof of the passing of a resolution [the proceedings] by the Houses of Parliament."[318]

The expression 'journals' in **article 89 (2)** of Qanun-e-Shahadat Order is plainly to be given a broad and general meaning since it is not confined to the journals of the Houses of Parliament, but includes journals of other legislatures also. There is no reason, therefore, why in its application to Parliament, it should necessarily be confined to only the copies of the official journals of the two Houses. It includes the official record of such proceedings printed under authority of the Parliament.[319] As regards the report of debates, they can only be evidence of what was stated by the speaker in the Legislative Assembly and are not evidence of any facts contained in the speeches.[320] As regards the production of printed / published debates of the House or reference to them in a court a view was held that no leave of the House was required for this purpose. Under section 78 of the Indian Evidence Act, 1872, proceedings of the legislature can be proved by copies thereof printed by order of the Government. The question of obtaining leave of the House would arise only if a court requires assistance of any of the members or officers in connection with the proceedings of the House or production of documents in custody of secretary general of the House. However, a report in the News Paper is only hearsay evidence and a newspaper is not one of the documents referred to in **article 89 (2)** of the Order by

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[318]Justice Khalil-ur-Rehman Khan, ed., *Justice Munir's Principles and Digest of the Qanun-e-Shahadat, 2 Volumes* (Lahore: P.L.D Publishers, 1995), Vol. II, 1117 referring to *Nitharendu Dutt v. Emperor*, 1942 FC 22 at 24 = 200 IC 289 = 43 Cr. LJ 506.

[319]*Niharendra v. Emperor* AIR 1942 FC 22 at 25.

[320]*Gerald Lord Stickland v. Carmelo Mifsud Bonnici*, AIR 1935 PC 34 at 35; *Shib Nath v. A.E. Porter*, AIR 1943 Cal 377.

which an allegation of fact can be proved.[321] As explained by the Indian Supreme Court, no presumption under **Section 81** of the **Indian Evidence Act** is attached to genuineness of the newspaper reports. Accordingly, a party's statement as to inconsistency in the data relating to the number of votes cast, does not assume any significance if it is primarily based on newspaper reports.[322] In England, a special privilege attaches to the use of parliamentary proceedings as evidence. The House may give leave to issue subpoena to produce tabled documents. The question whether evidence may be given by a member or other person as to matters done and things said in parliament is surprisingly obscure. Despite early cases which would render inadmissible any evidence of these matters or things, it is now clear that even without the leave of the House, *Hansard* may be tendered, or other evidence led from a member or otherwise as to facts that occurred during a sitting.[323]

The Article begins with the words “subject to the Constitution”, meaning thereby that the rules of procedure will not be in conflict with the Cnstitution. Such rules cannot give a different procedure if some procedure is already available in the Constitution. Even a statute cannot take away a constitutional jurisdiction.[324] The expression “subject to the Constitution” means that “the jurisdiction provided for in … [the Constitution] can be exercised except where the Constitution itself creates a bar.”[325]

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[321] *Laxmi Raj Shetty v. State of Tamil Nadu*, AIR 1988 SC 1274.

[322] Ibid, reaffirmed in *S.A. Khan v. Ch. Bhajan Lal*, (1993) 3 SCC 151; *Ravinder Kumar Sharma v. State of Assam*, AIR 1999 SC 3571.

[323] C. Tapper, *Cross on Evidence* (London: Oxford University Press, 1985), 738.

[324] *Asma Jillani's* case, PLD 1972 SC 139 at 198; *Government* v. *Begum Agha Shorish Kashmiri*, PLD 1969 SC 14; *Mehr Din* v. *Border Area Committee*, PLD 1970 SC 311.

[325] *Muhammad Khan* v. *Border Area Committee*, PLD 1965 SC 623 at 633.

In this way, a rule made by a House is not valid if it infringes any provision of the Constitution.[326]

Once it is found that a rule is valid, then it must be followed. The High Court held, although in a different context, that government instructions issued for guidance of its officers, the government is bound to follow such instructions and obliged to implement its own interpretation.[327] A statutory rule cannot be modified or amended by administrative instructions.[328] Therefore, the members are bound by the limitations placed on their conduct by the relevant Rule.[329] *A fortiori*, a rule made under the Constitution cannot be by-passed or ignored. The Supreme Court held that the Prime Minister could not move any legislation, finance or fiscal bill, or approve any budgetary or discretionary expenditure, without consulting and obtaining approval from the Cabinet.[330] These Rules have the status of law deriving direct mandate from the Constitution.[331]

However, where there is inconsistency between the parent Act and Rules framed thereunder the first attempt should be to reconcile the inconsistency between the two and only when the conflict between the Act and the Rule is irreconcilable, the Rule will have to be declared ultra vires.[332] Immunities given in **Article 69** of the

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[326] AIR 2010 SC 1310.

[327] *Munawar-ud-Din*, PLD 1979 Note 80 [Lahore].

[328] *Muhammad Riaz Akhtar* v. *Sub-Registrar*, PLD 1996 Lah 180 at 187.

[329] ***Syed Masroor Ahsan and others* v. *Ardeshir Cowasjee and others***, PLD 1998 SC 823.

[330] *Mustafa Impex, Karachi* v. *The Government of Pakistan*, PLD 2016 SC 808 at 867.

[331] *Action against distribution of development funds by Ex-Prime Minister Raja Pervaiz Ashraf*, PLD 2014 SC 131.

[332] *Mian Hakimullah etc.* v. *Addl. District Judge*, 1993 SCMR 907; *Sayed Mukhtar Gilani* v. *Registrar*, 1993 CLC 463 (Azad J & K).

Constitution are in respect of irregularities of procedure. If validity of any proceedings is challenged on the ground other than irregularity of proceedings, then a High Court does have jurisdiction under **Article 199** of the Constitution to adjudicate the matter.[333] In the case of *Farzand Ali* v. *Province of West Pakistan*,[334] a constitutional amendment was challenged on the ground that some of the members who had voted stood disqualified as members. Two questions arose: One, the constitution of such an Assembly, and two, validity of such proceedings. The Supreme Court held:

> "[I]t is not a question which can possibly be barred from inquiry by the courts under … the Constitution. This is not a matter which pertains either to the regulation of the procedure of the House or the conduct of its business or the maintenance of order in the Assembly or affecting any of its privileges. This is not a question which … relates to the 'internal proceedings' of an assembly. [The provision] bars the courts only from inquiring into the validity of proceedings in the assemblies in the formal sense and nothing more."[335]

However, the second question was answered in the negative holding that "the members concerned could not be unseated until they were held by a competent court to be disqualified."[336]

3.1.1 National Assembly**:**

Article 67 of the Constitution grants power to the legislature to make rules. Legal positivists maintain that law-making cannot be understood except as a rule-governed process, and that accordingly a legal system must be thought of as consisting of

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[333] 2002 YLR 2209.
[334] PLD 1970 SC 98.
[335] Ibid.
[336] Ibid.

secondary rule - rules for rule-change, for example - as well as the primary rules that are supposed to govern our conduct.[337]

The Rules of Business "do not require votes of MPs to be recorded unless the Speaker's decision is contested in the House. The result is that voting in the House has become mechanical, [being] controlled by the Party policies and devoid of responsibility."[338] It is a truth universally acknowledged that parliamentary procedures cannot be underestimated; because they govern and define the content of legislation.[339] There will be a shared sense among the officials that they have an obligation to govern their law-making behaviour in a certain way: it does not particularly matter what the motive for compliance is or where it comes from.[340]

3.1.2 Constitutionality:

It is the basic principle of jurisprudence that rule making power under the Constitution is in the nature of delegated power and cannot be so exercised to be inconsistent with the Constitution.[341] In the case of the legislature, the decision-procedures used are fraught with issues of fairness towards the members of the community at large. What makes the decision procedures of legislatures fair from a democratic point of view is

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[337]H.L.A. Hart, *The Concept of Law*, 2nd ed. (New York: Oxford University Press, Inc., 1994), 94-99.

[338]Patil, 'Push button parliament'. Op cit.

[339] M.P. Jain, *Indian Constitutional Law*, 6th ed. (Calcutta: Kamal Law House, 2010), App 1; *S. P. Gupta v. Union of India*, AIR 1982 SC 149.

[340]Hart, 114-117 op cit.

[341]*Malik Asad Ali v. Pakistan*, PLD 1998 SC 161 at 229; Prem Chand v. Excise Commissioner, AIR 1963 SC 996 at 1003.

related to a notional vote in the country by virtue of the elective credentials of each voting member.[342]

The term "proceedings in Parliament" or the words "anything said in Parliament" have not so far been expressly defined by courts of law. It covers both the asking of a question and the giving of written notice of such question, motion, Bill or any other matter and includes everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business.[343] The Orissa High Court, *inter alia,* observed:

> It seems thus a settled parliamentary usage that "proceedings in Parliament" are not limited to the proceedings during the actual session of Parliament but also include some preliminary steps such as giving notice of questions or notice of resolutions, etc. Presumably, this extended connotation of the said term is based on the idea that when notice of a question is given and the Speaker allows or disallows the same, notionally it should be deemed that the questions were actually asked in the session of Parliament and allowed or disallowed, as the case may be.[344]

The following points are to be remembered in this regard:

1. Standing: No forensic challenge has yet been thrown to the rules of a House in Pakistan. Therefore, help may be taken from such a challenge from a foreign jurisdiction. In a case where challenge is thrown to the House Rules, guidance may

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[342]Waldron, "Legislating with integrity", 72 at 382. Op cit.

[343] Jai Singh Rathi v. State of Haryana, AIR 1970 Punjab and Haryana 379; State of Kerala v. R. Sudarshan Babu, I.L.R. (Kerala) 1983, 661-70 = AIR 1984 Ker 1.

[344]*Godavaris Misra* v. *Nandakishore Das,* AIR 1953 Orissa 111.

be sought from *Powell v. McCormack*.[345] **The court cannot foreclose suits challenging constitutionality of a Senate or House rule**. It has been established that the rules of Congress are judicially cognizable. The political question doctrine came before the Court in *Powell*. There the Court held that whether or not a congressman is qualified to take his seat is not a political question despite the constitutional provision that "each house shall be the judge of the ... qualifications of its own members."[346] The separation of powers cannot tolerate insulation of Senate and House rules from judicial review. Because jurisprudentially, judicial power is assigned to the judiciary:

> Deciding whether a matter has in any measure been committed by the [U.S] Constitution to another branch of government, or whether the action of that branch of government exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation of … [the] Court as ultimate interpreter of the Constitution.[347]

As such, judicial review is strongly warranted. On the authority of *Powell*, it can be said that employees of the House may be considered to have sufficiently "participated in the unconstitutional activity" to establish jurisdiction.[348] To say that court lacks jurisdiction because the Senate cannot be sued ignores the fact of participation of the employees in the administration of the House rules.

In his complaint, Powell had "alleged that the Clerk of the House threatened to refuse to perform the service for Powell to which a duly elected Congressman is entitled ...

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[345] 395 U.S. 486 (1969); Cushman, 23, 47, 81.
[346]Ibid, 23.
[347] *Baker v. Carr*, 369 U. S. 186; Cushman op cit.
[348]*Powell*, 395 U.S. 486 at 504 (1969); Cushman, 23, 47, 81. (Case law is rare on this point).

and that the Doorkeeper threatened to deny Powell admission to the House chamber." The Powell Court noted that judicial review of the propriety of the decision to exclude petitioner is possible.[349] The Court explained:

> Especially it is competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution, because ... it is the province and duty of the judicial department to determine ... whether the powers of any branch of the government, and even those of the legislature in the enactment of the laws, have been exercised in conformity with the Constitution.[350]

It may be said that judicial review of the legislative process is warranted on the authority of *Powell* as employees of the House may be considered to have sufficiently "participated in the unconstitutional activity" which establish jurisdiction."[351]

Powell was a constitutional challenge to a congressional rule against a Legislative employee. Representative Adam Clayton Powell challenged constitutionality of a House resolution denying him his seat in the House of Representatives. The **U. S Supreme Court** acknowledged that the House was real party in interest being primarily responsible for the unconstitutional resolution excluding Powell from membership and declaring his seat vacant. Although the **Speech** or **Debate Clause** of the U.S. Constitution contained in article I, section 6, clause 1 barred Powell's suit against the House members; but the Court held that it had jurisdiction over Powell's declaratory –judgment action as asserted against those "legislative employees who

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[349]*Powell,* at 508 op cit.
[350]*Powell*, 395 U.S. at 506 (quoting *Kilbourn*, 103 U.S. at 199) op cit.
[351] *Powell*, 395 U. S. 486 at 504 (1969; Cushman, 23, 47, 81 op cit.

participated in the unconstitutional activity [and] are responsible for their acts."[352] In his complaint , Powell alleged that the Clerk of the House threatened to refuse to perform the service for Powell to which a duly elected Congressman was entitled and the Doorkeeper threatened to deny Powell admission to the House chamber. The Court held that participation of the Clerk and Doorkeeper in the unconstitutional resolution was sufficient to establish jurisdiction. The Court noted that allowing the suit against House Officers was consistent with the Speech or Debate Clause and as such was held to be necessary to permit "judicial review of the propriety of the decision to exclude petitioner Powell."[353] Repeating its statement of *Kilbourn v. Thompson*,[354] the Court explained necessity of jurisdiction over constitutional challenges to the rules of Congress in the following words:

> Especially it is competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution, because … it is the province and duty of the judicial department to determine … whether the powers of any branch of the government, and even those of the legislature in the enactment of the laws, have been exercised in conformity with the Constitution.[355]

To establish the causation prong of Article III of the U.S. Constitution standing, a plaintiff need only to show "a causal connection between [the plaintiff's] injury and the

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[352] Ibid, *Powell*, at 504 op cit.
[353] Ibid at 508.
[354] 103 U.S. 168 (1881).
[355] Ibid at 506 quoting *Kilbourn*, 103 U.S at 199 op cit.

conduct complained of … [that is] fairly traceable to the challenged action of the defendant."[356]

In fact, the House does not administer or enforce its rules of procedure without participation of employees. The House relies on non-Members – the Secretary to implement the rules. Parliamentarians interpret the rules and Sergeant-at-Arms enforces the rules on behalf of the House. Moreover, these officials perform their duties by recording votes and keeping official minutes and record of the House. The Secretary oversees and controls the clerical force in the Secretary's office. As such, he participates in the proceeding and is responsible for execution of the rules.[357]

A constitution puts limits on rule-making power requiring "a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained."[358] The rule will not "ignore constitutional restraints … [and will not] violate fundamental rights."[359] In *Ballin*, the plaintiff's injury was caused by an amendment to the rules of the House that changed definition of a quorum without which a statute that imposed an excise tax on Ballin's goods would not have passed the House. Ballin was allowed to challenge constitutionality of the amendment as a violation of the Quorum Clause of the U.S. Constitution contained in article I, section 5 clause 1 without naming Speaker or other members of the House as defendants. In *Smith*, an appointee to the Federal Power Commission challenged

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[356] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[357] *Powell*, 504 op cit.

[358] *Canning*, 134 S. Ct. 2550, 2574 (2014) available at http://www.leagle.com/decision/In%20SCO%2020140626E72.xml/N.L.R.B%20v.%20NOEL%20CANNING [last accessed on 27.04.2015].

[359] *Ballin*, 144 U.S. 1 at 5 (1882) op cit.

constitutionality of the senate's interpretation of a hundred-year-old Senate rule that reserved to the Senate the power to reconsider a confirmation vote within three executive calendar days. Both the Senate rule and the Senate's vote to reconsider and disapprove Smith's nomination were questionably 'legislative actions' of the Senate and its members. Neither the senate nor any of its members who voted to reconsider Smith's confirmation were parties to the quo warranto action challenging Smith's right to hold office' nevertheless, in a unanimous opinion by Justice **Brandeis**, the U.S. Supreme Court held that the issues were justiciable. It was held that when "the [Senate's] construction [of its] … rules affects persons other than members of the Senate, the question is necessarily a justiciable one."[360] The Court held that the questions presented were purely legal issues and ultimately rejected the Senate's interpretation of its own rule. It demonstrates that **Rulemaking Clause** of the Constitution grants only limited power to the legislature; such rules must remain judicially cognizable.

2. Separation of powers: The principle of separation pf powers cannot tolerate the view to insulate rules of legislature from judicial review. There are two reasons. Firstly, when plaintiff is neither member of the House nor beneficiary and has little more than an abstract interest in a legal issue, Court usually does not take

[360] *Smith*, 286 U.S. 6 at 33 (1932).

cognizance.[361] But where petitioners assert concrete vote-nullification injuries[362] and concrete injuries to their opportunity to benefit, [363] Courts do take cognizance. Secondly, this view is wrong to foreclose jurisdiction over constitutional challenges where the injury owes to the legislature inaction, because the principle of separation of powers simply cannot tolerate a jurisdictional rule that forecloses the courts' power to consider a constitutional challenge to such a rule. Because of the limits on the Rulemaking Clause's grant of power to the legislature, the Court has long guarded jurisdiction over the rules of Congress.[364] In the light of that long-held vigilance, the Court should grant review.

3.1.3 Comparison with the Rules of Business of Governments**:**

In Pakistan, "all the executive actions of the Federal Government shall be expressed to be taken in [the] name of the President."[365] The question is as to how that power is to be exercised in reality and practically? The Constitution empowers the President to formulate rules of business to specify the manner in which orders and other instruments made and executed in his name shall be authenticated. It also empowers him to allocate through rules the business to be transacted as such. It means that a governmental action can only be taken in the manner provided in the rules of

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[361] *Judicial Watch, Inc. v. United States Senate*, 340 F. Sup. 2d (D.D.C, 2004), aff'd, 432 F. 3d 359 (D.C.Cir. 2005) available at http://law.justia.com/cases/federal/appellate-courts/F3/432//359/602884/ [last accessed on 13.09.2015; *Page v. Shelby,* 995 F. Supp. 23 (D.C.C. 1998) aff'd 172 F. 3d 920 (D.C.Cir. 1998; Michael J. Teter, 'Letting Congress Vote: Judicial review of Arbitrary Legislative Inaction' available at http://lawreview.usc.edu/wp-content/uploads/Teter-Final-PDF.pdf [last accessed on 13.09.2015].

[362] *Coleman v. Miller*, 307 U.S. 433 (1939).

[363] *N.E. Fla. Chapter of assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508U.S. 656 (1993).

[364]*Powell*, 395 U.S. at 506 (quoting *Kilbourn*, 103 U.S. at 199) op cit.

[365]Article 99, Constitution.

business. Such exercise of power may be either constitutional or under some legislative enactment. The point to remember is that power is to be conferred by the Constitution or given by legislative enactment while the manner is to be specified by the rules of business.[366]

Such a question came for judicial consideration for the first time in the pre-independence era. In a case, the Court repelled the argument that power conferred by a statute can be exercised only to the extent to which specific provisions had been made in the statute and no reference would be made to the Rules of Business.[367] In post-independence era, this view was followed. It was a detention matter and the statutory power was to be exercised by the Provincial government. The order of detention had been passed by the Chief Minister. The questions before the Court were: (i) what was meant by Provincial Government and (ii) who was to exercise the authority? The first question was answered that Provincial Government meant the Governor; but while answering the second question, it was held that the matter was, under the Rules of Business, the concern of the Chief Minister and the Chief Secretary, as such the order of detention was held to be validly passed by the Chief Minister on recommendation of the Chief Secretary.[368]

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[366]*Shamsher Singh* Case, AIR 1974 SC 2192.
[367]*Emperor v. Sibnath Banerji*, AIR 1945 PC 146.
[368]*Crown v. Muhammad Afzal*, PLD 1956 FC 1.

3.1.4 Comparison with the Supreme Court Rules**:**

In the capacity of rule making body, the superior Courts do not exercise judicial power in the strict sense. They exercise executive and quasi executive powers.[369] So, **the Supreme Court Rules, 1980** are not a piece of legislation. These Rules have been framed by the Supreme Court under the mandate given by the Constitution.[370] As such, they are not the rules to be referred to as envisaged by **Article 175(2)** of the Constitution. Thus, the review jurisdiction as mentioned in these Rules would have become unconstitutional had it not been backed by the constitutional jurisdiction contained in Article 188 of the Constitution. It should be kept in mind that the mere fact that the rules are mentioned along with provisions of a statute, it does not imply that rules are raised to the level of statute under which they are framed.[371] Here mention may also be made to section 3 of the Law Reforms Ordinance, 1972 which has given Intra Court Appeal jurisdiction to two Judges or more against the judgment of a Single Judge having been passed under **Article 199** of the Constitution: A constitutional jurisdiction cannot be subjected to a legislative jurisdiction. Similar is the constitutional position of the other so may legislative pieces, like Election Tribunals, Tribunal hearing cases under the High Treason Act, 1974 etc. The Legislatures were not competent to make these laws because a High Court Judge cannot exercise jurisdiction except in the capacity of a High Court Judge; but these legislative pieces purportedly give jurisdiction to a High Court Judge otherwise than as a High Court

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[369] *Humphrey's Executor v. United States,* 295 U.S. 602 (1935); Cushman, 94-98 op cit.
[370] Article 191, Constitution.
[371] *Emmanual Masih* v. *Punjab Local Council*, 1985 SCMR 729; *Bakhsh Elahi* case, 1985 SCMR 291.

Judge. Same is the constitutional position of an Additional Judge of a High Court. Such a Judge cannot exercise constitutional power and jurisdiction because there is no oath of an Additional Judge in the Constitution. The oath administered to such judges is a usurpation of the oath of a judge of a High Court. In the presence of Additional Judge, the post of *the* judge of a High Court shall remain vacant. It is to be reflected upon that an Additional Judge cannot be appointed as judge of a High Court because **Article 193** visualizes practicing lawyers and judges of the sub-ordinate judiciary. An Additional Judge falls in none of these categories. A High Court consists of a chief justice and judges, not additional judges. Even **Article 209** of the Constitution is not applicable to an Additional Judge. How can this be that a person can exercise constitutional jurisdiction and power being an Additional Judge; but is not amenable to **Article 209** of the same Constitution? It is the right moment to cite Justice **Khosa** saying after having recitation from **Khalil Gibran** "Pity the nation that adopts a Constitution/ but allows political interests to outweigh constitutional diktat."[372] It may be added here with apology to Justice **Khosa** that 'pity the nation that closes eyes to *the* Constitution in the presence of the oath to preserve, protect and defend it.'

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[372] Criminal Original Petition No. 06 of 2012 in Suo Motu Case No. 04 of 2010 at http://www.supremecourt.gov.pk/web/userfiles/ file/crl.o.p.6of2012.pdf [last accessed on 05.04.2015]

CHAPTER FOUR: CONSTITUTIONALITY OF LAW-MAKING PROCESS

4.1 INTERNAL PROCEEDING DOCTRINE (IPD)

4.1.1 Definition and Significance:

A written Constitution envisages law-making function as the most important one and enshrines that "each of [the] … three limbs of the State enjoys complete independence in … [its] own sphere."[373] In fact, IPD signifies independence and integrity of the legislature.

4.1.2 Rationale:

The reasoning in *Ranasinghe* was built on the jurisprudence in *Trethowan* and *Harris*. Together these cases came to represent a rationalization of parliamentary sovereignty under a written constitution where special alteration procedures applied. The Privy Council's decision in *Ranasinghe* is significant for the width of the proposition that a parliament must comply with the procedural rules set out in the constitution or "instrument which regulates its power to make laws" irrespective of "the question whether the legislature is sovereign." [374]

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[373] *Liaqat Hussain v. Federation*, PLD 1999 SC 504.
[374] *Bribery Commissioner v. Ranasinghe* (1965) AC 172 at 197. (*Ranasinghe*).

The Government of India Act, 1935 had been enacted by the English Parliament. With the passage of the Indian Independence Act, 1947, British legislation removed the power of the United Kingdom Parliament to legislate for Pakistan, freed the Assembly of Pakistan from the paramountcy of British law; and amended the 1935 Act to permit Pakistan make laws. The Government of India Act, 1935 as amended in 1947 became the working constitution of Pakistan. It established a Westminster style parliamentary system of government. It dealt with legislative power, including the power of constitution-making.

The Constitution established a parliamentary system of government, with a bicameral parliament comprising the President of Pakistan, a House of Representatives and a Senate. **Articles 50-77** dealt with legislative power, including the power of constitutional amendment under **Articles 238-239**. Plenary power was conferred to make laws. But **Article 8** rendered void laws 'inconsistent with or in derogation of Fundamental Rights'. Rules framed under Article 67 provided that any Bill to amend or repeal any provisions of the constitution must be certified by the Speaker of the House to have been supported by two-thirds of the whole number of the members of the Parliament.

Position under **Sri Lankan Constitution**: The effect of the substantive and procedural restrictions on parliamentary sovereignty became the subject of legal and political debate. Ivor **Jennings** observed that in common with most parliaments governed by a written constitution, the powers of the Parliament of Ceylon under the 1946 Constitution were "not that of a sovereign legislature," using the term in the **Diceyan** sense. **Jennings** explained the minority protections as a limitation that **Ceylon** chose

"to impose on her legislature in the interest of her own people" which could be altered, and even abolished, by the Parliament following the procedures set out in Section 29(4).[375] Other scholars took a different view of the authority of the Parliament, arguing that Section 29(2) imposed an absolute limitation on the powers of the Parliament that could not be amended even through the procedure in Section 29(4). The power to amend the constitution in Section 29(4) commenced with the words "In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this [Constitution]." By framing the Parliament's power to amend the constitution in this way, it was argued that any amendments to the constitution were subject to the limitations set out in Section 29(2), so that Section 29(2) could not itself be amended following the procedure in Section 29(4). On this view, Section 29(2) was a permanent limitation on the legislative power of the Parliament within the confines of the 1946 Constitution.

This issue was never directly determined by a court. Instead, the leading case on Section 29 arose in the context of constitutional provisions dealing with the composition of the judiciary. *Ranasinghe* concerned the validity of a legislation that established a tribunal to hear charges of bribery, the members of which were appointed by the Minister of Justice. Mr. Ranasinghe was convicted by the tribunal, but appealed on the grounds that the legislation and therefore the tribunal constituted by it contravened provisions of the constitution dealing with appointments to the judiciary. The argument was upheld by the Supreme Court. Because the Bribery

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[375] W.I. Jennings *The Constitution of Ceylon*, 3rdEd (Oxford: OUP, 1953), 201.

(Amendment) Act was not certified to have been passed by a two-thirds majority as required by Section 29(4), the relevant provisions of the constitution applied, and the law was declared void. On appeal to the Privy Council, the government argued, inter alia, that the Parliament was sovereign subject only to the limitations in Section 29(2) and (3). Apart from these, it claimed, the Constitution of 1946 was ordinary legislation and could be amended or repealed by later inconsistent legislation, even by implication.[376] In rejecting the argument on appeal, the Privy Council affirmed that the requirements of s 29(4) were binding because 'a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make laws'.[377] The Privy Council also made some observations about the implications for parliamentary sovereignty of 'manner and form' provisions of this kind under a written constitution:

> No question of sovereignty arises. A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority e.g. when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the constitution there is only a bare majority if the constitution requires something more....The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.[378]

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[376] *Ranasinghe*, 181-2 op cit.
[377] *Ranasinghe*, 197 op cit.
[378] *Ranasinghe*, 200 op cit.

4.1.3 Its Foundation and Justification**:**

There is no denial to the truth that the Legislature has plenary power to make law[379] but it is also a recognized principle of constitutional law that **limitations imposed** by the **Constitution** itself would be observed by the Legislature strictly according to the spirit of the Constitution.[380] It seems that the judicial reasoning in *Ranasinghe* signifies something of interest for the purpose of change to legislative process. As such, ultimately an argument for the constitutional authority of the superior Courts to review the legislative process is sparked. It implies that constitutional scrutiny and judicial review of the legislative process have normative importance also. Let us attempt to scrutinize the underlying major arguments against constitutional scrutiny and judicial review of legislative process. It is being shown that there is doctrinal and theoretical incoherence in the prevalent position of resistance to constitutional scrutiny and judicial review of legislative process besides having negative consequences for a constitutional representative democracy. The starting point in this regard is the concept of 'irregularity' of proceedings in the legislature.

4.1.4 Irregularity of Proceedings**:**

The Constitution refers only to 'irregularity' saying that "validity of any proceedings in Parliament shall be called in question on the ground of any irregularity of procedure."[381] Although, no specific particulars or definition have been provided in

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[379]*Dawood Yamaha Ltd v. Baluchistan*, PLD 1986 Quetta 148.
[380]*Abdur Rahim Allah Ditta v. Pakistan*, PLD 1988 SC 670.
[381]Article 69, Constitution.

the Constitution of the term 'internal proceedings'; but this much is clear that 'illegalities' 'material irregularities' are not covered. So, there is no blanket cover available to anything and everything said and done just because it was 'inside' the Parliament. Support is also available for this proposition in the case of *Farzand Ali* wherein the Court observed that 'internal proceedings' "do not extend to anything and everything done within the House."[382] The protection to the proceedings is not absolute under the present Constitution, although, it was absolute under the 1956 and 1962 constitutions. As such, it must be kept in mind that the old case of *Ahmad Saeed Kirmani*[383] is not applicable any more. For discussion of this case, section 1.7 supra is referred. The position is the same under the Indian Constitution. Relevant Article is 212 in the Indian Constitution which has judicially been interpreted: "Article 212 seems to make it possible for a citizen to call in question in the appropriate court of law the validity of any proceedings inside the legislative chamber if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality."[384] It may be said, as the Indian view goes, that grounds like 'unconstitutionality' and 'illegality' can be made grounds to challenge legislative proceedings. The jurisdiction is ousted, prima facie, only "in respect of irregularity of procedure, but where the interpretation of the constitutional instrument is involved, the jurisdiction is unaffected."[385] It means that not only the rules of procedure can be constitutionally scrutinized but "[i]f the … [very] procedure is illegal and unconstitutional, it would be

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[382] *Farzand Ali v. Province of West Pakistan*, PLD 1970 SC 98 at 120.
[383] *Federation of Pakistan v. Saeed Ahmad*, PLD 1974 SC 151.
[384] *The Reference* case, AIR 1965 SC 845 at 868.
[385] *Muhammad Anwar Durrani v. Balochistan*, PLD 1989 Quetta 25.

open to be scrutinized in a court of law, though such scrutiny is prohibited if the complaint is no more than this that the procedure was irregular."[386]To understand the concept of the term 'internal proceedings', some analogy may be taken from the statutory law of the land.

Meaning of Irregularity: The word irregularity finds mention in **section 115** of the **Code** of **Civil Procedure**, 1908 (CPC). It provides that the revisional (supervisory) court can interfere if the subordinate court appears "to have acted in the exercise of its jurisdiction illegally or with material irregularity." So, three things come to mind: illegality, material irregularity, and irregularity. **Article 69** of the Constitution refers only to 'irregularity'. Thus, by analogy, what can be seen under section 115 CPC can also be seen under the Constitution? The only question that will remain will be the ascertainment as to what amounts to illegality or material irregularity, or simply, what is just irregularity.

Anything being illegal makes no difficulty because everything is illegal which is contrary to law. It has time and again been reminded by the judiciary that anything prescribed by law to be done in a particular manner must be done in that manner or not in any other manner at all. The expression 'material irregularity' has judicially been defined to mean committing some error of procedure in the course of the trial which is essential in the sense that it might have affected the ultimate decision.[387] In other words, if the subordinate court has taken a procedural step which is contrary to a

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[386]*The Reference* case, AIR 1965 SC 845 at 868.
[387]*N.S. Vinkatagiri Ayyangar*, PLD 1949 PC 26.

mandatory provision of the law, or has omitted to take a procedural step which is required by a mandatory provision of law to be taken, or has taken a procedural step which is contrary to a directory provision of the law, or to a general principle of law, and which in the final result has given to one party an advantage over the other *which it would not have got but for the fact that the step was taken or not taken, as the case may be*, would amount to material irregularity.[388] Now, the question is as to whether mentioning only 'irregularity' and not 'material irregularity' in **Article 69** of the Constitution, can the courts exercise jurisdiction on the grounds of material irregularity and illegality of procedure on the pattern of **section 115** CPC?

For this purpose, **Article 199(1)(ii)** of the Constitution will be referred to which empowers the High Court to declare that the State action in question has been done or taken without lawful authority and is of no legal effect. Two things are to be kept in mind: i) State's action, and ii) without lawful authority. State includes the Legislature.[389] In this regard, notice will be given to the Attorney-General or/and the Advocate-General under **Order 27-A** of CPC.[390]

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[388] *Zafar Ahmad v. Abdul Khaliq*, PLD 1964 (WP) Karachi 149.

[389] Article 7, Constitution.

[390] Order 27-A of the Code of Civil Procedure, 1906 (CPC): "In a suit [appeal. writ] in which it appears to the Court that any substantial question as to the interpretation of constitutional law is involved, the Court shall not proceed to determine the question until after notice has been given to the Attorney-General for Pakistan if the question of law concerns the Federal Government and to the Advocate-General of the Province if the question of law concerns a Provincial Government. … The Court may … order that … [the Government concerned] shall be added as defendant [respondent]…." See PLD 2002 SC 167; 2004 SCMR 1308; However, in case of urgency, the Court may proceed for the time being: 2002 CLC 512, otherwise non-compliance with this provision renders the judgment a nullity. PLD 1972 SC 723; A law should not be declared unconstitutional without following provision of this Order: PLD 1961 Lahore 536.

4.1.5 Interpretation of Constitutional Instrument:

It is to be noted that a written constitution is to be interpreted in accordance with its own language. The Privy Council observed, “During the argument analogies were naturally sought to be drawn from the British Constitution. The British Constitution is unwritten whereas in the case of Ceylon their Lordships have to interpret a written document from which alone the legislature derives its legislative power.”[391] But at the same time, it must be kept in mind that Pakistan got independence from Britain and the first provisional Constitution was the Government of India Act, 1935. So, continuity from the unwritten British Constitution onwards is to be kept in mind while interpreting the Constitution of 1973. Lord **Diplock** pointed out:

> The new constitutions ...[being] evolutionary not revolutionary ... provided for continuity of government through successor institutions, legislative, executive, and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.[392]

The case law in England is the result of a long and determined fight by Parliament for supremacy. Reluctance of the Courts to interfere with internal proceedings of Parliament is based on practicality and common sense as it stemmed from the structure of the institutions in England whereby if the Courts had jurisdiction in such matters, the final appeal to the House of Lords could place that House in the position

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[391] *Liyanage v. Reginam* [1966] 1 All E.R. 650, 658.
[392] *Hinds v. The Queen* [1976] 1 All E.R. 353 at 359.

of controlling proceedings of the Commons: something against which the latter had to fight for centuries.

