



SEPARATION OF STATE POWERS IN PAKISTAN

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DEDICATION

TO MY PARENTS

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CONCLUSION

BIBLIOGRAPHY

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AGP	Attorney General of Pakistan
AIR	All India Reports
CCI	Council of Common Interest
CDA	Capital Development Authority
CJ	Chief Justice
CJP	Chief Justice of Pakistan
CLC	Civil Law Cases
CLD	Civil Law Digest
FR	Fundamental Rights
HC	High Court

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HR	Human Rights
HRCP	Human Rights Commission of Pakistan
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JCP	Judicial Commission of Pakistan
MLD	Monthly Law Digest
NAB	National Accountability Bureau
NRO	National Reconciliation Ordinance
PBC	Pakistan Bar Council
PCO	Provisional Constitutional Order
PLJ	Pakistan Law Journal
P Cr LJ	Pakistan Criminal Law Journal
PIL	Public Interest Law
PILL	Public Interest Law Litigation
PIL	Public Interest Litigation
PLJ	Pakistan Law Journal
PLD	Pakistan Legal Decisions
PBL	Pro Bono Publico Litigation

RA	Representative Actions
SAL	Social Action Litigation
SC	Supreme Court of Pakistan
SCMR	Supreme Court Monthly Review
SJC	Supreme Judicial Council
UNO	United Nations Organization
UN	United Nations
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
USA	United States of America

FOREWORD

The separation of powers is one of the most important constitutional concepts of modern times. It has particularly attained great importance in the federal constitutions. The concept of 'separation of powers' includes both horizontal as well as vertical separation of powers. The horizontal separation means the trichotomy of powers among the three organs of a state: legislature, executive, and judiciary. The vertical separation includes powers exercised at the federal, provincial, and local levels of government.

The primary purposes of the doctrine of 'separation of powers' in any constitutional government are to prevent tyranny and to guarantee political stability. The concept is rooted in democracy, and since democracy is of recent origin, the application of the concept is also of recent origin. Britain is generally regarded as the oldest among the democracies going back to 1688 when the charter of rights was adopted; and the monarchy came under constitutional rule.

The first written democratic constitution was adopted by the United States of America in 1788 which clearly and significantly provided for horizontal 'separation of powers'. Article I pertains to the Congress of the United States, which is its legislative organ. Article II provides for the executive powers that are vested in the President of the United States of

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America. Article III focuses on the judiciary and judicial power of the United States vested in the Supreme Court and the courts below. All three organs of the State were thus separately dealt with in the Constitution defining and demarcating their respective powers, functions, and spheres. It is generally believed that the Constitution makers, during the Constitution Convention of 1787, were deeply influenced by Montesquieu's theory of 'separation of powers' (*Esprit des Lois*) published in 1748.

This doctrine attained its full potential during the twentieth century with more and more countries adopting democratic constitutions, particularly countries with a federal set-up and presidential form of government. These countries are mostly situated in Latin America (Central and South America). In the Asian continent, a few countries like the Philippines and Indonesia also adopted the US Constitutional model.

However, countries that adopted a parliamentary form of government on the British pattern faced difficulty in adopting the doctrine in its entirety. The main difficulty arose out of the fact that the executive has to be chosen from amongst the members of the legislature who command the confidence of the majority of its members. Hence, there could not be a strict separation of powers between the executive and the legislature in the parliamentary system. Nevertheless, the third organ of the state, the judiciary could function separately even in the parliamentary system as the judiciary is empowered to interpret written constitutions. On this behalf, the judiciary started performing a dominant role as the ultimate guardian of the constitution. In this way, the courts could set aside any piece of legislation or any executive action as *ultra vires* of the constitution. Thus, the doctrine has a limited application to the parliamentary form of government.

Nevertheless, the Indian Supreme Court, beginning with the judgement in *Kesavananda Bharati's case* (AIR 1973 SC 1461), held the doctrine of 'separation of powers' as part of

the basic structure of the Indian Constitution. The Supreme Court of Pakistan, in its judgement in the case of District Bar Association, Rawalpindi (PLD 2015 SC 401), broadly included the doctrine (though not expressly) among the salient features of the Constitution of Pakistan.

Given the importance of the doctrine, it is indeed gratifying and commendable that Dr. Zia Ullah Ranjah, a prominent author and lawyer on constitutional law, has written a book on 'separation of powers' doctrine from Pakistan's legal perspective. Authorship on legal subjects is rather rare in Pakistan and, particularly, there are only a few authors who attempt to author a full-fledged book on one of the doctrines of constitutional law. Enough has been written on the subject by several authors in the context of the US Constitution, but Dr. Ranjah might be the only author to write a book on the doctrine in the context of the Pakistan Constitution which is highly appreciable.

The book is divided into various parts which are indicative of in-depth study and research by the author on the topic. The introductory part deals with the broad parameters of the study, particularly referring to the key questions of the study with their theme and significance. This part also covers the theoretical framework of the study concerning other authors and case law on the subject.

The second part deals with the concept of 'separation of powers' in the context of fundamental rights. It also includes an interesting discussion of the doctrine in the context of Islamic tradition. The discussion includes the concept of human rights in the Muslim states concluding that recognition of human rights in the Muslim states was before the renaissance in Europe. This part deals with the concept of 'separation of powers' in the West along with fundamental rights with a view that it promotes, enhances, and facilitates the enforcement of fundamental rights. However, it is made clear that the main focus of the study is its connection and impact on fundamental rights in Pakistan. The author concludes this part with the

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statement that both Islamic and Western traditions accommodate the concepts of 'separation of powers' and fundamental rights.

The third part deals with the overall evolution of the doctrine of 'separation of powers' in the West with particular emphasis on the US Constitution, which remains a model for the application of the doctrine to a constitutional framework. Not only the US Constitution divides the government into three organs of the state but also provides a framework of checks and balances. There is a useful discussion regarding the application of 'separation of powers' doctrine in the UK, particularly in the context of the separation of legislature and executive. The separation of judiciary from the other two organs of state in the UK has also been discussed. Similarly, the 'separation of powers' under the Australian Constitution has been discussed. While discussing 'separation of powers' in India it is stated that the Indian Supreme Court has expanded the role of the judiciary in the protection of fundamental rights and enhanced its role vis-à-vis other branches of the government. The separation of powers in Pakistan has been discussed in detail in the context of various constitutions during the history of Pakistan. The author concludes this part with a positive note that despite the challenges from the executive branch, the judiciary in Pakistan has withstood the pressure over a period of time.

The fourth part deals with judicial review in Pakistan in the context of legislative actions. The author observes that the role of judiciary has been expanded by the Supreme Court of Pakistan by the exercise of judicial review of legislative actions. The judicial intervention in legislative actions is primarily based on the power of judiciary to enforce the fundamental rights of citizens under the Constitution.

The fifth part pertains to the doctrine of 'separation of powers' in the context of judicial review of executive actions in Pakistan. It is observed that this power of judicial review vis-à-vis executive actions strengthens the concept of 'separation of

powers' and expands the role of judiciary. During the course of the constitutional history of Pakistan, the superior courts have frequently exercised the power of judicial review over executive actions leading to various periods of judicial activism, at times bordering on judicial overreach.

The sixth part focuses specifically on judicial overreach that might be the consequence of judicial review of executive actions. The author discusses the concepts of 'judicial restraint' and 'judicial activism' in the context of the judiciary in Pakistan. The author takes into account various periods in Pakistan's history wherein the aforesaid concepts have been the dominant themes of the judiciary. The debate about the said concepts is universal in nature and is not specific to Pakistan. The role of the executive in the history of Pakistan has been very controversial. During military regimes, judicial restraint is the dominant theme. It is only during the periods of relative democracy and constitutionalism that the judiciary asserts itself by way of judicial activism.

The concluding part takes note of the application of the doctrine of 'separation of powers' for promoting rule of law and balance of interests between the state institutions. The author also states that the doctrine of 'separation of powers' applies to both presidential as well as parliamentary forms of government and that it has been recognized as an effective tool for the protection of fundamental rights. Nevertheless, the application of this doctrine leaves much to be desired, particularly in the context of the exercise of jurisdiction by the Supreme Court under Article 184(3) of the Constitution. Regardless of the excesses caused during the periods of judicial activism, the judiciary remains the ultimate arbiter and protector of the basic rights of the people of Pakistan.

The book is a valuable addition to the legal literature of Pakistan for which the author deserves acclaim. The book will be of great assistance to the superior courts in Pakistan exercising constitutional jurisdiction. The lawyers, judges, law professors, law students, civil servants and students of

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constitutional law and political science will benefit from the book. It should also encourage other potential authors to undertake research and write research articles and books on important subjects of constitutional law.

Hamid Khan

ABSTRACT

The implementation of the constitutional doctrine of separation of powers is challenging owing to the complex relationship between the three institutions of the state, namely, the legislature, the executive, and the judiciary. This book examines this relationship with reference to the doctrine of separation of powers and the protection of fundamental rights in Pakistan. It offers an in-depth analysis of the vociferous debate in recent times as to whether true adherence to the doctrine of separation of powers, whereby state responsibilities are divided between the three branches of the state, each having distinct and independent powers, helps to protect fundamental rights.

This book explores the doctrine of separation of powers and the concept of fundamental rights. More specifically, it considers how the courts have scrutinized legislative and executive actions in order to protect fundamental rights in Pakistan. This book also examines how the courts have exceeded their constitutional limitations while interpreting and enforcing fundamental rights in Pakistan.

The book provides theoretical and practical insights into the ongoing debate on the separation of powers and the protection of fundamental rights in Pakistan. It argues that true adherence to the doctrine of separation of powers protects fundamental rights whereas non-adherence to the doctrine

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impedes the protection of these rights. This book assesses the relationship between the doctrine of separation of powers and the protection of fundamental rights in Pakistan with reference to the practice of judicial review by the superior courts of Pakistan in cases wherein pertinent questions concerning fundamental rights were raised before them.

The book concludes that while interpreting provisions of the Constitution guaranteeing fundamental freedoms, our judiciary needs to appreciate the constitutional doctrine of separation of powers. It proposes a balanced exercise of the courts' powers of judicial review in cases concerning fundamental rights. In other words, it suggests that, while exercising their powers to review acts of the executive and the legislature, judges should refrain from acting as policy-makers, given that policy-making is the domain of the government.

AUTHOR'S NOTE

The idea of writing a book on the separation of state powers between the executive, the legislature, and the judiciary and the protection of fundamental rights emerged when I started practicing and teaching constitutional law in 2003. I noted that each of these institutions tries to protect the rights of the people within its constitutional mandate. However, in actuality, a large segment of our society seems to be deprived of even basic needs and rights such as food, health, and education. It raised important questions in my mind: Who is committed to the rights of ordinary Pakistanis? Is it the legislature, the executive, or the judiciary? Why have the fundamental rights of the people not materialized since 1947?

These questions led me to undertake some research. I decided to explore whether or not, and the ways in which, fundamental rights are protected in Pakistan. I do not argue that fundamental rights have been a victim of routine corruption or official malfeasance in Pakistan (although, in part, they have). I argue that, more often than not, fundamental rights have been caught in the crossfire between Pakistan's state institutions and, specifically, their zero-sum battles for supremacy. At various points, each state institution seems to have insisted that its role alone should prevail. Each has used its power, not merely to check the others, but to marginalise them, ostensibly 'on behalf of the people'.

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Yet the fundamental rights of ordinary people remain unprotected: 'caught in the crossfire'. I have *studied* this pattern, and every day, I have *worked* to address it. I have combined my academic understanding of the big picture with a lawyer's perspective and a careful focus on pursuing justice one step at a time. And, of course, I did so with my humble commitment to the well-being of my fellow citizens. I am aware that, like all of us, I am just one more participant in a much larger process.

The debate of separation of powers started when the Supreme Court of Pakistan pronounced the constitutional doctrine of separation of powers in the *Moulvi Tameezuddin* case in 1956, while reviewing the actions of the Governor General who dissolved the first Constituent Assembly. This case raised important questions about the constitutional domain of the judiciary, the executive, and the parliament. Thereafter, our superior courts have reviewed acts of other branches of the government in many cases involving fundamental rights.

