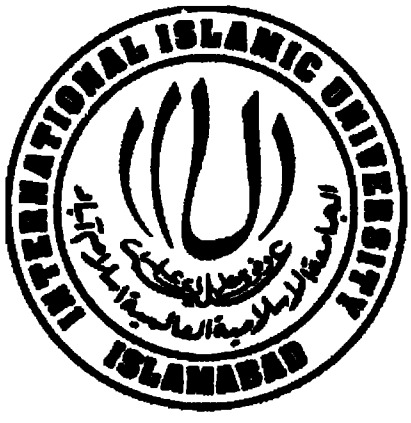
TOWARDS JUDICIAL SUPREMACY: A CRITIQUE ON CONSTITUTIONALISM IN PAKISTAN



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FINAL APPROVAL CERTIFICATE

It is certified that we have evaluated the thesis, **"Towards Judicial Supremacy: A Critique on Constitutionalism in Pakistan"** submitted by Mr. Muhammad Fahd Amin, Registration No 103-SF/PHDLAW/S18 in partial fulfilment of the requirements of the degree of PhD. Law at International Islamic University, Islamabad. The thesis fulfills the requirements for the award of the degree of PhD. Law.

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DECLARATION

It is hereby declared that, to the best of my knowledge, this thesis is an authentic study except where due acknowledgments are made in the text. It is submitted in the partial fulfilment of the requirement for the award of degree of Doctor of Philosophy in Law (PhD. Law). This thesis has not been submitted for any other degree or any examination at any other institution.

DEDICATION

This thesis is dedicated to my wonderful parents who have always supported and encouraged me in all my endeavours.

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ABSTRACT

This thesis provides a comprehensive critique on constitutionalism in Pakistan. The main focus of this study pertains to the augmentation of the judiciary's authority at the highest level via the mechanism of judicial review, which has resulted in dominance of judiciary in the constitutional setting of Pakistan. Non-doctrinal research methodology has been used to study the phenomenon of constitutionalism in Pakistan from the angle of theory of political constitutionalism. As the principal focus of this work is a critical examination of constitutionalism in Pakistan, so case study method is used as a research method to identify the challenges associated with constitutionalism and judicial supremacy in Pakistan. Constitutionalism functions as safeguard against capricious exercise of authority and is indispensable for enforcing rule of in a community. Conventionally, parameters of constitutionalism have been defined by two theories, namely, legal constitutionalism and political constitutionalism. The theoretical underpinnings of legal constitutionalism are based on the notion that judicial review is a pivotal instrument and recognizes judiciary's essential role in upholding rule of law in the country. Political constitutionalism challenges the democratic credentials of judicial review and suggests that decisions having political implications should be decided by means of democratic participatory mechanisms. Just like some other jurisdictions, one of the major ramifications of legal constitutionalism has been the rise of judicial supremacy. By using its interpretative powers and forum of public interest litigation, the judiciary has on numerous occasions asserted itself as a supreme organ in the constitutional dispensation of the country. In contrast to the fundamental idea of power separation, the legislative and executive parts of government have been overshadowed by the dominant influence of the judicial branch. A constitutional democracy is premised upon the idea that every governmental branch must function within its lawful domain. A combination of fragile democratic system and judicial populism has contributed in pre-eminence of judiciary. For the purpose of ensuring that

governmental branch respects its own lawful boundaries, a re-examination of constitutionalism in Pakistan is required.

Contents

Chapter 1

INTRODUCTION, SCOPE AND SIGNIFICANCE OF RESEARCH

1. Thesis Statement

The phenomenon of legal constitutionalism in Pakistan has resulted in judicial supremacy by enabling superior judiciary to exercise unlimited authority through judicial review thereby arrogating powers of other branches of government, hence there is a need to reappraise legal constitutionalism and define the limits of judicial powers.

1.1 Introduction

The term 'constitutionalism' stands for limited government.[1] The authority of a government is limited through checks and balances. Constitutionalism articulates a government founded on supremacy of constitution, protection of individual rights and scrutiny of a governmental action by judiciary. This doctrine is a bulwark against the arbitrary governmental power. Though constitutionalism does not have a fixed definition, numerous legal scholars have defined it in different ways. According to Neil Walker, the concept of constitutional government is linked to a set of norms known as constitutionalism.[2] This is rather a broad definition and requires further elaboration. Broadly speaking, it can be stated here that constitutionalism is a process that places limitations on the exercise of governmental authority to protect the citizenry from unchecked governmental power and protect rights of minority groups from the oppression of democratic majorities.

A central tenet of the theory of constitutionalism is creation of a comprehensive oversight over a government. Written constitutions provide vast powers to judiciary to examine the legality of an

[1] Hilaire Barnett, *Constitutional and Administrative Law* (London: Cavendish Publishing Limited, 2002), 6.
[2] Alec Stone Sweet, "Constitutionalism, Legal Pluralism and International Regimes," *Indiana Journal of Global Studies* 16, no.2 (Summer 2009): 627.

administrative or legislative action. This judicial scrutiny is commonly called judicial review.[3] However, it is important to highlight the foundations upon which judicial review rests. In evaluating the legality of a specific administrative action or statutory provision, judges are essentially assessing the legislatures or the executive branch's jurisdictional authority. This phenomenon has been technically termed as *ultra vires*. Craig claims that the rule of *ultra vires* prohibits a public (or private) body from going beyond the authority provided to it by a statute, an order in council or some other instrument.[4] So if an institute goes acts beyond its jurisdiction such an action would be *ultra vires*. Oliver Dawn argues that the doctrine of ultra vires encompasses an additional aspect that clarifies that while an authority may be acting within the confines of its jurisdiction in a manner that is strictly intra vires, it is nonetheless acting in excess of its authority.[5] Some of these ways include disregard for principles of natural justice, unfairness, bad faith, curtailing liberties of citizens and so on.[6] It is assertion of the supporters of judicial review that *ultra vires* rule not only applies to administrative law but is also relevant to judicial review of legislation. Building on this doctrine, they postulate that the Constitution signifies the domain of each branch of government and grants the judiciary the power to supervise them all to make sure they are all operating within the bounds of the law. Thus, according to this theory judicial review enables the judiciary to fetter unlawful powers of the organs of state.

However, numerous scholars have levelled a scathing critique on the principle of *ultra vires*. As mentioned before, this principle provides support to judicial review by assuming that courts are simply applying intent of legislature. The power delegated by legislature must be exercised in the prescribed limits. In other words, ultra vires principle provides justification for imposing constraints on the manner in which power delegated to an agency is to be exercised. Paul Craig

[3] Also sometimes called Constitutional Review.
[4] Paul Craig, *Administrative Law* (London: Sweet and Maxwell, 1983), 299.
[5] Oliver Dawn, "Is the Ultra Vires Rule the Basis of Judicial Review?" in *Judicial Review and the Constitution*, ed. Christopher Forsyth (Oxford: Hart Publishers, 2002), 4.
[6] Ibid.

questions the efficacy of doctrine of ultra vires by holding that it does not accord with reality.[7] He supports his argument by illustrating constraints placed by courts on exercise of discretion. These constraints are justified by reference to intent of Parliament; the legislature only envisioned that such powers be exercised on relevant considerations, reasonably and for proper purposes. Craig sees two problems with this justification. First, the enabling legislation may not expressly provide for need of such constraints and it all comes down to court's own interpretation as to which action is reasonable or based on relevant considerations.[8] Secondly, the argument for constraints on discretion does not carry weight when the evolution of such constraints is examined. New types of constraints emerge due to change in judicial attitudes.[9] Furthermore, some critics argue that courts are actually engaged in determining substantive legal norms rather than giving effect to intent of parliament.[10] According to Lord Irvine,

> "The ongoing discourse in the United States regarding the authority of the courts in relation to the Constitution and the discourse in Britain regarding the desirability of parliamentary sovereignty are strikingly similar. Instead of kind, the distinction lies in vocabulary and degree. The same concerns are at the core of both discussions: To what extent should the judiciary possess authority in comparison to the other branches of government? Under what conditions, if any, might the judicial branch be justified in superseding elected legislators and administrators to protect the interests of an individual or group?"[11]

Following these contentious opinions, the principle of ultra vires makes it difficult to defend judicial review. Another question is whether it is suitable to extend this doctrine beyond the bounds of administrative law. Though in countries having a written constitution, courts are empowered to scrutinize a legislation on the touch stone of fundamental rights, but is a constitutional court right forum to deliberate upon something as political as rights of citizens? Furthermore, can it be said with certainty that courts would always reach a right decision on rights of citizens when more often

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[7] Paul Craig, "Ultra Vires and the Foundations of Judicial Review," *The Cambridge Law Journal* 57, no.1 (March 1998): 67.
[8] Ibid.
[9] Ibid, 68.
[10] Lord Woolf of Barnes, "Droit Public-English Style," *Public Law* 7, no.2 (1995): 65.
[11] Lord Irvine of Lairg, "Sovereignty in Comparative Perspective: Constitutionalism in Britain and America," *New York Law Review* 76, no. 1 (April 2001): 6.

than not the debate about rights involves serious contestations of a diverse citizenry? The doctrine of ultra vires does not provide any plausible explanation to these complex conundrums.

The notion of constitutionalism gives rise to two well-known traditions: political and legal constitutionalism. Legal constitutionalism occupies a dominant position in the modern discourse of constitutionalism. Constitutionalism of this kind implies that the constitution enshrines certain fundamental rights, that general legislation must be evaluated against these standards, and that the judiciary has the authority to overturn any laws that do not follow these standards.[12] The legal constitutionalists maintain that judiciary is the most apt institution to safeguard individual rights and establish supremacy of constitution. Conversely, political constitutionalism posits that democratic institutions and political activity are best equipped to foster a rights-based polity.[13] Furthermore, the political constitutionalists argue that judicial review and expanded judicial role lacks legitimacy as well as capacity to deal with complex rights-based questions in a society. The basis of their critique stems from the concept that courts, upon being granted power to interpret rights, are required to make subjective assessments on their inherent worth. This stance contradicts the democratic principle, which asserts that major judgements ought to be determined by the people rather than by appointed judges.[14] When it comes to defending minority groups from democratic majorities and preserving constitutional rights, supporters of both traditions have different set of arguments.

Because of rampant constitutionalisation, judicial role has expanded in numerous domains that were traditionally associated with other branches of government (more specifically elected legislature). The use of judicial authority to address ethical matters, matters of public policy and political disputes has emerged as an inherent outcome of the increased influence wielded by the

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[12] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007), 15.
[13] Richard Bellamy, "The Political Constitution and Human Rights Act," *International Journal of Constitutional Law* 9, no.1 (January 2011): 91-92.
[14] Jeremy Waldron, "*The Core of the Case Against Judicial Review*," *The Yale Law Journal* 115 (6) (January 2006): 1385-86.

judiciary. Some experts name this phenomenon as judicialization of politics.[15] Enlargement of the decision-making authority of unelected judges on matters requiring democratic resolution has been the subject of considerable debate in numerous circles. The process of taking away powers from elected politicians to judiciary through constitutional reforms is now commonly termed as 'juristocracy'.[16] Juristocracy is thus, the judicial supremacy through constitutional apparatus. Under this phenomenon, the courts often tend to decide highly controversial political questions carrying far-reaching implications. It is often pointed out that elected parliaments are the most suitable institutions for determining such questions as they possess democratic legitimacy needed to settle these matters. However, the proponents of expansive judicial power claim that legal constitutionalism engenders a system of checks and balances and also protect minority rights from democratic majorities.[17] But how do extensive judicial powers fare in a constitutional democracy? Notable jurists like H.L.A. Hart maintain that the extraordinary judicial powers are hard to rationalise in a constitutional democracy.[18] Similarly, it is also being posited that supporters of supremacy of judiciary are not in a position to reconcile their stance with democratic norms.[19] This chasm between judicial review and democracy is not easily reconcilable, as both notions are based on different principles.

Pakistan's constitutional history is replete with instances of political unrest and constitutional collapses. The country has seen many rounds of political and constitutional upheavals in the shape of military governments, unstable civilian governments, activist judiciary and constitutional breakdowns. Thus, the phenomenon of constitutionalism has been quite complex. Due to the pluralistic character of the Pakistani political system, the architects of the Constitution of 1973

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[15] See for instance, Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts," *The Annual Review of Political Science* 11, no.1 (June, 2008):93-94.
[16] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of New Constitutionalism*, (Cambridge: Harvard University Press, 2004), 1-4.
[17] Michael J. Klarman, "What's so Great About the Constitutionalism?" *Northwestern University Law Review* 93, no. 1 (August 1998), 1, http://dx.doi.org/10.2139/ssrn.40520 last accessed October 10, 2020.
[18] H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (New York: Oxford University Press, 1983), 125.
[19] Sidney Hook, *The Paradoxes of Freedom* (Berkeley: University of California Press, 1962), 95.

were drawn from diverse social strata. As with the majority of written constitutions worldwide, the Pakistani Constitution establishes distinct duties for the legislature, executive branch, and judiciary in addition to enshrining fundamental rights. Consequently, the Constitution clearly prescribes role and limit of each organ of state.

The presence of bill of rights in constitution enables judiciary to scrutinize vires of laws or administrative actions that are contrary to such rights. The constitutional framework stipulates that constitutionality of all laws is contingent upon their adherence to fundamental rights.[20] Furthermore, Supreme Court is authorised to take any measure for implementation of fundamental rights.[21] Does this kind of judicial authority grant the Supreme Court unrestricted authority to decide cases involving political issues? Does the overarching interference of Supreme Court in domains of legislature and executive undercut the established norm of separate institutional powers? Did the drafters of our constitution intend for constitutional courts to have a role that goes beyond the constitution? Is it an impeccable assumption that judges are insulated from the political and social pressures and thus are best suited to settle contestations on rights? Is there a possibility that judiciary can go beyond its constitutional role and pave way for judicial supremacy? Has robust legal constitutionalism weakened the democratic dispensation of the country? These questions have appeared in the wake of the judicial activism observed during last decade.

There is an assumption that judiciary is best suited to adjudicate upon rights, as unlike the elected representatives, judges do not represent constituents and thus are not likely to be swayed by subjective factors. Those who oppose this point of view contend that judiciary cannot remain oblivious to social and partisan pressures just like elected representatives. Furthermore, when elected legislators debate about rights in the parliament, they consider a plethora of opinions on

[20] Art. 8, Constitution of Pakistan.
[21] Art. 184(3), Constitution of Pakistan.

such rights; this type of holistic debate is not possible in a formal judicial setting. Furthermore, the constitutional division of powers is frequently distorted by courts' use of broader judicial authority. Increased judicial interventions on policy matters and political matters provides evidence of the emerging judicial supremacy in almost every country. Though Supreme Court has sole domain to interpret the Constitution, this sometimes leads to excessive use of powers by the judicial organ. As this study will show, often it appears that the Supreme Court is going against an express provision of the Constitution. Lack of independent accountability forums for the judges of constitutional courts also pose a huge problem in ensuring checks and balances on the judicial organ.

1.2 Significance of Study

The significance of this study lies in critical examination of constitutionalism in Pakistan. The research aims to explore limits of legal and political constitutionalism in Pakistan, expansion in judicial power, scope of judicial review and phenomena of judicial supremacy. The study strives to examine the relationship between legal constitutionalism and judicial supremacy. This study's findings will contribute in the ongoing discourse on constitutionalism in Pakistan and will provide insights to scholars, legal practitioners and policy makers to revaluate role of judiciary in a constitutional democracy, determine scope of judicial power, acknowledge the importance of political constitutionalism in constitutional matters and address the challenge of judicial supremacy through constitutional interpretation. This research strives to foster a deeper understanding of constitutionalism in Pakistan and suggest measures to bolster separation of powers among governmental branches, promote rule of law and limit judicial activism in the country.

1.3 Literature Review

1.3.1 Critique on Modern Constitutionalism

Kelsen is widely recognised for his pivotal role in the formulation of a centralised approach to constitutional review. This approach involved the creation of a Constitutional Court, an

independent judicial entity endowed with explicit authority to scrutinise the constitutionality of legislation.[22] According to Kelsen, the parliament creates constitutional norms, and regular courts' function is restricted to enforcing those rules. Only an extra-judicial organisation would be qualified to assess a law's legitimacy based on constitutional requirements.[23] Kelsen acknowledges the possibility that the legislatures may enact statutes which go against constitutional principles and thus calls for establishment of a special forum to invalidate such laws.[24] An important question that arises here is doesn't this centralized model of review infringe doctrine of separation of powers? Kelsen rejects such criticism by holding that basically the Constitutional Court is using its 'negative legislative power' when it declares a statute unconstitutional. He provides an explanation for this by contending that the constitutional court's decision to overturn a statute was of the same nature as a statute that nullified another statute. It was a negative legislative act.[25] Hence, Kelsen espouses the endorsement of judicial review of legislation, contingent upon its execution by a distinct tribunal as opposed to conventional courts. Kelsen's basic premise for advocating this power is similar to the most contemporary legal constitutionalists that is to prevent legislature from passing unconstitutional law. It is worth mentioning that Kelsen does not address the fundamental query about the democratic legitimacy of constitutional review. Furthermore, he does not comment upon how impartial a specialized tribunal could be in deciding constitutional disputes. The proponents of legal constitutionalism would argue that in Kelsen's idea of creating a special court would not secure independence of judiciary as it would allow a greater control to the elected legislatures in deciding the membership of such courts. Additionally, Kelsen's line of

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22 Jose Juan Moreso, "Kelsen on Justifying Judicial Review," available at https://www.academia.edu/12050745/Kelsen_on_Justifying_Judicial_Review ,accessed July 17, 2019.

23 Hans Kelsen, "La garantie jurisdictionnel de la constitution," *Revue de Droit Public, 197, (1928).*

24 Hans Kelsen, "La garantie jurisdictionnelle de la Constitution"
Revue du Droit Public et de la Science Politique en France et à l'étranger, (1928), 197-257, at 223.

25 Hans Kelsen, "Judicial Review of Legislation: A Comparative Study of Austrian and American Constitution," *The Journal of Politics* 4, no. 2 (May 1942): 187.

argumentation does not provide safeguards against judicial overreach by the specialized constitutional tribunal.

Tushnet takes a unique tack on the modern constitutionalism by holding that the constitutional law should not be seen as a principal domain of the courts rather the Constitution is self-enforcing through political process.[26] He argues that the legislature and executive have an incentive to enforce Constitution in a better manner than the courts that are outside the political processes.[27] While describing drawbacks of judicial review, he states that populist constitutionalism sees constitutional law as something not in hands of lawyers and judges but in the hands of people themselves.[28] One potential gap in Tushnet's framework is that he does not fully explain as to how rights of people would be secured in a polity that does not have judicial review. Furthermore, he does not shed light on the drawbacks of populist constitutionalism which include tyranny of majority and absence of rule of law.

Aatir Rizvi and Rehana Saeed have criticized the expansion of judicial power in the domains of other branches of government.[29] They contend that judicial discretion has come to dominate the legislative process.[30] The phenomenon of judicial activism has overshadowed the role of the executive and the legislature. In the recent years, the judicial interreference has undermined the constitutional authority of other branches. The politicization of judiciary has further aggravated the imbalance in the powers among the branches of government. The authors have emphasized that each branch of government must perform its respective constitutional role and respect the constitutional domain of other branches of government. Though the authors have discussed the problem of judicial activism in great detail, they did not examine the theory of legal

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[26] Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999), 5.
[27] Ibid, 95.
[28] Ibid, 182.
[29] Aatir Rizvi and Rehana Saeed Hashmi, "Judicial Politics and Judicial Independence at Crossroads: A Study of Judicial Activism in Pakistan," *Pakistan Languages and Humanities Review* 5 no.2(September 2021):74, http://doi.org/10.47205/plhr.2021(5-II-sep)1.01.
[30] Ibid.

constitutionalism as a cause of such activism. Furthermore, their publication does not shed light on the merits of political constitutionalism in a constitutional dispensation.

1.3.2 Authority of Judicial Review

Bickel asserts that the power of constitutional review vested in the United States Supreme Court is a remarkable authority.[31] Peculiarly, constitutional review power is not a part of text of the American constitution.[32] According to Bickel, John Marshall, in the Marbury case, argued that it would be illogical to entrust the determination of legality only to the legislature, since this would paradoxically provide those whose authority is meant to be constrained the ability to define the boundaries.[33] However, it is important to acknowledge that the aforementioned assertion is also applicable to the judiciary, as the Constitution imposes limitations not only on the legislative branch but also on the judiciary. Indeed, Bickel has presented a compelling case on the boundaries of judicial review. Does the rationale in the *Marbury* case provide the court unrestricted authority to make final decisions on constitutional issues?

Dworkin, a fervent proponent of the judicial role within a constitutional framework, asserts that judicial review is an essential condition for ensuring a well-functioning government, as it facilitates the attainment of equitable outcomes. According to Dworkin, due to the judicial enforcement of its constitution, the United States enjoys greater justice than it would have if majoritarian institutions had been left in charge of enforcing its constitutional rights.[34] Dworkin's interpretive theory is based on moral reading, which enunciates that it is the job of judiciary to construe and implement abstract constitutional clauses.[35] According to this theory the best interpretation of such abstract clauses is the one that which according to our moral principles achieve best results.[36] In

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[31] Alexander M Bickel, *The Least Dangerous Branch: Supreme Court at the Bar of Politics*, 2nd Ed. (New Haven: Yale University Press, 1986), 1.
[32] Ibid.
[33] Bickel, *The Least Dangerous Branch*, 1.
[34] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 356.
[35] Ronald Dworkin, *Freedom's Law: The Moral Reading of American Constitution* (Cambridge: Harvard University Press, 1996), 34.
[36] Ibid.

Dworkin's view, judicial review is not antidemocratic but is essential for a democracy.[37] In opposition to this argument, Waldron and other scholars contend that it is inherently undemocratic for unelected individuals or organisations to make authoritative determinations concerning the requirements of democracy.[38] Whether or not judicial review is democratic remains a topic of heated debate. However, a major problem with Dworkin's approach is that he puts too much faith in ability of judges to discern and apply objective moral principles. Dworkin's line of argumentation does not explain safeguards against judicial overreach and judicial supremacy. Though he posits that judiciary is best suited to protect rights of the citizens, he refrains from commenting on the potential misuse of judicial authority. He does not offer a plausible explanation into possible danger of rewriting the constitutional text under the pretext of interpretation.

Richard S Kay in his article *Democracy, Mixed Government and Judicial Review*, has justified judicial review on a rather interesting notion of mixed governments. According to Kay, the functioning of constitutional democracies involves power sharing between two agencies.[39] The first agency comprises of elected officials directly answerable to public. The second involves unelected officials who hold office for a fairly long term. The first makes decisions in light of the preferences of voting public. The second decides according to its own principles as to the correctness of action taken by the first agency. According to Kay, judicial review authority is a crucial part of mixed governments, which involve the participation of two or more distinct political power centres in the creation of public policy.[40] Though this is an interesting idea, yet it fails to explain under what basis is a group of unelected officials hold power over the opinion of an elected body. Though the author has criticised the evils of a majoritarian democracy, he has underlined any constraints that would enable judiciary not to act in a whimsical manner. Kay fails to take into account weak forms

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[37] Ibid, 7.

[38] Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), 293.

[39] Richard S Kay, "Democracy, Mixed Government, and Judicial Review" (September 18, 2018). Law under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy (eds. L.Crawford, P.Emerton, & D.Smith, Hart Publishing, 2019). Available at SSRN: https://ssrn.com/abstract=3260845. last accessed October 13 2020.

[40] Ibid.

of judicial review as applicable in some jurisdictions like the United Kingdom. Furthermore, he provides an insufficient analysis of relationship between judicial review and democracy. Though he provides two levels of accountability of elected officials, he does not offer any explanation regarding the expansion in judicial power due to judicial review.

Jeremy Waldron posits that under a well-functioning democracy characterised by a robust culture of rights, the customary legislative processes are more adept at addressing constitutional inquiries. Waldron contends that these procedures, as opposed to courts, provide a more democratic means of safeguarding and upholding individual rights.[41] Waldron challenges the normative basis of judicial review. Court has power to question a legislation via judicial review, but can ordinary legislative procedures effectively replace the established doctrine of judicial review especially when such procedures are surrounded by divisive political agendas? The opinion of public law experts is greatly divided on this question. A major gap in Waldron's analysis is that he fails to address the question of bias in executive and political branches. His analysis is largely based on the assumption that democratic processes are best designed to safeguard individual rights, however, that does not happen when democratic majorities tend to undermine minority rights. Moreover, he does not offer practical alternatives to abolishing judicial review. Waldron also does not take into account the significance of judicial review in promoting rule of law by compelling executive and legislative branch to act in accordance with law. Waldron's arguments primarily focus on criticising judicial review on the basis of democratic ground yet he fails to acknowledge the importance of judicial review in preventing individual rights of citizens.

1.3.3 Legal Constitutionalism

Legal constitutionalism is premised on the conception of constitutional rights. It posits that judiciary is more suited to any adjudication on rights and is free from the pathologies that often taint the democratic legislatures. The followers of political constitutionalism on the other reject

[41] Waldron, "The Core of the Case Against Judicial Review," 1346.

this assumption and hold that the debate on rights is part of political discourse. In his book, Richard Bellamy provides a critical analysis of normative underpinnings of judicial review as a means of promoting rights.[42] Legal constitutionalists posit that constitutional bills of rights ensure that rules are equitable and vital interests of all humans are protected.[43] Bellamy contends that despite widespread agreement that rights are necessary to uphold justice, there are significant differences among people regarding essence, implications and impact of rights.[44]Thus debates over form and extent of rights is endless that challenges basis of constitutional rights hypothesis. The circumstance of politics—a scenario in which our interests would be jeopardised without a collectively enforceable agreement—is the reason rights are necessary. However, perspectives and interests differ on what that agreement should look like, and there isn't a single, workable solution.[45] Bellamy also debunks the argument that judicial review offers the best solution in adjudicating on rights discourse. He posits that rights-based discourse requires participation and cooperation of all people.[46]Furthermore, the tyrannous majorities are usually unattainable in a pluralist polity due to diverse social relations. Though Bellamy attempts to defend democracy by justifying majority rule, he does not provide sufficient attention to the role of power and privilege dynamics in a society. Democratic processes are not always neutral and impartial and more often than not they are influenced by powerful segments of society. Without an effective system of judicial review, the unequal power structures in a community could lead to injustice and violation of rights of weaker segments of society.

Paula Newberg extensively explains the phenomena of constitutionalism in Pakistan. She points out that courts and legal specialists reconstitute the state when constitutions fail to sufficiently define it in a way that is meaningful to the people living in it. Owing to Pakistan's unruly

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[42] Bellamy, *Political Constitutionalism*.
[43] Some jurists like John Rawls have termed this as 'circumstance of justice' i.e. the normal conditions under which human cooperation is both possible and necessary.
[44] Bellamy, *Political Constitutionalism*, 20.
[45] Ibid, 21; Also see John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 55-56.
[46] Ibid, 51.

constitutional past, the judiciary has defined the political community according to its own standards, using the protection of the constitution.[47] She further maintains that through their proceedings and judgements, the judicial branch has been instrumental in shaping powers of institutions of state. Judiciary has also determined the limits of acceptable political behaviour in the society.[48] She argues that a more collaborative arrangement between judiciary and other limbs of government is desirable. The judges must foster a culture of democratic participation on issues of national importance and refrain from unilaterally enforcing their will through their decisions.[49] This narrative provides important context for understanding judiciary's fundamental function in the political process. Throughout history, judiciary has been at forefront in providing legitimacy to military takeovers that have impeded Pakistan's aspirations to establish a strong constitutional democracy. However, the jurisprudence of last three decades indicates that the highest court of Pakistan has arrogated powers for itself, making judiciary less accountable and supra-constitutional. Newberg does not offer analysis of phenomenon of judicial activism in the country. The book is primarily concerned with the analysis of political cases that came before the superior courts in the country. The expansion in judicial power has not been discussed in her publication. She has also not touched upon as to how the judicial branch increased its power by means of public interest litigation. Though the book offers a great insight into the role of judiciary in the constitutional development of Pakistan, it does not provide details into contemporary constitutional challenges such as judicial overreach.

Rahim Awan maintains that the apex Court of Pakistan cannot invalidate any law unless the said law clearly violates fundamental rights.[50] In cases where there is no violation of constitutional rights and the issue is solely policy-related, he contends that the court should abstain from exercising its

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[47] Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (New Delhi: Cambridge University Press, 1995), 31.
[48] Ibid, 11.
[49] Ibid, 250.
[50] Muhammad Raheem Awan, "Judicial activism in Pakistan in commercial and constitutional matters: Let justice be done though the heavens fall", *Journal of International Criminal Justice Research* 1, no.11 (July, 2014): 22.

original jurisdiction.[51] After delineating the limitations imposed on the authority of the top court to invalidate laws, he argues that the socio-economic and political context of Pakistan makes activism by judiciary an advantageous undertaking.[52] The author neglects to answer an important query in this regard; what actually constitutes an infringement of fundamental rights? If the Supreme Court is to decide this question, then we don't have an objective criterion for judicial action. The harms of judicial activism that took place during the last decade or so are all too evident for the concerned stakeholders, however, there has been no introspection into this judicial behaviour. Furthermore, in his article he also did not give any plausible answer as to democratic status of constitutional review of the apex court. The author has also not provided an account of impact of judicial overreach on separation of powers. He has also not delved into analysing the impact of political factors on judicial decisions.

Osama Siddique argues that there is a link between judicialization of politics and unstable constitutionalism in Pakistan.[53] He has discussed the implications of judicialization of politics on the democratic system of the country. He further asserts that the apex court under the Chief Justice Iftikhar Muhammad Chaudhary showed an affinity to admit public interest litigation for invocation of original jurisdiction of the Supreme Court.[54] Osama Siddique expresses his deep concerns on the role of populist judiciary and dangers extensive judicial review policy in a constitutional dispensation marked by the concept of separation of powers. Though the writer has aptly described the dangers of judicialization of politics in his publication, he does not shed light on the alternative forms of constitutionalism that could lead to a balance between the powers of legislatures and executive. Moreover, the author does not discuss the limits of public interest litigation that are necessary to keep the executive power in check.

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[51] Ibid.
[52] Ibid, 23.
[53] Osama Siddique, "The Judicialization of Politics in Pakistan: The Supreme Court after Lawyers' Movement," in *Unstable Constitutionalism: Law and Politics in South Asia*, eds. Mark Tushnet and Madhav Khosla (New York: Cambridge University Press, 2015), 159.
[54] Ibid, 176.

Hatim Aziz Solangi justifies the court's intervention in the affairs of other branches of government via public interest litigation.[55] While discussing the effectiveness of public interest litigation as a forum for redressal of public grievances, he argues that this provided public with a new forum that allowed for the examination of both legislative and executive actions.[56] The constitutional movement and judicial authority, which have adopted a more people-centric profile, have both attained the status of social movements. According to him, public interest litigation has given rise to the creation of corresponding instruments, such as the expansion of the concept of locus standi, the relaxation of the statute of limitations, the streamlining of procedures, precedent, and suo-moto jurisdiction. However, it must be pointed out that the author does not highlight dangers associated with the excessive use of public interest litigation. He does not shed light on the phenomenon of judicial activism which resulted from public interest litigation.

Constitutional framework provides mandate to superior judiciary in Pakistan to interpret constitutional provisions. The apex court has not shied away from determining a political question even though such determination often derogates separation of powers. In an important constitutional case[57] the court ruled that Constitution recognizes political justice and guarantees it. This line of argumentation often overlooks the political character of constitution and merely consider it as a juridical document. Adjudicating upon political questions undermines the democratic procedures designed to resolve such questions. In context of the aforementioned debate, judiciary lacks democratic legitimacy to determine the political questions, as legislatures are best suited to deal with such questions.

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[55] Hatim Aziz Solangi, "The Neo-Jurisprudence of PIL in Superior Court of Pakistan: A Comparative Analysis of Pre and Post Lawyers' Movement Working of Superior Courts," *Journal of Social Sciences and Humanities* 60 no.1(Jan-Jun 2021):33.

[56] Ibid, 37.

[57] *Muhammad Nawaz Sharif v Federation of Pakistan* (PLD 1993 SC 473), Opinion of Justice Saleem Akhtar, p. 809.

1.3.4 Political Constitutionalism

The theoretical foundation of political constitutionalism is derived from the enduring tension between law and politics. J.A. Griffith argues that law should not be seen as a viable replacement for politics.[58] This point of view recognises the primacy of politics above law and views latter as an integral component of politics. Pursuant to this line of argumentation, Griffith believes that the whole rights discourse falls within the domain of political claims. He expresses opposition to the incorporation of the bill of rights into the constitution on the grounds that it permits the adjudication of political conflicts by the judiciary. In his view, political matters must be resolved by political leaders because they are more capable to decide upon such matters and also because the people can make their political leaders accountable in elections. Such form of political accountability is non-existent for judges who adjudicate upon the political rights of people. Of course, the supporters of legal constitutionalism find this argument without substance as it calls for giving unbridled powers to the elected representatives. The chief criticism on Griffith's view is that it does not provide a convincing remedy for the possibility of tyranny of democratic majorities in a constitutional democracy. Griffith also does not discuss the important role of judiciary as a neutral arbiter in protecting constitutional rights of citizens. The overemphasis on parliamentary sovereignty often tends to neglect the important role of courts in ensuring rule of law in the society. The concept of political constitution advocated by Griffith only considers the importance of political decision-making and altogether omits to mention the significance of human rights. Furthermore, in his analysis Griffith does not address the issues relating to political accountability by means of legal rules. Overreliance on the virtues of popular sovereignty is often misplaced, as elected legislatures can sometimes enact laws that are detrimental to rights of citizens. While discussing his theory of political constitutionalism, Griffith does not take into account the value of political representation and political equality. He erroneously assumes that political

[58] J A Griffith, The Political Constitution, (1979) *MLR*, 16.

representation is equal and effective. This is not a correct assessment of the political decision making as such decisions are often based on political inequality and representation bias.

As mentioned earlier, judiciary plays a pivotal role in legal constitutionalism. The legal constitutionalists firmly believe that it is the most suitable branch of government to protect individual rights of citizens and act against tyrannical tendencies of democratic governments. Now the main question which arises here is that how do the advocates of political constitutionalism view the role of courts in a democracy? Adam Tomkins provides an answer to this question in his article. Tomkins argue that though modern human rights discourse seems to enlarge liberties, but some of its tools lead to an expansion in judicial power.[59] He does not discard judiciary's role in implementation of rights of citizens, rather he is more concerned with the structure and interpretation of scope of rights. Tomkins believes that judicial enforcement of narrowly defined rights is in line with political constitutionalism, however, the courts should refrain from interfering in rights having a qualified nature. The main justification behind this position is that the determination of scope of a qualified right (such as freedom of expression) is essentially a question having political character and this must be settled through political processes. The opponents of political constitutionalism contend that discerning between rights that need judicial examination and those that do not would pose significant challenges. Tomkins's distinction between rights that merit judicial attention leads to confusion. Constitutional experts would always disagree as to which particular rights must be protected by means of judicial review and which rights should be determined by elected representative institutions. Furthermore, the article does not accord adequate attention to the role of political equality in a debate on rights of citizens. Without discussing this aspect of the constitutional rights, it would not be possible to appreciate the concerns of advocates of political constitutionalists.

[59] Adam Tomkins, "The Role of Courts in a Political Constitution," *The University of Toronto Law Journal* 60 (1), (winter 2010), 4.

1.3.5 Judicial Supremacy

Interestingly, judicial supremacy often results from court's authority to interpret constitution. Many enthusiastic proponents of judicial supremacy firmly argue that the courts have exclusive authority in constitutional interpretation due to their unique expertise in legal interpretation. In her article, Tabatha Abu El-Haj has succinctly summarised this controversy regarding the court's authority in constitutional interpretation. She believes that the court's expertise is greatest when constitutional interpretation is elaborated through literal, structural, and philosophical arguments.[60] However, the Court's interpretive ability is weakest when it has to rely on prudential or ethical grounds to interpret the Constitution, as non-judicial actors are also capable to provide the said grounds.[61] Basically the prudential arguments are in fact policy arguments and legislative bodies are better equipped to debate these arguments because the decisions in such matters are often value judgments and an elected body is relatively a better forum to make such judgments.

Andrei Marmor in his book *Interpretation and Legal Theory* has examined the legitimacy of constitutional review. Marmor acknowledges that democratic ideals and authority of constitutional review by judiciary are incompatible.[62] Certain commentators attempt to support judicial review by asserting that judges, being the most qualified individuals to lawfully interpret the Constitution due to their possession of the requisite expertise in interpreting a legal document. Andrei notes that this hypothesis is flawed because it is based on a dubious assumption which makes constitution a legal document, whereas, most constitutional decisions are premised on moral and political considerations.[63] This further demonstrates that courts lack necessary institutional resources and insulation from various rights perspectives to effectively deal with rights debate. The alternative is to leave such matters to the ordinary legislative and democratic procedures. Unlike

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[60] Tabatha Abu El-Haj, "Linking the Questions: Judicial Supremacy as a Matter of Constitutional Interpretation," *Washington University Law Review* 89, no.6 (2012): 1333.
[61] Ibid.
[62] Andrei Marmor, *Interpretation and Legal Theory* (Oxford: Hart, 2005), 149.
[63] Ibid, 150

the constitutional decisions of the courts, the legislative decisions are more democratic and tentative.[64] Despite the pitfalls of judicial review, Andrei maintains that it is a prevalent constitutional practice in most constitutional democracies and will continue to exist for the foreseeable future. Nevertheless, his arguments merit greater consideration, particularly at a time when judicial review is regarded as the sole mechanism to safeguard the constitutional rights of the populace. A holistic evaluation unfolds that judicial review is equally susceptible to the flaws found in the legislative procedures. Though judicial review seeks to counter the tyranny of democratic majorities, it leads to tyranny of unelected judges. Though Marmor has raised some important points with regard to the supremacy of judiciary in constitutional issues, he does not share a viable alternative for constitutional interpretation. Thus, if it is assumed that judiciary is not a suitable institution for interpretation of constitutional text, can this important function be entrusted to a partisan legislature or an overarching executive? Though Marmor's insights are helpful in understanding the dangers associated with judiciary's exclusive power to interpret constitutional provisions, he does not offer a solution for dealing with tyranny of majority in the legislature. The main premise of legal constitutionalism is a distrust on the elected legislatures vis-à-vis protection of individual rights. This book does not offer a meaningful insight as to how such distrust can be removed.

In his essay, Robert Justin Lipkin states that judicial supremacy is attained when the opinion of the Court is regarded as definitive.[65] He argues that there is a difference between republicanism as enshrined in the American Constitution and majoritarian model of democracy.[66] The dual purpose of a republican democracy is to distribute authority and attain a participatory consensus. Republicanism engenders certain constitutional limitations such as federalism, bicameralism and review by judiciary to prevent tyranny of a political government and to refine the reflective

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[64] Ibid, 153

[65] Robert Justin Lipkin, "What's Wrong With Judicial Supremacy? What's Right About Judicial Review," *Widener Law Review* 14, no.1 (December, 2008): 2.

[66] Ibid, 7.

judgments of the community as a whole. Thus, judicial review, being one of the constitutional filters, is not inconsistent with the concept of constitutional democracy. In a nutshell, Robert maintains that judicial review should only assist citizens in making reflective judgments instead of becoming a reflective judgment itself. This is an interesting proposition; however, judicial review is often a prelude to judicial supremacy. As it is quite evident that without constitutional apparatus, the courts cannot examine constitutionality of a particular legislation enacted by the legislature or an executive action. The author attempts to distinguish judicial review from supremacy of courts, however falls short in identifying the specific mechanisms by which this differentiation might be maintained. Furthermore, the article considers judicial supremacy as a problematic feature in a constitutional democracy, yet it does not fully explore the alternative models for the role of judiciary in a democratic system. Lipkin does not discuss the potential benefits of judicial role in protection of individual rights in a community. He also does not shed light on the historical and social justification of expanded judicial role in a constitutional democracy. This article also falls short of discussing the probable threats to constitutional democracy in absence of an independent robust judiciary.

In her article, Saima Bazmi has mentions drawbacks of judicial activism in a constitutional democracy.[67] She maintains that though on numerous occasions, judicial activism is welcomed by the general public, this phenomenon creates more problems in a constitutional dispensation. She explores the historical role of judiciary in precipitating constitutional crises through an examination of landmark verdicts. Furthermore, she asserts that judicial activism has created an imbalance in the constitutional role of the three branches of government.[68] Though this article provides the challenges associated with judicial activism, it does not shed light on the changing patterns of constitutionalism and phenomenon of judicial supremacy. The article also does not discuss

[67] Saima Bazmi, "Politico-Judicial Activism in Pakistan: A Historical View," *Pakistan Journal of Social Research* 4, no.3, September 2022:97, https://doi.org/10.52567/pjsr.v4i03.690.
[68] Ibid, 103.

political constitutionalism as a theory due to which it provides an incomplete account of the phenomenon of constitutionalism and its relevance to Pakistani jurisprudence.

1.4 Research Objectives

This study seeks to achieve the following research objectives:

1. Critically examine the phenomenon of legal constitutionalism in Pakistan.
2. Examine role of judiciary in shaping constitutionalism in Pakistan.
3. Recount factors which result in judicial supremacy.
4. Analyse the potential advantages and drawbacks of political constitutionalism in Pakistan.
5. Suggest recommendations to address challenges associated with constitutionalism in Pakistan.

1.5 Research Questions

1. What is the influence of legal constitutionalism on the distribution of powers among governmental organs?
2. What are the normative underpinnings of legal constitutionalism and political constitutionalism?
3. Is political constitutionalism more appropriate for determining the issue of rights as opposed to delegating this authority to unelected judges?
4. How has the judicial power expanded in Pakistan?
5. Has legal constitutionalism led to judicial supremacy in Pakistan?

1.6 Research Methodology

This research employs a non-doctrinal research methodology to examine constitutionalism in Pakistan from perspective of political constitutionalism. Though an analysis of legal provisions and cases has been made in this study, it adopts a non-doctrinal approach that considers the theory

of political constitutionalism as baseline for critically examining the problems with constitutionalism in Pakistan. A case study approach has been used as a research method to discuss the phenomenon of constitutionalism in Pakistan. The case study method provides the essential groundwork for developing a contextualized understanding of how constitutionalism operates in Pakistan. The data collection for this study involves a comprehensive review of relevant literature in form of books, journal articles and primary sources such as constitutional provisions, judicial precedents and legislative instruments. Data analysis involves a critical and interpretive approach examining data through lens of political constitutionalism. This methodology aims to provide a nuanced and contextualized account of constitutionalism and judicial supremacy in Pakistan.

1.7 Limitations of Study

This study has several limitations which must be acknowledged. Firstly, this research is specifically focussed on the phenomena of constitutionalism and judicial supremacy in Pakistan which limits its generalization to other jurisdictions. Secondly, this study relies on the relevant available literature on the subject which is by no means exhaustive or representative of every perspective on the topic. Thirdly, this study is based on case study research method which may not applicable to the findings of other research methods. Fourthly, as a researcher the author's own biases and perspectives may influence the interpretation and analysis of data. Finally, the research is limited to specific time-frame till the year 2022 and will not encapsulate future developments and changes. Through acknowledgement of these limitations, the author strives provide an honest and transparent account of this study's boundaries and potential areas for future research.

1.8 Conclusion

This chapter has enunciated a comprehensive literature review on the legal and political constitutionalism and judicial supremacy. Though there is an abundance of literature on this subject, the academic literature falls short in several respects. The review recounts gaps in literature

on the relationship of constitutionalism with judicial supremacy. The research objectives and questions clearly define the scope and limitations of this study and show that it is primarily a critical review of constitutionalism in Pakistan and its implications on the phenomenon of judicial supremacy. The chapter sets groundwork for the next chapters as it clearly provides a non-doctrinal research methodology to critically examine legal constitutionalism in Pakistan.

Chapter 2

Theoretical Foundations of Legal and Political Constitutionalism

2. Introduction

At its core, constitutionalism is an intricate and multifaceted concept that has evolved and shaped by interplay of legal, political and social forces. As a concept of modern democratic governance, there are diverse theoretical perspectives on the concept of constitutionalism. This chapter provides insights into legal and political constitutionalism. These two traditions reflect opposite perspectives on constitutionalism and delve into the role of judiciary and elected legislatures in a constitutional dispensation. This chapter offers an account of tensions and synergies between legal and political constitutionalism, examining how these two constitutional traditions have influenced and shaped the phenomenon of constitutionalism in the world. Furthermore, this chapter provides a critical account of legal constitutionalism which is the first research objective of this dissertation. The chapter also addresses the first two research questions dealing with the role of legal constitutionalism in distribution of powers in governmental branches and theoretical foundations of legal and political constitutionalism in Pakistan.

2.1 Legal Constitutionalism

The dominant tradition associated with the concept of constitutionalism is legal constitutionalism. It is actually a compendium of principles and practices that includes distribution of powers among state organs, oversight mechanisms and securing basic rights of people.[69] In view of this particular tradition, a constitution is a written document, justiciable, entrenched against normal legislative change, superior to ordinary legislation, constitutive of legal and political institutions in a legal system and embodies a common philosophy that defines public life in a country.[70] Justiciable

[69] Andras Sajo and Renata Utiz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford: Oxford University Press, 2017), 13.