In Pakistan, it would be impossible for Parliament to function if every time a member disagreed with the Speaker has to seek Court's ruling. Further, proceedings in Parliament depend upon respect of the members for impartiality and integrity of the Speaker. However, these matters now make part of the Constitution of Pakistan. The written Constitution should not be negated or reduced to fit the situation in the United Kingdom. Apart from other rights, one of the basic rights is contained in **Article 199** allows 'any party', 'any person', and 'any aggrieved person' to apply to the High Court for remedy against 'a person performing … functions in connection with the affairs of the Federation, a Province or a local authority'. Person includes any body politic or corporate, any authority of or under control of the Federal Government or of a Provincial government.'[393] A strict observance of the common law rule that the Courts cannot enquire into the internal proceedings of Parliament is inconsistent with **Articles 199** and **184(3)** of the Constitution. That is why **Article 69** refers only to 'the ground of irregularity of procedure' which cannot be made a ground of attack in a court of law. The Courts should allow enquiry into the internal proceedings of Parliament where there has been a breach of the Constitution.

[393] Article 199(5) of the Constitution.

4.1.6 IPD and its Grounds in *Tahir Ali Beg*, PLD 1976 SC 504:

To begin with, let us dispel a basic misconception. This pertains to the concept contained in **Article 69** of the 1973 Constitution and similar provisions in the earlier Constitutions. To catch the misconception, let formulate the premises: Pakistan has never had a revolutionary constitution; its constitutions were the result of the earlier experiences and failures. We got independence from the English nation. So, we also had in mind always the English Constitution:

> [T]here are ... important constitutional rules which are not "laws" in the sense that the courts will enforce them. These are the rules which regulate the internal affairs of Parliament, such as the rules governing the process of legislation and the conduct of debates. Many, but not all, of these "customs" of Parliament are now contained in the Standing Orders of the two Houses.[394]

So, by virtue of having in mind the English parliamentary tradition, the 'internal proceedings' in the British Parliament and the 'internal proceedings' in the Parliament of Pakistan are conceived and taken to be the same. The distinction between the two is not noticed: there in England, the 'proceedings' are regulated only and solely by the non-statutory rules known as 'Standing Orders' but in Pakistan, the 'proceedings' is mainly regulated by the Constitution itself and only supplemented by the **Rules** of **Business** of the National Assembly and the Senate. There, the English Parliament can make any law by simple majority including Rules of Procedure, law, and even a constitutional provision; but here, the people framed the Constitution through the

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[394]James, 117 op cit.

Constituent Assembly and provided that law shall be legislated with simple majority and any amendment in the Constitution can only be made with a greater majority of the total membership. The Rules of Business of either House is neither statutory nor having any force from the Constitution. They are just 'internal' rules; neither constitutional nor statutory: something of the status of a resolution. So, in the garb of such a rule, any violation of the Constitution cannot be saved by taking resort to **Article 69** of the Constitution. Just to have a spark in our mind, let us say that this Article has not made any mention to any Rules of Business with words 'internal proceedings', so the internal proceedings will be only that proceedings which are taken in the four-walls of the arena built with the bricks of the constitutional Articles; not with the bricks of the Rules of Business. A quick example may be like this: Suppose the Assembly instantly changes (or suspends) the Rules of Business and passes an amendment in the Constitution with simple majority, can such an amendment be valid? Nobody can say that do not ask this question because the 'internal proceedings' of the Assembly cannot be questioned in a Court of Law under the colour of **Article 69**. No, because such proceedings are not internal; they are against the provisions of the Constitution. It is the same thing with different words: "What's in a name? That which we call a rose/ By any other name would smell as sweet."[395] To say that the Parliament can make any law or any amendment in the constitution tantamounts to reinforce the **Nazi's** thinking that '"[t]he constitution does

[395] William Shakespeare, *Romeo and Juliet*, II. ii. 43. At https://shakespeare.folger.edu/downloads/pdf/romeo-and-julietPDFFolgerShakespeare.pdf [last accessed on 15.08.2914].

not stand above the legislature, but rather at its disposition."'[396] This is misconception and is wrong. It is the other way round. The Constitution stands above the legislature and the legislature is at its disposition.

In *Tahir Ali Beg*,[397] the facts in brief were that Beg was elected to the Assembly on party ticket. One Kausar Ali Shah delivered a resignation purported to be of Beg. The Speaker accepted the same. The matter was challenged by Beg in Court on the plea that the resignation had been obtained on pistol point. His ground was that of coercion in the writ petition. The High Court dismissed the writ petition holding that the duty lies with the Chief Election Commissioner (CEC) to see the genuineness of the resignation and not with the Speaker. The issue was agitated before the CEC who also dismissed the petition with the observation that the question whether the resignation was voluntary or not was for the Speaker. Another writ petition was filed in the High Court. The High Court took the view that the CEC was under a constitutional duty to arrange for a by-election. So, another person was elected in the by-election. Another writ petition was filed which was dismissed in limine. The Supreme Court held that the duty of the Speaker was not merely to transmit the resignation to the CEC; the Speaker duty was to enquire into and determine the genuineness and voluntary character of the resignation. The question whether Beg had really resigned as

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[396]Peter Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy and Dictatorship in Germany and France, 1920s-1950s', [2004] The Yale Law Journal 1341-1415 at FN 87 [internal quotation omitted].

[397] *Tahir Ali Beg*, PLD 1976 SC 504.

member related to the constitution of the Assembly and did not relate merely to the 'internal proceedings' of the House.[398]

4.1.7 Legislative Lists:

The English Legislature is a trinity, composed of Queen, Lords and Commons. The period between the time when Parliament is summoned and its termination by dissolution or by lapse of time is called "*a parliament*".[399] Each parliament is divided into *sessions*, which is a formal thing, and is something like a little parliament in itself. The Queen *sommons* Parliament at the beginning of a session and *prorogues* it at the end. Prorogation affects both Houses, but either House may *adjourn* of its own motion during a session.[400]

Parliament performs two original functions: i) no public money may be expended without the sanction of parliament, and ii) legislation. Besides, modern parliaments are the "watch-dogs" of the nation, having the power and duty of controlling the government. It is the principle of "Responsible Government". Therefore, the House is master of the government because there is constitutionally recognized Opposition Party ready to take over advantage of the mistakes. Parliament exercises its power of control in two ways. Firstly, a salutary check is kept upon the doings of ministers and department during the daily "question time" in the House of Commons: an unsatisfactory answer, given due publicity in the Press, may have a material effect

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[398]Summarized in Fazal Karim, 199-200 op cit.

[399] James, 124 op cit.

[400] James, 123; see Article 50 pf the Constitution: "There shall be a Parliament of Pakistan consisting of the President and two Houses to be known respectively as the National Assembly and the Senate."

upon the popularity of a government. Secondly, debates, whether in the commons or in the Lords, may show weakness in the administration. Debates are published – in particular in *Hansard*'s Reports – and their substance is transmitted by the media to the nation; it is through debates that the electorate appraises political personalities and governments.[401]

At the core of the new philosophy of government under the 1973 Constitution was the concept that the government could do certain things and could not do other things. To be acceptable to the people and to extract obedience from them, it must mirror their needs and aspirations. It is a truth to be remembered that "[e]xamined in isolation from the political, cultural and socio-economic forces at work in the society, a constitution seems drab and lifeless."[402] The Framers in the Constituent Assembly were in tune with the sentiments and attitudes then vogue in the left over Pakistan. The Constitution is the first place to look to at the legislative process when the task of legislation is undertaken.[403]

A Bill in the Federal Legislative List may originate in either House of the Parliament. It seems as if the people are left with no say in the initiative of an idea for legislation. This is as clear as you can get. When the legislators are elected, the electorates are right to expect of them to ably represent them, because there is no authority reserved to initiate legislative action if they do not sincerely legislate. Further, there is no authority retained by the people to reject legislative action of which they disapprove.

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[401] James, 125-126 op cit.
[402] K.C. Wheare, *Modern Constitutions* (Oxford: Oxford University Press, 1966), 98.
[403] Article 70 of the Constitution.

Interestingly enough, the Constitution is quiet on the question of how long or how hard the members of the legislature should work.[404]

There was "the rise of the colonial assembly in the first three-quarters of the eighteen century", [405] and "the most conspicuous feature – and one that was common to nearly all the colonies – was the rise of the colonial assembly with its growth to self-conscious activity and *de facto* independence of royal control."[406] Jack P. **Greene** has stated that "the rise of the representative assemblies was perhaps the most significant political and constitutional development in the history of Great Britain's overseas empire before the American Revolution."[407] The concept of the 'citizen legislature' goes back to colonial time and is based on the precept that if the lawgivers have to go home and work under the laws they created, they will be more careful about passing laws. Then, too, there was not all that much for legislatures to do two hundred years ago. The legislature could meet in January when the ground was too frozen to put in crops, could debate and socialize and pass what few laws needed passing – and they could still be home in plenty of time for the spring plowing.

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[404] Article 52 of the Constitution: "The National Assembly shall … continue for a term of five years…."; Article 54(2) of the Constitution: "There shall be at least three sessions of the National Assembly every year…."

[405] Alison G. Olson, 'Eighteen-Century Colonial Legislatures and Their Constituents', *The Journal of American History,* September, 1992, 543, available at http://www.jstor.org/stable/2080046 [last accessed on 16.1.2019] (internal quotations were omitted by me). See Barnard Baily, *The Origins of American Politics* (New York: Publisher is not decipherable, 1966); George Drago, Roots of the Republic (New York: Publisher is not decipherable, 1974).

[406] Ibid, Olson (internal quotations were omitted by me).

[407] Jack P. Greene, 'The Role of the Lower Houses of Assembly in the Eighteenth Century Politics', *Journal of Southern History,* 27 (Nov. 1961, 451), available at Jack P. Greene, Role of the Lower Houses of Assembly in the 18th (paperzz.com) [last accessed on 17.-1.2019].

It is the basic concept of a federation that there shall be distribution of the legislative powers between the Centre and Units. In the case of the Federation of Pakistan, they are called Federal Government and the Provincial Governments. The legislative power has been distributed through lists.[408]

4.1.7.1 Federal List:

Under the Government of India Act, 1935, the matter was governed by sections 99, 100, and 107, and under the Constitution of Pakistan, 1956, **Articles 105** and **107** contained such provisions. The 1962 Constitution contained one **Article 131** to this effect. In all these Constitutions, the Legislatures were unicameral. The 1973 Constitution provided two legislative lists, namely, Federal Legislative List and Concurrent Legislative List.[409] Parliament has exclusive jurisdiction to legislate with respect to matters in its own list. Under the 18th Amendment, now, there is only one Federal Legislative List, and the rest of the subjects are for the provinces to legislate upon. However, criminal law, criminal procedure and evidence are the subjects upon which both the Legislatures have concurrent powers.[410]

4.1.7.2 Concurrent List:

Both the Parliament and the Provincial Assemblies had concurrent jurisdiction to make laws with respect to mattes in the Concurrent List. The legislative power is "subject to the Constitution" which embodies the constitutional principle that the

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[408]Articles 141-144, Constitution.
[409] Fourth Schedule, Part I and Part II, Constitution.
[410]Article 142 and 142 (b), Constitution.

legislative power is not unlimited.[411] Now after the 18th amendment, there is no Concurrent List; as such the provinces have the powers to legislate exclusively on any subject not mentioned in the Federal List, of course subject to the Constitution.

Are there any moral restraints on the legislative competence of Parliament? **Coke** J and **Hobbes** argued that there are basic tenets of 'natural law' which could not be disturbed, invoking the concept of natural rights inherent in man. In *Dr. Bonham's Case*[412] **Coke** J said 'there could be a law of nature or reason superior even to an Act of Parliament'. **Blackstone** provided tacit acceptance of the possibility of natural law prevailing over statute. If it is not so, then consequently, in **Hobbes's** famous phrase, the life of man is "solitary, poor, nasty, brutish, and short."[413]

4.1.7.3 Residuary Subjects:

Matters not mentioned in either of the Lists were called the Residuary Subjects. Only the Provincial Assemblies had the exclusive power to make laws with respect to those matters.

The Government of India Act, 1935 contained three lists for the distribution of the legislative powers, namely, the Federal List, the Concurrent List, and the Provincial List. The Constitution of Pakistan, 1956 had the same three legislative lists. The Constitution of Pakistan, 1962 had only one legislative list for the central legislature and the residuary subjects were for the provinces to legislate upon.

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[411]Articles 141- 142, and Chapter 1, Part II, Fundamental Rights, Constitution.
[412]*Bonham's Case* (1610) Co Rep 113b.
[413]T. Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1991), ch 13, end of para 9.

It is to be noted that the Constitution follows none of its predecessors. It has two legislative lists. Residuary subjects have been assigned to the provinces. The Federal Legislative List has been sub-divided into two parts. The Constitution Provides:

> Subject to the Constitution, Majlis-e-Shoora (Parliament) may make laws (including laws having extra-territorial operation) for the whole or any part of Pakistan, and a Provincial Assembly may make laws for the Province or any part thereof.[414]

Parliament makes laws exclusively on the subjects given in the Federal Legislative List. It has also power to make laws with respect to any matter in the concurrent Legislative List. The Provincial Assembly can make laws on the subjects in the Concurrent Legislative List. It has exclusive power to make laws in respect of any matter not mentioned in either of the Lists.[415] It is of interest to note that two or more Provinces may request the Parliament by resolutions to "regulate any matter not enumerated in either list … and Majlis-e-Shoora (Parliament) … [may] pass an Act … but any act so passed may … be amended or repealed by Act of the Assembly of that Province."[416]

Powers of the legislature are subject to the Constitution, and particularly Fundamental Rights enshrined as they "impose a fetter on the exercise by the Legislature, the executive and the judiciary of the plenitude of their respective powers."[417] Similarly, there are other provisions in the Constitution putting limitations on the Legislatures.

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[414]Article 141, Constitution.
[415]Article 142, Constitution.
[416] Article 144, Constitution.
[417]*Hinds v. The Queen*, (1976) 1 All ER 353 at 364.

For example, no tax can be imposed on state property and any law in this respect would be void.[418] The **Supreme Court** of **Pakistan** has provided valuable guidance in this regard by holding that:

> [T]he entries contained therein [in the Lists] indicate the subjects on which a particular legislature is competent [to legislate;] but they do not provide any restriction as to the power of the legislature concerned. It can legislate on the subject mentioned in an entry so long as it does not violate any fundamental right as the legislative power is subject to the constraints contained in the Constitution itself.[419]

It was judicially observed that:

> To determine the Constitutional validity of an Act, its pith and substance should be considered. In other words, where a law is impugned as ultra vires, it is the true character of the legislation that has to be ascertained. That is, it must be ascertained whether the impugned legislation is directly in respect of the subject covered by any particular Article of the Constitution or touches the said Article only incidentally or [in]directly. If it be found that the legislation is in substance one on a matter which has been assigned to the Legislature, there can be no question of its [in]validity even though it might incidentally infringe on matters beyond its competence.[420]

The Parliament can legislate for the whole of Pakistan while a Provincial Assembly has been restricted to its own territory.[421] But it is to be noted that the distribution of power is qualified in favour of the Provinces in so many respects that as a matter of constitutional law and political science, it can be described as the Constitution of a

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[418]Article 165, Constitution; *Punjab Province V. Federation of Pakistan*, PLD 1956 SC 72.

[419]*Elahi Cotton Mills v. Pakistan*, PLD 1997 SC 582 at 622; contra view *Nasrullah Khan Hanjra v. Government of Pakistan*, PLD 1994 SC 23.

[420] *Commissioner of Income Tax v. Abdul Ghani*, PTD 967.

[421]*Hashwani Hotels v. Punjab*, PLD 1981 Lah 211.

Federation. The Federal Legislature has not been made a judge of its own jurisdiction and if it makes a law in respect of a matter which does not specifically falls within the sphere of the Federal Legislature, it can be questioned on the ground of want of jurisdiction.[422] The Constitution provides that whenever there is a dispute between a Province and the Federation, the Supreme Court will have exclusive Jurisdiction. When a provincial law is inconsistent with federal law, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid. Such a constitutional understanding is called as '**The Supremacy Clause** whereby the Constitution is supreme, then the federal law, and then the provincial law is to be applied. In the U.S. "[w]hen a federal and state law is in conflict, the federal law is supreme."[423] In *Benazir Bhutto* v. *President of Pakistan*, PLD 1998 SC 388, it was held:

> Constitution is the supreme law of the land to which all laws are subordinate. Constitution is an instrument by which government can be controlled. The provisions in the Constitution are to be considered in such a way which promotes harmony between the different provisions and should not render any particular provision to be redundant as the intention is that the Constitution should be workable to ensure survival of the system which is enunciated therein for the governance of the country.

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[422]PLD 1963 Dacca 865.

[423] *Gibbons v. Ogden*, 22 US 1 (9 Wheat) (1824); Cushman, 186-191; *Supreme Court Case Studies* (Columbus, Ohio: McGraw-Hill Companies, Inc., n.d) (The booklet contains 82 U.S Supreme Court studies. These cases include landmark decisions in the American government that have helped and continue to help to shape the nation, as well decisions dealing with current issues in American society. Every case includes background information, the constitutional issue under consideration, the Court's decision, and where appropriate, dissenting opinions.) available at http://www.bville.org/tfiles/folder3891/sccs.pdf [last accessed on 29.03.2015].

In Pakistan, the position is the same. But now after the 18th amendment in the Constitution, no such conflict is possible as there is no concurrent legislative list except procedural law.

4.2 ORIGINATION OF BILL

It is interesting to note that under the parliamentary system of governance, each and every gesture matters. It is of great importance to assign specific role to each Member of a House of the Parliament while initiating the idea for legislation. Who thinks what and when is the soul of representative democracy. **Shakespeare** has said, "There is nothing either good or bad, but thinking makes it so."[424] I**qbal** may be referred here:

> The growth of republican spirit and the gradual formation of legislative assemblies in Muslim Lands constitute a great step in advance. The transfer of the power of Ijtihad from individual representatives of schools to a Muslim legislative assembly which, in view of the growth of opposing sects, is the only possible form ijma can take in modern times, will secure contributions to legal discussion from laymen who happen to possess a keen insight into [public] affairs.[425]

Article I, Section 7, Clause 1 of the **U.S. Constitution** provides that "[a]ll bills for raising revenue shall originate in the House of Representatives…."[426] It means that it is the constitutional scheme that "Tax bills must start in the House of Representatives…."[427] This point came for adjudication before the U.S. Supreme

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[424]William Shakespeare, *Hamlet*, II, ii, 259 op cit.

[425] Allama Iqbal, *The Reconstruction of Religious Thoughts in Islam* (Lahore: Ashraf Press, 1968), 138.

[426] James V. Saturno, 'The Origination Clause of the U.S. Constitution: Interpretation and Enforcement, CRS Report for Congress Prepared for Members and Committees of Congress, 2011', available at http://fas.org/sgp/crs/misc/RL31399.pdf [last accessed on 13.03.2015].

[427]O'Connor, 405 op cit.

Court in *Munoz-Flores*.[428] The argument was that the Bill had originated in the Senate and, thus, violated the **Origination Clause**. The Government raised the plea of nonjusticiability, and also argued that after the signature of Presiding Officer, it will be conclusively presumed that the Bill has either originated in the House or that it is not a revenue bill. The reasoning given was that a "judicial invalidation of a law on Origination Clause grounds would evince a lack of respect for the House's determination." The Court rejected the plea of nonjusticiability by enunciating the principle that "[o]ur system of government requires that … courts [may] … interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict … cannot justify the courts' avoiding their constitutional responsibility."[429] The Act was declared to be unconstitutional. In Pakistan, **Article 73** of the Constitution provides that "… a Money Bill shall originate in the National Asembly…." A question arose as to whether levy of fee was covered by the definition of Money Bill. The Court held that fee was not covered as such and therefore fee could only be imposed through a Bill which was passed by the National Assembly as well the Senate before presenting to the President for assent. It was declared that when fee was imposed through a Money Bill, that was in violation of the Constitution.[430]

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[428] *United States v. Munoz-Flores*, 495 U.S. 385 (1990) at 390-391; US v. Butler, 297 U.S. 1 at 73 (where the Court found that the setting of quantity and quality of agricultural production was a matter reserved to the state governments, and the Agricultural Adjustment Act of 1933 was invalidated on this score.); for an academic discussion, see Louise Weinberg, 'Political Questions and the Guarantee Clause', 65 U. Coco. L Rev 849 (1994).

[429] Ibid, at 390-91.

[430] *Messrs Fatima Enterprises Ltd* v. *The Federation of Pakistan* 1999 MLD 2889; Articles 70,72 and 73 of the Constitution.

As per **Article 70** of the Constitution, a Bill in the Federal Legislative List may originate in either House of the Parliament. It seems as if the people were left with no say in the initiative of an idea for legislation. That is as clear as you can get. When we elect legislators, we are right to expect of them to ably represent us, because we have not reserved an authority to initiate legislative action if they do not sincerely legislate for us. We have also not retained the authority to reject legislative action of which we disapprove. Interestingly enough, the Constitution is quiet on the question of how long, or how hard, the members of the legislature should work, although, life and yearly minimum sessions of the National Assembly are available therein.[431]

4.2.1 Constitutional Amendment**:**

There is a special mechanism for a constitutional amendment.[432] In a sense all the provisions of the Constitution are "entrenched provisions", the purpose being to ensure that the provisions of the Constitution should not be altered "without mature consideration by the Parliament and [without] the consent of a larger proportion of its members than the bare majority required for ordinary laws."[433] This is because the Constitution wanted to protect itself from encroachment, abrogation, abridgement, or infringement. The Constitution is itself concerned with future abuses of authority, usually state authority, and it is largely pre-occupied with the possibility of abuse of

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[431] "The National Assembly shall ... continue for a term of five years...." Article 52, and "There shall be at least three sessions of the National Assembly every year...." Article 54(2), Constitution.

[432]Articles 238-39, Part XI, Constitution.

[433]*Hinds v. Queen*, (1976) 1 All ER 353 at 361 (Lord Diplock).

authority by the legislature or the executive.[434] That is why the Constitution of Pakistan has entrenched itself from amendments in the ordinary way.

A democratic Constitution has to be particularly responsive to changing conditions, since a Government founded on the principle of popular sovereignty "must make possible the fresh assertion of the popular will as that will change[s]."[435] Adopting a combination of the 'theory of fundamental law', which underlies the written constitution of the United States with the 'theory of parliamentary sovereignty' as existing in the United Kingdom, the Constitution of Pakistan constituent power upon the Parliament subject to the special procedure laid down therein.[436] Dr. B.R. **Ambedkar** tells the logic of such insight in the following words:

> The Constituent Assembly in making a Constitution has no partisan motive. Beyond securing a good and workable Constitution it has no axe to grind. In considering the Articles of the Constitution it has no eye on getting through a particular measure. The future Parliament if it met as Constituent Assembly, its members will be acting as partisans seeking to carry amendments to the Constitution to facilitate the passing of party measures which they have failed to get through Parliament by reason of some Article of the Constitution which has acted as an obstacle in their way. Parliament will have an axe to grind while the Constituent Assembly has none. That is the difference between the Constituent Assembly and the future Parliament. That explains why the Constituent Assembly though elected on limited franchise can be trusted to

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[434]*Maharaj v. A.G. of Trinidad*, (1978) 2 All ER 670 at 682; Yaniv Roznai, 'Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers', PhD thesis. (The Courts in Pakistan held in *Abdul Wali Khan* case PLD 1976 SC 57 and in *Pakistan Lawyers Forum V. Federation of Pakistan* PLD 2005 SC 719 that a constitutional amendment can be challenged if it has been enacted in a manner not stipulated by the Constitution itself.

[435]Encyclopaedia of Social Sciences, New York, 1951, Vol. II, 21.

[436] See Articles 38 and 39 of the Constitution.

pass the Constitution by simple majority and why the Parliament though elected on adult suffrage cannot be trusted with the same power to amend it.[437]

The Constitution of Pakistan provides:

> 238. Amendment of Constitution: Subject to this Part [XI], the Constitution may be amended by Act of Majlis-e-Shoora (Parliament).
>
> 239. Constitution, Amendment Bill: (1) A Bill to amend the Constitution may originate in either House and, when the Bill has been passed by the votes of not less than two-thirds of the total membership of the House, it shall be transmitted to the other House. ... (4) No amendment of the Constitution shall be called in question in any court on any ground whatsoever. ... [I]t is hereby declared that there is no limitation whatever on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution.

The amending Article in the Indian Constitution is as under:

> 368. Power of Parliament to amend the Constitution and Procedure therefor: 91) … Parliament in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article. … (4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article … shall be called in question in any court on any ground. … (5) [I]t is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

Clauses 4 and 5 have been declared invalid by the Indian Supreme Court.[438] Further, it has judicially been declared that the Constitution can be amended only by

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[437] *C.A. Deb*., Vol. VII, 4 Nov. 1948, 43-44 referred here from 'Constitution Amendment: *Nature and Scope of the Amending Process*', 4, at http://164.100.47.134/intranet/CAI/CANature.pdf [last accessed on 20.06.2015]; *Shankari Prasad v. UOI*, AIR 1951 SC 455; *Mangal Singh v. Union of India*, AIR 1967 SC 944.

[438] *Minerva Mills Ltd v. Union of India*, (1980) 2 S.C.C. 591.

Parliament and in the manner provided therein and any attempt to amend the Constitution by a Legislature other than Parliament and in a manner different from that provided for will be void and inoperative.[439] The Indian Supreme court clarified the position in the following terms:

> Having provided for the constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House) article 118), the makers of the Constitution must be taken to have intended Parliament to follow that procedure, so far as it may be applicable consistently with the express provisions of article 368 when they entrusted to it power of amending the Constitution.[440]

The Constitution of Pakistan provides:

> 238. Amendment of Constitution: Subject to this Part [XI], the Constitution may be amended by Act of Parliament.
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> 239. Constitution, Amendment Bill: (1) A Bill to amend the Constitution may originate in either House and, when the Bill has been passed by the votes of not less than two-thirds of the total membership of the House, it shall be transmitted to the other House. … (4) No Amendment of the Constitution shall be called in question in any court on any ground whatsoever. …[I]t is hereby declared that there is no limitation whatsoever on the power of Parliament to amend any of the provisions of the Constitution.

It is clear from the above provisions that the Constitution can be amended, and it was wise with the Constituent Assembly to so provide because the Constitution cannot remain stationary forever as it is a living one. It was thought that it could not be a

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[439] *Abdul Rehman Jamaluddin v. Vithal Arjun*, AIR 1958 Bombay, 94; Anti-defection clause, *Kihota Hollohon v. Zachilhu,* (1992) 1 S.C.C. 309.

[440] *Shankari Prasad Singh v. Union of India*, AIR 1951 SC 458.

cumulative end to a journey that started in the year 1947. But the question is that what will be the nature and extent of such amendments by the subsequent Legislative Parliament?

Two things may be kept in mind to understand the issue: one, constituent power, and two, legislative power. If it is said that the constitution can be amended to any extent without any limitation, and nobody would ask any question in this regard, then it would mean in plain language that the constituent power merged completely in the legislative power. So, then, as per this assertion, there will be no difference between legislative and constituent power. Logically, then, Parliament may be supreme in the sense that it can do anything it wishes. On the other hand, if it is said that constituent power ceased with the expiry of the constituent assembly after framing the constitution in the year 1973, then only the legislative power is available to any subsequent parliament of Pakistan, and exercising such legislative power, it cannot amend the constitution according to its wishes. Of course, such 'amendment of the Constitution shall be called in question in any court on any ground whatsoever....' and 'there is limitation on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution.**'** The matter got more complicated now.

In Pakistan, the Constituent Assembly was itself not absolute in its power. It framed the Constitution deriving power from the people of Pakistan who were also not its original owners. We said in the preamble: "Whereas sovereignty over the entire Universe belongs to Almighty Allah alone and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust...." In the year 1973, we said, "And whereas it is the will of the people of Pakistan to establish an

order... [w]herein shall be guaranteed fundamental rights." By saying so, the people of Pakistan entrusted the sovereign power being with them as "a sacred trust" to the constituent assembly. The members of such assembly "establish[ed] an order" by "adop[ting], enact[ing] and giv[ing] to ourselves, this Constitution." Even the people of Pakistan shall exercise the power of the sacred trust "within the limits prescribed by Him [Almighty Allah]." So, the givers of the power to the representatives in the constituent assembly were not without limits, *a priori*, the holders, the recipients of such power cannot become without limits. Further, it shall be noted down that the power shall be exercised by "the State" as an institution in the form of the Parliament as defined in **Article 7** of the Constitution. It means that this State is not prior to the Constitution; it is the very creation of the Constitution. The people of Pakistan first adopted and enacted the Constitution "through our representatives in the National Assembly." Mark the words: "in the National Assembly." It was only that National Assembly which was competent to frame the Constitution, not any subsequent assembly. It means that in Pakistan, every subsequent Assembly will be only and only a legislative assembly. That is why the Constitution has to give the subsequent legislative parliament a power of only amendment *in the Constitution*. The subsequent assembly cannot frame a new constitution, why, because it is not a constituent parliament. The conclusion is the same whether to say that the Parliament cannot frame a new constitution because it is not a constituent parliament or to say that because it cannot make a new constitution, therefore, it is not a constituent parliament. It is also pointed out that unlike the Indian Constitution, the Constitution of Pakistan does not use the word "constituent" while giving power of amendment in the Constitution. So, such an amendment will not be a part of the Constitution in the

sense of being a constituent part of the constitution. It will just be a legislative part of the **Constitution** having been legislated with a 2/3rd majority of the members of the Parliament.[441] An analogy may be given of a constituent college and an affiliated college of a university: one is part while the other is not part of the university. That is why the Americans just append a constitutional amendment to the **U.S Constitution**: they do not incorporate an amendment in the main body of the Constitution; to keep it distinct from the constituent part of the Constitution; how wise! The English are wiser than the Americans: they do not refer to any written constitution to avoid such complication just to make any law including a written constitutional provision in the unwritten constitution; how illogical! The Pakistanis are the wisest of both: they made **Article 63A** (anti-defection) in the constitution by providing a sword on the members of parliament if any member votes against the wishes of the Head of the Political Party.[442] Meaning thereby that in Pakistan, a single man can make any amendment in the constitution: a constitution by a single man! How sweet! Perhaps, the people in power knowingly and deliberately forget that the amending power is subject to Part XI only of the Constitution; not to any other Article including **Article 63A**. "Knowingly and deliberately"! Because do whatever you can in Pakistan because nobody cares. If challenged, then the Courts in Pakistan will never suspend the impugned provision, even of an ordinary law, what to say of a constitutional provision; and then it will take

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[441] *District Bar Association V. Federation of Pakistan*, PLD 2015 SC 401.

[442] Montesquieu, *Spirt of the Laws,* VIII, c.12 "When once a republic is corrupted, there is no possibility of remedying any of the growing evils but by removing the corruption and restoring its lost principles; every other correction is either useless or a new evil." Thomas Jefferson on the necessity of the impeachment provisions in the U.S Constitution, copied into his Commonplace Book, at https://famguardian.org/Subjects/Politics/ThomasJefferson/jeff1800.htm [last accessed on 27.09.2014].

more than five years to decide such a question: the five years tenure of the ruling party will be over and the coming party will devise another technique by repealing the impugned provision by providing that the repeal "shall be effective from the next ... election [and] after the commencement of the ... [amendment] Act."[443]

Now coming to the point whether constituent power has merged in the coming parliaments or not, it has been shown that such power has not gone forward after the framing of the Constitution because such constituent power was available to "the National Assembly" of the year 1973. See that there is a limited life of a particular National Assembly which is five years. That is why **Article 90 (9)** provides: "A Minister who for any period of six consecutive months is not a member of the National Assembly shall, at the expiration of that period, cease to be a Minister and shall not before the dissolution of that Assembly be again appointed a Minister unless he is elected a member of that Assembly...." Before going to the question of process-competence of parliament to make amendments in the Constitution, let us remind ourselves of the concept of judicial review with a further reminder that in the Constitution, there are no express words conferring such a power to the judiciary either under **Article 199** or **Article 184** of the Constitution as far as legislative actions/Acts are concerned. But in practice, at least, judicial review of legislation is entertained with the purported colour of the said Articles. So, it may be said generally

[443] Article 59, Constitution.

that judicially review is understood in the context of the court being interested only in the validity of a public body's decision and whether it was good.[444]

Now, the procedural aspect of amendment is the only way out to be seen if the above concept of judicial review is taken as the only legitimate power available to the Courts in Pakistan. It has been provided that "[s]ubject to this Part [XI], the Constitution may be amended...." It has further been provided that, unlike other legislation, "when the Bill has been passed by the votes of not less than two-thirds of the total membership of the House, it shall be transmitted to the other House." The other step is the same in the other House, however, "[i]f the Bill is passed with amendment ... and if the Bill as amended ... is passed by the ... [House of origination] by the votes of not less than two-thirds of its total membership it shall ... be presented to the President for assent." The point to bring to notice is the missing words of "joint sitting" as are available in Article **70 (3)** of the Constitution which is meant for ordinary legislation; and there "all decisions at a joint sitting shall be taken by the votes of the majority of the members present and voting."[445] For constitutional amendment, there will be 2/3rd majority of "the total membership of the House" and that too without any joint sitting. Consequently, any vote casted because of the fear of **Article 63A** or under the direction of the Party Head will render the amendment invalid. It has been observed judicially, although in a slightly different context, that machination in voting deprives minority of its right because:

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[444] A.P. Le Sueur and J.W. Hergerg, *Constitutional Law* (London: Cavendish Publishing Limited, 1995), 156.