The doctrine of separation of powers distributes state power between the three organs of the state and places limits on the powers of these organs. While exercising their powers of judicial review, our courts have employed the doctrine of separation of powers to interpret the constitution and protect fundamental rights and liberties from the transgressions of the state. In doing so, however, the courts occasionally intervened in the spheres of the legislature and the executive.

Constitutional theorists like James Bradley and Alexander M. Bickel proposed judicial restraint in policy matters. They argued that the restrictive use of powers of judicial review would help to promote constitutionalism (including separation of powers and fundamental rights) and democracy. Constitutionalists like Jesse H. Choper, John Hart Ely, and Greg Jones opposed both judicial restraint and judicial activism in interpreting the constitution. They proposed three additional approaches to interpret the constitution in a balanced manner: a theory of jurisdictional retrenchment (i.e. the judiciary should refrain from interfering in matters of a political nature as such

matters can be better resolved through political forums like the legislature), a theory of process-oriented review (namely, that judges should interpret the constitution considering the overall scheme and structure of the constitution), and structural activism (that the judiciary should adhere to the constitutional doctrine of separation of powers that is the supreme feature of any constitution). Considering the turbulent history of constitutionalism in Pakistan, this study suggests that the superior courts should follow Choper, Ely, and Greg's approach for a balanced exercise of judicial review.

This book makes two original contributions: First, it traces the constitutional link between the doctrine of separation of powers and the protection of fundamental rights in Pakistan. Second, it makes an assessment of the superior courts' *practice* of judicial review regarding the protection of fundamental rights in Pakistan. Across these two domains, it makes two claims: First, it argues that though the doctrine of separation of powers is not expressly stipulated in Pakistan's Constitution, it has a valid Constitutional basis as it is envisaged *implicitly* in the constitution. Second, while exercising their powers of judicial review, the superior courts have *applied* this doctrine to safeguard the fundamental rights of citizens; sometimes, however, our courts have overstepped their constitutional domain and, thereby, *weakened* fundamental rights.

It concludes that while interpreting the Constitution, including the provisions on fundamental rights, our courts need to appreciate their constitutional limitations, allowing *the realization of fundamental rights through a multi-institutional process*. Such a balanced exercise of judicial review has risks as the executive might ignore adequate protection of fundamental rights. However, despite these risks, such an approach would promote constitutionalism and fundamental rights in Pakistan as the people would hold the executive accountable for its failures through an electoral process.

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In short, it proposes that the legislature must perform its legislative role; the executive should work within its domain and not interfere in the domain of the courts; the courts must safeguard judicial independence and uphold the Constitution. If all the institutions of the state function within their respective spheres of authority, this would help Pakistan to become a modern democracy.

In the end, I am grateful to Dr. Matthew J. Nelson, Dr. Muhammad Munir, Hamid Khan, Dr. Shahbaz Ahmad Cheema, Dr. Zubair Abbasi, and Dr. Ahmad Ali Ghouri, for their valuable comments on the book. I am thankful to my family and friends for allowing me space to engage in this work. I also acknowledge research assistance of my associates Kalim and Waseem.

Zia Ullah Ranjah

INTRODUCTION

Pakistan is a constitutional democracy. Its constitution illuminates essential characteristics of a constitutional government, including a division of power between the three institutions of the state, i.e. the legislature, the executive, and the judiciary, and the principle of the protection of fundamental rights. Under the *social contract theory*, the constitution provides a catalog of fundamental rights that are to be protected by every branch of the state.¹ In Pakistan, the Constitution is tied to essential features of a parliamentary democracy with a federal structure. Certain other rights of an Islamic and non-justiciable nature are enumerated as principles of state policy in our Constitution.² Articles 4, 184 and 199, focusing on the provision of fundamental rights and the principles of policy, define the scope and provide the mechanisms for the protection of fundamental rights in Pakistan. The provision and protection of fundamental rights is seen as essential to upholding the Constitution.³

Despite the fact that the Constitution stipulated fundamental rights and laid down the mechanisms for their protection, these rights were frequently suspended during times of political crisis, emergency, and the implementation of martial law regimes in Pakistan. In these times of political turmoil and constitutional crisis, citizens were barred from

approaching the superior courts, as the courts' jurisdiction for the enforcement of fundamental rights was ousted.⁴ Unequal distribution of economic and social resources in Pakistan has also contributed to the weakening of basic rights.⁵ At the same time, the courts have tried to protect the basic rights of citizens from the transgressions of the government.⁶ In doing so, the courts have occasionally relaxed procedural requirements for aggrieved persons for approaching the courts. Specifically, the courts have tried to make justice accessible to all by relaxing the formalistic requirements of the procedure for filing human rights petitions, benefitting the most vulnerable citizens.

A prolonged unconstitutional rule imposed on July 5, 1977, by the military dictator, Zia-ul-Haq, was lifted on December 30, 1985, and democracy was restored. The courts proactively took notice of the violations of fundamental rights and attempted to enforce such rights.⁷ In order to redress the grievances of the people, the superior courts frequently allowed public interest petitions.⁸ While following a liberal mode of constitutional interpretation, then, the courts expanded the meaning and importance of fundamental rights.⁹

The ideal of 'complete justice' has inspired our courts to use judicial review powers more proactively.¹⁰ Article 2-A encouraged our courts to interpret basic human rights in light of the notions of justice in Islam.¹¹ The courts started to use their judicial review powers more liberally in the late 1980s,¹² although a lenient approach of the courts was somewhat reflected in earlier decisions as well.¹³

It is refreshing that the courts did their best to protect fundamental rights in Pakistan.¹⁴ In the *Benazir Bhutto* case,¹⁵ for example, the courts interpreted the Constitution in a progressive manner. In this case, the petitioner alleged violations of the freedom of association, the principle of equality of citizens, and the freedom of speech. Thereafter, some prominent judges promoted judicial activism in our legal system.¹⁶ Such a liberal judicial review approach has been followed in Pakistan and some other countries¹⁷ aiming to deliver socio-economic justice through enforcing fundamental

rights provisions.¹⁸ At the same time, this approach of judicial activism challenges constitutional principles like the separation of powers. This tension necessitates further study in Pakistan.¹⁹

1.1 BACKGROUND OF THE STUDY

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

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

1.2 THE ARGUMENT

The implementation of the constitutional doctrine of separation of powers is challenging due to the complex relationship between the legislature, the executive, and the

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

1.3 KEY QUESTIONS

This study examines the following research questions, each of which has later been explored in a separate chapter.

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

1.4 MAPPING OUT THE DOCTRINE OF SEPARATION OF POWERS

Throughout history, the distribution of governmental power and its link with the rights of the citizen has been a contested issue. In Pakistan, President Musharraf removed the then Chief Justice of Pakistan, Iftikhar Muhammad Chaudhary, from his constitutional position in 2007 on Chaudhary's refusal to act in accordance with his dictation. In a single stroke,

Musharraf removed sixty judges who refused to swear an oath of judicial allegiance to him, introduced by Musharraf himself, from their posts. This onslaught on the judiciary initiated a movement called the 'lawyers' movement' aiming to restore the deposed judges. Thereafter, Musharraf filed a reference against Justice Iftikhar. This was challenged in court and Justice Iftikhar was restored by the Supreme Court ("SC").²⁰ A number of petitions were filed against Musharraf, challenging his unlawful actions, including that of holding two offices simultaneously.²¹ Wajihuddin being a candidate for the presidency also filed a petition to challenge the candidature of Musharraf. Apprehending an adverse decision in these cases, Musharraf declared an emergency through a Provisional Constitutional Order ("PCO") on 3 November 2007.²² In Wajihuddin's case, an eleven-member bench of the SC passed a restraining order against this PCO.²³ Meanwhile, a bunch of judges declared the findings of *Wajihuddin's* case without jurisdiction and unlawful.²⁴ These judges further upheld the PCO in the case of *Tikka Iqbal Muhammad*.²⁵ However, succumbing to the pressure from the civil society, the government restored the judges deposed by Musharraf and promoted the independence of the judiciary, which is essential for the protection of fundamental rights. Since then, we have seen an institutional contest for power, making the doctrine of separation of powers and fundamental rights the subject of both constitutional and public debate. This institutional struggle for power is not unique in Pakistan. We can observe similar phenomenon in other countries as well.

In Malaysia, Prime Minister Mahathir dismissed the Lord President of the Supreme Court in 1988 for overturning decisions of the legislature and the executive through judicial review. Article 121(1) of the Federal Constitution was amended to oust the power of the High Court to conduct judicial review. Ousting of the High Court's powers of judicial review put the fundamental rights of the people at stake, as it incapacitated the judiciary from reviewing acts of the government that infringed upon the fundamental rights of the citizens. The Malaysian Bar protested against the dismissal of

the Lord President and Mahathir's encroachment of judicial power by the government. The bar was unable to roll back Mahathir's amendment, but across Malaysia, Mahathir's actions ushered a separation of powers debate with reference to basic human rights protections.

Similarly, in the US, the case of *Marbury vs. Madison* (1803) initiated a debate as to whether the US Supreme Court could review legislation and declare it to be inconsistent with the US Constitution and, therefore, void. In this landmark case, President Adam appointed William Marbury as a judge. However, Marbury did not receive any commission, so Marbury petitioned for a writ of mandamus seeking delivery of the commission. This was refused on the ground that the Act which provided for such writs was not consistent with the US Constitution, and, hence, invalid.²⁶ This decision, elevating the power of the court, marked the dawn of the jurisprudence of the separation of powers in the US. In other words, with increased focus on the separation of powers within the scheme of the US constitution, fundamental rights of the people acquired enhanced protection.

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

In view of the above, it may be concluded that the enforcement of the doctrine of separation of powers in order to protect the fundamental rights of citizens is a core concern for any constitutional state. However, this study is confined to Pakistan, with references to other jurisdictions as necessary.

1.5 THEME AND SIGNIFICANCE OF THE STUDY

This study focuses on the implementation of the constitutional doctrine of separation of powers and its impact upon the protection of fundamental rights in Pakistan.²⁷ It argues that the focus on the doctrine of separation of powers by the superior courts enhances protection of the fundamental rights of the citizens; however, stretching the provisions of fundamental rights beyond its explicitly stated terms leads to interference with the policy-making functions of the government. For example, adherence to the doctrine of separation of powers requires that the right to 'life' be upheld by the judiciary, which necessitates that life should not be taken unlawfully. While the judiciary should interpret the right to life as the right not to be killed unlawfully, it should refrain from interpreting the right to life to include the provision of the basic necessities of life, such as pure water, housing, quality education etc., which should fall to be regulated by the government, being matters of policy. Although it is arguable that this restrictive approach to judicial review will provide vast discretion to the government even if it does not deliver anything to the people, this study proposes that the judiciary should restrain itself to the literal interpretation of the fundamental rights and the ultimate accountability of the government should be left to the people.

The Constitution of Pakistan illuminates that the state powers are distributed amongst different branches of the government. In this regard, specific reliance may be placed on Part III (executive), Part V (legislature), and Part VII (judiciary) of the Constitution. Each institution draws upon these chapters while exercising its powers. In the absence of clear institutional boundaries, however, all the branches *claim*

to work within the constitutional domain. Nevertheless, these claims turn into occasional conflict, endangering the constitutional scheme of government and democracy. Since 2009, this conflict has become more common in Pakistan.

The apex court of Pakistan started using its suo-moto powers more proactively in 2009 following the restoration of the judges who had been removed by Musharraf. The SC started deciding cases 'to preserve and protect fundamental rights' but, in doing so, infringed upon the core functions of the executive as well as the legislature. The suo-moto cases filed in the SC of Pakistan saw a significant increase after the restoration of the deposed judges.

Debates regarding the constitutional mechanism for appointing judges further raised questions about the respective constitutional mandates of the judiciary and the parliament.²⁸ Through the 18th amendment, the parliament was provided a significant role in the appointment of judges of the superior courts. A Parliamentary Committee was constituted to approve (or reject) appointments made through the Judicial Commission.²⁹ However, this constitutional amendment was strongly resisted by the judiciary, which reasserted its autonomy in the realm of appointments. This was later reflected in the 19th amendment.

The distribution of power between the different state organs has always been a key question in Pakistan. More specifically, the executive, the legislature, and the judiciary have been struggling to secure a preeminent constitutional role in the exercise of state powers. This institutional struggle raises two possibilities. First, the struggle between these branches actually *promotes* a constitutional orientation (indeed, this struggle highlights a focus on the constitution in ways that promote the rule of law, the balance of power, and fundamental rights). Second, this struggle *hampers* the progress of constitutionalism and the protection of fundamental rights, because in a state of conflict, the state institutions cannot function properly within their limits to protect fundamental rights.