[70] Joseph Raz, "On Authority and Interpretation of Constitutions," in *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander (Cambridge: Cambridge University Press, 1998), 153-54.

nature of Constitution serves as a safeguard to prevent the government from enacting a legislation that contradicts principles and ideals embodied in the Constitution. This essentially gives a superior character to the constitution over any other legislation. Furthermore, this whole idea of justiciabilitly arises because of entrenchment of certain basic rights of people in constitution. Under this scheme of arrangement constitutional courts have exclusive mandate to implement rights of people and construe constitutional provisions.

This whole idea of legal constitutionalism is premised upon a sceptical view of the efficacy of democratic processes. The advocates of this theory posit that democratic majorities often trample upon the rights of those in minority and entrenchment of certain fundamental rights is the only panacea to this problem. They maintain that when majoritarian procedures fail to assign equal status to citizens, non-majoritarian procedures may be adopted to preserve such equal status.[71] This implies that courts may step in to protect individual rights of citizens when majoritarian procedures (democratic institutions) fail to do so. Consequently, legal constitutionalism makes courts final arbiter vis-à-vis contestations of basic liberties of people.

Judiciary acting as sentinel of citizens basic rights is an important cornerstone of legal constitutionalism. This discourse is of course not new, Locke identified some specific rights as prerequisites for creation of a civil society.[72] According to Locke, the social contract between sovereign and subjects rests on preservation of natural rights. Legal constitutionalism rests on robust emphasis on rights, their entrenchment in constitution and their interpretation or elaboration by Court.[73] This intricate function of the court begets constitutional review that is deemed instrumental in enforcement of rights under legal constitutionalism. The jurisdiction of constitutional review gives the court the ability to nullify any executive or legislative action that is seen to be incompatible with constitutional rights.

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[71] Dworkin, *Freedom's Law*, 17.
[72] John Locke, *Two Treatises of Government* (Peter Laslett ed., Cambridge U. Press 1988), Sections 22-23.
[73] Bellamy, *Political Constitutionalism*, 15.

So why do the rights discourse hold such a pivotal importance in legal constitutionalism? The answer to this question demands a comprehensive understanding of role rights play in protecting citizens from arbitrary will of the state. This is what justifies the entrenchment of rights in the constitution.

Horace Spector holds that liberty is threatened by domination and dependence and law is essential to prevent such domination.[74] Thus, people must have a legal recourse in case a government seeks to dominate them by curtailing their liberty. According to Horace, moral rights epitomize empowerment of individuals to challenge the arbitrary will of powerful rulers.[75] He further argues that when there is a possibility of legislature exercising arbitrary power, then it necessitates the creation of a non-representative institution to achieve non-domination and liberty.[76] Thus, there is a need for a non-partisan, neutral and independent institution to restrain the legislature from curtailing the freedom of citizens. Legal constitutionalists assign this important task to the institution of judiciary.

But why is it the exclusive jurisdiction of court to determine the substantive rights of citizens and protect them from arbitrary will of majoritarian government? Why cannot the legislature be the best judge of rights of people? After all, the elected members of legislature represent the will of the majority of electorate. Legal constitutionalists believe that a morally correct judgement must be an impartial judgment. When a government violates the rights of citizens, an impartial response can only come from a neutral third party. This line of reasoning rests upon the famous principle which prohibits a person from becoming a judge in his own cause. Hans Kelsen justified judicial review on the basis of this principle. He unequivocally rejected the claim that representative institutions could be considered as protectors of constitution. He maintained that it is one of prime

[74] Horace Spector, "Judicial Review, Rights and Democracy," *Law and Philosophy* 22, No.3 (July 2003), 295.
[75] Ibid, 296.
[76] Ibid, 296-97.

functions of constitution to prescribe limits of legislative authority.[77] Kelsen recognized the possibility that legislature may enact laws that are in contravention of the constitutional principles and held that a special court could invalidate such laws. Hans Kelsen was a fervent proponent of judicial constitutional review, advocating for the power of courts to invalidate legislation that infringes upon the constitutional rights of individuals.

Basis of Legal Constitutionalism

1. Entrenchment of Rights in Constitutional Document

Many constitutions around the world contain specific provisions in relation to basic rights of people. This practice can be justified on the ground that it fosters individual liberty and acts as a bulwark against arbitrary state power. John Stuart Mills defines liberty as protection against the tyranny of political rulers.[78] He further enunciates that the check on power of rulers can be achieved in two way; first by recognition of certain rights, the violation of which justified rebellion against rulers, and second by introducing constitutional checks through which consent of community or a body which represented its interests could be made essential to the act of governing.[79] Mills offers a holistic account about the dangers of arbitrary use of power by rulers. In his view without certain safeguards in shape of rights and constitutional checks it would be impossible to prevent the tyranny of government over people. Such apprehensions justify the incorporation of rights in the constitutional document.

Cecile Fabre claims that rights reflect interests of people and rights are not merely moral claims against private individuals but also against state.[80] She further contends that entrenchment of rights in constitution places legal constraints on State as well as private individuals to respect such rights

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[77] Hans Kelsen, "Wer soll der Huter der Verfassung sein?", *Kritische Justiz*, 6 (1930-1931), pp. 576-628.
[78] John Stuart Mill, *On Liberty*, (Ontario: Batchohe Books Limited, 2012), 6.
[79] Ibid, 6-7.
[80] Cécile Fabre, "A Philosophical Argument for Bill of Rights," *British Journal of Political Science* 30, No. 1 (January 2000): 81.

and not to violate them.[81] As mentioned earlier, the constitutionalisation of rights acts as a check against democratic majorities. The individual character of constitutional rights enables each citizen to seek redress whenever a majoritarian government attempts to trample upon such rights.

Ronald Dworkin considers rights as individuated political aims which cannot be compromised to promote general interest of society.[82] While distinguishing between right and goal, Dworkin elaborates that if someone has a right then it must always be protected without going into the debate as to whether such right serves any other political aim.[83] A goal on the other hand is a non-individuated political aim which a society can forego for its overall benefit.[84] Thus, in Dworkin's view the non-utilitarian character of a right reflects its true importance and thus justifies their entrenchment in the constitution. Perhaps, this is the reason why a government is not allowed to abridge citizens' rights even for the noblest of ends.

The conception of constitutional rights is closely connected with idea of justice propounded by John Rawls. Rawls in his seminal work enunciates the following principles of justice:

I. Each person is inherently deserving of an equitable entitlement to a complete set of freedoms, provided that such entitlement does not infringe upon the similar entitlement of others.

II. For the existence of inequalities, they must meet two conditions. Firstly, individuals must be assigned to jobs and offices that are accessible to all ensuring fair equality and opportunity; and secondly these allocations should aim to maximize overall advantage to the least privileged segments of society.[85]

It is obvious that in first principle, Rawls provides a list of liberties that should be available to everyone to ensure justice in the society. He holds the view that political liberty, encompassing the

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[81] Ibid, 87.
[82] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), 269.
[83] Ibid, 91.
[84] Ibid.
[85] John Rawls, *A Theory of Justice* (Massachusetts: Harvard University Press, 1999), 53.

right to vote and run for public office, along with freedoms of assembly, speech, and personal property, is an indispensable liberty that ought to be universally granted to every citizen.[86] Rawls maintains that norms governing constitutional design indicate that a workable scheme of liberties can be formulated.[87] Here, he is referring to entrenchment of fundamental rights in a constitutional document. Thus, from this debate it can be seen that entrenchment of rights is a step toward ensuring justice for a society. Hence, specific constitutional rights are a prerequisite for a just society.

2. Separation of Powers

The underlying tenet of the doctrine of separation of powers serves as the cornerstone of modern constitutionalism. The distribution of power among several parts of government is a basic aspect that underpins the operation of a democratic society.[88] This division of power enables governmental branches to maintain checks and balances over one another. These checks and balances prevent establishment of an oppressive government and fosters individual liberty. Historically, separation of powers used to be considered as an important safeguard against tyrannical governments. Charles Montesquieu held that there can be no 'liberty' without separation of powers.[89] The document in question has enormous historical importance. The French Declaration of Human Rights underscores the significance of the division of powers among governmental bodies by asserting that a society devoid of a constitution is devoid of the guarantee of safeguarding rights and maintaining the separation of powers.[90]

The nexus between liberty and separation of powers is also highlighted by numerous scholars. Eric Barendt holds that separation of powers is pivotal in safeguarding individual rights and in making

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[86] Ibid.

[87] John Rawls, The Basic Liberties and Their Priority, The Tanner Lectures on Human Values at the University of Michigan (Apr. 10, 1981), https://tannerlectures.utah.edu/_documents/a-to-z/r/rawls82.pdf accessed April 20, 2021.

[88] Aileen Kavanagh, "The Constitutional Separation of Powers," in *Philosophical Foundations of Constitutional Law*, ed. David Dyzenhaus and Malcolm Thorburn (Oxford: Oxford University Press, 2016), 221.

[89] C. Montesquieu, *The Spirit of the Laws* (1748).

[90] Art. 16, French Declaration of the Rights of Man 1789.

arbitrary state action more difficult.[91] Evidently, when state powers are diffused between different organs of state, it becomes hard for one particular branch of government to enforce arbitrary decisions. The competing functions of legislature, judiciary and executive makes an arbitrary state action almost impossible. The extensive checks on power ensure that a government does not take arbitrary decisions to trample upon the liberties of citizens.

Though separation of powers holds immense significance in development of constitutionalism, it is not easy to encapsulate this idea in concrete terms. Numerous scholars have attempted to define separation of powers in various ways. Does this concept entail a mutually exclusive role of branches of government? Or is there any justification for interference in functions other branches of government? These questions must be answered if we are to comprehend the constitutional role of each branch of government and how judiciary scrutinizes legislative and executive actions.

Pure View of Separation of Powers

This view envisages mutually exclusive functions of each branch of government. Under this doctrine there can be no interference from one branch into the functions of the other. According to Maurice Vile:

> "The optimal structure for a government entails the division of power into three distinct parts or departments: the legislative, the executive, and the judiciary. Each of these departments is associated with a distinct and definable role of government, whether legislative, executive, or judicial. It is essential that each part of the government adheres to the limitation of its designated role and refrains from infringing onto the functions of the other branches. Moreover, it is essential to maintain a clear demarcation between the individuals comprising these three branches of government, ensuring that no person concurrently holds membership in more than one body. By using this approach, each branch will serve as a counterbalance to the others, preventing any one party from gaining complete control over the mechanisms of the government."[92]

There is an opinion that a precise demarcation of functions of branches of government is not realistic. Therefore, this doctrine has attracted criticism from numerous quarters. Each branch of government performs certain functions which are outside its formal domain. For instance,

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[91] Eric Barendt, "Separation of Powers and Constitutional Government," *Public Law* (1995): 599.
[92] Vile, *Constitutionalism and Separation of Powers*, 14.

executive also undertakes law-making in shape of subordinate legislation, in fact executive performs multifaceted functions.[93] These ground realities gainsay the ideas provided by pure theory of power separation among branches.

This pure theory also enunciates that each branch of government must refrain from encroaching upon the functions of other branches. This theory does not consider interdependence of branches of government under the constitutional order.[94] Take the example of legislature. Whenever legislature makes a new law, it employs numerous legislative tools. One of these tools is use of vague terminologies in statutory text.[95] When legislature uses these terms, it actually enables other bodies (judiciary) to interpret them according to the merits of individual cases.[96] Joseph Raz calls them 'directed powers' whereby legislature enables other institutions to decide the meaning of law.[97] The application of the pure theory would result in the interpretation that the use of directed powers is equivalent to an encroachment by one part of government onto the functioning of another. Therefore, the pure theory is insufficient in addressing practical dynamics of interaction of branches of government. Does this imply that separation of powers holds no significance in a constitutional dispensation? The answer is in the negative, as an altered version of separation of powers is not only relevant but essential to foundations of modern constitutionalism.

Checks and Balances and Theory of Separation of Powers

Interaction among branches of government is inevitable in a polyphonic legal system[98]. This means that pure theory of separation of powers which calls for specific allocation of powers to each branch is not helpful in understanding the interaction of different branches of government *inter se.*

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[93] W. B. Gwyn, "The Indeterminacy of the Separation of Powers in the Age of the Framers," *William & Mary Law Review* 30, no.2 (February 1989), 266.
[94] Aileen Kavanagh, "The Constitutional Separation of Powers," in *Philosophical Foundations of Constitutional Law*, ed. David Dyzenhaus and Malcolm Thorburn (Oxford: Oxford University Press, 2016) 227.
[95] Ibid.
[96] Ibid.
[97] J. Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 249.
[98] A polyphonic legal system is the one that has plurality of state organs engaged in joint project of governing the state. For details see Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford: Oxford University Press 2017), 33.

An illustration of this limitation of traditional theory of separation among organs is the all-encompassing function of executive in modern states. In many states executive is engaged in the process of making legislation (delegated legislation, executive orders etc.).[99] If one were to follow pure view of separation of powers then every law-making activity, including delegated legislation, must fall within the province of legislature. Similarly, executive also undertakes certain dispute resolution functions which traditionally fall within the ambit of judicial functions.[100]

According to Kyritsis, the preservation of power division among governmental branches in a polyphonic legal system rests on two conditions, namely: distribution of powers and oversight in form of an operational system of checks.[101] Delving upon the significance of division of labour in modern conception of separation of powers, Kyritsis contends that dividing government power among the organs has always been a key challenge.[102] The solution to this problem is in the institutional division of labour, whereby some functions are assigned to a particular organ because it has more time and resources to handle it.[103] Hence, the judiciary is bestowed with the responsibility of carrying out the process of adjudication, since it holds the necessary competencies in contrast to the legislative and the executive. Consequently, division of labour is premised upon efficiency. Nick Barber also considers efficiency as the pivotal foundation of separation of powers.[104] He maintains that separation of powers guides drafters of constitution to allocate proper mandate to the suitable institution of government in order to make collective action of governance possible.[105] However, it has also been pointed out that efficiency alone cannot provide legitimacy to the notion of separation of powers. Participatory political processes (which entail fairness) are

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[99] Louis Jaffe, *Judicial Control of Administrative Action* (Boston: Little Brown 1965), 33.
[100] Laurence Tribe, *Constitutional Choices* (Massachusetts: Harvard University Press 1985), 84-98.
[101] Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford: Oxford University Press 2017), 40.
[102] Ibid.
[103] Ibid.
[104] Nick Barber, "Prelude to Separation of Powers," *Cambridge Law Review* 60, no. 1 (March 2001):65.
[105] Ibid.

equally important in justifying separation of powers.[106] Thus, without fair procedures, an institution (though suitable for an assigned function) would lack the moral authority to coerce its decisions.[107]

Kyritsis believes that the other important component of segregation of powers is checks and balances. According to his assertion, the inclusion of checks and balances within the framework of the theory of separation of powers is necessary in order to fulfil the crucial criterion of legitimacy.[108] The reason for such extensive oversight in an overall scheme of power separation is because political issues are not readily determined to fall within the domain of any particular institution. This gives rise to the possibility where one of the institutions might usurp the mandate of other institutions on such questions and disrupt the institutional division of labour.[109] Nevertheless, institutional design must counter such possibilities by discouraging such encroachments and restabilising institutional equilibrium in case of such disruptions. The implementation of a comprehensive system of oversight within the institutional framework serves to mitigate and avoid such challenges. The primary aim of adopting the principle of separation of powers, according to James Madison, is to establish an unambiguous demarcation of governmental operations among distinct and independent branches.[110] According to Madison, such division ensures that each branch of government has a will of its own.[111] Dealing with the proposition of prevention of encroachment of powers by one branch of government, Madison proposed that the interior structure of government should be constituted in a manner that each branch of government keeps the other in its proper place.[112] This approach is more akin to the dispersal of powers among various governmental branches in a manner that no single branch is omnipotent.

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[106] Kyritsis, *Where Our Protection Lies*, 41.
[107] Ibid.
[108] Ibid, 47.
[109] Ibid, 48.
[110] J. Madison, No. 51; in C. Rossiter (ed), The Federalist Papers (New York: Penguin Putnam, 1999), 288-93.
[111] Ibid.
[112] Ibid.

The advocates of legal constitutionalism cherish judicial review as an effective tool to exercise such checks and balances.[113]

Role of Judiciary and Separation of Powers

Under separation of powers, an independent judicial branch assumes an important function in keeping other branches in their respective domains. The recognition of this essential role of the court was duly acknowledged by the early proponents of the principle of separation of powers. Charles Montesquieu unequivocally maintained that administration of justice requires insulation of judicial branch from other political branches (executive and legislature).

Hamilton has conducted an examination of the dispensation of judicial duty in accordance with the principle of power separation. Hamilton holds that an attentive examination of the three branches of government makes it evident that judiciary does not endanger constitutional rights of citizens because it will have no incentive to abridge or injure these rights.[114] According to him, the executive has backing of the community, the legislature not only has vast financial powers but also determines what rights and duties of citizens are to be regulated.[115] Though judiciary is supposed to stay above the fray of politics, it does decide questions having political bearings through judicial review and this constitutional adjudication is in fact a check on authority of political institutions of government.[116]

Therefore, in the context of legal constitutionalism, it is essential for courts to uphold the concept of division of powers via the mechanism of constitutional review. A free judiciary makes certain that power cannot be used arbitrarily by government. Thus, judicial review serves as an essential component in upholding a comprehensive framework of oversight. The legislative and executive

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[113] Yuval Eylon and Alon Harel, "The Right to Judicial Review, *"Virginia Law Review* 92 no. 5 (September 2006): 994, https://www.jstor.org/stable/4144987.

[114] Alexander Hamilton, Federalist Papers: No 78, at https://avalon.law.yale.edu/18th_century/fed78.asp accessed on May 27, 2020.

[115] Ibid.

[116] Sajo and Utiz, *The Constitution of Freedom*, 157.

branches of government are susceptible to the capricious exercise of authority and frequently operate for short-sighted political gain. In order to address this repercussion, it is critical to establish an independent and unbiased third branch to ensure that the protection of minority rights is not compromised for the sake of political convenience. Legal constitutionalists entrust this function to judiciary. The judicial branch acts as a bulwark against majoritarian excesses by keeping other branches of government in their lawful ambit.

3. Limited Government

Constitutionalism espouses limited government. The theory of constitutionalism enshrines some important principles which should be present in modern constitutions.[117] The purpose of these norms is two-fold; to establish constraints on exercise of public authority and establish procedures for exercise of this authority.[118] Thus, the contours of legal constitutionalism prevent arbitrary exercise of public power and make validity of executive action conditional upon judicial scrutiny. The notion of limited government is premised upon the conception of state as an entity exercising raw power in the name of legitimacy.[119] Keeping in view the tendency of state to impinge upon the individual liberties, constitutionalism provides means and ways to limit state power. Constitutionalism provides justification to the courts to thwart arbitrary public action.

Explaining the significance of limited government, Lord Hailsham maintains that:

> "The philosophy of limited government provides exactly what the prevailing paradigm rejects. Instead of promoting uniformity, it provides a range of diverse options. Instead of equality, it provides justice. Instead of prioritising the collective welfare, it safeguards the rights of marginalised groups and individuals. Instead of advocating for regulation, it proposes the implementation of the rule of law. The objective of this ideology does not include the toppling of governments or institutions, nor does it aim to eliminate universal franchise or popular control. However, it establishes boundaries that governments and Parliaments must not exceed, and proposes methods by which they might be made to adhere to these boundaries. Instead of focusing, it disperses energy. It bestows to formerly marginalised groups the right to exercise self-

[117] Martin Loughlin, "What is Constitutionalisation?" in P Dobner and M Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press, 2010), 55.
[118] Ibid.
[119] N W Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018), 4.

governance. It provides a safeguard against the potential tyranny imposed by labour unions and corporate entities. Primarily, it aligns with the collective moral awareness of humanity."[120]

4. Rule of Law

Legal constitutionalism traces its justification in cherished value of rule of law. This important principle signifies fetters imposed by law on arbitrary use of power. This significant phenomenon allows the judiciary to assess the legality of all governmental actions in line with the law. Numerous jurists have provided definitions for rule of law, with each offering an interpretation grounded in their own ideological standpoint. The illustrious English jurist, Dicey elaborates on the idea that the expression primarily denotes the supremacy of established legal standards over the sway of capricious authority. Dicey categorically rejects presence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government.[121] In his view, this supremacy is indispensable for maintaining check over executive power. Another celebrated scholar, F. A Hayek gives a comprehensive definition of rule of law in following statement:

> "In simple words this implies means that government's acts are restricted by pre-established rules that have been publicly disclosed. These rules assist individuals in making informed predictions about the use of coercive powers by the authority under various circumstances, and in devising personal strategies based on this knowledge."[122]

Essentially, it implies that a governmental action should be in accordance with a set of predetermined rules and any action which goes beyond the pale of such rules would be stripped of legitimacy. Therefore, the rule of law is of considerable significance when it comes to establishing standards for assessing the legitimacy of a public action. The judiciary is entrusted with the particular responsibility of assessing the legality of public authority exercises; it functions as an autonomous protector of the rule of law.

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[120] Quintin Hogg, Baron Hailsham of St. Marylebone, *The Dilemma of Democracy: Diagnosis and Prescription* (London: HarperCollins, 1978), 13.
[121] A.V. Dicey, *The Law of Constitution*, 8th Ed., 198.
[122] F. A. Hayek, *The Road to Serfdom* (New York: Routledge Classics, 2001), 76.

Raz endeavours to explicate the notion of the rule of law to a restricted extent. From his standpoint, the fundamental notion of the rule of law posits that every person is required to comply with legal tenets and is susceptible to their enforcement. Nevertheless, in the domain of political and legal philosophy, this concept entails the necessity of regulating the activities of a governing entity through legal constraints.[123] Drawing from the aforementioned discussion, it becomes evident that a correlation can be established between constitutionalism and Raz's clarification of the precise meaning of the rule of law. The impression of rule of law permits the evaluation of whether or not actions taken by the government are lawful. Raz contends that the concept of the rule of law possesses substantial worth on account of its role as a protection against capricious administration.[124] When a government is bound by legal principles, it is constrained from using discretionary power. The government will be restrained from passing retroactive laws or making whimsical decisions. Most jurists have tried to elaborate these principles in their own way; however, their findings are largely based on the eight principles given by Fuller termed as "internal morality of law".[125] Some of these principles are associated with the form of law and others are linked to legal system. According to Fuller's desiderata, a law must be general and applicable to all in the same way; law should be prospective; there must be proper publication/promulgation of law; law should have clarity; there should be no inconsistent rules; rules must prescribe something which is possible; rules must not be changed frequently; and the rules should be administrable.[126] Without unwavering commitment to these principles, it will be impossible to effectively maintain and enforce the law in its fundamental form.

Richard Fallon, enumerates the following five constitutive components of rule of law:

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[123] Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), 212.
[124] Ibid, 219.
[125] Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 49.
[126] Ibid.

1. The presence of legal standards is crucial for equipping individuals with the essential direction required to understand and comply with the law.[127]
2. Law should be efficacious.[128]
3. Law should have the quality of stability and it must not change too frequently.[129]
4. The fourth characteristic of rule is law is primacy of legal authority over people. Officials as well as common people are subject to law.[130]
5. The rule of law is characterised by the administration of unbiased and fair justice. The courts must strictly adhere to legal principles and employ impartial procedures."[131]

A cursory look on these elements shows that rule of law hinges on judging everyone on the touchstone of law. Every public action must correspond with the established law of the land. However, for law to have a supreme character, it is necessary that public as well as officials are aware of the law that applies to them. Equally essential is the fact that courts adopt fair procedures while dispensing justice.

Is Rule of Law a Sufficient Measure against Tyranny and Oppression?

The common perception that has been emphasized over time is that rule of law is an important bulwark against arbitrary rule. When a government is governed by the law, it has almost no space to manoeuvre the legal system against the subjects. The effectiveness of constitutionalism is based on the principle of the rule of law, which prevents the various branches of government from arbitrarily exercising their authority. Nonetheless, the intricate correlation between the rule of law and arbitrary government is a fascinating subject for observation. Certain legal scholars have

[127] Richard Fallon, "The Rule of Law as a Concept in Constitutional Discourse," *Columbia Law Review*, 97 no. 1 (January 1997): 8.
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Ibid.

argued that the principle of the rule of law and arbitrary governance are not necessarily mutually exclusive.

Raz contends, in his analysis of the correlation between arbitrariness and the rule of law, that an arbitrary sovereign could adhere to and enforce broad norms motivated by self-interest while maintaining adherence to the principles of the rule of law.[132] The rule of law provides despotic dictators with numerous incentives. The observance of the principle of the rule of law offers numerous advantages, including the provision of unambiguous and transparent directives, the encouragement of compliance-oriented incentives, and the improvement of intergovernmental coordination.[133] Therefore, it will be absurd for a tyrannical ruler not to take advantages provided by the doctrine of rule of law.[134] The oppressive ruler will rely on a legal system to enforce his repressive sway over his subjects. While it is conceivable that he may occasionally deviate from the norms of rule of law, that does not imply that he will choose to act arbitrarily all the time. Thus, even the most oppressive ruler knows about advantages of establishing rule of law in society.

The critics often postulate that the blurred connotation of 'rule of law' provides opportunities to different people to use this doctrine according their own views. Carl Schmitt maintained that the word *Rechtsstaat* (German equivalent of rule of law) may convey more than one meaning.[135] It was his assertion that propagandists and legal experts can use this notion to attack their adversaries.[136] In times of crisis, the transient suspension of legal principles poses a substantial barrier to the preservation of the rule of law. The operation of the legal system may be disrupted in times of emergency. Schmitt considers this as contradiction which negates the efficacy of rule of law

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[132] Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), 219.
[133] M. H. Kramer, "On the Moral Status of Rule of Law", *Cambridge Law Journal* 63, no. 1 (March 2004): 69.
[134] Ibid.
[135] Danilo Zolo, "Rule of Law: A Critical Reappraisal," in *The Rule of Law: History, Theory and Criticism*, ed. Pietro Costa and Danilo Zolo (Dordrecht: Springer, 2007), 5.
[136] Ibid, For Schmitt's criticism of the rule of law, see C. Galli, *Genealogia della politica. Carl Schmitt e la crisi del pensiero politico moderno*, Bologna: il Mulino, 1996, pp. 513–36. Schmitt's sovereign is somewhat unique as he defines sovereign as a person who can decide on exception. Schmitt's asserts that it is always persons who establish or carry out legal norms, mere abstract norms do not reality outside contextualized perception and interpretation.

theory.[137] This famous principle appears rhetorical in cases of emergency use of powers because more often than not law takes a backseat in such instances of emergency and sovereign powers is the final determinant.

Fuller's desiderata list promulgation of laws as an essential prerequisite for rule of law. The subjects should know beforehand about the law if they are to follow it. Any law which lacks this essential feature of promulgation is devoid of certainty. The central focus of the discussion regarding the notion of rule of law predominantly concerns the judiciary's function. There is an overwhelming opinion that judiciary is the most apt agency to safeguard the cherished value of rule of law. The other limbs of government are sometimes deemed to channelize a partisan approach when it comes to making decisions. The questions whether a particular executive/legislative action is valid or not is determined by the judicial branch of government. Nevertheless, a judge's personal discretion can occasionally be decisive in establishing the meaning of law. Even Lon Fuller was critical of the judge-made law and considered it a retroactivity which goes against the internal morality of law.[138] However, there is a need to know about the level of judicial discretion involved in deciding the constitutional questions. The exclusive reliance on the court to enforce the rule of law gives rise to doubts regarding true character of the rule of law, considering that a specific institution possesses the supreme authority to ascertain the substance and understanding of the law.

Given the numerous possible interpretations of the term rule of law, it is not inaccurate to say that this has been a fundamentally disputed notion.[139] For some theorists, the rule of law has merely turned into a rhetorical device which is employed by various groups to bolster their position. The

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[137] David Dyzenhaus, "Schmitt V. Dicey: Are States of Emergency Inside or Outside the Legal Order?" *Cardozo Law Review* 27, no. 5 (2006): 2006-40.

[138] Lon L. Fuller, *The Morality of Law*, 56–57

[139] See, for example, Richard Fallon, "'The Rule of Law," 9-10. Fallon believes that though there is a general consensus upon some essential principles of rule of law, there is often a vagueness and ambiguity as to the application of these principles. He further asserts that in the absence of uniform standards of judicial interpretation, it is often hard to observe whether judges themselves are constrained by law in their decision making.

vagueness associated with the concept has made it an empty slogan. Judith Shklar expresses her dismay over the ineffectiveness of this concept in following words:

> "Illustratively showcasing the erosion of the term the Rule of Law in its substantive sense can be achieved relatively effortlessly, given its pervasive ideological manipulation and excessive prevalence. There is a possibility that this expression has evolved into a trite rhetorical device that is frequently employed by Anglo-American politicians as a means of lauding themselves. Therefore, it does not necessitate any mental effort to participate in this fragment of discourse that originates from the ruling elite."[140]

Can it be postulated that the concept of the rule of law has diminished in significance? Or is it a plausible interpretation that a dispensation without rule of law would not be too different from the one with this concept? If the response to these inquiries is positive, the entire discussion surrounding legal constitutionalism would be rendered meaningless, as this specific approach to constitutionalism derives its effectiveness and justification from the principle of the rule of law. However, it would be imprudent, if not outright absurd, to dispense with a doctrine that has captured the imagination of legal thinkers from ancient times.[141] It would be unwise to envision a society devoid of a specific set of criteria by which the activities of the government may be evaluated. The lack of a legal framework would result in the proliferation of arbitrary rule due to the absence of constraints on governmental authority. The presence of scepticism around the rule of law has the potential to contribute to the theoretical advancement of this notion and to debunk any misunderstandings that may be underlying it. Furthermore, the critique can also be helpful in making judges cognizant of their role in interpreting and applying the law. It would be enlightening to explore some different interpretations of rule of law to make it more acceptable to all stakeholders.

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[140] Judith N. Shklar, "Political Theory and the Rule of Law," in *The Rule of Law: Ideal or Ideology* ed. Allan C. Hutcheson and Patrick Monahan (Toronto: Carswell, 1987), 1.

[141] Aristotle maintained that maximum matters must be settled in advance by applying general rules. For details see, Aristotle, *On Rhetoric*, trans. George A. Kennedy (Oxford: Oxford University Press, 1991), p. 31 (Bk. I, Ch. ii, 1354a).

2.2 Political Constitutionalism

Though the modern theory of constitutionalism is often equated with legal constitutionalism, there has been a growing sceptical scholarship on legal constitutionalism. Numerous scholars[142] have pulled no punches in criticising the basic premises on which the theory of legal constitutionalism rests. In contrast to juridical limitations placed on the actions of government, the critics of legal constitutionalism call for transparency in democratic procedures and limited role of courts. The notion of political constitutionalism is significant due to its pertinence to the fundamental principles that underpin constitutional democracies. Frequently, these democratic systems are constructed upon two foundational principles: populism, which affirms the supremacy of the people's will and constitutionalism, which imposes limitations on governmental behaviour.[143] There exists possibility of conflict between these two ideals. Neil MacCormick elaborates this schism between constitutionalism and democracy in the following words:

> "As per democratic tenets, the people hold sovereignty; however, constitutionalism contends that sovereignty ought to be subject to limitations and constraints and not be absolute and unrestricted. Rather than explicitly asserting the validity of the will of the people, it proposes that the exercise of power by the people's will can only be considered prudent and equitable when it functions within acknowledged limitations. Constitutionalist administrations demonstrate a diligent adherence to the limitations that regulate the implementation of governmental power."[144]

The theory of political constitutionalism was initially propounded by J A Griffith, when he discussed the pitfalls of giving primacy to law over politics. Griffith's perspectives were mostly grounded on the defence of the uncodified British fundamental law. Griffith's 1978 lecture on the notion of the political constitution laid the groundwork for the subsequent formulation of a normative structure within the domain of political constitutionalism.[145] He unequivocally gainsaid the idea that judges and legislators should be guided by ideals of justice, truth or moral standards

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[142] Jeremy Waldron, Ran Hirschl, Richard Bellamy, Adam Tomkins are some leading names who have questioned the normative foundations of legal constitutionalism.

[143] Albert Weale, *Democracy* (Hampshire: Macmillan Press Ltd. 1999), 167.

[144] Neil MacCormick, "Unrepentant Gradualism," in *A Claim of Right for Scotland*, ed. O.D. Edwards (Edinburgh: Polygon Press), 101.

[145] JAG Griffith, 'The Political Constitution' *Modern Law Review* 42, no.1 (1979). See also, Adam Tomkins, *Our Republican Constitution* (Oregon: Hart Publishing, 2005), 36.

of community.[146] Rejecting the essential tenets of legal constitutionalism, Griffith categorically stated that Bill of Rights or a written constitution does not warrant rule of law. In his lecture, he contended:

> "It is imperative to avoid misconstruing the role of law as a substitute for the realm of politics, as the two serve unique objectives and perform disparate functions. This statement exposes an unpleasant reality that could be perceived negatively. Political philosophers have persistently endeavoured to establish an ideal society wherein authority is derived from the rule of law as opposed to the capriciousness and arbitrary judgement of individuals. The concept represents an unachievable ideal. Written constitutions fail to achieve this particular aim. In pursuit of this objective, bills of rights and other similar mechanisms prove to be ineffective. The actions mentioned above successfully transfer the authority to make political decisions from politicians to tribunals or other entities. The requirement that specific categories of political decisions be rendered by the Supreme Court does not mitigate the inherently political character of those decisions. Political decision-making should be entrusted to elected officials, in my firm conviction. This in modern society refers to individuals who possess the ability to be removed from office."[147]

Griffith has raised some intriguing points which merit attention. Firstly, he maintains that politics has a much wider scope than law and the former cannot be made subservient to the latter as it would be a fallacious endeavour. Moreover, he posits that the incorporation of fundamental rights into a codified constitution does not profoundly alter these rights in their essence, as they continue to be political privileges susceptible to continuous contention and discord. Most importantly, Griffith believes that by allowing judiciary to have a final say in political matters would not resolve anything rather it would limit the scope of political debate on contested matters like rights. According to him, the most suitable people for resolving any political question are politicians who can be held accountable before the public.

[146] Griffith, "The Political Constitution," 12. Griffith did not believe in the existence of moral standards of community
[147] Ibid, 16.

Basic Tenets of Political Constitutionalism

1. Superiority of Politics over Law

The interplay of law and politics has given rise to a heated debate among the scholars. It has been asserted that there are commonalities between politics and law.[148] In contrast to the adherents of legal constitutionalism, proponents of political constitutionalism hold a steadfast belief that legal theory constitutes a subset of political theory.[149]In their view, law is an instrument to attain political objectives. It is important to mention that the dominant tradition of legal constitutionalism sees politics as inferior to law. Describing the relative importance of the two fields, Judith Shklar maintains that: "politics is frequently perceived not only as separate from law, but also as being subordinate to it. Achieving principles of equity is the fundamental aim of the legal system, whereas politics often places greater emphasis on practicality and expediency. The former demonstrates an impartial and objective position, while the latter is marked by the unchecked impact of competing interests and ideologies."[150] Conversely, advocates of political constitutionalism hold an opposing stance with regard to this contention. Political constitutionalists hold the view that moral objectivity is not required.[151] From their particular standpoint, politics inherently encompasses contrasting opinions and conflicts; however, it is more advantageous to resolve these differences through political processes as opposed to pursuing legal recourse.

The primacy is politics is based on the need to identify 'the circumstances of politics'. According to Rawls, the justification for the presence of rights originates from the circumstance of justice, which he defines as ordinary situations in which cooperation among humans is not only possible but essential.[152] This idea entails that since every society has scarce resources and there is a possibility that individuals might be tempted to impinge upon the rightful shares of others, it is

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[148] Waldron, *Law and Disagreement*, 4.
[149] Ibid.
[150] Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge: Harvard University Press, 1964), 111.
[151] Waldron, *Law and Disagreement*, 167-187.
[152] Rawls, *A Theory of Justice*, 126-30.

necessary to have a framework in shape of rights to determine the legitimate entitlements of people as this would uphold principles of justice. An entrenchment of basic rights in a constitutional document comes as a natural corollary, because such entrenchment could guarantee protection of individual rights of citizens.[153] Any legislation which contradicts such a 'bill of rights' can be struck down and thereby prevent any attempt to disregard the individual rights of citizens. This entire notion rests on the assumption that such a framework in the constitution reflects an agreed account of justice, however, the supporters of political constitutionalism seriously disagree with this assertion.[154] According to them, it is important to take into account the effect of 'circumstances of politics' in a debate on rights. It is interesting to examine how political constitutionalists explain the significance of 'circumstances of politics' with regard to constitutional rights.

Circumstances of politics represent an intriguing paradox. According to Albert Weale and Jeremy Waldron, such circumstances create a situation where a collective decision is mandatorily required because there is no other suitable alternative and yet the views on such a decision are so diverse and varied that no single best solution is available.[155] Thus, it can be said that though there is a need for agreement on certain rights of people due to circumstances of justice, however, the scope, nature, relationship of such rights pose a new problem and this problem is reflected in the circumstances of politics.[156] Due to circumstances of politics, it will not be possible to give an agreed account of rights, rather it is more apt to give weight to fairness of procedures which are effective in resolution of disagreements of individuals in a society. Due to these circumstances, the tradition of political constitutionalism accords more significance to fair political procedures rather

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[153] For example, see Bellamy, *Political Constitutionalism*, 17-18.

[154] Ibid, 20.

[155] Waldron, *Law and Disagreement*, 167-187. See also Weale, *Democracy*, 10-13. Weale describes the circumstances of politics by taking the example of a society which is characterized by both cooperation and conflict. People tend to cooperate and establish social institutions to avoid the Hobbesian desolate state of nature. However, the society is also marked by conflicts because the social institutions provide different advantages to different groups of individuals which often leads to disagreements between the individuals.

[156] Bellamy, *Political Constitutionalism*, 20.

than a zero-sum determination by the courts. After all, the concept of rights can never be truly understood without looking at their political origins.

If one has to give weight to the role of disagreements in law, judicial review of rights presents two challenges: Firstly, a purely juridical determination of rights weakens the political debate and does not treat people with equal respect in relation to making decisions on important matters such as substance of rights.[157] This argument proceeds on basis that a judicial decision on rights essentially negates the debates on disagreements of people and their respective views on the rights. Secondly, by removing disagreements on rights from political sphere, constitutional review of legislation prevents plurality of opinions on rights and reduces the entire disagreement to a standard adversarial litigation. Thus, proper consideration is not accorded to the plurality of opinions in line with the circumstance of politics.

2. Importance of Political Equality

Political equality constitutes an additional pivotal foundational element in theory of political constitutionalism. It is a natural corollary of dominance of politics over law. Equality in political sense signifies an equal opportunity to each individual to have his voice heard and serves as basis for democratic politics. Political constitutionalists argue that when courts overturn democratic decisions made by legislators, it undermines political parity due to giving more importance to judges' opinions rather than treating them equally with opinions of general population.[158] Why is political equality so fundamental for the political constitutionalists? The answer lies in comprehending dangers which domination poses to individuals in a polity. As per the political constitutionalists, such domination could only be avoided by ensuring political equality.[159]

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[157] Jeremy Waldron, "Representative Lawmaking," *Boston University Law Review* 89, no. 2 (April, 2009): 335-353.
[158] Dimitrios Kyritsis, "How (not) to argue the merits of liberal constitutionalism" (September 12, 2020). Available at SSRN: https://ssrn.com/abstract=3691519 or http://dx.doi.org/10.2139/ssrn.3691519. Accessed January 1, 2022.
[159] Bellamy, *Political Constitutionalism*, 210.

According to Bellamy, legal constitutionalism attempts to take essential constitutional principles outside the purview of politics by circumscribing the limits of political sphere.[160] However, such depoliticisation of constitutional principles does not achieve the desired outcomes as questions on matters of rights cannot be understood independently of politics. What people consider as universal rights cannot be determined by juridical tools. When a particular view on rights is favoured, there is a potential risk that such exercise would become arbitrary.[161] This arbitrariness leads to domination. Domination is different from oppression in the sense that the oppression involves some sort of transgression of interests of individuals by interference such as violence, marginalisation or discrimination, whereas, domination is derived from power of an individual or a group to exercise such oppression on others.[162] Domination and oppression can exist side by side but they can also exist independently. This shows that domination can be an independent form of injustice. Thus, it would be unwise to limit the scope of politics because it pervades almost all facets of our social life. The only way to avoid such domination is to provide equal right to public to decide contentious issues such as rights, and the most feasible way of providing this equal right is via normal democratic procedures.[163] Thus, in view of this argument, political equality can only be achieved through democratic means and any attempt to undermine such political equality necessarily leads to domination. The most common democratic indicator of ensuring political equality is the majority rule.

Sometimes it might appear that democratic voting is a mechanical exercise, however, political constitutionalists assert that this process is beneficial because it ensures procedural fairness as it enables all citizens to express their views.[164] This gives equal opportunity to the citizenry to freely choose what they feel right. Their inclusion in the process of voting ensures that they are treated

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[160] Ibid, 147. Bellamy maintains that such depolticisation of constitution occurs at two levels: Firstly, this approach straight away takes certain matters outside the ambit of politics and secondly, an apolitical approach is adopted to settle and discuss particular constitutional matters.
[161] Ibid, 151.
[162] Ibid, 151. See also I. M Young, *Justice and Politics of Difference* (Princeton: Princeton University Press, 1990), 38.
[163] Ibid, 163.
[164] Ibid, 225-226.

with fairness and accorded political equality in deciding even the most contentious of the issues. Of course, democratic voting results in a view that is favoured by the majority but unlike zero sum judicial determination of rights, this procedure is suitable for settling disagreements of the citizens because it makes them part of the process of decision making. Furthermore, when a certain decision is made by the majority of citizens, it does not in any sense imply that their decision is superior to that of the minority, rather it merely reflects that a particular opinion has been endorsed by majority of citizens.[165] Such participation of citizens fosters legitimacy of decision making process and prevents the possibility of arbitrary decisions which may lead to domination. Waldron justifies majority decision on two grounds in the following way:

> "Majority judgements uphold the dignity of individuals in two distinct ways. Firstly, they acknowledge and respect the existence of differing perspectives on matters of justice and the collective welfare. The process of majority-decision does not need the suppression or marginalisation of any individual's perspective due to an assumed significance of agreement."[166]

This goes to show that the notion of majority rule takes into account disagreements and allows each citizen to provide their respective opinions on important matters. This does not happen in constitutional review of legislation, where judges decide upon such disagreements in a conclusive way and thereby do not take into account citizens as autonomous reasoners. The recognition of equal regard and concern for all individuals, exemplified by the principles of rule by majority and equal suffrage, further contributes to the legitimacy of the law.[167]

3. Skepticism Over Judicial Review and Importance of Legislative Politics

As political equality is an essential tenet of the theory of political constitutionalism, it necessarily follows that parliamentary procedures are best suited for any debate on the matter of rights. Any substantive determination of rights by the court does not possess legitimacy as it fails to account for the varied view of the populace, neither does it uphold political equality. Thus, as per this

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[165] Ibid, 226.

[166] Waldron, *Law and Disagreement*, 111.

[167] Henry Richardson, *Democratic Autonomy* (New York: Oxford University Press, 2002), 78.

account, all politics is constitutional and defines the framework of public reason.[168] Conversely, political constitutionalists see judicial review as an inapposite tool vis-à-vis settling disagreements pertaining to rights of citizens.

In order to provide more clarity on this statement, it is necessary to differentiate between reasons that are linked to outcomes and reasons that are related to processes.[169] According to Waldron, the process related reasons are concerned with ensuring participation of people in decision making process and such reasons stand independently from the considerations of desirable outcome of such decision.[170] In political sphere, such reasons are founded on political equality and right to vote which warrants an equal right to each citizen to voice their opinion even when others disagree with such opinion. On the contrary, outcome-related reasons primarily focus on formulating a decision-making process that results in correct or suitable decisions.[171] Though, it might appear convenient to say that outcome related reasons justify judicial review, whereas, process related reasons pose a direct challenge to it, however, it would be a wrong sort of generalization.[172] Even the legislatures can on numerous occasions fully satisfy the outcome related reasons. Judicial review is often seen as the the best tool to settle contentions about rights because the cases which come before the courts reflect individual situations. This particular circumstance enables the courts to examine how individual rights are affected by a particular legislation.[173] However, Waldron disagrees with this argument and maintains that usually cases that come to higher appellate courts have lost trace of the original right holder and the decision on such cases reflects reasoning of an abstract principle

[168] Marco Goldoni, "Two Internal Critiques of Political Constitutionalism," *International Journal of Constitutional Law* 10 no. 4 (2012): 934.

[169] These terminologies have been used by Jeremy Waldron. Waldron asserts that no decision making process can be termed as perfect, may it be legislation or judicial review of a legislation by a court, there is always a possibility of a wrong decision. See Waldron, "The Core Case against Judicial Review," 1372.

[170] Ibid, 1372-1373. Bellamy has used the term 'inputs' for process related reasons. For details see, Bellamy, *Political* Constitutionalism, 27.

[171] Waldron, "The Core Case against Judicial Review," 1372. See also, Bellamy, *Political Constitutionalism*, 27.

[172] Waldron, "The Core Case against Judicial Review," 1376.

[173] In this regard, Michael Moore maintains that judges are better suited for moral insights than legislatures because they deal with moral thought experiments on a more frequent basis. For details see, Michael Moore, "Law as a Functional Kind" in *Natural Law Theory*, ed. Robert P. George (Oxford: Clarendon Press, 1992), 230.

rat her than a real individual case.[174] This implies that when a case reaches the highest appellate stage, any determination by the court is more akin to settling a much broader principle rather than the individual case. Furthermore, in common law jurisdictions such determination has the binding effect on the courts that are lower down hierarchy.