[445] Article 72 (4), Constitution.

> in the case of legislation to amend the constitution … [t]he minority are entitled … to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.[446]

Even the nature of a valid amendment in the Constitution will remain just a sub-constitutional provision, how, let us see.

The term "constitutional amendment" is a misnomer. It has not been used in the Constitution; rather, the Constitution uses the words: "A Bill to amend the Constitution ... may be ... by Act of Majlis-e-Shoora (Parliament)." That is, the end product of a Bill will first become an Act of Parliament, and after that it will insert an amendment in the Constitution. An Act has been defined in **Article 260** to the effect that an '"Act of Majlis-e-Shoora (Parliament)" means an Act passed by … Parliament … and assented to, or deemed to have been assented to, by the President.' It may be read as an Act of Parliament means an Act having been passed by the Parliament in the form of a Bill and then having been assented to by the President. Because a passed Bill will remain an Enrolled Bill till the time it is assented to by the President of Pakistan or such assent is deemed to have been given. When the Enrolled Bill receives such assent, the same is then called an Act of Parliament. Thus there is no difference provided by the Constitution between an Act having been passed with simple majority of the members present and voting and one having been passed with two-thirds majority of the members present and voting, and one having been passed with two-

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[446] *Ranasinghe* (1964) 2 All ER 785 at 793 op cit.

thirds majority of the total members of the Parliament. The end product in all situations will remain the same: Act of Parliament, a Parliament which is a legislative institution; not a constituent institution/assembly/convention. Such a venture cannot be intermingled with the constituent venture of the entire nation.[447] Otherwise, there will be no constitutional State; rather we will again revert back to a primitive society which does anything for the first time to organize itself. We have ordained an order by establishing the State through the Constitution of 1973. Meaning thereby, it is the final and ultimate form of a society so far known to civilized people. Let us not disturb it for just our personal follies; and instead let us devote the time to the further building of the Nation. But the few elites spent the precious time on making useless, nay, fraudulent amendments in the Constitution.

The Constitution of 1973 has undergone thirty-six amendments, many of which pertain to the same few articles that delegate power to the heads of state: the Prime Minister, the President or the Chief Executive.[448] It is the right time to frankly admit and acknowledge that the Constitution of Pakistan is not that which is just written or to be written on a parchment; it is that which is registered in the mind of the minds of the people of Pakistan finally in the year of 1973; as there had been played havocs with the previous state of the Nation since independence in the year 1947 till 1973. So, let cut the long discussion short, the conclusion may be sated in these simple

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[447] See Michele Brandt, et al, *Constitution-making and Reform: Options for the Process* (Geneva-Switzerland: Interpeace, 2011) [a 402 pages Handbook].

[448] S. A. Rabbani, *List of Amendments in the Constitution of Pakistan*, at http://nationalassembly.tripod.com/am.htm [last accessed 20.12.2015] Furan Muhammad , ' Exploring Power Politics and Constitutional Subversion in Pakistan: A Political and Constitutional Assessment of Instability in Pakistan', Loyola University Chicago International Law Review, Volume 7, issue 2, 229.

words: a valid amendment in the Constitution will remain an amendment in the Constitution in the sense that it will be in consonance with the Constitution if it wants to remain in the neighbourhood of the Constitution; however, it will never remain a constituent part of the Constitution. Otherwise, it will be thrown out just like the English thrown away by the Indians in the year 1947. The position can be stated in a summary way as under:

> The doctrine of judicial review is ingrained in the concept of separation of powers, the main purpose of which, it appears, is to institute a system of checks and balances. Judicial review would appear therefore to be the principal tool at the disposal of the judiciary for *checking* the legislature.[449]

4.2.2 Bills:

An inchoate Act is called a "*Bill*". Bills are divided into "clauses" which subsequently become "sections" in the Acts. Bills fall into two main categories, "*Public*" Bills which deal with matters of public importance, and "*Private*" Bills which deal with local matters or matters affecting individuals. The latter must not be confused with a third category, "Private Members" Bills, i.e. Bills whether public or private which are introduced by ordinary members (in the sense that either the Member does not belong to the ruling party or the bill is not introduced by the minister-member). Public Bills may be subdivided into "ordinary" Public Bills and "*Money Bills*".[450]

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[449] A.P. Le Sueur and J.W. Hergerg, *Constitutional & Administrative Law* (London: Cavendish Publishing Limited, 1995), 156 (italic in the original).

[450] James, 126-27 op cit.

4.2.3 Ordinary Bill**:**

A Bill may originate in either House and it shall "if passed by the House in which it originated, be transmitted to the other House; and if the Bill is passed without amendment by the other House also, it shall be presented to the President for assent."[451] If the other House rejects it, or does not pass it within 90 days, or passes it with amendment(s), a joint sitting of both the Houses at the request of the first House shall be requisitioned.[452]

4.2.4 Money Bill**:**

The procedure of a Money Bill is different from the ordinary bill. It "shall originate in the National Assembly" and shall not be transmitted to the Senate for the purpose of passing it. However, the Senate may make recommendations which may be considered by the National Assembly at the time debating the Bill. It means that the directly elected representatives have the exclusive authority and responsibility in the money matters.[453] But see the machination of the parliamentary government.

Article 90 of the Constitution provides that a senator shall remain a Federal Minister for six months only, and he shall not be re-appointed as federal Minister in the life time of that National Assembly. This is one aspect that Minister if happened to be a Senator, so he will be only for six months. The other aspect is that a money bill is to be originated in the National Assembly only by introducing it in the form of tabling it

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[451]Article 70 (1), Constitution.
[452]Articles 70 (2), (3) and 72, Constitution.
[453]Article 73, Constitution.

as Member-in-Charge who is the Federal Minister for a government bill of the ministry concerned. Now the Finance Minister being a Senator cannot come to the National Assembly in the capacity of a Legislator; he will be there only in the capacity of minister, that is, a member of the executive Government. So, the Constitution has kept the entire senate away from money matters being indirectly members of the Parliament. But twice in the present government, i.e., 2013-2014, Senator Ishaq **Dar** remained Finance Minister. The nation is under the unbearable burden of taxes because of the aloofness of the Senate and of the involvement of one senator only. A money bill not introduced and not tabled by a member of the National Assembly cannot be legislated.

4.3 RETROSPECTIVE LEGISLATION

Retrospective legislation is seen to be an abhorrent form of legislation since it can render illegal conduct of persons which they were quite entitled to believe was legitimate at the time that they carried out the act, and may therefore be seen as being 'morally wrong'.[454] Nonetheless Parliament has demonstrated that it is prepared to legislate retrospectively in appropriate circumstances. Thus the [English] War Damage Act, 1965 retrospectively reversed the law as declared in *Burmah Oil v. Lord Advocate*[455] regarding compensation for property destroyed by the crown under the royal prerogative during the Second World War. Retrospective legislation was passed

[454] See *Kenilorea v. Attorney-General*, [1984] SILR 179, available at http://www.parliament.gov.sb/files/legislation/courtfiles/Kenilorea%20v%20AG,%201984.pdf [last accessed on 19.02.2015].

[455] [1965] AC 75 printed in Keir 126-146 op cit.

after both world wars by the English Parliament protecting various illegal acts committed in the national interest.[456] Retrospective laws are, however,

> contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought ... to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law ... *Accordingly the court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature*.[457]

The *italic portion* in the above quotation is not understandable as to how a legislature can legislate retrospectively *with clear intention* when intrinsically such legislation is forbidden under the principles of legislation. It seems a perversity of reasoning to say that something is bad but can be done intentionally by a body. Why not say in simple words that when there is no competency, then nothing can be done either intentionally or impliedly. At least, the Constitution of Pakistan in **Article 12** prohibits retrospective legislation.

The search for the repository of supremacy would appear not only to irrelevant but perhaps inimical to the notion of a representative democracy as epitomized by the doctrine of separation of powers ingrained in the constitution of Pakistan by giving separate chapters to the powers of each organ of the State.[458] The concept of checks

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[456] See The Indemnity Act, 1920; War Charges Validity Act, 1925; Enemy Property Act, 1953, ss. 1-3.

[457] *Phillips v. Eyre* (1870) LR 6 QB 1, 23 (Willes, J), (*italic* provided by me) quoted in A.W Bradley and K.D Ewing, *Constitutional and Administrative Law* 14th ed (Harlow, England: Pearson Education Limited, 2007), 538.

[458] 'Separation of powers': "The division of governmental authority into three branches of government – legislative, executive, and judicial – each with specific duties to which neither of the other branches can encroach; the constitutional doctrine of checks and balances by which the people are protected against tyranny." *Black's Law Dictionary*, 1369-1370.

and balances reaches its climax in the context of Pakistan where the executive and legislature are separate in name only. It is only the judiciary to be detached from the political branches i.e., the legislature and the executive "in order to ensure the highest degree of judicial independence, neutrality and impartiality".[459] The matter reaches to the point of zenith in Pakistan because the system is grounded on the principle of constitutional supremacy; rather than parliamentary supremacy. That is why the Constitution says in express words that "[a]ny 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."[460] It is immediately further provided that "[a]ll executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court."[461] See only the legislature is left because is the rival. It means without much ado that the makers of the Constitution while ordaining the Order were cognizant of a possible conflict between the Legislature and the Judiciary, and the ultimate power was granted to the non-elected few consciously with the physical force of the executive. It is not the other way round as is misconceived that Parliament was granted power to control the Judiciary by making any amendment in law or the Constitution. It is the Constitution: the constituent will of the people evidenced by the human words in the written Constitution. No wisdom of the Legislative Parliament can negate this wisdom of the people expressed through the Constituent Assembly. Because Parliament is the creation of the Constitution. Parliament *being under* the

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[459] J. Martin, *The English Legal System*, 4th ed (London: Hodder Arnold, 2005), 221.
[460] Article 189 of the Constitution.
[461] Article 190 of the Constitution.

Constitution *cannot come over and above* the Constitution. Otherwise, it would mean then that people would *frame* the Constitution just for a joke, the would elect representatives *under* the same for another joke, and then ultimately would *permit* the representatives *to do whatever* they [the representatives] want to do with the lives of those people just for a big joke: "Life's is but a walking shadow, a poor player/That struts and frets his hour upon the stage/ And the is heard no more./ It is a tale/ Told by an idiot, full of sound and fury, / Signifying nothing."[462]

4.4 LEGISLATION THROUGH ORDINANCES

4.4.1 Historical perspective:

In the British times, there was *rule by law* and not *rule of law* in Indo-Pakistan. This legacy was inherited by Pakistan after independence. Instead of making law through deliberation in the Parliament, the State is mostly run through Ordinances; which is in fact a power given by the Constitution to the Head of State in case of *emergency*. But exercise of this power is now a rule and proper legislation in the Parliament is an exception. Worst is the position in Pakistan that so many Ordinances promulgated by the Martial law regimes were later on given constitutional protection by inserting provisions in the Constitution by the Parliament, which this unfortunate nation had to

[462] William Shakespeare, *Macbeth*, V.v.26-31. at https://shakespeare.folger.edu/downloads/pdf/macbethPDFFolgerShakespeare.pdf [last accessed on 27.09.2014].

tolerate.[463] Judiciary has exhaustively traced and has discussed such a history of Ordinance-making power.[464]

Although the President shall in the exercise of his functions act in accordance with the advice of the Cabinet or the Prime Minister but Ordinance-making power may not be one of those matters.[465] It is also of interest to see whether this power of Ordinance-making is executive or legislative. Justice **Saeeduz Zaman Siddiqui** pointed out that in the constitution of 1956, a similar provision was described in the marginal note showing it as legislative power of the President.[466] Generally, it is judicially considered to be legislative power having been conferred by constitution on a single person.[467] There is further support in the Constitution for the argument that it is a legislative power as "[a]n Ordinance … shall have the same force and effect as an Act of … Parliament and shall be subject to the same restrictions as the power of … Parliament to make law."[468] It is further provided in the Constitution that an "Act of … Parliament … shall include an Ordinance promulgated by the President …."[469] Now as per principle, *mala fides* cannot be attributed to the legislature, so an Ordinance

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[463]For example, Exit from Pakistan Control Ordinance, 1980, Maintenance of Public Order Ordinance, 1962; Law Reforms Ordinance, 1972; Arms Ordinance, 1965; Muslim Family Laws Ordinance, 1961; Civil Courts Ordinance, 1962; Motor Vehicles Ordinance, 1965; Contempt of Courts Ordinance, 2003; Companies Ordinance, 1984; Consolidation of Holding Ordinance, The Qanun-e-Shahadat Order, 1984 and so on. See Articles 269, 270, 270A, 270-AA, Constitution.

[464]*Mahmood Hasan Harvai v. Pakistan*, PLD 1999 Lah, 320.

[465] Article 48(1) and (2) of the Constitution

[466] *Sabir Shah v. Shad Muhammad*, PLD 1995 SC 66 at 207.

[467] *A.K. Roy v. Union of India*, AIR 1982 SC 710; *Reference No. 1 of 1988*, PLD 1989 SC 75 at 103.

[468]Articles 89 (2) and 128 (2), Constitution.

[469]Ibid, Article 260 (2).

may not be *mala fides*, although, an executive act can be challenged on such ground.[470]

Since legislation is the job of the legislature in a democratic polity, and making law by any other authority is an exception, the **Supreme Court** of **Pakistan** had the occasion to respond to the intrinsic value of such a temporary legislation:

> They [Ordinances] are, no doubt, co-extensive with those of the … [Legislature] … but this can be said only with regard to [the] field of legislation as regards the … list … as given in … the [1956] Constitution. But it is evident that the power of an Assembly is more extensive, inasmuch as it was empowered to enact permanent Acts at all times [which are] not subject to any limitation….[471]

It is a truth to say that consultation, consensus, and belief in collective wisdom are embedded in our nature as Allah says that "… the conduct of their affairs is by mutual consultation…."[472]

Though **Article 89** of the Constitution empowers the President to promulgate an Ordinance but **Article 48(1)** provides that the Prime Minister and his Cabinet have to advice the President, therefore, the President will not in his individual capacity issue an Ordinance, although, he can do certain things in his discretion under **Article 48(2)**. Because, Parliament has the power to disapprove an Ordinance at any time to nullify its effect. It is not practicable for the President to enter some negotiations and then

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[470] *Sabir Shah v. Shad Muhammad*, PLD 1995 SC 66 at 207.
[471] *Sargodha Bhera Bus Service v. Province of West Pakistan*, PLD 1959 SC (Pak) 127.
[472] Al-Quran, Al-Shura, 42:38.

issue an Ordinance.[473] So, practically, it is the Executive Organ which promulgates an Ordinance in the name of the President. Thus, care should be taken not to confuse an Act with an Ordinance: What does it mean?

Simply put, it means that an Ordinance-making does not go the stages and process of law-making, so practically its making cannot be possibly challenged. The only way out is to challenge its vires when it has taken effect. The Court should then concentrate on the circumstances in which the Constitution permits such legislation; and when a circumstance required for the exercise of such power is missing, the Ordinance shall be struck down by the Court.

4.4.2 No permanency**:**

An Act of Parliament is usually a permanent law until repealed. It is timely to reproduce **Article 89** of the Constitution to appraise its true import:

> The President may, except when the National Assembly is in session, if satisfied that circumstances exist which render it necessary to take immediate action, make and promulgate an Ordinance as the circumstances may require.…[E]very such Ordinance … shall be laid … before the …[Legislature] … and shall stand repealed at the expiration of four months from its promulgation or, if before the expiration of that period a resolution disapproving it is passed by … [the Legislature], upon the passing of that resolution; and … may be withdrawn at any time by the President.

The **Supreme Cour**t has held in a language which cannot be dimmed by the vagaries of time in the following words:

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[473] *Tirathmal v. The State,* PLD 1959 Karachi 594.

> It is quite clear that the legislative power conferred by this Article on the President to promulgate Ordinance is *circumscribed by … conditions*.… [A]t the time the Ordinance is promulgated … circumstances [must] exist which render it necessary to take *immediate action*.… [It] is only a *stop gap arrangement* and a *temporary measure*, as this Ordinance has to be placed before the …Parliament, within four months …. It is, therefore, quite clear that the power … is designed to meet a situation *when the legislation is required urgently*…. But the Ordinance … does not acquire the status of a permanent Act of Parliament ….[474]

Under the English law, the effect of repealing a statute was to obliterate it as completely from the records of the Parliament as if it had never been passed.[475] The effect of repeal was that in the absence of any express or implied provision to the contrary in the repealing enactment, the repeal of a permanent enactment brought about the revival of the enactment which it had itself repealed.[476] The subject has also been dealt with seriously by the **text-book writers**:

> The common law rule was that if an Act expired or was repealed, it was regarded, in the absence of provision to the contrary, as having never existed, except as to matters and transactions past and closed. Where, therefore, a penal law was broken, the offender could not be punished under it if it expired before he was convicted, although the prosecution began while the Act was still in force.[477]

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[474] *Sabir Shah v. Shad Muhammad*, PLD 1995 SC 66; *Federation of Pakistan v. Muhammad Nawaz Khokhar*, PLD 2000 SC 26 at 36.

[475] *Kay v. Goodwin*, (1830) 130 ER 1403 relied upon in *Muhammad Bashir v. Province of West Pakistan*, PLD 1958 (WP) Lah 853.

[476] Halsbury's Laws of England, 3rd ed. Vol. 36, 714; Article 264, Constitution.

[477] P. St. J. Langan, edit, *Maxwell on Interpretation of Statutes,* 12th ed (London: Sweet & Maxwell, 1969), 16 referring *Surtees v. Ellison* (1829) 9 B. & C 750; *Churchill v. Crease* (1828) 5 Bing. 177; *Simpson v. Ready* (1844) 11 M. & W. 344; *R. v. London Justices* (1764) 3 Burr.1456; *R. v. Inhabitants of Mawgan* (1838) 8 A. & E. 496; *Government of Punjab v. Ziaullah Khan*, 1992 SCMR 602 at 610.

Justice **Chase** held this view as early as 1869 by saying that the general rule "supported by the best elementary writers, is that when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed."[478] That is why a practice started in England to insert a provision in the repealing Act to preserve the rights and liabilities intact having been acquired or incurred under the repealed Act.[479]

4.4.3 No promulgation time and again**:**

The question whether an Ordinance can be re-issued and re-enacted after its expiry and repeal has come up before the Courts. In the case of *New Electronics*,[480] the previous decisions were noted in detail and it was held that the life of an expired Ordinance cannot be extended by another Ordinance. If an Ordinance is not placed before the Assembly, then the same cannot be re-enacted. However, re-enacting the same Ordinance again has to be dealt with on the basis of the peculiar circumstances of each case in which the re-enactment was done.[481] Now, the 18th amendment in the Constitution has empowered the President to promulgate the same Ordinance twice. It means that the Parliament curtailed its own legislative power and enlarged the power of the President. Can it do so, is a question to be determined by the Courts

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[478]*McCardle*, *Ex parte*, (7 Wallace) 506 (1869) printed in Cushman, 41-46 op cit; William W. Van Alstyne, 'A Critical Guide to Ex parte MacCardle', [1973] Arizona Law Review, Vol 15, 229-269, available at https://scholarship.law.wm.edu/facpubs/796/ [last accessed on 29.03.2015].

[479]*M. Bashir v. Province of West Pakistan*, PLD 1958 (WP) Lah 853 at 858; General Clauses Act, 1897; *State of Punjab v. Mohar Singh*, AIR 1955 SC 84; The [English] Interpretation Act of 1889.

[480]*Collector of Customs v. New Electronics*, PLD 1994 SC 363.

[481]*Momina Khatoon v. Pakistan*, PLD 1958 Kar 530.

when an Ordinance is challenged along with this amended provision in the Constitution. Being a parliamentary form of government, prima facie, the challenge if thrown may be successful.

CHAPTER FIVE: THE PUZZLING RESISTANCE TO JUICIAL REVIEW OF THE LEGISLATIVE PROCESS

Introduction: This is the age of information and awareness. Democracy cannot flourish without involvement of the governed in all aspects of political life. Like good citizens, a question comes to mind to ask whether Parliament of Pakistan is without any limitations in the area of legislation or whether there are constitutional limitations in this regard. Because it is the motto of a good citizen to obey punctually but to censure freely. With qualitative research methodology, this chapter examined both primary and secondary sources, which included a critical analysis of constitutional provisions, other legislative instruments, published research papers, and judicial precedents in order to theorize the concept of separation of powers in Pakistan and judicial check on the legislature so as to counter the apprehension of exploitation of legislative authority.

5.1 DEFINING JUDICIAL REVIEW OF THE LEGISLATIVE PROCESSS

For the purpose of this chapter, it may be defined as the power of the courts to examine actions of the legislative arm of the government to see whether such actions are consistent with the constitution, and actions judged inconsistent are declared unconstitutional and, therefore, null and void. Such judicial review must take place either in abstract i.e., in the absence of an actual case or controversy and before

promulgation i.e., before a challenged law has taken effect, or if promulgated, on the grounds of illegality or material irregularity in the process of legislation.

The scope and extent of **Article 69** was scrutinized in juxtaposition with **Articles 70 - 77** of the Constitution. **Article 69** provides that there will be immunity to the proceedings in Parliament. Is it so absolute an immunity that in all eventualities, the Courts have been debarred from looking into the **inside of the Parliament** to ascertain as to whether a Bill has been read, debated, and voted upon in the presence of the quorum in the manner provided by **Articles 70 - 77** to attain the status of a legislated law after having been passed.

The first question to be addressed is as to whether the Legislature in Pakistan is a person to be liable to the constitutional jurisdiction? It is important because primary legislation is enacted by the Parliament, a Provincial Assembly or through Ordinances, so the legislature is required to be a person within the meaning of **Articles 199** and **184** of the Constitution for the amenability of writ jurisdiction.

It was observed by Justice **Orcheson** that legislature is not a person to be amenable to writ jurisdiction.[482] But this is not the right approach and it provides no solution to the problem. This problem can be tackled by the argument that there is no need to delve upon the question as to whether legislature is a person or not when there is challenge to the vires of the law. The executive can be sued who has passed an order on the basis of such an invalid law. The President or a Governor are persons within

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[482] *Akhlaque Hussain*, PLD 1965 SC 147 at 153.

the meaning of the Constitution.[483] Notice will be given to the Attorney-General with respect to Federal law and to the Advocate-General in case of the Provincial law.[484] In the American context, **Wilson** observed:

> [I]t is possible that the legislature ... may transgress the bounds assigned to it [by the Constitution], and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before *the judges*, - when they consider its principles, and find it to be incompatible with the superior power of the Constitution, - it is their duty to pronounce it *void*.... In the same manner, the President of the United States could shield himself, and *refuse to carry into effect an act that violates the Constitution.*[485]

But the problem will remain there in case the challenge is to the legislative process. For this purpose reference may be made to the Constitution wherein 'State' has been defined to mean the Legislature also.[486] So the Legislature can be sued as a Legislature under **Articles 199** and **184** being 'person'.[487]

The scope of judicial review "is confined to the enforcement of the Constitution as supreme law … [;] its purpose is corrective … and extends to determining the legality of an administrative action and in relation thereto the constitutionality of the legislation".[488] Thus, when a law is held to be inconsistent or incompatible with the

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[483] Articles 90, 129 and 199, Constitution; *Abu Ala Moudoodi v. Government of West Pakistan*, PLD 1964 SC 673 at 689.

[484] Order 27A of the Code of Civil Procedure, 1908 (CPC).

[485] James Wilson, Statement before the Convention of the State of Pennsylvania (Dec. 1, 1787) referred here from John E. Beerbower, 'Ex Parte McCardle and the Attorney General's Duty to Defend Acts of Congress', University of San Francisco Law Review [Vol. 47, 2013], 647-5, available at https://repository.usfca.edu/usflawreview/vol47/iss4/1/ [last accessed on 28.03.2015].

[486] Article 7, Constitution.

[487] See generally Muhammad Munir, *Precedent in Pakistani Law* (Karachi: Oxford University Press).

[488] *Fauji Foundation v. Shamimur Rehman*, PLD 1983 SC 457 at 546.

Constitution, and therefore void, the inevitable conclusion is that a constitutionally invalid or *ultra vires* law is incapable of conferring any jurisdiction or power.[489] The Indian Supreme Court has also enunciated the principle to the effect that the Courts have power of judicial review of the legislative actions.[490]

Things will become easier in this regard if we keep in mind the essential steps of a **judicial process**. These steps are: (i) the ascertainment of facts, (ii) **determination** of the **law applicable** to the **facts**, (iii) an inference as to the existence or otherwise of a right or obligation from the determination of the law, and (iv) a decision as to the final order to be made in respect of such right or obligation.[491] So **validity** of the **law becomes under scrutiny** in each **forensic battle**. It may now be said that at least two grounds can be taken: challenge to the executive action on the ground of exceeding the power, and **challenge** to the **very validity** of the **law** or **rule**.[492] It is because the legislature has been negatively restricted by the instrument of the Constitution and for this purpose the terms of the instrument will be looked into. The Court observed:[493]

> The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the Constitution by which, affirmatively, the legislative powers

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[489] *Moulvi Tamizuddin Khan* Case, PLD 1955 FC 240; *Yusaf Patel Case*, PLD 1955 FC 387.

[490] *Chandra Kumar v. Union of India*, AIR 1997 SC 1125.

[491] *Province of East Pakistan v. Mehdi Ali Khan,* PLD 1959 SC 387 at 409; *Fazlul Qauder Chaudhry v. M Abdul Haq*, PLD 1963 SC 486 at 503.

[492] *Marbury v. Madison* op cit.

[493] *Queen v. Burah*, (1878) 5 IA, 178 (PC); *United Provinces v. Atiqa Begum*, 1940 F.C.R. 110; *The State of Tripura v. The Province of East Bengal*, AIR 1951 SC 69; *Prafulla Kumar v. Bank of Commerce, Khulna*, (1947) F.C.R. 28; *Mahindra Nath Gupta v. Province of Bihar*, (1949) F.C.R. 596 (distinguished).

were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any Court to inquire further, or to enlarge constructively those conditions and restrictions.

5.1.1 Judicial review of the legislative process**:**

It is very difficult to convince someone in Pakistan of the possibility of any challenge to the **legislative process** in the presence of **Article 69** of the Constitution. Even the superior Courts are too reluctant in this regard. It is because that we forget that interpretation of statutes and law-making have great relation with each other. This fact needs to be realized that when legislation inconsistent with the Constitution can be challenged in Courts,[494] then the inter-relationship between jurisprudence and legislation will also be taken into consideration:

> It is impossible to consider Jurisprudence quite apart from Legislation; since the inducements or consideration of expediency which lead to the establishment of laws, must be adverted to in explaining their origin and mechanism. If the causes of laws and of the rights and obligations which they create be not assigned, the laws themselves are unintelligible.[495]

So, the starting point in this respect is **Article 8** of the Constitution which prohibits the State from **making** any law in contravention of the Fundamental Rights conferred by the Constitution. So here is some indication to say that the **making: the process** is not prohibited by the Constitution.[496]

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[494] *Baz Muhammad v. Federation of Pakistan*, PLD 2012 SC 923.
[495] Austin, 373 op cit.
[496] See Chapter 1, Part II, Constitution (Fundamental Rights).

However, **Article 69** says:

> The validity of any proceedings in … Parliament shall not be called in question on the ground of any irregularity of procedure.… No officer or member of … Parliament in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order in … Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

It is to be remembered before proceeding further that Pakistan is being governed under a written Constitution. In this regard, the US case of *Kilbourn v. Thompson*[497] shall be kept in mind. In England, since there is no written constitution, the English authorities have taken a narrow view of the courts' power to look behind an authentic copy of the Act of the Parliament.[498] It was because that law-making was a sovereign prerogative, and since the sovereign was the source of all law, he could hardly be governed by law in his exercise of that function.[499] But when the English judiciary is seized with such a question from a country having written constitution, its reasoning is different from the English scenario. And rightly so because:

> [I]n the Constitution of the United Kingdom there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers. There was, therefore, never such a necessity as arises in the ...

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[497] 103 US 168 = 26 L Ed 377 (1881) op cit.

[498] Fazal Karim, 184 op cit.

[499]Thomas Hobbes, *Leviathan:* 'The First Part | The Second Part | The Third Part | The Fourth Part' (Oregon: The University of Oregon, [1651]/ 1999), 143: It is true that sovereigns are all subject to the laws of nature, because such laws be divine and divine laws cannot be by any man or Commonwealth be abrogated. But to those laws which the sovereign himself, that is, which the Commonwealth, maketh, he is not subject. For to be subject to laws is to be subject to the Commonwealth, that is, to the sovereign representative, that is, to himself which is no subjection, but freedom from the laws; Austin, 212 op cit.

> case [of a country having written constitution] for the court to take any close cognizance of the process of law-making.[500]

The *Bribery Commissioner v. Ranasinghe*[501] shows that the need to comply with procedural requirements in respect of certain categories of parliamentary enactment does not derogate from the sovereignty of a legislature.

The written constitution of Sri Lanka, known as Order, had a provision to the effect that "no bill for the amendment or repeal of any of the provisions of … [the] Order shall be presented for the royal assent unless there has been endorsed on it a certificate in the hand of the Speaker that the vote cast … amounted to not less than two third…."[502] The reasons given by the **Privy Council** are that every such certificate "shall be conclusive for all purposes and shall not be questioned in any court of law."[503] Since there was no such certificate, the **Privy Council** went on to say that, "If the presence of the certificate is conclusive in favour of such a majority, there is force in the argument that its absence is conclusive against such a majority. Moreover… the certificate is a necessary part of the Act-making process and its existence must be made apparent."[504]

It can now be at least argued that the court has a duty to see that the provisions of a written constitution are not infringed. The point to be kept in mind is: "If the sovereign

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[500]*Ranasinghe*, 172 op cit (a case under the Sri Lankan Constitution heard by the Privy Council); Keir, 17-25 op cit.

[501]Ibid.

[502]Ibid.

[503]Ibid.

[504]Ibid.

power be in a great assembly, and a number of men, part of the assembly, without authority consult a part to contrive the guidance of the rest, this is a faction, or conspiracy unlawful, as being fraudulent seducing of the assembly for their particular interest."[505] Although, there is no cavil to the proposition that the legislature is the master of its own household; but provisions of the Constitution are to be preserved inviolate.

Hobbes considered self-limitation a logical and practical impossibility, remarking that "he that is bound to himself only, is not bound [at all]."[506] The **Indian Supreme Court** can at this juncture be timely and promptly referred to which says in unequivocal language that "in a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign … [and] there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any legislature in India in the literal absolute sense."[507]

Legislative process requires to be transparent, open, and confidence inspiring so that to claim integrity: It is not only the judiciary to which integrity is attributed, although the same "is invoked largely as a value associated with judicial reasoning, [the] idea of integrity [can also be applied] to legislation."[508] It is a surprise to note that even **Louis XIV**, the exemplar of absolutist monarchy, stated in an ordinance in 1667:

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[505]Thomas Hobbes of Malmesbury, *Leviathan or the Matter, Forme & Power of a Commonwealth Ecclesiasticall and Civill* (London: Andrew Crooke, Green Dragon, St. Pauls Church-yard, 1651), 145-46.

[506]Thomas Hobbes, *Leviathan*, edited by J.C.A. Gaskin (Oxford: Oxford Univ. Press 1996) 176-77.

[507]*Reference* case, AIR 1965 SC 745 at 762-63 (Gagendragadkar CJ).

[508] R. Dworkin, *Law's Empire* (Massachusetts: Harvard University Press, 1986), 167, 176-84, 217-28.

> Let it be not said that the sovereign is not subjected to the laws of his State; the contrary proposition is a truth of natural law…; what brings perfect felicity to a kingdom is the fact that the king is obeyed by his subjects and that he himself obeys the law.[509]

To say that the Legislature is above law and its proceedings cannot be looked into because of **Article 69** of the Constitution, then, being the parliamentary form of government, it can do anything it wants just by changing overnight the law, and even without following the requirements prescribed in the Constitution for law-making. It would be a self-contradiction as there will be no difference between a constitutional democracy and a kingship. This tension shows up in the famous **Justinian Code**, written in the 6th century. One provision in the Code reads: "What has pleased the prince has the force of law".[510] Another provision reads: "The prince is not bound by the laws".[511]

5.1.2 The logic of substantive judicial review**:**

This topic may be researched from two different perspectives i.e., primary legislation and subordinate legislation because each has different criterion. **Primary legislation** is legislation made directly by the legislature while subordinate legislation is law made by the authority acting under a power granted by a primary legislation.[512] In Pakistan,

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[509]Brian Z. Tamanaha, 'The History and Elements of the Rule of Law', ('History') Singapore Journal of Legal Studies [2012] 232-47 at 238; Brian Tamanah, 'A Concise Guide to the Rule of Law', St. John's University School of Law, Paper # 07-0082, September 2007 available at https://www.ruleoflawus.info/The%20Rule/Tamanha%20Concise%20Guide%20to%20Rule%20of%20Law.pdf [last accessed on 13.02.2015].

[510] Digest 1.4.1, cited in Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999) at 59.

[511]Digest 1.3.1, ibid.

[512]Fazal Karim, vol. 2, 1193 op cit.

there are two types of law known as Federal Law which is “a law made by or under the authority of Majlis-e-Shoora (Parliament)” and Provincial Law is “a law made by or under the authority of the Provincial Assembly”.

Primary Legislation: In England, it was the view that “an Act of Parliament can do no wrong, though it may do several things that look pretty odd”.[513] As such, there was no concept of judicial review of Acts of Parliament; although Lord **Coke** had issued a warning earlier that “when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void”.[514] Academicians were convinced of the absolute supremacy of Parliament in those days. Perhaps, at that time, they were convinced that an Act of Parliament can do no wrong.[515] Thus, Parliament was supposed to be enjoying unbridled immunity. The only function of courts was to interpret that document “according to the intent of that who made it.”[516] In view of Sir Edward **Coke**, one of the greatest judges, “Judges are supposed to construe statutes by seeking the true intent of the makers of the Act, which is presumed to be *pro bono publico*, or intended for the public good.[517] **Dicey** was vociferous by saying that the right to make and unmake any law whatsoever is the sole prerogative of Parliament and that no

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[513] *City of London v. Wood* (1701) 12 Mod Rep 669 at 678.