Roberto Gargarella argues that institutional conflict creates confusion: which branch will perform which task? Here, the system of checks and balances seems risky. Furthermore, this system may cause a political stalemate and, in the worst situation, a state of war between the various branches of government. He further argues that the presence of institutional checks and balances creates a permanent war amongst the state institutions.³⁰ Making an original contribution to scholarship, with particular reference to Pakistan, this study will argue, generally, in favor of the first possibility (promotes the rule of law and fundamental rights) and against the second possibility (hampers institutional action and, thus, fundamental rights).

The debate on the separation of powers in Pakistan started in 1956. In the *Moulvi Tamizuddin* case,³¹ the executive intervened in the mandate of the parliament while dissolving the Constituent Assembly. This case initiated a debate on the constitutional domain of the state institutions.

Thereafter, the question of the separation of powers was discussed in many cases. The court dealt with the subject of basic structure³² and observed that basic features of constitutionalism emerged from the Objectives Resolution.³³ The *Mehmood Khan Achakzai* case highlighted the separation of powers debate once again as the court held that any law that violates the basic structure of the constitution cannot sustain and is, thus, invalid.

This debate was fuelled further in a few other cases.³⁴ These cases pertain to the competence of the legislature to make laws, the authority of the executive to define policy, and the power of the judiciary to examine legislation and executive actions. In these cases, each institution defends its position and claims to work within a constitutional mandate while protecting fundamental rights. This study focuses on this debate in an effort to ascertain the implementation of the doctrine and the protection of fundamental rights as a product of constitutional practice in Pakistan.

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

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

1.6 THE ORETICAL FRAMEWORK

Plato may be credited as a founding father of any constitutional government. He maintained that state power should be divided.³⁵ John Locke, developing this concept further, argued that there should be a separate legislative power to make laws, a judiciary to decide the rights of the subjects in accordance with established laws, and an executive having the power to enforce the legislation.³⁶ The French philosopher Montesquieu analysed the doctrine in the early eighteenth century in the context of Britain.³⁷ He maintained that if the power is concentrated in a single person's hand or a group of people then it results in a tyrannical form of government. As per Montesquieu, liberty cannot be protected unless and until there is a separation of power between the three organs of the state i.e. executive, legislature, and judiciary.

James Madison built on Montesquieu's theory in *The Federalist Papers*. He stressed an independent judiciary with enough powers and institutional safeguards to review the unconstitutional acts of other powerful branches of the government as it is the least dangerous branch of the government. He argued that a consolidation of political powers

in any form whatsoever in the hands of the executive and the legislature by any source of election or selection promotes tyranny.³⁸ Alexander Hamilton disagreed with Madison and, building on British notions of parliamentary sovereignty, argued for an independent judiciary with relatively *limited* powers. He promoted institutional checks and balances in constitutional governance. He argued for a strong executive to save the rights of the people and establish a stable government. He believed that only a strong executive could save the polity from foreign aggression or internal disturbance and could provide effective administration, good governance, and justice.³⁹

The theoretical background mentioned above informs the methodology of this study. This study builds upon the perspectives of John Locke, Montesquieu, Alexander Hamilton, and James Madison. Tayyab Mahmud and N.W. Barber further enlightened me regarding the crucial link and the relationship between the doctrine of separation of powers and fundamental rights.

Tayyab Mahmud examines the judicial response to constitutional breakdowns in Pakistan and provides a critique of that response. He argues that the superior courts have *undermined* the constitution and facilitated an erosion of constitutional governance in Pakistan.⁴⁰ This argument, which contradicts the arguments in my book, is directly related to this study, which proposes that the courts have generally *protected* constitutional governance and, thus, fundamental rights in Pakistan. Barber discusses the doctrine of separation of powers in the context of the constitution of Britain. Pakistan essentially follows the constitutional practice of Britain. Thus, Barber's insight is helpful in understanding the functioning of parliamentary democracy in Pakistan.⁴¹ He further reflects on the devices used by each institution to shield against intervention by the other state institutions.⁴² This perspective helps to examine the institutional struggle of the three organs of the state vis-à-vis the safeguarding of their constitutional sphere of power while protecting fundamental rights in Pakistan.

Jesse H. Choper, John Hart Ely, and Greg Jones educated me as to the balanced use of the courts' power of judicial review in protecting fundamental rights. Choper promotes the theory of jurisdictional retrenchment that is, the judiciary should avoid entertaining matters of a political nature.⁴³ Ely emphasizes on process-oriented judicial review, whereby the judiciary should consider the overall scheme of the constitution while reviewing the acts of the other branches of the government.⁴⁴ Jones relies on the structure of the constitution, including the separation of powers between the institutions of the state, with reference to the protection of fundamental rights.⁴⁵

This book aims to examine the relationship between the executive, the legislature, and the judiciary and its impact on the protection of fundamental rights in Pakistan. More specifically, it aims to explore the relationship between the constitutional doctrine of the separation of powers and the protection of fundamental rights in Pakistan. The analysis helps to strengthen the main argument of the book that 'an increased focus on constitutionalism and the implementation of a separation-of-powers doctrine by the courts *protects* fundamental rights in Pakistan'.

1.7 METHODOLOGY OF THE STUDY

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

This study will also employ Dworkin's theoretical framework, namely 'constructive interpretation'. At the 'pre-interpretive' stage, textual rules and standards, including statutes, articles, and books, shall be identified to form tentative content of the practice. Then, these contents shall be used to examine the practice of the doctrine for the protection of fundamental rights in Pakistan via case law. At the post-interpretive stage, the study shall examine what the doctrine of separation of powers 'really' requires from our constitutional courts.

This study explores how the courts have sometimes restrained themselves from exercising constitutional powers to enforce fundamental rights such as under martial law regimes and, at other times, have assumed the policy-making role of the executive unrestrictively on the basis of the dysfunctionality of the executive. Such an inconsistent approach of the judiciary has blurred the constitutional boundaries between the executive and the judiciary, impeding the realization of fundamental rights in Pakistan. Thus, this study concludes that while interpreting constitutional provisions concerning fundamental rights, our courts need to appreciate the constitutional limitations allowing the realization of fundamental rights through a political process. It proposes a balanced exercise of the courts' powers of judicial review for the protection of fundamental rights. In other words, it suggests that, while exercising their powers to review the acts of the executive and the legislature, the courts should refrain from engaging in policy-making, which is a function of the executive.

The argument and conclusion are supported by an analysis of case law, statutes, and literature. The focus has been on cases that entail a nexus between the separation of powers and fundamental rights. These cases provide support for the argument that there should be a cautious exercise of judicial powers, whereby the courts give due credence to the domain of other state institutions in cases involving questions concerning the protection of fundamental rights.

1.8 LITERATURE REVIEW

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

In Pakistan, the courts interpret the constitution, including fundamental rights, while examining legislation and executive actions. Sometimes, however, the courts appear to act beyond their constitutional domain as envisaged in the constitution, interfering with the policy-making domain of the government. The constitutional role of the courts is to adjudicate and to interpret the constitution. In doing so, they cannot adopt and intervene in the dominion of the executive in terms of making or dictating policy to the government. For example, while interpreting the constitutional right to education (Article 25A), the courts may not inspect educational institutions and direct on the standards or the mode of education. Thus, this study examines the practice of judicial review by the judiciary of Pakistan, which is reflected in the case law pronounced on the subject. In addition, an extensive literature review is conducted to evaluate the impact of the practice of judicial review on the status of fundamental rights in Pakistan.

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

1.8.1 BOOKS AND ARTICLES

Hamid Khan analyses the doctrine of separation of powers in the context of the US constitution and briefly discusses the doctrine in the constitutional context of Pakistan. However, the 1956 and the 1962 constitution are excluded from his analysis. He also does not explore the link between the doctrine of separation of powers and *fundamental rights* in

Pakistan.⁴⁶ In another book, he provides a fair account of the constitutional history of Pakistan.⁴⁷

A.G. Chaudhry discusses the evolution of the doctrine with reference to the US and Indian constitutions. He argues that the doctrine of separation of powers does not exist in the constitution of Pakistan. He erroneously states that Pakistan's constitution hardly provides any balance of powers. He highlights a few relevant cases like the *United Sugar Mills* case⁴⁸ and *Fouji Foundation* case.⁴⁹ However, his work is not comprehensive.⁵⁰

Asif Saeed Khosa traces the history of the doctrine of separation of powers. He discusses institutional rifts and moments of cohesion between the executive, the legislature, and the judiciary. However, his article does not contain the argument that in cases involving the interpretation of fundamental rights in Pakistan, the courts sometimes intervene into the policy-making domain of the government.⁵¹

Ali Nawaz Chowhan provides a brief account of the doctrine of separation of powers. While referring to *Myers v. US*⁵² and Montesquieu's book 'The Spirit of the Laws', Chowhan traces the link of the doctrine to Pakistan's Constitution. However, his article fails to examine the relevance of the doctrine to *fundamental rights* in Pakistan.⁵³

Tayyeb Mahmud examines the judicial response to constitutional breakdowns in Pakistan and also provides an interesting description and critique of that response. He argues that our courts have undermined constitutional governance and facilitated an erosion of constitutional governance. This contention may be opposed as it can be argued that the courts in Pakistan have generally *promoted* constitutional governance and have *protected* fundamental rights.⁵⁴

Siddique argues that our courts have been inconsistent in their approach while deciding upon the dissolution of elected assemblies under different political regimes. However, the author fails to discuss the impact of such cases on

constitutional governance, including the separation of powers and fundamental rights.⁵⁵

Newberg examines the interaction of our courts with the executive and provides a basis for conducting a systematic study of the implementation of the doctrine of separation of powers in Pakistan. The author discusses constitution-making phases systematically. Her book contains the following chapters: Constituting the state (1947-1958); Confining courts and constitutions (1958-1969); Seeking justice (1969-1972); Testing courts and constitutionalism (1972-1977); Silencing courts, muting justice (1977-1988); and Reviving judicial powers (1988-1993).⁵⁶

Anil Kalhan discusses how Pakistan has been struggling under authoritarian and democratic regimes. He argues that an aggressive judiciary weakens the parliament and suggests a balanced role for the judiciary to promote emerging democracies. This work supports my argument that while interpreting the constitution and enforcing fundamental rights, the courts should appreciate the constitutional limits envisaged under the doctrine of separation of powers.⁵⁷

A.K. Brohi provides a basic understanding of constitutional concepts. He elaborates on the powers and limitations of each branch of the government, which is the main focus of this study.⁵⁸

Ishrat Hussain stresses the importance of checks and balances in a constitutional democracy. To him, institutional accountability and fundamental rights are key to good governance. His article is helpful for appreciating the role of the judiciary and the executive in a constitutional democracy. However, the author fails to provide insight into how the system of checks and balances can be ensured and its impact upon fundamental rights, which is the focus of this study.⁵⁹

Santos argues that the judiciary's role in political cases has been expanding in Asia since 1990s. He suggests that an active political role for the judiciary is bound to create institutional tensions with other organs of the state. This study

helps in examining the role of courts in Asia and, more specifically, in the changing circumstances in Pakistan since the restoration of the judiciary in 2009. However, this study does not provide any account of institutional accountability and fundamental rights.⁶⁰ In fact, it suggests that the doctrine of separation of powers envisages a limited role for each institution of the state.