2.3 Judicial Review and Democracy

The two constitutional traditions maintain fundamentally contrasting perspectives with regards to the concept of judicial review. According to the perspective of legal constitutionalism, the presence of judicial review is an essential prerequisite for the establishment of a constitutional framework. In contrast, the advocates of political constitutionalism have always adopted a sceptic approach towards judicial review and more often than not, they raise concerns on democratic foundations of constitutional review. Judicial examination of legislation can be historically identified with the seminal case of *Marbury v. Madison*. Nevertheless, the official inception of judicial review as an institutionalised process took place after the constitutionalization of rights, which evolved as a development following World War II. Numerous nations' written constitutions function as comprehensive structures that delineate individual rights and grant judicial power to safeguard against violations of said rights. However, some experts believe that judicial review goes against the democratic ideals. An example of this can be seen in Bellamy's unequivocal claim that the notion of constitutional review contradicts democratic principles by granting judges the power to overturn decisions rendered by elected representatives.[175] However, an alternative viewpoint contends that a constitutional democratic dispensation is characterised not solely by the notion of popular sovereignty, but also by the implementation of a comprehensive oversight system. It would be prudent to see how the pundits of constitutional practice see the interrelationship between democracy and judicial review.

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[174] Waldron, "The Core Case against Judicial Review," 1379.

[175] Anabelle Lever, "Democracy and Constitutionalism: Are They Really Incompatible," *Perspectives on Politics* 7, no. 4 (December 2009): 806.

Dworkin's Counter Majoritarian Premise

Ronald Dworkin holds that even though the judicial review may appear to go against the democratic norms, it fosters the substantive democratic values.[176] Furthermore, Dworkin outright attacks the majoritarian premise of democracy. In his view, the term 'democracy' does not have a universal definition and it has always been a subject of great debate and disagreement.[177] Democracy, he maintains, is subject to certain conditions, which he calls democratic conditions.[178] Such conditions presuppose equal concern for everyone. Dworkin holds that

> "When majoritarian institutions provide and respect the democratic conditions, then the verdicts of these institutions should be accepted by everyone for that reason. But when they do not, or when their provision or respect is defective, there can be no objection, in the name of democracy, to other procedures that protect and respect them better."[179]

As his position indicates, Dworkin offers a counter-majoritarian argument to support to judicial review. His contention is largely based on the apprehension that elected majorities in legislatures can be tempted to disregard the individual rights of the citizens and in order to remedy this ill, judicial review is the only feasible option.

However, an important question which arises here is which considerations should guide a judge while interpreting the constitution under judicial review? Intriguingly, Dworkin holds two varying views on this question. Although Dworkin reconciles his two positions to provide a rationale for his argument, it appears that he grants the court exclusive authority over the ethical interpretation of the Constitution. Let us see his arguments one by one.

Firstly, it seems that Dworkin is well cognizant of the challenge of judicial overreach and therefore, he asserts that judges do not make subjective assessments of complex legal questions in their decisions, rather they must take into account history, text and precedent.[180] According to him,

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[176] Alexander Latham, "Dworkin's Incomplete Interpretation of Democracy," *Washington University Jurisprudence Review* 10 no. 2 (2018): 156.
[177] Dworkin, *Freedom's Law*, 15.
[178] Ibid, 17.
[179] Ibid.
[180] Michael W. McConnell, "The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's Moral Reading of the Constitution," *Fordham Law Review* 65, no.4 (1996): 1271.

judges ought to show deference to established and universally acknowledged interpretations of the authority granted to them by the Constitution.[181]This indicates that Dworkin does not believe in absolute discretion of judges in deciding constitutional matters. He unequivocally maintains that judges are constrained by the history, past practice and precedent. Dworkin calls these constraints as 'fit'. So, any determination by a judge must be within the framework of the fit. This position sits well with most traditional constitutional experts who believe that judicial discretion should be circumscribed through certain concrete constitutional constraints.

However, Dworkin's second approach to constitutional review offers broad powers of interpretation to judges. In other words, it would seem that in his quest to vest judges with exclusive powers of interpreting the constitution, he essentially negates his earlier argument. He argues that justifying a conclusion with historical veracity is in direct opposition to the making principled decisions. He sees historical justification as an obstacle in court's quest to find the right answers to constitutional questions. Dworkin argues that the interpretation of constitutional provisions ought to be regarded as abstract notions distinct from the original intent of the Constitution's framers.[182] This kind of reasoning grants the courts significant latitude to expand their authority in constitutional affairs. It also goes to show that Dworkin completely challenges the originalist view[183] on constitutional interpretation. This view negates the views held by some earlier jurists who espoused democratic ideals in decision making process.

As has been pointed out earlier, Dworkin doesn't subscribe to majoritarian premise. He asserts that prioritising majority decision-making is not advisable. Conversely, they contend that it would be more suitable to give precedence to a framework in which political establishments, by virtue of their configuration, constituents, and operations, accord every constituent of the populace

[181] Dworkin, *Freedom's Law*, 11.

[182] McConnell, "The Importance of Humility in Judicial Review," 1271.

[183] Originalist theory maintains that constitutional text must be given same meaning which it had when it was framed. As per this theory, the original intent of framers of the constitution must be adhered to at all costs.

individual status and equivalent regard.[184] Since the democratic legislatures usually fall short of this ideal, Dworkin believes that courts are best institutions to provide a moral reading of Constitution and ensure equal concern and respect for everyone. Such argumentation provides grounds for unrestrained judicial powers. This exclusive Dworkinian right of courts to provide moral reading of the Constitution has been contested by numerous experts. Michael McConnell argues that Dworkin's reasoning is in conflict with the fundamental principles of democracy, which include not only governance for the people, but also government of and by the people.[185] According to him, Dworkin's position strip citizens of their right of self-government and political liberty.[186] Furthermore, McConnell offers a rebuttal to Dworkin's claim regarding equal concern and respect. According to McConnell, the aforementioned principles require that all individuals be afforded an equitable opportunity to have their viewpoints regarding justice and the collective welfare duly taken into account.[187] In a democratic system, it is generally believed that no one group of individuals have the exclusive ability to provide the most optimal solutions to contentious issues.

Dworkin's position can be applied to an important Pakistani constitutional case. In *Al Jehad Trust case*, apex court laid down a comprehensive criterion for judicial appointments to superior courts[188]. Given the ongoing discourse pertaining to kinds of constitutionalism, it will be imperative to gain a comprehensive understanding of contextual factors influencing this judgment. A number of measures were enacted by the government in 1996 with the objective of appointing compliant justices to the highest court of country. Three High Courts of the country were headed by Acting Chief Justices.[189] Furthermore, numerous dubious appointments were made in the Lahore High Court.[190] The constitutionality of these appointments was contested in the highest court of country

[184] Dworkin, *Freedom's Law*, 18.
[185] McConnell, "The Importance of Humility in Judicial Review," 1290.
[186] Ibid.
[187] Ibid, 1291.
[188] *Al-Jehad Trust Case v. Federation of Pakistan* (PLD 1996 SC 324) paragraph 80-93, p. 404-410.
[189] Khan, *Constitutional and Political History of Pakistan*, 435.
[190] Ibid.

in *Al Jehad Trust case.*[191] Apex court accepted appeal against appointments in Lahore High Court and specified a criterion for judicial appointments in High Courts. The Supreme Court's interpretation of constitutional provisions dealing with judicial appointments might be considered very captivating. The aforementioned regulations have created a systematic process for the selection and appointment of judges to the highest court of justice. In adherence to these provisions, the President was granted the authority to designate judges to the Supreme Court and High Courts only after consulting with the Chief Justice of Pakistan and the Chief Justice of the respective High Court where the judge was to be appointed. In the Al-Jehad case, the apex court redesigned procedure for consultation for judicial appointments. After careful examination of the pertinent constitutional articles, the court determined that the phrase "after consultation" refers to a consultative procedure that actively requires the participation of both the Executive and Judiciary.[192] Additionally, the court noted that the Chief Justice of Pakistan and the Chief Justice of a High Court possess the requisite knowledge and skills to evaluate an applicant's suitability for a judicial position in higher courts. Therefore, this decision established that the opinions articulated by Chief Justices possessed legal force with regard to judicial appointments. When a disagreement arises, it is the responsibility of the executive branch to furnish reasonable and comprehensive justifications, which are susceptible to examination by the judiciary.[193] Pakistani apex court placed reliance upon the judgment of Indian Supreme Court[194] while deciding this case. Furthermore, this judgment also mentioned the long-established convention of following recommendations of Chief Justices in appointment of Judges in pre-partition and post-partition period.[195] Given the Dworkin's conception of moral reading of constitution, it must be said that *Al-Jehad case* fits the bill. The Supreme Court was guided by precedent and past practice while arriving at the verdict

[191] *Al-Jehad Trust Case v. Federation of Pakistan* (PLD 1996 SC 324), paragraph 1, p.367.
[192] PLD 1996 SC 324, at paragraph 82, p. 405-406.
[193] Ibid. Also see Khan, *Constitutional and Political History of Pakistan*, 436.
[194] AIR 1994 S.C. 268.
[195] Khan, *Constitutional and Political History of Pakistan*, 436.

and interpreted a provision of constitution based on constitutional principle of independence of judiciary.

However, speaking from sceptical angle, *Al-Jehad case* practically took the Executive powers of appointment of judges and vested it in hands of Courts. The makers of Constitution essentially gave authority of judicial appointments to Executive after consultation with judiciary. A rigorous analysis of the pertinent provisions of the Constitution would indicate that the court departed from intended mechanism for judicial appointments as envisioned process the framers. Some commentators also noted that the decision was controversial because it pertained to an issue in which the judiciary itself was a party.[196] Furthermore, the incumbent government argued that the decision was tantamount to rewriting the constitution. The Prime Minister at the time made her reservations on the judgment known in the legislature, where she stated:

> ".....The process of appointing judges is regulated by Constitutional Articles 177 and 193. Appointments are made in accordance with the President's authority. The articles mentioned above contain a reference to a consultation process. The Constitution does not mention that opinion of any consultee is binding upon the President....."[197]

This constitutional adjudication and its aftermath serve as a paradigmatic illustration of the schism that existed between the executive and judicial branches of government. Though there was an immense criticism on government's policy of arbitrary judicial appointments, the question here is whether the court was right in redefining an express constitutional provision? Even if we admit that the cherished constitutional principle of independence of judiciary was at stake, was it right for the apex court to give a constitutional interpretation which effectively divested President of his authority to make judicial appointments as was envisaged by the Constitution of the time? Dworkin would have answered these questions affirmatively, since he firmly believed in the abstract character of constitutional principles and effectively countered the originalist approach to constitutional interpretation. However, Dworkin's critics would take a different tack on this case.

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[196] Ibid, 437.

[197] Statement of the Prime Minister on Judgment of the Supreme Court, National Assembly Debates, 28 March 1996, 436.

Democratic Justification of Judicial Review

Another point of view prevalent among the supporters of legal constitutionalism is that character of judicial review is not anti-democratic, rather it fosters democratic norms in a society. According to Alon Harel, two mainstream theories give rationalization to judicial review. The first theory is the majoritarian theory which lays down that by imposing limitations on legislature's powers judicial review does not seek to limit the power of the people, instead it ensures proper participation of people and results in fair implementation of the will of the people.[198] The second theory is anti-majoritarian theory which is premised upon the notion that judicial review does not promote democracy rather it is an instrument for fostering other important goals.[199] In Harel's view, a substantial counterargument to majoritarianism, is the moral rights justification. In the light of this theory, the constitutional rights and liberties of individuals ought to be safeguarded, notwithstanding the inclinations of the democratic majority.[200] A substantial number of nations adhere to the moral rights justification argument, as evidenced by the incorporation of a bill of rights into their respective written constitutions. The primary objective of the comprehensive bill of rights programme is to safeguard the individual rights from oppression of majority. Courts are frequently perceived as unbiased arbiters in such matters.

Harel posits that the concept of constitutional review naturally encompasses a participatory approach to the process of making decisions. According to him, the argument that judicial review deprives citizens of their right of participation (which is essential in any democratic dispensation) can be criticized on two grounds: Firstly, it can be said that there is no right of participation or the right to participation is overridden by protection of some other important rights.[201] The other argument against the criticism on judicial review is that the review system fosters participatory

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[198] Alon Harel, "Rights-Based Judicial Review: A Democratic Justification," *Law and Philosophy* 22, no.3/4 (July 2003): 249. (247-276).
[199] Ibid, 250.
[200] Ibid.
[201] Ibid, 256.

decision making.[212] Harel asserts that judges do not deprive public of their right of participation, rather they adjudicate upon rights on the basis of accepted moral foundations of society in which they live.[213] There is a delegation of authority of participatory rights of citizens to the judges on matters pertaining to rights of citizens. Quite interestingly, one finds similar argument in Pakistani constitutional jurisprudence. In *Muhammad Azhar Siddique case* it was established that judicial branch should be considered as a co-equal to the Parliament when it comes to representing will of the people.[214] The Court refused to acknowledge the proposition that the legislative branch is the sole embodiment of the will of the people. Conversely, it asserted that the judiciary discharges a democratic duty by ensuring that duly elected officials carry out their fiduciary duties to the people in accordance with constitutional tenets.[215] This line of reasoning is in sync with Harel's argument where he attempts to establish the democratic credentials for judicial review.

However, Harel's argumentation has been criticized by Larry Alexander. Firstly, Larry Alexander categorically refutes Harel's argument about legislature's limitations on protecting rights of citizens by claiming that judges are also not immune from problems which are faced by legislatures.[216] Alexander is particularly critical of Harel's assertion that judicial review does not defeat the democratic ideals rather offers participation of people through an alternative way. Harel takes a position that a legislation passed by a representative body is less democratic than a plebiscite, however, nobody condemns the legislatures for violating the democratic rights. Larry Alexander takes a strong exception to this position because it rests on a flawed assumption about the institution of judicial review. Alexander holds that Harel's effort to speak of the democratic right of participation and then fit it to the instrument of judicial review defies logic.[217] Alexander prefers

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[212] Ibid.
[213] Ibid.
[214] *Muhammad Azhar Siddiqui v Federation of Pakistan* (2012 PLD SC 774) Opinion of Justice Jawwad S Khawaja, paragraphs 4-7, p. 835-837.
[215] Ibid.
[216] Larry Alexander, "Is Judicial Review Democratic? A Comment on Harel," *Law and Philosophy* 22, no.3/4 (July, 2003): 279.
[217] Alexander, "Is Judicial Review Democratic?, 281.

consequentialist argument to deontological argument taken by Harel. He continues by making the observation that there is no need to undertake the arduous endeavour of attempting to reconcile the concept of judicial review with the democratic system.[208] Larry Alexander, to put it succinctly, holds a contrasting viewpoint to that of Harel concerning the democratic nature of constitutional review. If one sees arguments taken by Richard Bellamy and Jeremy Waldron, it would seem that it is really difficult, if not impossible, to give democratic validity to judicial review.

2.4 Court vs. Legislature in a Constitutional Democracy—A Debate that Never Ends

It goes without saying that many experts find it hard to reconcile judicial review with principles of democracy. Andrei Marmor acknowledges this schism between democracy and constitutional review and observes that even supporters of judicial review accept the existence of tension between decision making through democratic procedures and power of judiciary to overrule such democratic decisions made by legislature.[209] Even if it is admitted that a certain institution must determine conflict between constitutional provision and ordinary legislation, it cannot be readily assumed that certain institution should always be judiciary.[210] It is sometimes argued that since constitution is a legal document so courts are best suited to interpret it as they have the necessary legal acumen. However, this particular argument lacks strength as most constitutional decisions are grounded on moral and political considerations.[211] Such decisions often determine the limits and scope of individual rights, establish the contours of political decision-making, and mould the structure of democratic procedures.[212] The important question arising here is whether courts are the best institutions for such moral and political deliberations. According to Marmor, those who

[208] Ibid, 283.
[209] Marmor, *Interpretation and Legal Theory*, 149.
[210] Ibid, 150.
[211] Ibid.
[212] Ibid.

advocate that courts are the best institutions to decide such moral and political questions rely on the following arguments:

i. Entrenchment of rights and principles in a constitution reflect shared moral consensus of the community
ii. Constitutional entrenchment of rights prevents them from being trampled for momentary political gains
iii. As Supreme Court is not an ordinary institution, it is free from populist pressures
iv. Judicial review would ensure that a community would be in a better position to secure its widely shared rights.[213]

The corollary to this line of reasoning is that though judicial review may seem to be an anti-democratic on its surface, it actually upholds democratic principles by safeguarding rights held by majority of the people.

This whole argumentative framework seems to be plausible, however, such a simplistic explanation needs reconsideration in a pluralistic society. Unlike the dominant perception that rights discourse reflects broad-based consensus of society, people usually agree upon rights discourse because there is an immense disagreement among them on the ultimate values they cherish.[214] Marmor discusses two advantages of entrusting such moral deliberations about rights to the legislature: Firstly, such decisions are democratic and enjoy greater legitimacy in the eyes of public. Secondly, decisions by legislatures are relatively more tentative than decisions of courts because these decisions may not last too long.[215] The court decisions on controversial moral issues often become a zero-sum game where the losing party essentially gets the message that its moral principles are wrong. Within the realm of democratic decision-making within legislative bodies, this phenomenon is non-existent,

[213] Ibid, 151.
[214] Ibid, 153.
[215] Ibid.

as the party that loses on one occasion may emerge victorious on another occasion.[216] This means that the losing party's stance on controversial issues is not considered to be against the shared values of the community.

Kyritsis negates the argument that legislators truly 'represent' their constituents/voters. Two models may be helpful in understanding the representative functions of legislators, namely, proxy model and trustee model.[217] Both these models essentially share a common thread that legislative decision-making is a process which gives power to someone to decide on behalf of the people. The fundamental distinction among these models resides in their acknowledgment of the intrinsic division that exists between legislators and their constituents. The trustee model recognises this detachment, thereby empowering legislators to exert autonomous judgement. On the contrary, the proxy model contends that there is no such division and argues that each legislative decision directly mirrors the desires of the constituents.[218] Kyritsis believe that proxy model of representation suffers from some limitations. The limitations mentioned above are clearly evident, as they arise from the circumstance that voters can only seek their representative's removal from office in the subsequent election as a means of conveying discontent. However, this course of action does not have any influence over the choices made by the legislator during their tenure.[219] Furthermore, proxy model of representation also suffers from another problem, that is, the voters may not have a preference/opinion on a number of issues which come before their representatives.[220] Usually it is the representative's duty to inform and convince his voters about his decisions on such issues. Thus, the notion that representatives are proxies of their voters/constituents does not appear to be sound from a practical standpoint. In democratic

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[216] Ibid.

[217] Dimitrios Kyritsis, "Representation and Waldron's Objection to Judicial Review," *Oxford Journal of Legal Studies* 26 no.4 (Winter 2006):741, https://www.jstor.org/stable/4494565.

[218] Ibid, 742. The proxy model rests on the assumption that representative merely acts as a conduit for the constituents. The representative only voices what his constituents want. Conversely, trustee model of representation is premised upon the understanding that though representatives are cognizant of the sentiments of their constituents, they are free to make decisions that are independent from the constituents' convictions.

[219] Kyritsis, "Representation and Waldron's Objection to Judicial Review," 743-44.

[220] Ibid, 744.

systems around the globe, legislators are afforded a significant level of independence in their decision-making processes. Oftentimes, the decisions taken by representatives do not match the expectations and convictions of their electors, nevertheless, the legitimacy of such decisions is not challenged on this score. The shortcomings of 'proxy model' makes it important to understand the 'trustee model' of representation.

As described above, the trustee model does not make it incumbent upon the legislators to be mouthpieces of their constituents all the time. It demands that they adopt a comprehensive perspective regarding the desires and beliefs of their supporters and devise the most optimal vision for a democratic society that upholds individual rights while ensuring effective governance.[221] Practically, Kyritsis asserts, trustee model is practiced in representative democracies around the world. Through trustee model, Kyritsis attempts to show that just as the claim that legislators always represent their constituents is not always correct. If the legislators can take decisions that go against the wishes of their voters, how is it less democratic for judges to make such independent decisions? In this way, he attempts to proffer support to judicial review. Kyritsis acknowledges that generally legislative decisions are largely based on support of the people, but he suggests that such decision-making power should not be unfettered.[222] Due to impartial and independent nature of the courts they can effectively check the decisions of the legislature. In an effort to uphold the integrity of constitutional review on the criteria of democratic ideal, Kyritsis argues that legislative decision making invariably incorporates an element of aristocracy.[223] Though representative institutions are accountable to the citizenry, they do not always give equal weight to the opinions of their constituents and make independent decisions. So, no one should object when judiciary exercise this power of decision-making on behalf of the community.[224] This is indeed a different assertion. In a way, this argument draws its strength from the notion that just like legislators are

[221] Ibid, 743.
[222] Ibid, 746.
[223] Ibid, 750
[224] Ibid.

trustees of their constituents, judges also have a similar fiduciary relationship to the public in a constitutional democracy. The rationale put forth within this particular framework is intricately linked to the remarks rendered by apex court in *Muhammad Azhar Siddique* case.[225] In the context of discussing superiority of Parliament in a constitutional democracy, the court stated that the elected officials in the legislative and executive branches of government do not possess any superiority over the Constitution.[226] The Court further elaborated that only constitution reigns supreme over all institutions of State because it embodies "will of the people".[227] However, court's observation in relation to discovering will of the people merits special attention. The Court held:

> "In order to discern the intentions of the people, it is not necessary for judges to delve into the domain of political philosophy or attempt to resolve legal dilemmas in foreign constitutional systems that are significantly distinct from our own. Rather, an examination of our own Constitution suffices to guarantee adherence to the Constitution and the will of the people of Pakistan, who are the political sovereigns, as stated therein. In the end, this is precisely the foundation of the democratic order."[228]

Put simply, the court functions as a sentinel, guaranteeing that every branch of government adheres to its constitutional limits. Furthermore, the court sees this arrangement as the foundation of a democratic order.

Former Pakistani Chief Justice Tassaduq Hussain Jillani has discussed the relationship between democratic principles and constitutional review. According to him, the Court is obligated by the Constitution to ensure that government operates as a government based on law rather than government founded on arbitrary powers of individuals.[229] Judicial review functions as a constitutional mechanism through which the Court carries out this pivotal duty within the framework of the constitution. He maintains:

> "While democracy is characterised by the rule of the majority, the presence of a system of checks and balances within the government and the inclusion of safeguards for individual rights in the constitution have effectively prevented the accumulation of power that

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[225] *Muhammad Azhar Siddique v Federation of Pakistan* (2012 PLD SC 774) Opinion of Justice Jawwad S Khawaja paragraph 3, p. 835.
[226] Ibid.
[227] Ibid.
[228] Ibid.
[229] Tassaduq Hussain Jillani, "Judicial Review and Democracy," *American Bar Association, Litigation* 44, no.2 (The Supremes, 2018): 50.

> undermines democratic principles. The judiciary via the exercise of its power of judicial review, safeguards the adherence of every branch of government and every state institution to its designated boundaries, while also ensuring the protection and enjoyment of individual rights by the populace."[230]

Justice Tassaduq believes that democracy ceases to exist without individual rights. In fact, the protection of rights is a prerequisite for democratic politics. By recounting the requirements of our written constitution, he asserts that judiciary acts as a custodian of individual rights and ensures that majority does not trample the minority.

Waldron holds that judicial review is antithetical to democratic ideals. He asserts that modern experts on democracy emphasize on the citizens' participation in decision making and they believe that judicial review seeks to limit this important right and thus lacks democratic credentials.[231] The advocates of public participation are more interested to practical political deliberation, which is not merely a rhetorical exercise rather seeks to enlarge participation in collective decision making.[232] Waldron maintains that Dworkin's argument that democracy is better served if the court protects the rights associated with democracy is flawed because it overlooks the importance of participatory process which is an essential procedural requirement for a democracy.[233] Dworkin's approach is oriented towards results rather than the process. To put it another way, in the event that a judge renders a decision that supports democratic rights through judicial review, the lack of public participation in the decision-making process may be overlooked, provided that the court reaches a conclusion that is consistent with democratic principles.

Waldron straightaway rejects the argument that depriving someone of participation in a political decision serves democracy. He argues that it is not apt from a democratic standpoint that an

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[230] Ibid, 52.

[231] Jeremy Waldron, "Judicial Review and the Conditions of Democracy," *The Journal of Political Philosophy* 6, no. 4, (1998): 338.

[232] Ibid, 340.

[233] Ibid, 344. Dworkin builds his argument on a hypothetical example whereby the legislature enacts a piece of legislation which is challenged by a citizen on the ground that it goes against his rights associated with democracy. The court in turn strikes down the legislation. The question here is that whether this decision has caused loss to democracy? Dworkin believes that it would be dependent on whether court has made the right decision. Thus, his theory is more result-driven and does not give due importance to procedure need to arrive at such decisions. For further details see, Dworkin, *Freedom's Law*, 32.

unelected body of persons makes absolute decisions in relation to question as to what the democracy requires.[234] Conversely, if an elected body arrives makes an incorrect judgment about requirements of democracy, then even though there is a loss to democracy in the substantive sense, the citizens would at least know that it is their own mistake and not a decision that is imposed upon them.[235] It is obvious that Waldron accords as much significance to the process of decision making about questions involving democracy as he accords to the results. Broadly, the level of participation is key in any democratic decision making. Without such participation, there will always be a question on the legitimacy of the decision taken and it doesn't actually matter if the decision actually leads to strengthening of democracy. The procedural requirement of participation may at first seem benign, but to some jurists it is the very key in any kind of democratic decision making.

2.5 Judicial Supremacy

Recently, a lot of experts have expressed their fears about judicial supremacy in a constitutional dispensation. Before giving an account of their thoughts, it would be appropriate to reference a specific excerpt from Abraham Lincoln's Inaugural Address as the President of the United States. Lincoln stated:

> "Simultaneously, an honest citizen must acknowledge that if the Supreme Court's decisions irrevocably determine the government's policy on vital issues affecting the entire populace, then the people will have effectively relinquished control over their government and placed it in the hands of that eminent tribunal. "[236]

It is insightful to see that Lincoln was wary of the danger of ceding policy sphere of government to the judiciary. One can immediately gather that he was trying to establish 'self-government' as a cherished value in a democratic dispensation. It goes to show that any encroachment by the court on the policy domain of the government would necessarily compromise self-government of the

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[234] Waldron, "Judicial Review and the Conditions of Democracy," 346.
[235] Ibid.
[236] First Inaugural Address of President Abraham Lincoln, March 4, 1861 at http://www.abrahamlincolnonline.org/lincoln/speeches/1inaug.htm accessed on March 4, 2022.

citizens. It is a classic argument in favour of preserving popular sovereignty and circumscribing the role of courts to limited matters. However, modern states with written constitutions have experienced a unique phenomenon which entails a much broader role for exercising judicial powers. The exclusive right to interpret the constitution often gives courts a unique position to assert its understanding of the constitution on all branches of government. Though judiciary always claims to ensure constitutional supremacy, but sometimes it appears that the unrestrained exercise of judicial powers results in judicial supremacy. It is really important to examine what exactly judicial supremacy means and what is its connection to judicial review.

The term 'judicial supremacy' has numerous connotations. However, generally it reflects primacy of the courts in constitutional matters. Robert Lipkin attempts to explain this phenomenon in America in the following terms:

> "Today America is being governed by a covert aristocracy. A cohort of justices, who are appointed for life without election, lack accountability, and operate under the guise of constitutional interpretation, wields an undue degree of influence over the legislative process in the United States. Unacknowledged by the majority of Americans, the existence of this judicial aristocracy implies the conviction that its deliberative evaluations regarding the interpretation of the Constitution (and, by extension, public policy) surpass those of the elected branches of government and even the general public. There is no doubt that an alliance exists among aristocratic class members of the judiciary, with the explicit aim of transforming the benefits of self-governance into a system that is centralised in the hands of a privileged few. Constitutionalism in the United States has been profoundly impacted by the "judicial supremacy" phenomenon, which has fostered the notion that judicial interpretation of the Constitution is the sole or ideal form of constitutionalism."[237]

One salient aspect of this definition is that judicial supremacy arises from court's sole right to construe constitutional provisions. When discussing the constitutional provisions, it is conceivable that the court may infringe upon the jurisdiction of other departments of government. Such extensive powers often make judiciary a supra-constitutional branch of government. The elected representatives are practically deprived of their constitutional role in such a scenario.

It would also be apt to define what judicial activism implies. The primary objective of this study is to examine the concept of judicial supremacy, which can be defined as extensive judicial control

[237] Lipkin, "What's Wrong with Judicial Supremacy?" 2.

over executive and legislative authority of the state. If one were to disregard the discourse around semantics, it might be argued that judicial activism and judicial supremacy are synonymous terms that denote the consolidation of authority within the judicial branch of the state. Just like judicial supremacy, the term 'judicial activism' has been defined in numerous ways. However, judicial activism comprises of following characteristics:

i. Invalidation of legislation by courts
ii. Deviation from the text of precedents
iii. Driving changes in public policy through judgments
iv. Assumption of legislative role by the court
v. Abuse of unsupervised power outside the bounds of judicial power which may or may not foster individual rights.[238]

For the sake of convenience, this study would not attempt to draw specific distinctions between the two concepts. Fundamentally, it does not really matter what name is given to the phenomenon of extreme appropriation of powers by the Court.[239]

The subsequent pivotal question that arises concerns the difficulties linked to judicial supremacy. As has been described above, some experts believe that judiciary is the most suitable institution for making decisions about individual rights and constitutional provisions, as this task requires a juridical reading and judges are best equipped to provide such reading. Furthermore, the insulation of judges from popular pressures makes them the most apt functionary to make such independent decisions. Waldron tends to disagree with this line of argumentation. He notes certain disadvantages of judicial supremacy. Firstly, judicial supremacy deprives citizens of their right of self-government.[240] Waldron believes that even the staunchest supporters of strong judicial

[238] Waris Hussain, *The Judicialization of Politics in Pakistan* (New York: Routledge, 2018), 3.
[239] Sometimes the term 'juristocracy' is also used to convey the same meaning.
[240] Jeremy Waldron, "Judicial Review and Judicial Supremacy," *Public Law Research Paper No. 14-57*, Available at https://ssrn.com/abstract=2510550 accessed on March 5, 2022.

review[241] believe that there are certain limits to court's authority to adjudicate contentious constitutional questions.[242] For instance, it would be absurd for the judicial branch to decide whether the country should be governed as a capitalist state or a socialist state.

Waldron identifies 'judicial sovereignty' as the second problem associated with the concept of judicial supremacy.[243] He draws upon the Hobbesian omnipotent sovereign while explaining his point of view.[244] As per Hobbesian argument, the concept of sovereign is that of an uncommanded commander, if legislature is not that sovereign and its decisions are being controlled by courts who are not themselves omnipotent sovereigns so the courts must be controlled by some other uncommanded commander who can be called as a sovereign.[245] This sort of theoretical framework repudiates the notion of constitutionalism. Though countries with written constitutions (Waldron cites specific example of United States), do not follow this Hobbesian limitation, which means that courts review the legislative decisions of the legislatures and yet do not enjoy the status of sovereigns.[246] However, Waldron disagrees with this particular argumentation and holds that this sort of role of judiciary often leads to judicial supremacy which actually makes judiciary a Hobbesian sovereign. He adopts this stance by asserting that judicial review often entails the act of legislating rather than just interpreting and implementing the law.[247]

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[241] Waldron draws an important distinction between strong and weak judicial review. In strong judicial review, courts either decline the application of a particular statute under review or alter its effect in order to make it conform with individual rights or in some other circumstances courts may altogether strike down the statute. However in weak judicial review, courts may examine a statute on the touchstone of individual rights but they do not decline to apply it. For further details see, Jeremy Waldron, "Judicial Review and Judicial Supremacy," *Public Law Research Paper No. 14-57*, Available at https://ssrn.com/abstract=2510550 accessed March 5, 2022.

[242] Waldron, "Judicial Review and Judicial Supremacy," at https://ssrn.com/abstract=2510550 accessed March 5, 2022.

[243] Ibid.

[244] In his famous book, *The Leviathan*, Thomas Hobbes advocated for an absolute sovereign lawgiver. Hobbes made it a mandatory condition that such sovereign could not be subject to any legal constraints. Thus, the cherished conception of rule of law does not apply to the sovereign in question.

[245] Waldron, "Judicial Review and Judicial Supremacy," at https://ssrn.com/abstract=2510550 accessed March 5, 2022.

[246] Waldron quotes Alexander Hamilton's Federalist Paper No 78, where he mentions that limitations of the judicial role.

[247] Waldron, "Judicial Review and Judicial Supremacy," at https://ssrn.com/abstract=2510550 accessed March 5, 2022.

The third problem associated with judicial supremacy is usurpation of constituent power. Waldron uses the French term '*pouvoir constituant*'[248] for constituent power. Usually, a constitution comes into existence after it has been made and adopted by some power in a community.[249] This constituent power usually results from a constitution convention which reflects the popular will of the whole community. Speaking from a standpoint of comparative constitutional practice, this type of power does not rest in judiciary. Constituent power usually rests in the people of a community and it is commonly exercised as per the aspirations and ideals of community as a whole. The foundation of the constituent power concept lies in the principle that individuals or groups who initially design the constitution ought to have the authority to amend it. The establishment of courts is a direct result of constitutional provisions, hence precluding them from possessing constituent authority. So basically, courts are 'constituted power' (*un pouvoir constitue*) not constituent power. Interestingly, Waldron sheds light on one of the pioneers of constituent power theory, Abbe Emmanuel Joseph Siyes.[250] Siyes asserts that constituent power should be distinguished from ordinary legislative power. If the constituent power is vested in people, then the only authority to make revisions to the constitutional framework would rest with the people. Waldron identifies a negative principle for constituent power (*pouvoir constituant*). He explains the negative principle in the following words:

> "The negative Siyes principle posits that a constitutional system should be structured in a manner that effectively prohibits and minimises the likelihood of any formed power assuming the authority of le pouvoir constituant. The concept posits that no established authority may be directly or indirectly associated with the populace or claim its legitimacy as the sovereign representative of the people."[251]

One can easily gather that this negative principle makes distinction between a constituent legislature and an ordinary legislature. The jurisdiction of constituent legislature is unlimited with regard to amending the constitution while ordinary legislature has limited legislative mandate. This

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[248] It means the power to establish the constitutional order of a nation.

[249] Waldron, "Judicial Review and Judicial Supremacy," at https://ssrn.com/abstract=2510550 accessed March 5, 2022.

[250] Siyes, What is Third Estate? In Emmanuel Joseph Siyes, *Political Writings* ed. Sonenscher (Hacket Publishing, 2003).

[251] Waldron, "Judicial Review and Judicial Supremacy," Available at https://ssrn.com/abstract=2510550 accessed March 5, 2022.

fine distinction gives unique character to the constituent power. Waldron argues that this negative principle is not only applicable to the legislature but also applies to judiciary.[252] So whenever judiciary attempts to attain supremacy in the constitutional arrangement, it results in usurpation of constituent power of the people. This particular problem arises from judicial interpretation of constitution. The exclusive domain of judiciary to interpret the constitution often results in judicial supremacy.

Ran Hirschl has also been sceptical of growing role of judicial branch of government in constitutional democracies. He describes this in form of transfer enormous shifting of power from representative institutions to judiciary and names this supremacy as "juristocracy".[253] The recent wave of constitutionalism has placed judiciary at a higher pedestal in the constitutional scheme. The idea that enforcement of rights through judicial power is an effective means of social change has been somewhat captivating and resulted in a special status for judicial fora.[254] The foundation of this emerging constitutionalism is in the notion that democracy ought to be defined in a broader sense than mere majority rule. On the contrary, authentic democracy requires the inclusion of legal protections for minority groups, which are codified in a constitution and which cannot be altered by simple majority in legislature.[255] This conceptualization entails the recognition of the Bill of Rights as a fundamental element of the legal structure, wherein unbiased judges fulfil the role of upholding these rights.

Speaking about the impact of rights on judicial activism, Hirschl holds that there is a close relationship between constitutionalization of rights and judicial activism.[256] The main justification behind this assertion is that without basic rights in constitution, court's constitutional review powers are extremely limited and only apply to procedural matters.[257] However, the constitution's

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[252] Ibid.
[253] Hirschl, *Towards Juristocracy*, 1.
[254] Ibid.
[255] Ibid.
[256] Ibid, 170.
[257] Ibid.

inclusion of an exhaustive enumeration of specific individual rights furnishes an institutional framework for the judiciary to utilise in order to protect those rights. Concurrently, this structure permits the judiciary to expand its purview to encompass ethical dilemmas and political conflicts that arise within the political sphere.[258] In a way, Hirschl's argument goes on the line that ideals of legal constitutionalism often provide incentive to court to arrogate more constitutional space for itself which may consequently lead to judicial supremacy. According to Hirscl's analysis, the adoption of a constitutional bill of rights and the establishment of active judicial review in certain countries would probably lead to a significant escalation in both frequency and extent of judicial reviews. As a result, this transition confers authority upon the judiciary to undertake responsibilities that were previously the responsibility of the legislative and executive branches.[259] This argument is plausible in the context of Pakistan's judicial activism. It must be mentioned that judicial role expanded manifold due to exercise of its original jurisdiction on the pretext of safeguarding rights of citizens. In spite of the fact that judicial activism has occurred on numerous occasions in Pakistan's past, it is noteworthy that the apex court, led by former Chief Justice Iftikhar Muhammad Chaudhary, took steps to assert judicial supremacy.[260] Even after he completed the term of his office, the apex court played a proactive role on multiple fronts. The detailed analysis of this period in our judicial history will be carried out in the next chapters, however, it would be apt to mention a few instances here to reinforce the position taken by Ran Hirschl about juristocracy.

2.6 Conclusion

The chapter has delved into the central tenets of legal and political constitutionalism, exploring the relative strengths and weaknesses of these two approaches. The debate on judicial review

[258] Ibid.
[259] Ibid.
[260] Justice Chaudhary's Court is known to take populist stance on numerous issues. More often than not the court interfered in the functions of the executive and legislative branches of government.

demonstrates the challenge of balancing court's power of constitutional interpretation with principles of democratic rule. The perspective on judicial supremacy has underscored the complexities in reconciling expanded judicial power with the will of the people. This chapter has essentially addressed the research questions on critical evaluation of legal constitutionalism and theoretical framework of legal and political constitutionalism. While both approaches have their respective strengths and weaknesses, the increase in judicial power raises serious concerns about the democratic legitimacy of judicial decisions. This chapter has demonstrated the complex interplay and constant tension between legal and political constitutionalism in a democratic society. Though judicial review can play a pivotal role in safeguarding individual rights and upholding rule of law, it can provide judiciary with a justification to expand its constitutional role which is not in line with the norms of a democratic dispensation.

Chapter 3

Evolution of Constitutionalism in Pakistan: From Authoritarianism to Judicial Overreach

3. Introduction

This chapter delves into formative years of constitutionalism in Pakistan, navigating the early developments and setbacks that have shaped country's constitutional trajectory. It bears significance to understand the contemporary phenomenon of constitutionalism by considering important decisions of superior judiciary of Pakistan. This chapter elucidates the constraints and difficulties pertaining to nascent stages of the nation. The chapter additionally offers an understanding of constitutional practices throughout colonial period preceding Pakistan's independence. Subsequently, a discourse ensues regarding seminal rulings that have had tremendous influence on constitutionalism. The chapter also sheds light on the judicialization of politics in Pakistan by analysing landmark judgments on dissolution of legislatures which perpetuated political instability and judicial overreach. Furthermore, the chapter explores the evolution of public interest litigation as a precursor to the judicial supremacy in the country. The chapter primarily deals with the research question about expansion of judicial power in Pakistan. To a limited extent, it also sheds light on the role of legal constitutionalism in fostering judicial supremacy in country. As far as research objectives are concerned, this chapter aims to highlight the role of judiciary in shaping constitutionalism in Pakistan.

3.1 Background

The principle of constitutionalism advocates for the establishment of a robust mechanism for supervising and regulating actions of various branches of government. The primary characteristic of a constitutional system is to guarantee that each arm of government adheres to the prescribed authority outlined in the constitution, so preventing any overreach of power. It is of utmost significance to comprehend that the trajectory of constitutionalism is profoundly shaped by the

conditions that gave rise to the establishment of a constitution inside a political entity. Thus, understanding constitutionalism demands a thorough examination of historical events that shaped its development. An exemplary manifestation of this phenomenon can be observed in the rise and progression of constitutionalism in the decades following World War II. In the aftermath of devastating events of the Second World War, many constitutions have incorporated an exhaustive enumeration of individual rights, which function to impose considerable limitations on governmental actions. It is the responsibility of the judicial branch of government to safeguard and maintain fundamental liberties. Hence by means of judicial review, judiciary oversees the actions of governments that are primarily driven by majority rule. The idea of constitutionalism is intrinsically intertwined with judiciary's responsibility to protect individual rights.

Constitutional Edifice of Newly Create State-- A Colonial Legacy

The manner in which significant constitutional events shape the course of constitutionalism is similarly relevant to the context of Pakistan. The colonial authorities established a centralised constitutional framework prior to partition through the enactment of the Government of India Act, 1935. Anil Kalhan calls it a "viceregal model" which has its foundations in British centralized colonial state.[261] Under this governance model, a huge authority was vested in the Viceroy, the Governors and the Services.[262] However, to fully understand the events that transpired in the constitutional history of Pakistan, it would be necessary to examine the impact of constitutional changes in subcontinent during the colonial era. The first semblance of self-government appeared in the Government of India Act, 1919, better known as Montague-Chelmsford reforms. The Act of 1919 vested the Viceroy (Governor General) with a wide range of powers. He had the power to convene, adjourn, and disband the legislature as he saw fit.[263] He had the authority to refuse his

[261] Kalhan, "Gray Zone Constitutionalism," 14.
[262] K.J. Newman, "Constitutional Evolution of Pakistan," *International Affairs* 38, no.3 (July 1962):355, https://doi.org/10.2307/2609445.
[263] K.J Newman, The Dyarchic Pattern of Pakistan Government and Pakistan's Problems," *Political Science Quarterly* (March 1960):96.

approval to laws that were approved by the legislature or to delay their approval until His Majesty's decision was made. Alternatively, he had the ability to ensure the approval of a measure without the consent of the legislature. Additionally, during times of crisis, he had the authority to govern by ordinances. This Act introduced a system of 'dyarchy' in the provinces which was a dual governance model. Under this scheme, some legislative and administrative control was shared with the provincial governments while certain subjects were reserved in the discretionary powers of the Governor.[264] However, the Viceroy and provincial governors retained greater control than the elected provincial representatives. This Act did not transfer control to the Indian representatives but was first attempt at introducing democracy in Indian subcontinent. However, as the dyarchy model suggests, Britain was neither interested nor motivated to establish self-government in India. Though the dyarchical model of governance was abolished at the provincial level in the Government of India Act 1935, the office of Governor General was made omnipotent making it clear that even with changes to the earlier law, the colonial rulers were only interested in a power-sharing model that suited their own interests.

With the enactment of the Government of India Act, 1935, the dyarchic model was implemented at the central level.[265] Under the new constitutional order, the Governor General was granted immense discretionary powers over certain legislative and administrative matters. The extent of powers of the office of Governor General can be gauged from the fact that he could even decide not to consult his Council of Ministers while exercising his discretionary powers. The Constitution of 1935, like its predecessors, maintained a "dual government" system characterized by strict limitations on the authority of elected legislatures and extensive powers granted to the executive branch at both the national and provincial levels. These measures, along with additional safeguards,

[264] Ibid.
[265] Ibid, 99.

effectively impeded progress towards self-governance. The delegation of such extensive powers to the Governor General ultimately instigated constitutional crises in Pakistan.

In contrast to contemporary constitutions worldwide, this specific colonial document did not have fundamental rights of citizens. Despite sincere attempts by the Indian political leaders in the Round Table Conferences, the British government did not agree to including fundamental rights in the Government of India Act, 1935.[266] This omission on part of colonial rulers demonstrate that Britain was not interested in extending liberties to the common citizens of Indian subcontinent. The primary purpose of the Government of India Act, 1935 was to construct a governance model that ensured a symbolic role for the elected representatives. Contemporary constitutionalism largely relies on presence of an independent and empowered judiciary that acts as a bulwark against arbitrary use of authority. However, like other branches of government, judiciary is also a creation of the constitution. The Government of India Act, 1935 prescribed a limited role for the apex judiciary in India. Though a Federal Court was created under this colonial document, its powers in relation judicial review were seriously constrained.[267]

After the partition, Pakistan decided to adopt this colonial constitutional framework as its interim constitution.[268] As previously stated, this law conferred significant authority upon the Governor General, leading to a heightened level of authority in the executive arm of government following independence of Pakistan.

3.2 Trials and Tribulations in Constitution-Making

Following partition of India, the scramble for power among branches of government in the new state of Pakistan had profound impact upon the character of constitutionalism in the country. The colonial legal tradition engendered an enduring tension between the legislative and executive

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[266] S. Sundara Rami Ready, "Fundamentalness of Fundamental Rights and Directive Principles in the Indian Constitution," *Journal of Indian Law Institute* 22 no.3 (July-September 1980):400.

[267] The Federal Court exercised three types of jurisdictions, namely, *original jurisdiction, appellate jurisdiction and advisory jurisdiction*. See Khan, *Constitutional and Political History of Pakistan*, 27.