[514] *Bonham’s* case, (1610) 8 Co. Rep. 114a; 113b; James, 10 op cit: “Indeed, the greatest of our judges, Sir Edward Coke (1552-1634), [pronounced as cook] even found it possible to maintain that an Act of Parliament contrary to the reason of common law was invalid.”

[515] *Maxwell on the Interpretation of Statutes,* 12th ed P. St. Langan, ed (London: sweet & Maxwell, 1989), 238, referring *Bonham’s Case* (1609) 8 Rep. 114a.

[516] Sir Edward Coke, 4 *Institute*, 330, referred from *Maxwell*, 238 op cit.

[517] Steve Sheppard, ed., *The Select ed Writings of Sir Edward Coke* (Indianapolis, Indian: Liberty Fund, 2003), 78.

person or body is recognized as having the right to override or set aside legislation of Parliament.[518]

It is because that in England there is no difference between a statute and a constitutional provision. The Parliament can repeal even **Magna Charta** and the **Bill** of **Rights** through ordinary process of legislation. There is no constitution apart from the rest of the law. There is merely a mass of law consisting of statutes and partly of the decided cases and accepted usages, in conformity with which the government of the country is carried on from day to day; but which is being constantly modified by fresh statutes and cases. In a sense, "[t]he British Constitution has entrusted to the two Houses of Parliament subject to the assent of the King an absolute power untrammeled by any written instrument, obedience to which may be compelled by some judicial body."[519] In England, any defect in the procedure by which a modern "Act" is passed is more likely to be cured by immediate legislative action, rather than to be canvassed in the courts.[520] It seems as if submission to a sovereign requires people to be "as absolutely subject … as is a child to the father or a slave to the master in the state of nature".[521] But all this, on deeper look "is a tale /Told by an idiot, full of sound and fury,/ Signifying nothing."[522] See a glimpse of the reasoning of an English judge:

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[518] A.V. Dicey, *Introduction to the Law of Constitution*, 10th ed (Delhi: Universal Law Book House, 2003).

[519] *The King v. Halliday*, (1917) AC 260 (Lord Dunedin) printed in Keir, 39-44 op cit.

[520] Erskine May, *Parliamentary Practice*, 17th ed. 597-600 referred in *Maxwell*, fn 2 at 1 op cit.

[521] T. Hobbes, *The Elements of Law Natural and Public* (1640) in F. Tonnies, ed., 2nd ed (London: Simpkin, Marshall, and Co., 1889), 20.16, 115.

[522] William Shakespeare, *Macbeth*, V.v. 26-31. Op cit.

> [W]hat my Lord Coke says in *Dr. Bonham*'s case ... is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be judge and party, for the Judge is to determine between party and party, or between the Government and the party; and an Act of Parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the Government he lives under, and restore him to the state of nature: but it cannot make one who lives under a Government Judge and party.[523]

However, the orthodox view still prevails. Even after the Human Rights Act, 1998, no major difference occurred in the position. Specific courts were empowered to make a declaration of incompatibility of a statutory provision with a Convention right but that did not go so far as to empower the courts to strike down legislation that might be incompatible with the Convention rights. It was judicially observed:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human rights act, 1998 will not detract from this power.... But the principle of legality means that Parliament must squarely confront what it is doing and accept the *political cost*. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In absence of the express language or necessary implication to the contrary, the courts

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[523] *City of London v. Wood*, 12 Mod. 669, 88 Eng. Rep. 1592(K.B. 1701), quoted in Frederick F. Shauer, 'English Natural Justice and American Due Process: An Analytical Comparison' Wm. & Mary L. Rev. 18: 47 (1976), 47-72 at 50, fn 17, available at https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2419&context=wmlr [last accessed on 23.04.2014]; Philip A. Hamburger, 'Revolution and Judicial Review: Chief Justice Holt's Opinion in *City of London v. Wood*' Columbia Law Review, 1994 [Vol. 94:2091-2153], available at https://www.jstor.org/stable/1123172?origin=crossref [last accessed on 16.03.2014].

> therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[524]

The Court refers to political cost, which implies the concept of non-justiciability of the issue. In this way, Courts of the United Kingdom, while believing in absolute supremacy of Parliament, apply principles of constitutionality a little bit different from those principles which exist in countries where powers of legislature have expressly been limited by a constitutional document. Before *Marbury v. Madison*, even in America, before it attained independence from the British rule, the position was the same so much so that when the State court judges declared a state law unconstitutional, the judges were summoned by the **Rhode Assembly** to answer the charge that the judgment was "unprecedented in the State and may tend directly to abolish the legislative authority thereof…." [525] The judges were threatened with removal from office.[526]

Interpretative power of Courts is provided, *inter alia*, in **Articles 199** and **184** of the Constitution. It is power and duty of Courts to interpret the Constitution and adjudge validity of the law.[527] In concrete cases, *vires* of an Act can be challenged if its provisions are *ex facie,* for example, discriminatory. However, where provisions of an Act are capable of being administered discriminately, it is for the party who challenges

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[524] *Ex parte Simms*, (1999) 3 WLR 328 at 341 quoted in Mark Elliott, *The Constitutional Foundations of Judicial Review* (Oxford-Portland: Hart Publishing, 2001), 112, fn 56.; *R. v. Secretary of State,* (2003) 3 All ER 627 at 840.

[525] *Trevett v. Weeden*, (1786) r. (1) 2 Chandler Am Criminal Trials, 269, referred here from Fazal Karim, Vol. 2. 1195, op ci.

[526] Fazal Karim, Vol.2, 1195, referring an Article 'Earlier Cases of Judicial Review of State Legislation by Federal Courts' (1922-23), 32 Yale Law Journal, 15.

[527] *Federation of Pakistan v. M. Nawaz Khokhar*, PLD 2000 SC 26; *Ghulam Hussain v. Jamshed Ali*, 2001 SCMR 1001.

it to show that it has actually been administered in a partial, unjust and oppressive manner.[528]

The judges will watch inviolability of the Constitution because they preserve, protect and defend the Constitution. It is called the **Supremacy Clause** of the Constitution. Power of judicial review must exist in courts in order that they may be enabled to interpret the constitution in all its multifarious bearings on the life of the citizens.[529] The provisions in the Constitution which bar certain questions from being raised in the Courts are in the nature of a qualified embargo and it is not possible to spell out an absolute prohibition against judicial scrutiny of legislation, where it comes in conflict with the supreme law of the Constitution and ultimate judicial review.[530]

Subordinate Legislation: There is no provision in the Constitution authorizing the Parliament to delegate power of legislation to any subordinate body. As the sovereign power of the State has been entrusted to the Parliament with the authority to legislate without giving it any power to delegate the said authority to any subordinate body, it must remain with it and accordingly any delegation of such power by the Parliament and thereafter any legislation by a delegated authority on such authority will be null and void. This principle applies to the **essential legislative function**. John **Locke**

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[528] *Miss Benazir Bhutto v. Federation of Pakistan,* PLJ 1988 SC 306; For cases in which the judges have to adjudicate upon the authenticity as statutes of old documents, see *Merttens v. Hill*, [1901] 1 Ch. 842; *Swaffer v. Mulcahy* [1934] 1 K.B. 608; May, *Parliamentary Practice*, 17th ed., 597-600.' Referred here from *Maxwell*, 1 fn 2, op cit.

[529] Jeremy Waldron, 'The Core of the Case Against Judicial Review' The Yale Law Journal, 115:1346, 2006, 1346-1401. https://www.humanities.mcmaster.ca/~walucho/3Q3/Waldron.Core%20Case%20Judicial%20Review%20Yale%20LJ.pdf [last accessed on 18.02.2014].

[530] *Province of East Pakistan v. Sirajul Haq Patwari*, PLD 1966 SC 854; *Fazlul Quader Chowdhury v. M. Abdul Haque*, PLD 1963 Dacca, 486.

defined the classical position centuries earlier in a famous passage in the *Second Treatise of Government*:

> The power of the *legislative*, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands.[531]

After that the legislature may leave the making of necessary, incidental and auxiliary provisions within that limit, working of the details, determination of facts with which it cannot deal with directly, to outside agencies in order to give effect to the primary legislation. The underlying principle is that it is not possible for the legislature to legislate on every aspect of the matter in complex condition. A legislature makes can law and leave it to the delegate to complete the legislation by supplying details keeping in view the limits laid down by the statute. But it has judicially been held that naked, unbridled and unguided powers cannot be given to an outside agency like the executive.[532] It presupposes that limits and guidelines must be indicated in the statute.[533]

It is to be noted that subordinate legislation cannot be kept alive after repeal of the parent Act. It is unconstitutional; but strangely, such left-over subordinate legislation

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[531] John Locke, *Second Treatise of Government*, C.B. Macpherson ed (Hackett Publishing Co., 1980/1690), Section 141 (*Italic* in original); Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn Limited, 1929), 52; John Keane, *'The New Despotisms of the 21st Century: Imagining the end of democracy*, Lecture Delivered: May 19, 2014; London, Text First Published: September 2014, at https://www.google.com.pk/ url?sa [last accessed on 30.01.2016].

[532] *Muhammad Aslam v. Punjab Government*, 1995 MLD 685.

[533] *Province of East Pakistan v. Allahabad Bank Ltd*., PLD 1969 Dacca 1.

has judicially been treated alive.[534] The Indian Supreme Court held, "A statute challenged on the ground of excessive delegation must … be subject to two tests, (1) whether it delegates essential legislative function or power, and (2) whether the Legislature has enunciated its policy and principles for the guidance of the delegate."[535] The underlying principle is that it is not possible for the legislature to legislate on every aspect of the matter in the complex condition. A legislature can make law and leave it to the delegate to complete the legislation by supplying the details keeping in view the limits laid down by a particular statute. However, it has judicially been observed that naked, unbridled and unguided powers cannot be conferred upon an outside agency like the executive.[536] In other words, "[l]egislation can delegate its powers in a number of statutes but after having its own control and safeguard in place which is only possible when definite guidelines are given, otherwise blatant conferment of powers would make such a statute unconstitutional."[537] In *Pakistan Tobacco Co. Ltd.* v. *Government of NWFP*, PLD 2002 SC 460, it was held, "there is consensus of the judicial opinion that delegation of powers should not be uncontrolled, unbridled and to check the arbitrary attitude of the Executive in exercise of powers the legislature must provide some guidelines basing on the policy of the government to exercise such powers." It, therefore, presupposes that limits and guidance must be indicated in the statute.[538]

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[534] See *Province of East Pakistan v. Muhammad Yasin*, PLD 1964 SC 438.
[535] *Vasanthlal Manganbhai Sajanwal* v. *The State of Bombay*, 1961 SCR 341= AIR 1961 SC 4.
[536] *Muhammad Aslam v. Punjab*, 1996 MLD 685.
[537] *Haji Ghulam Zameer* v. *A.B. Khundkar*, PLD 1965 Dacca156.
[538] *Province of East Pakistan v. Allahabad Bank Ltd*., PLD 1969 Dacca 1.

It is to be noted that subordinate legislation cannot be kept alive after repeal of the parent Act. But it is to note that a judicial observation is otherwise, saying that subordinate legislation may be saved by the repealing Act.[539] Being supplementary to the primary legislation, as such, when the main statute has been repealed, the support will automatically fall. It can also be not reconciled with the judicial holding whereby it was ruled that "the impugned amendment made by the [Ordinance] in the … Act whereby the life of the Act was extended from one to two years [,] was in force only during the subsistence/currency of the amending Ordinance [;] and it has not survived the ... [expiry] of the said Ordinance."[540] However, a distinction is to be made where such an amendment has been brought about by a permanent Act. Even after the repeal of the amending Act, the amendments in the amended Act will survive. How can this be? The finer distinction is that an Ordinance being itself a temporary law cannot make permanent amendments; while a permanent statute can make permanent amendments.[541] In a way it can be said in simple words that a temporary law can neither kill nor enliven a permanent law.[542]

Although subordinate legislation in the form of bye-laws or regulations by local bodies is a recognized feature of all modern States;[543] but it cannot be made applicable retrospectively to the detriment of the citizens.[544] They have been held to be

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[539] *Province of East Pakistan v. Muhammad Yasin*, PLD 1964 SC 438.

[540] *Government of Punjab v. Zia Ullah Khan*, 1992 SCMR 602.

[541] Section 6-A, General Clauses Act, 1897 (Interpretation of Statutes); *Abdul Majeed v. Asif Jan*, PLD 1982 SC 82; *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416.

[542] *Gooderham v. CBR*, AIR 1949 PC 90.

[543] *Ghulam Zamir v. A.B. Khondkar,* PLD 1965 Dacca 156.

[544] *Hashwani Hotels Limited v. Pakistan*, PLD 1997 SC 315.

applicable retrospectively if beneficial to the citizens.[545] Here comes the concept of *ultra vires*.

The term 'ultra vires' literally means "beyond powers" or "lack of power". It signifies a concept distinct from "illegality". In the loose or the widest sense, everything that is not warranted by law is illegal but in its proper or strict connotation "illegal" refers to that quality which makes the act itself contrary to law.[546] It has been ascertained by way of judgment reported as *Shaheen Cotton Mills* that a law established by federal or provincial legislature has to stand the test of constitutionality, while a law promulgated by delegated legislature, according to the legal principles, must also stand the additional test of not being uncertain, unreasonable, ultra vires the parent statute or in conflict with any other law.[547] Whether it is primary or subordinate legislation, both may be constitutionally scrutinized, *inter alia*, through judicial review. This exploration needs further conceptual understanding.

5.1.3 Separation of powers**:**

The conflict seems to be revolving round the concept of **separation** of **powers**. It means division of governmental authority into three branches, namely, legislative, executive, and judicial, each with specified duties on which neither of the other branches can encroach. But at the same time the constitutional doctrine of checks

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[545]*Anoud Power Generation Limited v. Pakistan*, PLD 2001 SC 340.
[546]*Anand Prakash v. Assist. Registrar*, AIR 1968 All 22 [6].
[547]*Shaheen Cotton Mills v. Federation of Pakistan*, *Ministry of Commerce,* PLD 2011 Lah 120 at 130.

and balances will be kept in mind whereby people are protected against tyranny. Roscoe **Pound** has elaborated it in the following words:

> [T]he doctrine of separation of powers was adopted by the [American] convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.[548]

Montesquieu has elaborated the doctrine in the following words:

> Political liberty is to be found only in moderate governments; and even in these it is not *always* found. It is *there only* when there is *no abuse of power*. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go…. To prevent this abuse*, it is necessary from the very nature of things that power should be a check to power*…. When the legislative and executive powers are united in the same *person*, or in the same *body* [of persons] …, there can be no liberty; because apprehensions may arise, lest the same *monarch* or *senate* should enact *tyrannical laws*, [and] to execute them in a tyrannical manner.... Again, there is no liberty, if the judicia[l] power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression…. *There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers.*[549]

For the purpose of this dissertation, **Blackstone** is reproduced as under:

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[548] Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* (New Haven: Yale University Press, 1957), 94.

[549] Charles de Secondate, Baron de Montesquieu, *The Spirit of Laws*, trans. Thamas Nugent (Ontario: Batoche Books, 1748 [1752/2001]), 172-74, (*emphasis* added by me).

> In all tyrannical governments, the supreme magistracy, or the right of both *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together; there can be no public liberty.[550]

The doctrine is of too vital an importance but is extraordinarily difficult to define precisely each particular power. **Text-book writers** refer to this difficulty in the following words:

> In an ideal state we might imagine a legislature which had supreme and exclusive power to lay down general rules for the future without reference to particular cases; courts whose sole function was to make orders to settle disputes between individuals which were brought before them by applying these rules to the facts which were found to exist; an administrative body which carried on the business of government by issuing particular orders or making decisions of policy within the narrow confines of rules of law that it could not change. The legislature makes, the executive executes, and the judiciary construes the law.[551]

There is a difference of approach between the American and European scholars on the point:

> Separation of powers means something quite different in the European context from what it has come to mean in the United States…. Separation of powers to an American evokes the familiar system of checks and balances among the three coordinate branches of government, namely, legislative, executive, and judiciary, each with its independent constitutional basis. To a European, it is a more rigid doctrine and inseparable from the notion of legislative supremacy.[552]

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[550] Sir William Blackstone, *Commentaries on the Laws of England in Four Books* (Indianapolis, Indiana: Liberty Fund, Inc., [1753] 2011), vol. 1, 177.

[551] G. W. Paton, *A Textbook of Jurisprudence*, 4th ed. (London: Clarendon Press, 1972), 330.

[552] Mary Ann Glendon et al., *Comparative Legal Traditions: Text, Materials, and Cases,* 2nd ed. (New Jersey: West Publishing Co., 1994), 67.

John **Austin** seems to be not happy with the American sense of the concept. The learned author has made a detailed discussion, and has concluded that:

> Of all the larger divisions of particular powers, the division of those powers into *supreme* and *subordinate* is perhaps the only precise one. The former are the political powers, infinite in number and kind, which, partly brought into exercise, and partly lying dormant, belong to a sovereign or state: that is to say, to the monarch properly so called, if the government be a government of a number, to the sovereign body considered collectively, or to its various members considered as component parts of it.[553]

In the case of Pakistan, it is inherent in the Constitution that there will be a substantive judicial review of legislation. This is the same concept of the separation of powers which is known to constitutional minds nearing the American approach. Even under the Constitution of 1962, the Supreme Court of Pakistan observed to confine the game to be played within the confines of the Constitution. In the case of *Fazlul Quader Chaudry*, the Court observed that the Judges:

> are bound by ... [the] duty to act so as keep the provisions of the Constitution fully alive and operative, to preserve it in all respects safe from all defeat or harm, and to stand firm in defence of its provisions against attack of any kind. The duty of interpreting the constitution is, in fact, a duty of enforcing the provisions of the constitution in any particular case brought before the courts in [the] form of litigation.[554]

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[553] John Austin, *The Province of Jurisprudence Determined* ed. by Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995), 237, in fn 20, the learned author writes: "Division of governments according to *forma imperii* (Monarchy, Aristocracy, and Democracy), or *forma regiminis* (despotic or republican) [is not realistic]. The latter is founded on a fancied distinction between executive and legislative."

[554] *Fazlul Quader Chaudhry v. Mohammad Abdul Haq*, PLD 1963 SC 486 (A. R. Cornelius CJ).

At the cost of repetition, it can safely be asserted in Pakistan that the expression 'constitutional government' is closely affiliated with the concept of **constitutionalism** in its actual undertone. It is a belief and practice in limited government which must be set in contradistinction to arbitrary power.[555] Thus, "no power can be claimed by any functionary which is not to be found within the four-corners of the constitution nor can anyone transgress the limits therein specified."[556] Constitutional law is the legal framework of a nation and a scheme whereby the country is governed.[557] After all, why there is a written constitution? It is because a constitution, in fact, "springs from a belief in limited government."[558] It ensures responsible and representative government. If, in practice, it nullifies its goal or else it is "destructive of the values it was intended to promote"[559], it cannot stay tenable with the populace.

5.1.4 Advisory jurisdiction under Article 186 of the Constitution

Article 186 of the Constitution Provides:

> If at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law of public importance, he may refer the question to the Supreme Court for consideration.

This provision confers authority to the Supreme Court to consider any question on a reference by the President. Such a question may be about the constitutionality of a bill, either federal or provincial. Although, the Constitution of Pakistan recognizes the

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[555]M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund 1998), 1.
[556]*Fazlul Quader Chowdhury v Muhammad Abdul Haque*, PLD 1963 SC 486 at 535.
[557] C. H. McIlwain, *Constitutionalism, Ancient and Modern* (N Y: Cornell University Press, 1947), 24.
[558] K. C. Wheare, *Modern Constitutions* (Oxford: Oxford University Press, 1966), 4-8.
[559]M. J. C. Vile, *Constitutionalism and the Separation of Powers*, (Oxford: OUP, 1967), 1.

principle of separation of powers, but unlike the US Constitution, it permits the head of State to involve the judiciary in any question of public importance. In 1793, when Secretary State Jefferson enquired of the US Supreme Court whether it would give advice the US President on questions of law arising out of certain treaties, the US Supreme Court refused saying that there was no such provision in the US Constitution.[560] It was observed that it was not proper for the highest Court to decide such like questions extra-judicially.[561] It is because that the US Constitution, in Article III, Section 2(1) provides that the judicial power of the Supreme Court shall extend to "cases" and "controversies".[562] The Australian Constitution has also no such provision.[563] However, the Attorney-General may be permitted to bring such an advisory case to the High Court to secure a determination of the validity of National or State legislation after its passage whether before or after it has come into force.[564] The Canadian Supreme Court Act, 1960, by section 60, empowers the Governor-General in Council to refer important questions of law touching on the validity or interpretation of the Dominion or Provincial legislation.[565] Such advisory jurisdiction has frequently been used in Canada to settle constitutional issues.[566]

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[560] Muhammad Abdul Basit, *The Constitution of the Islamic Republic of Pakistan with Commentary* (Rawalpindi: Federal Law House, 2015), 739.

[561] Ibid referring Douglas, *Marshall to Mukherjea,* 25-26 and Thayer, *Legal Essays,* 53 (1923).

[562] *Muskrat* v. *U.S.,* 219 US 346.

[563] *In re: Judiciary and Navigation Acts,* 29 CLR 25(1921).

[564] Muhammad Abdul Basit, *The Constitution of the Islamic Republic of Pakistan with Commentary* (Rawalpindi: Federal Law House, 2015), 740, referring *Attorney-General for Victoria* v. *Commonweath,* 71CLR 237 (1945); SAWER, The Supreme Court and the High Court of Australia, *6 JI of Public Law,* 482, 491 (1957).

[565] Ibid.

[566] Macdonald, "The Privy Council and the Canadian Consitution", 29 Can. B.R. 1020 (1951); Davison, "The Constitutionality and Utility of Advisory Opinions", 2 University of Toronto L.J., 347 (1950); Rubin, "the Nature, Use, and Effect of referenc Cases in Canadian Constitutional Law", 6 McGill L.J., 168 (1959-60), available at lawjournal.mcgill.ca/userfiles/other/7455946-rubin.pdf [last accessed on 24.06.2019].

Its simple definion may be "[a] formal opinion by judge or judges or a -court of law or a law officer upon a question of law submitted by a legislative body or a governmental official, but not actually presented in a concrete case at law."[567] In the context of Pakistan, it is commonly believed that such an advisory opinion of the Supreme Court is having no binding force.[568] But on deeper look, such observations are in its own context.

In re: *Special Courts Bill*, 1978 (AIR 1979 SC 478), it was held as under:

> 101. … We are inclined to the view that … all other courts … are … bound by the view expressed by this Court even in exercise of its advisory jurisdiction under Art. 143 (1) of the [Indian] Constitution. … Almost everything that could possibly be urged in favour of and against the Bill was urged before us and to think that our opinion is an exercise in futility is deeply frustrating.

In the *Presidential Reference No.1 of 1998* (AIR 1999 SC 1) the Indian Supreme Court recorded statement of Attorney General to the effect that "the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference." in the case of *Hakim Muhammad Anwar Babri* v. *Federation of Pakistan* (PLD 1974 Lahore 33), the High Court held as under:

> [T]he resolution in question was passed [by the legislature] after obtaining the advice and opinion of the Supreme Court. The Supreme Court held that such a resolution could be passed, and after that to ask … [the High] Court to declare that such a resolution could not have been passed or that it was without lawful authority is an attempt to ask us to sit in judgment over the views of the Supreme Court. Obviously, such an attempt cannot succeed because in

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[567] Ibid, Rubin.

[568] *Al-Jehad Trust* case, PLD 1997 SC 84.

> Article 189 of the Constitution of the Islamic Republic of Pakistan, it is written that … "[a]ny decision of the Supreme Court shall, to the extent that if decides a question of law or is based upon or enunciates a principle of law, be binding on all other Courts in Pakistan."

From the language of Articles 189 and 190 of the Constitution, it is concluded that opinion expressed by the Supreme Court in a reference under Article 186 is required to be esteemed utmost by all the organs of the State, therefore, it would not be fair to say that the opinion expressed by the Supreme Court on Presidential Reference under Article 186 of the Constitution has no binding effect.

5.2 HISBA BILL CASE[569]

The President of Pakistan made a reference under Article 186 of the Constitution for the opinion of the Supreme Court on the following questions:

> i) Whether the Hisba Bill or any of its provisions would be constitutionally invalid if enacted?
>
> ii) Whether the Hisba Bill or any of its provisions, would, if enacted; be violative of the fundamental rights guaranteed in Part-II, Chapter 1 of the Constitution, including but not limited to Articles, 9, 14, 16 to 20, 22 and 25 thereof?
>
> iii) Whether the Hisba Bill or any of its provisions would, if enacted, be violative of Articles 2A, 4, 203G, 212, 229 and 230 of the Constitution?
>
> iv) Whether the enactment of the Hisba Bill would encroach on an occupied field, violative of the Constitution by creating a parallel judicial system,

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[569] file:///C:/Users/Ibrahim/Desktop/Reference%20by_the_President_of_Pakistan_under_Article_186.pdf [last accessed on 20.06.2019].

undermine judicial independence and deny citizens their right of access to justice?

v) Whether the enactment of the Hisba Bill would violate the principle of separation of powers enshrined in the Constitution?

vi) Whether the Hisba Bill, and in particular Sections 10 and 23 thereof, is unconstitutionally overbroad and vague and suffers from excessive delegation?

vii) If the answer to any one or more of the above questions is in the affirmative, whether the Governor, NWFP is obliged to sign into law the Hisba Bill passed by the NWFP Assembly?

The facts in brief are to the effect that on 19th June, 2003, a draft Bill titled "HISBA BILL" was submitted to the Governor of NWFP for his approval prior to its presentation before the N.W.F.P Assembly. The Governor pointed out certain defects and retransmitted the Bill back. The Government submitted the same before the Council of Islamic Ideology (CII).[570] The CII pointed out inherent defects in the proposed legislation and specifically stated that the draft Hisba Bill violated a number of constitutional provisions and was capable of being exploited for political motives. The Provincial Government, without taking into consideration the opinion of the CII, tabled the draft Hisba Bill in the N.W.F.P Provincial Assembly and got it passed. The Governor requested the Prime Minister to make a request to the President of Pakistan for making a Reference to the Supreme Court for its opinion on the constitutionality of the draft Hisba Bill under Article 186 of the Constitution as serious questions of law of public importance were involved in the matter.

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[570] It is a constitutional body under Articles 153-154 of the Constitution.

“Hisba” is an Arabic word which means “to count” or “accountability” or “to prohibit from evil things.” The Supreme Court traced the etymological and historical origins of the institution of “Hisba.” It was highlighted that from ancient times till the 20th century, the office of Hisba Mohtasib effectively functioned to spread virtues and battle against evils.

The Supreme Court of Pakistan found that the jurisdiction and power of the proposed Mohtasib under the proposed Hisba legislation were already available in 1) Establishment of Office of the Wafaqi Mohtasib Order 1983, 2) Establishment of the Office of Ombudsman for the Province of Balochistan Ordinance, 2001, 3) Punjab Office of the Ombudsman Act, 1997, 4) Establishment of the Office of Ombudsman for the Province of Sindh Act, 1991, 5) Establishment of Office of Federal Tax Ombudsman Ordinance 2000, and 6) NWFP Local Government Ordinance, 2001. It was declared by the Supreme Court that the NWFP Local Government Ordinance, 2001 has constitutional protection as its alteration, repeal or amendment, without the previous sanction of the President, has been prohibited under Article 268 (2) read with Sixth Schedule of the Constitution. Therefore, Provincial Government by creating Offices of “Zilla Mohtasib” under the Hisba Bill was not authorized to legislate a provision of law having constitutional protection.

It was also observed by the Supreme Court that the “Mohtasib” under the Hisba Bill enjoys dual powers i.e. as an authority, exercising powers of a judicial officer, competent to punish a person for noncompliance of his orders and at the same time, as an investigator and prosecutor; authorized to submit complaint against a citizen, who in his arbitrary wisdom, failed to oblige him by accepting his orders, refraining

him from or ordering him to perform certain actions, which in Mohtasib' s view are in accordance with Islamic thoughts, etiquettes and faith as believed by him. Plurality of powers at the command of "Hisba Mohtasib," distinguishes him from the "Ombudsman" functioning under other laws, which give Ombudsman an authority only to make recommendatory directions,[571] having no binding effect.[572] The guiding principle enunciated by the Supreme Court in this case is that Article 175 (3) of the Constitution mandates that judicial powers of binding nature are not to be conferred upon an Authority exercising Executive powers.[573] Such modus operandi had already been declared by the Supreme Court by holding that "such provision incorporated in such like legislation shall be declared to be void being in conflict with **Articles 9, 25, 175** and **203** of the Constitution."[574] Section 14 of the Hisba Bill gives him powers of contempt, as are vested under Contempt of Court Act, 1976. As such, Hisba Bill if passed into law would infringe the "principle of separation of powers" which is the hallmark of the Constitution. "Hukamnama" [order] issued by the Hisba Mohtasib, under Section 12(1) of the Hisba Bill has to be obeyed even if it is an unlawful "Hukamnama" [order]. The Supreme Court in the case of *Zahid Akhtar* v. *Government*

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[571] *Shafaatullah Qureshi* v. *Federation of Pakistan*, PLD 2001 SC 142.

[572] *National Bank of Pakistan* v. *Wafaqi Mohtasib*, NLR 1993 CLJ 171; *Tariq Majeed Chaudhry* v. *Lahore Stock Exchange*, PLD 1995 Lahore 572; *Pakistan International Airlines Corporation* v. *Wafaqi Mohtasib*, 1998 SCMR 841; *East West Insurance Company Ltd*. v. *Wafaqi Mohtasib*, 1999 MLD 3050; *Punjab Agricultural Development and Supplies Corporation* v. *Muhammad Rafiq Khan*, 2002 PLC (CS) 1133; *Muslim Commercial Bank Ltd.* v. *Momin Khan*, 2002 SCMR 958; *Nazir Ahmed Khan* v. *Pakistan International Airlines Corporation*, 2004 PLC (CS) 119.

[573] *Mehram Ali* v. *Federation of Pakistan*, PLD 1998 SC 1445 ("the Courts/Tribunals which are manned and run by Executive Authorities, without being under the control and supervision of the High Court, in terms of Article 203 of the Constitution, can hardly meet the mandatory requirement of the Constitution."); *Liaquat Hussain* v. *Federation of Pakistan*, PLD 1999 SC 504; *Khan Asfandyar Wali* v. *Federation of Pakistan*, PLD 2001 SC 607.

[574] *Government of Balochistan* v. *Azizullah Memon*, PLD 1993 SC 341.

of Punjab, PLD 1995 SC 530 and *Ramesh M. Udeshi* v. *The State*, 2005 SCMR 648, had forbidden the Government Officials to implement illegal orders.

Under Article 116 of the Constitution, the Governor of the Province is required to assent to a bill which has been passed by the Assembly in accordance with the Constitution. The Supreme Court observed that two positions could be visualized in respect of a Bill, namely, if in judicial scrutiny it is held that it is intra vires the Constitution, then Article 116 of the Constitution would lay an obligation on the Governor to assent to it. If the judicial opinion is that either the Bill as a whole or some of its parts are ultra vires the Constitution, then the Governor would not assent to the Bill. The Court held that the Governor was not bound to assent to that part of the Hisba Bill which was declared ultra vires the Constitution by the Supreme Court. Reference was made to *Attorney General for New South Wales* v. *Trethowan*, 47 CLR 97, elaborating the point that two bills were passed but without the majority of the electors, therefore, the Governor was restrained from assenting to the same unless and until the majority of the voters had approved them. The Court also observed that illegal orders will not be complied with.[575]

It is equally important to note that once some of the Sections of a Bill have been declared unconstitutional, it would not mean that leftover Sections of the Bill have been declared in accordance with the Constitution. Their constitutionality remains open to be questioned, which can be upheld or struck down as or when challenged

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[575] *Zahid Akhtar* v. *Government of Punjab*, PLD 1995 SC 530; *Yaqoob Shah* v. *XEN PESCO*, PLD 2002 SC 667); *Secretary Education NWFP* v. *Mustamir Khan*, 2005 SCMR 17; *The State* v. *Udeshi M. Ramesh*, 2005 SCMR 648.

before a competent forum. The Supreme Court of Pakistan referred to the Irish Supreme Court case of *The Housing (Private Rented Dwellings) Bill,* 198 [1983] I.R. 1 and quoted as follows:

> It is to be noted that the Court's function under Article 26 [of the Irish Constitution] is to ascertain and declare repugnancy (if such there be) to the Constitution in a referred bill or in the specified provision or provisions thereof. It is not the function of the Court to impress any part of a referred bill with a stamp of constitutionality. If the Court finds that any provision of a referred bill or of the referred provisions is repugnant, then the whole bill fails for the President is then debarred from signing it, thus preventing it from becoming an Act. There thus may be areas of a referred bill or of referred provisions of a bill which may be left untouched by the Court's decision. The authors of a bill may therefore find the Court decision less illuminating than they would wish it to be.

When the question of maintainability at Bill stage was raised, the Supreme Court repelled the same by quoting the Indian case of *Kerala Education Bill 1957*, AIR 1958 SC 956:

> The principles established by judicial decisions clearly indicate that the complaint that the questions referred to us relate to the validity, not of a statute brought into force but of a bill which has yet to be passed into law by being accorded the assent of the President is not a good ground for not entertaining the reference.