Remington examines how the doctrine of separation of powers impacts the capacity of any government to ensure a responsive government. He advocates for a proactive legislature to ensure effective checks over the functions of the executive. However, he does not indicate any link between the decisions of the courts (while interpreting the doctrine of separation of powers) and governance, including fundamental rights.⁶¹

Victoria Nourse argues that a standard understanding of the separation of powers begins with the idea of “function”, which is not adequate to assess government structures. She suggests an alternative approach, namely, ‘the vertical separation of powers’, stressing the importance of political relationships between the people and those who govern them (i.e., the state institutions). This article suggests that institutions should represent the will of the people. In other words, institutions should protect the rights of the people. This article sharpens our understanding of the link between state institutions and fundamental rights. Building on this link, it is argued that if the institutions of the state operate within their constitutional limits in accordance with the doctrine of separation of powers, this facilitates a key component of constitutional governance, that is, the protection of fundamental rights.⁶²

Campbell illustrates institutional clashes between the organs of the state through case studies. His book is useful as it explains how institutions struggle to assert and protect their constitutional role. Though the cases discussed in his book emerge from a foreign jurisdiction, they help to appreciate the

institutional conflict with reference to the doctrine of separation of powers in Pakistan.⁶³

Ran Hirsch explores the origin of constitutionalism, highlighting an expansion of judicial power worldwide. He claims that national courts have become a policy-making body, which should be the role of the executive. In a way, he points to the rift between the judiciary and the executive as an emerging trend in constitutional governance globally. This perspective is useful in identifying the shifting constitutional role of each organ of the state in Pakistan.⁶⁴ This article supports the argument that our courts, sometimes, interfere in the policy domain that is constitutionally reserved for the executive.

N.W. Barber discusses the doctrine of separation of powers in the constitutional context of Britain. Pakistan inherited and follows some of the constitutional practices of Britain. Thus, Barber's insight is helpful in understanding the functioning of parliamentary democracy, including separation of powers in Pakistan.⁶⁵ In another article, he elaborates how state institutions use constitutional devices and mechanisms to shield against intervention by other institutions.⁶⁶

M.J.C. Vile traces the evolution of the doctrine of separation of powers with reference to Britain. Crucially, he examines the criticism of this doctrine as well, which is helpful in contextualizing the doctrinal debate on separation of powers and fundamental rights in Pakistan.⁶⁷

1.8.2 CASE LAW

The courts in Pakistan have frequently discussed the concept of 'separation of powers', 'checks and balances', 'constitutionalism', 'democracy', and 'good governance' etc. with reference to fundamental rights.⁶⁸ Some important cases have briefly been examined to contextualize and build my argument within the practice of our courts.

In the *Moulvi Tamizuddin Khan* case,⁶⁹ the executive interfered with the constitutional sphere of the legislature as the executive dissolved the Constituent Assembly. This case raised important questions regarding the independence of the judiciary and the supremacy of the parliament soon after the creation of Pakistan.

In the *Usif Patel* case,⁷⁰ which followed very shortly after *Moulvi Tamizuddin*, the law-making power of the executive and the legislature was discussed again. The court clarified that the executive, in particular the then Governor-General, had *no* legislative power as law-making was the exclusive domain of the Constituent Assembly serving, simultaneously, as the National Assembly.

In the *Haji Saifullah and Tariq Raheem* case,⁷¹ the power to dissolve the National Assembly under Article 58 (2) (b) of the Constitution – as an unfettered discretionary power of the President – became a moot point. The court stressed upon its power of judicial review and held that such power must be exercised reasonably, fairly, and subject to scrutiny by the courts. Thus, these cases elaborated on the domain of the judiciary and the executive.

In the *Sharaf Faridi* case,⁷² the constitutional role and limitations of the legislature as well as the executive came into discussion. The court held that, in the constitutional scheme of Pakistan, the judiciary has a special role as it is obliged to ensure that each institution works within its constitutional domain. Through interpreting the Constitution, the judiciary asserted a supreme role vis-à-vis other state institutions.

In the *Azizullah Memon* case,⁷³ however, the court tried to follow a balanced approach under the Constitution. While moving away from the *Sharaf Faridi* case, the court stressed on the principle of a trichotomy of power. The court clarified that no institution, under the constitutional scheme, can claim any kind of superiority over other institutions of the state. This case helps to establish the argument that while protecting fundamental rights, the judiciary should observe the balance of

power as maintained under the doctrine of separation of powers.

In the *Al-Jehad Trust* case,⁷⁴ the court emphasized, once again, that each institution of the state is bound to remain within its allotted domain under the constitution. With reference to the appointment of judges, the court cautioned all institutions that a constitutional government can only survive if all institutions act within their limits and do not transgress into the domain of other institutions. Again, this case promotes my argument. Similarly, in the *Qazi Wali Muhammad* case,⁷⁵ the court said that although strict separation of powers is not stipulated in our Constitution, the concept of division of power between different institutions of the state is envisaged in the overall structure of the Constitution. The court held that each institution has a defined role and the power of an institution cannot be assigned to other institutions.

In the *Wattan Party* case,⁷⁶ the court observed that policy-making is the sphere of the executive and the judiciary should not intervene in this function of the executive. However, in a suo-moto case,⁷⁷ in an attempt to regulate the price of sugar, the court claimed to have constitutional authority to review government policy if it violated 'fundamental rights.' Indeed, this case created serious debate as to the powers of the judiciary and the domain of the other state institutions vis-à-vis fundamental rights. This is an important case which supports my assertion that the courts have, at times, intervened in the policy-making domain of the executive while exercising their powers of judicial review.

In the *Sindh High Court Bar Association* case,⁷⁸ the court held that an executive order to restore the deposed judges could not be withdrawn by the executive itself. It was reaffirmed that an order by a military dictator in pursuance of the Provisional Constitutional Order, 2007 was in blatant violation of the Constitution, hence void. This case fuelled constitutional debate, once again, as to the role of the institutions of the state and the division of power between them.

In the *Munir Hussain Bhatti* case,⁷⁹ the court discussed the role of a Parliamentary Committee as to the disapproval of the nomination of High Court judges by the Judicial Commission.⁸⁰ The court established its exclusive power regarding the appointment of judges of superior courts and held that, under the constitutional scheme of distribution of powers, a Parliamentary Committee cannot reject nominations made by the Judicial Commission. This case highlighted the inherent tensions in demarcating the separate and distinct roles of various institutions within the constitutional polity of Pakistan.

In the case of *Nadeem Ahmad*,⁸¹ the appointment of a judge of a superior court had been challenged in accordance with the 18th amendment. Here, the court asserted that making judicial appointments was a prerogative of the judiciary and asked the parliament to reconsider the mechanism of judicial appointments proposed in the 18th amendment, which had given a significant role to the Parliamentary Committee. This case contributes to the constitutional debate concerning the role and the domain of the legislature.

The last three cases demonstrate that the separation of powers between the executive, the legislature, and the judiciary is envisaged in the Constitution of Pakistan. They also provide that the institutions of the state are required to exercise their powers within their respective domain, this being necessary for the promotion of democracy and the protection of fundamental rights.

In a *suo-moto* case,⁸² the court took notice of the award of an LNG (Liquefied Natural Gas) contract to a foreign company and held that it violated the rights of the citizens, as it had caused a loss to the national economy. In another *suo-moto* case,⁸³ the court held the National Insurance Company Ltd. liable for loss to the public money. In both cases, the court attempted to promote accountability and transparency in transactions made by the government while exercising its power to judicially review actions of the executive. The court, therefore, intervened in the policy-making domain of the government in the name of protecting fundamental rights.

In the *Baz Muhammad Kakar* case,⁸⁴ the court held that contempt of court is a question of fundamental rights and that courts can review any legislation that violates such a fundamental right.⁸⁵ This case raised an interesting debate as to the law-making power of the legislature and the powers of the court to review such legislation under its constitutional mandate of judicial review vis-à-vis fundamental rights.

In a *suo-moto* case,⁸⁶ the court took notice of an alleged misappropriation of money in the bidding of a steel mill. The court held that the bidding of the steel mill had been done in a corrupt manner, thereby causing a loss to the national money, and had, thus, violated fundamental rights. These cases demonstrate the topicality and importance of the doctrine of separation of powers in the context of constitutional governance and fundamental rights in Pakistan.

In another case,⁸⁷ the issue before the apex court was the exercise of jurisdiction by the High Court while creating the citizens' committees and placing judges from the district judiciary on these committees to oversee the flood relief work in Sindh, being done by the committees.

Justice Ayesha Malik held that "The Constitution of the Islamic Republic of Pakistan, 1973 does not contemplate the assumption of functions by one organ that essentially belongs to another. Moreover, planning and strategy, coordination, monitoring, and implementation are the functions of the executive and are best left for them to fulfill their duty and obligations in this regard". Thus, while abolishing the role of judges in flood relief distribution monitoring, the court highlighted that the role assigned to the judicial officers of overseeing work of the executive by heading citizens' committees essentially meant officers were performing executive functions – an act that goes against the principle of separation of powers. The judgment also emphasizes women's representation and effective role in disaster management plan ensuring the integration of the gender perspective. In doing so, the court promotes gender perspective. It would help to realize the fundamental rights, particularly of women, in Pakistan.

In a presidential reference,⁸⁸ the SC held that the vote of any member cast contrary to any direction issued by a parliamentary party in terms of para (b) of clause (1) of Article 63A of the Constitution – regarding the election of the prime minister or the chief minister; or a vote of confidence or a vote of no-confidence; or a money bill or a constitutional (amendment) bill – cannot be counted and must be disregarded. Arguably, such a judicial approach in the interpretation of Article 63A amounts to judicial overreach and rewriting the Constitution.

A well-intentioned judicial endeavour to eradicate parliamentary defections from the body politic, the verdict changes the intent and spirit of Article 63A. In case any member votes against a direction issued by a parliamentary party in terms of para (b) of clause (1) of Article 63A of the Constitution, the party head, after providing him/her with an opportunity to show cause for defection, may declare in writing that the member has defected from the political party.

The party head may then forward a copy of this declaration to the presiding officer of the House and the CEC for the latter to decide the same within thirty days. Upon confirmation of the declaration by the Election Commission, the member shall cease to be a member of the House. Any party aggrieved by the decision of the Election Commission may, within 30 days, lodge an appeal to the Supreme Court which shall decide the matter within ninety days from the date of the filing of the appeal.

The SC emphasizes that, regardless of whether the party head, subsequent to the vote, proceeds to take, or refrains from taking, an action that would result in a declaration of defection, the vote of that member “cannot be counted and must be disregarded”. This interpretation makes the explicit procedure and purpose of Article 63A redundant. Moreover, it nullifies the powers of the party head, the Election Commission, and even the Supreme Court to declare, reject, or confirm the declaration of the defection of a member.

Considering the history of horse-trading and political engineering in Pakistan, Article 63A was added to the Constitution by the passage of the 18th amendment in 2010. It aimed to strike a balance between the rights of individual parliamentarians and regime stability. A three-layered mechanism for the declaration of defection and de-seating was provided to ensure constructive debate and freedom of expression, the sine qua non of parliamentary government.

Particularly in a country where political parties are generally run like personal fiefdoms and dynasties, the freedom of expression of individual parliamentarians is very important. It is an established custom of parliamentary practice that a parliamentarian is only bound by his/her conscience. Thus, the verdict is not in keeping with parliamentary democracy and its norms and could end up stifling dissent or encouraging unintended consequences, for example, encouraging independent non-party parliamentarians.

The SC argues that “Article 63A must be interpreted in a broad manner, consistent with fundamental rights. If there is any conflict between the fundamental rights of the collectivity i.e., political party and an individual member thereof, it is the former that must prevail”. Yet, it can be argued, the right of individual members – freedom of speech (Article 19) – cannot be eclipsed by the right of a political party: freedom of association (Article 17). Both categories of rights are equal and should be interpreted in a balanced manner. In the absence of freedom of speech, freedom of association does not make any sense for citizens or parliamentarians.

A broad interpretation of Article 63A does not require the denial of freedom of expression for parliamentarians. Para (b) of clause (1) of Article 63A should not necessarily mean the nullification of the vote of a member against the direction of a party head. Every defection is not a case of horse-trading. There could be genuine dissent and disapproval with one’s political leadership for failing to deliver to the people. The right to dissent is an essential feature of a functioning democracy.

Arguably, the interpretation of Article 63A in the presidential reference takes away parliamentarians' right to dissent and weakens democracy. It demolishes the conceptual basis of the right to liberty, freedom of speech etc., and disturbs the balance provided under Article 63A between the individual right of a member and the right of political parties. It also offends the constitutional doctrine of separation of powers, as while interpreting the Constitution, the judiciary has entered into the domain of the legislature and has re-written the Constitution.