[268] *Section 8* Indian Independence Act, 1947.

departments. Although this Act of 1935 did indeed provide a clear mandate for the court, it would be incorrect to claim that the judicial branch did not contribute to shaping the constitutional framework of the state. Established in accordance with the Indian Independence Act of 1947, the Constituent Assembly was primarily charged with two objectives:

a) Firstly, it was tasked with responsibility of formulating a constitution for the nation; and
b) Secondly, it performed the role of prime legislative authority of the state until the new constitution was officially implemented.[269]

The simultaneous engagement of the Constituent Assembly in two distinct roles hindered the progress of constitution-making as performance of one function encroached into the other.[270] A considerable number of individuals who were part of the Constituent Assembly held positions as Ministers in the Federal Cabinet, while fulfilling their duties as Assembly members.[271] As previously stated, constitutionalism calls for implementation of a thorough system for overseeing various branches of government. The creation of the Constituent Assembly may be credited to the existence of a written constitution, namely the Government of India Act, 1935. Furthermore, the Indian Independence Act of 1947 was instrumental in facilitating the formation of this legislative body. The main aim of the Assembly was to formulate the Constitution of Pakistan, ensuring its alignment with the aspirations and objectives of the general public. The process of drafting a constitution, which began after attaining independence, remained incomplete until 1954. It would be fallacious to posit that the Constituent Assembly did not effectively achieve any noteworthy goals during this period. As stated earlier, the provisional Constitution of the Dominion conferred a vast array of authorities upon the Governor General. The vice-regal constitutional paradigm was highly compatible with the responsibilities of the Governor General, an unelected representative of the British Government entrusted with the administration of the Dominion.[272] Nevertheless,

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[269] *Section 8* Indian Independence Act, 1947; See also Khan, *Constitutional and Political History of Pakistan*, 51.
[270] Newberg, *Judging the State*, 38.
[271] Ibid.
[272] Section 5, Indian Independence Act, 1947.

with regards to the legislative process, the Constituent Assembly seldom sent legislation to the Governor General for his approval. Between the years 1949 and 1954, a total of forty-six legislations enacted by the Assembly were approved without obtaining specific permission from the Governor General.[273] The Governor General made no objection to these statutes.

Furthermore, in *Mohammad Ayub Khuro v Federation of Pakistan*[274] the Attorney-General maintained that there was no requirement of seeking assent of Governor-General in relation to constitution-making under the Indian Independence Act, 1947. The Sind Chief Court, in support of the argument, stated that the Constituent Assembly's legislative powers, in its capacity as the entity tasked with formulating the constitution, were not susceptible to any restrictions.[275] Furthermore, it is important to highlight that the Constituent Assembly demonstrated its disapproval of the accused individuals in the Rawalpindi Conspiracy Case[276] through the passage of legislation preceding the court's final verdict. The Federal Court refrained from addressing the matter of the Governor-General's absence of assent in this particular case.[277] A glance at the jurisprudence that was formulated from independence of the country shows that approval of Governor-General had not been a mandatory requirement for legislative function of Constituent Assembly. This particular question received no importance whatsoever in the laws that were passed by the Assembly nor was it ever discussed or dilated upon by the Federal Court in its judgments on numerous cases.

Section 223-A was among the amendments to the Government of India Act, 1935 that were enacted by the Constituent Assembly. By virtue of this provision, the High Courts of India were granted the power to issue writs. This jurisdiction empowers individuals to contest the illegitimate exercise of state authority by means of legal proceedings. This measure was an important step in the protection of the basic liberties of individual citizens.

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[273] Newberg, *Judging the State*, 39-40.
[274] PLD 1950 Sind 49.
[275] Ibid.
[276] *Ex-Major General Akbar Khan and Faiz Ahmad Faiz v The Crown* (PLD 1954 FC 87).
[277] Newberg, *Judging the State*, 40.

In an effort to re-establish a balance of authority between the legislature and an omnipotent Governor General, the Constituent Assembly reached a consensus to modify some provisions of the Government of India Act, 1935. As a result of this legislation, the Governor General's power to dismiss his ministers was effectively curtailed. Ministers were now accountable to the federal government according to with the new legislation. The primary objective of enacting the Act was to bolster parliamentary sovereignty and safeguard members of the Constituent Assembly from the Governor-General's exercise of discretionary authority. Following the decision mentioned above being adopted by the Assembly, the legislature was promptly dissolved by the Governor General. He primarily justified the dissolution of the Constituent Assembly on the grounds of the collapse of the constitutional machinery and the erosion of public confidence in it. As noted by some, the proclamation issued by the Governor General contained a substantial error in that it failed to cite any particular law within the pertinent constitutional structure. This capricious exercise of authority by Governor General constituted a pivotal moment when the highest court of the country had the task of deliberating on the trajectory of constitutional governance in the country.

3.3 *Tamizuddin Case*—Descent into Bureaucratic Despotism

Maulvi Tamizzuddin Khan lodged a legal challenge against Assembly's dissolution at the Sindh Chief Court. By using the constitutional remedies of writ, the petitioner requested the court to intervene and prevent the dismissal of the Constituent Assembly. He argued that the declaration issued by the Governor General was both illegal and ineffective.[278] The Chief Court had to determine three issues: Firstly, it needed to determine whether the assent of Governor General was necessary for validating Assembly's action and if lack of such assent rendered them unlawful; secondly, the Court needed to determine that whether the constitutional framework of Pakistan permitted the Governor General to dissolve the Constituent Assembly; finally, the Court need to

[278] Ibid, 81.

rule whether it had jurisdiction to entertain the writ petitions filed by the petitioner.[279] The decision of the court was in favour of the petitioner. It decisively dismissed the federation's claim pertaining to the requirement of getting assent from Governor General.[280] The Court's ruling acknowledged the supreme legislative power of legislature and concluded that the Governor General's permission was not necessary for the implementation of legislation enacted the prime legislative organ of state.[281] Moreover, the Court concluded that the acts of the Governor-General lacked legitimacy, since the Governor-General did not possess the requisite power to dissolve the Constituent Assembly. This judgment continues to be recognised as a ruling that protected democratic values and upheld rule of law. This ruling, which forbade a high-ranking executive authority from carrying out an unlawful directive, could be interpreted as an illustration of constitutionalism.

An appeal was submitted by the federation against this ruling.[282] In its decision, the Federal Court reversed the judgment of Sindh Chief Court, stating that the Legislative Assembly's law could only be considered legally valid with permission of Governor General. It is intriguing of note that substantive grounds of dissolving legislature were not given any importance. As the Assembly's procedure for adopting the challenged provision did not adhere to the prescribed procedure, the Court determined that the provision could not be regarded as valid legislation. The Federal Court, in light of procedural considerations, overturned the judgement of Chief Court, without delving into the merits of the legality of executive action dismissing the legislature. This verdict changed the future course of constitutionalism in Pakistan. On the one hand, the Chief Court of Sind, attempted to dissuade dictatorial behaviour of state officials; the apex court created foundations for authoritarianism in the country.

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[279] Syed Sami Ahmad, *Tamizuddin Khan Case: The Judgment that Brought Disaster* (Karachi: Royal Books 1991),42.
[280] *Maulvi Tamizuddin Khan v. Federation of Pakistan* (PLD 1955 Sind 96).
[281] Ibid. While expounding the scope of authority of the Constituent Assembly, one member of the Bench Justice Baksh even observed that the Assembly "could even repeal the whole 1935 Act."
[282] The Federal Court was established under the Government of India Act, 1935 and it was the predecessor of the Supreme Court of Pakistan.

Proponents of legal constitutionalism maintain a steadfast belief in the judiciary's ability in safeguarding and preserving individual rights. The Pakistani populace placed their faith in their elected representatives, who, in their roles as members of the Constituent Assembly, were tasked with the responsibility of drafting the country's new constitution. This implies that legislature was efficiently carrying out the crucial task of constitution formulation. The tenure of the Assembly extended over a period of seven years, during which it encountered difficulties in effectively achieving its designated aim. The Court's intervention in this matter did not resolve a constitutional problem. This constitutional adjudication provided an excellent chance to the judiciary to bolster constitutional values in the country. However, the ruling in *Tamizuddin case* had a pivotal part in the emergence of an unaccountable bureaucratic elite that sowed seeds of undemocratic governance in the country.

Aftermath of *Tamizuddin Case*—Origin of Doctrine of Necessity

The Assembly passed many legislations[283] without getting assent of Governor General. The prime effect of verdict in *Tamizuddin case*, was that it nullified several statutes enacted by the legislature.[284] This was a serious setback to the legislative achievements of the Assembly as one controversial decision stripped many laws of their validity. Realizing the gravity of situation, a new Emergency Powers Ordinance (IX of 1955) was promulgated. This legislative endeavour was meant to provide retroactive legitimacy to laws passed by the dissolved legislature which did not receive Governor General's assent. The legitimacy of Ordinance IX was challenged in *Usif Patel* case.[285] The Sind Control of Goondas Act 1954 (Act 28 of 1954) was used to bring criminal proceedings against appellants. The appellants contested the legality of a law enacted by the Governor of Sind under section 92A of the Government of India Act, 1935. They argued that the law was unlawful because it was inserted through the Governor General's Order No 13 of 1948, which was also deemed

[283] According to Hamid Khan as much as forty-six Acts became invalid. See, Khan, *Constitutional and Political History of Pakistan*, 85.
[284] Muhammad Munir, *Precedent in Pakistani Law* (Karachi: Oxford University Press, 2014), 104.
[285] *Usif Patel v. The Crown* (PLD 1955 FC 387).

illegitimate as it was passed after the final date specified in the Indian Independence Act, 1947.[286] The Federal Court was tasked with resolving two crucial matters: first, whether the Governor General could enact the Indian Independence (Amendment) Act, 1948 through an Ordinance; and second, whether the Governor General could retroactively grant assent to constitutional legislation passed by the Constituent Assembly.[287] It was ruled that that the character of Ordinance was that of a constitutional legislation and solely the Constituent Assembly possessed lawful jurisdiction to pass such legislations.[288] Serious constitutional predicament ensued as a result of this judgment. In the light of this decision, the mandate to pass laws was reserved for legislature but due to dismissal of Assembly there was no legislative body that could make laws.

For resolution of the constitutional impasse, the Governor General summoned a constitutional convention and sought advisory opinion of the Federal Government on the situation that transpired after *Usif Patel case.* The Federal Court was asked about the authorities and duties of office of Governor General, legality of dissolution of the first Constituent Assembly, proper means for validating prior laws and legal standing of Constitutional Convention called by Governor General.[289] In its opinion, the highest court reaffirmed the authority of Governor-General in conferring retroactive legitimacy to legislative bills approved by defunct legislature on grounds of doctrine of civil or state necessity. This theory of civil necessity provides legitimacy to an otherwise illegal governmental action during times of national emergency.[290] This idea has its origins in English Common Law of Middle Ages. This doctrine was first put forward by Henry de Bracton who articulated that actions which are illegal can be made legal under circumstances of necessity.[291]

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[286] Sub-section 5 of section 9 of the Indian Independence Act allowed Governor General to make orders until 31 March 1948. The date was extended by the Constituent Assembly to 31 March 1949 but this legislation did not receive assent of the Governor General. Under the *Tamizuddin* ruling, this constitutional legislation by Assembly did not have any legal effect as having been passed without assent of the Governor General.

[287] *Usif Patel v. The Crown* (PLD 1955 FC 387).

[288] Ibid.

[289] Khan, *Constitutional and Political History of Pakistan*, 87. See further, Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan*, 54.

[290] Stavsky, "The Doctrine of State Necessity in Pakistan," 342.

[291] *Manby v Scott*, I Lev. 4 (1672).

The chief inquiry in context of constitutional quagmire in Pakistan was that whether using this doctrine was the correct way to approach the state of affairs when the constitutional crises was precipitated by a dubious judicial ruling? The minority judgment passed by Justice A.R Cornelius and Justice Muhammad Sharif deserve attention on this issue. The dissenting judges disagreed with the majority on the basis of the argument that the common law of civil necessity applies only when the executive may infringe upon private rights during war or other national disasters; it had never been applied to changes in constitutional law.[292] A number of critics hold the opinion that superior judiciary should always act with utmost caution when applying doctrine of necessity, especially when such application can lead to infringement of constitutional rights and change in arrangement of national government.[293] It is not appropriate to justify an unconstitutional termination of an elected administration on basis of this hypothesis.[294] The supremacy of constitution is seriously impaired if this doctrine is made applicable to unconstitutional actions. However, Federal Court's determination on the *Reference* laid foundations for this infamous doctrine in the constitutional jurisprudence of the country. As we shall see, this doctrine had been adopted time and again to justify unconstitutional actions military rulers in Pakistan. The concept of state necessity and arbitrary standards of justice were quite contrary to the goals of constitutionalism. Instead of keeping the executive authority in check, the judiciary validated capricious use of powers by government.

The convening of the Second Constituent Assembly was in conformity with the verdict rendered by the Federal Court in the Constitutional *Reference*. The electoral procedure for membership to the new Assembly was identical to that of its antecedent. Unlike its predecessor, the Second Constituent Assembly successfully completed the task of formulating the Constitution for Pakistan and on 23 March, 1956, the first Constitution of the nation was adopted. Despite experiencing

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[292] *Reference by His Excellency, The Governor-General*, (PLD 1955 FC 435). See dissenting opinions of Justice A.R. Cornelius and Justice Muhammad Sharif at pages 554 and 460.
[293] Stavsky, "The Doctrine of State Necessity in Pakistan," 343.
[294] Ibid.

political and constitutional unrest, the nation's accomplishment in devising a constitution is regarded as a productive advancement. Many were optimistic that the new constitutional arrangement would herald in a new era of constitutional supremacy as a result of this political development. Nevertheless, these ambitions were ultimately thwarted by the disintegration of the new constitutional order within a two-year timeframe.

3.4 Judicial Powers under the Constitution

In context of this study, a noteworthy aspect of the 1956 Constitution is its framework in relation to judicial powers. This constitutional document included a comprehensive enumeration of rights of citizens of Pakistan. Moreover, it granted the top court with specific powers to preserve and enforce basic rights.[295] In addition to power of issuing writs, the Court could give specific directives for security of constitutional rights.[296]

Constitution also conferred writ jurisdiction upon the High Courts. Despite Supreme Court's unwillingness towards embracing constitutional review, the High Courts have significantly contributed to the advancement of administrative law through writs. At this time, the writs served to scrutinize validity of issues associated with bureaucratic service. Over time, there was a progressive increase in the jurisdictional authority of the High Courts via the exercise of judicial review. In *Hadi Ali v the Government of West Pakistan*[297], the Court determined that it was essential for the petitioner to have been had a just and equitable opportunity to submit their case prior to the release of an adverse verdict. In *Hussain Haji Ahmed v. S. Ashhad Ali*[298], it was determined that the relinquishment of writ jurisdiction is not appropriate only due to the presence of an alternative remedy, irrespective of whether that remedy is unduly expensive or time-consuming, or if the procedures used violate principles of fairness and equity. Therefore, it is apparent that the High

[295] Article 22, Constitution of the Islamic Republic of Pakistan, 1956.
[296] Allah Bukhsh Karim Bukhsh Brohi, *Fundamental Law of Pakistan* (Karachi: Din Muhammadi Press, 1958), 438.
[297] PLD 1956 (WP) Lahore 824.
[298] PLD 1957 (WP) Karachi 874

Courts have undertaken a broadening of their judicial jurisdiction via the practise of reviewing administrative acts taken by state entities. The courts' main focus was to determine the legality of the public activities carried out by the authorities.

The proactive role assumed by High Courts did not sit well with apex court. The top court preferred not to ruffle bureaucracy's feathers and the judgments against bureaucracy raised concerns in the Supreme Court. In the landmark *Tariq Transport Company case*, the highest court delineated the parameters of the High Courts' writ prerogative.[299] It was held that the constitutional provision providing writ jurisdiction must be construed in accordance with the traditional limitations and conditions applicable to the prerogative of writs.[300] Furthermore, the Court specially observed that writ jurisdiction could not be exercised in presence of an alternate remedy and the test of *locus standi*[301] must be satisfied before exercise of writ jurisdiction. These limitations thus curtailed writ authority of High Courts.

Judicial Validation of Martial Law and Abolition of the Constitution—Constitutionalism in Jeopardy

Constitutionalism is rooted on the fundamental ideas of upholding the authority of law and restraining arbitrary use of authority. Therefore, the theory of constitutionalism is founded upon the principle of establishing legal limitations on governmental authority.[302] Within the bounds of a constitutional framework, the judicial branch strives to create its authority over the executive branch by upholding basic rights of citizens. Incorporation of rights in a constitutional document tends to put legal restraints on government and individuals, which ultimately results in protection of rights.[303] The foundational principle of constitutionalism is the establishment of the supremacy

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[299] *Tariq Transport Company v. Sargodha-Bhera Bus Service* (PLD 1958 Supreme Court (Pak) 437) Justice Cornelius Opinion, p. 497.
[300] Ibid.
[301] The term *locus standi* implies that the petitioner must be personally aggrieved by a public action or law.
[302] Charles McIlwain, *Constitutionalism: Ancient and Modern* (1947), 21.
[303] Cecile Fabre, "A Philosophical Argument for Bill of Rights," *British Journal of Political Science* 30, no. 1 (January 2000): 87.

of the constitution above regular legislation. Pakistan's experience with constitutional making was marked by significant political and legal upheavals, yet the state was able to eventually succeed in adopting its first Constitution in 1956. During the time of Constitution's adoption, there was a great optimism about democratic and constitutional future of the state. However, these good expectations did not mature into reality as fundamental law of the state was abolished through imposition of martial law.[304] The proclamation dismissed the central as well as provincial Assemblies of Pakistan, proscribed all activities related to politics in country and delayed elections indefinitely. Following the declaration of martial law, the Laws (Continuance in Force) Order was issued with the purpose of providing legal legitimacy to the pre-existing laws that were in effect prior to the proclamation of martial rule.[305] However, this Order did not revive the abrogated constitution of 1956. Subsequently, General Ayub ousted Iskander Mirza from his position, gained control of the country and established the initial military administration in the country. This extraconstitutional episode provided groundwork for future military regimes in Pakistan.

Superior judiciary examined the constitutional validity of newly installed military administration and termination of the Constitution in *Dosso* case.[306] The case offered the Court with an exceptional opportunity to enforce constitutional principles and declare the President's actions unlawful. However, the Court opted to assume a subservient position to the military dictatorship and conferred legitimacy onto the martial law, notwithstanding its inherent illegality. In its ruling the court maintained that a successful revolution is a legitimate way of effecting a change in constitutional order.[307] The verdict placed reliance on Kelsen's theory of revolution and law[308] which elucidates that a revolution attains the status of a law-making event if it meets the criteria

[304] Hamid Khan, *A History of the Judiciary in Pakistan* (Karachi: Oxford University Press, 2017), 44. The country was moving towards the first general elections, however, the President was not in favour of elections and wanted to retain power, for further details see Herbert Feldman, *Revolution in Pakistan in The Herbert Feldman Omnibus* (Oxford: Oxford University Press, 2001), 33-34.

[305] Khan, *Constitutional and Political History of Pakistan*, 121.

[306] PLD 1958 SC 533.

[307] Ibid.

[308] Hans Kelsen, *General Theory of Law and the State*, translated by Anders Wedberg (New York: Russel & Russel, 1961).

of efficacy.[309] In the absence of the Constitution, the top court found itself in a unique conundrum as it was compelled to decide an issue requiring interpretation of constitutional provisions. As a result, the top court was confronted with the choice of either endorsing the nullified Constitution or validating the authority of martial law and its corresponding laws. The court decided to opt for the latter option and conferred legitimacy to an unconstitutional action. The Court observed:

> "The revolution itself becomes a law creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success... The new law creating organ—The Laws (Continuance in Force) Order—however transitory or imperfect thus validated itself."[310]

Furthermore, the court concluded that the termination of the basic law deprived people of their fundamental rights which stipulated in the nullified Constitution. This decision was met with severe criticism for a variety of reasons. The ruling effectively impeded the progress of the nation's constitution development and fostered the promotion of government transitions via unconstitutional channels. Certain experts even cast doubt on the judgment's reasoning, arguing that the implementation of an innovative legal theory failed to offer a credible rationale for suspending the Constitution.[311] Intriguingly, there are many who argue that the Chief Justice made an erroneous application of the principle of *grund norm*. In Kelsen's viewpoint, the validity of a norm is wholly dependent upon the requirement that the norm must be part of a norm based system which constitutes an efficacious order.[312] The Court failed to provide any plausible proof as to how this so called revolutionary action was justified as per Kelsen's theory of revolutionary legality.[313] As opposed to what Kelsen advocated, the apex court neglected to distinguish between concepts of legality and legitimacy.[314] Furthermore, is it correct to call martial law as revolution? Moreover, how could the court judge that imposition of martial law has met the Kelsenian test of

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[309] *The State v Dosso* (PLD 1958 SC 533).
[310] Ibid, see also Newberg, *Judging the State*, 75.
[311] See for example, Khan, *Constitutional and Political History of Pakistan*, 122.
[312] Kelsen, *General Theory of Law and the State*, 41-42.
[313] Newberg, *Judging the State*, 74.
[314] Ibid.

efficacy in such a short time? The apex court eventually reversed its earlier decision in *Asma Jillani v Government of Punjab*[315] in which it questioned the flawed legal reasoning in *Dosso* case. The legal proceedings in *Dosso case* began six days after the first martial law. In the case of *Asma Jillani*, top court raised a unique question about the relevance of Kelsen's theory in scenarios where a person who orchestrated a *coup* is subsequently overthrown by another *coup*.[316] The Court observed:

> "Even on the theory propounded by the learned Chief Justice (Munir) himself, was this subsequent change also a successful revolution? If so, by what test, because on this occasion there was no annulment of any constitution, or of the *Grundnorm* of any kind which had been created by the President Iskander Mirza?"[317]

This particular enquiry makes it evident that judicial reasoning in *Dosso case* rested on shaky foundations. The judgment was not legally tenable by any stretch of imagination and it laid groundwork for further constitutional disruptions in the country. It has also been argued that the Court should have decided the matter according to law instead of providing sketchy legal justifications for an unconstitutional action.[318]

A review of constitutional events that transpired in early years subsequent to independence of the country present a remarkable dilemma concerning legal constitutionalism. Legal constitutionalism is predicated on the fundamental principle that the judiciary, in its capacity as an ultimate reviewer, has the authority to scrutinise the constitutionality of legislation and ascertain its validity.[319] It is possible that legal constitutionalists, who strongly support for an expanded judicial involvement in constitutional affairs, may not have foreseen the specific circumstances of the *Dosso* case, when the court validated a conduct that was deemed unlawful. It is crucial to acknowledge that the individuals filing the petition in this particular instance endeavoured to claim their rights as

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315 PLD 1972 SC 139.

316 T.K.K. Iyer, "Constitutional Law in Pakistan: Kelsen in the Court" *The American Journal of Comparative Law* 21, no.4 (Autumn 1973): 762.

317 *Asma Jillani v Government of Punjab* (PLD 1972 SC 139).

318 One of the colleagues of former Chief Justice Munir (who authored the judgment in *Doso case*), Justice Cornelius commented that Justice Munir often took pride in judge's power of interpreting the law in any manner he likes. See Khan, *Constitutional and Political History of Pakistan*, 123.

319 Shannon Roesler, "Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority," *Law & Social Inquiry* 32 No. 2, 546 (Spring 2007) (545-579).

stipulated by the defunct Constitution.[320] Rather than imposing constraints on executive power, it may be argued that the apex court played a significant part in conferring legitimacy to arbitrary and malicious use of presidential authority, as evidenced by legal decisions of that era.

Additionally, the judicial role in enforcing rights of citizens also needs to be evaluated. The adherents of legal constitutionalism vociferously assert that judiciary is the lone institution with capacity to protect rights of citizens. Some followers of this tradition argue that rights constitute individual political entitlements that cannot be given up for general welfare of people.[321] As a corollary to this contention, the Court has a legal responsibility to render decisions on legal basis without taking into account the potential consequences of such decisions. A closer review of *Tamizuddin case*, demonstrates that the highest court curtailed jurisdiction of provincial High Courts[322]on basis of a technicality.[323] As opposed to this, Sind Chief Court dismissed Federation's argument concerning the need for assent to legitimize the enactments that were passed by chief legislative organ of state. The petitioner was granted writs of *mandamus* and *quo warranto* which served to protect his rights and restricted the executive from engaging in unauthorized exercise of authority. However, the Federal Court overturned this decision without extensively examining the core issues pertaining to this case.[324]

In similar vein, the decision in *Dosso case* demonstrates Court's failure to give precedence to rights of people. As previously explained, the apex court conferred validity to new martial regime by treating the Constitution of 1956 as abrogated and also provided legitimacy to newly promulgated Laws (Continuance in Force) Order.[325] The highest judicial body of the state rendered an

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[320] The petitioner challenged the vires of the Frontier Crimes Regulation (FCR) by arguing that the law was contrary to the fundamental rights mentioned in the Constitution of 1956. See *The State v Dosso* (PLD 1958 SC 533)

[321] Dworkin, *Taking Rights Seriously*, 269.

[322] Though there was no Constitution but the Assembly extended the Common Law writ jurisdiction to the Courts. Even under the Common Law, the Writs provided an adequate framework to the aggrieved person to ask Courts to restrain an unlawful public action.

[323] *Federation of Pakistan v Maulvi Tamizuddin Khan* PLD 1955 FC 387.

[324] Khan, *A History of the Judiciary in Pakistan*, 31.

[325] *The State v Dosso* (PLD 1958 SC 533)

innovative interpretation on the matter of constitutional rights afforded to individuals. The Laws (Continuance in Force) Order of 1958 stipulated that the governance of the state will strive to closely align with the previously nullified Constitution.[326] Nevertheless, Chief Justice argued that this provision merely concerned administration of government and could not be construed to reinstate the constitutional rights of citizens under the repealed Constitution.[327] The primary tenet of constitutionalism, as seen by a multitude of legal scholars, is protection of basic rights.[328] The Court's ruling had similarities with Bentham's conceptualization of individual rights. Bentham had expressed his criticism against the notion of natural rights and argued that all rights are established by state.[329] He consistently maintained that the presence of a statutory structure is necessary for the preservation of rights, asserting that the lack of such a framework result in the cessation of rights.[330] This type of state legalistic approach to rights was challenged by John Locke in Two Treatises on Government. Locke posited the belief that the presence of rights predates the establishment of a civil society.[331] The incorporation of fundamental rights in modern constitutions is based on sanctity attached to basic liberties of people. The top court of the country did not uphold this sanctity in the *Dosso case.* Through authorization of an action that violated the Constitution, the court effectively stripped citizens of their fundamental rights. A traditional claim made by legal constitutionalists is that court guards rights of citizens by exercising oversight over executive power appears to be without merit in the light of ruling in *Dosso case.*

3.5 The Decay of Constitutionalism—Origins of Praetorianism in Pakistan

Following his ascension to power, General Ayub Khan initiated a series of actions that laid foundations for unstable politics and military intervention in political sphere. It is not inaccurate

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[326] Khan, *Constitutional and Political History of Pakistan*, 122.
[327] Ibid.
[328] See for example John Stuart Mill, *On Liberty*, (Ontario: Batchohe Books Limited), 6-7. See also Sajo and Utiz, *The Constitution of Freedom*, 13.
[329] Jermey Bentham, "Works of Jeremy Bentham Vol. 3", available at https://oll.libertyfund.org/quote/jeremy-bentham-on-rights-as-a-creation-of-the-state-alone-1831 accessed June 21, 2021.
[330] Ibid.
[331] John Locke, *Two Treatises of Government* (Peter Laslett ed., Cambridge U. Press 1988), Sections 22-23.

to assert that he had a pivotal role in introduction of praetorianism in Pakistan. Praetoriansim can be defined as:

> "A praetorian state is characterised by a tendency for military intervention in the political system, with the possibility for military dominance. The political dynamics within this state exhibit a distinct inclination towards prioritising the advancement of the military as a central entity and fostering the expansion of its influence as a governing class. The individuals occupying positions of political leadership are mostly drawn from military backgrounds or affiliations that are supportive, or at the very least not opposed, to the military. Constitutional amendments are implemented and upheld by military means, with the army often intervening in governmental affairs. In a praetorian state, the military assumes a prominent position within political structures and institutions."[332]

The Ayub regime established a precedent for subsequent unconstitutional military interventions in the country and weakened the democratic fabric of the country. The two important guiding principles of this regime included an effort to boost efficiency in administration of state and a clear disregard for political endeavours.[333] In order to accomplish the initial objective, numerous commissions were formed with the specific goals of augmenting the professionalism of the public service, enacting modifications to property ownership, and adjusting legislation to more closely correspond with societal needs.[334] The regime introduced several laws to restrict political life and limit the influence of political leaders. One example of such legislation is Public Offices (Disqualification) Order, 1959 which placed a retroactive prohibition on certain politicians from entering public office for a period of fifteen years. Moreover, another regressive law in form of Elective Bodies (Disqualification) Order (EBDO) was also promulgated which essentially provided that lawmakers might face disqualification from office for misconduct without guarantee of legal representation in such matters.[335] As a consequence of these draconian laws, seventy-five prominent politicians were formally prosecuted and barred from running for office until 1966.[336] The punitive measures under this legal framework were not aimed at eradicating corruption but to

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[332] Tayyub Mahmud, "Praetorianism & Common Law in Post-Colonial Setting: Judicial Responses to Constitutional Breakdowns in Pakistan" *Utah Law Review*, no.4, (1993): 1228.
[333] Newberg, *Judging the State*, 79.
[334] Ibid.
[335] Ibid.79-80
[336] Dr Rafi Amir-Ud-Din, "Accountability Mania" *The News*, January 31, 2021.

exert pressure on politicians in order to coerce their compliance. The aim of these coercive tactics was to supress political dissent against the regime. The source of power for any authoritarian government lies in the use of oppressive measures against its people.

Although, the apex court was presented with an opportunity to correct course in *Mehdi Ali Khan case*[337], it declined to do so. The Court stuck to its stance on basic rights of people and concluded that constitutional rights became non-existent after abrogation of the 1956 Constitution. The Laws (Continuance in Force) Order of 1958, rather than being regarded as merely as a provisional constitutional arrangement, gained notoriety for being dubbed the "shortest Constitution in the world".[338] This ruling conferred unbridled authority to the military regime and effectively dismantled the whole discourse on fundamental rights. Evidently, the ruling further weakened the ideal of constitutionalism in the country.

The new military regime, after receiving validation from the court, began the undertaking of drafting a new constitution for the nation. In order to solicit recommendations on the new Constitution, a Constitution Commission was set up in 1960.[339] Unfortunately, the suggestions of the Commission were not accorded the importance which they deserved and the military regime enforced Constitution in 1962. Under this constitutional model, the President was the primary centre of executive authority.[340] The Constitution may be characterized as 'One-Man Constitution' primarily because public had no say in its formulation as it was not made by duly chosen representatives of public. Entire process of constitution-making was executed in alignment with the interests of a dictatorial regime. The process of devising a new Constitution may be seen as a means to establish legitimacy for an unelected tyrannical regime.

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[337] *Province of East Pakistan v Md. Mehdi Ali Khan*, PLD 1959 SC 387 Opinion of Chief Justice Muhammad Munir, p.412.
[338] Ibid.
[339] Former Chief Justice of Pakistan, Justice Shahabuddin was the head of the Constitution Commission. See, Khan, *Constitutional and Political History of Pakistan*, 122.
[340] *Article 31*, Constitution of Pakistan 1962

Besides the undemocratic mode in which the new Constitution was promulgated, Richard Wheeler identifies four key controversies in the new constitutional order. Firstly, to establish a closer connection between candidates and voters, the legislative and presidential voting rights were restricted to an electoral college consisting of around 80,000 Union Councillors.[341] Secondly, to safeguard against the influence of "anti-national" factions, the involvement of political parties in the election procedure was prohibited, unless explicitly permitted by legislation enacted by the central legislature.[342] Thirdly, to avoid the possibility of a hostile Assembly exerting pressure on the independent administration by withholding funds, the budgetary authority of the Assemblies was restricted to either accepting or disapproving any budget increases compared to the preceding year.[343] Fourthly, to ensure that the judicial process does not hinder the implementation of policies established by elected officials in legislation or disrupt the efficient functioning of the administration, the Constitution did not incorporate any justifiable fundamental rights. Additionally, the courts were not granted the authority to invalidate laws as unconstitutional or beyond the scope of their powers.[344] This last provision demonstrated that the regime was least interested in fostering constitutionalism. Evidently, the new Constitution was created to concentrate powers in the office of the President.

Initially, the Constitution did not grant the powers to superior judiciary to scrutinize validity of a legislation. The powers of judiciary were limited in the new Constitution and the court could not interfere with the laws passed by legislature even if there were questions on the validity of such laws.[345] However, the Courts were granted this power through first amendment in 1963. The new amendment gave full powers to the judiciary to examine the vires of a legislation.[346] This development was undeniably significant within the framework of judicial oversight regarding the

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[341] Richard Wheeler, "Pakistan: New Constitution, Old Issues," *Asian Survey* 2 no.3 (February 1963):108-109.
[342] Ibid.
[343] Ibid.
[344] Ibid.
[345] Newberg, *Judging the State*, 85.
[346] Khan, *A History of the Judiciary in Pakistan*, 31.

constitutionality of legislation, a notion that is highly esteemed in legal constitutionalism. In relation to the examination of executive action via constitutional review, the High Courts were granted the authority to exercise writ jurisdiction as stipulated in the 1962 Constitution.[347] However, the architects of the new Constitution espoused a legal framework that provided unchallenged authority to the executive; therefore, they circumscribed judicial powers in matters pertaining to constitution.

3.6 Constitutionalism and the 1962 Constitution

The authoritarian nature of the 1962 Constitution was evident because it consolidated substantial powers in presidency. It was formulated with the explicit purpose of granting the executive arm of government broad authority. Nevertheless, the judiciary did contribute (even if to a limited extent) in scrutinizing the discretionary authority of government, a characteristic which is emblematic of contemporary constitutionalism. An illustration can be seen in apex court's verdict in *Fazlul Quader Chowdhry v. Muhammad Abdul Haque.*[348] As stipulated by the Constitution, a member of central legislature was not eligible to serve as a member of Cabinet of President until such member had resigned from his seat in legislature.[349] Nevertheless, the President made a decision to modify this constitutional limitation via an executive order.[350] This order was made pursuant to a constitutional provision that authorized the President to remove difficulties in the Constitution.[351] Under this Order, the legislators were permitted to retain their seats as lawmakers notwithstanding their appointments to the President's Council of Ministers. The legality of this Order was challenged at the Dacca High Court, which subsequently decided that it was in violation of the Constitution.[352] This High Court decision was upheld in the apex Court.[353] This judgment holds significant

[347] *Article 98*, The Constitution of 1962
[348] PLD 1963 SC 486
[349] *Article 103 and Article 104*, The Constitution of 1962
[350] Removal of Difficulties (Appointment of Ministers) Order, 1962.
[351] *Article 223*, The Constitution of 1962
[352] *Muhammad Abdul Haque v Fazlul Quader Chowdhry* (PLD 1963 Dacca 669)
[353] *Fazlul Quader Chowdhry v. Muhammad Abdul Haque* (PLD 1963 SC 486) at p. 512.

importance in the annals of nation's constitutional history. Through this judicial decision, the Court effectively restrained President's powers to alter the basic law. In other words, the ruling established that executive authority was circumscribed by a written constitution and courts had authority to check the validity of such authority under the constitution. This ruling can be considered a valiant defence of the constitutional system due to the fact that it was rendered in opposition to an extremely oppressive and powerful regime.

The *Madudi case*[354] holds considerable importance within the context of constitutionalism during this Ayub era, as it involved protection of right of association. Following the first amendment in the Constitution, citizens could agitate violations of their fundamental rights before courts.[355] The Political Parties Act, 1962 was enacted to establish regulations governing behaviour of political parties in the country. Jamat-i-Islami, an opposition party, was actively engaged in demonstrations against the government. As a response to the continuous demonstrations and protest rallies organized by Jamat-i-Islami, the government declared the party as illegal association.[356] The head of Jamat-i-Islami challenged this action of government in West Pakistan High Court and Dacca High Court. West Pakistan High Court did not find merits in the petition and dismissed it, however, it was accepted by Dacca High Court which declared the ban imposed on the political party as unlawful.[357] While affirming the verdict of the Dacca High Court, apex court ruled that designating a political party as illegal organization falls within the purview of administrative action of government, which could be reviewed by judiciary.[358] Thus, a legislation was invalidated by judiciary because it curtailed the constitutional rights of the citizens. Throughout the course of

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[354] *Abul ala Madudi v Government of West Pakistan* (PLD 1964 SC 673) at p.702.

[355] Constitution (First Amendment) Act, 1963. Initially the Constitution did not give powers to Courts to enforce fundamental rights of the citizens. Subsequently, due to pressure from the various political quarters, the regime introduced a constitutional amendment which made fundamental rights justiciable. For further details, see, Khan, *Constitutional and Political History of Pakistan*, 157.

[356] Both provincial Governments of West and East Pakistan declared Jamat-i-Islami as an unlawful association. The Criminal Law Amendment Act, 1908 gave arbitrary powers to the provincial governments to declare a political party as an unlawful association, for details see, Khan, *A History of the Judiciary in Pakistan*, 70-71.

[357] *Tamizuddin Ahmad v Government of East Pakistan* (PLD 1964 Dacca 795).

[358] Khan, *A History of the Judiciary in Pakistan*, 71.

these legal processes, the highest court skilfully deliberated on several interpretations pertaining to the maintenance of public order and the protection of individual rights. The primary objective was to establish the boundaries of governmental action in relation to the political rights afforded to individuals.[359] Furthermore, this ruling offered further credence to the claim put forth by legal constitutionalists that judicial systems can function as a protective barrier against legislation that infringes upon individual rights.

In an authoritarian regime, the use of coercive tactics is essential for suppression of dissent. Dictatorial government under Ayub demonstrated a keen understanding of such suppressing measures in order to quell resistance from people. Some specific laws were enacted to authorize preventive detention. Preventive detention was an effective mechanism employed by government to silence the nonconformist voices of political leaders and civil society members. During this era, the constitutional courts of Pakistan were bestowed with the pivotal duty of evaluating the legitimacy of actions taken by the government, taking into account the delicate equilibrium between safeguarding the rights of the populace and upholding public order. The Supreme Court in *The Government of East Pakistan v Mrs. Rowshan Bijaya Shaukat Ali Khan*[360] was vested with the responsibility of ascertaining the legal standing of a political figure who had been unlawfully incarcerated, contravening the provisions outlined in public safety law of East Pakistan. The Court advised the government on the implementation of preventive detention, placing particular emphasis on the imperative of complying with stringent constitutional and legal regulations.[361] Furthermore, the court maintained that it possessed jurisdiction to evaluate the nature of executive actions in line with the principle of judicial review and ascertain if they infringed upon private rights of citizens.[362] Moreover, the court also mandated that the authority responsible for executing

[359] Newberg, *Judging the State*, 97.
[360] PLD 1966 SC 286.
[361] Newberg, *Judging the State*, 101.
[362] Hamid Khan, "Developing Liberal Jurisprudence in Pakistan: Role of Justice A.R. Cornelius, *Policy Perspectives* 17, no.1 (2020):137.

detention must specify precise actions which constituted danger to stability of country to justify private detention.[363] Thus, this decision was instrumental in vindicating rights of citizens.

The case of *Malik Ghulam Jilllani v Province of West Pakistan*[364] presented the apex court with a proposition of determining status politicians who were detained under detention rules.[365] The imprisoned petitioners invoked writ jurisdiction, but their applications did not succeed. However, an appeal lodged by one of the petitioners was accepted by the top court of Pakistan. Subsequently, the Court established important parameters pertaining to detention. The court maintained that it is essential for detaining authority to differentiate between concepts of reasonable belief and suspicion.[366] The court further noted that the evaluation of authority in issuing orders for custody pertaining to the conduct of prisoners need to rely on objective criteria. Furthermore, the Court rendered a decision affirming its jurisdiction to review orders of detention and emphasised the need for the detaining authority to provide sufficient evidence to demonstrate the legitimacy of those orders.[367] Despite being bound by legal constraints, the Court implemented measures to regulate preventive detention by mandating that detaining authority adhere strictly to legal provisions.

Judgments against preventive detention forced government to promulgate a new Ordinance.[368] The new Ordinance stated that the sufficiency of grounds on which opinions pertaining to preventive detention is based would be determined by the detaining authority.[369] This provision essentially gave all the powers to the detaining authority in determining whether sufficient grounds exist for detaining someone or not. The law was promulgated to curtail the powers of Court from

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[363] Khan, *Constitutional and Political History of Pakistan*, 187.
[364] PLD 1967 SC 373 at p. 378.
[365] Some political leaders started agitation against the Tashkent Declaration which ended the War between India and Pakistan. These dissidents maintained that the Declaration favoured India and the President of Pakistan did not give due importance to the interests of the nation.
[366] Hamid Khan, *A History of Judiciary in Pakistan* (Karachi: Oxford University Press, 2017), 73.
[367] Ibid.
[368] Defence of Pakistan (Amendment) Ordinance 1968.
[369] *Section 3 (2)(x)*, Defence of Pakistan Ordinance, 1965

looking into the validity of detention orders. The government detained Shorish Kashmiri who was a journalist and public orator under the Defence of Pakistan Rules. It was ruled that the amended provisions of Defence of Pakistan law fell within category of subordinate legislation and they had no impact upon the constitutional powers of High Court.[370] Resultantly, the Court could still examine the substance in grounds for detention. The province in their appeal maintained that the detainees must prove that the orders of detaining authorities were invalid. Nevertheless, the top court affirmed the impugned decision, noting that the right of review is intrinsically connected to the fundamental rights of individuals.[371] It was determined that the burden of proof was with the detaining authority to establish the legitimacy of its conduct.[372] The Court explicitly said that security rules do not provide whimsical, unhinged, uncontrolled, or unrestricted powers. Furthermore, the Court maintains the jurisdiction to evaluate the logic of actions made by the detaining authority.[373] The ruling substantially limited the discretion bestowed upon the detaining authority under the altered legislation. The apex court reaffirmed the utmost significance of protecting fundamental rights of citizens and rendered a decision holding government accountable for its abuse of authority.

Abolition of 1962 Constitution

The reputation of Ayub government was damaged beyond repair due to its authoritarian actions. In response to tyrannical actions, widespread protests and public demonstrations ensued throughout the country which ultimately culminated in the resignation of Ayub Khan. As per the stipulations of the Constitution, an election was obligatorily scheduled to occur within a time-frame of ninety days following the resignation of the President.[374] Thus, Ayub Khan who rose to

[370] *Begum Agha Abdul Karim Shorish Kashmiri v Government of West Pakistan* (PLD 1969 Lahore 438) at p.444.
[371] *Government of West Pakistan v Begum Agha Abdul Karim Shorish Kashmiri* (PLD 1969 SC 14) at p. 31.
[372] Ibid.
[373] Newberg, *Judging the State*, 104.
[374] Article 165(4), Constitution of Pakistan, 1973

the echelons of power in an unconstitutional way had to abdicate his authority in the same way. In defiance of the constitutional procedure, he transferred the power to General Yahya Khan.[375]

Upon attaining power, Yahya Khan emulated the decisions of his predecessor. He proceeded to abrogate the Constitution, dissolve legislative bodies and effectively disbanded Cabinet members.[376] Hence, constitutionalism in the country suffered another setback through yet another unconstitutional action carried by another military ruler.

3.7 Constitutional Jurisprudence Leading to Passage of 1973 Constitution

After Yahya Khan assumed power, he immediately abrogated the Constitution of 1962. Under the Yahya regime, Pakistan's first elections took place on the principle of adult franchise. The elections were considered as free, fair and without violence.[377] In the province of East Pakistan, Awami League was victorious while Pakistan People's Party emerged victorious in western wing of the country.[378] Nevertheless, Awami League gained an absolute majority in National Assembly and under the rules of politics should have been invited to form government. However, Bhutto was adamant on an equal role in formation of constitution as a representative of the West Pakistan. Owing to the pressure exerted by Bhutto and his military junta, Yahya Khan postponed the National Assembly session indefinitely. The government's disregard of the electoral results resulted in widespread alienation and transformed the calls for provincial autonomy into a secession movement.[379] Due to unstable political situation and a botched attempt to quell resistance through a military operation in East Pakistan, Dhaka fell on 16 December 1971 and became the state of Bangladesh.

This series of tragic events mounted huge pressure on Yahya regime and in an attempt to chart the future constitution of the country, Bhutto undertook the position as the first civilian martial

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[375] Khan, *A History of Judiciary in Pakistan*, 91.
[376] Ibid.
[377] Newberg, *Judging the State*, 115.
[378] Khan, *Constitutional and Political History of Pakistan*, 208.
[379] Lawrence Ziring, *Pakistan in the Twentieth Century* (Oxford: Oxford University Press, 1997), 346-47.

law administrator of the country. Though government convened the session of the Constituent Assembly, it used its power under martial law to coerce its political agenda.[380] Several political opponents and journalists were tried under martial law regulations. Some dissidents were placed under detention under Martial Law Regulations.[381] The detainees challenged the orders of detention; however, their petitions were rejected by the Lahore High Court which affirmed the validity of Jurisdiction of Courts (Removal of Doubts) Order 1969, an instrument which ousted jurisdiction of the High Courts.[382] An appeal was filed by petitioners.