In the Hisba Bill case, the Supreme Court of Pakistan made useful discussion about judicial challenge to a proposed law. It observed that in *Re. Reference under section 213 of the Government of India Act, 1935*, AIR 1944 FC 73, it was held that "the fact that the question referred related to future legislation cannot by itself be regarded as valid objection." The hisba reference was held maintainable and it was declared that

the Governor can competently refuse to assent to the unconstitutional engrossed Bill.[576]

5.3 PROCESS AND OUTCOMES

Why process? But what, when that which wears the form of law is at variance with true law, is the remedy? To main procedural forms connected with the enactment of law suggested to **Cicero**, in answering this question, something strikingly like judicial review. It was a Roman practice to incorporate in statutes a saving clause to the effect that it was no purpose of the enactment to abrogate what was sacrosanct or *jus*.[577] In this way, certain maxims or *leges legum*, some of which governed legislative process itself, were enacted into a species of written constitution binding on the legislative power. The *lex Caecilia et Didia*, for example was a portion of the *jus legeum* which prohibited the proposal of any law containing two or more matters not germane.[578]

Legislation may be understood either as the **process** of **lawmaking** or as the product of that process. A law is usually understood to be a general rule of conduct which is laid down by the legislature and which the inhabitants of the country must obey. **Article 66** states: "there shall be freedom of speech in Parliament and no member

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[576] *Sea Customs Act, 1878 Section 20(2)*, AIR 1963 SC 1760; *Special Courts Bill. 1978*, AIR 1979 SC 478; *Reference under section 213 of the Government of India Act, 1935*, AIR 1944 FC 73; *Special Courts Bill 1978,* AIR 1979 SC 478; *Reference No.1 of 1988*, PLD 1989 SC 75; *Reference under Article 143 of the Constitution of India*, AIR 1965 SC 745;

[577] Brissonius (Barnable Brisson), *De Formullis et Solennibus Populi Romani Verbis* (Leipsic, 1754) Lib. 2, c. 19, 129-130 (this work first appeared in 1583. The Leipsic edition is based on a revision and extension of the original work by one Franciscus Conradus, and contains a life of Brisson, who was one-time President of the Parlement of Paris. Referred here from Corwin, 'Higher Law' 159 op cit.

[578] Brinton Coxe, *Judicial Power and Unconstitutional Legislation* (Philadelphia: Kay, 1893), 111, citing Smith's Dictionary of Antiquities (1842), art. *Lex* at 559-561.

shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament." This lays down an express rule of conduct which applies to everyone. This right of freedom of speech in the legislature is so cherished that the Indian Supreme Court has to observe:

> [A]rticle [105(2) of the Indian Constitution] confers immunity *inter alia* in respect of "anything said … in Parliament ", the word "anything" is of the widest import and is equivalent to "everything". The only limitation arises from the words "in Parliament" which means during the sitting of Parliament and in the course of business of Parliament. Once it is proved that Parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceedings in any Court. What they say in only subject to the discipline of the rules of Parliament, the good sense of the members and the control of proceedings by the Speaker. The Courts have no say in the matte and should really have none.[579]

This implies that for his speech and action in Parliament, a member is subject only to the discipline of the House itself and no proceedings, civil or criminal, can be instituted against him in any court in respect of the same.[580]

The term "Act of Parliament" came into use when Pakistan was first provided with a Parliament on obtaining independence in 1947 and the Government of India Act, 1935 became its working constitution. Its current use is coached in the language of **Article 75(3)** of the Constitution which provides that "[w]hen the President has assented or is deemed to have assented to a Bill, it shall become law and be called an Act of

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[579] *Tej Kiran Jain v. N. Sanjiva Reddy*, AIR 1970 SC 1573.

[580] *M.S. Sharma v. Sri Krishna Sinha*, AIR 1959 SC 295; *Suresh Chandra Benerji v. Punit Goala*, AIR 1951 Cal 176; *Surendra Mohanty v. Nabakrishna Choudhury*, AIR 1958 Orissa 168; *In the matter of Article 143 of the Constitution of India*, AIR 1965 SC 745.

Parliament." It tells us that, following the British practice, an Act of the Parliament of Pakistan starts its life as a Bill. The form of Bills, and the procedure for the introduction and passage through the Parliament, are dealt with in the Constitution, and are regulated by the Legislature through its **Rules** of **Business**. The point to remember is that in the garb of regulating its procedure, the legislature cannot become king of its power to become a despotic monarch. **Hughes CJ** of the U.S. Supreme, ergo in a different context, said that the power to regulate implies a power to foster, protect and restrain.[581]

The significance of the three readings, together with the consideration stage, is that they provide several opportunities for Members to weigh up the merits of the Bill and to suggest improvements. Whether this opportunity is taken or not depends on the alertness and interest shown by Members, and also, it must be said, on the timetable laid down by the Business Committee. There is a tendency in Pakistan for Bills to be put through all their stages at one time - a process which rules out the possibility of errors being corrected, and improvements made, through the perspicacity of Members.

A Bill is taken to have been passed by the Assembly if, but only if, it has been read three times and has passed through the consideration stage. If opinions differ about whether a Bill should pass at any stage, the decision is taken by holding a division,

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[581] National Labor Relations Board v. Jones, 301 US 1 at 37; Regulate, 1. To control or direct according to a rule. 2. To adjust in conformity to a specification or requirement. 3. To adjust for accurate and proper functioning. The American Heritage Dictionary of the English Language (New York: dell Publishing Co. Inc., 1979), 595.

the question will be decided by a simple majority of votes cast. An engrossed bill must be presented to the President, who may assent to the whole or a part of it or refuse assent. When the President signifies his assent, the Bill or the part to which assent is given, as the case may be, becomes an Act of Parliament. What this narrative signifies? It means simply that the freedom of speech and debate in Parliament is to freely and boldly express one's view for the benefit of the represented.

5.4 PROCESS AND LEGITIMACY

Legislatures are meant for deliberation. They are places where disagreements are aired. That is why the rules of procedures are framed to facilitate such deliberation. It is a misconception to think or render them just assemblages for voting. Let us state the obvious: the issues discussed in legislatures are issues on which we expect to experience disagreement. They are issues on which we expect proposal to be matched by counter-proposal, and every proposal that someone finds persuasive is liable to be opposed by in a variety of ways by others. The idea that it is appropriate, indeed necessary; to air these disagreements in open debate are evidently a deep principle underlying the rules that govern legislative procedure. It can be justified by saying that deliberation may actually improve our legislative decision-making. Because of what is at stake in legislation, we have a duty to make the best decisions we can, and to neglect nothing. But how to do it practically is the question. The public officers are accountable to Parliament for what they do so far as regards efficiency and policy and of that Parliament is the only judge; they are responsible to a Court of

justice for lawfulness of what they do and of that the Court is the only judge[582] See the present indefinite tense of the quoted sentence; why not the legislature in Pakistan, being included in the definition of State, be accountable to the Courts?

5.5 PROCESS AND THE RULE OF LAW

The most fundamental sense of the Rule of Law is that it requires a person bound by the law to follow its prescriptions: if the law is followed, the Rule of Law reigns.[583] The Constitution enshrines the rule of law in **Articles 4** and **5**. **Article 4** provides:

> Right of individuals to be dealt with in accordance with law etc: - (1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.
>
> (2) In particular: - a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law; b) no person shall be prevented from or be hindered in doing that which he is not prohibited by law; and c) no person shall be compelled to do that which the law does not require him to do.

At the same time, "Obedience to Constitution and law is the **inviolable** obligation of every citizen wherever he may be and of every other person for the time being within

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[582] *IRC v. National Federation of Self*-Employed, (1981) 2 All ER 93 at 107; *S.P. Gupta v. President of India*, AIR 1982 SC 149, (Justice Bhagwati at 194: "We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objective.")

[583] Juha-Pekka Rentto, 'Background and Presuppositions of The Rule of Law', 4, available at http://www.googgle.com.pk/url?sa=t [last accessed on 22.02.2015].

Pakistan."[584] **Article 4** embodies the rule of law.[585] In Pakistan, constitutionally saying, there is no government of men; there is government of law:

> It prevents the government from taking any action in this country for which there is no legal sanction and it at the same time debars the Legislature from creating an authority whose actions are not subject to law. The Legislature cannot … enact that whatever action a particular person may take shall be immune from challenge. All persons exercising authority in Pakistan must do so only in accordance with law.[586]

Difficulty arises when a law has been legislated which is invalid or void being in violation of the Fundamental Rights. **Article 8** provides:

> Laws inconsistent with or in derogation of Fundamental Rights to be void: - (1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.

See the addressee being the State. Is law made by State? No. It is made by the Legislature being an Organ of the State. Then why the above constitutional provision has mentioned the State, not the Legislature? It is because the Constitution was well aware of the amendment in the Constitution, and prohibited the State from making any legal provision either legislative or by two-third majority in the garb of an amendment in the constitution to take away or abridge the Fundamental Rights.

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[584] Article 5, Constitution.
[585] *Manzoor Elahi v. Federation of Pakistan*, PLD 1975 SC 66 at 101.
[586] *Jamal Shah v. Election Commission*, PLD 1966 SC 1.

Nobody has ever thought over the very language of the Constitution from this perspective. We the Pakistani write in fine niceties of the English language but later on do not pay attention to such niceties. Reference here may be made quickly to **Article 7** of the Constitution where-in State has been defined to be consisting the Legislature as well. It is also to be kept in mind that unlike the American Constitution, our Constitution does not expressly vest legislative power in the Legislature. So, here, the burden of proof in the sense of indicating the very provision which either expressly or by implication conferring or vesting the legislative power in the Legislature lies on the Legislature.

Now there is a difficulty. A law once enacted remains effective unless declared and struck down by Courts to be ineffective. The Courts usually do so under **Articles 199** and **184** of the Constitution, but till that time, the citizens have to suffer the agonies of the unconstitutional law.

It is a strange logic. Under **Article 199**, the words used are 'without lawful authority' and 'of no legal effect.' It has judicially been said in the English context that if an order, though void, is capable of producing legal consequences and it is necessary to have it set aside, it is not a 'nullity' in the sense that it is liable to be quashed by the courts.[587] This reasoning is fallacious: how can a void order be 'capable'? A void order by its very definition is that which lacks legal authority behind. Further, this English judicial observation does not apply to Pakistan for the simple reason that in England, there

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[587] *Boddington v. British Transport Police*, (1998) 2 All ER 203 at 209.

are no such fundamental rights as is the case in Pakistan. Further, it refers to an executive order, not to a legislative act.

But the dilemma is that in Pakistan too, the judicial sayings are not much different. It has been observed judicially that the word 'void' does not mean that the inconsistent law is repealed or ceases to be on the statute book. It only means, in the view of the judiciary, that it will be ignored or disregarded.[588] Put simply, the 'void law', according to this forensic view, shall work till the time some individual challenges it in a Court of law and get it struck down. But the irony is that the burden of persuasion always lies on the citizen which is impossibility against the Leviathan, the State.

A working definition will suffice, namely that furnished by the late Lord **Bingham** in his excellent book, *The Rule of Law*: "The core of the ... principle is ... that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."[589] But the question is that mundane law is to be made in the mundane way and then the Rule of Law be applied in its thick version which means content as well as the form of law. The term 'manner and form requirement' has its origin in section 5 of the Colonial Laws Validity Act, 1865 (U.K) which authorized colonial legislatures to amend their constitutions but stipulated that such amendments had to be made "in such manner and form as may from time to time be required by an Act of Parliament, letters patent, order in council or colonial

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[588] *M. Mehdi Ali Khan*, PLD 1959 SC (Pak) 387; *Mir Abdul Baqi Baloch*, PLD 1968 SC 313 at 329.
[589] T. Bingham, *The Rule of Law* (London: Penguin, Allen Lane, 2010), 8.

law for the time being in force in the said colony".[590] In this context, it is plain to remember that once a law is competently enacted with respect to content and form, then Megarry , V.C is better to be remembered who said judicially:

> [T]he duty of the court is to obey and apply every Act of Parliament, and … the court cannot hold any such Act to be ultra vires…. [I] is a fundamental of the English constitution that Parliament is supreme. As a matter of law, the courts of England recognize Parliament as being omnipotent in all save the power to destroy its own omnipotence.[591]

The English Parliament cannot destroy its own omnipotence but what is the authority for this proposition? If **Dicey** vociferous saying is taken on its face value that the right to make and unmake any law whatsoever is the sole prerogative of Parliament and that no person or body is recognized as having the right to override or set aside legislation of Parliament,[592] then why Parliament is not competent to destroy its own omnipotence? In fact, it is wrong even in England to believe that Parliament has absolute immunity. One of the first constitutional scholars to challenge Dicey's formulation of parliamentary supremacy was **Sir Ivor Jennings**. At the heart of his critique was the contention that Dicey's formulation left unanswered the question of what constituted a valid expression of the will of Parliament. The reason for Jennings was a question of law he expressed the revised doctrine of parliamentary sovereignty in the following terms:

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[590] Ibid, 66-67.

[591] *A-G, N.S.W. v. Trethowan*, [1932] A.C. 526 (*Trethowan*).

[592] See generally, A.V. Dicey, *Introduction to the Law of Constitution*, 10th ed (Delhi: Universal Law Book House, 2003).

> Legal sovereignty is merely a name indicating that the legislature has for the time being power to make laws of any kind in the manner required by the law. That is, a rule expressed to be made by the King, "with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same", will be recognized by the courts, including a rule which alters this law itself. If this is so, the "legal sovereign" may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself…. The law is that Parliament may make any law in the manner and form provided by the la or by the Parliament Act of 1911. But Parliament may, if it pleases provide another manner and form. Suppose, for instance, that the present Parliament enacted that the House of Lords should not be abolished except after a majority of electors had expressly agreed to it, and that no Act repealing that Act should be passed except after a similar referendum. There is no law to appeal to except that Act. The Act provides a new manner and form which must be followed unless it can be said that at the time of its passing that Act was void or of no effect.[593]

The concept of the Rule of Law as understood so far take it for granted that law is valid when the Government says it is an enactment. First, the ugly: By this is meant formalism, devoid of content. The idea of the "Rule of Law" simply refers to rule under the authority of law. It is the idea that there are formal rules which have to be complied with by the State and its citizens. The content of those rules is irrelevant. It makes no difference if they are morally repugnant, as laws, in the past, have legalized slavery or torture. How can mere adherence to formal rules regardless of content constitute the rule of law in the sense known and valued by civilized people?

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[593] W. I. Jennings, *The Law and the Constitution*, 4th ed (London: University of London Press, 1952), 147-49.

Next, the bad: To illustrate this, let me take you back to **Ancient Rome** and two statements made by one of its leading figures: **Cicero**. The first is his claim that the safety of the public is the highest law - '*Salus populi suprema lex esto*'.[594] The second is his claim that laws are silent when arms are raised- '*Silent enim leges inter arma*'.[595] Why do they fall silent? Because in doing so they secure the safety of the public. Here the rule of law takes on an entirely more dangerous shape: it is tyranny's justification. To serve the highest law anything becomes justifiable, even to the extent that general laws or in countries with written constitutions, constitutional provisions can be set aside. In this situation, there is little law and what there exists is in name only. Such claims, ancient or modern, are fraught with danger. They militate against the wisdom underlying the proposition advanced by John **Locke**, the English philosopher: "wherever law ends tyranny begins...."[596] They also serve as a reminder that the most finely crafted constitutions are not, by themselves, reliable bulwarks against tyranny.

The issue was internment and the House of Lords held in *Liversidge* that a court cannot inquire as to whether the Secretary of State had reasonable grounds for "believing a person to be of hostile associations". [597] But see the **dissenting speech** of Lord **Atkin** in the course of **World War II**. Lord **Atkin** said:[598]

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[594] Macus. Tullius Cicero, 'The Laws' in *The Republic and The Laws*, (Oxford) (2008) (Rudd ed.) at 152; Marcus Tullius Cicero, *The Political Works of Marcus Tullius Cicero, vol. 2 (Treatise on the Law* (London: Edmund Spettigue, 67, Chancery Lane, 1842) Translator: Francis Barham at http://oll.libertyfund.org/titles/545 [last accessed 08.03.2015]

[595]Marcus Tullius Cicero, *Speech in Defence of Titus Annius Milo*, translated by Charles Duke Yonge, 9 at http://pinkmonkey.com/dl/library1/book0602.pdf [last visited 05.02.2015]

[596] John Locke, *Second Treatise of Government* (2010 Ed), Para 202, Ch 18 at http://www.earlymoderntexts. com/assets/pdfs/locke1689a.pdf [last visited 22.01.2016].

[597] [1942] AC 205.

[598]*Liversidge v. Anderson*, [1942] AC 205 at 244-245.

> I view with apprehension the attitude of judges who on a mere question of construction, when face to face with claims involving liberty of the subject, show themselves more executive-minded than the executive. ...In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges ... stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I ... I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister.

In Pakistan, the Supreme Court reversed a judgment where the Court below had relied on the majority view in *Liversidge* holding that it was late in the day to follow the dicta of the majority in *Liversidge* and the Court had the power to review, following Atkin, the reasons provided on an objective basis.[599] It should not be forgotten that attempts to circumvent due process, both Parliamentary and then legal, lay behind both the English civil war and the **Glorious Revolution**[600] - "Glorious" because it was peaceful, and which firmly established the modern constitutional settlement through what would be the **1688 Bill of Rights**. One of the grounds on which it did so was that King **James II** had been in the habit of attempting to set aside the law, was in the habit of removing judges from office and had attempted to establish a new court. His successors **William** and **Mary** were offered the Crown on the basis that they would

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[599] *Malik Ghulam Mustafa v. Government of West Pakistan*, PLD 1967 SC 373 at 389.
[600] Bingham, *The Rule of Law* (London: Penguin, Allen Lane, 2010), 23.

abide by the law. In other words, it was government by consent of the governed. It was government according to law and the limits it imposed.

It is now proper to refer to **Magna Carta**, the **Bill** of **Rights 1688** and the **Act** of **Settlement 1701**. They were not simply paper constitutions. They were part of a constitutional settlement that society as a whole, if not all of the society, accepted. Here perhaps is the real difference between the good, the bad and the ugly. From Magna Carta, both before and after, a real commitment can be traced. It is one that people do not only consent to, but it is one that as a society they give life to through the institutions of State, just as to be held to it.

This raises the question then, how does society hold our State institutions properly to account? The answer, or at least part of the answer, is through, and the different roles we ascribe to those powers. It is to this I now turn.

First, let us discern the legislative branch: Parliament, which is responsible for publicly enacting law and is accountable to the electorate for doing so. Secondly, the executive branch: the government, which includes the civil service, the police, who provide security at home, and the armed forces, who provide security abroad. Without the various aspects of the executive branch, the law cannot be properly implemented. Equally, only through acting within the law provided by Parliament and the common law of Pakistan, can the executive ensure that the rule of law is maintained. Finally, last but not the least, the judicial branch: the judiciary and the courts and tribunals, through which the law is administered - through which all persons and authorities in the State are subject to the general law. The rule of law clearly places limits on the exercise of powers by the government and protects the rights of citizens. The rule of

law theory, like the separation of powers, emphasizes the need for keeping the institutions and their processes within reasonable limits so as to avoid **totalitarianism**.

An **inherent premise** of the rule of law is that the law is **properly enacted**, and it must not be understood only as a procedural requirement. Lawmaking means responsible lawmaking. Democratic procedures should be taken seriously. **The court should** thus be **able** to **ensure** a **minimal due process** of **lawmaking by reviewing legislative process.** Not only the **constitutional requirements** of law-making must be strictly followed, but at the same time, something more is the **requirement** of being a **Legislator**.

5.6 POWER OF THE LEGISLATURE

The search for the repository of supremacy would appear not only to be irrelevant, but perhaps inimical, to the notion of a representative democracy as epitomized by the doctrine of separation of powers as ingrained in the Constitution of Pakistan by giving separate Chapters to different Organs of the State. The doctrine of 'checks and balances' reaches its climax in the context of Pakistan where the executive and the legislature are separate in name only. It is only the judiciary to be detached from the political branches i.e. the legislature and the executive "in order to ensure the highest degree of judicial independence, neutrality and impartiality".[601] The matters clenches to the point that in Pakistan, the system is grounded on the principle of constitutional

[601] J Martin, *The English Legal System*, 4th ed. (London: Hodder Arnold, 2005), 221.

supremacy rather than parliamentary supremacy. That is why the Constitution says in express words that "[a]ny 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." It is immediately further provided that "[a]ll executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court."[602] It means without much ado that the makers of the Constitution were cognizant of a possible conflict between the Legislature and the Judiciary, and the ultimate power was granted to the non-elected few consciously with the physical force of the executive. It is not the other way around that the Parliament was granted power to control the Judiciary by making any amendment in the Constitution with the physical force of the executive. It is the Constitution, the constituent will of the people of Pakistan evidenced by the human words of the Constitution. No wisdom of the Parliament would negate this constituent wisdom of the people because Parliament is itself the creation of the Constitution. The Parliament *being under* the Constitution cannot come *over* the Constitution. Otherwise, it would mean then that the people would *frame* a Constitution just for a joke, then would elect representatives *under* the same for another joke, and then ultimately would *permit* the representatives *to do whatever* they [the representatives] want to do with the lives of those people just for a big joke: "it is a tale/ Told by an idiot, full of sound and fury, / Signifying nothing."[603]

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[602]Articles 189 and 190, Constitution.
[603]William Shakespeare, *Macbeth*, V. v. 17.

Edward **Gibbon** writes**:**

> The rich and polite Italians, who had almost universally embraced the philosophy of Epicurus, enjoyed the present blessings of ease and tranquility, and suffered not the pleasing dream to be interrupted by the memory of their old tumultuous freedom. With its power, the senate had lost its dignity; many of the noblest families were extinct. The republicans of the spirit and ability had perished in the field ... or in the proscription. The door of the assembly had been designedly left open for a mixed multitude of more than a thousand persons, who reflected disgrace upon their rank, instead of deriving honor from it.[604]

In Pakistan, the position is more alarming than the one depicted in the above quoted history. Our State is either run by Ordinances or law seldom deliberated by members. It is only the head of a political party, inside or outside the Parliament, no matter, who is responsible for a wanted piece of legislation. There is no T.V channel to show us the debates, if any, in the Parliaments. If need be, an amendment can be passed easily against the express will of the members: a member will weep to have casted vote against his conscience on an amendment in the Constitution. Yes, and then he will be showered with the bounty of office of the chairmanship of the Senate. The whole country will be run by a Senator-Finance Minister inspite of the prohibition of **Articles 90-92** of the Constitution. Nobody will ask, and nobody can ask because it is '*Pakistan*'. Before weeping, let us peep into the historical perspective for a while.

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[604] *The Decline*, Ch III, 79 op cit.

Earlier it was view of judiciary that a constitutional amendment cannot be challenged in Courts. The first in line was **Hamood-ur- Rehman**, C J who observed:

> [T]he judiciary cannot declare any provision of the Constitution to be invalid or repugnant to the national aspirations of the people and the validity of a constitutional amendment can only be challenged if it is adopted in a manner different to the one prescribed by the Constitution or is passed by a lesser number of votes than those specified in the Constitution.[605]

This judicial verdict was taken subsequently to be debarring judicial review of provision inserted in the Constitution; but it is a misconception. It has rather opened doors for the judicial review, if not substantive, at least procedural: "a constitutional amendment can only be challenged if it is adopted in a manner different to the one prescribed by the Constitution or is passed by a lesser number of votes than those specified in the Constitution." In the aftermath, the scope was widened which reached near substantive judicial review. Authority was seen in the Constitution which reads as under:

> The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause, shall to the extent of such contravention, be void.[606]

In the case of *Achakzai,* it was observed that "by employing the words 'any law', the intention of the Constitution seems to be that **Article 8** will apply to all laws made by the Parliament, be it general or any law to amend the Constitution.... These are in-

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[605] *Islamic Republic of Pakistan v. Abdul Wali Khan*, PLD 1976 SC 57.
[606] Article 8, Constitution.

built limitations in the Constitution."[607] So, it may be said that there is a shift in the judicial view towards substantive judicial review which indicates that a hybrid "theory is available in Pakistan to invalidate a constitutional amendment."[608] The grounds may be procedural as well as substantive.

In a subsequent case, **Ajmal Mian**, CJ made a distinction for the first time between 'lesser' and 'higher' rights by observing[609]:

> In Pakistan, instead of adopting the basic structure theory or declaring a provision of the Constitution as *ultra vires* to any of the fundamental rights, this Court has pressed into service the rule of interpretation that if there is a conflict between the two provisions of the Constitution which is not reconcilable, the provision which contains lesser right must yield in favour of a provision which provides higher rights.

Jurisprudentially, no such concept of lesser rights and higher rights is known. The Chief Justice may be understood to have referred to 'constituent' and 'legislative' rights in the Constitution. That is why the U.S. Constitution did not incorporate any amendments in the main body of the Constitution which are just appended. The difficulty may be overcome if distinction between a constitutional provision and a provision in the Constitution is made.

To use the language by saying a 'constitutional provision' or a 'provision of the Constitution' tantamounts to presuming an 'unstated premise',[610] which is itself under

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[607] *Mehmood Khan Achakzai v. Federation of* Pakistan, PLD 1997 SC 426.
[608] Fazal Karim, Vol 2, 1258 op cit
[609] *Wukala-Muhaz v. Federation of Pakistan*, PLD 1998 SC 1263.
[610] John D. Ramage, et al, *Writing Arguments* 4th ed (Boston: Allyn and Bacon, 1998), ch 5, 95.

challenge? Here support may be taken from the words used in the Constitution: “Chief Justice *of* Pakistan”, “Attorney-General *for* Pakistan”. See the difference. ‘Of’ signifies a ‘constituent part’ of the State of Pakistan; while ‘for’ signifies a ‘part’ of the State of Pakistan. How can this be? ‘Constituent part’ means simultaneous, *sine qua non*, like water-fish, fish-water; while ‘part’ means that there is a State and then, there is an Attorney-General. Sometime, there may not be the Attorney-General, but the State will legally exist, both under International Law as well as under the Constitution: and will enjoy the protection of the United Nations. Further analogy may be found in article 2 of the Qanun-e-Shahadat Order, 1984 which contains a language like this: “proved”, “unproved”, and “disproved” in relation with court. Meaning thereby that there will remain assertions till the time they are endorsed by the court of law. So, an amendment will remain just an amendment *in* the Constitution forever. Whether it is valid or not is something different. It will be an amendment in the Constitution with relation to the rest of the provisions. It will remain working till the time not challenged in a court of law. The moment it is challenged, it will stop working, not practically, but notionally, and if declared by the court to be invalid, then the de facto doctrine will not apply since the time of such challenge; it will only apply to the time prior to the time-point of such challenge.

It is not strange. There is such a clear provision in the Constitution: An Ordinance works, and is also a Bill simultaneously. If rejected earlier, it is gone. If passed, it becomes permanent law. If not passed and the allotted time expires, it is gone forever.

In the lengthy discussion and reasoning of different judges, one thing is missing. Nobody has noted the word “State” in **Article 8** of the Constitution which has been

prohibited from making law. Can a State as a State make law? No, it is the Legislative Organ of the State which can make law, and that is why State has been defined in **Article 7** to have a constituent part in the form of the Legislature. *A* State is prior to the Constitution, and then *the* State is subsequent to the Constitution when the Constitution has been framed. The word 'State' used in **Article 8** refers to the subsequent State, also known as constitutional State, the prior one is known as pre-constitution State or just 'State' or political State. When one says that the Parliament cannot 'abrogate', repeal, or 'substitute' the Constitution, one may ask the authority for such saying. Whosoever subverts, attempts to subvert, or abrogates the Constitution is guilty of high treason under **Article 6** of the Constitution. Does not this 'whosoever' include the Parliament? It includes. Why? If Parliament has also the 'constituent' power, and it can make any amendment in the Constitution, then what are the other modes whereby Parliament can subvert the Constitution? Why the Constitution did not use a language to have said, "In the exercise of constituent power, the Parliament can amend any provision of this Constitution?" It is because no constituent power was either given or can be given to a Legislative Parliament being the creation of the Constitution. Short of revolution, the Constitution of Pakistan cannot be amended against its spirit. Otherwise it will be a self-contradictory logic to say that a constitution is framed by a constituent assembly, but can be reframed by a legislative assembly. If it is so, then, there was no need of **Article 6** to refer to 'subversion' amongst other phenomena.

That is subversion which is without physical force but through some 'arrangement'. Compare with the phenomenon where a judge might have committed contempt of his

own court. The Legislators may also be guilty of subversion of the Constitution. Be careful, after all it is the Constitution of the people of Pakistan. It is true that the State-officers shall 'preserve' it, having taken oath as such, but ultimately, it is the people of Pakistan to preserve, protect and defend it who need not take such an oath. Why?

It is because that there is no danger from them to the Constitution. The Constitution delivers oath to the Officers because danger is sensed from them. If it is not so, then, why the superior judiciary looks to the People for the protection of the Constitution. Can any Pakistani, just by not having taken oath, subvert the Constitution? No, because **Article 5** directs him to obey it without referring to any oath. Is an Officer not so directed to obey the Constitution? If yes, then why does he also take oath to protect the Constitution? Why the sub-ordinate court judges are not given such an oath. Is he at liberty to protect or not it at his sweet will? He must protect, but he will not take oath because he is not in a position of power to injure the Constitution.

The Legislators cannot claim greater authority just by grater majority or even by total majority. A law passed with greater majority or total majority does not attain superior authority over a law passed with a simple majority. Just changing the nomenclature, an amendment in the Constitution cannot attain the status of a constitutional provision.

Now, we have reached, through our follies, to a point to call a spade a spade. It is time to frame Rules of Business whereby it will be indicated in the statute as to how many members voted for it. It will be the same procedure as is there in the Supreme Court Rules and practice whereby the majority and dissenting minority are shown in the judgment. Then any law or amendment if passed with the greater majority will be

an amendment *in the Constitution* and will be seen on the touchstone *of the Constitution*.

The people are not concerned with the individual intentions of the MPs. There is no such intention when it comes to interpreting the law; otherwise, just like evidence in courts, it was very easy and time saving to ask the MPs, or ex-MPs to disclose their intention they held at the time of enacting while interpreting the law. It is rather the intention of the law which is sought at the time of interpretation by the courts and others.

5.8 THE IRONIES OF CONSTITUTIONAL THEORY IN PAKISTAN

In certain societies around the world today, there is a growing concern about the expansion of judicial power - known as the 'judicialisation of politics', in which judges render sweeping decisions that potentially infringe on the decision-making authority of the other institutions of government. This over-stepping of judicial bounds can produce a backlash that leads to the politicization of the judiciary, whereby groups within society seek to seat judges who will aggressively advance their political positions through their legal decisions. Going down this path threatens to undermine independence of the judiciary as well as the collective judicial commitment to render decisions in accordance with the law.[611]

[611] Brian Z. Tamanaha, 'The History and Elements of the Rule of Law', Singapore Journal of Legal Studies [2012] 232-247 at 245, at http://law.nus.edu.sg/sjls/articles/SJLS-Dec-12-232.pdfhttp://law.nus.edu.sg/sjls/articles/SJLS-Dec-12-232.pdf [last accessed 28.06.2015]

This shows a warning that judges must be selected with the utmost care, not just focusing on their legal knowledge and acumen, but with at least as much attention to their commitment to fidelity to the law, to their willingness to defer to the proper authority for the making of law, to their qualities of honesty and integrity, to their ability to remain unbiased and not succumb to corruption, to their good temperament and reasonableness and to their demonstrated capacity for wisdom. They must possess the judicial virtues.[612] Take the example of constitutional interpretation at the hands of the judges.

How to make law and then how to interpret it has always been a chronic disease without proper remedy in Pakistan. Although, we have fought all the battles in courts since *Tamizuddin Khan* till *Chief Justice Iftikhar*, there is no consistent judicial view. Particularly, when it comes to be a constitutional question, the matter becomes more complex and confusing after the ordeal of the judicial verdict.

In *Tamizuddin Khan* Case, it was held that assent of the head of state is necessary for the law; in the *Reference* Case, it was held to be given competently ex post facto. Similarly, in *Abdul Wail Khan* Case, it was held that a constitutional amendment cannot be challenged in a court of law; in *Achakzai* Case, it was held that a constitutional amendment cannot be challenged on the ground of being against the theory of basic structure of the Constitution; in *Wukala Mahaz* Case, reference was made to lesser rights and higher rights in the Constitution and so on. The **irony** is that

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[612]Lawrence B. Solum, "Judicial Selection: Ideology Versus Character" (2005) 26 Cardozo L. Rev. 659-689.

the **premise** put is always **wrong**. In none of the cases, more than two dozen spreading over a period of sixty years since 1954 till 2013, except *Justice Iftikhar* Case, no consistent view was taken, albeit, very polished and sophisticated English language was used embodying grandiose ideas and ideals. But nothing was disturbed; just reasons were created for the *status quo*. Perhaps, the Hon'ble judges were concerned with their own posts and position: nothing more, nothing less. It did not matter whether it was Martial law, or civilian acrobat. Take one example.

In the case of challenge to **Article 63A** - which disqualifies an MP if he votes against direction of the Head of the Party on a vote of no confidence against the Prime Minister - the Supreme Court did not interfere by taking shelter in the non-availability of the 'theory of the basic structure' of the Constitution in Pakistan.[613] The premise was deliberately wrongly put. 'Deliberately'! Because the persons at such a high pedestal cannot reasonably be expected to put the cart before the horse. Why 'theory' when there is a **Question of First Impression**?

After all, what is a 'theory'? It is a Greek word, '*theories'*, which means contemplation. It is used in the following senses: i) organized knowledge; ii) as distinguished from experiment or practice; iii) abstract reasoning; iv) hypothesis or supposition.[614] There was no need to take help from any theory because theory is subsequent to the determination, particularly, when it is a case having come before the court for the first

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[613] *Wukala Mahaz Barai Tahafaz Dastoor v. Pakistan*, PLD 1998 SC 1263

[614] The American Heritage Dictionary of the English Language, Paperback edition (New York: Dell Publishing Co., Inc., 1979), 718; 'contemplation' is a noun of the verb 'contemplate' which is from Latin *contemplari,* to observe carefully., It is used in the sense: i) to ponder or consider; ii) to intend; expect. Ibid, 156

time. The solution was so simple and easy, in a few words instead of hundreds of thousand pages. See a glimpse of the possible in a few words answer to the problem.