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

1.9 LIMITATIONS OF THE STUDY

This study aims to assess the constitutional doctrine of separation of powers in theory and in practice with reference to the protection of fundamental rights in Pakistan. It employs Dworkin's approach of constructive interpretation when examining the doctrine of separation of powers in the context of Pakistan. The method used to conduct this study, i.e., analysis of court cases, might have brought some element of subjective interpretation of facts and the law and thus may have influenced the outcome of the research. However, in order to minimize the element of bias and to develop an argument on a sound basis, reliance is also placed on the scholarly literature.⁸⁹

The principles of statutory interpretation, such as the rule that a statute must be construed as a whole and those words which are reasonably capable of only one meaning must be given their literal meaning (i.e., the literal rule), and that ordinary words must be given their ordinary meanings unless absurdity would result (i.e., the golden rule), have been used to

analyze statutes. Methods of political science and sociology, which are more inclined towards examining a particular issue in a broader socio-political context, have been avoided. An effort has been made to examine the implementation of the doctrine of separation of powers in Pakistan with respect to the practice of judicial review. The findings of this study are confined to the analysis of judicial practice through case law and legal literature. The practice of the executive and the legislature is not a focus of this study. Thus, these findings may not be taken as a broader analysis of the theory of separation of powers in Pakistan.

1.10 SCHEME OF THE STUDY

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

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

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

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

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

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

This chapter briefly explains the constitutional basis for the doctrine and how it evolved in the US, the UK, Australia, India, and Pakistan. It also considers the question of whether the three branches of the state in Pakistan work within their respective domains or whether they usurp the powers of other branches. Moreover, it determines how the doctrine was spelled out in the constitutions of 1956, 1962, and 1973. The chapter also examines how non-civilian regimes have affected the application of the doctrine and the protection of fundamental rights in Pakistan.

Chapter four examines a few important questions, which are as follows: What is the procedure of law-making? What is the domain of the federal legislature? What is the sphere of the provincial legislature? What happens when the laws made by the federal and the provincial legislatures conflict with each other? What is the constitutional justification for the review of legislative action by the judiciary? How does the practice of judicial review protect fundamental rights? In a nutshell, this chapter explores how the superior judiciary has interpreted constitutional and sub-constitutional legislation while exercising their power of judicial review with a view to protecting fundamental rights.

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

Chapter six examines the constitutional concepts of judicial restraint and judicial activism. The previous chapters explained the application of the doctrine of separation of powers through the exercise of judicial review by our courts. Some argue that the judiciary has protected fundamental rights while adhering to the doctrine of separation of powers. Others maintain that the courts have, in fact, restrained the actualization of fundamental rights by non-adherence to the doctrine. This chapter explores, through case law, how the courts intervene in the functions of the legislature and the executive while enforcing fundamental rights through the practice of judicial review. The chapter concludes that the courts have occasionally ignored the constitutional doctrine of separation of powers, thereby *impeding* the protection of fundamental rights. This conclusion lends support to my argument that the courts should interpret and use the doctrine of separation powers in a balanced manner to protect fundamental rights in Pakistan.

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

END NOTES

¹ Articles 9-28 of the Constitution, 1973.

² See, Articles 29-40 of the Constitution, 1973; See also, Hussain, *Public*, 5.

³ See, Hussain, *Public*, 5.

⁴ Among others, the Constitution (Third Amendment), (Fourth Amendment), (Fifth Amendment), Act 1975; Proclamation of Martial Law

1977, Laws (Continuance in Force) Amendment Order, 1977; The Constitution (Second Amendment) Order 1979; CMLA Order 72 of 1979; PCO, 1981; PCO, 1999 and PCO, 2007 have severely influenced the fundamental rights and courts' jurisdiction under the Constitution, 1973.

⁵ See, Tassaduq Hussain Jilani C J, *The News*, International Edition, December 12, 2013, 1.

⁶ See, *State v. Dosso*, PLD 1958 SC 533, 541.

⁷ A long Martial law which was imposed on July 5, 1977 was left over and democracy was restored in Pakistan. (See, *The Revival of the Constitution of 1973*, Order 1985.)

⁸ See, Iqbal, *Right*, 157.

⁹ See, Menski et al., *Public*, 64-67.

¹⁰ Articles 184 (3) and 199 of the Constitution read with Article 187(1) of the Constitution.

¹¹ *Ibid.*, 38 and 79.

¹² See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416; *Dharshan Masih v. State*, PLD 1990 SC 513.

¹³ See, *Imtiaz Ahmed v. Ghulam Ali*, PLD 1963 SC 382; *Fazlul Quder Chowdhry v. Muhammad Abdul Haque*, PLD 1963 SC 486; *Abul A'la Maudoodi v. Government of West Pakistan*, PLD 1964 SC 673; *Fazal Din v. Lahore Improvement Trust*, PLD 1969 SC 223.

¹⁴ See, Menski et al., *Public*, 23.

¹⁵ See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416.

¹⁶ See, Menski et al., *Public*, 7.

¹⁷ See, Karen Kong, "Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?" *Civil Justice Quarterly* 28, no. 3 (2009): 327.

¹⁸ See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416, 421; See, *S.P. Gupta v. President of India*, AIR 1982 SC 149, 189.

¹⁹ See, Iqbal, *Right*, 166; See, Menski, et al., *Public*, 30.

²⁰ See, *Mr Justice Iftikhar Muhammad Chaudhary v. The President of Pakistan*, PLD 2007 SC 578.

²¹ President to Hold Another Office Act, 2004.

²² Order 1 of 2007, PLD 2008 Federal Statutes 110.

²³ See, *Wajihuddin Ahmad v. Chief Election Commissioner*, PLD 2008 SC 25.

²⁴ *Ibid.*,

²⁵ See, *Tikka Iqbal Muhammad v. General Pervaiz Musharraf*, PLD 2008 SC 6.

²⁶ Section 13 of the Judiciary Act of 1789.

²⁷ See, Robert G. Hazo, "Montesquieu and the Separation of Powers," accessed November 7, 2014, <http://heinonline.org>

²⁸ See, the 18th Amendment to the 1973 Constitution of Pakistan.

²⁹ See, Article 175 of the Constitution, 1973.

³⁰ See, Roberto Gargarella, "Democratization and the Judiciary," (Research Council of Norway, 2003), 153, 154.

³¹ See, *Moulvi Tamizuddin Khan v. Federation of Pakistan*, PLD 1988 Sind HC 96.

³² See, *Mehmood Khan Achakzai v. Federation of Pakistan*, PLD 1997 SC 416.

³³ See, Ali Nawaz Chowhan, *The News*, (2010), Ideology, Democracy, and 18th Amendment, April 23, 24, 2010.

³⁴ See, *Baz Muhammad Khan v. Federation of Pakistan*, PLD 2012 SC 923; *Mubashar Hassan v. Federation of Pakistan*, PLD 2010 SC 265; *Nadeem Ahmed v. Federation of Pakistan*, PLD 2010 SC 1165; PLD 2008 SC 673; See, Suo-Motu Case No. 23 of 2012, Anita Turab Case.

³⁵ See, Hamid Khan, "Comparative Constitutional Law," (Lahore: Pakistan Law House, 2008).

³⁶ See, John Locke, "Two Treatises of Government," (Cambridge University Press, 1967).

³⁷ See, Montesquieu, "The Spirit of the Laws," transl. by A. Cohler, B. Miller & H. Stone (Cambridge University Press, 1989).

³⁸ See, Paper No. 51.

³⁹ See, Paper No. 78-79.

⁴⁰ See, Tayyab Mahmud, Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan, 1993, *Utah Law Review* 1253.

⁴¹ See, N.W. Barber, "The Separation of Powers and the British Constitution," (London: University of Oxford, 2012).

⁴² See, N.W. Barber, "Self-Defense for Institutions," (London: University of Oxford, 2012) Paper No. 61; N.W. Barber, "Prelude to the Separation of Powers," *Cambridge Law Journal*, 2001, 159-60.

⁴³ See, Choper, *Judicial*.

⁴⁴ See, Ely, *Democracy*.

⁴⁵ See, Jones, *Proper*.

⁴⁶ See, Hamid Khan, "Comparative Constitutional Law," (Pakistan Law House: Lahore, 2012).

⁴⁷ See, Hamid Khan, "Constitutional and Political History of Pakistan," (Oxford University Press: Karachi, 2017).

⁴⁸ See, *Federation of Pakistan v. United Sugar Mills Ltd*, PLD 1977 SC 397.

⁴⁹ See, *Fouji Foundation v. Shamiur Rehman*, PLD 1983 SC 457.

⁵⁰ See, A.G. Chaudhry, "Lectures on Constitutional Law," 1994.

⁵¹ See, Asif Saeed Khan Khosa, "Legislature, Executive, and Judiciary: Conflicts and Cohesion," 1994.

⁵² See, 272 U.S. 52, 71 L. Ed. 160.

⁵³ See, Ali Nawaz Chowhan, "Judicature in the Trichotomy of Power," 1994.

⁵⁴ See, Mahmud, "Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan," 1993.

⁵⁵ See, Siddique, “Jurisprudence of Dissolutions: Presidential Powers to Dissolve Assemblies under the Pakistani Constitution and its Discontents,” 2006.

⁵⁶ See, Newberg, “Judging the State Courts and Constitutional Politics in Pakistan,” (1995).

⁵⁷ See, Anil Kalhan, “Gray Zone Constitutionalism and the Dilemma of Judicial Independence in Pakistan,” *Vanderbilt Journal of Transnational Law*, 1, (2013), 46.

⁵⁸ See, A.K. Brohi, “Fundamental Law of Pakistan,” (Karachi: Din Muhammad Press, 1957).

⁵⁹ See, Ishrat Hussain, “The Missing Element in Pakistan’s Governance,” 1999, *The Pakistan Development Review*, Vol. 38, No. 4, Papers and Proceedings PART I Fifteenth Annual General Meeting and Conference of the Pakistan Society of Development Economists Islamabad, November 5-8, 1999 (Winter 1999), 511-536.

⁶⁰ See, Boaventure de Sousa Santos, “Toward a New Legal Common Sense,” 2002.

⁶¹ See, Remington, “Democratization and the Problem of Governance,” 2002.

⁶² See, Victoria Nourse, “The Vertical Separation of Powers,” *Duke Law Journal*, Vol. 49, No. 3 (Dec., 1999), 749-802.

⁶³ See, Campbell, “Separation of Powers in Practice,” (Stanford University Press, California, 2004).

⁶⁴ See, Ran Hirschl, “The Political Origins of the New Constitutionalism,” *Indiana Journal of Global Legal Studies*, Vol. 11: Iss. 1, Article 4.

⁶⁵ See, N.W. Barber, “The Separation of Powers and the British Constitution,” (London: University of Oxford, 2012).

⁶⁶ See, N. W. Barber, “Self-Defence for Institutions,” (London: University of Oxford, 2012).

⁶⁷ See, Vile M.J.C, “Constitutionalism and the Separation of Powers,” 2nd ed., (Indianapolis, Liberty Fund 1998).

⁶⁸ See, *Al Jihad Trust v. Federation of Pakistan*, PLD 1996 SC 324; *Federation of Pakistan v. Haji Muhammad Saifullah Khan*, PLD 1989 SC 166; *Sharaf Faridi v. Federation of Islamic Republic*, PLD 1989 SC 404; *Moulvi Tamizuddin Khan v. Federation of Pakistan*, PLD 1955 Sind HC 96; *Usif Patel v. The Crown*, PLD 1955 FC 387; *Federation of Pakistan v. Moulvi Tamizuddin Khan*, PLD 1955 FC 240; *Watan Party v. Federation of Pakistan*, PLD 2006 SC 697; *Registrar Supreme Court of Pakistan v. Qazi Wali Muhammad*, PLD 1997 SC 141; *Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan*, PLD 1992 SC 646; *The State v. Dosso*, PLD 1958 SC 533; *The State v. Ziaur Rehman*, PLD 1973 SC 49; *Nusrat Bhutto v. Chief of Army Staff*, PLD 1977 SC 657; *Muhammd Sharif v. Federation of Pakistan*, PLD 1988 Lahore HC 725; *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *Benazir Bhutto v. Farooq Ahmad Khan Leghari*, PLD 1998 SC 388; *Mehmood Khan Achakzai v. Federation*

of Pakistan, PLD 1997 SC 416; *Farooq Ahmad Khan Leghari v. Federation of Pakistan*, PLD 1999 SC 57; *Zafer Ali Shah v. General Pervaiz Musharraf*, PLD 2000 SC 869; *Baz Muhammad Kakar v. Federation of Pakistan*, PLD 2012 SC 923; *Mubashar Hassan v. Federation of Pakistan*, PLD 2010 SC 265; *Nadeem Ahmed v. Federation of Pakistan*, PLD 2010 SC 1165; *Suo-moto case*, PLD 2008 Supreme Court 673; *Federation of Pakistan v. United Sugar Mills Ltd*, PLD 1977 SC 397; *Fouji Foundation v. Shamimur Rehman*, PLD 1983 SC 457;

⁶⁹ See, *Moulvi Tamizuddin Khan v. Federation of Pakistan*, PLD 1995 Sind 96; *Federation of Pakistan v. Moulvi Tamizuddin Khan*, 1955 Federal Court 240.