In *Asma Jillani case*[383] the highest court of Pakistan denied legitimacy to martial law regime. Among other important issues the court had to decide the legal standing of ratio taken in the *Dosso* case. It was specifically held that Kelsen's theory lacked universal acceptance and Keslen's intention was not to devise a philosophy which would provide support to a totalitarian system.[384] Apex Court maintained that it would be apt to trace the *grundnorm* in the Objectives Resolution which was framed by the political representatives of the country instead of attempting to find in it in writings of alien jurists.[385] Furthermore, it was held that the Presidential Order could not bar jurisdiction of superior judiciary under 1962 Constitution.[386] The Order under which petitioners were detained was struck down by the Court and General Yahya was declared as a usurper as he had no claim to power under the Constitution of 1962.[387] Given the tumultuous constitutional jurisprudence of the country, this decision delegitimized a military regime and invalidated numerous martial law regulations. The Court's disapproval of the martial law and divergence from the ratio of *Dosso case* was evident from the following passage of the judgment:

> "It would be paradoxical indeed if such a result could flow from the invocation in the aid of a State of any agency set up and maintained by the State itself for its own protection from external invasion and internal disorder. If the argument is valid that the proclamation of

[380] Newberg, *Judging the State*, 119.
[381] A politician from Lahore Malik Ghulam Jillani and a journalist Altauf Gauhar were detained by the Bhutto regime.
[382] Khan, *Constitutional and Political History of Pakistan*, 252.
[383] *Asma Jillani v Government of Punjab* (PLD 1972 SC 139).
[384] Ibid.
[385] Ibid, see also Newberg, *Judging the State*, 122.
[386] Khan, *A History of Judiciary in Pakistan*, 103.
[387] Ibid.

> Martial Law by itself leads to the complete destruction of the legal order, then the armed forces do not assist the state in suppressing disorder but actually create further disorder, by disrupting the entire legal order of the state."[388]

Unlike its earlier precedents, apex court chose to set a different trajectory for constitutionalism in the country. The power of executive was brought into question. It is also argued by some commentators that the Bench in *Asma Jillani case* debunked the reasoning in *Dosso case* because they were of the opinion that decision in *Dosso* was nothing more than an abandonment of constitutional duty of judiciary to act as a guarantor for democracy in the country.[389] Even though the judiciary did invalidate numerous actions of the martial regime, it was fully aware of its role in a constitutional dispensation of Pakistan.

In another important constitutional case[390], apex court refrained from assuming an absolute role in constitutional arrangement of the state. After assuming power, Bhutto government and the members of legislature adopted the Interim Constitution.[391] This new constitutional instrument provided validation to the Orders, Regulations made under martial law and took away jurisdiction of Courts via an ouster clause.[392] Some critics of the Bhutto government were incarcerated under Regulations of Martial Law. Special military tribunals imposed different imprisonment terms on these critics.[393] The detainees challenged the orders of their detention in High Court and it did not find weight in argument about ouster of jurisdiction under the Interim Constitution. The Court had a rather disdainful view towards the trials by military tribunals.

In view of the government, this judgment to be provided a policy role to the courts and thus instituted an appeal. The *Zia ur Rehman* case led to the formulation of important principles concerning the authority of the nation's highest judiciary and the extent of constitutional oversight over legislation.[394] The Court acknowledged and reaffirmed the written constitution's supremacy

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[388] *Asma Jillani v Government of Punjab* (PLD 1972 SC 139).
[389] Newberg, *Judging the State*, 126.
[390] *The State v. Zia ur Rehman* (PLD 1973 SC 49).
[391] Khan, *Constitutional and Political History of Pakistan*, 254.
[392] Article 281, Interim Constitution of 1972.
[393] Khan, *Constitutional and Political History of Pakistan*, 257.
[394] *The State v. Zia ur Rehman* (PLD 1973 SC 49).

and judiciary's responsibility to enforce its provisions.[395] Commenting upon significance of constitutional review, the Court maintained that it was constitutional tool for accountability and it cannot be used for policy making. Moreover, it was acknowledged that the judiciary lacked the authority to declare constitutional provisions null and invalid. The petitioners had contested the Interim Constitution's legitimacy by arguing that it had not been drafted by a competent legislature.[396] However, this argument was considered untenable and the Court determined that National Assembly's principal function was the drafting of the Constitution and it had fulfilled this duty.[397] It was specifically determined by the court that nullifying a constitutional provision was not in its lawful jurisdiction. Judiciary did not provide blanket cover to the ouster clause given in the interim Constitution and held that the validity could not extend to the acts done under martial law regulations which were undertaken *mala fide.*

In a way the judgment in *Zia ur Rehman case* can be considered as a good example where the Supreme Court did not assume supra-constitutional role nor did it construe constitutional provisions in an extensive manner. In contrast to subsequent jurisprudence, the highest court explicitly asserted that authority of constitutional review did not encompass scrutiny of constitutional provisions for their validity because it was the domain of the people of Pakistan to determine the content of the Constitution.

3.8 Judicialization of Politics—Constitutional Jurisprudence on Dissolution of Governments

The constitutionalism in Pakistan has seen many ebbs and flows. The jurisprudence on dissolution of governments presents another example where the constitutional courts had to check legality of Presidential actions on touchstone of constitutional provisions. Ultimately, the question of dissolution was more of a political question than a legal one, nevertheless, judiciary was obligated

[395] Ibid, see also Newberg, *Judging the State*, 128.
[396] Khan, *A History of Judiciary in Pakistan*, 105.
[397] Ibid.

to assess the legitimacy of dissolution of governments by President. During his term as a military dictator, General Zia enacted modifications to the core principles of the Constitution. Through introducing Eighth Amendment in the constitution, he enhanced authority of President by giving him powers to dismiss federal legislature and announce new elections.[398] This power gave unrestrained authority to dismiss elected governments on the basis of subjective assessment of their performances.[399] Speaking from the perspective of constitutionalism, it is often debated that the courts are better equipped to ensure rule of law and prevent arbitrary decision making. Jurisprudence on dismissal of Assemblies tell an altogether different story.

The First Dissolution—*Haji Saifullah Case*

The application of powers stipulated in Article 58(2)(b) was first demonstrated by Zia ul Haq through dismissal of administration of Muhammad Ali Junejo on May 29, 1988.[400] The charge sheet against the Junejo government included breakdown of law and order, deterioration of public morality.[401] Hence, the President reached the conclusion that the government could not fulfil its constitutional mandate and there was an immediate need for new elections. The Presidential order pertaining to dismissal of National Assembly was challenged in constitutional courts of Pakistan. In a landmark constitutional case[402], highest court maintained that legislature could only be dissolved take place under some specific circumstances. In order to exercise this power, there must be a situation in which there is complete breakdown of government, its authority is diminished and government cannot function under the constitution.[403] The Court prescribed that prior to exercising this authority, the President must develop an objective opinion grounded on verifiable grounds.[404] The aforementioned verdict imposed restrictions on the President's capacity to utilise

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[398] Article 58 (2) (b) was incorporated under the Eighth Constitutional Amendment which allowed the President to dissolve the National Assembly

[399] Osama Siddique, "The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its Discontents," *Arizona Journal of International & Comparative Law* 23 no.3, (2006): 622.

[400] Khan, *Constitutional and Political History of Pakistan*, 389.

[401] Ibid.

[402] *The Federation of Pakistan v Muhammad Saifullah Khan* PLD 1989 SC 166.

[403] Ibid, see also Siddique, "The Jurisprudence of Dissolutions," 655.

[404] Ibid.

discretionary powers in an arbitrary manner. One of the judges even concluded that effectiveness and success or failure of elected assemblies could not be examined beyond the pale of constitution.[405] Thus, the undemocratic and arbitrary decision making was checked through the pronouncement of this decision.

Even though the Court declared that dissolution of Assembly lacked legality, it did not restore dissolved Assembly. The Court justified its decisions on political grounds which begs the question as to how a court could decide a case when a substantial change in political situation has taken place.[406] It is indeed factually true that political scenario had altered significantly as numerous politicians had changed their political parties and were preparing for the elections.[407] Nevertheless, this justification was not sufficient to give effect to an unlawful action. It is also argued that the Supreme Court preferred collective good—elections over individual interest—restoration of Assembly.[408] However, this judgment did raise fundamental enquiries about judicial interpretation and usage of political facts. It was a consequentialist approach on part of the top court to invalidate presidential directive but not to restore the dissolved Assembly.

Dissolution of First Benazir Government—*Tariq Rahim Case*

The weak democratic dispensation of Pakistan was once again tested when President Ghulam Ishaq Khan sacked Benazir administration invoking Article 58(2)(b) of Constitution. Leading a weak coalition government, Benazir had to face a turbulent opposition from Punjab where the opposition was in power.[409] Furthermore, ethnic tensions in the province of Sindh and a tense relationship with the President were also some key factors that culminated in the dismissal of her

[405] See Justice Shafi ur Rehman's Observations in *The Federation of Pakistan v Muhammad Saifullah Khan* (PLD 1989 SC 166).
[406] One of the reasons due to which the Court did not restore the Assemblies was the fact that numerous members of the ruling party had joined other political factions and the nation was ready for a new election.
[407] Siddique, "The Jurisprudence of Dissolutions," 656.
[408] Newberg, *Judging the State*, 209.
[409] Bakhtiar Khan, Arif Khan and Irfan Khan "The Crisis of Governance in Pakistan: A Critical Analysis of Benazir Bhutto Government," *Global Political Review* Vol IV, No.III (Summer 2019): 14.

government.[410] The Presidential order enlisted political failures and rampant corruption as the major charges against the Benazir government.[411] The deposed government described the President's actions as unconstitutional and arbitrary.[412] The matter was brought before two high courts of the country and both Courts endorsed dissolution of Assembly by relying upon the ratio of *Haji Saifullah case.* This decision was challenged in the apex court.

After a review and analysis of facts surrounding this case the apex court decided that dissolution order was justified.[413] In its judgment, the apex court observed that repeated requests were made by the federating units (provinces) to constitute important constitutional bodies such as National Finance Commission and Council of Common Interests to resolve disputes between federation and the provinces, however, federal government did not pay any heed to such requests.[414] Explaining the test for exercise of powers under Article 58 (2) (b), Justice Rehman observed:

> "The act of dissolution is a significant authority that should only be used in cases when there is a tangible or impending collapse of the constitutional system, rather than a mere failure to adhere to a specific provision of the Constitution. There may arise circumstances in which it becomes necessary to utilise this authority, particularly when there is a widespread, persistent, and all-encompassing disregard for multiple provisions of the Constitution, giving rise to the perception that the governance of the nation is influenced more by non-constitutional means rather than adherence to the Constitution itself."[415]

Furthermore, Court noted that dereliction in discharging constitutional duties jeopardized the existence of federation. Contrary to the test mentioned for dissolution of Assembly, the above mentioned passage shows that the Supreme Court deviated from criterion mentioned in the *Haji Saifullah* case that specified that a comprehensive collapse of constitutional apparatus would justify the dissolution of Assemblies.[416] Supreme Court did not give reasons for the change in principle for using powers under Article 58(2)(b) but this new interpretation gave ample powers to the President to 'pre-empt' an imminent breakdown of constitutional machinery. Thus, the President

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[410] Ibid, 15-16.
[411] Newberg, *Judging the State*, 215. See also Maleeha Lodhi, "Why Benazir Bhutto Fell," *The News* 6 August 1991, 6.
[412] Ziring, *Pakistan: At the Crosscurrent of History*, 216.
[413] Ibid.
[414] Ibid, see Khan, *Constitutional and Political History of Pakistan*, 406.
[415] *Ahmad Tariq Rahim v Federation of Pakistan* (PLD 1992 SC 646) at p.664-65.
[416] Siddique, "The Jurisprudence of Dissolutions," 664-65.

invoked his authority under the infamous Article 58(2)(b) and an elected government had to leave office based on the subjective evaluation of the President. Since the Assembly was dissolved due to agreement of apex court with the charge sheet of the President, there was not an objective basis for validating the order of the President. After dissolution of Assembly, fresh elections were called and the electoral coalition of conservative parties gained majority in legislature and Nawaz Sharif assumed the position of Prime Minister.

Dissolution of Nawaz Government and Subsequent Restoration—*The Nawaz Sharif Case*

Just like the Benazir administration, tensions developed between the government of Mr. Sharif and the President. There was a prevailing belief that Prime Minister intended to limit powers of the President and to take away Presidential authority to dissolve Assemblies via a constitutional amendment. The mutual distrust between the two individuals reached its zenith when the Prime Minister publicly accused the President of conspiring against his government. Furthermore, the Prime Minister unequivocally made it clear that he was not going to resign and would not take any dictation from the office of President. The President termed this assault as an "act of subversion" and labelled the Nawaz administration for being the most corrupt government in the history of the country.[417] Once again the President had disbanded legislature by using his constitutional powers. The charge sheet against Nawaz government included mass resignations of the members of opposition members, malicious allegations by Prime Minister, inability of federal government in protecting sovereignty of country, endemic corruption and nepotism, victimization of opposition leaders and misuse of public resources.[418] The President also appointed a caretaker government after dismissal of Nawaz government.

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[417] Ziring, *Pakistan: At the Crosscurrent of History*, 227.

[418] *Muhammad Nawaz Sharif v the President of Pakistan* (PLD 1993 SC 473) at p.554, see also Khan, *Constitutional and Political History of Pakistan*, 417-18.

It is significant to observe that Nawaz Sharif expeditiously filed a petition contesting the verdict by applying under original jurisdiction of apex court.[419] In previous cases of dissolution, petitioners had invoked appellate jurisdiction of Court against the Presidential Order. Under provisions of the Constitution, the top court could only decide a matter under its original jurisdiction if such matter is of importance to public and is concerned with enforcement of constitutional rights of people. The important question was which particular fundamental right justified invocation of original jurisdiction of highest court. The Court accepted the petition under its original jurisdiction by giving a broad interpretation to fundamental right of association. The court ruled that the constitutional entitlement of association includes a right of winning party to establish government.[420] Thus a novel interpretation of a constitutional right enabled court to exercise original jurisdiction in this case.

Unlike *Tariq Rahim case* where Court unequivocally acknowledged of President's discretion to pre-empt the imminent dysfunctionality of constitutional machinery and dissolve Assembly under constitutional provisions. In a stark contrast to the line of reasoning taken in *Tariq Rahim case,* the Court held that only way to determine whether a Prime Minister commands the majority of House is through a vote of confidence.[421] However, in the event of such a situation, the overthrow of the Benazir administration would not have been warranted, given that she had successfully prevented a motion of no confidence in legislature.[422] From the perspective of constitutionalism, it can be said that the Court restrained President from using his powers in an arbitrary manner. However, departure from earlier rulings created a perception that the court was motivated to grant relief to a particular political party. The superior judiciary made an attempt to rectify its decision in *Haji Saifullah case* by restoring National Assembly. On face of it, the judgment was hailed as a success

[419] Under Article 184(3) of the Constitution, the Supreme Court has powers to make orders in a matter of public importance involving fundamental rights of the citizens.
[420] Siddique, "The Jurisprudence of Dissolutions," 674.
[421] *Muhammad Nawaz Sharif v the President of Pakistan* (PLD 1993 SC 473).
[422] Siddique, "The Jurisprudence of Dissolutions," 675.

for parliamentary democracy and constitutionalism in the country as an elected government was restored by nullifying the illegal order of the President. The arbitrary character of the Presidential Order was examined and unlike *Khawaja Tariq Rahim case,* the Court did not validate the action.

Dissolution of Second Benazir Government—The *Benazir Bhutto Case*

Following the elections held in 1993, Benazir Bhutto assumed office for her second term as Prime Minister. The history began to repeat itself when tensions erupted between Prime Minister and the President Leghari. Bad governance, deteriorating state of public order in Sindh and charges of corruption led to hostile relationship between the holders of two constitutional offices.[423] Furthermore, the famous *Al-Jehad Trust Case,* also created acrimony between executive and judiciary. Benazir attempted to delay the implementation of the judgment as she considered that judicial appointments were sole remit of the executive. The President and the Prime Minister engaged in a dispute regarding the implementation of the *Al-Jehad* judgement. This dispute arose when the President instituted a Presidential Reference seeking clarification on whether the President's power to appoint judges in constitutional tribunals was dependent on the instruction of the Prime Minister.[424] Benazir government resisted this reference on the ground that President filed this reference without seeking advice from Prime Minister, and thereby circumvented a constitutional requirement. The continuing strife between the top constitutional offices prompted the President to dissolve National Assembly in November 1996. Worsening public order in Karachi, Prime Minister's contempt to judgment of apex court in *Judges' Case* and her continuing criticism on the judiciary and corruption were the main charges mentioned in order of dissolution.[425] In the wake of this development, a constitutional petition challenging Presidential action was lodged in apex court.

[423] Siddique, "The Jurisprudence of Dissolutions," 682.
[424] Ibid.
[425] Ibid, 440.

The top court did not decide constitutional petition against dismissal of government as rapidly as it did in the *Nawaz Sharif Case*. Some commentators believe that hearing of petition was strategically delayed to enable the caretaker government to make important economic decisions and address political violence prevalent in the state. In fact, the Chief Justice initially dismissed the petition on flimsy procedural grounds. Later on, when the petition was admitted, it was fixed after other cases and there arose an impression that the Chief Justice deliberately wanted to frustrate the petition. Finally, the court reaffirmed the Presidential order of dissolution.[426] It was argued by the petitioner that as per earlier judgment of court in the *Nawaz Sharif Case*, only an absolute breakdown of constitutional machinery could justify Presidential action of dismissal of legislature under the Constitution.[427] However, Court took a different stance in this petition when the Chief Justice remarked that the use of such authority may be warranted in situations when there is a widespread, persistent and all-encompassing disregard for several constitutional provisions.[428] This was a clear deviation of the standard established in *Nawaz Sharif Case*, as the Court held that a continued non-compliance with the constitution could also trigger the dissolution of Assembly. Though the Court attempted to reconcile its earlier precedents and attempted to clarify that judgment was in line with reasoning in *Nawaz Sharif Case*, it was quite evident that the test laid down for dissolution in this constitutional petition was far broader in scope than the one provided in the *Nawaz Sharif Case*.[429] The petitioner also questioned that the exact facts and evidence which prompted President to use his authority to dismiss Assembly. Nevertheless, the court adopted an alternative approach by maintaining that President did not require material to weigh in the decision of dissolution of Assembly nor was it a requirement that the President must scrutinize the evidence in detail. Thus,

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[426] *Benazir Bhutto v. President of Pakistan* (PLD 1998 SC 388) Opinion of Chief Justice Sajjad Ali Shah, paragraph 166, p. 567.
[427] Ibid.
[428] Ibid.
[429] Siddique, "The Jurisprudence of Dissolutions," 682.

all the arguments about parliamentary nature of government and restrictions on presidential authority were altogether ignored by apex court.

3.9 Public Interest Litigation—Beginning of Judicial Activism in Pakistan

Apex court began to increase its powers by means of public interest litigation. Public interest law is defined as: "Legal practice that advances social justice or other causes of public good."[430] The process of public interest litigation involves institution of actions by private citizens in courts for redressal of public wrongs. In Indian constitutional jurisprudence, a huge corpus of case laws has developed in the area of public interest litigation. In a landmark Indian judgment,[431] the Indian apex court elucidated concept of public interest litigation in the following terms:

> "Law, as I conceive it, is social auditor and this audit function can be put into action when someone with real public interest ignites the jurisdiction."[432]

In another case, the Indian Supreme Court defined the public interest litigation in the following way:

> "Our adjectival branch of jurisprudence, by and large, deals not with sophisticated litigants but the rural poor, the urban lay and the weaker societal segments for whom law will be an added terror if technical misdescriptions and deficiencies in drafting pleadings and setting out the cause-title create a secret weapon to non-suit a part. Where foul play is absent, and fairness is not foulted, latitude is a grace of processual justice. Test litigations, representative actions, pro bono publico and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to by-pass the real issues on the merits by suspect reliance on peripheral procedural shortcomings. Even Article 226, viewed on wider perspective, may be amenable to ventilation of collective or common grievances, as distinguished from assertion of individual rights, although the traditional view, view, backed by precedents has opted for the narrower alternative. Public interest is promoted by a spacious construction of locus standi in our socioeconomic circumstances and conceptual latitudinarianism permits taking liberties with individualisation of the right to invoke the higher Courts where the remedy is shared by a considerable number, particularly when they are weaker. Less litigation, consistent with fair process, is the aim of adjective law."[433]

Thus, public interest litigation entails using judicial processes to resolve matters which concern public at large. Numerous factors determine characteristics and extent of public interest litigation

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[430] Black's Law Dictionary, 9th Edn. (2009).
[431] *Fertilizer Corporation Kamgar Union v Union of India* (AIR 1981 SC 344).
[432] Ibid, Justice Krishna Iyer's Remarks on Public Interest Litigation.
[433] *Janata Dal v. H.S. Chowdhury* (AIR 1993 SC 892).

in a polity. Arguably, when litigation gives rise to issues which go beyond the interests of the litigants, the courts have to make serious political and constitutional choices.[434] The key question which arises in such situations is whether the citizens can avail remedies in court in name of public interest or is the state solely responsible for protecting public interest? If the courts go by an elitist view then they would always think that they would always consider it the prerogative of state to define and enforce public interest.[435] Conversely, if everyone is allowed to raise public interest matters in the court then such litigation would become an alternative to standard judicial practices and would diverge courts from adjudicating on individual rights and duties.[436] Therefore, it is essential to have some concrete parameters for public interest litigation.

Proponents of public interest litigations view courts as ultimate guardians of public interest. Judiciary is often seen as the most "rational" decision making organ.[437] However, it is not always the right idea to take every public interest matter to the court. It has been maintained that the judicial action can be uneven and spotty.[438] Furthermore, using judiciary to resolve every public interest matter result in inefficient and sometimes arbitrary decisions. Thus, it is important to set the contours of public interest litigation.

Public interest litigation can give rise to judicial activism. The whole of point of this litigation is to address the void created by the legislative and executive branches. As per this line of argumentation, the inactivity, incompetence and disregard for law by other branches of government compels judiciary to play an activist role and fill in the vacuum left by the other

[434] David Feldman, "Public Interest Litigation and Constitutional Theory in Comparative Perspective," *The Modern Law Review* 55, no.1, (January 1992), 48.
[435] Ibid.
[436] Ibid.
[437] Donald L. Horowitz, "The Courts as Guardians of Public Interest," *Public Administration Review* 37 No.2 (March-April 1977), 148.
[438] Ibid.

constitutional branches of government.[439] This actually goes beyond the conventional role accorded to judiciary in a constitutional dispensation.

Constitutional Basis for Public Interest Litigation in Pakistan

In Pakistan, the underpinnings of litigation pertaining to public interest can be seen in express provisions of the constitution. Judicial role in public interest litigation is necessitated by the fact that the Constitution of 1973 enshrines original jurisdiction for constitutional courts. This original jurisdiction is meant to enable judiciary to implement fundamental rights of people.[440] Sometimes it might appear that there is an overlap between the respective jurisdictions of the Supreme Court and the High Courts, however, it must be noted that both jurisdictions are premised upon different threshold requirements.[441] Original jurisdiction of a High Court as per constitutional provisions is:

> "A High Court may, if it is satisfied that no other adequate remedy is provided by law... on application by the aggrieved person make orders on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Right."[442]

Evidently, the jurisdiction of High Court can be invoked by "an aggrieved party". Anyone who wishes to move to High Court must establish their *locus standi*[443]. It is vital to satisfy the condition of *locus standi* in such petitions as is laid down in a judgment of the Balochistan High Court. The Court held:

> "Admittedly, the constitutional jurisdiction of this Court could be invoked by all citizens when there is infringement of any fundamental rights. Thus, in like case it is the duty of Court to protect Fundamental Rights, guaranteed by the Constitution. Thus the powers available under Article 199 of the Constitution this Court could issue appropriate directions for enforcement of a Fundamental Right. To invoke the 'constitutional jurisdiction' of this Court one is required to first qualify the test of being 'aggrieved person' and then to show that his case falls in any of the categories, so defined by the Article 199 of the Constitution, that there is no alternate legal remedy else the petition. To satisfy the requirements of an 'aggrieved person' in public interest litigation under Article 199 of the Constitution, the petitioner needs to disclose

[439] M. M. Semwal and Sunil Khosla, "Judicial Activism," *The Indian Journal of Political Science* 69, no.1 (January- March 2008): 114.
[440] Maryam S. Khan, "Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization," *Temple International & Comparative Law Journal*, 28, no.2 (Fall 2014): 298.
[441] Ibid, 299.
[442] Article 199, Constitution of the Islamic Republic of Pakistan.
[443] *Locus standi* refers to the entitlement or ground to present a case in the Court.

> a person interest in the performance of legal duty owed to him which if not performed would result in the loss of some personal benefit or advantage or curtailment of a privilege in liberty or franchise... Any person who fails to demonstrate the above pre requisites as recognized by the law has no locus standi or any cause of action to seek any relief under Article 199 of the Constitution."[444]

Another constitutional requirement to apply for original jurisdiction of the High Court is that aggrieved party must show that there is no other adequate legal remedy besides applying to the High Court. If anyone is able to show that these constitutional requirements are met they can seek the remedy from High Court.

Threshold for original jurisdiction of apex court is different from that of High Courts. Constitution defines original jurisdiction of Supreme Court in following terms:

> "Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article."[445]

As opposed to High Courts, when it comes to original jurisdiction of apex court it must be noted that this jurisdiction is not dependent upon the requirement of *locus standi.*[446] In numerous cases, the highest Court has dispensed with or relaxed the requirement of *locus standi* for instituting a petition under its original jurisdiction.[447] This suggests that an individual is not required to be an aggrieved party in order to apply for original jurisdiction of the highest court of Pakistan. The only important thing which needs to be proven is that issue must hold a collective significance and should not merely be concerned with private interests of individuals. It is clear from the above debate that when it comes to the case of an aggrieved person, both apex court as well as provincial High Courts have concurrent jurisdiction to provide relief and it is up to the aggrieved party to choose forum for redressal of his grievance. It would be enlightening to see the expansion of

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[444] *Balochistan Medical Association v. Government of Balochistan* (2017 CLC 1195), paragraph 8, p. 1198-1999
[445] Article 184(3) Constitution of Pakistan.
[446] Khan, "Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan," 300.
[447] See for example, *Benazir Bhutto v Federation of Pakistan* (PLD 1988 SC 416) at p. 488-493, and *Imran Khan v Election Commission of Pakistan* (PLD 2013 SC 120) paragraph 15, p. 129-131.

judicial power through public interest litigation and its overall impact on the constitutionalism in Pakistan.

Benazir Bhutto v Federation of Pakistan—Expanding the Scope of Public Interest Litigation

Following end of General Zia's military regime, the Supreme Court started developing and expanding public interest litigation. During his time in office, General Zia introduced a number of amendments in legal framework pertaining to political parties to oust Pakistan People's Party from electoral politics of country.[448] These amendments were challenged by Benazir Bhutto who filed a petition under original jurisdiction of apex court.[449] Prime contention of the petitioner was that amendments in Political Parties Act, 1962 contravened freedom of association which is basic right guaranteed under the Constitution.[450] Principally, the federation objected that the petitioner did not meet the criteria of aggrieved party which precluded the petitioner from falling under the original jurisdiction of the apex court. It was the first instance when the Court ruled that the authority of constitutional review provided the Court with powers to declare a legislation void when it is contrary to any fundamental right of the citizens. While dispensing the formal *locus standi* requirement, the Court observed:

> "...When interpreting Article 184(3), it is important to avoid a rigid adherence to interpretive standards and practises, since ensuring access to justice for everyone is crucial in promoting the collective ambitions and national goals of the population... This approach aligns with the current period of advancement and aims to assert that the Constitution is not just a relic of the past, but also responsive to the evolving future. Therefore, it would be ineffective to persist in employing a formalistic approach to constitutional interpretations, as has been done in the past. This approach has only succeeded in minimising conflicts between the government and individuals, without adequately extending the protections of civil liberties and the guiding principles of governance to all members of society."[451]

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[448] Numerous provisions of the Political Parties Act, 1962 were amended to deprive PPP from contesting elections. For instance, it was provided in one of the amendments that a person who had been an office bearer at any time after 1971 of a political party that had not been registered by the Election Commission would not be qualified to contest elections for a period of seven years. Similarly, those who held positions in the cabinet of the Bhutto government were also disqualified from contesting elections for a period of seven years. These provisions were meant to specifically keep PPP leadership out of parliament. For further details see, Khan, *Constitutional and Political History of Pakistan*, 379.

[449] *Benazir Bhutto v Federation of Pakistan* (PLD 1988 SC 416) at p. 464-465.

[450] Ibid.

[451] Ibid at p. 489-490.

This event signified the start of public interest litigation in Pakistan. Interestingly, it was a political case which initiated this string of litigation. However, country saw a monumental expansion in judicial power under the guise of public interest litigation.

Darshan Masih Case—Evolution of *Suo Moto* Jurisdiction

The Latin term *suo moto* stands for 'on its own motion'.[452] When a court or any other government functionary takes action on its own accord, this process is termed as *suo moto* action. It is an action without formal request of a party. Though the use of *suo moto* powers have increased exponentially in Pakistan, some commentators do not view them as part of the original constitutional scheme. That is why, some legal experts call the *suo moto* powers to be "self-created" as there aren't any specific basis for exercise of this power in the constitutional design.[453] The reason why Justice Fazal has a skeptical view of *suo moto* powers is because such powers facilitate judicial activism, disregard normal legal procedures and derogate the constitutional concept of separation of powers.[454] However, the contemporary constitutional jurisprudence considers *suo moto* powers to be an essential feature of modern public interest litigation. The subject of *suo moto* jurisdiction of Court has attracted an intense debate since the beginning of this jurisdiction in the landmark *Darshan Masih Case*[455]. In this case, Chief Justice received a telegram from a bonded laborer in a brick kiln who prayed from immediate help from the court against the brick kiln owners.[456] The petitioner described the appalling treatment of the brick kiln owners toward the bonded laborers and mentioned serious violations of fundamental rights of the laborers. Before ruling on the main prayer of the petitioner, the Court had to decide a fundamental question about taking cognizance of the matter. The Court made an expansive interpretation of its original constitutional jurisdiction

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[452] "Suo Moto," *The Law.com Dictionary* at https://dictionary.thelaw.com/suo-moto/
[453] Fazal Karim, *Change is Only Constant* (Karachi: Pakistan Law House, 2019), 228.
[454] Shayan Manzar, "A Concoction of Power: The Jurisprudential Development of Article 184(3) & Its Procedural Requirments," *LUMS Law Journal* 8, no.1 (2021): 6.
[455] *Darshan Masih v The State* (PLD 1990 SC 513) at p.513.
[456] Ibid.

and maintained that since there was no specific mechanism for taking cognizance under the said Article so the Court may initiate a case based on gravity of the issue.[457]

Clearly, it can be seen that Court moved away from the traditional mode and broadened the scope of its original jurisdiction by coining the concept of *suo moto* actions in Pakistani jurisprudence.

The case is significant from the angle of constitutionalism. The legal constitutionalists always consider courts to be the best forum for protection of individual rights of citizens.[458] It can be observed that in *Darshan Masih* case the court came to the protection of an aggrieved party by taking cognizance of the matter via a *suo moto* action. Furthermore, upon recommendations of the court, the legislature passed a special law which banned bonded labour.[459] Though, the court pioneered the *suo moto* actions in its judgment, it led to protection of a vulnerable segment of society. The action by the court prompted a legislation on the subject. Thus, by ensuring enforcement of the rights of bonded laborers through magnifying ambit of public interest litigation. Thus, the court actually affected a legislative change. This particular judgment supports the contention taken by the legal constitutionalists vis-à-vis importance of judiciary in implementing basic rights of public. However, the constitutional device of *suo moto* powers were excessively used by later Chief Justices in political cases. By giving expanding the limits of original jurisdiction of Court, a constitutional path toward judicial activism was opened and consequently it became hard for the relevant stakeholders to put this genie back in bottle.

Shehla Zia Case—Supreme Court defines 'Right to Life'

In Pakistan, public interest litigation became quite common in the last decade of twentieth century. After whittling down the procedural restrictions on exercise of its original jurisdiction, the Court also began to give substantive scope of rights. Apex court redefined the scope of 'right to life' in

[457] Manzar, "A Concoction of Power," 17.
[458] See for example, Marmor, *Interpretation and Legal Theory*, 149 and Dworkin, *Taking Rights Seriously*, 269.
[459] The Bonded Labour (Abolition) Act, 1992.

Shehla Zia case.[460] The aforementioned case has a prominent position in Pakistan's environmental law jurisprudence and is widely regarded as a landmark case. Additionally, its relevance extends to the realm of public interest litigation. In *Shehla Zia* case, some citizens sent a letter to Chief Justice in which it was prayed that the WAPDA should be stopped from installing an electricity grid in the residential sector as this action would endanger the life of residents.[461] Thereupon, apex court took cognizance of matter. The petition's maintainability was challenged by respondents who contended that the Court lacked jurisdiction to hear this matter as it did not fall under its original jurisdiction given that there was no violation of any constitutional right. This assertion was rejected this assertion and established its jurisdiction in the matter by taking support from constitutional right to life which makes it essential for the state to safeguard life of citizens.[462] The right to life was expounded at length by the Court in following words:

> "The word life is very significant as it covers all facets of human existence. The word life has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. For the purposes of present controversy suffice it to say that a person is entitled to protection of law from being exposed to hazards of electromagnetic fields or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installation..."[463]

Excerpt from judgment shows that Court gave an expansive and broad meaning to an important constitutional right. Now the advocates of political constitutionalism might argue that determining the exact scope of a particular right is political question which must be decided by the legislature after deliberations and weighing various considerations, the judgment provided citizens with an adequate remedy to challenge an executive decision by raising their concerns before the Court. Just like in case of *Darshan Masih*, court prioritized safeguarding rights of citizens through public interest litigation. The case also laid to enactment of the country's first special law on environment.[464] However, according to some commentators the expansive interpretation of right

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[460] *Shehla Zia v. WAPDA* (PLD 1994 SC 693) paragraph 7, p.712.
[461] Ibid paragraph 1, p.700.
[462] Art.9, Constitution of Pakistan.
[463] *Shehla Zia v. WAPDA* (PLD 1994 SC 693) paragraph 7, p.712.
[464] The Environment Protection Act, 1997.

to life has been abused by the litigants as well as the Courts.[465] Furthermore, the constitutional jurisprudence of Pakistan in the last two decades indicates that the judiciary has intervened and undermined legislature and executive by means of public interest litigation.

3.10 Redefining the Constitution through Public Interest Litigation—*Al Jehad Trust Case*

Apparently, concept of public interest litigation seems to provide citizens and interest groups with the constitutional means to raise their legitimate concerns before the superior judiciary. There is little question that public interest litigation has had a remarkable influence on the evolution of rights-based jurisprudence. However, the constitutional history of the country makes it clear that an expansive and broad interpretation of original jurisdiction of apex court could become an unruly horse. The absence of concrete contours of the original jurisdiction of the apex court has in many instances resulted in some form of discretion of the Chief Justice to consider a case under the purview of public interest litigation. Arguably, such unrestrained exercise of judicial power results in supremacy of judiciary over other branches of government. Such supremacy makes the whole concept of trichotomy of powers redundant. *Al Jehad Trust Case* offers a pertinent illustration of the phenomenon where the judiciary redefined the scope of constitutional provisions pertaining to judicial appointments.[466] This constitutional petition was instituted by petitioning original jurisdiction of the apex court. Again, the top court clearly laid down that requirement of *locus standi* was not an essential condition for invoking original jurisdiction of apex court and considered that interpretation of constitutional articles in relation to judicial appointments to superior courts was a matter of public importance.[467]

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[465] See for example, Khan, "Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan," 314, and Maryam Khan, "Legal Solution to a Political Question," *THE NEWS ON SUNDAY*, Jan. 8, 2012. The expansive interpretation of right to enable the Court to exercise judicial activism. "In a bid to protect right to life, the Supreme Court had intervened in a number of policies and activities, ranging from regulating wedding meals and kite flying to controlling prices of commodities."

[466] *Al-Jehad Trust v. The Federation of Pakistan* (PLD 1996 SC 324), paragraph 82, p.405-406.

[467] Ibid.

By means of this constitutional petition, the appointments and transfers of certain members of superior judiciary was challenged and clarification was sought as to meaning of constitutional provisions dealing judicial appointment superior courts.[468] The court in addition to establishing several observations regarding judicial appointments, elaborated on the extent to which executive and judicial branches may consult this matter. In a comprehensive judgment, it was noted that Chief Justice of Pakistan and Chief Justice of a High Court are the most competent authorities to assess an individual's qualifications and expertise for a position of judge of superior judiciary. Therefore, in its judgement, apex court held that opinions of Chief Justices were binding upon the government and in event of a dispute the executive branch should provide substantial justifications which would be subject to review by the court.[469]

Though Supreme Court emphasized on giving equal status to constitutional consultees, it gave a superior status to the recommendations of Chief Justice. Practically, authority to make judicial appointments shifted from Executive to the Judiciary. Now did this verdict open ways for judiciary to alter a constitutional provision by means of interpretation? The response to this query appears to be in the affirmative. Later constitutional jurisprudence attests to the fact that on several occasions judiciary has interpreted the constitution in ways that undermined the role of other constitutional functionaries and led to phenomenon of judicial supremacy.

The *Al-Jehad Case* also shows constitutional usurpation of power by the Court. Even a dynamic interpretation of constitution does not justify such arrogation of powers. It is pertinent to note that the Federal Government was authorized by constitutional provisions to appoint judges to superior judiciary. This mandate was taken away by widely interpreting the word 'consultation' and linking it with broad principle of independence of judiciary.

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[468] Ibid.
[469] Ibid.

3.11 Basic Structure Doctrine—Examining the Substance of Constitutional Amendments under Judicial Review

A controversial constitutional doctrine is theory of basic structure, a theory which put substantive restraints on the authority of legislature to alter the constitution. This theory is labelled as a judicial innovation because the judicial branch has laid down the contours of this theory judicial interpretation. Of course, the idea of unamendability of certain constitutional provisions is prevalent is explicitly provided in some constitutions of world. For instance, the 1958 Constitution of France contains an unamendable provision relating to structure of government. Under the French Constitution, no amendment can made to republican form of government.[470] Arguably, the most well-known example of unamendable constitutional provision is German Basic Law. It explicitly proscribes the legislature from amending the constitution in such a way that it affects dignity of humans or constitutional system, the division of Federation into Lander and core institutional principles.[471] It can be argued that the German Basic Law contains such unamendable provisions due to the horrors of the Third Reich when a majoritarian government changed the constitutional order and established a tyrannical regime. Nevertheless, these instances demonstrate that the legislative branch deliberately restricted its authority to amend some specific constitutional provisions. It is not difficult to comprehend the rationale behind an explicit provision that restricts legislature's power to amend specific sections of the constitution. However, it is hard to justify the creation of such prohibition through judicial verdicts when constitution places no such bar on constitutional amendments.

Some commentators believe that certain constitutional provisions might be implicitly unamendable even in absence of an express constitutional constraints on legislature's prerogative

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[470] Article 89, Constitution of France, 1958.

[471] On the German unamendable clause, see Helmut Goerlich, "Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany" (2008) 1 *National University of Juridical Sciences Law Review* 1, no.3 (2008): 397; Monika Polzin, "Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law" *International Journal of Constitution Law* 14 no. 2 (2016): 411.

to alter the constitution.[472] The chief way in which such implicit unamendability is established is through judicial interpretation of constitutional provisions. Admittedly, the presence of an express constitutional provision limiting the amending powers of the legislature leads to greater legitimacy and suffers less from institutional problems.[473] Just like Pakistan, the Indian Constitution does not have any unamendable provisions.[474] However, the courts have imposed certain restraints on parliament's authority to make amendments in constitution by coining 'Basic Structure Doctrine'. The doctrine lays down that power to bring about a constitutional amendment does not allow legislature to completely revoke or alter the essence of constitution or its fundamental characteristics.[475] The concept of the basic structure was introduced by the Supreme Court of India in the landmark decision of *Kesavananda Bharati* case.[476] Prior to this judgment, judiciary had always given reverence to legislature's prerogative to amend the Constitution.[477] The background of *Kesavananda* case is that the Indra Gandhi won two-third majority in the Parliament and in order to stamp supremacy of parliament passed Twenty-fourth and Twenty-fifth Amendments in 1971. These amendments enabled parliament to make constitutional amendments vis-à-vis fundamental rights of the citizens. These amendments were challenged in the *Kesavananda* case, these amendments were brought into challenge and the majority of the Bench unequivocally held that amendment powers do not extend to altering fundamental constitutional structure.[478] The minority of the Bench accorded equal status to all constitutional provisions and held that there were no unamendable provisions in the Constitution. Since the judgment essentially made the

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[472] Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (New York: Oxford University Press, 2017), 39.

[473] Ibid.

[474] Article 368 of the Indian Constitution specifically provides that there can be no limitation on the constituent power of the Parliament vis-à-vis amending the constitution.

[475] Roznai, *Unconstitutional Constitutional Amendments*: 42-43. See also Shivprasad Swaminathan, "The Long Slumber of Dicey's Indian Monarch," *Commonwealth Law Bulletin* 42 no. 2 (2016): 212.

[476] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461

[477] For example, In *Shankari Prasad v. India* (AIR 1951 SC 458), the Supreme Court held that even the fundamental rights could be altered via a constitutional amendment. The Court reached the same conclusion in *Sajjan Singh v. State of Rajasthan* (AIR 1965 SC 845).

[478] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461. See also T. R. Andhyarujina, *The Kesavananda Bharati Case—The Untold Story of Struggle for Supremacy by Supreme Court and Parliament* (Universal Law Publishing 2012).

constitutional amendments a subject of judicial review, it received criticism from several quarters. Justice Dwivedi who disagreed with the majority judgment made his dissent known in the following words:

> "I posit that it is not within our purview to make definitive determinations of worth on behalf of the populace. The establishment of a judicial government is not provided for in the Constitution of this nation. The responsibility of establishing primary standards has been exclusively entrusted to Parliament. Within the confines of Constitutional value choices, courts are granted the authority to use limited discretion in making value-based decisions. The Court is unable to assess the immediacy of an amendment and the potential harm to the State resulting from its absence, since it is limited in its access to all available material. In contrast, the Parliament has comprehensive knowledge about several influential variables, including social, economic, political, financial, national, and international aspects, which need an alteration. Consequently, the Parliament is better equipped to assess the prudence and practicality of such a modification."[479]

These observations show that judges who dissented with the majority opinion believed that the powers of legislature cannot be abridged by judiciary. Thus, the minority members showed deference to the democratic norms and questioned the proactive judicial approach to constitutional interpretation.

Clearly, the Court went beyond its constitutional mandate when it explained the limits of legislature's authority to amend constitution. The central inquiry that emerges is to the extent of authority held by the highest court to restrict the range or modify the interpretation of an explicit constitutional provision.

Evolution of Basic Structure Doctrine in Pakistan

The development of basic structure doctrine passed through different phases in Pakistan. In the beginning, the judges exhibited hesitancy in entertaining the notion of scrutinising the vires of a constitutional change. Taking into consideration the principles of democratic decision-making and the idea of division of powers, the Court opted for a strict construction of the constitutional language rather than engaging in idiosyncratic interpretations. However, when public interest litigation became common, the Court began to assert its clout by providing purposive

[479] *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

interpretation on numerous issues. As has been discussed before, in cases having a political dimension, the judgments of the courts relied on subjective evaluation of judges and had little to do with the earlier precedents. The beginning of the twenty first century saw a wave of judicial populism in which judicial power reached its zenith. The recent constitutional jurisprudence shows that though Pakistani judiciary refrains from using the term 'basic structure theory', it essentially follows the ratio of *Kesavananda* case. Judicial activism required the court to embrace this theory. It would be interesting to see development of this theory in Pakistan.

The issue about the power of the court to nullify constitutional modifications was brought before the Supreme Court of Pakistan in the case of *Zia ur Rehman.*[480] Zulifiqar Ali Bhutto's government tried and punished numerous political opponents and journalists under the Martial Law Regulations. Writ petitions were filed by some friends and relatives of such persons in the Lahore High Court where they challenged their convictions. The writ was allowed by Lahore High Court. The government challenged this judgment in *Zia ur Rehman* case claiming that court lacked jurisdiction to nullify provisions of constitution.[481] The Court acknowledged the claim and reaffirmed that it had never asserted itself to be exempted from the Constitution and that it is obligated to operate within the constraints outlined in the Constitution.[482] Furthermore, it was held that apex court only possesses jurisdiction to interpret constitution but it could not invalidate any provision of Constitution under its power to interpretation.[483] It is evident that the Court clearly defined the scope of its interpretive role in constitutional issues. Thus, the court clearly laid down that examining or scrutinizing a constitutional provision fell outside the pale of its authority.

The issue pertaining to list of salient features of constitution was brought before the court in *Mahmood Achakzai* case.[484] The petitioner argued that Provisional Constitutional Order 1981 and

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[480] *The State v. Zia ur Rehman* (PLD 1973 49).
[481] The Interim Constitution of 1972 provided validation to Martial Law Regulations.
[482] *The State v. Zia ur Rehman* (PLD 1973 49).
[483] Ibid.
[484] *Mahmood Khan Achakzai v Federation of Pakistan* (PLD 1997 SC 426).