The Constitution envisages a bicameral democratic-parliament having so many members from all over the country. It legislates ordinary law with simple majority of the members *present* and *voting- with a joint-session* if need be. It can make amendment in the Constitution with 2/3rd majority of the *total membership* of the Parliament - *without any joint-session*. The ultimate analysis is that it is a deliberative-consensus-oriented institution with a *detachment* between the two chambers. Consequently, any restriction placed on the independence, deliberation or detachment of the members and chambers respectively is unconstitutional. Hence, **Article 63A** is not part of the Constitution as it does the above-mentioned evils. These are about 100 words, and now find the theory. It may be gleaned to be the 'theory of independence and deliberation'. In the Indian context, the Supreme Court mandated without ambiguity that it is the Constitution which is supreme and not the Parliament. The Parliament cannot damage the Constitution to which it owes its existence, with unlimited amending power.[615]

5.8.1 *Tamizuddin Khan* and Its Progeny:

To begin with, the Government of India Act, 1935 was taken as the working constitution of Pakistan. It contained sections 69 and 70 in respect of the significance

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[615] *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625; *I.C. Golaknath v. State of Punjab*, AIR 1967 SC 1643; *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845; *Sankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458.

of assent on *legislative* Bills. Mark the words **"legislative Bills."** But see the judicial tricks!

Judicial power first began to erode democracy when the Constituent Assembly was dissolved on the ground that "[it] … as at present constituted has lost ... confidence of the people and can no longer function" [616] and the Federal Court declared that, "that which otherwise is not lawful, necessity makes [it] lawful". This so-called doctrine of necessity was used many times by subsequent superior courts to justify military coups.[617] It is to be noted that it was a strange forensic prudence: "the Federal Court may not have wanted to legitimize the Governor-general's actions but thought it necessary to bow to his powers. Later, this precept seemed to demonstrate Courts early predilection to support the government of the day."[618] It is '"a monstrous ruling from which Pakistan has never fully recovered"'.[619] When the case was pending in the Federal Court, Governor General **Ghulam Muhammad** not only exchanged coded messages with Justice **Munir**, the former also went to see the latter at his residence.[620] How badly "we have suffered because of this case [621]… [can] anybody

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[616] Gazette of Pakistan Extraordinary, October 24, I954; Shivprasad Swaminathan, 'India's benign constitutional revolution' [updated January 26, 2013], 2, (the etymological roots of 'autochthony', which is not to be confused with 'autonomy', are to be found in the Greek *autos* (self) and *chthon* (earth). The goal of constitutional autochthony is to deliver an indigenous Constitution, the source of whose 'authority' can be located in the new state's own soil. The dominant academic view in the middle of the 20th Century was that autochthony could not be achieved simply by drafting an original Constitution or verbally invoking *We the People* as the source of its authority, for autochthony does not so much concern the content of the Constitution as its *pedigree*: the chain of legal validity authorizing it. Available at http://www.igu.edu.in/sites/default/files/article/26%20jan%202013%20igls.pdf [last accessed on 25.02.2015].

[617] Stephen Philip Cohen, *The Idea of Pakistan* (Lahore: Vanguard Books, 2005), 58.

[618] Paula R. Newberg, 49 op cit

[619] Ayesha Jalal quoted by Hamid Yusuf, *Pakistan: A Study of Political Developments 1947- 97* (Lahore: Sang-e- Meel Publications), 59.

[620] Qudratullah Shahab, *Shahabnama* (Lahore: Sang-e-Meel Publications, 1992), 664

[621] Justice (R) Haziqul Khairi, 'Intellectual Corruption in Pakistan', the daily 'The News', June 25, 2001.

guess[?]" A former justice said extra-judicially that when section 223-A of the Government of India Act, 1935 was enacted, first impression of the lawyers in the country was that the provisions had conferred upon the High Court power to issue writs.[622] This judgment has become most widely disliked one. During proceedings of Chief Justice Iftikhar Muhammad Chaudhry petition in 2007, at a reference by lawyer to *Tamizuddin*, the presiding judge of the Supreme Court – Justice Khalil-ur-Rehman **Ramday** – remarked that "the judgment in *Tamizuddin Khan*'s case has become a taunt for us, so no reference be made to that judgment".[623] Before seeing reasoning of Justice Munir, it is apt to recall **Shakespeare** who says:

> [W]hy, it appears no other thing to me but a foul and pestilent congregation of vapours! What a piece of work is a man! How noble in reason! How infinite in faculty! In form, in moving, how express and admirable! In action how like an angel! In apprehension how like a god! The beauty of the world! The paragon of animals! And yet, to me, what is this quintessence of dust?[624]

Munir C.J writes:

> Suppose they said: 'It is our will that there shall henceforth be no God in Pakistan and no Religion. Let Religion and God both be ejected from Pakistan and a Constitution based on the purely economic doctrine of Karl Marx be framed' and suppose they did all this against the will of the people and in open defiance of their views and sentiments. What would have happened in such a case? The Assembly, if it had absolute and uncontrolled powers, could very well impose such a Constitution on Pakistan. And surprisingly enough the reply to it of one of the learned Judges was 'if the majority of the members are for it

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[622] Justice (R) Syed Akhlaque Hussain, 'Writ Jurisdiction of the Superior Courts in Pakistan', PLD 1958 Journal Part.

[623] Reported in daily 'Mashriq', Peshawar, May 23, 2007.

[624] William Shakespeare, *Hamlet*, II. Ii. 316

> that means the people are for it.' Comment on this reply is unnecessary beyond saying that it overlooks the doctrine, which is a fundamental doctrine in democracy, that the mere fact that the majority of members of a legislature are in favour of a measure does not necessarily mean that the people are for such measure. The second instance cited by Mr. Faiyaz Ali was precisely the instance where if the question arose in the United Kingdom, the King would exercise his reserve powers of dissolution or of withholding assent. In the circumstances supposed, the Governor-General here will act in precisely the same way, namely, he will withhold his assent from such legislation, not because he represents the King but because he represents the people of the Dominion and in such matters, acts on their behalf in the belief that his action will have their approval.[625]

The above reasoning is self-contradictory. It is perverse, arbitrary and self-serving. Rather, it destroys the proposition in support of which it is put forward. It is not understandable as to how section 223-A can be called 'unreasonable'. That section had only conferred original (writ) jurisdiction on the Courts to check arbitrary exercise of the government. So, it is right time to quote **Shakespeare** once again: "A beast that wants discourse of reason."[626] The discussion of **Munir**, CJ is unnecessarily too lengthy; but it makes no sense. Sir Edward **Coke** says, "[H]ow long so ever it hath continued, if it be against reason, it is of no force in Law. "[627]

Because of the verdict in *Tamizuddin* declaring section 223-A void for want of assent of the Governor-General, courts were flooded with cases challenging various actions of the government taken under provisions of the constitutional acts that stood void

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[625] *Federation of Pakistan v. Moulvi Tamizuddin Khan*, PLD 1955 FC 240 at 304

[626] William Shakespeare, *Hamlet*, I. ii. 150

[627] *Institutes*, 'Commentary upon Littleton', I, 80; *The Selected Writings and Speeches of Sir Edwards Coke* (Indianapolis, Indiana: Liberty Fund, 2003), 684.

and ultra vires resulted in legal vacuum.[628] To fill it, the Emergency Powers Ordinance !X of 1955 was promulgated giving retrospective validity to all laws which had become void and inoperative. The Ordinance was challenged in Court in the case of *Usif Patel v. The Crown.*[629] It was held that Governor-General had no power to give validity to void laws and frame new constitution. *Tamizuddin* was an "ill-fated judicial and executive engineering which was perpetrated on the people of Pakistan. Had it been avoided; our present constitutional wrangles and successive Martial laws might not have been encouraged."[630] In the words of **Newberg**:

> [B]y giving the Governor General wide berth and offering precedents to uphold executive intervention in constitutional and legislative activities, the immediate consequences of the Federal Court rulings were detrimental for Pakistan's developing polity and particularly for legislative sovereignty. For the longer term, the court established a practice of striking unspoken bargains with those in powers so that its rulings would be obeyed and those in power would not feel defied. At a crucial time of Pakistan's history, the judiciary molded this interpretation of prudence into a precedent from which it would later find it hard to depart.[631]

A *Reference* was made to the apex Court for advisory opinion for a legal solution.[632] The Court undertook to offer a legal solution to politically intractable problems but understood that an opinion contrary to the Governor General might not be acceptable and upheld. This mixed political message affected the Court's method to a degree.[633]

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[628] G. W. Chaudhry, Constitutional Development in Pakistan (London: Longmans, Green, 1959), 87.
[629] PLD 1955 FC 387.
[630] Justice (R) Mir Khuda Bakhsh Mari, *A Judge May Speak* (Lahore: Ferozsons, Pvt. Ltd., 1990), 76
[631] Paula R. Newberg, 31, op cit.
[632] *Reference* by Governor-General, PLD 1955 FC 435.
[633] Paula R. Newberg, 55 op cit.

The Court returned its advisory opinion holding that invalidation of 46 enactments of the constituent Assembly for lack of assent of Governor General caused crisis which justified use of emergency powers until a new constituent Assembly be convened. Such powers were not available in the working constitution, that is why Justice Munir created the doctrine of state necessity. Later on, this doctrine was used by military regimes as well as civilian politicians to authenticate their abrogation of powers.[634] In *Dosso*[635], military regime was held as legitimate. Justification was sought in Kelson's theory for usurping constitutional powers. **Newberg** records the said reasoning of the Court: '"where revolution is successful it satisfies the test of efficiency and becomes a law-creating fact"'.[636] In reality "[t]he judicial branch of Pakistan was ...accomplice towards military power, particularly under the pretext of 'State Necessity.'"[637] Such like 'necessity ' had earlier been created by Justice **Munir** as judge of **High Court**.[638] He relied on Brocton's maxim, 'that which is otherwise not lawful is made lawful by necessity'. Munir CJ also made reference to English constitutional history and a number of famous cases in support of his position that the Crown can exercise emergency powers forgetting none has supported such exercise of powers in peace times or outside of the nation's Constitution.[639]

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[634] Ibid, 59.

[635] *State v. Dosso*, PLD 1958 SC 533.

[636] Ibid, 76 op cit

[637] Delou Bouvier, and Fatma-Boggio Cosaddia, 'Pakistan: A Long March for Democracy and the Rule of Law, 2007-2008', fidha, International Federation for Human Rights, 9, Online; "Coups and courts: the Pakistan Supreme courts' judgments on usurp regimes in the past have led to constitutional debate across the world ". V. Venkatesan, Frontline, vol. 24, November-December 2007.

[638] See *Muhammad Umer Khan v. The Crown*, PLD 1953 Lahore 528.

[639] Allen McGrath, The Destruction of Pakistan's Democracy (Karachi: Oxford University Press, 2000), 210.

The obvious truth was deliberately ignored that '"Constitutional Martial Law is a contradiction in terms ... [as] Martial Law means no law."'[640]

Lord **Hewart** says, "… 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."[641] No justice was done by Justice Munir. Both *Tamizuddin* and *Reference* were "ill-fated judicial and executive engineering which was perpetrated on the people of Pakistan … [h]ad it been avoided, our present constitutional wrangles and successive Martial laws might not have been encouraged.[642]

It may be said that the starting point of misfortune of this sovereign nation can be reckoned from the judicial verdict in the case of *Tamizuddin Khan* by the apex Court. Chief Justice **Munir** decided the case in the following terms:

> We are concerned in the present case only with the validity of the Government of India (Amendment) act of 1954 and so far as that Act is concerned, it is common ground that it was not presented to the Governor-General for assent and that he has not done anything under this Act which might be taken as indicative of his having assented to it … If the result is disastrous, it will merely be another instance of how thoughtlessly the Constituent Assembly proceeded with its business and by assuming for itself the position of an irremovable legislature to what straits it has brought the country. Unless any rule of estoppel requires us to pronounce merely purported legislation as complete and valid legislation, we have no option but to pronounce it to be void and to leave it to the relevant authorities under the Constitution to set right the position

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[640]Ibid.
[641]*R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 at 259.
[642] Justice (R) Mir Khuda Bakhsh Mari, *A Judge May Speak* (Lahore: Ferozsons, Pvt. Ltd., 1990), 76.

> in any way it may be open to them. The question raised involves the rights of every citizen in Pakistan, and neither any rule of construction nor any rule of estoppel stands in the way of a clear pronouncement.[643]

Cornelius, J. dissented by holding that the legislative enactments passed by the Federal Legislature in the capacity of a Constituent Assembly did not require the Governor-General assent. He stated that **Munir**'s clarification of the history of the Commonwealth had its own significance. **Cornelius**, J. argued that the historical reality was that Pakistan was formed in comprehensive independence, and pointed to what he assumed to be clear differences in the state of administrative power, and the new dominion of Pakistan.[644]

The **Chief Justice** seems[645] so learned and noble by referring to 'Constitution', 'Legislature', 'assent', 'disastrous', 'consequences', 'thoughtlessly', and 'country'; but deliberately avoided the words 'constituent power', 'legislative power', 'jurisdiction', and 'independence'. Justice **Munir** said that the Constituent Assembly had "lived in a fool's paradise, if it ever was ... that it was the sovereign body of the state. **Munir** had not been able to find any firm cause to justify the move of the Governor General who permitted his dissolution of the Constituent Assembly. He maintained that in order to appreciate the role of Pakistan's Governor-General, it was necessary to go "way back

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[643] *Federation of Pakistan v. Tamizuddin Khan*, PLD 1955 FC 240.

[644] G. Kibria, *A Shattered Dream* (Karachi: Oxford University Press, 1989), 78.

[645] "Seems, madam! Nay, it is; I know not 'seems'. / 'Tis not alone my inky cloak, good mother, / Nor customary suits of solemn black." William Shakespeare, *Hamlet*, I. ii. 76.

in history and trace the source and expansion of the British Empire itself."[646] Let us refer again to the great poet-dramatist William **Shakespeare**:

> What a piece of work is a man! How noble in reason! How infinite in faculty! In form, in moving, how express and admirable! In action how like an angel! In apprehension how like a god! The beauty of the world! The paragon of animals! And yet to me what is this quintessence of dust?[647]

The same Chief Justice had to defend, extra-judicially, this unfortunate verdict when the Supreme Court of Pakistan rejected it in *Asma Jillani*.[648] The defence is even against the Supreme Court by saying that the Supreme Court, in *Asma Jillani*, "went out of its way to denounce this case [*Tamizuddin*] and described it as the starting point of the misfortune of this country."[649] In *Nusrat Bhutto* case,[650] the Court extended validity to "extra-constitutional step" of the Army seizing power for "temporary period" in the interest of the state and for the welfare of the people. The Court committed "judicial suicide" by allowing usurper to take any legislative measure including amending the Constitution.[651] The obvious truth was deliberately ignored that "Constitutional Martial Law is a contradiction in terms … [as] Martial Law means no law."[652]

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[646]Ajmal Mian, *A Judge Speaks Out* (Karachi: Oxford University Press, 2004), 125.

[647]Hamlet in *Hamlet*, II. Ii. 316; (quintessence, noun, 1. The pure, highly concentrated essence of something. 2. The purest or most typical instance. [From Medieval Latin *quinta essentia*, fifth essence.], The American Heritage Dictionary of the English Language, paperback edition (New York: Dell Publishing Co., Inc., 1979), 578).

[648]*Asma Jillani v. Government*, PLD 1972 SC 139

[649]Muhammad Munir, *Highways and Byways of Life* (City: Publisher, not decipherable, 1978), 57

[650] *Begum Nusrat Bhutto v. Chief of Army Staff*, PLD 1977 SC 657.

[651] Justice (R) Shamim Hussain Kadri, *Judges and Politics* (Lahore: Jang Publications, 1990), 45.

[652] Ibid.

Even a recent text-book writer in Pakistan tries to provide a safe valve for the retired Chief Justice by saying that "there were two possible interpretations of the relevant constitutional provision…."[653] However, the learned author, after making so many extracts, has then shifted the burden from himself in the explanation given in foot note 3 by saying that these "words are from the judgement … in *Asma Jillani* case…." The learned Chief Justice **Munir** and the like-minded persons have forgotten that the Indian Constitution, framed in the year 1950, under the same constituent power, was in existence in the year 1954, had not been placed for the assent of the Governor-General, but was valid.

If the Governor-General had never assented, in the case of Pakistan to a constitution, whether Pakistan would have again become a colony of the British Empire? Can such a situation be imagined in the context of a sovereign people? The answer will be a BIG NO. Because the Governor-General was not representative of the British Empire in the sense to prevent the constitution of an independent State; he was just here to facilitate things to reach completion. It is better to call Mathew **Arnold**: "Let the long contention cease! / Geese are swans, and swans are geese."[654] That decision was wrong, will remain wrong, and has been held judicially to be wrong. Why? Because the Assembly was exercising sovereign and constituent power to frame a constitution; being independent of all and any extraneous shackles. The doctrine of "state necessity" has been declared "false" by Chief Justice **Ajmal Mian,** as it has also

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[653]Fazal Karim, Vol. 2, 1070

[654] Mathew Arnold, *The Last Word*, quoted here from Cohen, *Dictionary of Quotations*, 10:28

encouraged repeated illegal military take-overs and retarded or rather stunted the growth of democracy in Pakistan.[655] It can be "expect[ed] that the time has now arrived when the superior courts, upholding the rule of law under the Constitution [,] shall adopt the course of 'judicial purism' while deciding ... constitutional issues and discard the outdated, time-worn and conventional philosophy of 'judicial prudence' or 'judicial pragmatism'".[656]

Let us see the position somewhere else. Constitutional supervision of colonial states by the United Kingdom Parliament has led to constitutional difficulties. One example illustrates the problem. In the case of Southern Rhodesia[657], a colony since 1923 which today is the independent Republican State of Zimbabwe, the United Kingdom faced a direct challenge to its constitutional authority. In 1965 Unilateral Declaration of Independence (UDI) led to the passage of the Southern Rhodesia Act 1965, a United Kingdom Act of Parliament asserting sovereignty over Southern Rhodesia. The 1965 Act declared that Southern Rhodesia remained part of Her Majesty's dominions and the power to make laws by Orders in Council was maintained under the Act. The UDI purported to establish independent legislative powers for the Southern Rhodesian legislature, originally set up under the 1961 Constitution with a large measure of self-government granted thereunder by the United Kingdom. The terms of the UDI declared that Southern Rhodesia was to cease to be a colony and conferred full legislative powers on the Southern Rhodesian legislature, including the abolition of

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[655] *Sheikh Liaqat Hussain v. Pakistan,* PLD 1999 SC 504.

[656] Justice (R) Dr. Javid Iqbal, 'The Independence of Judiciary', 4, at http://www.supremecourt.gov.pk/ijc/Articles/2/5.pdf [last accessed 04.07.2015]

[657] See Zimbabwe Act 1979; C. Palley (1967) 30 *Modern Law Review* 263: [1968] Public Law 239

appeals to the Judicial Committee of the Privy Council. It also sought to protect the status of independence by removing jurisdiction of the courts to question its validity.

The constitutional crisis, whereby the government in Southern Rhodesia continued unrecognized in law and enacted rules expressly repugnant to an Act of the United Kingdom Parliament, tested authority of the British Parliament against the self-proclaimed independence of a newly formed State. This matter was raised as an issue in the case of *Madzimbamuto v. Lardner-Burke*[658] which the Privy Council heard on a special application made by Madzimbamuto who challenged his detention under Southern Rhodesia emergency laws made in 1966. Lord **Reid** in the Privy Council made some observations as to the extent of the legal powers of the United Kingdom Parliament, including the case where even if the United Kingdom Parliament acted "unconstitutionally" it would not render the Act of Parliament invalid. The decision of the Privy Council declared the UDI illegal and sought to enforce the [English] Rhodesian Act 1965. It also declared Madzimbamuto's detention illegal. Lord **Reid's** dicta included the following:

> It is often said that it would be unconstitutional to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But this does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them [,] the courts could not hold the Act of parliament invalid.[659]

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[658][1965] 1 A.C 645.

[659] Ibid, at 725; John F. McEldowney, *Public Law* (London: Sweet & Maxwell, 2002), 2-097 to 2-098 at 45-46

Nothing happened. Former Rhodesia became an independent republic known now Zimbabwe.

Cornelius, J dissented in *Tamizuddin Khan* by holding that the legislative enactments passed by the Federal Legislature in the capacity of a constituent Assembly did not require assent of Governor General. He reasoned that historical reality was that Pakistan was formed in comprehensive independence, and pointed out to what he assumed to be clear differences in the state of administrative power and the new dominion of Pakistan.[660]

In the case of Pakistan too, Mr. Tamizuddin Khan, the president (speaker) of the Assembly had rushed to England before going to the Court in Pakistan for restoration of the Assembly but the Queen of England had refused to help him in this regard. Thereafter, he filed the petition in Sindh Chief Court. His assembly ultimately could not be restored because of the unfortunate verdict of Chief justice **Munir**; but poetic justice was done to Mr. Tamizuddin!

5.8.2 Rule-of-Law Justifications*:*

After all, why law exists? A community would be in a state of "warre of every man against every man"[661] if there is no law. In 1776, Thomas **Paine** told readers of *Common Sense* where to find the "king" in America. He entreated them to look not among earthly beings, but to a power above. In America, he explained, "[T]he law is

[660] G. Kibria, A Shattered Dream (Karachi: Oxford University Press, 1989), 78.
[661] Thomas Hobbes, *Leviathan* (1651), ch XIII, and Para 62 op cit.

king. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other."[662] John **Locke** says, "Wherever law ends, tyranny begins."[663] Lord **Hope** said:

> My Lords, I start where my learned friend, Lord Steyn, has just ended. Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.[664]

Put simply, there is a tendency to use the rule of law as a shorthand description of the positive aspects of any given political system.[665] Since authority is derived from the needs of the common good, a ruler's use of authority is radically defective if he exploits his opportunity by making stipulations [laws] intended by him not for the common good but for his own or his friends' or party's or faction advantage. The exercise of power, otherwise than in accordance with the Rule of Law, and "otherwise than in accordance with due requirements of manner and form is an abuse and an injustice."[666]

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[662]Thomas Paine, *Common Sense 1776*, at 28 at http://pinkmonkey.com/dl/library1/sense.pdf [last accessed on 20.03.2015]

[663]John Locke, *Two Treatises of Government* (London: W. Sharpe and Son, 1823), Chapter XVIII, 'Of Tyranny' para 202 at 193 at http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/locke/government.pdf [last accessed on 20.03.2015]

[664]*Jackson v Attorney General* [2006] 1 AC 262 at Para 104.

[665] Joseph Raz, "The Rule of Law and its Virtue", in *The Authority of Law: Essays on Law and Morality* (Oxford: OUP, 1979), 210.

[666] John Finnis, 'Natural Law and Natural Rights', 19, at http://homepage.westmont.edu/hoeckley/readings/Symposium/PDF/201_300/253.pdf [last accessed 27.06.2015]

In Pakistan, dignity of man is guaranteed.[667] Now, to allow the Legislators to ignore the Rule of Law while legislating just because of **Article 69**, apart from other reasons, would be violation of the fundamental right contained in the former Article by a constitutional provision contained in the later provision. So is basically a wrong conception as a fundamental right being inviolable cannot be overridden by any provision of law including a constitutional provision. To interpret both provisions harmoniously, the only way out is that **Article 69** will have to follow **Article14**. Now the point to understand is as to how giving blanket immunity to the legislators violates dignity of the citizens as well as the legislators, reference is made here to **Fuller:**

> To embark on the enterprise of subjecting human conduct to rules involves ... a commitment to the view that man is ... a responsible agent, capable of understanding and following rules.... Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey ... your indifference to his powers of self-determination.[668]

Parliament is an institution, *a priori*, is governed by rules. Each legislator is entitled to respect as a rational human being. Law is a mode of governing people that treats them with respect as though they had a view or perspective of their own to present on the application of the norm to their conduct and situation. Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the

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[667] Article 14, Constitution.

[668] Lon L. Fuller, *The Morality of Law*, (New Haven: Yale University Press, 1969), 162.

entity one is dealing with. As such, it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.[669] Even in systems of parliamentary supremacy, legislatures do act in ways that are constituted by rules. They are highly proceduralized institutions. To say otherwise is to disparage the rule-governed character of parliamentary democracy.[670]

5.8.3 Constitutional Basis and the Battles in the Courts of Pakistan:

Pakistan came into being in 1947 through the Indian Independence Act, 1947. The Government of India Act, 1935 was its working constitution. In 1954 the Governor General dissolved the Constituent Assembly when he did not agree to the proposed constitution. The Federal Court validated dissolution of the Constituent Assembly in the case of *Tamizuddin*, PLD 1955 F. C 240. In the *Special Reference* case,[671] the Constituent Assembly was held to have ceased to be a Constituent Assembly because of an amendment without the consent of the Governor-General whereby six members had been added. For this reason, the Increase and Redistribution of Seats Act, 1949 was declared as invalid. A new Constituent Assembly framed the 1956 Constitution. The first President of Pakistan, Major-General Iskander Mirza, abrogated the Constitution, dissolved the national and provincial legislatures and imposed Martial Law in October, 1958, appointing General Ayub Khan as the Chief Martial Law Administrator. The Supreme Court of Pakistan validated once again the extraconstitutional actions of the executive and enunciated the doctrine of

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[669] James E. Fleming, ed., *Getting to the Rule of Law* (New York University Press, 2011), 15-18.
[670] Ibid. 25-26.
[671] PLD 1955 FC 435.

"revolutionary legality" in the case of *State* v. *Dosso*, PLD 1958 SC (Pak) 533. The Court invoked Kelsenian theory and held that, "a victorious revolution was itself a law creating fact." However, it was held in the case of *Province of East Pakistan v. Muhammad Mehdi Ali Khan*, PLD 1958 SC 387 that the country would continue to be governed as nearly as possible under the abrogated Constitution. A new Constitution of 1962 was enacted. General Ayub Khan ruled till 1969. He was forced to step down by the widespread agitations of students led by Zulfiqar Ali Bhutto. The authority of executive-dominated government was contested vigorously when Ayub Khan turned over the reins of government to General Yahya Khan. The problems that set the stage for civil war still existed at its conclusion; the impossibility of their resolution in post-election constitution-writing led to war and then the independence of East Pakistan. To clear the way for constitutional rule, the judiciary was asked to take center stage once again. Rulings on the transfer of pre-war power in *Asma Jillani*'s case and the conditions for post-war constitutionalism in *Ziaur Rahman*'s case arbitrated continuing disputes about federalism and executive powers, and focused deep-rooted arguments about political ideology and conscience.[672] In *Asma Jillani*, PLD 1972 SC 139, the Court dubbed the Chief Martial Administrator as usurper. It revisited the ratio laid down in the earlier judgment of *Dosso* by holding that Kelsenian theory had been wrongly applied; that no valid law comes into force from "*the foul breath or smeared pen of a person guilty of treason against the national orde*r."

[672] Samuel R. Olken, 'The Ironies of Marbury v. Madison and John Marshal's Judicial Statesmanship', [2004] The John Marshall Law Review, 391- 439.

In 1973 the present constitution was framed after thorough deliberation and consensus of all the political parties. It created a parliamentary form of government whereby the elected Prime Minister is the locus of executive power and the President is a figurehead. The other key principle of the 1973 Constitution is that of federalism. Each of the four provinces has its own provincial legislature. In 1977, general elections were held. There were serious allegations of rigging. The Army Chief General Zia-ul-Haq imposed Martial Law. Assemblies were dissolved and government was dismissed. This time, the Constitution was not abrogated but "held in abeyance." The Supreme Court of Pakistan validated the action in *Begum Nusrat Bhutto* case, PLD 1977 SC 657 on the ground of "*State Necessity*" and the principle of *salus populi suprema lex*. In the 1988 elections Benazir Bhutto led the PPP and became the first Prime Minister. The President used Article 58(2) (b) to dissolve the government on the charges of corruption against the political leaders. The Supreme Court ruled in most of these cases, mostly upholding the dissolution and other times invalidating presidential action, as when it restored Prime Minister Mian Nawaz Sharif in 1993.[673]

Both Bhutto and Sharif had strained relations with the superior judiciary and may be accused of attempting to undermine its independence. Most notable in this regard is Bhutto's disregard for constitutional tradition in her 1994 decision to appoint Justice Sajjad Ali Shah as the Chief Justice of Pakistan while superseding two senior judges.

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[673] *Mian Muhammad Nawaz Sharif* v. *President of Pakistan*, P LD 1993 SC 473; *Federation of Pakistan* v. *Haji Saifullah Khan*, PLD 1989 SC 166; Ahmed *Tariq Rahim* v. *Federation of Pakistan*, PLD 1992 SC 646; Federation *of Pakistan*, v. *Aftab Ahmad Khan Sherpao*, PLD 1992 SC 723; *Sabir Shah* v. *Federation of Pakistan*, PLD 1994 SC 738; Benazir *Bhutto* v. *President of Pakistan*, PLD 1998 SC 388; Zafar *Ali Shah* v. *Pervez Musharraf*, PLD 2000 SC 869.

This led to the *Al-Jehad Trust* case, PLD 1996 SC 324 in which the Supreme Court elaborated key principles for the appointment process of the High Court and Supreme Court judges. In practice, these principles were not followed. Tensions between Chief Justice Sajjad Ali Shah and Prime Minister Sharif started in 1997, eventually led to a division within the Supreme Court, an attack on the Supreme Court by PML-party members, and the removal of the Chief Justice. This episode is viewed as a low-point in the judicial history of the country.

The Musharraf Coup and yet another 'Transition to Democracy'

Immediately after the military's takeover of power in 1999, Pakistan began to experience the unfolding of a blueprint developed by the earlier military regimes and ratified by the superior Courts. A Proclamation of Emergency was declared, the Constitution was put in abeyance, a Provisional Constitutional Order (PCO) was issued to provide a temporary governing framework, and the general assumed the office of the Chief Executive. In January 2000, when the Supreme Court entertained a challenge to the military coup, the judges of the superior courts were compelled to take a new oath of office pledging to serve under the PCO. Six out of a total of thirteen judges of the Supreme Court refused to take the oath and resigned from the bench, including the then Chief Justice Saeduzzaman Siddiqui. A reconstituted Supreme Court decided the case of *Zafar Ali Shah* v. *General Pervez Musharraf*, PLD 2000 SC 869 and validated the coup on the grounds of the doctrine of state necessity. The Court granted virtually unlimited powers to the military regime, including the power to amend the Constitution. In December 2003, the Seventeenth Amendment to the Constitution validated almost all the actions taken during the state necessity phase,

including the revival of the presidential power to dismiss the parliament. In *Pakistan Lawyers Forum* case, PLD 2005 SC 719, the Supreme Court validated the Seventeenth Amendment based on an extension of the doctrine of state necessity. In October 2007, when his term of office was to expire, Musharaff wanted to contest for the second term and his eligibility to do so was challenged by one of the candidates and this matter came up before the Court in *Wajihuddin* v. *The State*, PLD 1996 SC 324. The issues involved in the said petition were twofold: (i) whether General Pervaiz Musharraf could contest the elections notwithstanding the constitutional restraint that no holder of public office could contest the elections unless a period of two years has elapsed between his retirement and the elections. General Musharraf was still holding the office of the Chief of Army Staff; (ii) whether the Assemblies whose term was to expire in two months-time or the succeeding Assemblies would form the Electoral College in view of **Article 43** of the Constitution. The current Assemblies had elected the President for a term of five years which was about to expire. The arguments dragged on and when the polling day approached nearer, on the application of General Musharraf the Court instead of postponing the elections (as that would have changed the complexion of electoral college by efflux of time) allowed him to contest the elections with the rider that the Election Commission of Pakistan shall not notify the result till the final disposal of the pending petition. On the 2nd of November, 2007, the counsel for the petitioner who happened to be the President of Supreme Court Bar Association as well filed an application for issuance of a restraint order against respondent General Musharraf, Chief of Army Staff, not to pass any order which had the effect of suspending the Constitution or changing the composition of the Court. The Court directed the office to put up the petition on the next working day which was

5th of November, 2007 as it was a long weekend and the Court was closed. In the afternoon of 3rd of November, 2007, the word went around in the Capital that martial law was being imposed. Apprehending this the Chief Justice of Pakistan with the available Judges in the Capital City Islamabad assembled in the afternoon (7-Members) and passed a restraining order which reads as follows:

> (i) Government of Pakistan, i.e. President and Prime Minister of Pakistan are restrained from undertaking any such action, which is contrary to Independence of Judiciary; (ii) No judge of the Supreme Court or the High Courts including Chief Justice (s) shall take oath under PCO or any other extra-Constitutional step; (iii) Chief of Army Staff, Corps Commanders, Staff Officers and all concerned of the Civil and Military Authorities are hereby restrained from acting on PCO which has been issued or from administering fresh oath to Chief Justice of Pakistan or Judges of Supreme Court and Chief Justice or Judges of the Provincial High Courts;
>
> (ii) They are also restrained to undertake any such action, which is contrary to independence of Judiciary. Any further appointment of the Chief Justice of Pakistan and Judges of the Supreme Court and Chief Justices of High Courts or Judges of High Courts under new development shall be unlawful and without jurisdiction.
>
> (iii) Put up before Full Court on 5th November 2007.

Notwithstanding the order passed, General Musharraf, the then Chief of Army Staff imposed the “State of Emergency”, directed the Constitution to be held in abeyance, issued a provisional constitutional order prescribing a special oath for judges of the superior Courts with the stipulation that those who will not take oath would cease to hold office. Out of the 18 Judges, 13 did not take oath in the Supreme Court and out of 93 Judges from all over the four High Courts in the provinces of the country, 61 did

not take oath. Those who did not take oath were motivated by no reason other than defending the Constitution and upholding the Rule of Law.

After the general elections in February 2008, the Constitution was restored and an elected Government revived. General Musharraf resigned, and there was a growing demand for restoration of the Judges who had been removed from the Constitutional Courts. In September 2008, several of the deposed Judges rejoined the Court, and finally, on 16 March 2009, the Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry, was re-instated by an executive order of the Prime Minister of Pakistan.

We fought endlessly among ourselves. There was none to save us from the fruitless forensic and political follies.