⁷⁰ See, *Usif Patel v. The Crown*, 1955 Federal Court 384.

⁷¹ See, *Federation of Pakistan v. Haji Muhammad Saifullah Khan*, PLD 1989 SC 166; *Khawaja Ahmad Tariq Raheem v. Federation of Pakistan*, PLD 1992 SC 646.

⁷² See, *Sharaf Faridi v. Federation of Pakistan*, PLD 1989 Karachi 404; *Government of Sind v. Sharaf Faridi*, PLD 1994 SC 105.

⁷³ See, *Government of Balochistan v. Azizullah Memon*, PLD 1993 SC 341.

⁷⁴ See, *Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 SC 324.

⁷⁵ See, *Registrar Supreme Court of Pakistan v. Qazi Wali Muhammad*, 1997 SCMR 141.

⁷⁶ See, *Wattan Party v. Federation of Pakistan*, PLD 2006 SC 697.

⁷⁷ See, *Suo-moto case No.10 of PLD 2007 SC 673*.

⁷⁸ See, *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 2010 SC 1151, 1161.

⁷⁹ See, *Munir Hussain Bhatti v. Federation of Pakistan*, PLD 2011 SC 407.

⁸⁰ Article 175 of the Constitution, 1973.

⁸¹ See, *Nadeem Ahmad Advocate v. Federation of Pakistan*, PLD 2010 SC 312

⁸² See, *Suo-moto case No. 5*, PLD 2010 SC 731.

⁸³ See, *Suo-moto case No. 8*, PLD 2010 SC 821, 927.

⁸⁴ See, *Baz Muhammad Kakar v. Federation of Pakistan*, PLD 2012 SC 923.

⁸⁵ In this case, the Contempt of Court Act, 2012 was challenged before the SC.

⁸⁶ See, *Suo-moto case No.15*, PLD 2009 SC 610.

⁸⁷ See, <<https://tribune.com.pk/story/2396332/sc-opposes-judicial-oversight>> accessed on 24 March 2023.

⁸⁸ See, <https://www.thenews.com.pk/print/959924-sc-on-defections> accessed on 25 March 2023.

⁸⁹ See, Ronald Dworkin, “Law’s Empire”, (Cambridge: Harvard University Press, 1986).

CHAPTER TWO

THE DOCTRINE OF SEPARATION OF POWERS AND FUNDAMENTAL RIGHTS

2.1 INTRODUCTION

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

This chapter builds the theoretical foundations of the study. It addresses the following questions: What is the definition of separation of powers? Does the doctrine of separation of powers exist in Islamic tradition? How did the

doctrine evolve in the West? What are fundamental rights? What is the link between the doctrine of separation of powers and the protection of fundamental rights? The discussion around these questions helps to lay down the conceptual foundations of this study. It informs that the theory of separation of powers and the conception of fundamental rights exist both in Islamic and Western constitutional jurisprudence. Answers to these questions unpack the hypothesis of the book, namely, whether upholding the doctrine of separation of powers promotes the protection of fundamental rights in Pakistan.

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

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

2.2 DEFINING THE DOCTRINE OF SEPARATION OF POWERS

This study explores how the courts in Pakistan have applied the doctrine of separation of powers while exercising their powers of judicial review. At the outset, the following question may be considered: how can the terms ‘power’ and ‘the separation of powers’ be defined? M.J.C Vile has also stressed these questions and states that, in the literature, the word ‘power’ reflects the legal mandate or the ability of governmental agencies or persons representing those agencies to achieve certain objectives and perform acts like making, judging, and enacting laws.¹ In other words, the word ‘power’

implies authority, force, capacity, and agency to do an act that is legally protected and justified. This study uses the word 'power' to describe a *constitutional* mandate of the organs of the state.

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

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

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

judicial decision by enacting a statute or a constitutional amendment. In a parliamentary democracy, the executive can influence the legislature to pass a law curtailing the powers of the judiciary. It is argued that fundamental rights would be better protected in Pakistan if the judiciary acts within its constitutional domain³ and adheres to this definition of separation of powers.⁴ This is because judicial restraint or a balanced exercise of judicial review would allow the growth of political process enabling the people to hold governments accountable for the failure in the provision of fundamental rights. Due to increasing judicial activism, however, this has not happened so far in Pakistan.

2.3 UNDERSTANDING THE FUNDAMENTAL RIGHTS

A legal right refers to an interest that is created and protected by the law.⁵ The fundamental rights are premised on a philosophical ground that there is a higher law which cannot be violated by the state.⁶ That higher law, also referred to as natural law, is incorporated in written constitutions in the form of fundamental rights. The idea behind providing such fundamental rights under a written constitution is to protect these rights from the transgression or tyranny of the state.

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

This study examines how the courts have interpreted the Constitution, including the constitutional doctrine of separation of powers, while enforcing fundamental rights. A standard definition of fundamental rights is used to examine how the courts have stretched and expanded the meaning and scope of

fundamental rights while exercising their powers of judicial review.

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

While appreciating constant changes in society, the judiciary contended that constitutional interpretation should not be restricted or confined to the past. The constitution is like a living tree and it continues growing over time. A constitutional document embodies the aspirations of the people which may not be contained in time and space.¹² The courts in Pakistan seem to appreciate these ambitions and aspirations. Therefore, they have assigned the widest meaning and broadest scope to the provisions on fundamental rights and have frequently interpreted the constitution in a liberal manner.¹³ The courts dictated for a broader and progressive interpretation of the fundamental rights in order to meet societal changes.¹⁴ Such a liberal approach of the courts can be seen in procedural as well as substantive aspects of the law concerning fundamental rights. In procedural terms, the courts relaxed the filing and evidentiary requirements in cases concerning fundamental rights. For example, the courts took notice of such cases even on the basis of a letter or news or an incident reported on social media. In substantive terms, the courts often issued broad directions to the legislature and the executive.¹⁵ In doing so, the

courts have brought the principles of policy into the fold of enforceable rights.¹⁶

The courts are obliged to enforce fundamental rights of public importance and they have extensively used this power, considering the constitution an organic instrument and the rights incorporated therein as indefinite and imprecise legal rights.¹⁷ The courts have used such a progressive and dynamic approach in cases involving fundamental rights such as safeguards against arrest and detention (Article 10),¹⁸ the right to defend in case of arrest and detention (Article 10),¹⁹ the freedom of business and profession (Article 18),²⁰ the prohibition of forced labour (Article 11),²¹ the privacy of the home (Article 14),²² the dignity of mankind (Article 14),²³ the right to consult a counsel (Article 10),²⁴ the freedom of forming business unions (Article 17),²⁵ the right to individual liberty (Article 9),²⁶ political freedoms (Articles 15, 16, and 17),²⁷ the freedom of business and profession (Article 18),²⁸ the right to property (Article 23),²⁹ and the right to equality of citizens (Article 25).³⁰

The courts have even taken cognizance of those matters which arguably do not fall within their constitutional dominion, falling instead in the policy-making domain of the government. The courts have, for example, intervened in matters pertaining to inheritance,³¹ offshore companies,³² write-off loans,³³ interest,³⁴ pollution,³⁵ the supply of clean water,³⁶ the elimination of exploitation,³⁷ the principles of policy,³⁸ and Islamic rights,³⁹ while enforcing the constitutional provisions concerning fundamental rights. The courts have interpreted fundamental rights quite progressively and claimed that they can expand the meaning and definition of fundamental rights to benefit the citizens.⁴⁰

The meaning of the fundamental 'right to life' was stretched to include all the benefits which a free-born person needs to have in order to live with dignity.⁴¹ More specifically, the court observed that the right to life cannot be interpreted in a restricted manner.⁴² In *Shehla Zia's* case,⁴³ the court expanded the meaning of the word 'life' given in Article 9

through an activist approach.⁴⁴ The court observed that although the constitution does not define the word 'life', yet it cannot be given a restrictive meaning, because that would be tantamount to equating human life with animal life. While liberally interpreting the meaning of life, the court observed that a human should be able to live a dignified life, with all the facilities and pleasures of being born in a free society. In this case, the court, for the first time, departed from the traditional definition and jurisprudence of fundamental rights in Pakistan.

Following such a progressive interpretation of the fundamental rights, the courts have tried to enforce even non-enforceable or non-justiciable rights such as the aspirations of the state envisaged in the principles of policy. The courts have expanded the right to life to encompass the right to accommodation for a civil servant,⁴⁵ and access to clean drinking water.⁴⁶ The courts have even held that damage caused to property by flooding is a matter of fundamental rights.⁴⁷ Likewise, cases concerning employment contracts have been treated as involving the right to life.⁴⁸ Access to justice, too, has been regarded as an issue pertaining to the right to life.⁴⁹

It is evident that our courts have occasionally followed a liberal, progressive, creative, and dynamic approach to fundamental rights and, especially, the right to life. The courts have relied upon the preamble to the Constitution, the Objectives Resolution, fundamental rights and principles of policy to deliver justice to the people (although only fundamental rights are typically seen as 'justiciable' or 'enforceable' provisions).⁵⁰ The courts in Pakistan appear to be inspired by the notions of socio-economic justice in Islam. With this objective in mind, the courts seemingly relaxed procedural requirements such as the personal grievances of the petitioner or the filing of a formal petition to seek redressal of the grievance.⁵¹ It may be argued that this procedural relaxation by the courts has opened a floodgate of human rights issues that may be dealt with more appropriately in political forums.

Such a liberal approach in terms of interpreting the procedural as well as the substantive aspects of constitutional law appears to offend the very spirit of constitutionalism that is envisaged in the constitutional doctrine of separation of powers. If courts are allowed to interpret provisions concerning fundamental rights in an unrestricted manner, it may create institutional conflicts and then a crisis or anomaly for the legislature and the executive. Indeed, constitutionalism, including the separation of powers, dictates that each institution, including the judiciary, should remain within its constitutional domain so as to protect democracy. However, the examples discussed above illustrate that in their passion to protect fundamental rights, the courts crossed the constitutionally prescribed limits for the exercise of judicial power.⁵²

This study will now briefly explain which conception of fundamental rights will be employed to examine the practice of judicial review by the courts in Pakistan. For the purposes of this study, fundamental rights mean those rights which have been explicitly provided in Chapter 1 of the Constitution of 1973, such as the right to life, the freedom of religion, the freedom of expression, the freedom of movement and association, the right to privacy, the right to education, the right to a fair trial, and the right to property, etc.⁵³ Any other conception or meaning of fundamental rights is discarded from the purview of this study in order to enhance the precision and legitimacy of the findings of this study.

These rights are considered fundamental because they are essential and integral to the existence of a human being. Humans have these rights by virtue of being human. These rights are so important that they cannot be taken away except in the circumstances provided under the Constitution for the suspension of these rights through the proclamation of emergency or a constitutional amendment.⁵⁴

Occasionally, in Pakistan, the courts seem to have ignored this standard definition and have interpreted the provisions on fundamental rights beyond the textual content of the

provisions.⁵⁵ In doing so, however, the courts appear to have muddled the essence of constitutionalism encapsulated in the doctrine of separation of powers. Such an interpretation disturbs the constitutional balance between the organs of the state and weakens democracy.⁵⁶ It amounts to an encroachment on the policy-making domain of other branches of government, as when the courts intervened in the government's domain of regulating environmental pollution.⁵⁷ Article 9 of the Constitution provides that, "No person shall be deprived of life or liberty save in accordance with law". This provision may not be interpreted to include 'environment' in any meaning of the word 'life'. Hence, any attempt to regulate the environment, for example, while interpreting the right to life is an encroachment on the policy-making mandate of the executive.