Referendum Order, 1984 promulgated by General Zia ul Haq violated verdict in *Nusrat Bhutto* case.[485] Furthermore, petitioner challenged the validity of Eight Amendment constitutional amendment. Interestingly, Court made a reference to the "salient features of the Constitution" and restrained legislature from making changing to these salient features. The following observation identifies the salient features of the Constitution of Pakistan:

> "Eighth Amendment does not affect the basic structure of the Constitution because there is no basic structure in the Constitution of 1973 and salient features or special characteristics are mentioned in the Objectives Resolution which remained Preamble to all the four Constitutions promulgated in Pakistan. Objectives Resolution is harbinger to and beacon light of Constitution reflecting hopes and aspiration of people, who created Pakistan after sacrifices and insurmountable hardships and laid down guideline as to how they wanted to be governed. Objectives Resolution now is incorporated in the Constitution of 1973 by the Eighth Amendment as Article 2A which is now substantive part of the Constitution. Salient features and basic characteristics of the Objectives Resolution are federalism; parliamentary democracy and Islamic provisions including independence of judiciary. Article 239 in the Constitution provides for amendment to the Constitution to be made in the manner prescribed therein."[486]

In a way the Court attempted to distance itself from the basic structure doctrine as applicable in India. However, it can be seen that the Court identified basic characteristics of Constitution and placed limits upon the Parliament's authority vis-à-vis amending the constitution.[487] Furthermore, the Court held Eight Constitutional Amendment to be a valid piece of legislation as it was passed by an elected Assembly which was validly constituted.[488] It is noteworthy that the Court also made the observation that acknowledging certain prominent aspects of the constitution should not be interpreted as the Court having implicitly embraced theory of basic structure. The decision *Achakzai* case marked a distinct deviation from the preceding ruling in *Zia ur Rehaman* case. Furthermore, the Court also validated the Eighth Amendment albeit by limiting the powers of Parliament in relation to constitutional amendments.

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[485] *Begum Nusrat Bhutto v. Chief of Army Staff* (PLD 1977 SC 657).
[486] *Mahmood Khan Achakzai v Federation of Pakistan* (PLD 1997 SC 426).
[487] Under Article 239(6) of the Constitution, a constitutional amendment could not be challenged in any court. However, the absolute character of this provision was altered when the Court mentioned that the Parliament could not bring any amendment which is contrary to the salient features of the Constitution.
[488] Khan, *A History of Judiciary in Pakistan*, 246.

In another important case, superior highlighted immutable essential features of the Constitution when it validated *coup d'etat* of General Musharraf on principle of state necessity.[489] The verdict granted legislative authority to an undemocratic regime, and also provided it power to modify the Constitution. However, the Court added a caveat as to amendment of constitution by the Chief Executive. The Court maintained:

> "No amendment should be made in the salient features of the Constitution i.e. independence of judiciary, federalism, parliamentary form of government, blended with Islamic provisions."[490]

Clearly, it was one of the basic differences between *Zafar Ali Shah* case and *Nusrat Bhutto* case. While relying upon the ratio of the *Achakzai* case, the Court restrained the military regime from altering fundamental characteristics of the Constitution. However, this particular direction was not heeded by the Musharraf regime which almost rewrote the Constitution through Legal Framework Order (LFO), 2002.[491] Though the Court had included parliamentary system as an unamendable salient constitutional feature, Musharraf government turned the government into a quasi-Presidential system.[492] Legal Framework Order officially became part of the Constitution under the Seventeenth Constitutional Amendment. This whole constitutional change was contrary to the rules prescribed in the *Zafar Ali Shah* case. Though court specifically enjoined the Chief Executive from changing the salient features of the Constitution, this change happened anyway. Did the court have an obligation to implement its ruling with regard to basic features of the Constitution? Apex court responded to this question in *Pakistan Lawyers Forum* case.[493] In the said case, a constitutional petition challenging the Legal Framework Order, 2002, Seventeenth Constitutional Amendment and President to Hold another Office Act, 2004 was lodged in the apex court.[494] The main contention of the petitioners was that General Musharraf had violated the directions given

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[489] *Zafar Ali Shah v. General Pervez Musharraf* (PLD 2000 SC 869) at p.1219.
[490] Ibid at p. 1221.
[491] Khan, *Constitutional and Political History of Pakistan*, 487.
[492] This was clear from revival of Article 58(2)(b) under which the President could dissolve the National Assembly and inclusion of several laws in Sixth Schedule of the Constitution that took away power of the parliament to legislate on a number of subjects without prior sanction of the President.
[493] *Pakistan Lawyers Forum v. Federation of Pakistan* (PLD 2005 SC 719) paragraphs 29-38, p.752-757.
[494] Khan, *Constitutional and Political History of Pakistan*, 499.

under the *Zafar Ali Shah* case by promulgating LFO. It was also argued that Seventeenth Constitutional Amendment was against fundamental characteristics of Constitution and thus should be invalidated by Court. The Court dismissed the petition by upholding all the impugned legal instruments. From the perspective of basic structure theory, the following excerpt of the judgment hold significance:

> "There is a significant difference between taking the position that Parliament cannot may not amend salient features of the Constitution and between the position that if Parliament does amend these salient features, it will be the duty of superior judiciary to strike down such amendments. The superior courts of this country have consistently acknowledged that while there may be a basic structure to the Constitution, and while there may also be limitations on the power of Parliament to make amendments to such basic structure, such limitations are to be exercised and enforced not by the judiciary (as in the case of conflict between a statute and Article 8), but by the body politic, i.e. the people of Pakistan. The theory of basic structure or salient features, as far as Pakistan is concerned, has been used only as a doctrine to identify basic features."[495]

A plain reading of these observations indicates that though the Court had identified salient characteristics of Constitution, it lacked jurisdiction to invalidate an amendment in constitution that contravened these characteristics.

3.12 *Rawalpindi District Bar Association* Case—Redefinition of Judicial Power to Strike Down an Amendment to the Constitution

The apex court of Pakistan followed true spirit of basic structure doctrine in the *Rawalpindi District Bar Association* case.[496] Prior to this decision, it is evident that the Court had not explicitly asserted its authority to invalidate a constitutional amendment based on its inconsistency with the fundamental principles of the Constitution. There was a completely different judicial view on the issue in *Rawalpindi District Bar Association* case. Under the instant case, numerous provisions of the Eighteenth and Twenty-First Constitutional Amendments were challenged as being contrary to chief features of Constitution. The primary inquiry before highest court was to the existence of

[495] *Pakistan Lawyers Forum v. Federation of Pakistan* (PLD 2005 SC 719) paragraph 56, p. 763.
[496] *District Bar Association, Rawalpindi v. Federation of Pakistan* (PLD 2015 SC 401).

any substantive constraints on the legislature's authority to modify the Constitution.[497] Majority of Bench answered in the affirmative and also held for the first time that the apex Court reserved the right to substantively scrutinize legality of the constitutional amendments passed by the legislature. The court held that jurisdiction of apex court includes the authority to interpret the Constitution for the purpose of determining and delineating its defining salient features. The competence of the entity in question extends to the examination of the legality and constitutionality of any modification made to the constitution. This examination aims to ascertain whether any of the fundamental characteristics of the constitution have been revoked, abolished, or significantly modified as a result of such change.[498]

Thus, the majority of the Bench upheld the basic structure theory by maintaining that the Supreme Court can substantively review the constitutional amendments. This marked a significant shift in the constitutional jurisprudence of the country as it practically gave ultimate powers to judiciary in listing the basic features of constitution and to nullify constitutional amendments passed by the legislature if such amendments contravene such features. Some commentators found the principle laid in *Rawalpindi District Bar Association* case akin to landmark *Marbury v Madison* case.[499] The trouble which arises here is that what standard will court apply when they strike down constitutional amendments? In other words, the judgment provided arbitrary powers to court to void a constitutional amendment.

In reality, reserving the authority to nullify a constitutional amendment on the basis of conspicuous constitutional characteristics is equivalent to judicial supremacy. This approach involves criticising the institutions of elected representatives, which are answerable to the people. As previously stated,

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[497] Majid Rizvi, "*South Asian Constitutional Convergence Revisited: Pakistan and the Basic Structure Doctrine*," *Int'l J. Const. L. Blog*, Sept. 18, 2015, at: http://www.iconnectblog.com/2015/09/south-asian-constitutional-convergence-revisited-pakistan-and-the-basic-structure-doctrine Accessed on August 05, 2021.

[498] *District Bar Association, Rawalpindi v. Federation of Pakistan* (PLD 2015 SC 401).

[499] Neil Modi, *District Bar Association, Rawalpindi v. Federation of Pakistan: Marbury-Style Judicial Empowerment?*, at: http://www.iconnectblog.com/2019/12/district-bar-association-rawalpindi-v-federation-of-pakistan-marbury-style-judicial-empowerment/ Accessed on August 05, 2021.

the authority of constituent power is vested in the populace rather than the judiciary.[500] The judiciary has inherent powers and cannot appropriate component authority by using the notion of fundamental structure.

Therefore, a fundamental implication of the idea of basic structure is that the judiciary, rather than the Parliament, has ultimate authority in determining the kind and manner of constitutional amendments.[501] It is clear that by having the exclusive domain to lay down essential characteristics of constitution, judiciary has paved way for judicial supremacy. In a quest to look at everything from strictly legal angle sometimes the political dimension of constitution is overlooked. The judicial supremacy is a manifestation of constitutional entrenchment which implies a process in which courts entrench constitutional norms and this enables judiciary to even review the constitutional amendments.[502] Thus, more often than not judicial supremacy has its roots in interpretive supremacy of the Court.[503] As mentioned earlier, judicial supremacy does not augur well for institutional balance of power among governmental branches. Furthermore, such supremacy fosters an environment where judiciary interferes and disrupts working of the other constitutional limbs of government.

3.13 Conclusion

By reviewing the constitutional developments after creation of Pakistan, this chapter has addressed the research question pertaining to the expansion of judicial power in Pakistan. Furthermore, the chapter also addresses the research objective of identifying the critical constitutional developments which enhanced the judicial power. Pakistan's experience with legal constitutionalism demonstrates that there has been an incremental increase in the judicial power. Before attaining independence in 1947, the nation's constitutional framework

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[500] Waldron, "Judicial Review and Judicial Supremacy," *Public Law Research Paper No. 14-57*, Available at https://ssrn.com/abstract=2510550. Accessed on August 06, 2021.
[501] Joel Colon-Rios, "Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reforms in Latin America," *Victoria Wellington University Law Review* 44, no.3/4 (2013): 528.
[502] Manoj Mate, "Judicial Supremacy in Comparative Constitutional Law," *Tulane Law Review* 92, no.2 (2017): 408.
[503] Ibid, 452.

was formulated using legislative instruments that were handed down from colonial era. It is evident that constitutional framework implemented during colonial times were aligned with the interests and objectives of British rulers. A basic analysis of colonial constitutional framework demonstrates that the British exhibited a lack of concern for the rights of people of Indian subcontinent. Subsequent to partition of subcontinent, both Pakistan and India had an opportunity to create a constitutional order that would embody the goals and values of their respective people. In 1950, the Indian Constituent Assembly achieved the task of formulating and ratifying a written Constitution. Contrarily, Pakistan experienced numerous challenges in the process of developing its Constitution. The persistent conflict between organs of state impeded country's constitutional progress leading to dismissal of first constitution making body. This reflected a propensity to administer the country in a colonial-style fashion, as opposed to devising mechanisms for participatory governance. These constitutional issues were brought before judiciary for resolution and the judicial response in these matters had a significant impact on the prospective trajectory of constitutionalism. It is essential to recognize that during the early years of the nation, the judicial verdicts showed proclivity towards strengthening executive branch of government. The fundamental principle of constitutionalism is rooted in prevention of abuse of power by government. The evolution of constitutionalism in Pakistan has seen many stages. This chapter has also provided a comprehensive analysis of the constitutional advancements after the adoption of the 1973 Constitution. The constitutional framework clearly delineates the respective functions and responsibilities of all limbs of government. Over time, the judiciary gradually established itself as a significant constitutional entity. The increase of judicial authority may be attributed to the occurrence of prominent political cases, which provided courts with the opportunity to provide judgements about the legality of the removal of various political administrations. The jurisprudence surrounding the dismissal of governments is sketchy to say the least, as it reflects the subjective standards of judicial branch in deciding the fates of

political governments. However, it must be noted that this adjudication led to a monumental increase in judicial power. Furthermore, the Court also vigorously pursued and developed the area of public interest litigation which provided relief to certain vulnerable segments of society, but a detrimental consequence of this phenomenon was that the apex Court broadly interpreted the contours of its original jurisdiction. The expansive interpretation bestowed the court with unparalleled authority to deem any issue as one of significant public importance. Another significant advancement pertained to the formulation and implementation of theory of basic structure in relation to constitutional modifications. This actually gave broad powers to court to check validity of constitutional amendments (a constitutional mandate of the legislature) on the touchstone of basic structure of the constitution. All these developments in the constitutionalism of Pakistan had one common consequence and that was substantial increase in the powers and scope of authority of judiciary. By using constitutional review, Courts could make any matter justiciable. So much so that the Courts were able to redefine a constitutional provision. It is evident that the groundwork for judicial supremacy was established during this particular era. The phenomenon of judicial supremacy reached its zenith during the first two decades of twenty-first century.

Chapter 4

Expansion of Judicial Power after Lawyers' Movement

4. Introduction

Pakistani polity has experienced a unique form of constitutionalism throughout the history of nation. The country got embroiled in *coups* and unconstitutional actions of military leaders. Thus, unlike some other constitutional democracies, the development of constitutionalism in the country suffered setbacks on numerous occasions. Historically, the judicial branch has validated such unconstitutional steps on one pretext or another. However, we do find fleeting instances where judiciary has asserted its dominance and safeguarded the rights of citizens. During the initial turbulent history of the nation, the executive branch arrogated vast swathes of authority and turned the state into a bureaucratic authoritarian enterprise. However, after the adoption of the Constitution of 1973, judiciary did play some role in checking the legality of executive actions.

This study explores the trajectory of constitutionalism in the country. Thus far, it can be seen that there had been an incremental change in power structures of state. It can be observed that judicial branch began assuming powers for itself from legislature and executive, but it was circumspect in this regard. However, matters came to head when judicial activism reached its zenith under Chief Justice Iftikhar Muhammad Chaudhary. This particular era cemented the notion of judicial supremacy in the constitutionalism of Pakistan. It must not be overlooked though, that all this judicial supremacy happened under the aegis of notion of constitutionalism.

This chapter provides an insight into the events and important judgments that placed the superior courts at a higher pedestal than executive and legislative arms of state. Separation of powers became blurred, if not completely obliterated, when the Supreme Court initiated a plethora of *suo moto* actions in matters related to rights of citizens. A Prime Minister was ousted from his office and judicialization of politics reached its peak during this time. This chapter addresses the research

question pertaining to impact of legal constitutionalism on judicial supremacy. The constitutional developments after restoration of judiciary demonstrates that the judicial branch wielded immense powers under the pretext of legal constitutionalism. Furthermore, this chapter also attempts to achieve the research objective relating to factors that led to judicial supremacy in the country. A thorough analysis of constitutional cases during this time sheds light on the modes through judiciary established its supremacy in the constitutional order of Pakistan.

4.1 Courts and Authoritarian Regimes

Before discussing impact of decision of Court of Chief Justice Iftikhar Chaudhary on constitutionalism in Pakistan, it would be apt to understand what roles courts play in an authoritative regime. The constitutional history of Pakistan testifies that judiciary has always legitimized unconstitutional actions of military regimes.[504] Now the important question which arises here is why do authoritarian regimes require such legitimacy from courts when they have all the means and resources to enforce their will against public? The response to this inquiry is in the observation that authoritarian regimes need a legalistic justification to handle affairs of state and to prevent large-scale law and order problems. The courts perform the following five functions in authoritarian regimes:

i. Create a system that controls society
ii. Strengthen legitimacy of authoritarian regime
iii. Bolster the administrative machinery of state and resolve disputes between the adverse groups within regime
iv. Enable trade and investment

[504] As has been mentioned in previous chapters, the regimes of Ayub Khan, Zia ul Haq and General Pervaiz Musharraf got legitimacy by the Supreme Court on the pretext of doctrine of necessity.

v. Enforce politically contentious policies[505]

Evidently, the military regimes in Pakistan used judiciary to achieve the above-mentioned objectives. The courts gave legal recognition to such regimes through their verdicts[506], provided legal justifications for controversial (sometimes absolutely unconstitutional actions)[507] and provided social control to such regimes. However, the judiciary through its judgments did make some significant inroads towards checking powers of authoritarian regimes. In *Nusrat Bhutto* case, top court provided unchecked authority to the military regime to even amend the Constitution of 1973.[508] But in case of *Zafar Ali Shah*[509], though the apex Court allowed the authority to alter the Constitution but restrained the government from changing fundamental characteristics of the Constitution.[510] Thus, Court did not give blanket cover to the martial regime to amend the Constitution as per its whims and fancies.

Interestingly, after Iftikhar Muhammad Chaudhary became Chief Justice in 2005, the Supreme Court did not perform the role in the way which has been described above. Rather than bolstering the authoritarian regime of General Pervez Musharraf, the Court took keen interest in public interest litigation and decided cases against government functionaries. Particularly, when the court stopped the denationalization of Pakistan Steel Mills (PSM) on the basis of public interest, the regime came at loggerheads with the judiciary. This particular decision is actually against the regime's idea facilitating trade and investment in the country, something for which the

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[505] Tamir Moustafa and Tom Ginsburg, "Introduction: The Functions of Courts in Authoritarian Politics," in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tamir Moustafa and Tom Ginsburg (New York: Cambridge University Press, 2008), 4.

[506] See for example, *State v Dosso* (PLD 1958 SC 533), *Begum Nusrat Bhutto v Chief of Army Staff* (PLD 1977 SC 657) *and Zafar Ali Shah v General Pervez Musharraf* (PLD 2000 SC 869)

[507] For example, General Zia-ul-Haq promulgated the Provisional Constitutional Order, (PCO) 1981 which made substantive changes to the Constitution of 1973. Numerous judges took oath of office under this PCO and furthermore, this extraconstitutional measure was validated by the Lahore High Court in *Tajjamal Hussain Malik v Federal Government of Pakistan* (PLD 1981 Lahore 462). Similarly, General Zia ul Haq promulgated Revival of Constitution of 1973 Order, (1985) (RCO) which made significantly altered the original Constitution of 1973 which was not questioned by the Courts.

[508] *Begum Nusrat Bhutto v Chief of Army Staff* (PLD 1977 SC 657) p. 722-723.

[509] *Zafar Ali Shah v General Pervez Musharraf* (PLD 2000 SC 869).

[510] Ibid. See also Khan, *The History of Judiciary in Pakistan*, 300.

authoritarian governments seek support from judiciary. It might seem a good development to challenge an authoritarian government but the expansion of judicial power extracts a huge cost in a constitutional democracy. As later events indicate, the unrestrained judicial power tilted the balance of power towards judiciary and greatly minimized the lawful authority of other governmental institutions.

4.2 Judicialization of Policymaking before Lawyers' Movement

The policy-making function is performed by executive arm of government. Judicial interference in matters of policy often belittles the cherished value of division of powers. It has been described earlier, constitutional democracy is characterized by distribution of powers among state organs.[511] Even the staunchest supporters of legal constitutionalism, believe that political decisions pertaining to policy often reflect the collective goals of the community and judiciary is not a competent institution to make such political choices.[512] However, some commentators endorse court's role as policymakers.

Dahl argues that policy perspectives held by judiciary often align with the views prevailing opinions of democratic majorities, so it would be absurd to assume that the Court would resist a major policy decision sought by democratic majority.[513] However, the chief critique against this role of courts is that use of legal discourse in decisions based on policy the courts are in attempting to achieve politically congenial decisions.[514] This particular function is incongruent with court's function in a constitutional democracy as other branches of government, particularly legislature is best suited to make such policy decisions.

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[511] Aileen Kavanagh, "The Constitutional Separation of Powers," in *Philosophical Foundations of Constitutional Law*, ed. David Dyzenhaus and Malcolm Thorburn (Oxford: Oxford University Press, 2016), 221.

[512] Dworkin, *Taking Rights Seriously*, 82-83. Unlike Hart, Dworkin does not consider judges as deputy legislatures. Dworkin maintains that judges are only competent to decide cases on principles not policies.

[513] Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National-Policy Maker" *Role of the Supreme Court Symposium* No.1 (1957), 285 (279-295) available at https://static1.squarespace.com/static/60188505fb790b33c3d33a61/t/6049c2bd69f212651b53aab3/1615446718720/DahlDecisionMaking.pdf Accessed on August 20, 2021.

[514] Mark Graber, "Foreword: From the Countermajoritarian Difficulty to Juristocracy and Political Construction of Judicial Power," *Maryland Law Review*, 65 no.1, (2006): 2.

The highest Court of the country under Chief Justice Iftikhar Muhammad Chaudhary began expanding scope of judicial power incrementally. A significant increase in public interest litigation provided the court with justification to play an activist role in matters of governance. This increase in public interest litigation is attributed to economic liberalization policy of the military regime of the time.[515] Public interest litigation became order of the day in the Chaudhary Court. To facilitate the enlargement in judicial authority, apex court used its *suo moto* powers under its original jurisdiction.

The relevant constitutional provision grants apex court clear authority to consider any matter of public importance that concerns constitutional rights of people. The Supreme Court used these powers in numerous cases to assert its institutional position. A dedicated cell for human rights was created in the apex court to take cognizance of human rights abuses.[516] Some instances of the judiciary's interference in policy matters may be categorized in following topics:

Price Control Measures by Court

Supreme Court intervened in the deregulation of prices of oil in the country. This was a rather unique intervention on part of the highest court of country as this particular area falls squarely within domain of executive. In the period from 2005 to 2006, Petroleum Ministry entrusted the Companies Advisory Committee (OCAC), a consortium of oil companies, with the responsibility of determining petroleum prices in the absence of parliamentary supervision.[517] When the worldwide prices of oil rose to $70 per barrel, the OCAC responded by raising the local pricing of petroleum goods. However, when the international prices subsequently dropped to $62, the domestic prices did not see a matching reduction. Without going into intricacies of setting domestic oil prices, apex court took notice of this incidence and directed National Accountability

[515] Shoaib Ghias, "Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf," *Law and Social Inquiry*, 35 No.4, (Fall 2010): 991-92.
[516] Ghias, "Miscarriage of Chief Justice," 992.
[517] Ibid, 993.

Bureau (anti-graft body) to initiate an investigation into this issue.[518] Though this activist approach was lauded by some people, was it right for the court to step into a purely policy matter of price regulation of petroleum products. The government's policy to fix rates of petroleum products is usually based on multi-faceted factors, whereas the court only judged the matter on the metric of international oil prices. Emboldened by appreciation and support of some stakeholder, Supreme Court undertook a series of populist measures which went beyond its constitutional mandate.

Judicial Action on Privatization of State-Owned Entities

The government decided to carry out an agenda of privatization of state-owned entities. In third-world privatization is often looked at with a sceptical eye. However, privatization of public enterprises has always been a global phenomenon. One compelling rationale for supporting the process is a belief in market forces and disinclination towards public investment.[519] Usually, this process seeks to achieve better efficiency and reduce costs for the government. Some experts believe that privatization can be detrimental to public interests as it often involves layoffs, change in rules and shrinkage in operations of the enterprises. When we see this issue from a legal angle, it is somewhat obvious that it is neither desirable nor appropriate for Court to weigh the strength of such arguments. The decision pertaining to privatization is purely a policy decision. Nevertheless, the Court has the authority to examine any public action in accordance with the requirements outlined in the constitution and the laws of the country. But the authority to initiate constitutional review is also circumscribed by constitution, which essentially implies that it is not within remit of court to take judicial action on every matter.

Pakistan Steel Mills Corporation (PSMC) was one of the state-owned entities which the government planned to privatize. In this regard, a letter of acceptance was issued to a consortium of buyers. The said consortium was declared to be the successful bidder at the rate of Rs.16.80 per

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[518] Ibid.

[519] Ramaswamy Iyer, "The Privatization Argument" *Economic and Political Weekly*, 23 No.11, (March 1988): 554.

share.[520] A number of petitioners challenged this privatization. The main contentions of the petitioners included: lack of transparency of privatization process, low share price compared to the assets of the PSMC, unconstitutional nature of privatization process as it was carried out without involving the Council of Common Interests and Province of Sindh.[521] As can be seen from the contentions of the petitioners they contested the validity of public action of privatization. The highest court in the land rendered a verdict declaring the privatisation of PSMC as null and invalid and held that the privatization decision lacked legality as it was made without seeking directions from the Council of Common Interests.[522] Furthermore, the Court held that process of privatization was carried out in violation of law and therefore does not create any legal effects.[523] This made the Letter of Acceptance issued by the Government redundant. Consequently, due to public interest litigation, a major executive decision was overturned by apex court of Pakistan. It goes without saying that Court did not go into the merits of privatization while making its decision. However, the Court stopped government from a major decision by determining that the said decision was illegal. The argument of illegality has been challenged by some experts who believe that the whole process of privatization was viewed with a sceptical view and the arguments upon which the Court considered privatization as unlawful were sketchy at best.[524] A major consequence of the judgment was that the foreign direct investment suffered a setback.[525] Furthermore, according to a news report the annulment of privatization resulted in a monumental loss to the national exchequer.[526] Whenever, courts interfere in the economic decisions, there are always unintended consequences.[527] Nevertheless, this was the first instance in which superior judiciary rendered a verdict adverse to the prevailing military rule. Obviously, this attracted the ire of the

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[520] Khan, *The History of Judiciary in Pakistan*, 337.

[521] Ibid.

[522] *Watan Party v Federation of Pakistan* (PLD 2006 SC 697) paragraph 94, p.770.

[523] Ibid paragraph 96.

[524] Khalid Anwar, "Privatization & Supreme Court," *Dawn*, August 8, 2016

[525] Kishwar Munir and Iram Khalid, "Judicial Activism in Pakistan: A Case Study of Supreme Court Judgments 2008-13" *A Research Journal of South Asian Studies* 33, no.2, (July-December 2018): 326.

[526] Ibid.

[527] In 2016, the losses of PSMC were approaching Rs. 400 billion and these losses were to be borne by the taxpayers of the country.

regime. The charge levelled against the government regarding the improper transfer of a critical national asset had an adverse effect on the government's privatisation policy as a whole. The case also illustrates how constitutional courts can expanded scope of their judicial powers in matters related to governance and public policy. Furthermore, the significance of the division of power among state organs under a constitutional regime is readily apparent. Court's inclination to increase its sphere of power often comes at a hefty price.

4.3 Lawyers' Movement—Birth of Populist Judiciary

The military administration expressed strong disapproval towards the increase of judicial authority. In March 2007, the Chief Justice was removed from his position following a presidential reference submitted in Supreme Judicial Council.[528] This chain of events led to a country-wide demonstrations by the legal fraternity in favour of the deposed judge. This nationwide series of demonstrations—commonly known as Lawyers' Movement, shook the very foundations of the military regime.[529] The Chief Justice instituted a constitutional petition against the Presidential Reference raising question on the competence of the Supreme Judicial Council[530] and agitating that Reference was *mala fide* and lacked legality.[531] The Bench resolved to halt the proceedings of Supreme Judicial Council and convened a Full Court Bench of Court to deliberate on constitutional petition submitted by the deposed Chief Justice. The Chief Justice's petition was accepted by the Court and the Presidential Reference was set aside as being illegal.[532] The Court said that the conduct of the President in suspending a Supreme Court Judge was deemed illegal

[528] General Musharraf asked the Chief Justice to either tender his resignation or face a reference. Chief Justice refused to resign and hence President initiated proceedings against him. Through a Presidential Order, General Musharraf restrained Chief Justice Chaudhary from performing his duties and appointed Justice Javed Iqbal as acting Chief Justice. For details see Khan, *The History of Judiciary in Pakistan*, 344.

[529] Moeen H. Cheema, "Two Steps Forward One Step Back: The Non-Linear Expansion of Judicial Power in Pakistan," *International Journal of Constitutional Law* 16, no.2 (June 2018): 518.

[530] Under the Constitution, Supreme Judicial Council could not be constituted without the Chief Justice.

[531] Khan, *The History of Judiciary in Pakistan*, 348.

[532] *Mr. Justice Iftikhar Muhammad Chaudhry v The President of Pakistan* (PLD 2007 SC 578) p. 581.

and in violation of the principle of judicial independence, which is essential for ensuring the right to access justice.

General Musharraf, who was again eyeing the position of President, did not digest this slight. Prior to his re-election as President, a group of petitioners filed a case with the Supreme Court to challenge the legality of General Musharraf simultaneously holding both offices.[533] The President's eligibility to contest election was also challenged on the ground that same Electoral College could not elect anyone President twice.[534] Other Presidential candidates also challenged the eligibility of General Musharraf. On 6th October, 2007 it was announced that Musharraf had won the Presidential Elections. The petitions on his qualification for election were still pending before Supreme Court. These constitutional petitions got under Musharraf's skin and in an act of desperation he declared an unconstitutional emergency on November 3, 2007.[535] It is evident that the court has established itself as a significant participant in the power dynamics of the State. Unlike the events in the past, judiciary did not flinch in declaring Reference against its head as unconstitutional. More importantly, this was done in time of a military regime.

In a manner reminiscent of his actions in 1999, General Musharraf proceeded to issue a Provisional Constitutional Order (PCO) subsequent to proclaiming a state of emergency, so suspending the constitution of the nation. Under the newly implemented legal framework, the constitutional courts were deprived of their constitutional authority to issue any directives or rulings against the President and Prime Minister.[536] The promulgation of the Oath of Office (Judges) Order 2007 followed. According to this Order, Judges were obligated to take an oath in accordance with the newly implemented Provisional Constitutional Order (PCO). The majority of judges declined to take the oath under this unconstitutional document. Nevertheless, a small number of judges did

[533] General Musharraf was the Chief of Army Staff and President at the same time.
[534] Khan, *The History of Judiciary in Pakistan*, 354.
[535] Ibid, 355.
[536] Ibid, 356.

choose to take the oath of office under the Order.[537] As expected this unpopular measure invited a huge backlash from legal fraternity in form of massive protests.

Following the termination of the emergency, the legitimacy of the Provisional Constitution Order was contested before the highest judicial authority. The judges who took their positions under the Provisional Constitutional Order (PCO) affirmed the validity of the declaration of Emergency. They maintained that the proclamation was deemed essential in order to safeguard the broader public interest, as well as to ensure the integrity and safety of the nation.[538] Here again it can be seen that these Judges act contrary to the spirit of constitutionalism and used implausible legal justifications to support an illegal and unconstitutional action of the executive.

However, as a result of continuous protests from lawyers, civil society and political parties, Musharraf regime lost all its power. The newly elected government restored Chief Justice Chaudhry along with other Judges constitutional courts who refused to take oath under the PCO.[539] As previously stated, the rationale for the increase in judicial power is often justified on the basis of its contribution to the supremacy of law and its ability to restrain arbitrary authority. This reason aligns with one of the primary characteristics of legal constitutionalism. However, in a constitutional democracy, each branch of government is supposed to act within its respective constitutional mandate. Just like legislature, judiciary is a constitutional creation too. The judiciary has a distinct and privileged status by virtue of its sole authority to interpret the constitution. In fact, this particular function of the judicial organ requires caution and responsibility. It goes against will of the framers of Constitution that a particular branch of government encroaches upon or interferes with the functions of another branch of government. The Lawyers' Movement actually asserted the much-cherished value of independence of judiciary that has been envisaged in multiple

[537] Only five Judges took oath under the PCO. See, Hamid Khan, *The History of Judiciary in Pakistan* (Karachi: Oxford University Press, 2017), 357.
[538] *Tikka Iqbal Muhammad Khan v General Pervez Musharraf* (PLD 2008 SC 6) paragraph 3 p.11.
[539] Khan, *The History of Judiciary in Pakistan*, 373.

provisions of our Constitution. The unconstitutional actions of military dictator were reversed due to pressure generated by the lawyers' movement. It was thought that reinstated judiciary would be instrumental in fostering constitutionalism in the country. However, the dynamics of power altered dramatically after this restoration of judiciary. The expansion of judicial role made the judicial branch all but omnipotent and which overshadowed the role of other branches of government. Though constitutionalism requires that every state institution must act within its constitutional authority, but that was certainly not the case with superior judiciary of Pakistan. After restoration of judiciary, apex court embarked on a populist agenda which took powers away from legislature and executive.

4.4 Reinvigoration of Public Interest Litigation—Redefining the Original Jurisdiction of Apex Court

The trend of taking judicial notice of matters of public importance did not begin in Chaudhry Court. The apex court jurisprudence on public interest litigation began in the last decade of twentieth century. As mentioned earlier, *Darshan Masih Case*[540] changed the contours of public interest litigation and enhanced scope of original jurisdiction by giving immense powers to judiciary to take actions on public interest matters. The top court significantly broadened its judicial authority by embracing public interest litigation as a foundation for its decisions. Sometimes even the legal requirements as to pleadings became secondary to the decision of the issue at hand. In order to promote and cultivate a culture of public interest litigation, the highest court of land used the following modes:

i. ***Suo Moto Cases***

The apex court took cognizance of the cases involving fundamental rights through information in a newspaper article or news reports. The Court took notice of multiple issues during this time.

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[540] *Darshan Masih v The State* (PLD 1990 SC 513).

ii. **Human Rights Cases**

The petitioners submitted their petitions or complaints to either the Supreme Court or the Human Rights Cell, which then transformed them into Human Rights Cases (HRCs). The issues at hand pertain to infringements of the human rights of individuals.

iii. **Constitutional Petitions**

The petitioners (persons, groups, entities) invoked the original jurisdiction of the Supreme Court and filed constitutional petitions under the relevant constitutional provisions.

iv. **Complaints to Human Rights Cell**

The Human Rights Cell of the Supreme Court received many complaints, which were subsequently resolved without being converted into Human Rights Cases.

It is pertinent to mention here that there exists a clear correlation between public interest litigation and judicial activism. Courts often justify their activist approach in the name of public interest. This actually expands constitutional review powers of the courts and leads to judicial supremacy. An activist judiciary liberally uses public interest litigation to expand the remit of its power.[541] Certainly, this increase in judicial power gives unchecked powers to superior judiciary. This phenomenon of growth of judicial power through public interest litigation is not limited to Pakistan. The apex court of India broadened its involvement in the administration of polity by means of public interest lawsuits. Supreme Court of India has seen substantial expansion in its authority in key domains such as policy on environment, appointment of judges and efforts to combat corruption.[542] This goes to show that this phenomena of increase in judicial powers (which may sometimes lead to supremacy of judiciary) is prevalent in other countries too. Once again, this prompts us to scrutinise the democratic validity of the self-assumed powers held by constitutional

[541] See for example, Upendra Baxi, "The Avatars of Indian Judicial Activism: Exploration in the Geographies of Injustice' in *Fifty Years of the Supreme Court of India*, ed. S.K. Verma &Kasum (Oxford University Press, 2007).
[542] Mate, "Two Paths to Judicial Power," 202.

courts. Pakistani apex court followed same path of arrogating powers belonging to other functionaries of government.

Evidently, Pakistani apex court has liberally interpreted the limits of its original jurisdiction during this period. During this era the apex court has shown a proclivity for prioritising the consideration of human rights claims and constitutional petitions, as seen by a substantial volume of such cases. While using its original jurisdiction, the Court often overlooked significance of representative petitioners who engage in public interest litigation, thus the importance of Article 184 (3) (which stresses that matter must be of public importance) became irrelevant.[543] Once again it is important to point out that original jurisdiction of apex court is not meant to be used without principles rather it should be sparingly invoked under the constitutional mandate. However, this new wave of rights-based jurisprudence was novel in the sense that it began to overlook the constitutional limits placed on the exercise of original jurisdiction as envisaged in Constitution. A past judgment of the Supreme Court defines public interest mentioned in Article 184(3) in the following words:

> "Now, what is meant by a question of public importance. The term "public" is invariably employed in contradistinction to the terms private or individual, and connotes, as an adjective, something pertaining to, or belonging to, the people; relating to a nation, state, or community. In other words, it refers to something which is to be shared or participated in or enjoyed by the public at large, and is not limited or restricted to any particular class of the community..."[544]

The remarks made by the Court indicate that the original jurisdiction of the Court should be limited to cases involving the basic rights of the community rather than individual rights. Therefore, in order to establish jurisdiction according to Article 184(3), it is necessary for the subject matter under consideration to pertain to the collective welfare of the community at large. Therefore, it is evident that the jurisdiction in question is intended to be used in cases pertaining to the collective public interest. In the aforementioned scenario, the Supreme Court further said that whenever a particular topic is being deliberated upon by a court with concurrent jurisdiction, it is essential for

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[543] Siddiqi, "Public Interest Litigation," 85.

[544] *Manzoor Elahi v Federation of Pakistan* (PLD 1975 SC 66) at p. 144.

the highest court to abstain from issuing any directives or rulings.[545] This goes to show that in the past, the Court always gave significant importance to the petitioner. The petitioner had to establish that the matter brought before the court affects the community as whole. Being wary of the potential dangers of liberal use of original jurisdiction, the Court has also noted in the past that injudicious use of this extraordinary jurisdiction would open floodgates for frivolous public interest litigation and usurpation of the jurisdiction of other courts.[546]

During Chief Justice Chaudhry's tenure, a significant transformation occurred in the legal interpretation of the extent of the Supreme Court's original jurisdiction. The determination of which matter fell within the public interest domain was exclusively up to the Court's discretion. This is evident from the following passage in a judgment:

> "Article 184(3) empowers this Court to exercise jurisdiction thereunder whenever court considers a matter to be: (i) of public importance and (ii) that it pertains to enforcement of fundamental rights. The determination on both these counts is made by this Court itself keeping the facts of the case in mind. The exercise of jurisdiction by the Supreme Court, thus is not dependent on the existence of a petitioner..."[547]

To summarize, the Court's focus shifted towards prioritising the matter at hand rather than the individual presenting it before the Court. The Court, in some instances, exercised its original authority by means of unilateral proceedings. The court's active attitude was praised by some sectors of society. Nevertheless, it is well observed that a written constitution frequently establishes the parameters and boundaries within which judicial activity may operate. In situations when there are violations of individual rights, the affected person has the ability to use the writ jurisdiction of the High Courts.[548] Perhaps, the intent of framers of the Constitution was to divide work amongst the Constitutional Courts. By invoking its original jurisdiction in an unrestrained fashion, the Court practically acted in a parallel capacity to decide cases on the grounds of public interest. It can be seen from the language of Article 184(3) that it begins with "without prejudice to the provisions

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[545] Ibid, see also Manzoor, "A Concoction of Powers," 12.
[546] *Nusrat Batool v Federation of Pakistan* (PLD 1999 SCMR 2811) paragraph 10, p.2816.
[547] *Muhammad Yasin v Federation of Pakistan* (PLD 2012 SC 132) paragraph 9, p.141.
[548] *Article 199,* Constitution of Pakistan.

of Article 199..." which shows that there is a constitutional requirement to leave the cases affecting the individuals to the High Courts. However, the public interest jurisprudence introduced by the Chaudhry Court authorizes the apex Court to take cognizance of any matter which in the subjective determination of the Court came within the scope of public importance.

During this period, the apex court has also used its inquisitorial role as a justification for public interest litigation.[549] Though the dynamics of our legal system (like any other common law system) are premised upon adversarial nature of proceedings. Traditionally, judiciary's role is limited to adjudicating upon the facts and evidence that is presented before it. However, the Court has formulated an inquisitorial approach through unique interpretation of constitutional and legal provisions.[550] The following excerpts from a judgment elaborating the inquisitorial role of the Supreme Court merit attention:

> "Public interest litigation, as we conceive it, is essentially a co-operative or collaborative effort on the part of the petitioner the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them. The State or public authority against whom public interest litigation is brought should be as much interested in ensuring basic human rights, constitutional as well as legal, to those who are in a socially and economically disadvantaged position, as the petitioner who brings the public interest litigation before the Court. The State or public authority which is arrayed as a respondent in public interest litigation should, in fact, welcome it, as it would give it an opportunity to right a wrong or to redress an injustice done to the poor and weaker sections of the community whose welfare is and must be the prime concern of the State or the public authority."[551]

The judgement clearly acknowledges the power of the highest court to have an inquisitorial function in cases involving the constitutional rights of individuals. Once again, top court has presented a distinctive interpretation in order to expand its jurisdictional authority. The presence of an adversarial judicial system serves as a fundamental cornerstone in countries that adhere to the common law tradition. The departure from the existing judicial system might be regarded as a deliberate effort to consolidate more authority within the court. In this instance, the Court

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[549] Siddiqi, "Public Interest Litigation," 86.
[550] Dr. Barkat Ali, "Judicious Interpretive Paradigm for Exercising PIL Jurisdiction: A Critical Appraisal of Jurist Foundation Case 2020," *Pakistan Social Science Review* 4 No. IV, (December 2020), 62.
[551] *Watan Party and another v Federation of Pakistan* (PLD 2011 SC 997) at paragraph 52, p.1058.

acknowledged the prevailing law and order issues in Karachi in the year 2011. When discussing the trichotomy of powers, it becomes apparent that the primary role of the executive branch is to ensure law and order in a certain jurisdiction. Nevertheless, the highest court took the initiative to address this issue via legal proceedings and provided directives to the executive authorities. The rationale for acknowledging this specific issue stemmed from public interest litigation and the inability of relevant executive agencies to uphold the fundamental rights of the populace. This instance was hardly the only illustration in which the Court undertook an inquisitorial role throughout the proceedings.[552]

Another dimension of rise in public interest litigation can be attributed to Chaudhry Court's inclination to consider all matters justiciable. During this time Court exercised its jurisdiction upon all political, economic, foreign policy, highly complicated policy issues and socio-economic problems.[553] The judiciary's stance in this regard was consistent with the remark made by Ran Hirschl, which suggests that the notion of anything and everything being justiciable has gained widespread acceptance among courts globally.[554] Some of the judgments by the Chaudhry Court merit attention in this regard. Nevertheless, one fundamental element of public interest litigation was that the court retained authority to hear any subject matter while exercising its original jurisdiction. The recent development in jurisprudence is a notable deviation from prior rulings of the Supreme Court, when the Court always exercised care in its approach towards its original jurisdiction.[555] An important outcome of this particular activist approach was expansion of judicial power to unprecedented levels. The Supreme Court, via the lens of public interest litigation, has progressively expanded the boundaries of its original jurisdiction, rendering almost all aspects of

[552] See for example, *Tobacco Board v Tahir Raza* (PLD 2007 SCMR 97) paragraph 7, p.101 and *Sheikh Riaz ul Haq and another v Federation of Pakistan* (PLD 2013 SC 501) paragraph 32, p.527.
[553] Siddiqi, "Public Interest Litigation," 87.
[554] Hirschl, *Towards Juristocracy*, 221.
[555] *Manzoor Elahi v Federation of Pakistan* (PLD 1975 SC 66).

social life subject to legal adjudication. Thus, it can be deduced from above discussion that Supreme Court was moving in the direction of judicial supremacy.

4.5 Transformation of Supreme Court into Anti-Graft Watchdog

As mentioned earlier, the phenomenon of judicial supremacy entails the arrogation of a wide array of powers by the judiciary. Sometimes the Courts assume prosecutorial role in high profile graft cases. Chaudhary Court took a robust view on matters pertaining to corruption. Though there were specific anti-graft bodies like National Accountability Bureau and Federal Investigation Agency, the Court actively took part in ensuring swift prosecution of corruption cases. One illustration of the Court's keen interest in anti-corruption campaign is decision in the National Reconciliation Ordinance (NRO) case.

In 2007, General Pervez Musharraf promulgated National Reconciliation Ordinance (NRO) which granted immunity to numerous political leaders of Pakistan Peoples Party (PPP).[556] The Ordinance sought to do away with investigations and prosecutions against almost 8,000 individuals including politicians, bureaucrats and ministers.[557] Basically, the Ordinance was result of an understanding between General Musharraf and senior leadership of PPP. This particular law received a lot of criticism from various sections of society. Following the reinstatement of the judiciary, the future of this Ordinance became uncertain since the Supreme Court had already ruled that General Musharraf's declaration of Emergency was illegal.[558] The Supreme Court did not immediately invalidate the Ordinances enacted by General Musharraf during the Emergency period. Instead, it showed respect towards the democratic transition that took place after the Emergency.[559] Recognizing the decision making power of the Parliament, the Court did not declare the

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[556] Moeen H. Cheema, "The Chaudhry Court: Deconstructing the Judicialization of Politics in Pakistan," *Washington Law Review* 25, no.3 (2016): 452.

[557] Rajshree Jetly, "Pakistan's Supreme Court and National Reconciliation Ordinance: What Now for Pakistan?" *Institute of South Asian Studies Brief* No. 147 (December 2009) available at https://www.files.ethz.ch/isn/110966/148.pdf.

[558] *Sindh High Court Bar Association v Federation of Pakistan* (PLD 2009 SC 879) Opinion of Chief Justice Iftikhar Muhmmad Chaudhry, paragraph 179, p.1200.

[559] Cheema, "The Chaudhary Court," 192.