It reminds us of William **Golding'**s novel, *Lord of the Flies* wherein the littl-uns kill one another in the deserted jungle being without grown-ups; but when the grown-ups reach there, the littl-uns are saved but they (the grown-ups) themselves were waiving a war flag on their ship:[674]

> The central concern of *Lord of the Flies* is the conflict between two competing impulses that exist within all human beings: the instinct to live by rules, act peacefully, follow moral commands, and value the good of the group against the instinct to gratify one's immediate desires, act violently to obtain supremacy over others, and enforce one's will. This conflict might be expressed in a number of ways: civilization vs. savagery, order vs. chaos,

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[674] William Golding, *Lord of the Flies,* at http://mchs.mcisd.net/apps/download/X2bpH13Xnjn4ZJspWQzb5LMu7BGp5CUGaPGFQqVXvLT2M1AW.pdf/Lord%20of%20the%20Flies.pdf [last accessed 06.07.2015]

> reason vs. impulse, law vs. anarchy, or the broader heading of good vs. evil. Throughout the novel, Golding associates the instinct of civilization with good and the instinct of savagery with evil.[675]

Judges of the superior Courts, our saviours, have their own curious and mysterious reasons as they say that Courts do not exist in isolation: "Judges are a part of the society in which they live and they cannot but be influenced by the pressures of public opinion in the society...."[676]

5.8.4 The Very Essence of Judicial Duty*:*

At the risk of oversimplifying, parliamentary sovereignty entails that a bare majority of the nation's elected representatives possesses legislative power to make or unmake any law they choose, free from any substantive limits.[677] But the Courts have a core duty to perform:

> While there may be many reasons why a question is non-justiciable, in this appeal the Attorney General of Canada submitted that to answer the questions would draw the Court into a political controversy and involve it in the legislative process. In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government.... In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be

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[675]'Lord of the Flies [by] William Golding', Spark Notes, 2007, at http://www.sparknotes.com/free-pdfs/live scribe/download/flies.pdf [last accessed 06.07.2015]

[676]Dorab Patel, *Testament of a Liberal*, (Karachi: Oxford University Press, 2000), 90.

[677]A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 10th ed 1959), 39-40.

> determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.[678]

Where a statute is challenged as being in conflict with the Constitution, the Courts have the jurisdiction to declare that statute as void. [679] Because:

> [It] is the theory that the Constitution which is the fundamental law of the land, is the 'will' of the 'people', while a statute is only the creation of the elected representatives of the people; when, therefore, the 'will' of the legislature as declared in the statute, stands in opposition to that of the people as declared in the Constitution - the 'will' of the people must prevail.[680]

However, the presumption of constitutionality of the law must be kept in mind while embarking upon such navigation.[681] But one must not forget that presumption of constitutionality is only a presumption and when the enactment on the face of it is found to violate a fundamental right, it must be held to be invalid unless those who support it can bring it within the purview of an exception to the right.[682] The Supreme Court of Pakistan is of the view "that as between the two possible interpretations of a statute by one of which it would be unconstitutional and by the other valid, it is their plain duty to adopt that which saves the Act."[683] **Article 8(2)** of the Constitution commands and prohibits the State as defined in **Article 7** from enacting any law which

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[678] *Reference re Secession of Quebec,* [1998]2S.C.R.21para 26 referring *Reference re Canada Assistance Plan* (B.C.), [1991] 2 S.C.R. 525, at 545; Elizabeth Edinger, *Casebook Law 100: Canadian Constitutional Law* 2014-2015 (University of British Columbia, 2014/15), ch 1, 63-64 at http://faculty.law.ubc.ca/ edinger/files/100/Law%20100%20CB%202014-15.pdf [last accessed 24.05.2015]

[679] *State of Madras v. Srimathi Champakam*, AIR 1951 S.C. 226; *State v. V.G. Row*, AIR 1952 SC 196.

[680] *Namit Sharma v. Union of India*, W. P (CIVIL) No. 210 of 2012, In the Supreme Court of India, page 10, para 8, at http://supremecourtofindia.nic.in/outtoday/wc21012.pdf [last accessed on 09.11.2015]; *Supreme Court Advocates on Record Association v. Union of India* [(1993) 4 SCC 441]

[681] *Chiranjit Lal Chowdhuri v. The Union of India,* AIR 1951 S.C. 41; *The State of Bombay v. F.N. Balsara,* AIR 1951 S.C. 318.

[682] *Nawab Singh v. The State of Uttar Pradesh,* AIR 1954 SC 278.

[683] *Abdul Aziz alias Labha v. Province of West Pakistan,* PLD 1958 SC 499.

takes away or abridges fundamental rights guaranteed and any law made in contravention of this clause shall, to the extent of inconsistency or contravention, be void. Therefore, **Article 8**(**1**) and (**2**) relate to the existing laws as well as the laws which may be enacted after the promulgation of the Constitution. Such rights cannot be suspended except as provided in the constitution.[684]

Put in simple words, it can be said that interpretation of the Constitution is the *prerogative* as well as *duty* of the superior Courts. It is implied now in **Article 199** of the Constitution. The power of judicial review must exist in Courts of this country in order that they may be able to interpret the Constitution in all its multifarious bearings on the life of the citizens of the country.

5.9 CONSTITUTIONAL EXISTENCE CONDITIONS

Generally speaking, a Constitution is the grund norm and being at the acme of legal scheme, it "lays down the fundamental, constituent and organic law."[685] In fact, people collectively decide the rules to be applied to their collective life later on by the State. So, "[i]t is the supreme verdict of the people and all other organs must subserve to it" [686] Once the Constitution is ordained, the society is thereafter called as a constitutional society - the State. Such a society cannot be re-legated again to a pre-Constitution stage except through a revolution.

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[684] *Government of Baluchistan v. Azizullah Memon*, PLD 1993 SC 341.
[685] *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.
[686] P.B. Mukharji, 'The Aspirations of the Indian Constitution', AIR 1955 Journal 101.

Whether a legislature is to be supreme or not depends upon the Constitution-makers. In Pakistan, the legislature is not supreme; the Constitution has imposed restrictions "on the power of the legislature itself by prohibiting it from making certain laws"[687] Let us see a glimpse of the Australian constitution-framers' thinking.

When the Federal Constitution was going to be established at the Convention of 1891, **Cockburn** spoke of the necessity of judicial review in Federalism as:

> [A]ll our experience hitherto has been under the condition of parliamentary sovereignty … Parliament has been the Supreme body. But when we embark on federation, we throw Parliamentary sovereignty overboard, parliament is no longer supreme. When parliamentary sovereignty is dispensed with, instead of there being a High Court of Parliament, you bring into existence a powerful judiciary which towers above all powers, legislative and executive and which is the sole arbiter and interpreter of the Constitution.[688]

The Indian Supreme Court has signified that "while the court naturally attaches great weight to the legislative judgments, it cannot desert its own duty to determine finally the constitutionality of an impugned statute".[689] It is the correct approach, otherwise, the verdict of the judiciary cannot be reconciled when it says that "Judicial Review is essential feature of the constitution and no law passed by Parliament in exercise of

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[687] M. Munir, *Constitution of the Islamic Republic of Pakistan* (Lahore: PLD Publishers, 1965), 5

[688] Quoted in Sanjay Satyanarayan Bang, 'Judicial Review of Legislative Action: a tool to balance the supremacy of the Constitution', 6 at http://www.internationalseminar.org/XIV_AIS/TS%202/12.%_20Sanjay%20Satyanarayan%20Bang.pdf [last accessed on 12.11.2015]

[689] *State of Madras v. Row*, AIR 1952 SC 196

its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the constitution will cease to be what it is".[690]

A constitution, no doubt, allocates functions; but, "to allocate functions, powers and duties [,] [it] is also *ipso facto* to limit power."[691] It is the Constitution, to tell the obvious, that creates and constitutes the various offices of the State. So, it is the **constitutional existence** which provides force and authority to the natural persons because it was settled that the separation of powers concept will apply as per the Constitution on behalf of the sovereign - the people.

Now to interpret and apply the law, the court must first identify the law. It is called rule of recognition, legal validity, or legalism. It "provides criteria for the assessment of the validity of other rules; but it is also unlike [other rules] in that there is no rule providing criteria for the assessment of its own legal validity".[692]

In performing its duty, the Court has to see two things: First, it must identify the Legislature. Second, it must identify its authoritative utterances. In Pakistan, once when the different powers have been granted in different chapters signifying such a concept, then judicial review is available to the Courts. A finer distinction is there

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[690] *Sampath Kumar v. Union*, AIR 1987 SC 386; *Subhash Sharma v. Union of India*, AIR 1991 SC 631; *S.S. Bola v. B.D. Sharma*, AIR 1997 SC 3127 at 3170: "The founding fathers very wisely incorporated in the constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the fundamental rights and fundamental freedoms guaranteed to the citizens and to afford a useful weapon for … enjoyment of equality, [and] liberty."

[691] V. Bogdanor, *Introduction to Constitutions in Democratic Politics* (City not decipherable: Dartmouth Publishers, 1988), 3-7.

[692] H.L.A. Hart, The Concept of Law. 2nd ed., 107 op cit; Michael C. Dorf and Matthew D. Adler, 'Constitutional Existence Conditions and Judicial Review' (2003) Cornel Law Faculty Publications, Paper 84, fn 13, available at http://scholarship.law.cornell.edu/facpub/84 [last accessed on 18.07.2015].

between writ jurisdiction which has expressly been conferred by **Articles199** and **184** of the Constitution and judicial review which has not been mentioned in express words in the Constitution of Pakistan. Judicial Review "is a process in which courts decline to enforce acts of ... [Legislatures] when they run afoul of constitutional prohibitions."[693] All the provisions ousting jurisdiction say that either a particular provision shall not be questioned or the Court shall not challenge validity of an act / action based on such a provision. Mark the terminology: it does not say that a citizen cannot throw a challenge; it addresses the court not to take suo motu cognizance: "… a High Court cannot exercise suo motu jurisdiction under Article 199 of the Constitution"[694]; it does not attempt to render the very provision non-justiciable. **Article 175 (2)** provides that "No Court shall have jurisdiction unless conferred by the Constitution or by law or under law." It does not envision any competency of the Legislature to oust or prohibit jurisdiction of the Courts. It must also be noted that this sub-Article is not 'subject to any other Article of the Constitution'.

The words 'aggrieved person' or 'any person' are important as they occur in **Article 199**. These words indicate that suo motu power of the Courts is prohibited. Such like requirement is called as 'standing' or locus standi'. In the 1956 Constitution, these words were not available. They were inserted for the first time in the 1962 Constitution. In a pre-1962 Constitution, it was judicially observed, albeit in a different context, that "a High Court ... is not competent merely on information or on its own knowledge to

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[693]Michael C. Dorf and Matthew D. Adler, "Constitutional Existence Conditions and Judicial Review" (2003), Cornell Law Faculty Publications, Paper 84, 1105-1202 at 1108, at http://scholarship.law. cornell.edu/fac pub/84 [last accessed on 18.07.2015]

[694] *Dr. Imran Khattak* v. *Ms. Sofia Qaqar Khattak, etc*., 2014 SCMR 122.

commence certiorari proceedings or other proceedings of a similar nature".[695] It was judicially pointed out that "[t]he normal procedure is to move a court [not the High Court] by a petition, or a complaint or a plaint [,] and in cases where power to act suo motu is given [,] it is specifically conferred as [for example] in section 115 Civil Procedure Code [1908] and section 435 Criminal Procedure Code [1898]." [696] Otherwise it was very easy to have said in the Constitution that no citizen shall have any right to file a challenge in a court of law to a particular act or Act. Perhaps, it is because that when the Constitution recognized the separation of powers' concept, then it was not possible for it to impose absolute ban on the citizens. That is why, in Pakistan, it is for the Court to decide whether a lis is maintainable or not, and it is also for the Courts to decide and say whether an issue is justiciable or not. So, logically, whether a legislative process is/ was valid to give or to have given birth to a valid law is also for the Courts to decide and say. Put simply, what is law and what is not law is the domain of the Courts to say, and this determination can only be done to see the substantive as well as procedural competence of the Legislature, nay, also the composition of the Legislature in the light of the Constitution.

5.10 DIALOGUE THEORIES

The word "dialogue" has its origin in Greek language where it is spelled as dialegesthai which means to converse. It has been defined as "[a] conversation

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[695] *Tariq Transport Company v. Sargodha Bhera Bus Service*, PLD 1958 SC (Pak) 437.

[696] Ibid; *Fazal-e-Haq v. State*, PLD 1960 SC (Pak) 295 ("Against a suo motu proceedings by the High Court, the Supreme Court held "that the entire proceeding in this case is misconceived and void.")

between two or more people [or] an exchange of ideas or opinions."[697] It is of utmost importance to know the meaning of a word clearly before using it. Plato said, "One cannot incorrigibly use a term, let alone preach about it, unless it is known what that term refers to?"[698] The difference between dialogue and debate is clear. In debate you aim to win an argument. Dialogue is about mutual understanding.[699]

It is said that Parliament is master of its own procedure, but integrity cannot be restricted to the principle of keeping faith with whatever procedural rules happen to have been set up in the course of legislative history. It is more important that one has to keep faith with those procedures which are the expressions of the deeper principles of fairness and democracy. It has rightly been declaimed: "But man, proud man, / Drest in a little brief authority, / Most ignorant of what he's most assured, / His glassy essence, like an angry ape, / Plays such fantastic tricks before high heaven / As make the angels weep." [700] The point to internalize is that legislatures are meant for deliberation - Deliberation in the sense that it can "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country." [701] They are places where disagreements are aired. That is why the rules of procedures are framed to facilitate

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[697] *The American Heritage Dictionary of the English Language*, Paperback edition (New York: Dell Publishing Co., Inc., 1979), 198-9.

[698]Plato, *Early Socratic Dialogues* (City: Penguin Classics, 1987), 217.

[699] Frances Sleap and Omer Sener, *Dialogue Theories* (London: Dialogue Society, 2013), 174.

[700] William Shakespeare, *Measure for Measure*, II. ii. 117; Zdravko Planine, 'Shakespeare's Critique of Machivellian Force, Fraud, and Spectacle in Measure for Measure', available at http://www.nhinet.org/planinec23-1.pdf [last accessed on 02.01.2015].

[701] James Madison in The Federalist No. 10, quoted in Robert D. Cooter and Micheal D. gilbert, 'Theory of Direct Democracy and the Single Subject Rule, A,' 110 Colum. L. Rev. 687.

such deliberation. Law-making through Parliament will include view point of the laymen as they are often better aware of the actual problems faced by the masses and of the facts on the ground as compared to the scholars and experts of law who may become too involved in technicalities and alienated from hard facts.[702] **Iqbal** rightly pronounced that "Islam is very much earth-oriented and accepts in good faith the realities of life as well as the realities of the material around."[703]

It is a misconception to think or render them just assemblages for voting. Now recently the Full Bench of the Supreme Court of Pakistan observed:

> This is for the first time ever in our national, judicial and constitutional history that such a serious challenge has been thrown by a cross section of society including some premier Bar Associations of the country to a legislation which was no ordinary piece of legislation but was a constitutional amendment.[704]

It is worth remembering that the author of *Leviathan* tells, "If the sovereign power be in a great assembly, and a number of men, part of the assembly, without authority consult a part to contrive the guidance of the rest, this is a faction, or conspiracy unlawful, as being a fraudulent seducing of the assembly for their particular interest."[705] In Pakistan, being parliamentary system, bills are proposed by ministers, introduced by them and are passed as per their wishes. It is the same pattern and

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[702] Allama Dr Muhammad Iqbal, *The Reconstruction of Religious Thoughts in Islam* (Lahore: Ashraf Press, 1968), 84.

[703] Author, not decipherable, 'Deeds or Ideas: (Iqbal Philosophy of dynamism)', 11, at http://pu.edu.pk/images/journal/phill/pdffiles/02-%20Deeds%20or%20Ideas%20(Iqbal's%20philosophy%20of%20Dynamism)%20by%20C.A.% 20 Qadir .pdf [last accessed on 12.11.2015]

[704] *Nadeem Ahmed Advocate*, para 14, at http://www.supremecourt.gov.pk/web/userfiles/file/18thamendmentorder.pdf [last visited 15.07.2015]

[705] Thomas Hobbes of Malmesbury, *Leviathan or the Matter, Forme, & Power of a Commonwealth Ecclesiatical and Civill* (London: Andrew Crooke, Green Dragon, St. Pauls Church-yard, 1651), 145-46.

modus operendi which destroyed the Roman Empire: "In the exercise of the legislative as well as executive power, the sovereign advised with his ministers, instead of consulting the great council of the nation."[706] Now, when the Court passes an order at the legislative stage of a Bill, the legislature is not prohibited from passing the Bill, but only to engage in deliberation in the light of the Court' observations. Similar is the position when the Court strikes down an Act on the ground of procedural deficiencies. The legislature can pass the same law again after providing full opportunity of discussion to all the members of the legislature; because, the Court is not concerned with the contents of the law in such a judicial review challenge. In the case of *Mahmood Khan Achakzai*[707], challenge was thrown on substantive ground to Article 58 (2) (b) of the Constitution. The Supreme Court did not approve such a challenge. The 7-members-Bench headed by Chief Justice Sajjad Ali Shah referred to the observations of Hamood-ur-Rehman CJ in *State* v. *Zia-ur-Rehman*[708] namely that "in *Asma Jillani* case[709] it has not been laid down that the Objectives Resolution[710] is the grundnorm of Pakistan … and it is not correct … to say that … [it] has been declared to be a transcendental part of the Constitution or to be a supra constitutional instrument which is unalterable and immutable." In the case of *Pakistan Lawyers Forum*[711] the Supreme Court held that an amendment to the Constitution can be

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[706] Peter Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy and Dictatorship in Germany and France, 1920s-1950s', (2004), University of Connecticut School of Law Articles and Working Papers, Paper No. 49, available at http://lsr.nellco.org/uconn.wps/49 [last accessed on 16.10.2014].

[707] PLD 1997 SC 426.

[708] PLD 1973 SC 49.

[709] PLD 1972 SC 139.

[710] Article 2-A of the Constitution.

[711] PLD 2005 SC 719.

challenged on the ground that "it has been enacted in a manner not stipulated by the Constitution itself." It was further held that that the Supreme Court "does not have the jurisdiction to strike down provisions of the Constitution on substantive grounds."[712] In this way, the legislature remains supreme, but not absolute. Remember the scheme of the Constitution which has provided a bicameral legislature, i.e., the National Assembly and the Senate.[713] If some material procedural step has been left, the Court order will remand the matter to the legislature to reconsider the same by completing the procedural requirement. If it is not so and the legislature is left unchecked absolutely, then wisdom of the great author of *Leviathan* cannot be put aside who tells us: "If the sovereign power be in a great assembly, and a number of men, part of the assembly, without authority consult a part to contrive the guidance of the rest, this is a faction, or conspiracy unlawful, as being a fraudulent seducing of the assembly for their particular interest."[714] In the case of *Islamic Republic of Pakistan v. Abdul Wali Khan*[715], Hamood-ur-Rehman CJ said:

> [The Supreme Court of Pakistan is] committed to the view that the judiciary cannot declare any provision of the Constitution to be invalid or repugnant to the national aspirations of the people and … validity of a constitutional amendment can only be challenged if it is adopted in a manner different to the one prescribed by the Constitution or is passed by a lesser number of votes than those specified in the Constitution.

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[712] Ibid.

[713] Article 50 of the Constitution.

[714] Thomas Hobbes of Malmesbury, *Leviathan or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill* (London: Andrew Crooke, Green Dragon, St. Pauls Church-yard, 1651), 145-46.

[715] PLD 1976 SC 57.

So, there is a dialogue between the judiciary and the legislature: both get engaged in the nation-building by exercising the power given to them as sacred trust by the people. But in Pakistan, the legislators are rendered useless by the elites of the ruling political party. The bills are proposed by the ministers, introduced by them in the legislature and so are passed as per the wishes of the ruling ministers. The other members, both of the ruling party as well as of the Opposition are there in the Parliament to earn just bread and butter for themselves. Are we forgetting the modus operandi of the later on dismantled Roman Empire: "In the exercise of the legislative as well as executive power, the sovereign advised with his ministers, instead of consulting the great council of the nation"[716] Even if the non-minister legislators take part, they think only of the basic necessities for the masses. Let us refer to **Adam Smith** quickly here:

> All the arts, sciences, law and government, wisdom and even virtue itself tend all to this one thing, the providing meat, drink, raiment, and lodging for men, which are commonly reckoned the meanest of employments and fit for the pursuit of none but the meanest and the lowest of people.[717]

The solution is to be discovered. It is a welfare State.[718] It has to legislate for the people so that to achieve the rightful place amongst the community of nations. We the people will have to do something, and that something is at least to realize that "we, as

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[716] Edward Gibbon, *The Decline*, *The History of the Decline and Fall of the Roman Empire* in 7 Vols. (London: George Bell & Sons, 1891), 434.

[717] *Lectures on Jurisprudence* (London: Oxford University Press1763/1978), 338; R. L. Meek, et al, *Glasgow Edition of the Works and Correspondence of Adam Smith* (Indianapolis: Liberty Fund, 1982), 325.

[718] Peter Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy and Dictatorship in Germany and France, 1920s-1950s' (2004), *University of Connecticut School of Law Articles and Working Papers.* Paper 49 at http://lsr.nellco.org/uconn_wps/49 [last accessed on 16.10.2014]

a nation, are passing through testing times facing multidimensional challenges which could be best addressed only through measures and methods where societal and collective considerations are the moving and driving force ... [through] the collective wisdom of the chosen representatives of the people"[719]

Since God helps those who help themselves. The technique would be like this:

> It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their own advantages.[720]

It is strange to note that people do not learn from the past. Many nations disintegrated because of their follies. Let us take the example of the Roman Empire: "They [the generals] were, at the same time, the governors, or rather monarchs of the conquered provinces, united the civil with the military character, administered justice as well as the finances, and exercised both the executive and legislative power of the State."[721]

5.11 A KAYANIAN CASE FOR JUDICIAL REVIEW OF THE LEGISLATIVE PROCESS

It was Justice M.R **Kayani** who observed way back in the year 1956 in the High Court that:

> I cannot bring myself to hold that any provision in the Constitution was intended to divert the Court from the path of justice, equity and good conscience. The

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[719] *Nadeem Ahmad Advocate*, op cit., para 14.

[720] Adam Smith, *Inquiry into the Nature and Causes of the Wealth of Nations.* ed S. M. Soares (Amsterdam: MetaLibri Digital Library, 2007), Bk. I. Ch 2 at 16 'Of the Principle Which Gives Occasion to the Division of Labour'.

[721] Edward Gibbon, *The History of the Decline and Fall of the Roman Empire in 7 Volumes* (London: George Bell & Sons, 1891), vol. I. 83.

> Constitution represents the will of the people, and the will of the people is to be construed in favour of justice, equity and good conscience. Of all Parliaments and Assemblies in the world, the privilege of practicing fraud and coercion, or acting with malice, was certainly not to be reserved for the Assemblies of Pakistan….[722]

That is why I have dedicated this sub-section of the thesis to that greatest judge in the judicial history of Pakistan. Legislature, nay, none can go outside the Constitution.

Let us see the prayer clause of a constitutional case:

> That the Contempt of Court Bill/Law 2012 passed by the National Assembly is ultra-vires the Constitution and is against Article 8 of the Constitution, and may be declared against [the] Constitution; That the impugned Bill/Law is violative of Articles 2A, 4, 5, 25, 175, 203, 204 and 248 of the Constitution of the [the] Islamic Republic of Pakistan, 1973…. That the impugned law is [the]result of lack of legislative competence and being without jurisdiction may be declared ultra vires and without legal effect.[723]

The writ petition was filed in the Supreme Court challenging, in fact, the modus operendi of the Government of the day to save the prime minister from contempt of court. The Contempt of Court Bill was tabled in the National Assembly after the relevant rules were suspended and it was passed the same day. It was also passed in one day by the Senate and the President assented to it the same day. Challenge was based on the ground of being violative of fundamental right contained in **Article 8(1)** of the Constitution. The following provisions of the same were declared ultra vires of the Constitution:

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[722] *Ahmad Saeed Kirmani v. Fazal Elahi, Speaker,* PLD 1956 (W.P) Lahore 807.
[723] *Baz Muhammad Kakar v. Federation of Pakistan*, PLD 2012 SC 870.

> S. 3. Provided the following shall not amount to commission of contempt of court: (i) exercise of powers and performance of functions by a public office holder of his respective office under clause (1) of Article 248 of the Constitution for any act done or purported to be done in exercise of those powers and performance of those functions.
>
> S. 10. Expunged material: No material which has been expunged from the record under of … the presiding officer of the Senate, [or] the National Assembly, shall be admissible in evidence.
>
> S. 11. Appeal: An intra-court appeal shall lie against the issuance of a show cause notice or an original order including an interim order passed by a Bench of the Supreme Court in any case, including a pending case, to a larger bench consisting of all the remaining judges of the Court within the country …. Provided further that the operation of the impugned show cause notice or order shall remain suspended until the final disposal of the matter in the manner herein before provided.

The Supreme Court placed reliance on *Attorney-General for Alberta v. Attorney-General for Canada*, AIR 1948 PC 194 and the repealed statute was declared to have revived from the date of its repeal.

See machinations of the politicians. Para (i) (as reproduced above) prohibits the Court from initiating contempt of court proceedings against persons referred to in **Article 248(1)** of the Constitution. This is beyond the power of regulation provided in **Article 204(3)** of the Constitution. It amounts to usurpation, prohibition and negation of powers conferred by **Article 204**. The legislature is competent only to regulate which does not mean competency to prohibit.[724] Under **Article 70** read with Entry 55 of the List in the Schedule of the Constitution, Parliament can make laws about 'jurisdiction and powers

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[724] See *Arshad Mahmood v. Government of Punjab*, PLD 2005 SC 193 at 221.

of all courts' but that will be within the limits provided in the Constitution. Since **Article 204** confers specific powers of contempt of court, therefore, such powers cannot be curtailed. Because it would violate the principle of separation of powers as interpretation of the provision is the domain of judiciary exclusively. It was a colourable exercise by the legislature and therefore was nullity.[725]

To conceptualize the point, it is pointed out that unlike the U.S. Constitution, the Constitution of Pakistan does not say in express words that the legislative power of Pakistan is vested in the Parliament. However, it says expressly that the Parliament and the Provincial Assemblies will make laws respectively in accordance with the Legislative Lists. It may be said, then, that in Pakistan, like U.K, "the legal sources from which the legislative powers of Parliament are derived ... is the common law."[726] Put simply, it follows that "the common is prior to legislative supremacy, which it defines and regulate".[727]

The whole confusion seems to have been created by the fact that in England, the struggle for the supremacy of Parliament was against the King; it is then a paradox to say that Parliament is as absolute as the King was. In fact, "the increased political

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[725] See *S.S Bola B.D Sharma*, AIR 1997 SC 3127; *Jaora Sugar Mills Pvt. Ltd. v. State of M.P*, AIR 1966 SC 416; *Shankara Narayana v. State of Mysore*, AIR 1966 SC 1571; *R.S Joshi v. Ajit Mills*, AIR 1977 SC 2279; *Ashoke Kumar v. Union of India*, AIR 1991 SC 1792; *Robkar Adalat v. Sarfraz Alam*, 1996 MLD 1752; H.M Seervi, *Constitutional Law of India*, 4th ed (Delhi: Universal Law Publishing, 2010), Vol. I, Ch. III 'Court and the Constitution' at 269-275; Will Bateman, 'Legislating against Constitutional Invalidity: Constitutional Deeming Legislation', available at http://sydney.edu.au/law/slr/slr34/slr344.07BatemanConstitutionalInvalidity.pdf [last accessed on 22.11.2015].

[726] Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010), 14-15 (internal quotations marks omitted by me).

[727] T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), 271.

awareness of the [English] nation as a whole ... [is the cause whereby] it became inevitable that the country should be governed by its elected representatives rather than by a hereditary king."[728]

Since there is no absolute king in Pakistan, and judiciary believes in the principle of **'checks and balances'**, so there is no occasion to grant absolute power to any one; rather, the Constitution grants powers with limitations and mechanism for checking excesses and abuses of such powers. This principle needs to be internalized.

5.11.1 The Manner-and-Form-School:

It has been said that no Parliament can determine the subject-matter of future legislation but it can set rules about the 'manner and form' for future legislation.as such, the courts must have some scheme of authenticating Acts of Parliament. Logically, there must be criteria for the judges to identify the instrument before them as an Act of Parliament. Such an issue arose long ago in *The Prince's Case*.[729] It is because that "[t]he limiting provisions derive their authority from the fact that they are part of the constituent instrument that bestowed legislative power on the respective parliament in the first place."[730] The advocates of this 'new view' or 'manner-and-form-school' suggest that Parliament itself alter the formal criteria by providing that Acts might be created or existing Acts be amended or repealed only in specified way.[731]

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[728]James, 115 op cit.

[729] *The Prince's Case*, [1606] 8 Coke Report 1a (1610), 77 ER 481 at https://www.casemine.com/judgement/ uk/ 5a8ff87b60d03e7f57ec11ad [last accessed on 14.02,2014].

[730]Claus Hamacher, (1992) Parliamentary sovereignty in the European communities: the developing doctrine, Durham theses, Durham University, 18. at http://etheses.dur.ac.uk/6026/ 1/60263377.PDF?UkUDh:CyT [last accessed on 05.01.2016]

[731] See Jennings, The Law and the Constitution, 153 op cit.

Judicial approach also support this view as is evident from the cases of *Harris*,[732] *Trethowan*[733] and *Ranasinghe*.[734]

In *Harris*, the Court held that a Parliament, although sovereign, could be subject to the requirements of form and manner to effectively express its will. The South African Parliament owed its existence to a constituent act, namely the South Africa Act, 1909 (an Act of the U.K Parliament). It was held that '[t]he limiting provisions derive their authority from the fact that they are part of the constituent instrument that bestowed legislative power on the respective parliament in the first place."[735] It is to be noted that once independence is given through an Act of the U.K Parliament, then such independence cannot be regained.[736] This has beautifully been epitomized judicially in the saying of **Stratford** ACJ (South Africa), "Freedom once conferred cannot be revoked."[737]

But the orthodox view is strongly opposing the new view which finds expression in the judicial opinion of **Maugham** LJ:

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[732] *Harris v. Minister of the Interior*, [1952] 1 TLR 1245 = 1952 (2) SA 428 (A) (in the Appellate Division of the Supreme Court of South Africa) available at http://joasa.org.za/aricles/HARRIS%20v%20MINISTER%20OF%20THE%20 INTERIOR.pdf [last accessed on 14.02.2014].

[733] *Attorney General for New South Wales v. Trethowan*, [1932] 1 A 526 op cit.

[734] *Bribery Commissioner v. Ranasinghi*, 172 op cit.

[735] Claus Hamacher, (1992) 'Parliamentary sovereignty in the European communities: the developing doctrine', Durham theses, Durham University, 18, available at http://etheses.dur.ac.uk/6026/1/60263377.PDF?UkUDh:CyT [last accessed on 05.01.2016].

[736] See de Smith et al, *Constitutional and Administrative Law*, 6th ed (London: Penguin Books, 1989), 77; Wade, 'The Basis of Legal Sovereignty', 196 op cit.

[737] *Ndlwana v. Hofmeyei*, [1937] AD 229 at 237 quoted in Anthony Matthew Dillon, 'A response to the Jurisprudence of the High Court in the "implied right cases": An autochththonous Australian Constitution, Popular Sovereignty and Individual Rights', [2005] PhD thesis, School of Law, James Cook University, 231, fn 53, available at http://researchonline.iuc.edu.au/1291/3/Thessiwhole.pdf [last accessed on 05.01.2016].

> The legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislator."[738]

Thus when a constitution provides that the legislature can make and unmake any law in accordance with the form provided in the Constitution, the Legislature, cannot provide any other manner or form through either legislation or rules of business. For example, the Legislature sitting under the Constitution cannot say that a certain legislative enactment cannot be repealed except by two-third majority of the parliament when the Constitution has granted power to the legislature to repeal any law by simple majority. In this way, all the laws of Martial Law regimes are unconstitutional inspite of the fact that subsequently the legislatures have validated the same by two-third majority; because a legislative instrument cannot be given the status of a constitutional provision just for the purpose of repeal and in fact it will have the effect of a sub-constitutional instrument for all other purposes. Otherwise, it would be then a sphinx of Sophocles' *Oedupus Rex*.[739] Neither any such substantive power nor the power to change the manner and form procedure has been given by any of the constitutions of Pakistan.

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[738] *Ellen Street Estates v. Minister of Health,* [1934] 1 KB 590 at 597; Claus Hamacher, 'Parliamentary sovereignty in the European communities: the developing doctrine', M Jur thesis, University of Durham, Faculty of Social Science, 1992.

[739] Dudley Fitts and Robert Fitzgerald, trans, *Oedipus Rex*, Sophocles, available at https://www.fusd1.org/cms/lib/AZ01001113/Centricity/Domain/1385/Full%20text%20Oedipus.pdf [last accessed on 02..04.2015]; Oedipus Rex Summary is available at https://blog.12min.com/oedipus-rex-pdf/ [last accessed on 02.04.2015].

5.11.2 Acts of Independence:

Until the middle of 20th century, a large number of countries were dependencies of the United Kingdom in the sense that the respective parliaments could legislate only by virtue of delegated authority and appeal from their courts lay to the Privy Council.[740] In reaction to the growing demand and pressure for independence, the U.K Parliament first enacted the Statute of Westminster and later a number of single Acts of Independence.[741] Whether the English Parliament can continue to legislate for those countries after independence. An appropriately thorough appreciation of such crucial aspect must not exclusively rely on the wording of the statute.[742]

Slade LJ explained: "Section 4 itself does *not* provide that no Act of Parliament shall extend to a **Dominion** as part of the law of that Dominion unless the Dominion has *in fact* requested and consented to the enactment thereof. The condition that must be satisfied is quite a different one, namely, that it must be 'expressly declared in that Act that the Dominion has requested, and consented to, the enactment thereof.' [...] If an Act of Parliament contains an express declaration in the precise form required by section 4, such a declaration is in our opinion conclusive as far as section 4 is concerned."[743] In an earlier judgment, **Lord Sankey**, had expressed a view that "it is doubtless true that the power of the Imperial Parliament to pass on its own initiative

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[740] O. Hood Phillips and Paul Jackson, *O. Hood Phillips' Constitutional and Administrative Law*, 7th ed (London: Sweet & Maxwell, 1987), 738.