2.4 SEPARATION OF POWERS IN THE ISLAMIC TRADITION

This section traces the doctrine of separation of powers within the Islamic polity. In Islam, Muslims seek guidance from God and His messenger, the Prophet Muhammad (PBUH).⁵⁸ They construct their individual and social life on the basis of '*Shariah*', which means 'path' or 'the way of God'. Muslims believe that *shariah* provides complete guidance to human beings in worldly affairs and regarding life after death. However, as the text of the *Quran* and the *Sunnah* do not speak directly to the Muslims, Muslims interpret its meanings to live according to the will of God. This activity of interpretation is called '*ijtihad*' and indulgence by Muslim *legal* scholars to interpret the *Quran* and the *Sunnah* is called '*Fiqh*'.

Through *ijtihad*, Muslims attempt to understand the intentions or will of God. Due to the fallible nature of human beings, the meaning given to *Shariah* would always remain probable and subject to modification in accordance with changing circumstances. So, no one can claim certainty and unity of meaning in Islamic discourse. While relying upon the conception of Dr. Shahbaz Ahmad Cheema, it may be argued that Muslims can use this interpretive space for creating a

suitable political system to protect their rights and, then, to understand theological and non-theological issues relating to an Islamic state in modern societies.⁵⁹ It may be argued that a key difference between Islamic and Western conceptions of democracy is that Muslims are free to create, interpret, repeal, and amend the rules governing their individual and collective conduct only to a certain extent, as *shariah* (even beyond the realm of *ijtihad*) is thought to guide the overall conduct of the Muslims. This view is endorsed by Saiyyid Abul A'la Maudoodi.⁶⁰ In the Western form of democracy, Maudoodi argues, individuals are absolutely free as there is no limit as such on their freedom to act as per their independent conscience and free will.⁶¹

Some scholars, for instance, Allal al Fasi, argue that *shura* and modern democracy are compatible. Muhammad al-Ghazali argues that Islam provides a principle of consultation and the form and content of such consultation is left to *ijtihad*. Others maintain that the traditional conception of *shura* and modern democracy cannot be reconciled. For instance, Abd al-Salan Yasin argues that *shura* is based on the *Quran* whereas modern democracy is premised on the social contract. Muhammad Munir concludes that those who consider that both these conceptions of governance are similar have yet to provide the details of an Islamic democracy, and until a model of Islamic democracy is not provided, Muslims have to follow the Western model of democracy.⁶²

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

in affairs of the state, as the *Quran* ordains consultation amongst companions.⁶³

The first four Caliphs of Islam would also consult with the tribal heads.⁶⁴ This mechanism of consultation in the Islamic state of Madina confirms the separation of power or the existence of the executive and the legislature (consultative assembly or parliament in modern Islamic democracies). Furthermore, qadiz (judges) were appointed to adjudicate. For example, once a dispute regarding the ownership of armor occurred between the Caliph Ali and a non-Muslim. The judge decided against the Caliph. This incident shows that the separation of power between the executive and the judiciary existed in the traditional Islamic state.⁶⁵

Muslim scholars have thoroughly discussed the separation of power in an Islamic state. While exploring the history of state and government in Islam, Muhammad Asad states that Islam diluted tribal ties to some extent; however, during the rule of the Prophet Muhammad (PBUH) and the first four Caliphs, tribal structure of Arabian society largely remained intact. The tribal heads were the representatives of their tribes. Thus, they were consulted in political affairs of the state. Asad equates the rulers of Madina with the executive branch and the assembly of tribal heads with the parliament in modern Islamic democracies. He considers that in the traditional Islamic state, the executive was stronger than, and largely independent of the opinion of, the legislature. Therefore, he is of the view that the presidential system of government, such as the US system of government, is closer to the Islamic system of governance as opposed to parliamentary system of government. He also emphasizes the need for an independent tribunal/judiciary to adjudicate between the executive and the legislature.⁶⁶

Saiyyid Abul A'la Maudoodi believes that Islam is a complete code of life, covering all aspects of human life, including individual, social, and political. Therefore, he introduced the concept of Islamic democracy or theocracy. He emphasized that sovereignty belongs to the Almighty Allah. Moreover, he was of the view that the *Quran*

and the *Sunnah* are the basic laws to be enforced by the Muslim ruler. Saiyyid Maudoodi promoted consultative decision-making in the parliament. He advocated for a strong but accountable executive and legislature as affairs of any institution of the state have to be subject to the *Quran* and the *Sunnah*. This concept of 'accountable Islamic democracy' is a unique contribution in the discourse of political Islam.⁶⁷ He explains that Islam is a dynamic religion. Islamic law has the capacity to accommodate changing needs of the time, subject to the principles laid down in the *Quran* and the *Sunnah*.⁶⁸

With reference to the creation of Pakistan, Saiyyid Maudoodi stated: "The idea of Pakistan owes its origin to the belief that Muslims are a nation, an ideological community, and it is a dictate of their faith to establish a state, a society and a culture in the light of the principles given by the *Quran* and the *Sunnah*".⁶⁹ He quoted Muhammad Ali Jinnah's speech in 1945: "The Muslims demand Pakistan, where they could rule according to their own code of life and according to their own cultural growth, traditions and Islamic laws. Our religion, our culture and our Islamic ideals are our driving force to achieve our independence". He further referred to Muhammad Iqbal, who said that: "The life of Islam as a cultural force in this country very largely depends on its centralization in a specified territory. This centralization of the more living portion of the Muslims of India..., will eventually solve the problem of India as well as of Asia." Thus, Saiyyid Maudoodi highlighted the primary importance of Islamic law in an Islamic state.⁷⁰

According to Abu'l Hasan Ali ibn Muhammad al-Mawardi, sovereignty belongs to God and an Islamic state shall run under the laws of God; the ruler shall govern the state as the successor of Prophet Muhammad (PBUH) and he will be responsible for enforcing *Shariah*. The ruler shall uphold justice. He must have knowledge of religion and must not be disabled. He should be wise and brave and must be a descendant of the tribe of the Prophet Muhammad (PBUH). The ruler may be elected or nominated by the ruling Imam.⁷¹

Abu Hamid Muhammad al-Tusi al-Ghazali states that an Islamic state is a divine state and God is the Supreme Authority. Therefore, it is His divine law that should apply. Accordingly, the ruler of an Islamic state must be able to wage *jihad* and, while discharging his duties, he should consult experts and ministers. In addition to consulting religious experts, he should possess knowledge of *shariah* for the purpose of *ijtihad*. He must be pious in order to carry on his office as a political and religious entity. He must establish justice and settle cases with fairness. He must have knowledge of *shariah* and wisdom to endorse it as the rule of law. He should be a practicing Muslim and must show a reliable Muslim character. Moreover, he must be aware of official matters and the performance of his administrators. Additionally, he should seek consultation of men of caliber to speak about the affairs of the state and observe morality.⁷²

A survey of the thought of Muslim scholars establishes that separation of state power exists in the traditional Islamic state and is also appreciated in the context of modern Islamic democracies. The main difference between the Western and the Islamic conception of governance lies in the fact that the *Quran* and the *Sunnah* are the driving force of political thought in Islam and central to governance in an Islamic state. The Western democracy is premised on the will of the people, whereas, in Islamic democracy, sovereignty belongs to God. Any law made by the parliament has to conform to the *Quran* and the *Sunnah*. The *Quran* says, “for those who make decisions on other than what God has revealed are unbelievers”⁷³.

An Islamic state is not a dictatorial or authoritarian government; public affairs are handled and accomplished through mutual consultation.⁷⁴ The rule of law and the safety of the life and property of the people is one of the main objectives of an Islamic state. The people can approach courts for getting justice: “O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be against rich or poor: for Allah

can best protect both. Follow not the lusts, lest ye swerve, and if ye distort justice or decline to do justice, verily Allah is well acquainted with all that ye do”.⁷⁵ Finally, a Muslim ruler is obliged to order people to do good, stop them from committing wrongs and punish them for their wrongdoings: “The believers, men and women, are protectors of each other; they enjoin what is right and forbid what is evil”.⁷⁶

In the sub-continent, it was the Muslim rulers, who were referred to as *Salateen*,⁷⁷ and the Mughal Emperors who occupied state power.⁷⁸ However, they distributed the power of the state amongst different functionaries, namely, judges and administrators. Under the British regime, state power was distributed between the executive, the legislature, and the judiciary. The Government of India Act, 1935 conferred executive powers on the Governor-General, being a representative of the Crown, which were to be exercised in consultation with the Council of Ministers. The Federal Legislature comprised of the Governor-General as a representative of the King, and two houses, namely, the Council of State and the House of Assembly.⁷⁹ A Federal Court was also established to interpret the constitution and to adjudicate between the constituent units of the federation.⁸⁰

In modern Islamic states like Pakistan, then, the power of the state is divided within the government institutions. It may be argued, however, that religious scholars and judges in the Federal Shariat Court (“FSC”) in Pakistan still have legal authority to review rules made by the legislature. Under the Constitution of 1973, any law inconsistent with the *Quran* or the *Sunnah* can be challenged before the FSC.⁸¹ So, while the Parliament defines what is Islamic, the FSC declares what is not Islamic. Additionally, the Council of Islamic Ideology (“CII”) may examine the compatibility of a pertinent law vis-à-vis injunctions of the *Quran* and the *Sunnah*. However, its role is merely advisory and not binding on the legislature.⁸² In Pakistan, even religious scholars, also known as *Muftis*, have authority to interpret religious rules. It may be argued that this authority of the state as well as non-state religious scholars to interpret and determine religious laws is a continuing feature of

the traditional Islamic state. However, Pakistan's Constitution carries a combination of features from the Islamic and Western traditions of governance, which makes this study more challenging and interesting.

The aforementioned discussion illustrates that, in a modern Islamic state, the state's power is distributed across the legislative, executive, and judicial institutions. The only deviation from western democracies exists in the fact that religious scholars, via constitutionally established judicial institutions such as the FSC, also have a role in terms of examining the laws made by the legislature.⁸³ This overall structure and scheme, envisaging a division of powers, is endorsed by the courts in Pakistan.⁸⁴

2.5 FUNDAMENTAL RIGHTS IN THE ISLAMIC TRADITION

Before the emergence of Islam, there were gross violations of the rights of the people by powerful tribes and individuals in Arabian society. Such violations include female infanticide, violation of the dignity of humans, and the infringement of women's rights.⁸⁵ It may be argued that all prophets struggled to protect and enforce the rights of the people.⁸⁶ The Prophet Muhammad (PBUH) also initiated a movement for the revival of human rights.⁸⁷ While addressing the King of Abyssinia, Jaffar Tayyar, a companion of the Prophet (PBUH), stated that before the arrival of the Prophet (PBUH), they used to kill their daughters, attack each other and commit all kinds of evil.⁸⁸ The Holy Prophet (PBUH) emphasized the equality of humans and the protection of life and property as well as the rights of women and slaves in his last speech.⁸⁹

The *Quran* and the Prophet (PBUH) advocate for the equality of mankind, which is a basic human right. The *Quran* says that humans are divided into different tribes so that they could identify each other; otherwise, all humans are equal.⁹⁰ Freedom of religion is also recognized in Islam as there is no

coercion in matters of religion.⁹¹ In Islam, the freedom of expression and consultation is highly regarded and protected, and Muslims are encouraged to decide their matters with consultation.⁹² Moreover, the right to life and the security of a human is given utmost importance and is safeguarded. Such is the value of human life in Islam that taking the life of a man is deemed equal to killing all mankind.⁹³ Further, the right to property and privacy is protected in Islam, and it is prohibited to take the property of other Muslims through unfair means.⁹⁴

Some scholars, like Donnelly, however, argue that human rights originated in the West and other cultures lack the practice and, sometimes, even the concept of human rights. He further argues that, in Islam, no one has any rights; rights are only a matter of duties for rulers and individuals. He maintains that the right to justice is a duty of rulers and the right to freedom is only a duty not to hold slaves unjustly; economic rights entail a duty to earn a living and help the needy; the right to freedom of expression obliges one to speak the truth. He concludes that the basis for these injunctions are not human rights but divine will, which prescribes duties, dealing with rights not as human rights per se but in the sense of 'what is right'. He admits that promoting human welfare is a key objective in Islam. However, he argues that this concern is not equivalent to human rights in the Western sense.⁹⁵