Presidential Ordinances promulgated by General Musharraf to be null and void. The Court enunciated by way of legal fiction that the operation of Ordinances would commence from the date from which the Emergency was declared unconstitutional.[560] As per the provisions of the Constitution, these Ordinances were to be laid before the Parliament for adoption. In the light of this judgment, the government tabled the NRO in Parliament but withdrew it immediately as even its own allies were not in favour of adoption of this controversial Ordinance.[561] The vires of NRO came before the apex court and it declared NRO to be unconstitutional and reinitiated all the pending corruption cases that were done away with under NRO.[562] It was unequivocally ruled that NRO was violation of constitutional right of equal treatment of citizens, as the Ordinance was promulgated in attempt to overlook the alleged corrupt activities of certain persons.[563] This ruling signified the beginning of a dispute between the democratically elected administration and the judicial branch. By invalidating the NRO, the Supreme Court effectively stated that all activities taken under this Ordinance have no legal validity. Consequently, this led to the revival of corruption investigations against various politicians and officials. The aforementioned decision was widely celebrated by proponents of rigorous measures against public officials implicated in acts of corruption.

The Chaudhary Court's anti-corruption jurisprudence persisted when it opted to intervene in a case involving suspected corrupt activity in *Rental Power Plants Case*.[564] Supreme Court held that the contracts awarded to the Rental Power Plants (RPPs) for generation of electricity were void *ab initio* as they had violated fair competition and public procurement laws.[565] The Court inferred the existence of corrupt practices in the process of awarding contracts to the RPPs.[566] Again, it can be

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[560] Ibid.
[561] Ibid.
[562] *Dr. Mobashir Hassan v Federation of Pakistan* PLD 2010 SC 265, paragraphs 1-3, at p. 319-322.
[563] Ibid. See also Moeen H. Cheema, "The Chaudhary Court: Rule of Law or Judicialization of Politics?," in *The Politics and Jurisprudence of the Chaudhry Court 2005-2013*, ed. Moeen H. Cheema and Ijaz Shafi Gillani (Karachi: Oxford University Press, 2015) 193.
[564] 2012 SCMR 773.
[565] Ibid.
[566] Ibid.

seen that the decisions pertaining to energy sector, come in the policy domain of the executive. This particular point was agitated by the respondents and the Court did acknowledge it, albeit, partially. It is noteworthy that in its judgment, the top court admitted that powers of judicial review cannot be exercised in policy decisions, nor is it the remit of the Court to impose its own opinion in policy matters.[567] However, it was held that the judiciary can take notice of such matters under its authority of constitutional review to ensure that the policy is implemented transparently.

It is important to note that the government implemented a policy choice to allocate energy generating contracts to the RPPs as a means to address the energy shortfall. When the policy was approved, there were widespread power outages. The highest court acknowledged this case based on the charges of corruption and legal violations around the whole of the project. However, while taking cognizance of this matter the Court took ephemeral view of some technical aspects involved in awarding international energy contracts.[568] Furthermore, the Court not only rendered these RPP contracts as invalid, it also made an order to the National Accountability Bureau (NAB) to initiate proceedings against the officials involved in corrupt practices.[569] The apex Court held that all relevant functionaries that received financial gains from rental power plants agreements were *prima facie* indulged in corruption.[570] A basic question which arises here is that how did the Supreme Court assume jurisdiction of an anti-graft case which ought to be handled by the relevant anti-corruption agencies of the State? The Court deemed this case as a Human Rights case and exercised its original jurisdiction under the Constitution. Through an expansive interpretation of right to life[571] and right to property[572], the Court took cognizance of an intricate policy matter. However, as mentioned earlier, there are some unwanted consequences of judicial activism. It was opined by a Minister of Government that the decision would not augur well for the future of

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[567] Ibid. See also *Watan Party v Federation of Pakistan* (PLD 2006 SC 697).
[568] For instance, the Court questioned the increase in down payment to Rental Power Plants. The respondents argued that such increase is a norm in international contracts.
[569] 2012 SCMR 773.
[570] Ibid.
[571] Article 9, Constitution of Pakistan.
[572] Article 24, Ibid.

investment in power sector of the country.[573] Furthermore, the Minister responsible for pursuing these RPPs contracts has been acquitted by the accountability court as the prosecution was not able to establish any monetary gain derived by the said Minister.[574] Suffice it to say, that the assumption of corruption in RPPs seems to have been conjectural, at best. It merits attention that as the Court moved towards the phenomenon of judicial supremacy, there was an overarching encroachment on the domain other governmental branches.

Another obvious example of Chaudhry Court's anti-corruption jurisprudence is the court's ruling in famous case of *Reko Diq*. Supreme Court held that the joint venture agreement (known as the Chagai Hills Exploration Joint Venture Agreement CHEJVA) and its arbitration clause executed between the Government of Balochistan and a consortium of foreign exploration companies was invalid on public policy grounds. Initially, the petitioners contested validity of this agreement in Balochistan High Court by maintaining that concession for mining of gold and copper had been granted in violation of law. However, the Balochistan High Court held that the relaxation of rules vis-à-vis mining concession had been made within the four corners of law and thereby dismissed the petition.[575] Apex court allowed appeal against ruling of the Balochistan High Court and rendered the whole Joint Venture Agreement void. The Court held that CHEJVA did not materialize into a recognizable contract.[576] The Court unequivocally observed that all agreements subsequent to CHEJVA were void. It was maintained that agreement was void due to corruption in its execution.[577] Interestingly, the Court nullified arbitration clauses and maintained that later agreements were also invalid.[578] The Court, in its ruling, declined to recognise the authority of

[573] Zafar Bhutta, "RPP Contract Cancellation: Decision to have little or no impact on power shortfall," *The Express Tribune*, March 31, 2012.
[574] Tahir Naseer, "Former PM Raja Pervez Ashraf Acquitted in Sahiwal Rental Power Project Case" *Dawn*, June 25, 2020. See also"Ex-PM Raja Pervez Ashraf acquitted in another Rental Power Plant Case," *Dawn*, April 15, 2022.
[575] Sadaf Aziz, "The Politics of Anti-Corruption" in *The Politics and Jurisprudence of the Chaudhry Court 2005-2013*, ed. Moeen H. Cheema and Ijaz Shafi Gillani (Karachi: Oxford University Press, 2015) 266.
[576] Sara E. Myirski, "Copper, Gold, Corruption, and No Arbitral Relief: A Recent Pakistan Supreme Court Calls into Question the Doctrine of Separability," 6 *Yearbook on Arbitration and Mediation* 15, (2014): 309.
[577] Maulana Abdul Haque Baloch v Government of Balochistan (PLD 2013 SC 641) paragraph 122, p.774-775.
[578] Ibid.

foreign arbitration tribunals and unequivocally asserted that the Pakistani courts had exclusive competence to address this issue.[579]

An important feature of agreements involving international arbitration for disputes is that disputes arising out of the agreements could only be agitated before the agreed arbitral forum. This means that domestic courts usually do not have jurisdiction to adjudicate such disputes. The Court seized jurisdiction of this matter by invoking the UN Convention against Corruption.[580] The petitioners challenging the joint venture agreement maintained that the process was marred by corruption. Based upon these assertions, the Court decided that it could nullify a contract where there are blatant charges of corruption as the UN Convention against Corruption provided domestic tribunals jurisdiction to deal with such matters.[581] The decision further clarified that the Convention provided a valid justification to the Court to vitiate a contract on the basis of corruption.

While numerous analysts hailed the decision as a triumph of the nation's judicial system and rule of law, the situation started to unravel when the disgruntled investors initiated legal proceedings against this ruling in the International Centre for Settlement of Investment Disputes (ICSID). These investors claimed that the cancellation of mining lease resulted in breach of Fair and Equitable Standard (FET)[582] and violations of terms of Bilateral Investment Treaty between Pakistan and Australia.[583] Pakistani government tendered the evidence of corruption by the investor mining company, and challenged the jurisdiction of ICSID. However, in 2017 the Tribunal affirmed that it had jurisdiction over the matter.[584] The ICSID Tribunal concluded that

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[579] Myrski, "Copper, Gold, Corruption, and No Arbitral Relief," 310.
[580] Ibid.
[581] The Court relied upon Article 34 of the Convention which lays down that each state party must take measures in the light of its domestic law to address corruption within state contracts.
[582] This standard requires each contracting party to ensure that the investors are treated fairly and equitably in relation to their investments.
[583] Esha Farooq, "Reko Diq Case: An Integrity Risk to Mining Industry of Pakistan," *PCL Student Journal of Law*, IV no.2 available at https://leappakistan.com/wp-content/uploads/2021/02/REKO-DIQ-CASE-AN-INTEGRITY-RISK-TO-THE-MINING-INDUSTRY-OF-PAKISTAN.pdf Accessed on December 5, 2021.
[584] Ibid.

Pakistan had breached the Treaty by cancelling the mining lease. The Tribunal further stated that "the protection of an investor's legitimate expectations is an important element of the FET standard under Article 3(2) of the Treaty."[585] In its award, the Tribunal imposed a hefty penalty of USD 5.8 billion on Pakistan for breach of Treaty.[586] This goes to show that the Supreme Court's anti-graft jurisprudence did not result in saving public exchequer from loss, rather it exposed the country to a heavy penalty at international dispute settlement forum.

The ruling of the apex court in *Reko Diq* has drawn criticism from many quarters. The Court declared all subsequent agreements pursuant to the initial CHEJVA void, without considering the novation that took place between the Government of Balochistan and the investments of subsequent investors.[587] Furthermore, the Court also took a lenient view of the ramifications which could have resulted in case of violation of provisions of a Bilateral Investment Treaty.

It has been described time and again that whenever Court attempts to delve into matters involving complex policy decisions, there is a possibility that it might not arrive at the right decision. It must be observed that Balochistan High Court considered the multifaceted considerations involved in the *Reko Diq case* and thus refrained from interfering in the matter. On the contrary, the Supreme Court decided this case on the basis of non-compliance with rules and presence of corruption in the project. The Court chose to overlook the international law on investment treaties in this case and consequently the liability fell upon the public exchequer. This is another illustration where proactive anti-graft jurisprudence had a negative impact upon the affairs of the state.

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[585] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Award Case No. ARB/12/1, page 15.
[586] Farooq, "Reko Diq Case: An Integrity Risk to Mining Industry of Pakistan," https://icappakistan.com/wp-content/uploads/2021/02/REKO-DIQ-CASE-AN-INTEGRITY-RISK-TO-THE-MINING-INDUSTRY-OF-PAKISTAN.pdf Accessed on December 5, 2021.
[587] Ibid.

4.6 Questioning the Constitutional Amendment vis-à-vis Judicial Appointments—Legal Constitutionalism Leading to Expansion of Judicial Power

As described before, one of prime features of judicial activism is assumption of legislative functions by the courts.[588] The concept of judicial supremacy occurs when the judiciary excessively intervenes in the legislative and executive responsibilities of the state without any restraints. The Court's involvement in policy decisions has been seen as a significant instance of interference in operations of executive functions of state. The anti-corruption legal principles established by the Court demonstrate that the judiciary has consistently scrutinised the policy decisions made by the executive branch.[589] Similarly, the apex Court, known for its activism, took intentional measures to infringe onto the legislative sphere. During the process of evaluating the legitimacy of the Eighteenth Constitutional Amendment, the highest court effectively changed the parameters of constituent power. The justification for this judicial action was based on the preservation of the independence of the court.

The enactment of the Eighteenth Constitutional Amendment is largely seen as a significant turning point in the constitutional evolution of the nation. The amendment was enacted by a consensus among the main political parliamentary parties in the nation, and it brought about substantial modifications to the Constitution with the aim of promoting federalism, strengthening the parliamentary system, and safeguarding the individual rights of the populace. The Amendment facilitated restoration of powers to Parliament, abolished Concurrent Legislative List and thereby enhancing provincial legislative domain.[590] The Amendment also added new fundamental rights and also altered the procedure for judicial appointments in superior judiciary.[591] The procedure for

[588] Hussain, *The Judicialization of Politics in Pakistan*, 3.
[589] See for example, Rental Power Plants Case (2012 SCMR 773).
[590] Cheema, "Two Steps Forward One Step Back," 519.
[591] Ibid.

judicial appointments was to be executed by two forums. The initial forum established was the Judicial Commission, which consisted of the Chief Justice of Pakistan, two senior judges from the apex court, Chief Justices and two senior judges from the High Courts, the Attorney General of Pakistan, law ministers from the federal and provincial governments, as well as representatives from the Pakistan Bar Council and Provincial Bar Councils.[592] The candidates nominated by Judicial Commission were required to be presented to Parliamentary Committee. The Parliamentary Committee comprised of total eight members representing both treasury and opposition benches in equal numbers.[593] Upon approval of nominations, the names of judges had to be finally forwarded to President. The portion of amendment dealing with judicial appointments was challenged in apex court.[594] The petitioner contended that amendment aimed to curtail autonomy of judiciary and therefore violated the core constitutional framework.

This constitutional application was accepted by top court. However, the court adopted a 'dialogic approach' and asked parliament to reconsider the issue.[595] It must be mentioned here that the Constitution of Pakistan authorizes Parliament to amend the Constitution.[596] Furthermore, the constitutional framework precludes judiciary's authority to scrutinize an amendment to the constitution.[597] Yet, the judiciary directed the Parliament to modify the provisions of the constitutional amendment to safeguard the independence of judiciary. The Court observed:

> "We had two options; either to decide all these petitions forthwith or to solicit, in the first instance, the collective wisdom of the chosen representatives of the people by referring the matter for re-consideration. In adopting the latter course, we are persuaded primarily by the fact that institutions may have different roles to play, but they have common goals to pursue in accord with their constitutional mandate."[598]

This excerpt from the judgment indicates that although apex court had authority to invalidate a constitutional amendment, it opted to return it to parliament for reconsideration. Given the

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[592] Saroop Ijaz, "Judicial Appointments in Pakistan: Coming Full Circle," *LUMS Law Journal* 1, (2014): 88.
[593] The Parliamentary Committee comprised of four members of National Assembly and four members of Senate.
[594] *Nadeem Ahmad and others v Federation of Pakistan* (PLD 2010 SC 1165), paragraph 3, p.1176.
[595] Cheema, "The Chaudhary Court," 196.
[596] Article 238, Constitution of Pakistan.
[597] Article 239(5), ibid.
[598] *Nadeem Ahmad and others v Federation of Pakistan* (PLD 2010 SC 1165) paragraph 14, p. 1184.

presence of express constitutional provisions which give unrestrained authority to Parliament to amend Constitution, this particular judgment goes to show that Court arrogated a right to nullify a constitutional amendment if such amendment violated much cherished norm of judicial independence.

In its judgment, Supreme Court made two substantive recommendations: firstly, Court suggested an increase in number of judges serving in Judicial Commission. Secondly, the Court recommended that in the event that the parliamentary committee declines nominations that have been endorsed by Judicial Commission, it is obligated to provide a written explanation for its decision and send the matter back to the Commission. If the judicial commission upholds its original decision regarding nomination, such decision should attain finality and parliamentary committee should not have any say in the matter.[599] Thus, the Court asked the legislature to alter the constitutional amendment in light of these recommendations. Obviously, the Court grounded its decision in safeguarding the independence of judiciary, however, a relevant question which arises here is that how a parliamentary check upon judicial appointments be considered as an affront to the independence of judiciary? A governance model that is grounded on trichotomy of powers, a participatory deliberative process of judicial appointments is not only desirable but is in accordance with the spirit of constitutionalism.

Supremacy of Judicial Commission over Parliamentary Committee for Appointment of Judges—Upholding the Dicta of *Al-Jehad Trust Case*

In view of the concerns of the superior judiciary, the Parliament passed Nineteenth Constitutional Amendment. While adopting suggestions of apex court, Parliament enhanced number of Judges in Judicial Commission and made it mandatory for parliamentary committee to give reasons in writing for rejecting a nomination approved by the Judicial Commission.[600] However, Committee's

[599] Ibid. See also Cheema, "The Chaudhary Court," 196. See also Ijaz, "Judicial Appointments in Pakistan, 89.
[600] Section 4 of the Nineteenth Constitutional Amendment. See also Cheema, "Two Steps Forward One Step Back, 520.

right to reject nominations of the judicial commission was not changed nor did the amendment introduced any provision vis-à-vis justiciability of decision of parliamentary committee.[601] The passage of nineteenth amendment shows that the Parliament attempted to allay the concerns raised by judiciary in *Nadeem Ahmad* case. It would be insightful to see what the parliamentarians, who had passed the nineteenth constitutional amendment, had to say about judicial autonomy and procedure for judicial appointments in superior courts. The Chairman of the Special Committee on Constitutional Reforms, Senator Raza Rabbani explained the deliberations of the Committee in the following words:

> "... The committee met for seven formal meetings apart from a number of informal meetings that took place so that a detailed consideration of the order of the Supreme Court could be carried out and the basic underlying fact that was prevailing in the minds of members of the Parliamentary Committee was to ensure that the independence of judiciary is not impeded upon, was to ensure that there was a transparent mode of appointment that could come about..."[602]

These observations clearly elucidate that Parliament envisioned to secure independence of judiciary on the one hand and to make procedure of judicial appointments more transparent and participatory. Another consummate parliamentarian, Senator Waseem Sajjad made following remarks on the nineteenth amendment:

> "... important changes were made in the manner of appointment of judges of the superior courts. By superior courts, we are referring to the honourable Judges of the Supreme Court, the High Court and the Federal Shariat Court. These matters were challenged before the Supreme Court and in a number of petitions where the main attack was made on the manner of appointment of judges, it has been said that in the new method which has been adopted, somehow the independence of the judiciary has been affected. There was a lengthy argument and lengthy debate on this. I am glad that there was also a public debate on this. I would briefly sum up to say that a Judge who is appointed to the superior court, who enjoys the confidence of the Judiciary, who enjoys the confidence of the Parliament, who enjoys the confidence of the Government and the Opposition, he will definitely be a Judge who is more confident, who will have total independence to decide the matter in accordance with law and constitution..."[603]

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[601] Cheema, "The Chaudhary Court: Rule of Law or Judicialization of Politics?" in *The Politics and Jurisprudence of the Chaudhry Court 2005-2013*, ed. Moeen H. Cheema and Ijaz Shafi Gillani (Karachi: Oxford University Press, 2015) 197.

[602] Statement by Senator Mian Raza Rabbani, Thursday, December 30, 2010 (67th Session) Volume XI. No.1, The Senate of Pakistan Debates, 43.

[603] Statement by Senator Waseem Sajjad, Thursday, December 30, 2010 (67th Session) Volume XI. No.1, The Senate of Pakistan Debates, 49.

The views expressed by the Honourable parliamentarian tend to suggest that the parliament deliberately adopted a more participatory procedure for judicial appointments to constitutional courts. Trichotomy of powers is actually better served when the legislature has some say in the judicial appointments. In fact, rules of judicial appointments may be shaped to promote dialogue between various branches of government, for instance, the mechanism of legislative confirmation of the potential judges ensures that judiciary represents wider segments of society.[604] In a parliamentary democracy, a consensus-based approach for judicial appointments actually promotes legitimacy of judiciary and restrains the court from usurping the constitutional role of other limbs of government. However, Supreme Court of Pakistan disagreed with the idea of giving parliamentary committee the mandate to deny the nominations confirmed by judicial commission and made a rather uncanny interpretation of the nineteenth constitutional.

The apex court ruled unequivocally in *Munir Hussain Bhatti* case, that parliamentary committee has authority to either approve or reject judicial nominations forwarded by Judicial Commission, however, in latter case the committee was required to give strong reasons for its rejection and those reasons would be justiciable.[605] In *Munir Hussain Bhatti* case, the parliamentary committee a number of nominations submitted by Judicial Commission for extension in tenure of some judges of superior judiciary. A constitutional challenge was filed in the apex court against the decision of parliamentary committee. Before discussing the details of the decision of the Supreme Court, it would be apt to reproduce relevant part of Article 175-A which deals with the role of parliamentary committee in appointment of judges in superior judiciary.

> "... (12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to be confirmed:

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[604] Elliot Bulmer, "Judicial Appointments" *International IDEA Constitution Building Primer 4, 7*, available at https://www.idea.int/sites/default/files/publications/judicial-appointments-primer.pdf Accessed on December 20, 2021.

[605] *Munir Hussain Bhatti v Federation of Pakistan*, (PLD 2011 SC 407) Opinion of Justice Jawwad S. Khawaja, para 59, p. 472.

> Provided that the Committee, for reasons to be recorded, may not confirm nomination by three-fourth of its total membership within the said period:
>
> Provided further that if a nomination is not confirmed by the Committee, it shall forward its decision with reasons so recorded to the Commission through Prime Minister:
>
> Provided further that if a nomination is not confirmed, the Commission shall send another nomination."[606]

A bare perusal of this provision makes it clear that the Parliamentary Committee reserved the right to reject the nominations sent to it by the Judicial Commission. Though in *Nadeem Ahmad case*, the Supreme Court had strongly 'suggested' the parliament that if the Judicial Commission stood by its original decision vis-à-vis judicial nominations, the Parliamentary Committee should not overrule its decision.[607] As mentioned earlier, the Parliament conceded to many suggestions of the Supreme Court yet reserved the right to reject the nominations.

Let us now examine, Court's interpretation of Article 175-A. The Court rejected the argument that the Parliamentary Committee should be considered as part of legislature. Following excerpts from the highlight this particular point:

> "... We cannot comprehend how this "Parliamentary Committee", constituted under Article 175-A, can even remotely be considered as a part of the legislature or how, for that matter, any question relating to the supremacy of Parliament is involved in this case. The Judicial Commission and Parliamentary Committee are two limbs of one constitutional mechanism created by a newly added Article 175A. Both of them owe their existence to Article 175A and not to the provisions relating to Legislature or Executive in the Constitution..."[608]

Evidently, Court did not give legislative status to Parliamentary Committee, rather considered as a special body representing the Executive for the specific task of judicial appointments. Though the Supreme Court gave equal status to the two forums, however, it is apparent that the Court valued the role of Judicial Commission more than the Parliamentary Committee.

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[606] Article 175-A, The Constitution of the Islamic Republic of Pakistan

[607] Moeen H. Cheema, "The Chaudhary Court: Rule of Law or Judicialization of Politics?," in *The Politics and Jurisprudence of the Chaudhry Court 2005-2013*, ed. Moeen H. Cheema and Ijaz Shafi Gillani (Karachi: Oxford University Press, 2015) 196.

[608] *Munir Hussain Bhatti v Federation of Pakistan*, (PLD 2011 SC 407) Opinion of Justice Mahmood Akhtar Shahid Siddiqui, paragraph 10, p. 438.

This line of argumentation suggests that the decision of Judicial Commission should prevail because the members of the Commission have the requisite legal acumen to evaluate the candidature of a person who intends to be a part of superior judiciary. The judgement made by the Judicial Commission should be accorded more significance than that of the Parliamentary Committee due to the considerable competence and ability possessed by its members in matters pertaining to judicial appointments. The Court's judgement to render the Committee's actions justiciable essentially rendered the Committee's job largely superfluous. Now it is somewhat obvious that the relevant constitutional provision is silent about justiciability of decision made by Parliamentary Committee when it rejects nominations sent by Judicial Commission. The last clause of the aforementioned law establishes a constitutional obligation for the Commission to submit an additional nomination in the event that a previous nominee is not confirmed. The legislative purpose is evident in the allocation of authority to the Parliamentary Committee for the purpose of scrutinising the determinations made by the Judicial Commission. Nonetheless, the Supreme Court of Pakistan upheld the essence of the *Al-Jehad Trust* case by deeming the judgement of the Parliamentary Committee justiciable via an interpretation of the Constitution. From an alternative perspective, the Court effectively asserted its dominance in the constitutional framework of Pakistan by using purposive interpretation of a constitutional clause, even if it seemed to contradict the parliament's original meaning.

4.8 Judgment on Practice and Procedure Act—Setting Parameters on Exercise of Original Jurisdiction of the Supreme Court

The Parliament of Pakistan enacted the Supreme Court (Practice and Procedure) Act in 2023. The purpose of the Bill was to regulate the constitution of Benches of the Supreme Court and provide a framework for exercise of original jurisdiction of the apex Court. As mentioned earlier, judicial supremacy results from the power of constitutional interpretation. The apex court of Pakistan has on numerous occasions used its original jurisdiction to expand judicial power in the domains of executive and legislative functions of state. Furthermore, the Chief Justice of the Supreme Court

had considerable influence in shaping the preferences of the apex court vis-à-vis use of original jurisdiction in matters of public importance.

It is important to mention the salient features of this new legislation to understand its scope and purpose. Firstly, this legislation created a Committee of three judges including the Chief Justice and the next two senior most Judges for the purpose of constitution of Supreme Court Benches.[609] Secondly, the law provides that whenever the original jurisdiction of the Supreme Court under clause (3) of Article 184 is invoked, the aforementioned Committee would first examine whether the matter should be entertained by the apex court and if the Committee is of the opinion that the matter merits attention under the original jurisdiction of the Supreme Court, it would constitute a three member Bench to take up the said matter.[610] This particular provision demonstrates that the legislature took the unilateral decision making power away from the Chief Justice. Furthermore, it shows that a deliberative forum is created for assessing the merits of a petition invoking original jurisdiction of the Supreme Court. The Act also lays down that in a matter involving constitutional interpretation, the case must be heard by at least five Judges of Supreme Court.[611] The provisions of this law were challenged under a petition invoking the original jurisdiction of the apex Court. Petitioners challenged the constitutionality of this law on the grounds that it violates the principle of judicial independence, exceeds the legislative authority of parliament, abolishes the Chief Justice's powers, and the appellate jurisdiction of the Supreme Court cannot be redefined through ordinary legislation.[612]

In its judgment, the apex court upheld this legislation as constitutional. The Court acknowledged the constitutional powers of elected legislature to regulate procedure of the Supreme Court. In its judgment the apex court observed:

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[609] Section 2, The Supreme Court (Practice and Procedure) Act, 2023.
[610] Section 3, Ibid.
[611] Section 4, Ibid.
[612] Constitutional Petitions No. 6 to 8, 10 to 12, 18 to 20 and 33 of 2023.

"The Constitution has erected the legislature and the judicature and sets out their respective jurisdictions, boundaries and powers, which each must respect.... Mutual respect requires that the Supreme Court should not substitute its own opinion for that of Parliament, no matter how correct it considers it to be. Interventions should be restricted to only when Parliament enacts a legislation which is demonstrably unconstitutional. In respect of the Act this has not been demonstrated."[613]

It must be mentioned that the apex court exercised judicial restraint and respected the legislature's right to legislate. Furthermore, by establishing constitutionality of the Supreme Court (Practice and Procedure) Act, 2023, the judiciary has acknowledged that the use of original jurisdiction on matters of public importance needs to be established by a consultative process. This consultation avoids the possibility of use of arbitrary powers by any judge to use original jurisdiction of the apex court in a whimsical way. This judgment has resulted in establishing certain parameters for public interest litigation under the original jurisdiction of the apex court. Under the new legal framework, the apex court can only take cognizance of a public interest matter in its original jurisdiction when majority of the judges agree that the matter in question involves public interest and relates to fundamental rights of citizens.

4.9 Conclusion

This chapter has demonstrated the expansion of judicial power post lawyers' movement, with specific focus on the role of legal constitutionalism in establishing judicial supremacy. The fundamental principle underlying legal constitutionalism is the prevention of the misuse of power by executive authority and legislative organs. This particular theory enables courts to review the public actions of the legislature as well as the executive. The judiciary often exercises its authority to compel governmental entities to modify their public decisions, therefore safeguarding individual rights against potential infringement by the government. However, while attempting to achieve such noble aims, there is a possibility that the court may encroach upon the domains of other branches of government. This is neither desirable nor the constitutional mandate of the court. The

[613] Ibid, paragraph 31.

role of the court of Chief Justice Iftikhar Chaudhry illustrates numerous instances when the Court played an activist role that went beyond its constitutional remit.

The court of Chief Justice Iftikhar Chaudhry assumed a role in intricate policy decisions that traditionally fall under the purview of the executive branch. It is evident from this chapter, that the Court under Chief Justice Chaudhry made almost everything justiciable. In a bid to enforce fundamental rights (that too by an expansive interpretation of fundamental rights), the Court adopted an inquisitorial jurisdiction in numerous cases, a role which is not usually accorded to Courts of Common Law countries. Furthermore, the Court also took a series of initiatives on its own accord to investigate and judge corruption scams. So much so that the Court even went to nullify international investment contracts which did not augur well for the economic condition of the country. During this time, judicialization of politics became norm as the Court dismissed an elected Prime Minister on contempt charges. Upon careful examination of these events, it may be posited that the constitutionalism shown by the Supreme Court during this era led to the establishment of judicial supremacy inside the Supreme Court of Pakistan. Through critical analysis of the judicial activism exercised by superior judiciary during this period, this chapter has shown how legal constitutionalism has contributed to the consolidation of judicial power. The relevant research question about role of constitutionalism in creating judicial supremacy has been answered through nuanced exploration of factors culminating in judicial supremacy. This chapter has demonstrated that legal constitutionalism, as a normative framework, has enabled judiciary to assume a more dominant role in moulding Pakistan's constitutional framework. Through an incisive inquiry into the constitutional cases that vested the superior judiciary with enormous powers, this chapter has also achieved the research objective of highlighting factors that contributed in creating judicial supremacy in Pakistan.

Chapter 5

Political Constitutionalism in Pakistan: Prospects and Challenges

5. Introduction

This chapter provides a detailed account of political constitutionalism in Pakistan, exploring its strengths and drawbacks in determining citizens' rights. The chapter deals with the research question about the suitability of political constitutionalism in determining citizens' rights and its relative comparison to giving such powers to unelected judges. Furthermore, by means of an in-depth analysis of political constitutionalism in Pakistan, this chapter seeks to achieve the research objective pertaining to the advantages and limitations of political constitutionalism in a constitutional dispensation. Unlike legal constitutionalism, tradition of political constitutionalism has remained largely extraneous in the constitutional jurisprudence of Pakistan. A fundamental reason for the irrelevance of the political constitutionalism in Pakistani polity is presence of a codified constitution and exercise of judicial activism by courts in the constitutional dispensation of the country. Constitutional history of country shows that constitutional courts have been instrumental in defining contours of constitutionalism in country. After becoming an independent state, the country got embroiled into numerous constitutional crises and a series of judicial verdicts paved way for arbitrary rule. This formative constitutional jurisprudence was not in accordance with the theory of constitutionalism which requires judiciary to restrain executive from arbitrary decision making. Thus, due to unstable constitutionalism, the first constitution of the country was abrogated and the country plunged into arbitrary and dictatorial military rule. Pakistan's attempt to transition into a constitutional democracy was thwarted from the very beginning when the Constituent Assembly was prematurely dissolved before it could successfully conclude the process of constitution drafting. Furthermore, another reason for the inert development of political constitutionalism in the country is the constant denigration and violation of democratic norms and fragile democracy in the country. Political equality in decision-making is cornerstone of political

constitutionalism, however, the role of the elected representatives of the country has remained minimal which made the concept of political equality largely redundant.

Though the tradition of political constitutionalism has largely remained irrelevant in Pakistan, it would be wrong to completely discard this theory. The constitutional jurisprudence of the country shows certain historical moments when the political constitutionalism could be seen to be practiced by elected legislators. This chapter explores key moments when political constitutionalism led to inclusive and participatory decision making on important constitutional matters. The chapter also examines the challenges linked to the implementation of political constitutionalism and aims to provide a comparative assessment of the consequences of legal constitutionalism and political constitutionalism.

5.1 Political Constitutionalism in Pakistan

The tradition of political constitutionalism rests on reasonable disagreements about citizens on matters of constitutional rights. As mentioned earlier, advocates of this theory hold that constitutionalization of rights does not resolve such disagreements about rights, rather it only passes the decision-making power from elected representatives to unelected judges.[614] It goes without saying that this particular strand of constitutionalism attaches more importance to politics than law. The political constitutionalists see judicial review as a deviant constitutional device that does not take into account the disagreements among people on matter of rights as when a particular legislation is struck down on review by courts it essentially puts the individual views of judges over other citizens.[615] The supporters of this tradition give huge importance to the process thorough which a political decision is reached and assert that the judicial determination of any matter involving disagreements would lack legitimacy as it would fail to cater and respect the plurality of opinions on the said matter. Thus, political constitutionalism entails accountability of

[614] Gnffith, "The Political Constitution," 84.
[615] Bellamy, *Political Constitutionalism*," 210.

people having political powers by means of political procedures and institutions.[616] On a broader level political constitutionalism underscores those features of a constitutional dispensation which deal with accountability of government through political rather than juridical or legal branches of government.[617] The essence of political constitutionalism is rooted in fundamental principles such as non-domination, democratic rule, equal treatment open-government, and civic responsibility.[618]

We have also seen how some commentators have provided a normative account of political constitutionalism that is premised upon republican ideals of parliamentary accountability (ministerial responsibility), political equality and popular sovereignty.[619] A more extreme version of political constitutionalism has been advocated by Griffith who maintains that politicians who are accountable to people should make political decisions, rather than unelected judges.[620] It is not practical for country with a written constitution to completely adhere to Griffith's conceptualization of a political constitution. It is obvious from the above discussion that political constitutionalism has been defined in numerous ways by its proponents.

Pakistan has a written constitution. Like many other constitutions, constitution of Pakistan allows judiciary to review any legislation that is against basic constitutional rights or against constitutional provisions.[621] This shows that the constitutional framework of the country formally acknowledge the judicial authority to review legislation on constitutional parameters. However, the constitutional courts often tend to expand their judicial powers in matters that are supposed to be dealt with by other branches of government. Such arrogation of powers by judiciary under aegis of legal constitutionalism undermines concept of trichotomy of powers and even goes against the

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[616] Graham Gee and Gregoire C N Webber, "What is a Political Constitution?" *Oxford Journal of Legal Studies* 30, no.2 (2010): 273.
[617] Ng, Yee-Fui, "Political Constitutionalism: Individual Responsibility and Collective Restraint," *The Federal Law Review*, (2020): 2.
[618] Gee and Webber, "What is a Political Constitution," 282.
[619] See Adam Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005), 64-65. See also Bellamy, *Political Constitutionalism*, 210.
[620] Griffith, "The Political Constitution" *Modern Law Review* 42, no.1 (1979): 16.
[621] Article 8, Constitution of Pakistan.

fundamental norms of constitutionalism. So big question which arises here is whether we find any examples of political constitutionalism in Pakistan's constitutional history? Just like most constitutions of world constitution of Pakistan also came into existence through a broad-based political consensus.[622] However, this wasn't the only instance where democratic politics led to major constitutional development of the country. This chapter will examine instances in the constitutional past of the nation whereby the legislative body shown equitable regard for divergent viewpoints on significant constitutional issues.

5.2 Objectives Resolution—Setting the Foundations of a New State

As mentioned earlier, political constitutionalism rests on agreement of political actors of the state on contentious matters. Though there is always a possibility of disagreement among chosen representatives of public, democratic decision making through parliamentary means ensures that everyone is given equal concern and respect. Main two constitutional instruments which governed the state of Pakistan were the Government of India Act, 1935 and the Indian Independence Act, 1947.[623] The first Constituent Assembly of Pakistan had to perform two tasks; First and foremost, the Assembly was entrusted with the responsibility of formulating the Constitution for the nation. and secondly, it had to act in the capacity of federal legislature until the enforcement of the Constitution.[624] A severe critique on judicial supremacy is the fact that such phenomenon takes away constituent power from people and grant it to judiciary. In any democratic dispensation the constituent power usually rests in the people and their representatives exercise this power in a fiduciary capacity. The first Constituent Assembly comprised of elected representatives[625] who were entrusted with the crucial responsibility of formulating a constitutional framework for the country.

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[622] The Constitution Accord of 1972

[623] Newberg, *Judging the State*, 36.

[624] Khan, *Constitutional and Political History of Pakistan*, 51.

[625] The members of the Constituent Assembly were elected in the 1945-46 general elections. Muslim League won all Muslim seats in the Central Legislature and won 446 out of 495 Muslim seats in provincial assemblies.

Adoption of the Objectives Resolution was the initial step in the direction of constitution building. The Resolution laid the foundation of the Constitution and highlighted its essential features. The Resolution is an important example of phenomenon of political constitutionalism as it was laid before the House and there was a debate on its features by both the treasury and opposition lawmakers. It would be important to discuss the gist of the Resolution. The Resolution affirmed that the sovereignty over entire universe belonged to God Almighty alone and the authority has been delegated to the people by Him as a sacred trust.[626] Furthermore, the Resolution made it a responsibility of the State to provide Muslims enabling environment so that they could lead their lives according to teachings of Islam.[627] The Resolution envisioned a democratic government for Pakistan and also sought to protect constitutional rights. With respect to the rights of minority groups, the Resolution has established the responsibility of the State to ensure that appropriate measures are taken to enable religious minorities to exercise their freedom to openly profess and engage in their respective religious beliefs.

Mover of Resolution, Prime Minister Liaquat Ali Khan maintained that the *raison d'être* of creation of Pakistan was that Muslim population of subcontinent sought to lead their lives according to Islamic principles.[628] It was further elucidated that Resolution envisions a democratic order in which the authority of state could only be exercised by duly elected representatives of the people.[629] With regard to the rights of religious minorities, the speaker highlighted that the Resolution imposes an obligation upon the State to safeguard the rights of people who are non-Muslim citizens.[630] Prime Minister observed:

> "...Mr. President, in the end we firmly believe that by laying the foundations of our constitution on the principles enunciated in this Resolution, we shall be able to put Pakistan on the path of progress, and the day is not far distant when Pakistan will become a country of which its citizens, without distinction of class or creed, will be proud. I am confident that our people have great potentialities. Through their unparalleled sacrifices and commendable

[626] Objectives Resolution, 1949.
[627] Ibid.
[628] The Constituent Assembly of Pakistan Debates, Vol V, 1949, p 2.
[629] Ibid, 3.
[630] Ibid, 6.

> sense of discipline, displayed at the time of a grave disaster and crisis, they have earned the admiration of the world..."[631]

The Resolution was debated by the members of Government and opposition members. Once the Resolution was tabled, a non-Muslim member Mr. Prem Hari Barma moved a motion for eliciting public opinion on the Resolution.[632] He stressed upon the point that Pakistan comprises of people belonging to different religions and cultural backgrounds and the draft of Objectives Resolution must be shared with all people to seek their response on the Resolution.[633]

Another non-Muslim lawmaker, Mr. Sris Chandra Chattopadhyaya supported the motion for eliciting public opinion on the Resolution. He maintained that there was no need for Objectives Resolution as the Constituent Assembly did not need a theoretical framework for constitution-making.[634]

The motion for eliciting public opinion was opposed by the Prime Minister. The motion was put to vote on the same day and was defeated.

The non-Muslim members participated vigorously in the debate and raised objections to the Resolution. These members moved numerous amendments to the original draft of the Objectives Resolution.[635] The crux of these amendments was to change the religious character of the Objectives Resolution. However, these amendments were opposed by a large number of members of Constituent Assembly. The matter was put to voting and majority of the House rejected the proposed amendments.[636] The Resolution was adopted by Constituent Assembly on 12 March 1949. The Objectives Resolution holds significant constitutional historical importance in Pakistan. It has featured as preamble to all three constitutions of the country. Presently, it is a substantive part of the Constitution.

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[631] Ibid.
[632] Ibid, 8.
[633] Ibid.
[634] Ibid, 9.
[635] Khan, *Constitutional and Political History of Pakistan*, 59.
[636] Ibid, 60.

From the standpoint of political constitutionalism, it can be seen that the Resolution was adopted as a result of a political process in the Assembly. Various lawmakers hailing from diverse religious, cultural and social backgrounds took active part in discussing the Objectives Resolution which was to serve as a guiding document for the future constitution of the state. We have observed that in the view of the political constitutionalists, with regard to any political decision, the process related considerations are more important than the outcome related considerations.[637] Because process-related considerations indicate that there is wide participation in ultimate decision making.[638] The debate on the Objectives Resolution fulfils this important feature of political constitutionalism, where all members of Constituent Assembly were given equal respect and concern with regard to their views on Resolution. Of course, the resolution of disagreements happens through democratic voting in political constitutionalism. A decision by majority does not undermine the opinion of the minority, rather it shows that a certain decision has been agreed to by majority of political community.[639] The debates on the Objectives Resolution is indicative of this argument. Unlike a judicial ruling which oftentimes does not ally concerns of everyone and have a sum-zero nature, the parliamentary procedures are designed to ensure equality among the dissenting views.

Committee on Fundamental Rights of the Citizens of Pakistan and on Matters Relating to Minorities

As previously stated, the primary aim of the First Constituent Assembly of Pakistan was to draught a constitution for the nation. In order to accomplish this objective, a multitude of committees were established to address various facets of the constitution. One of the significant committees established by the Constituent Assembly dealt with fundamental rights and rights of minorities.[640] The formative constitution-making process acknowledged the significance of protecting

[637] Waldron, "The Core Case against Judicial Review," 1372.
[638] Ibid, 1372-73.
[639] Bellamy, *Political Constitutionalism*, 226.
[640] Khan, *Constitutional and Political History of Pakistan*, 52.

fundamental liberties of the citizens. The obvious corollary of entrenchment of bill of rights in constitutional document is that such entrenchment confers important powers upon courts.[641] The political constitutionalists do not favour this role of courts where they scrutinize political judgments of legislature because the decision making about rights often revolves around the 'circumstance of politics.[642] However, the constitutional design of every state depends on multitude of factors. The partition of India resulted in the division of the subcontinent's inhabitants along communal lines. The members of the Constituent Assembly, in their collective wisdom, recognised the critical nature of safeguarding the individual rights and interests of every citizen. The debate on the Objectives Resolution clearly points out this fact. However, the theory of political constitutionalism should be seen more broadly. When the representatives of people prescribe certain basic rights of the people, it should be celebrated as a triumph of the political process due to which the elected representatives reach a mutually acceptable solution on contentious issues such as rights of citizens. A completely antagonistic attitude towards judiciary's responsibility in safeguarding constitutional rights is neither practical nor desirable in a dispensation with a written constitution. Especially, if the elected representatives consider it apt to entrust the protection of constitutional rights to judiciary, such decision demands due deference as per the requirements of the theory of political constitutionalism.

The Committee on fundamental rights presented its report in Constituent Assembly in 1950.[643] In line with the constitutional developments in other jurisdictions, the committee proposed a comprehensive package of rights for both Muslims and non-Muslims in Pakistan.[644] A subcommittee was constituted to present a report on matters pertaining to rights of minorities in Pakistan. After an inclusive deliberative process[645], the final report on minority rights was tabled

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641 Timothy Macklem, "Entrenching Bill of Rights," *Oxford Journal of Legal Studies* 26 no.1 (Spring 2006): 108.
642 Waldron, *Law and Disagreement*, 167-187
643 Khan, *Constitutional and Political History of Pakistan*, 66.
644 Ibid.
645 A questionnaire was prepared by the committee and the opinion of important individuals was sought on issues related to minority rights.

in the Constituent Assembly after thorough debates. In addition to reaffirming the basic rights granted to non-Muslim citizens, the report included the following measures to defend the interests of minority groups:

i. Minorities living in any region of Pakistan ought to be granted the preservation of their unique culture, language, and script.

ii. The state would not exhibit any discriminatory practises when it comes to providing aid to educational institutions that are operated by religious minority groups.

iii. In order to protect the interests of minority groups, it was suggested that a Ministry of Minority Affairs be established.[646]

It can be seen that the Constituent Assembly took wide-ranging initiatives to ensure that the constitution of Pakistan provide a comprehensive framework of rights for the religious minorities. One notable advantage of this deliberative parliamentary procedure was that it all that it enabled stakeholders from a wide range of backgrounds to share their opinions and concerns. Democratic involvement in the decision-making process prioritises the recommendations of the Constituent Assembly above judicial decisions, since the latter frequently reflect the subjective viewpoints of the judges. The argument made by the political constitutionalists is that the constitution should be seen as a framework for amiable resolution of political disputes in community and not as an instrument of arriving at correct answers of these problems.[647] The debates, disagreements and decisions of the Constituent to important constitutional questions vis-à-vis fundamental rights and rights of minorities show how political process effectively ensured participation of those affected by such political decisions. Unlike the substantive judgments made by the courts, this process reflects participation, inclusivity and equal concern and respect for the members of the political community. However, due to unstable constitutionalism in the country, the proposals of the

[646] G.W. Choudhary, *The First Constituent Assembly of Pakistan* (1956), 121. See also Khan, *Constitutional and Political History of Pakistan*, 67.
[647] Bellamy, *Political Constitutionalism*, 123.

Constituent Committee in relation to the structure of the Constitution did not see light of the day as the Assembly was dissolved by the Governor General before it could complete its mandated task of constitution making. Therefore, instead of becoming a democratic republic the country got embroiled into chaotic politics and the rewards of political constitutionalism did not come to fruition.

5.3 Constitutional Accord 1972 and Framing of Constitution of 1973

Due to turbulent politics, the constitutional development of the country remained stagnated. The first two constitutions were invalidated due to a sequence of unlawful activities perpetrated by the influential executive arm of the government. As has been mentioned earlier, the judiciary legitimized these unconstitutional attempts on implausible grounds.[648] The secession of East Pakistan and its subsequent transformation into the state of Bangladesh was a consequence of the intricate political and constitutional challenges faced by Pakistan, culminating in a violent civil war. Though it would be inapt to make a benign assessment of this national debacle, the unconstitutional practices of the ruling elite create a sense of estrangement and alienation in the populace of East Pakistan. In a diverse country like Pakistan, the room for political constitutionalism can never be over. The fate of the country would have been different if unelected institutions had not usurped the legitimate powers of political actors of country. The country was in tatters after this debacle, however, the new government took the reins of power and embarked on a perilous journey of addressing the mammoth challenges which were faced by the country.