[741] For example, The Indian Independence Act, 1947; Independence Act for Ceylon, 1947; Ghana Independence Act, 1957; Nigeria Independence Act, 1960; Zimbabwe Independence Act, 1979.

[742] J.D.B. Michell, *Constitutional Law*, 2nd ed (Edinburgh: W. Green & Sons, 1968), 79.

[743] *Manuel v. Attorney General,* [1983] Ch. 77 at 106 op cit.

any legislation that it thought fit extending to Canada remains in theory unimpaired ; indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute [of Westminster]."[744]

5.11.3 Immunity of Prime Minister:

In Pakistan, a Prime Minister delivered a speech in the National Assembly by saying:

> We have banned them [a rival political party] and this ban under no circumstances can be withdrawn. If the Supreme Court gives a decision to the contrary, it is a different matter but even then it will not be my decision. It will not be the decision of the people, and if in consequence of that decision, anything happens, the responsibility will be of the Supreme Court.[745]

To comprehend the position, **Article 204** needs to be juxtaposed:

> A Court shall have power to punish any person who ... abuses, interferes with or obstructs the process of the Court in any way or disobeys any order of the Court ... [or] scandalizes the Court or otherwise does anything which tends to bring the Court or a Judge of the Court into hatred, ridicule or contempt ... [or] does anything which tends to prejudice the determination of a matter pending before the Court; or ... does anything which, by law, constitutes contempt of the Court.

Article 248 of the Constitution provides that "the Prime Minister … shall not be answerable to any court for the exercise of powers and performance of functions of … [his] … office or for any act done or purported to be done in the exercise of those powers and performance of those functions…." Now see, neither Article is subject to the other, hence, each one is an independent constitutional provision. Simply put,

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[744] *British Coal Corporation v. The King*, [1935] AC 500 at 520.
[745] *Ch. Zahoor Elahi v. Z.A. Bhutto*, PLD 1975 SC 383.

nothing is absolute, everything has limits. The Court enunciated the principles in the following words:

> We have to remember that this power to commit for contempt is ... an extraordinary power ... to be exercised ... where it is absolutely necessary in the public interest to do so. Comments in respect of pending proceedings are treated as contempt in order to keep the stream of justice pure and unsullied. ... The question ... is whether the Court ... would be ... influenced by the ... speech [of the Prime Minister in the Parliament] that it's [the Court] impartiality might be consciously or even unconsciously affected. In other words, is there any possibility of the speech ... being calculated to prejudice either party in the pending cause.[746]

In the recent case of contempt against the Prime Minister Gillani,[747] the Supreme Court clarified the position further. Certain directions had been given to the Federal Government by the Court in an earlier case which was not obeyed having declared the National Reconciliation Ordinance, (No. X of 2007) as void *ab initio* and *non est*.[748] The Court convicted and sentenced the Prime Minister for contempt of court who flouted directions contained in the judgment.

Otherwise, a Prime Minister being the Chief Executive becomes too powerful and becomes the source of his own destruction. Reference is given to the Constitution which has never protected anybody without the active support of the people. But after getting the position with the votes and support of the people, never a Prime Minister's

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[746] *Ch. Zahoor Elahi v. Z.A. Bhutto*, PLD 1975 SC 383.

[747] Crl. O. Petition No. 06 of 2012 in Suo Motu Case No. 04 of 2010 (Contempt proceedings against Syed Yousaf Raza Gillani, the Prime Minister of Pakistan regarding non-compliance of this Court's order dated 16.12.2009) at http://www.supremecourt.gov.pk/web/userfiles/file/crl.o.p.6of2012.pdf [last accessed on 05.04.2015]

[748] *Dr. Mobashir Hassan v. Federation of Pakistan*, PLD 2010 SC 265 (NRO Case); *Federation of Pakistan v. Dr. Mobashir Hassan*, PLD 2012 SC 106 (on review).

post has been martyred for the cause of the people. Pakistan's return to democracy in February 2008 after the last eight years of military dominated authoritarian rule was supposed to restore hopes in the country affected by economic slowdown, ethnic rebellion and the escalating threat posed by terrorist activities. None of these challenges were addressed. Public faith in the capacity of democratic institutions to deliver the goods was eroded. There is a question mark on the reality of the consolidation of democratic practices.[749]

In 1988, Prime Minister Junejo was dismissed by President Zia ul Haq. In 1990 Prime Minister Benazir Bhutto was dismissed by President Ghulam Ishaq Khan. In 1993 Prime Minister Nawaz Sharif was dismissed by President Ghulam Ishaq Khan. In 1996 Prime Minister Benazir Bhutto was dismissed by President Farooq Leghari and in 1999 Prime Minister Nawaz Sharif was ousted by General Musharraf.[750] It all happened because none of the Prime Minister had the support of the people of Pakistan as they had forgotten them after the election. On the other hand, even a non-elected Chief Justice Iftikhar Muhammad Chaudhry in the year 2007 with the support of the People was successful in vindicating his constitutional right.

5.11.4 The Rule of Law Argument:

Conceptually, "rule of law is a theme which pervades the law of judicial review. It is not found in any statute, or any constitutional document such as written

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[749] Gilles Boquerat, 2009, 'The democratic Transition in Pakistan Under Stress' The Institut Français des Relations Internationales (Ifri), 17, at https://www.ifri.org/sites/default/files/atoms/files/av13boquerat pakistan_democratic_transition_2009.pdf [last accessed on 09.11.2015]

[750] Mian Raza Rabbani, *LFO: A Fraud on the Constitution* (Karachi: Q.A. Publishers, 2003), ix.

constitution."[751] In fact, it is a concept which is registered in the mind of the citizens. **Aristotle** asserted that "the rule of law ... is preferable to that of any individual."[752] Judicially, it has been pronounced:

> The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. ... [T]he rule of law rests upon the twin foundations of the ... Parliament in making the law and the sovereignty of the ... courts in interpreting and applying the law.[753]

Text-book writers have elaborated the importance judicial review exhaustively. Harlow is reproduced for ready reference as under:

> This is where we may have to come back to the point about the supremacy of Parliament. We do not in the United Kingdom have an uncontrolled constitution…. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.[754]

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[751]See generally Michael Fordham, *Judicial Review Handbook*, 4th Edition (Oxford: Hart Publishing, 2004).

[752]Aristotle (384-322 B.C), *Politics*, Part XVI, 77; Aristotle, *Politics*, Trans. Benjamin Jowett, (Kitchener: Batoche Books, 1999).

[753]*X Ltd v Morgan-Grampian Ltd* [1991] 1 AC 1 (Lord Bridge).

[754] Carol Harlow and Richard Rawlings, Law and Administration, 3d ed (Cambridge: Cambridge University Press, 2009), 112.

It is believed usually that judiciary finds intention of the legislature while interpreting a statute. This approach is against the concept of separation of powers. Judiciary is not in partnership with the legislature. It is an independent organ of the State. The Constitution of Pakistan has no-where said so. Rather it is in-built in the structure of the Constitution that the legislature will legislate, the executive will execute, and the judiciary will interpret the law. It is because our Constitution is based on the concept of separation of powers that is why there are separate chapters for each organ in the Constitution. The true demonstration of such independence and separation of powers lies in the fact that the judiciary has to invalidate legislation if found contrary to the Constitution. Judiciary in Pakistan will find intention of the legislature only when the legislation is found to be constitutional.

This determination will be done by the judiciary. Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural".[755] A Rule of Law which is unable to prevent the legislature from enacting against it is just "a tale/ Told by an idiot, full of sound and fury, / Signifying nothing."[756] And reflect upon the words "the rule of law enforces minimum standards of fairness, both substantive, and procedural". Why minimum? It reminds one of Aesop saying, "I will have nothing to do with a man who can blow hot and cold with the same breath."[757] In fact, the legislature cannot legislate against the Rule of Law, and if it is going to do so or has done so, the Courts have

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[755] *R v. Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, at 581 (Lord Steyn).

[756] William Shakespeare, *Macbeth*, V. v. 17.

[757] Aesop (550 B.C), *Fables* 'The Man and the Satyr' quoted in Cohen, *Dictionary of Quotations*, 2:29; Aesop's Fables, at http://history-world.org/ AesopsFablesNT.pdf [last accessed 27.06.2015]

the duty to prohibit or nullify the action or Act so that to fulfil its basic duty under the oath having been taken to preserve, protect and defend the Constitution. Even the English judges have now realized that:

> The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. The fact that your Lordships have been willing to hear this appeal and to give judgment upon it is another indication that the courts have a part to play in defining the limits of Parliament's legislative sovereignty.[758]

5.11.5 The Irony Revealed**:**

Judges may be "constrained to pass upon the actions of other authorities of the State within the limits set down in the Constitution, not because they arrogate to themselves any claim of infallibility but because the Constitution itself charges them with this necessary function in the interest of collective security and stability."[759] The reference is to *the actions of other authorities of the State*. Now, "State" means also Parliament and the Provincial Assemblies.[760] The word "actions" refers to everything done or is being done by a legislature short of an "Act", like Resolution, Questions, Origination of a Bill, Readings of the Bill, Enrolling the Bill for assent and so on. One way of thinking is to say that there is no other way to check all these steps of the "actions" except to see the final product, the "Act" and then retrospectively investigate and determine as to whether those steps which culminated in the "Act" had been taken in

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[758] Jackson v. Attorney General [2005] UKHL 56 para 107 at 120 (Lord Hope), available at http://www.publications.parliament.uk/pa/ldjudgmt/ld051013/jack.pdf [last accessed on 27.06.2015].

[759] *Fazlul Quader Chowdhury v. Muhammad Abdul Haque*, PLD 1963 SC 486.

[760] Article 7, Constitution.

accordance with the provisions of the Constitution or not. If someone says that the Courts cannot see the "Internal Proceedings" of the Legislature, then how the Judiciary can fulfil its constitutional duty of "protecting" the Constitution? This much is established and there is no denial that it is the domain of the judiciary to interpret the Constitution and law. If this is so, then the judiciary has established its rules of constructions through judicial pronouncements. It is "the consistent rule of construction adopted by all courts that the provisions seeking to oust the jurisdiction of superior courts are to be construed strictly with a pronounced leaning against the ouster."[761] The irony is that, that the Courts acknowledge such jurisdictions but do not exercise the same![762] The Chief Justice had judicially clarified the position in Pakistan in the year 1973 in the following unambiguous words:

> [T]he court does claim and has always claimed that it has the right to interpret the Constitution and to say as to what a particular provision of the Constitution means or does not mean, even if that particular provision is a provision seeking to oust the jurisdiction of this Court.[763]

It is the intrinsic worth of judicial duty to adhere to the Rule of Law.

Judges are also bound by the Code of Judicial Conduct in this regard. So, then, as Trevor **Allan** asserts, "it is ultimately impossible [for them] to reconcile ... the rule of

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[761] *State v. Zia- ur-Rehman*, PLD 1973 SC 49 at 68.

[762] Lord Dyson, M.R, 'Criticising Judges: Fair Game or Off-Limits', [2014] at https://www.judiciary.gov.uk/wp-content/uploads/2014/11/bailli-critising-judges.pdf [last visited 10.01.2016]: '"It is time for judges to learn their place".' Citing *News of the World* (23 Feb., 2003); '[J]udges [are invited] to "wake up and smell the coffee" because they "simply [weren't] getting it" ... the judge had "got the [sentencing] formula wrong".'; "This is a perverse decision which highlights the idiocy of the judges who determine these cases." Ibid. Cf, Sir Francis Bacon, "[A[n] over speaking judge is no well-tuned cymbal". See Spedding, Ellis and Heath (eds.), *Works of Francis Bacon*, vol. VI (Hurd and Houghton: 1861), 3.

[763] *State v. Zia- ur-Rehman*, PLD 1973 SC 49 at 69.

law with the unlimited sovereignty of Parliament ... An insistence on there being a source of ultimate political authority, which is free of all legal restraint ... is incompatible with constitutionalism."[764]

5.12 THE CASE FOR JUDICIAL REVIEW OF THE LEGISLATIVE PROCESS (JRLP)

5.12.1 Authority**:**

Authority for JRLP may be shown in the general structure of the Constitution. The supreme law is the Constitution; that is why a law in violation of the Constitution is treated to be void: there is no express word for substantive judicial review of legislation in the Constitution; but the Courts do exercise such power to protect and preserve sanctity of the Constitution. The same logic can be applied to JRLP. Further, there are separate articles for legislation (**Arts 70-77**), which contain constitutional provisions. They are not just pious sayings like the 'Principles of Policy' to be non-justiciable. Since judges have taken oath to preserve and protect the Constitution, it includes their duty to protect each and every provision as the whole consists of the parts. So, any article not specifically rendered non-justiciable by the Constitution itself will be protected from violation. The government and the legislature also cannot blow hot and cold with the same breath. The point for reflection and philosophical thought is the very words "preserve" and "amend" the Constitution. It is strange to imagine that the Constitution mandated the Judges to "preserve" it; while at the same time permitted the parliamentarians to "amend" it. But on deeper look, both the duty and

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[764] Allan, *Law, Liberty and Justice*, 16, quoted in Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010), 60.

the power are not only reconcilable but are also necessary. To understand the point, let us see **Cicero**'s concept of amendment in a constitution:

> [There is no] flaw or defect in ... [Cicero]'s constitution which requires correction. Where a single Platonic artist may err, the collective product of Rome's *mayors* [people] is a constitution of ... the best order that human beings could produce in our material world. Cicero's painted constitution is thus not "corrected" ... but preserved ... and renewed....[765]

The painting metaphor also suggests a far newer view of **Cicero**'s political conservatism. The preservation of Rome's constitution is decidedly not achieved through passive admiration; rather, constitutional preservation is an active and ongoing process of renewal, demanding fresh ranks of enlightened and virtuous statesmen. Cicero laments that his generation has failed in its duty to "refresh the colours" of the Roman constitution, to "preserve its configuration" and "general outlines".[766]

How does Cicero's metaphor of the republic as painting help us understand the purpose and content of *De legibus*'s written Roman constitution? The metaphor suggests four linked principles that may have guided Cicero's constitutionalism. First, an optimal constitution for Cicero is not a legal arrangement frozen in place. Because time will naturally cause the "fading" of a constitution, each generation of statesmen has a role to play in preserving it. Second the maintenance of a constitution is not a

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[765] Lex Paulson, 'A Painted Republic: the Constitutional Innovations of Cicero's *De legibus*', Etica & Politica / Ethics & Politics, XVI, 2014, 2, 307-340 at 317, at http://www2.units.it/etica/2014_2/PAULSON.pdf [last accessed 23.06.2015]

[766] Ibid,

passive process but an active and creative one - a painting must be directly handled in order to “refresh” it. Third, this handling requires a special expertise earned by the painter, and embodied for Cicero in the rational reflection and seasoned prudence of statesmen. Finally, Cicero adds a fascinating detail to the metaphor of painting in the distinction made between the “colours” of a constitution and its “configuration” and “outlines”. What could he have meant by this distinction? A few lines later he states directly that “the loss of our customs is due to our lack of men” and concludes that “it is through our own faults […] that we retain only the form of the commonwealth, but have long since lost its substance.”[767] It is to be registered in mind that in this way and with this approach, the Constitution and the laws made under it are to be preserved.

In Pakistan, it has been held that any piece of writing lacking any step of the process of legislation is not law in *Moulvi Tamizuddin Khan* on the vehement contention of the Attorney-General, so it cannot be in the mouth of the government to take a somersault and say that the Courts cannot adjudicate on the procedural aspects of legislation. It will be a contradiction in itself to ask the Courts to declare a law invalid on a particular ground when it suit the government and also deny such a jurisdiction when a citizen prays on such a ground. Immunity inside the Constitution in Pakistan has never been absolute, and the Courts have time and again looked behind such veils. See an analogy: each piece of writing on a paper is not a piece of literature. Only that piece of writing is considered to be literature which the men-of-letters deem to be so. Now adjudication in accordance with law is the sole prerogative of the judiciary: it is the

[767]Ibid, quoting from Cicero’s *De republica* 5.1.2.

judiciary to say as to whether a piece of writing on paper is law or not. The Court will see the steps prescribed by the Constitution for legislation to be complied with before a piece of writing is to be treated to be law. It has judicially been held that:

> This is a right which it acquires not de hors the Constitution but by virtue of the fact that it is a superior Court set up by the Constitution itself. It is not necessary for this purpose to invoke any divine or super-natural right, but this judicial power is inherent in the Court itself. It flows from the fact that it is a Constitutional Court and it can only be taken away by abolishing the Court itself.[768]

The position in India is clear in this regard. An Act was judicially held to be ultra vires because of defect in the legislative process.[769] When the Parent Bill was passed, there were apprehensions in the Lok Sabha that the Bill was defective in many ways. The Bill was nonetheless passed and subsequently was contested in the Delhi High Court through a Writ Petition. The defects pointed out by the High Court remained unattended to and no amendments were moved.[770] This of course is not considered as a good Parliamentary practice.[771]

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[768] *State v. Zia- ur-Rehman*, PLD 1973 SC 49 at 69. (Hamood-ur-Rehman, CJ).

[769] See a very useful and informative discussion in *Greater Bombay Co-operative Bank Ltd. v. United Yarn Tex. (P.) Ltd.* 4 April, 2007, at http://taxguru.in/finance/sc-judgement-recovery-of-debts-due-to-banks-fi.html [last accessed on 12.11.2015]; *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 1461.

[770] *Delhi High Court Bar Association v. Union of India*, AIR 1995 Del 323; appealed, *Union of India v. Delhi High Court Bar Association*, (2002) 4 SCC 275.

[771] Collected from the Legislative debate (Lok Sabha) accessed from http://164.100.47.132/LssNew/psearch /Result13.aspx?dbsl=652 [last accessed on 22.09.2015]

5.12.2 Importance**:**

After all, why people organize themselves in a political society known as a "State"? It is because unless the 'freedom from wants' is actually realized, the other cherished rights may be destroyed or diluted. Equally important is the protection of the under-privileged in the society against the ruthless competition. The need is to strike a balance "between the *'haves'* and *'have nots'*."[772] It is then the Constitution which "contains the basic rules of conduct for the governance of a country".[773]Thus, "no power can be claimed by any functionary which is not to be found within the four-corners of the constitution nor can anyone transgress the limits therein specified."[774]

Let us repeat at the cost of repetition that It should not be forgotten however that attempts to circumvent due process, both Parliamentary and the legal, lay behind both the English civil war and the Glorious Revolution[775] - "Glorious" because it was peaceful, and which firmly established the modern constitutional settlement through what would be the 1688 Bill of Rights. One of the grounds on which it did so was that King James II had been in the habit of attempting to set aside the law, was in the habit of removing judges from office and had attempted to establish a new court. His successors William and Mary were offered the Crown on the basis that they would

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[772]S.K. Subbarao, 'Freedoms in Free India,' AIR 1986 Journal 21, 22-23; Dr Syed Abul Hassan Najmee, *Punjab Assembly Decisions: 1947 – 1999* (Lahore: Punjab Assembly Secretariat, 2001), xii.

[773]Nasim Hasan Shah, *Constitution, Law and Pakistan Affairs* (Lahore: Wajidalis, 1986), 3.

[774]*Fazlul Quader Chowdhury v Muhammad Abdul Haque*, PLD 1963 SC 486 at 535.

[775]Bingham, *The Rule of Law* (London: Penguin, Allen Lane, 2010), 23.

abide by the law. In other words, it was government by consent of the governed. It was government according to law and the limits it imposed.

5.12.3 Legitimacy**:**

Judicial review in any given area enjoys constitutional legitimacy if there exists a satisfactory *constitutional warrant and legal basis*. There exists such a constitutional warrant by recourse to constitutional principles. This requires examination and evaluation of the role of the judiciary and its interrelationship with the other branches of government. The existence of a satisfactory constitutional warrant for judicial review in any given area is a prerequisite of *constitutional legitimacy*.[776]

In Pakistan, judiciary does not claim supremacy over the other organs. When it declares a legislative measure as unconstitutional, it is because the Constitution puts a duty on them to see that the Constitution is not violated. It is only when the Legislature fails to remain within its limits that the Courts steps in. The judiciary itself thinks this duty to be a delicate task.[777] But such function has to be performed as a sacred constitutional duty when the other State functionaries disregard the limitations imposed upon them, or claim to exercise power which the people have been careful to withhold from them.[778]

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[776]M. Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001), xxix-xxx
[777]*Fazlul Quader Chowdhury v. Shah Nawaz*, PLD 1966 SC 106.
[778]*State v. Zia-ur-Rehman*, PLD 1973 SC 49 at 70.

5.13.1 Cost:

In view of the Supreme Court of Canada:

> A final cost of constitutional exemptions mandatory sentence laws is to the institutional value of effective law making and the proper roles of Parliament and the courts. Allowing unconstitutional laws to remain on the books deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it. Legislatures need clear guidance from the courts as to what is constitutionally permissible and what must be done to remedy legislation that is found to be constitutionally infirm. In granting constitutional exemptions, courts would be altering the state of the law on constitutional grounds without giving clear guidance to Parliament as to what the Constitution requires in the circumstances…. Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada.[779]

In Pakistan, it is now settled that a law passed by the legislature must pass the constitutional test. The Courts in Pakistan have considered legislation and even constitutional amendments.[780] Generally speaking, an act of the Parliament or an order passed, or a notification issued under the delegated legislation can be subjected to judicial review if the same is ultra vires of the Constitution, law or is otherwise

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[779] *R v. Ferguson*, 2008 SCC 6 para 73, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2406/index.do [last accessed on 27.06.2014]; Dufraimont, Lisa. "R. v. Ferguson and the Search for a Coherent Approach to Mandatory Minimum Sentences under Section 12." The Supreme Court Law Review: Osgood's Annual Constitutional Cases Conference 42. (2008), available at https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1161&context=sclr last accessed on 27.06.2014].

[780] *Abdul Wali Khan*, PLD 1976 SC 57; *Pakistan Lawyers Forum v. Pakistan*, PLD 2005 SC 719. (a constitutional amendment can only be challenged if it has been enacted in a manner not stipulated by the Constitution itself.)

unreasonable.[781] After highlighting requirements of the Constitution, Courts have left correction of law to the legislature. [782] Perhaps, the start is in the right direction.

5.13.2 Reading in**:**

When a court remedies an unconstitutional statute by reading in provisions, no doubt this constrains the legislative process and therefore should not be done needlessly, but only after considered examination. However, the "parliamentary safeguards" remain. Governments are free to modify the amended legislation by passing exceptions and defences which they feel can be justified. Thus, when a court reads in, this is not the end of the legislative process because the legislature can pass new legislation in response. Moreover, the legislators can always turn to the override provision, which is the ultimate "parliamentary safeguard".[783] Because the courts will never go beyond the meaning of the words expressed intentionally by the parliament as the duty of those who are called upon to expound it has been to discover the intention of the law giver.[784] Judiciary pays due attention to legislative words and no word is taken to be superfluous in a statute.

They are the primary source of authority.[785] That is why the Courts in the first instance, when doubt arises, treat it “a safe means of collecting the intention to call in aid the ground and cause of making the statute and to have recourse to the preamble which

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[781] *Dr. Suhail Iqbal Abbass Khan v. Punjab*, 1996 MLD 1078 at 1083.

[782] *Hakim Khan v. Government of Pakistan*, PLD 1992 SC 595 at 621.

[783]*Vriend v. Alberta,* [1998] 1 S.C.R.493 para 178 Supreme Court of Canada; Elizabeth Edinger, *Casebook Law 100: Canadian Constitutional Law* 2014-2015 (University of British Columbia, 2014/15), ch 11, 590 at http://faculty.law.ubc.ca/edinger/files/100/Law%20100%20CB%202014-15.pdf [last accessed 24.05.2015]

[784]*The Reference case*, PLD 1957 SC (Pak) 219 at 233 (M. Munir, CJ)

[785]*Nasim Ahmad v. Azra Feroz*, PLD 1968 SC 37.

... is a key to open the minds of the makers of the Act and the mischief they intended to redress."[786] But the purpose of a preamble of a statute will not contravene the Preamble of the Constitution. Where it is the Constitution that is expounded or the constitutional validity of a statute that is considered, a cardinal rule is to look to the Preamble of the Constitution as the guiding light and to the Directive Principles of State Policy as the Book of Interpretation.[787] Sometime, the courts add, or alter or ignore statutory words to "avoid manifest contradiction of apparent purpose of the enactment or some inconvenience or absurdity, hardship or injustice presumably not intended [by the legislature] ...."[788]

Now see the problem, the damage, and the solution to avoid in the future forever. First think over and reflect upon the above quoted judicial reasoning. The Courts do add, alter or ignore statutory words, yes of course sometime, on the ground of 'presumably' the inconvenience or absurdity, hardship or injustice *not intended by the legislature*. Now, it will also be recalled that courts decide concrete cases on individual basis. Such a law is at large to do damage because it is not the only way that a law is applied to the citizens through the gate-way of the courts; it is applied by the executive the moment it is enacted by the legislature. It is corrected for a particular individual when he has the resources to challenge its vires or the executive or subordinate court order based on such a bad law which is in need of addition etc. Let us promptly remind

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[786] *Bhola Prasad v. Empror* AIR 1942 FC 17; *Hameed-ul-Haq Chaudhry v. G.G*, PLD 1953 FC 279 at 305.

[787] *Naimat Sharma v. Union of India*, W.P (Civil) No. 210 of 2012 in the Supreme Court of India, 17, at http://supremecourtofindia.nic.in/outtoday/wc21012.pdf [last accessed on 09.11.2015]; *Atam Prakash v. State of Haryan*, (1986) 2 SCC 249.

[788] *M. Pentia v. Veeramallappa*, AIR 1961 SC 1107, quoted in *Shahid Nabi Malik v. Chief Election Commissioner*, PLD 1997 SC 32 at 49.

ourselves that in Pakistan it is not an easy job to get access to a court of law: court fee, lawyer fee, other expenses, delay, and the approach of the courts that they will not suspend a law when its vires are under challenge because it is a law, the law, and law. So, 99% of the poor, down-trodden, helpless and humourless citizens are being grinded by *the law* and the 1% may rule the law, a law, and law. The solution is like this: the process of law-making be constitutionally scrutinized by the judiciary and before becoming the law, it will be corrected by the legislature in the light of such constitutional scrutiny via judicial pre-law review. Then there will be no need to correct it for a particular individual, that too, by the judiciary itself by addition etc presumably to find out the intention of the legislature. Put simply, when judiciary highlights defect at the pre-law judicial review stage, the legislature will either correct the same or will provide exceptions in express words as intended by the legislature. In this way, separation of powers can be insured; otherwise, collective dictatorship of the elected persons and uncertainties will dance over the coffins of the poor.

5.13.3 No abuse of power**:**

Power is meant for use; not for abuse. It is now crystal clear that “the three main organs of the state – judiciary, executive and legislature – are all powerful in their respective domains, but they cannot go beyond their constitutional limits through the

abuse of authority."[789] A study of history[790] gives credence to the often-quoted observation of **Lord Acton** in 1887: "Power tends to corrupt and absolute power corrupts absolutely."[791] The will to power as the human being's primary urge was also a major theme in **Nietzsche**'s philosophy.[792] So far, the constitutional and forensic fights in Pakistan have been fought just for power, and nothing else. It is time to stop as it is the age of information and liberation. Liberation is not only defined as the attainment of a state of awareness and understanding that transcends cultural beliefs systems, mindsets, and contexts, but it is also a state of wisdom and freedom in being, thought, behaviour, affect, and relations.[793] Otherwise, sooner or later, we will meet the same fate as the Nazi **Hitler** or French fascist governments met.

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[789] 'Chief Justice of Pakistan Mr. Justice Iftikhar Muhammad Chaudhry addressing the 30th roll-signing ceremony at the Supreme Court Lahore Registry for Lawyers who have been awarded practice licences for the apex court', The daily 'The News', September 01, 2013.

[790] See generally, Raymond Westphal, Jr, *War and Virtual War: The Challenges to Communities* (Oxford: Inter-Disciplinary Press, 2003); J. M. Roberts and O. A. Westad, *The History of the World* 6th ed (Oxford: Oxford University Press, 2013).

[791] Quoted in Fred J. Hanna, et al, 'The Power of Perception: Toward a Model of Cultural Oppression and Liberation', Journal of Counseling & Development, 2000, Vol 78, 430-41 at 430.

[792] See generally, Will Durant, *The Story of Philosophy: The Lives and Opinions of the Greater Philosophers* (New York: Simon & Schuster, 1933); Niccolo Machiavelli, trans Tim Parks, *The Prince* (U.K: Penguin Random House, 2009), ("It is necessary for a prince wishing to hold his own to know how to do wrong." Advice like this, offered by Niccolo Machiavelli in *The Prince*, made its author's name synonymous with the ruthless use of power.) available at https://apeiron.iulm.it/retrieve/handle/10808/4129/46589/Machiavelli%2C%20The%20Prince.pdf [last accessed on 12.03.2015].

[793] F. J. Hanna, F. Bemak, and R. C. Chung, 'Toward a new paradigm for multicultural counseling' Journal of Counseling & Development, 77, 125-134, (Wisdom is introduced as a fundamental quality of the effective multicultural counselor. Wisdom is defined, discussed, and differentiated from intelligence. The authors propose that to be an effective multicultural counselor requires more than textbook knowledge. Wisdom, as a transcultural concept, is considered in relation to culture, context, dialectical thinking, awareness, metacognition, deep interpersonal insight, and advanced empathy. Implications for counselor education and professional practice are discussed. Wisdom is an ancient subject that may provide a "new" paradigm with the potential to bring the field to a higher plateau of effectiveness in practice and training.) available at file:///C:/Users/786-786/Downloads/WisdomMulticultural.pdf [last accessed on 51.12.2014].

5.13.4 Alternative political philosophy of democracy**:**

It is now time to re-define democracy.[794] In the opinion of the Judiciary, the question put is: whether "elected members of parliament alone represented the will of the people and, therefore, were not answerable to [the] … court"?[795] This philosophy is based on five propositions, First, the Constitution manifests will of the people and in support of this argument preamble of the Constitution of Pakistan is referred, stating that it is the "will of the people of Pakistan to establish an order". One can infer from this that the fundamental principle and essence of this democratic order is the 'will of the people' contained and having been expressed through the Constitution. So it is not fresh election which just meant for authorizing some persons to make legislative acts in accordance to the will of the people to gleaned from the Constitution. Second, the Constitution represents will of the people, as such, it is 'people's Constitution'. It follows that this is supreme, not its creation, the Parliament. Third, Courts are the enforcers of the Constitution, as such, judicial review is a mechanism used by the Courts to ensure compliance with the people's will. In other words, courts empowerment by the people is a democratic rule. Fourth, it is duty of the Courts to keep elected representatives in compliance with the will of the people manifested in the Constitution. It is in fact Courts 'democratic role'. Fifth, members of legislature can be said to represent this democratic will of the people when they fulfill both criteria of political representation and constitutional compliance. That is why, such lack of

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[794] Public Opinion on Quality of Democracy in Pakistan at the end of the Second Year of Federal and Provincial Governments June 2014 - May 2015 (Islamabad: PILDAT, 2015).

[795] Jawwad S. Khwaja, J in Prime Minister Gillani disqualification case, referred here from Faisal Siddiqi, 'Judicial democracy', the daily 'Dawn', July 13, 2012.

compliance would be determined by the Courts being the non-elected few but having been authorized by the people through the Constitution by giving them original jurisdiction contained in the Constitution.[796] And what after all is the name of progress! Why deter from further progress, provided the direction is correct and the intention is humanitarian. In this way, the known world has reached from antiquity/ stone-age to Enlightenment. Human conditions change, thinking changes and as such life goes on from good to better. It may be visualized that one day there will be a Legislative Bench in the High Courts like the present Green Bench, Utility Bench, Company Judge, and so on. A procedure may be prescribed whereby the parliamentarians will be exempted from appearing in the Courts and instead their counsel and representatives will defend their legislative performance vis-a-vis the citizens. It may insure answerability / accountability and transparency. These are the tools for insuring people's trust in the elected form of government. It will be sung then: the Country is stitched with Law inch by inch/ Nobody is afraid of any punch or pinch.[797] REMEMBER that the Constitution is "a partnership not only between those who are living, but between those who are dead, and those who are to be born."[798]

The End

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[796] See Articles 184, 199 and the concept of separation of powers in the Constitution of the Islamic Republic of Pakistan.

[797] My ex tempore poetry

[798] Edmund Burke, *Reflections on the Revolution in France* 82 (Frank M. Turner ed., 2003) (1790), quoted in Garrett Ward Sheldon, 'Constituting the Constitution: Understanding the American Constitution through British Cultural Constitution'. Essay, Harvard Journal of Law & Public Policy [Vol. 31], 1130-1137 at 1131.

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VIII. Table of Abbreviations

AC: Appeal Cases.

AIR: All India Reports.

All ER: All England Reports.

CEC: Chief Election Commissioner.

CII: Council of Islamic Ideology.

CLC: Civil Law Cases.

FB: Full Bench.

FC: Federal Court (now Supreme Court).

FSC: Federal Shariat Court.

IIUI: International Islamic University, Islamabad-Pakistan.

ILR: Indian Law Reports.

IPD: Internal Proceedings Doctrine.

JRLP: Judicial Review of the Legislative Process.

Kar: Karachi.

KPK: Khyber Pakhtunkhwa Province.

Lah: Lahore.

MLD: Monthly Law Digest.

NWFP: North-West Frontier Province, now KPK: Khyber Pakhtunkhwa Province.

PC: Privy Council.

PLD: Pakistan Legal Decisions.

PLJ: Pakistan Law Journal.

PML: Pakistan Muslim League.

PPP: Pakistan People's Party.

QB: Queen Bench.

SC: Supreme Court.

SCMR: Supreme Court Monthly Reports.

UK: United Kingdom.

US: United States.

… May God Bless Pakistan …