One of the major tasks of the new government was to frame a constitution upon which was acceptable to all the major political forces of the country. The opposition parties wanted the new constitution to enshrine a Westminster form of parliamentary government.[649] However, the

[648] See for example *Reference by the Governor General* (PLD 1955 FC 435) and *The State v Dosso* (PLD 1958 SC 533).
[649] Mubashir Hassan, *The Mirage of Power: An Inquiry into Bhutto Years, 1971-1977* (Karachi: Oxford University Press, 2000), 144.

government did not agree with the idea, given the fragile state of democracy in the country.[650] The interim constitution became operational in April, 1972 when the government lifted martial law.[651] This interim constitution was ratified by same National Assembly that had been constituted by elections in 1970 before fall of Dhaka. After a tumultuous round of political changes in the country, the Assembly served in the constituent capacity. The interim constitution was different from the permanent Constitution of 1973 in several aspects. Presidential system of government was enshrined under the interim Constitution.[652] It also enunciated a unicameral legislature. The configuration of administrative relationships between the central government and provincial entities had resemblance to the framework established under the 1962 Constitution. Nevertheless, divergences emerged over the core attributes of the constitution, prompting political factions inside the National Assembly to advocate for specific modifications to the constitutional framework.

With the aim of creating consensus on new Constitution of nation, a parliamentary committee was constituted having broad representation from all the parliamentary parties.[653] However, this committee could not make any significant progress vis-à-vis the constitution making.[654] There was a lack of consensus on some major constitutional issues such as powers of Prime Minister and matters pertaining to federalist structure of state. As a consequence of the prevailing lack of trust between the government and opposition representatives inside the Assembly, the latter made the decision to abstain from participating in the activities of the parliamentary committee.[655] On October 17, 1972, a gathering of all parliamentary leaders was convened in an effort to resolve the deadlock. After many rounds of deliberations, negotiations and bargaining between the political

[650] Rahat Zubair Malik, "Parliamentary System and Framing of the 1973 Constitution: Contest between Government and Opposition inside National Assembly," *Pakistan Perspectives* 25, no.1, (2020): 30.
[651] Khan, *Constitutional and Political History of Pakistan*, 255.
[652] Article 50, Interim Constitution of Pakistan.
[653] Malik, "Parliamentary System," 31.
[654] Ibid.
[655] Khan, *Constitutional and Political History of Pakistan*, 266.

leaders, a constitutional accord came into existence.[656] The key achievement of this political process was that finally there was a consensus on the main structure of the constitution by the elected representatives of the people. However, it must be mentioned that the decisions which laid groundwork for the Constitution of 1973 was substantially different from the provisions of interim constitution. The proposed constitutional deal included a system of governance characterised by a parliamentary structure, a bicameral legislature, Islamic provisions and a comprehensive allocation of legislative and administrative authority between the federal and provincial entities.[657] Again, it can be observed that the virtues of political constitutionalism enabled the elected legislature to reach an amiable settlement on the features of a new constitution. The manner in which political constitutionalism accommodates competing interests is unique and democratic. Conversely, we have seen that whenever judiciary attempts to redefine the constitutional contours it stirs up a controversial discourse on democratic validity of such action.[658]

The Constitutional Accord of 1972 exemplifies a democratic involvement of the pertinent stakeholders in the process of constitution-drafting. The Accord laid the foundation of Constitution of 1973. Even when the Constitution Bill was moved there were certain demands made by the opposition parties. They pressed for making the constitution more Islamic and democratic.[659] The government led by Bhutto entered into negotiations regarding the constitution and finally the government agreed to the amendments proposed by the opposition. Thus, on 10 April 1973 the Constitution of Pakistan was adopted without a dissenting vote. This again goes to show that democratic procedures provide greater legitimacy and inclusion in the law making process.

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[656] Ibid.
[657] Ibid, 266-267.
[658] For example see the interpretation of term 'consultation ' by the court in *Al Jehad v Federation of Pakistan* (PLD 1996 SC 324) paragraph 82, p.406-406.
[659] Khan, *Constitutional and Political History of Pakistan*, 267.

5.4 18th Constitutional Amendment—A Watershed in Constitutional Politics of Pakistan

After the conclusion of Musharraf's military regime, the recently elected government embarked on the endeavour of reinstating the 1973 Constitution to its initial form and purpose. After its promulgation in 1973, the Constitution of Pakistan underwent many changes in the successive military and civilian governments. Most importantly, this constitutional amendment package sought to reinstate a pure parliamentary form of government with ceremonial presidential powers. Another important object of the amendment was to foster federalism in the country so that the legitimate interests of the federating units could be protected. Furthermore, this constitutional change aimed to enhance transparency, participation and inclusivity in judicial appointments in superior courts. Moreover, the amendment added some new substantive constitutional rights. In the light of theory of political constitutionalism, it would be important to see how the elected representatives agreed to a holistic package of constitutional reforms.

Constitution of Special Parliamentary Committee on Constitutional Reforms

In 2009, President Asif Ali Zardari established a Special Parliamentary Committee on Constitutional Reforms. The Committee was constituted to reverse the autocratic constitutional amendments made to the constitution during military regimes of Zia and Musharraf.[660]

This shows that the special committee strived to undo the 17th Amendment which was passed by the Musharraf regime. Furthermore, in a bid to revive the scheme of government as enshrined in the original constitution, the committee noted that the constitutional amendments by military regimes altogether changed the form of government from parliamentary for to quasi-presidential form which is contrary to the design of the original constitution of 1973.[661] The question of provincial autonomy was perhaps the most important issue which needed to be addressed through

[660] Katharine Adeney, "A Step towards Inclusive Federalism in Pakistan? The Politics of the 18th Amendment," *Oxford University Press*, 42, no.4 (Fall 2012) 539.
[661] Ibid.

consensus. The constitutional amendment package was designed to promote federalism in the country by giving greater financial, administrative and legislative control to the provinces.

Besides the specific terms of reference (ToRs), the committee agreed upon following the principles while examining the provisions of the Constitution:

i. "Transparency in system
ii. Minimizing individual discretion
iii. Strengthening Parliament and Provincial Assemblies
iv. Provincial Autonomy
v. Independence of the Judiciary
vi. Further strengthening fundamental rights
vii. Question of merit
viii. Good governance
ix. Strengthening of Institutions"[662]

It can be observed that the establishment of this special committee reflects a broad-based consensus in the duly elected representatives. Political constitutionalism always gives greater significance to politics than law and argue that the former cannot be made subservient to the latter. The proponents of this tradition believe in supremacy of politics as opposed to law because only politicians have democratic claims to make political decisions for the community.[663] As we mentioned earlier, the depoliticisation of constitutional principles is a natural consequence of legal constitutionalism.[664] Such depoliticisation results in limiting the sphere of politics. One can note that the consensus on 18th Constitutional Amendment was result of politics. It was politics which ensured that elected legislators from different political parties agreed upon a comprehensive

[662] Ibid.
[663] Griffith, "The Political Constitution," 12.
[664] Bellamy, *Political Constitutionalism*, 210.

amendment package. Therefore, settling such matters through judicial decisions can never confer the legitimacy that is both desirable and important in such decisions.

New Fundamental Rights under Eighteenth Constitutional Amendment

To promote justice, transparency and social welfare, the 18th Constitutional Amendment added three important rights in the fundamental rights chapter.

i. **Right to Fair Trial**

The 18th Constitutional Amendment incorporated this important right in the list of fundamental rights. This provision guarantees that each individual is given a fair trial and the proper legal procedures in determining their civil or criminal responsibilities.[665] This fundamental right is in line with the international commitments of the country.

ii. **Right to Information**

Another important human right recognized by the Universal Declaration on Human Rights (UDHR) is right to information. In any democratic society, citizens have right to gain access to information on important public matters.

The inclusion of the basic right to freedom of speech and information in the constitution of Pakistan via the 18th Constitutional Amendment was a result of the country's acknowledgement of its international commitments and its commitment to upholding this crucial right. This right entitles all citizens to get information pertaining to topics of public significance, subject to legal norms and constraints.

Language of this constitutional provision makes it quite clear that every citizen can now information on any matter that has public importance. Under the aegis of this constitutional provision, right to information laws have been passed at federal and

[665] Article 10-A, Constitution of Pakistan.

provincial levels.[666] It has been argued that the right to information has a direct nexus with good governance as it enables the citizenry to keep check on the public officials.[667] Through inclusion of this right, the Parliament of Pakistan envisioned a responsive government where the citizenry also acts as a participant in ensuring that public officials are acting in accordance with their legal duties.

iii. Right to Free and Compulsory Education

The inclusion of the right to free and compulsory education in the chapter of Fundamental Rights was a significant aspect of the 18th Constitutional Amendment. In modern age, education is considered as a *sin qua non* for a decent life. Education cannot be considered as a luxury, rather it is one of the basic human necessities. The 18th Constitutional Amendment made free and compulsory education a fundamental right. This constitutional requirement establishes a significant legal obligation on the state to implement all necessary steps in order to guarantee the provision of compulsory and cost-free education to children.

A cursory glimpse at these fundamental rights makes it evident that the legislature intended to provide additional safeguards to the people of the country. The most important aspect of adding these rights through a constitutional amendment is the fact that they were a result of consensus among the elected representatives of the people. Unlike interpretation of rights through judicial verdicts, the politically negotiated package of rights has greater legitimacy as it is agreed upon by people's representatives espousing will of their constituents.

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[666] The Right to Information Act, 2017, The Khyber Pakhtunkhwa Right to Information Act, 2013, The Punjab Transparency and Right to Information Act, 2013, The Sindh Transparency and Right to Information Act, 2016, and Balochistan Right to Information Act, 2021.

[667] Naeem Ullah Khan and Sana Akhter, "Right to Information as an Instrumental Force of Good Governance in South Asia," *Research Journal of South Asian Studies* 32 no.1, (January 2017), 153.

5.5 Limitations of Political Constitutionalism

Just like legal constitutionalism, the theory of political constitutionalism is not without its limitations. The concept of legal constitutionalism focuses on making certain rights as inalienable so that they may be protected against the oppression of democratic majorities. It would be instructive to see the pitfalls of political constitutionalism in context of Pakistan.

Tyranny of Majority

The whole theory of legal constitutionalism rests upon the potential fear that democratic majorities will trample upon the rights of minorities. Perhaps, that is why the Greeks maintained that "will of people" must be under law.[668] Authors of famous Federalist paper in the United States also took note of potential ills of majoritarian pressure and politics.[669] Therefore, the proponents of legal constitutionalism often argue that rights are best protected by an independent judiciary. The argument goes that if rights of minorities are left to the whims of political majority, it would entail serious repercussions for the minorities who have nowhere to go but to courts to enforce their constitutional rights.[670] A further aspect of this perspective is that the majority ought not to serve as the ultimate arbiter when its own authority necessitates limitations.[671] Therefore, there is always a chance that democratic majorities may resort to usurpation of rights of minorities.

In context of Pakistan's constitutional history, there are numerous occurrences where democratic majorities did not abide by the democratic rules and made decisions that were detrimental to those who were not in power. After adoption of the 1973 Constitution, the elected government of Zulifiqar Ali Bhutto added numerous amendments which were detrimental to the opposition

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[668] Robert K Fleck and F Andrew Hanssen, "Judicial Review as a Constraint on Tyranny of Majority," (October 2006) Available at SSRN: https://ssrn.com/abstract=1699206 or http://dx.doi.org/10.2139/ssrn.1699206. Accessed on February 20, 2022.

[669] "It is of great importance . . . to guard one part of the society against the injustice of the other part. 2 Different interests necessarily exist in different classes of citizens" (Madison, Federalist 10).

[670] Erwin Chemerinsky, "In Defense of Judicial Review: A Reply to Professor Kramer," 92 *California Law Review* 1013.

[671] Dworkin, *Freedom's Law*, 16.

political parties and curtailed the jurisdiction of superior courts. It would be instructive to see how these amendments relate to tyranny of majority.

Bhutto government introduced a constitutional amendment that curtailed rights of *detenu* detained under preventive detention.[672] A constitutional change was effected to include the provision for preventive detention. Various safeguards as to preventive detention were removed under this amendment.[673] The primary objective of this constitutional amendment was to abridge the rights of political *detenus* and thereby granting government legal authority to indefinitely imprison political adversaries. This is a textbook example of a majoritarian government exercising tyranny on those who oppose it.

The government led by Bhutto did not stop at tinkering with the period of preventive detention, rather it passed another constitutional amendment that sought to limit judicial powers in relation to giving relief to the political *detenues*. The Fourth Constitutional Amendment effectively restricted the authority of High Courts to issue orders pertaining to the preventive detention of individuals or to grant bail to those imprisoned under preventive detention legislation. The perspectives of minority political groups were effectively suppressed within the parliamentary setting, as opposition members were expelled from the Assembly. Furthermore, constitutional amendments were hastily made in the lack of opposition representation. This goes to show that a government with a super-majority was able to enforce its will without even considering the legitimate concerns of the minority. The lack of an impartial and unbiased mediator allowed a government with majority rule to misuse power. The most cherished principle of political constitutionalism is equal concern and respect for everyone, it is quite evident from the above discussion that the majoritarian government was least interested in giving due respect to its opponents who happened to be a numerical minority in the legislature.

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[672] Khan, *Constitutional and Political History of Pakistan*, 293.

[673] For instance, the original constitution provided a period of one month for preventive detention for a *detenu*, this period of detention was enhanced from one month to three months.

Arbitrary Rule

It has been seen that more often than not majoritarian governments tend to disregard law and make arbitrary decisions. There is a possibility that a majoritarian government would make whimsical decisions to woo its constituents or achieve myopic political goals. Without an effective system of checks and balances, it would be nearly impossible to stop arbitrary rule. This is one of the reasons why some commentators believe that popular sovereignty resides in people not as a group but as individuals and judges protect the liberties of people from majoritarian abuses.[674] Whenever there is a possibility of a majoritarian abuse by a representative legislature, it becomes essential to have a non-representative institution to ensure non-domination and liberty.[675] That is why adherence to law is closely connected with the theory of legal constitutionalism. Arbitrary rule becomes very hard to practise, if not downright impossible, when there is rule of law in a polity. Rule of law is a precondition for civilized societies.[676] Though the proponents of political constitutionalism believe that a majoritarian government keeps into account the diverse interests of the populace and make decisions by according equal respect and concern for all, it is not always the case. The majoritarian governments often overlook the interests of those in minority and sometimes even disregard the established notion of rule of law to achieve their political objectives.

An example of arbitrary decision making was the passage of Anti-Terrorism Act (ATA), 1997 in Pakistan. Due to surge in sectarian and political violence, the government decided to enact a special law that dealt with broad range of crimes falling under the terrorism.[677] The ATA established special courts to try offences related to terrorism. The purpose of this law is to ensure speedy trial

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[674] Randy E Barnett, "Foreword: Why Popular Sovereignty Requires the Due Process of Law to Challenge "Irrational or Arbitrary" Statutes," available at https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2678&context=facpub Accessed March 1, 2022.

[675] Horace Spector, "Judicial Review, Rights and Democracy," *Law and Philosophy* 22, no.3 (July 2003): 296-97.

[676] Mandobi Chowdhury and Shayan Ghosh, "Constitutional Governance and Rule of Law," Available at SSRN: https://ssrn.com/abstract=1956317. Accessed on March 20, 2022.

[677] Moeen H. Cheema, "Two Steps Forward One Step Back: The Non-Linear Expansion of Judicial Power in Pakistan," *International Journal of Constitutional Law* 16 No.2 (June 2018), 514.

of terrorism related offences.[678] However, the law was contrary to numerous fundamental rights mentioned in the constitution. The law gave powers to the law enforcement officials to open fire on a person suspected of committing a terrorist act.[679] Furthermore, the law also provided for trial of an accused in absentia.[680] In addition to that, the confession of an accused before a police officer was made admissible under the provisions of ATA.[681] Evidently, these provisions jeopardized the constitutional entitlements of citizens as they gave blanket protection to the officials of law enforcement agencies. In *Mehram Ali case*[682], the apex court invalidated certain parts of ATA due to their inconsistency with constitutional provisions. The Court invalidated provision pertaining to authorization of law enforcement authorities to shoot an individual on the apprehension that he would commit a terrorist act.[683] Furthermore, the court maintained the provision pertaining to trial of person in absentia was in contravention of Article 10[684] of the persons and declared it to be void. The Court further decided that the provision which made the confession before a police officer admissible violated the fundamental right against self-incrimination and was void.[685] It is evident that the law was clearly in contravention of the fundamental rights of people. It was nothing more than an arbitrary piece of legislation that deprived people of their constitutional rights. The constitutional review of legislation enabled superior judiciary to safeguard the rights of citizens by striking down the unconstitutional provisions of ATA.

Disregard for Constitution and Democratic Norms

In his attack on the institution of judicial review, Waldron bases his criticism upon four assumptions. He argues that his critique would only hold water in a society where:

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[678] Muhammad Asif Khan and Pervaiz Khan, "Defining Terrorism in National Laws: An Overview of the Definition of Terrorism in the Anti-Terrorism Act of Pakistan 1997," *Journal of Law and Society, Law College University of Peshawar* XLVII, no. 69 (July 2016):121.
[679] Section 5(2) ATA, 1997.
[680] Section 19 (10) (b), ibid.
[681] Section 26, ibid.
[682] *Mehram Ali v. Federation of Pakistan* (PLD 1999 SC 57).
[683] Ibid.
[684] Fundamental Right as to safeguards against arrest and detention.
[685] *Mehram Ali v. Federation of Pakistan* (PLD 1999 SC 57).

i. Democratic institutions are in a good working order

ii. Judicial institutions are efficiently doing their job of adjudication of disputes

iii. Majority of the members of the community and its officials are well aware and committed to safeguarding individual rights and rights of minorities.

iv. There are continuing, significant and good faith disagreements about rights.[686]

It is evident that the criticism on judicial review and hence legal constitutionalism would only be plausible if the above assumptions are there. In essence, these assumptions indicate a dispensation in which the political stakeholders give due deference to the democratic norms and constitution. However, this is not always the case. To achieve its political goals, a political government may be encouraged to act against the democratic principles and it may even act against the constitution. Owing to several turbulent constitutional politics, the phenomenon of constitutionalism in Pakistan is often described as unstable constitutionalism[687]. Unlike a mechanism for constraining concentration of power, the constitutionalism in the country epitomizes a continuing conflict among rival power contenders.[688] The colonial legacy did not allow the state to grow into a democratic polity due to which democratic norms and a constitutionalism as a phenomenon could not take root in the country. It has been pointed out in the previous chapters that the courts did not have an encouraging record with regard to upholding the supremacy of the constitution. Despite this historical baggage, judiciary is the only independent and neutral institution capable of enforcing compliance of government on constitutional provisions. A recent example may be useful to illustrate this point.

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[686] Waldron, "The Core of the Case against Judicial Review," 1360.

[687] Unstable constitutionalism has been defined by Tushnet and Khosla in the following terms:
"The term unstable constitutionalism aims to capture the difficulties that the law faces in mediating between legal norms and sociopolitical facts, as well as the pressing challenges involved in giving constitutionalism a character that can move a nation from civil disorder to stability, thereby importantly transforming persistent features of the nation's experience." For details see, Mark Tushnet and Madhav Khosla, "Unstable Constitutionalism" in *Unstable Constitutionalism: Law and Politics in South Asia* ed. Mark Tushnet and Madhav Khosla (New York: Cambridge University Press, 2015), 5.

[688] Mohammad Waseem, "Constitutionalism and Extra-Constitutionalism in Pakistan," in *Unstable Constitutionalism: Law and Politics in South Asia* ed. Mark Tushnet and Madhav Khosla (New York: Cambridge University Press, 2015), 157.

A no-trust motion was submitted against former Prime Minister Imran Khan in the National Assembly of Pakistan by the opposition parties. Like other parliamentary democracies, Prime Minister is the leader of House and must command the majority of members of National Assembly. A constitutional mechanism exists for initiation of a no confidence motion against Prime Minister.[689] In the event that a vote of no confidence is approved by a majority of total membership of National Assembly, the Prime Minister ceases to hold office.[690] Mr. Khan assumed the role of Prime Minister with support of his coalition allies and formed coalition government. The opposition successfully garnered the support of the allies of the Mr. Khan's government. However, when the day of voting on no-confidence motion arrived, the deputy Speaker (hailing from Mr. Khan's party) in an unprecedented move rejected the no-confidence motion on the ground that it was a result of a foreign sponsored conspiracy.[691] The presiding officer struck down the no-confidence motion by maintaining that the opposition members did not abide by Article 5(1) of the Constitution which makes it constitutional duty of each citizen to be loyal to the State.

The ruling makes it evident that the Deputy Speaker interpreted the Constitution and stopped a constitutional process. In the aftermath of this ruling, the former Prime Minister asked President to dissolve the legislature and order of dissolution was made by President.[692] This series of events precipitated a constitutional crisis because the presiding officer did not have constitutional mandate to make such a ruling. Owing to the gravity of the situation, the Supreme Court of Pakistan took a *suo moto* action under Article 184(3) of the Constitution. In its short order, the Supreme Court declared the ruling of the Deputy Speaker as contrary to the Constitution and void ab initio.[693] The court noted that:

> "The Speaker shall not, in exercise of his powers under clause (3) Article 54 of the Constitution, prorogue the Assembly and bring the Session to an end, except as follows:

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[689] Article 95, The Constitution of the Islamic Republic of Pakistan
[690] Ibid.
[691] Nadir Gurmani and Fahad Chaudhary, "NA Speaker Dismisses No-Trust Move Against PM Imran, terms it contradictory to Article 5," *Dawn*, April 3, 2022.
[692] "PM Imran Khan advises president to dissolve assemblies," *The News International* April 3, 2022.
[693] Suo Moto Case No.1 of 2022.

a. If the Resolution is not passed by the requisite majority (i.e., the no-confidence resolution is defeated), then at any time thereafter;

b. If the Resolution is passed by the requisite majority (i.e., the no-confidence resolution is successful), then at any time once a Prime Minister is elected in terms of Article 91 of the Constitution read with Rule 32 of the Rules and enters upon his office."[694]

The apex court reinstated the legislature and instructed the Speaker of National Assembly to adhere to constitutional requirements. Thus, a major constitutional crisis was averted by the intervention of superior judiciary. Now in absence of the power of judicial review, the government of the day would have gotten away with violating the constitutional provision. This case reflect the fragile state of democracy in the country and also shows that political stakeholders might be tempted not to abide by the constitutional directives. The theory of political constitutionalism does not provide answers in such scenarios. When the elected members of parliament do not follow the constitution, there must be an independent body which should be in a position to enforce the constitution. The framers of the 1973 constitutions were aware of such a situation, therefore they chose judiciary as protector of the constitution.

5.6 Conclusion

The whole theory of political constitutionalism gives primacy to politics over law. This theory emerged as a reaction to the problems associated with legal constitutionalism. Political constitutionalism questions the ever-expanding judicial power and suggests an alternative in form of democratic politics. The theory gives special significance to 'will of the people' when it comes to deciding constitutional questions. The proponents of this theory do not consider the judicial review as a democratic tool in a constitutional dispensation. They always give greater importance to decisions made by the representatives of the people because such decisions are based on equal respect and concern for all citizens. As opposed to the judicial verdicts, decisions made by the political stakeholders are not zero-sum games.

[694] Ibid.

We have observed that despite having a fragile democracy, Pakistan has also benefitted from the consensus of the political stakeholders and landmark constitutional decisions have been made due to political constitutionalism. Evidently, broad based consensus of political parties of the country has been instrumental in the constitutional developments of the country. The chapter has shed light on important constitutional developments such as the passage of the 18th Constitutional Amendment. But due to weak state of democracy and lack of constitutional culture, there is always a danger for the abuse of power by a majoritarian government. The chapter has recounted the specific instances where the Court had to intervene to protect the constitution. Power structure of the polity dictates that there will always be need for judicial intervention in constitutional affairs of Pakistan for the foreseeable future. This certainly does not mean that political constitutionalism has no place in the constitutional design of the country. Political constitutionalism has helped the country in achieving landmark constitutional milestones and it must be fostered. However, given the tendencies of political stakeholders to deviate from the constitutional rules of the game, it would be a folly to remove the role of court from the constitutional scheme. Perhaps, that is the reason that the framers of the Constitution of 1973 envisaged an independent judiciary and entrusted it with the important mandate of protecting the rights of the people. With regard to the relevant research question about utility of political constitutionalism in determining citizens' rights, it must be said that political constitutionalism has proven to be quite successful on certain seminal occasions, yet political constitutionalism is not without its drawbacks like tyranny of majority and arbitrary rule. Overall, this chapter contributes to the ongoing debate about the role of political constitutionalism in shaping the constitutional development in Pakistan.

Chapter 6

Revisiting Constitutionalism in Pakistan—Conclusion and Recommendations

6. Introduction

This final chapter recounts the challenges that arise due to judicial supremacy in a constitutional dispensation. The potential strengths and weaknesses of legal as well as political constitutionalism often makes it an important question as to which tradition of constitutionalism should be preferred. There cannot be a universally acceptable answer to this question as the constitutional design of each state reflects its broader values and will of its people. After the Second World War, most countries opted for written constitutions which guaranteed protection of basic rights of citizens from arbitrary use of power by democratic majorities. In this regard, most of these constitutions envision a special role for judiciary and seek to foster independence of judiciary so that the rights of citizens are not jeopardized for the sake of myopic political advantages. Nevertheless, the increased authority of the judiciary has led to a kind of judicial supremacy, so undermining the equilibrium of power in a constitutional dispensation. The exclusive right of judiciary to determine what the constitution means has often given rise to arbitrariness in judicial decisions. Furthermore, Court has consistently intervened in shaping the policy options, a domain which exclusively falls within the domain of the executive. This chapter seeks to make some recommendations for restoring institutional balance of power in Pakistan. Furthermore, the chapter also strives to provide the contours of constitutionalism which is suitable for the Pakistan.

6.1 Journey from Viceregalism to Unstable Constitutionalism

Given Pakistan's history as a British colony, many of the unelected stakeholders preferred a viceregal model of governance since the independence of the country.[695] The protracted span of the constitution-making serves as a significant indicator of state's deficient democratic standards. The dismissal of the first Constituent Assembly makes it evident that the country's journey toward constitutionalism was stalled from the very outset. The endorsement of unconstitutional and unlawful actions of the ruling elite[696] also stifled adherence to law and turned the polity into a weak constitutional dispensation. Such turbulent constitutional jurisprudence pulled the country into the quagmire of repeated unconstitutional actions by civilian and military regimes.

Before the adoption of Constitution of 1973, the phenomenon of constitutionalism was almost non-existent as the superior courts played second fiddle to the whims of the government. The unelected bureaucracy amassed all the powers and the country's democratic future looked uncertain. The military government of General Ayub even prepared their own constitution. Like any other authoritarian regime, Ayub's government was least concerned about democracy, rule of law and constitutionalism. The institution of judiciary remained largely subservient to the executive during this period. Thus, the viceregal model was still being followed in those days, albeit with some changes.

The passage of the Constitution of 1973 is widely regarded as a significant milestone in the constitutional history of the nation. The country's elected leadership agreed upon a constitutional scheme which envisaged a workable model of constitutionalism for the polity. The Constitution envisioned an independent judiciary and enshrined a bill of rights for guaranteeing fundamental rights of the citizens. However, just like his predecessors, Mr. Bhutto showed reluctance in

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[695] At the time of independence, the viceregal model comprised of a powerful Governor General, an Executive Council chosen by the Governor General, a Central Assembly with limited powers, subordinate Provincial Governments and a powerful bureaucracy. For further details see, Khalid Bin Sayeed, *Pakistan: The Formative Years, 1857-1948*, (Oxford University Press, 1968), 221.

[696] See for example the decision of the Federal Court in *The Federation of Pakistan v Moulvi Tamizuddin Khan* (PLD 1955 Federal Court 240)

fostering constitutionalism and supremacy of law, as seen by his implementation of many constitutional modifications aimed at limiting the authority of judicial branch. The confluence of political instability and the implementation of authoritarian policies by the civilian administration ultimately resulted in yet another military *coup*. The incoming military government once again suspended the constitution and just like before the apex Court validated this unconstitutional action. The state of constitutionalism in Pakistan can be best described by the term 'unstable constitutionalism.'[697]

After the revival of democracy in the country in 1988, it was again thought that the phenomenon of constitutionalism would develop and foster under the new civilian leadership. However, the only change which took place was the expansion in power of the judiciary. By enhancing the scope of its original jurisdiction, the Supreme Court took cognizance of number of matters of public importance. The judicialization of politics began when the Court started ruling on the dismissals of governments during the last decade of twentieth century. The wave of judicial activism that started in the early 1990s reached its zenith when Justice Iftikhar Muhammad Chaudhry assumed the office of the Chief Justice.

6.2 Judicial Review without Judicial Supremacy

The exclusive right to interpret the Constitution often results in supremacy of courts other governmental branches. However, the Constitution of Pakistan empowers the constitutional courts to strike down any law under the power of constitutional review.[698] Thus, the utmost importance of enforcing constitutional rights is a pivotal aspect of constitutional framework of Pakistan. Moreover, it would be erroneous to make the assumption that the authors of the Constitution did not anticipate a distinct function for the court, since the preservation of judicial independence has significant constitutional value.[699] Hence, it is indisputable that the power of

[697] See, Tushnet and Khosla, "Unstable Constitutionalism," 5.
[698] See for example Article 8 of the Constitution of Pakistan.
[699] See for example, Article 2 A of the Constitution of Pakistan.

judicial review is a power prescribed by the constitution, and the judiciary has the constitutional authority to assess the constitutionality of legislation in accordance with the principles outlined in the Constitution. But we have seen that by using the pretence of public interest litigation, the Courts have arrogated unprecedented powers for themselves. As a result of the Court's intervention in the executive and legislative branches, judicial authority has been elevated above that of other branches of government. This supremacy has been criticized by numerous experts. According to Paulsen, the executive, legislative, and judicial departments of the federal government are seen as co-equal entities that function in a coordinated manner. He states that these branches are considered "co-ordinate" due to their shared ordination by a common authority, namely the People themselves. As a result, they possess equal status and position as representatives of the People. No entity is considered subordinate, which is the complete opposite of being considered coordinate with another entity.[700] Hence, the concept that judges possess ultimate authority in determining topics of significant public concern sometimes engenders conflicts between the elected and non-elected arms of government. The comments of a former Prime Minister in *Al Jehad Trust* case affirm this fact.[701] As may be shown from the preceding chapters, the gradual increase of judicial authority occurred during different eras. But as of now, apex court can even examine a constitutional amendment passed by the legislature on substantive ground.[702] This sort of power is even beyond the express text of the Constitution.[703] Two elected Prime Ministers of the country have been ousted from the office by means of judicial verdicts.[704] Pursuing an anti-

[700] Michael Stokes Paulsen, "The Most Dangerous Branch: Executive Power To Say What The Law Is", *Georgetown Law Journal* 83, (1994): 228-29.
[701] Statement of the Prime Minister on Judgment of the Supreme Court, National Assembly Debates, 28 March 1996, 434-435.
[702] *District Bar Association (Rawalpindi) v. Federation of Pakistan* (PLD 2015 SC 401).
[703] Article 239, Constitution of Pakistan.
[704] In 2012, Prime Minster Yousaf Raza Gillani was held in contempt of Court and subsequently disqualified from office. In 2016, Prime Minister Nawaz Sharif was disqualified by the Supreme Court on an investigation instigated by the Panama Papers.

graft agenda, the apex court has interfered in complex economic matters which culminated in enormous financial liabilities for the state.[705]

A brief analysis of constitutional jurisprudence of Pakistan shows that the phenomenon of constitutionalism in Pakistan has resulted in supremacy of judicial branch of the government. As mentioned earlier, numerous problems emerge out of such supremacy. The main concern is that by assuming an omnipotent role in the constitutional scheme, the courts overstep their formal role and disregard basic principles of separation of powers.[706] Those justifying an expansion in judicial power often argue that legislature has a self-interest in increasing its sphere of influence, however, this apprehension remains applicable for courts as well, since they too have a tendency to expand their powers through judicial verdicts.[707] It has been argued that courts are not suitable forums for formulating public policies.[708] In context of Pakistan, this is exactly what has happened as the judicial verdicts often tend to undermine the sphere of executive and legislative powers.

Evidently, the judges have been innovative when it comes to interpreting the texts of the Constitution. The controversy of judicial supremacy often arises when the Supreme Court makes a certain 'value judgment' about the meaning of a constitutional text and such judgment is supposed to be always followed by all functionaries of the State. In fact, understanding the meaning of constitutional text often creates problems for multiple stakeholders.[709] To prevent judiciary from giving new meaning to constitutional texts, some jurists often emphasize on traditional interpretive devices such as finding the basic intention of drafters.[710] Thus, a judge is not supposed to reinvent the meaning of the express texts of the words given in a law. This position is succinctly put by Richard Posner when he said that: "The self-disciplined judge is the honest agent of others until

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[705] See for example, *Maulana Abdul Haque Baloch v Government of Balochistan* (PLD 2013 SC 641).
[706] Veit Bader, "Parliamentary Supremacy versus Judicial Supremacy: How Can Adversarial Judicial, Public and Political Dialogue be Institutionalized?" *Utrecht Law Review* 12 no.1, (2016):166.
[707] Mark Tushnet, *Taking the Constitution Away from the Courts* (New Jersey: Princeton University Press, 1999), 26.
[708] Jarold Waltman, *Principled Judicial Restraint: A Case against Activism* (New York: Palgrave Macmillan, 2015), 58.
[709] Thomas Sowell, *Judicial Activism Reconsidered* (Hover Institution: Stanford University, 1989), 3.
[710] See for example, Blackstone, *Commentaries on Law of England*, Vol.1, 60.

the will of principals can no longer be discerned."[711] However, the case of Pakistan illustrates that the superior judiciary has often tried to give unique meaning to express constitutional provisions. It has been shown in this study that the Supreme Court has often preferred interpreting constitutional texts on consequentialist considerations rather than plainly interpreting the meaning of the constitutional texts.[712] So much so that apex court now has ultimate jurisdiction in checking validity of a constitutional amendment,[713] which goes against the express provision of the Constitution.[714] One issue associated with the activism of the judiciary is the lack of avenues for challenging the decisions made by the highest court, which in turn hampers the effectiveness of the legislative and executive branches. The concept of judicial supremacy has the tendency to limit the scope of authority of other departments of government, so conflicting with the principles of division of powers and supremacy of law. In a constitutional democracy, each organ of government must perform its duties in its respective sphere.

6.3 Pitfalls of Legislative Supremacy

The proponents of political constitutionalism often ignore potential for power abuse driven by political expediency. In the intricate constitutional trajectory of Pakistan, it becomes evident that elected leaders often choose to ignore the constitutional norms and tend to undermine the law and constitution if it is politically convenient for them. The abrogation of first two constitutions shed light on this phenomenon. In addition, the power of review by the courts gives the judiciary the ability to serve as an autonomous arbitrator in cases that have an impact on the general public.[715] A prime example of abuse of executive authority can be seen in the enactment of a controversial Anti-Terrorism Act in 1997. The Court declared that certain provisions of this legislation violated

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711 Richard Posner, *The Federal Courts: Crisis and Reform* (Massachusetts: Harvard University Press, 1985), 221.
712 See for example, the interpretation of the word 'consultation' in *Al-Jehad Trust v Federation of Pakistan* (PLD 1996 SC 324).
713 The Supreme Court in *District Bar Association (Rawalpindi) v. Federation of Pakistan* (PLD 2015 SC 401) has reserved the right to check the validity of constitutional amendments against the salient features of the Constitution of Pakistan.
714 Article 239 of the Constitution of Pakistan explicitly ousts jurisdiction of all courts to question the validity of a constitutional amendment.
715 Marmor, *Interpretation and Legal Theory*, 150.

constitutional requirements.[716] The law in question was enacted by a government that operated on majoritarian principles. However, it was subsequently invalidated by the Supreme Court due to its potential to undermine the rights of individuals. Another instance of the discretionary use of authority is seen in the unlawful decision made by the Deputy Speaker, who attempted to deny a legitimate vote of no-confidence against the Prime Minister. Pursuant to this unconstitutional ruling, the Prime Minister dissolved the National Assembly of Pakistan and announced elections. The Supreme Court took a *suo moto* notice of the matter and restored the National Assembly by setting aside the Deputy Speaker's unconstitutional ruling.[717] The government took this unconstitutional route because it had lost its majority in the legislature. These examples illustrate that political governments are susceptible to violating the law to secure political gains.

Moreover, even the sternest critics of judicial review make their assertions on the basis of certain assumptions. One of the important assumptions among them is that there is a stable democratic order in place and people are committed toward protecting the rights of minorities.[718] The fragile state of democracy in Pakistan is an open secret. There have been rounds of military interventions in Pakistan and the state of democracy has been anything but stable. Speaking from a historical angle, the military interventions received legitimacy from the superior courts, however, after the famous lawyers' movement, the country saw a different dimension of judicial power. The Courts have incrementally increased their sphere of influence and even used their powers to invalidate the actions of military regimes.[719] In numerous cases the apex Court emerged as the sentinel of rights of the citizens.[720]

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[716] *Mehram Ali v. Federation of Pakistan* (PLD 1999 SC 57).
[717] Suo Moto Case No.1 of 2022.
[718] Waldron, "The Core of the Case against Judicial Review," 1360.
[719] For example, The Supreme Court in *Asma Jillani v Government of Punjab* (PLD 1972 SC 139) declared the abrogation of 1962 Constitution as unconstitutional. Similarly, the Supreme Court in *Sindh High Court Bar Association v Federation of Pakistan* (PLD 2009 SC 879) declared the Emergency imposed by General Musharraf as unconstitutional.
[720] See for example *Darshan Masih v The State* (PLD 1990 SC 513).

6.4 Research Findings

This study has attempted to critically evaluate the phenomenon of constitutionalism and judicial supremacy in Pakistan. The preceding chapters have provided a comprehensive analysis of the operation of theories of constitutionalism in Pakistan and development and impact of judicial supremacy in the country. This section synthesizes key findings from the study, highlighting the most significant aspects of limitation of constitutionalism in Pakistan. The research findings provided below provide a detailed overview of the results of this study and will inform recommendations for future improvements. These findings also highlight the results of this study which has been conducted to examine problems of constitutionalism from a specific theoretical framework. Following are key research findings of this study:

1. The current model of judicial review provides immense powers to the judicial branch of the country. As has been seen throughout this study, the expansion of judicial powers is largely due to the fact that the judiciary itself sets the parameters of judicial review.
2. In the last few decades, the judicial branch has excessively involved itself in the domain of economic policy, thereby encroaching upon the functions of the executive. These unwanted interventions go against the concept of separation of powers among the branches of government.
3. One of the most important manifestations of judicial supremacy is the adoption of the basic structure doctrine by the apex court. Though there is no explicit constitutional basis of this theory, the court has practically assumed a status of a final arbiter on constitutional amendments. Through the judicial power of constitutional interpretation, the court can see whether Parliament has made a constitutional amendment consistent with the salient features of constitution. Providing such immense powers to unelected judges is not in line with democratic governance. Besides, the constitution of the country explicitly ousts jurisdiction of judiciary to scrutinize constitutional amendments.

4. The procedure of judicial appointments is opaque and undemocratic. Though the parliament attempted to exercise democratic control over the judicial appointments, the judiciary has taken this privilege away from the legislature by means of judicial review. Parliamentary control over judicial appointments is consistent with the concept of trichotomy of powers which is a fundamental principle of Pakistani constitutional dispensation. As it is observed, the lack of accountability and control engenders judicial supremacy. Due to absence of democratic procedure for judicial appointments, there has been a great expansion of judicial powers in the country.
5. The constitutional jurisprudence of Pakistan demonstrates that while interpreting the constitutional provisions, judiciary takes excessive latitude. The broad constitutional interpretations often reflect the subjective choices of judges on important constitutional issues.
6. A major problem with the political constitutionalism in Pakistan is the lack of transparency and participation in the legislative process. In absence of inclusivity and informed debate on legislation it is highly unlikely that this exercise would have democratic credibility and acceptability in public which could lead to tyranny of majority.

6.5 Quest for a Middle Ground between Legal Constitutionalism and Political Constitutionalism—Some Recommendations

After examining the limitations of both legal and political constitutionalism, it is imperative to chalk out a roadmap that contains the virtues of both these theories and limits the supremacy of any particular branch of government. Reconciling the diverging basis of these two strands of constitutionalism is indeed a daunting challenge. However, given the significance of this issue, it is necessary to provide some recommendations which address the problems and limitations of these two theories and address the problem of judicial supremacy. Moreover, it is important to

provide solutions that are suited to and are in line with the constitutional framework of Pakistan. The following suggestions have the potential to provide positive outcomes in re-establishing of power equilibrium among the departments of government, while also upholding the benefits of constitutionalism.:

1. Judicial review needs to be revisited by all the stakeholders. Currently, our legal system has a robust mechanism of judicial review, wherein the highest court possesses the authority to invalidate any legislation that violates basic rights or is deemed unconstitutional. The judicial review of legislation needs to have more legitimacy. For this purpose, weak judicial review appears to be a suitable option. In the weak model of judicial review, the Court has the option to send legislation back to the parliament for reassessment instead of outright striking it down. If the legislature agrees with the determination of the Court, it can repeal the legislation. However, if the legislature arrives at an opposite conclusion, it should pass the legislation after giving detailed reasons for its position. In order to mitigate the potential consolidation of power within the executive branch, it is proposed that any law brought back to the legislature by the court should need the approval of a super-majority of legislators, rather than a simple majority.

2. The responsibility for economic policy and issues related to foreign agreements should be delegated to the executive arm of the government. Undesirable effects often arise from court participation in such circumstances, as has been seen. It is not advisable for the judiciary to have a proactive stance in addressing such issues. According to the well-established principle of separation of powers, the responsibility for creating economic policy and making policy choices is primarily vested in the executive branch. Judicial interference in such matters undermines this constitutional mandate and creates uncertainty.

3. The basic structure theory (or 'salient features theory') does not have any explicit constitutional basis. The application of this theory has seriously constrained the Pakistani legislature from amending the constitution. This is tantamount to a direct interference in the legislative domain of parliament. The constitution does not explicitly impose any limitations on the authority of the legislature to modify the constitution. However, the Supreme Court has put implicit limitations on this legislative power via its extensive rulings. The examination of jurisprudence in its whole necessitates reconsideration, with the judicial branch being advised to prioritise adherence to the constitutional directives outlined by the legislature.
4. The process of selecting judges for constitutional courts should be enhanced to provide more transparency and adherence to democratic principles. It is high time for the judicial and the legislative branch to engage in a dialogue to determine the exact contours of judicial appointments. The composition of the constitutional courts has a huge impact on the constitutionalism. Therefore, there needs to be a collaborative formula under which the judicial appointments should be made in the superior judiciary. The implementation of parliamentary checks on such nominations is important in order to establish an efficient system of oversight on the judiciary.
5. The constitutional jurisprudence of Pakistan demonstrates that the judiciary have a distinctive authority in the realm of interpreting the provisions of the constitution. The Court's interpretation often extends beyond the explicit text of the constitutional provisions. Such expansive and innovative interpretations are often tantamount to rewriting of the constitution which is not within the remit of the court. To preserve the original purpose of the writers of the Constitution and prevent judicial activism, it is advisable for the highest court to adhere to a literal reading of constitutional provisions while engaging in the crucial duty of interpretation.

6. It is incumbent for the legislature to make the legislative process open, transparent, participatory and more deliberative. In particular, any legislation that has implications for rights of any segment of the society must be circulated among all the relevant stakeholders before putting it before the parliament. The parliamentary procedures should be redesigned to make legislation more inclusive. The counter-majoritarian difficulty and arbitrary power can be handled if the legislature involves more people in the law-making process. Such deliberative legislation can result in a robust constitutional democracy.

6.5 Conclusion

The phenomenon of constitutionalism in Pakistan has passed through various phases. The process of constitution making in Pakistan has always been turbulent. Following the attainment of independence from British colonial rule, the newly formed state underwent a transformation into a bureaucratic-military complex, with the judiciary assuming a pivotal role in the consolidation of administrative authority during this period. After the adoption and enactment of the 1973 Constitution, the judicial role became more independent and robust. Gradually, the judiciary began to wield immense power as opposed to other branches of government. The phenomenon of constitutionalism soon became a tool for judiciary to assert its dominance over other organs of state. The concept of judicial supremacy in Pakistan has had negative implications for the equilibrium of power among institutions, as it has undermined the rightful authority of the executive and legislative domains of government. It would be wrong to conclude that this phenomenon of judicial supremacy did not put restraints on the arbitrary use of executive power, as the judicial activism has on numerous occasions safeguarded the rights of common citizens and constrained the executive from making arbitrary decisions. However, the absence of a clear policy as to extent of judicial powers has given rise to judicialization of politics and judicial activism. The country has seen an unprecedented levels of judicial powers. Through the act of assuming authority to scrutinise the legitimacy of a constitutional amendment, the Court has effectively diminished

the role of the legislature as a subordinate entity in the process of enacting constitutional modifications. Concentration of power in any particular branch of power is against constitutional ideals. However, the importance of judicial review as an important constitutional tool can never be understated. The inherent dangers associated with the capricious use of authority by the executive and legislative branches of government are readily apparent. For fostering constitutionalism in country, it is necessary for all branches of government to exercise their constitutional mandate within their respective spheres.

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