There is no denial of the fact that Western civilization has brought the idea of human rights into the mainstream debate of rights at an international level and has campaigned to get such rights formulated in terms of international law; however, this does not necessarily prove the non-existence of the practice and the concept of human rights in non-Western cultures e.g. Islam. Muslim scholars like Mashood Baderin appreciate the active role of Western states in the promotion and standardization of human rights principles at an international level. He argues, however, that the concept of human rights is not unique to Western cultures and societies. It also exists in other civilizations like Islam.⁹⁶ As compared with Donnelly's argument, Baderin's argument is more convincing. Specifically, Baderin notes that al-Mawardi discussed the

rights of all humans⁹⁷ and described the obligations of the ruler to protect the rights of individuals under the concept of *Hisbah* (public order).⁹⁸ The irony lies in the fact that Western ideas about human rights see 'public order' (or disorder) as a condition allowing for a limitation of fundamental rights. Thus, Baderin argues that the term 'human rights' may have a special meaning in the Western context, but the idea it implies has universal application to all humans and may be worded in different terminologies by different groups. Baderin further argues that the concept of human rights should be conceived as an evolutionary process that took its present shape through various stages of human civilization and the same will continue to evolve in the future.⁹⁹

According to Baderin, through such evolution, the term *Huquq Al-Insan* (individuals rights) replaced the word *Huquq Adimiyain* (rights of a person) to represent human rights in modern terms. He traces fundamental rights to the doctrine of '*maslahah*' (human benefit). His reliance on '*maslahah*' as a justificatory principle merits further consideration for the development of fundamental rights. He divides Muslim jurists into two camps: traditionalists and evolutionists. Traditionalists are 'backward-looking', adherents to the classical legal texts, and not willing to reconsider their position in light of changing circumstances. However, the evolutionists, while identifying with the past, look forward to apply the juristic principles meaningfully in the modern context.¹⁰⁰

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

in the later centuries. The spirit of Islam may be discovered by interpreting the *Quran* and the *Sunnah*.

Leonard Binder argues that decisions based on human reasoning in one generation can be rejected by the next generation.¹⁰¹ Accordingly, the concept of separation of power in the traditional literature could not take account of the division of state power in modern democracies. However, the same can be re-interpreted in light of changing circumstances. It may be argued that the message of Islam is not limited to a particular time and space. Rather, it is for all times and for the whole world; thus, it can be construed afresh on the basis of new knowledge acquired by humans over time. It may be argued that if the message of Islam is eternal, then it requires constant re-interpretation in view of science, philosophy, psychology, and theology in the modern world.

Then, Baderin proceeds to define the term '*maslahah*'. The literal meaning of '*maslahah*' is a benefit. It also expresses the principle of public welfare, often qualified as '*maslahah mursalah*'. When used to refer to the public collectively, it is called '*maslahah al-ummah*' and when used in an individual sense, it is termed '*maslahah shakhsiyyah*'. The latter may be equated with the concept of individual rights.¹⁰²

Baderin, building on al-Ghazali's theory, provides a classification of human benefits/rights. Human benefits may be classified as 'indispensable' benefits (*daruriyyat*), which include the protection of life, religion, intellect, family, and property. Then there are 'necessary' benefits (*hajiyyat*). Neglect of these rights may cause hardship to the people, and lead to the collapse of the community. On the third level are rights which improve the overall quality of human life (*tahsiniyyat*).¹⁰³ Thus, the first and third levels relate to, and can accommodate, the notion of fundamental rights in the modern sense. The concept of *huquq al-ibad* (rights of the people) can also be interpreted liberally to protect human rights in the modern age. A ruler is obliged in Islam to cater to the welfare of the people. Therefore, human rights exist, and can be further promoted, on the principles of *maslahah* and *ijtihad*.

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

It may be argued that an absolute agreement between the Western traditions of democracy, the separation of powers, and fundamental rights within the Islamic tradition may not be desirable. Different civilizations may assign various meanings to the concepts of governance and rights. They may differ in their understanding and application of concepts like the separation of powers and the rights of the people owing to their particular social and historical contexts.

Finally, it may be argued that that the division of power between the rulers and religious scholars facilitated the protection of human rights in Islam. Muslim scholars have relied heavily on the principle of '*maslahah*' and have played an important role for the protection of human rights in Pakistan. The *Shariah* aims to promote human welfare in Islam. Baderin emphasizes that the preservation and protection of human interest is the will of God. The *maqasid* approach, he says, in applying the *Shariah*, mandates the provision of complete equity or justice. Moreover, the minimum requirement of the notion of justice is the protection of human rights.¹⁰⁴

2.6 SEPARATION OF POWERS IN THE WESTERN TRADITION

Western political discourse values human rights as an integral feature of democracy and constitutional governance. Because individuals are always weak against the might of the state, balancing state powers through the separation of powers increases the possibility of protection of the rights of the

individuals. The doctrine appeared as a key feature of constitutional government in the seventeenth century. It was acclaimed as a necessary formulation to support and secure individual liberty. It was promoted as an alternative theory of constitutional governance to the fading system of governance comprised of Kings and Commons. The doctrine of separation of powers emerged in the eighteenth century, and expanded as a theory of balanced constitutionalism, while interacting with other constitutional theories. Interaction with other doctrines of government and resulting concepts wove the fabric of political thought in England, France, and America. The theoretical potential of the doctrine of separation of powers was fully realized when its strands were tested in different places by the proponents of aristocracy and monarchy.¹⁰⁵

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

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

With the human experience of abuse of power, Montesquieu proposed that power should be subject to another power. He specifically explained that the life and liberty of citizens cannot be protected without separating the judicial power from other power centers of the government i.e., the

legislature and the executive. Essentially, he argued that the judiciary must be independent from other branches of the government. He also suggested that the judiciary can use its power in a balanced manner when it is not combined with the legislature or the executive. He fears that judges may act as legislators if their power is mixed with the legislature, and may behave aggressively if they are given executive powers.

In fact, Montesquieu discusses the concept of political liberty, moderate government, and the separation of powers. He claims that political liberty is protected by all moderate or modern (law-bound) governments. To him, political liberty is not doing whatever one fancies or desires. Rather, he advocated liberty under the limits of law, including the separation of powers. He considers that an excess of even the 'good' is not desired. He argues for the division of political power into different state organs or functionaries. He further condemns tyranny and recommends that it should be punishable in order to protect the liberty of the citizens.¹⁰⁶

Kairys David sketches the evolution of the doctrine of separation of powers in America. He draws our attention to the political, social, and economic context of the doctrine for a proper understanding of how it applies there. He shares Montesquieu's view on the tyranny of political power and asserts that the doctrine was adopted in the US not to promote efficiency but to control the excesses of a democratic government. He states that the main reason that led the founding fathers of the US democracy to draft the constitution was growing concern over the excess and inconvenience of democracy.¹⁰⁷ This concern attracted the framers of the US constitution to look at the British model of mixed government. However, these framers divided political power into the three branches of the government, namely, executive, legislature and judiciary, not amongst social classes and the monarchy. In the US, the features of mixed government were introduced through institutional checks and balances within state power. The feature of judicial review, the power of the executive to veto legislation, and the power of the Senate to ratify treaties thus kept the government accountable and stable in the early years

of the nation. Kairys further stated that the constitutional doctrine of separation of powers ensured the protection of fundamental rights by restraining powers of each organ of the state.

James Madison notes that the three branches of the government should be connected to give constitutional control to each other. He particularly cautions against encroachments by the legislature and the executive (*vis-à-vis* one another). He sums up that a mere description of the power of each branch in the constitution is not adequate to guard against institutional encroachment. In an attempt to provide a solution to the problem of institutional encroachment, he suggests that power must be met by counter-power.¹⁰⁸ This will ensure that the constitution is so designed that each branch keeps the others in their proper sphere.¹⁰⁹

Alexander Hamilton stresses that the judiciary must be independent of other branches. He considers that the judiciary is the least dangerous branch and the weakest of the three branches, as it has no influence over the purse or the sword. He considers that judicial independence can only be secured through the appointment of independent and permanent judges, who can perform their duties without fear or favor *vis-à-vis* the other branches. He proposes limits on the powers of the legislature, and considers the enforcement of these limits through the judiciary an appropriate means to uphold the constitution. He emphasized that only the judiciary as a mediator and custodian of the rights of the people could protect their rights against the excesses of a majority government.¹¹⁰

Thus, it may be contended that when the power of the judiciary was curtailed in Pakistan, it undermined the constitutional doctrine of separation of powers, weakened the judiciary, and, thus, impeded the protection of the fundamental rights of the people. Others argue that the judiciary has sometimes challenged the separation of powers by overplaying its role and slowing down the actualization of fundamental rights through the political process. This study,

therefore, would examine this argument from both these perspectives.

2.7 THE CONNECTION BETWEEN THE DOCTRINE OF SEPARATION OF POWERS AND FUNDAMENTAL RIGHTS

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

In Islam, the people or the representatives of the people exercise political power as a matter of sacred trust on behalf of God. For example, the Constitution of Pakistan, 1973, in its preamble, envisages the representative character of the people as agents of God for the use of political power. Under an Islamic dispensation of government, the ruler and/or the representatives of the people elected through a political process are, in fact, accountable to God - the ultimate sovereign. Thus,

in Islam, the first limit on government power comes from the ultimate sovereign. This aspect of the political system seems to be spiritual rather than temporal. In *practice*, however, the sovereignty of God lies with the people and their elected representatives (as a matter of sacred trust) who are the ultimate check on the state. In modern Islamic states, the people can elect and reject their representatives or rulers through a regular electoral process.

Subject to the constitution, any law made by the ruler or the parliament that violates the injunctions of Islam can be challenged before the FSC. However, a more direct and effective limitation on the powers of the ruler comes from the subjects, who can change their ruler through the electoral process if he fails to provide and safeguard their fundamental rights, or Islamic injunctions, as provided under the constitution. The division of state power into different branches imposes another limit on the ruler's power. These constitutional limits on the government ensure that the rights of the people are duly protected.

This study mainly focuses on the separation of powers and its connection and impact on fundamental rights in Pakistan. Therefore, it thoroughly examines the courts' powers of judicial review to assess their connection and impact vis-à-vis the constitutional doctrine of separation of powers and the actual realization of fundamental rights.¹¹¹

2.8 CONCLUSION

To conclude, Montesquieu suggests that political liberty can be ensured through the division of political power into different branches of government. The legislature makes the law; the executive enacts the law; and the judiciary interprets the constitution and the law. The fundamental rights of the people can be better protected (against the tyranny of any branch of the government) if each institution operates within its sphere of authority.

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

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

In an Islamic context, the division of general law-making and executive power (*siyasa*) lies with the ruler, while the interpretation of religious rules (*ijtihad*) lies with the scholars and the authority to adjudicate rests with *Qazis*. In modern Islamic states, however, state power is divided between state institutions such as the executive, the legislature, and the judiciary, each operating within certain boundaries as prescribed by the constitution.

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

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

In the sub-continent, state power was largely occupied by Muslim rulers. However, state power was divided amongst different functionaries of the state. In British India, state power was also distributed between the executive, the legislature, and the judiciary. The Government of India Act, 1935, for example, conferred executive power on the Governor-General. The Federal Legislature and the Federal Court were also created under the 1935 Act. Pakistan adopted the constitutional norms of Britain in 1947, and the forefathers of Pakistan were inspired by the written constitution of the US. Accordingly, powers of the state were divided among different branches of the state.

Most written constitutions in the world contain provisions on fundamental rights. These rights draw upon both the modern conception of human rights reflected in international human rights conventions and Islamic notions of rights. In modern

Islamic democracies, the separation of powers and the protection of human rights are interdependent, and the courts are mandated to exercise their powers of judicial review for the protection of these rights.

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

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

In short, both the Western and Islamic traditions accommodate the concepts of, and illuminate the theoretical link between, the separation of power and fundamental rights. While highlighting that crucial link, this chapter helps to explore the hypo bole of this book: the challenge of upholding the constitutional doctrine of separation of powers for the purpose of protecting fundamental rights in Pakistan, in light of the complex relationship between the three organs of the state.

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

END NOTES

¹ See, M.J.C. Vile, “Constitutionalism and the Separation of Powers,” 2nd ed., (Indianapolis, Liberty Fund 1998).

² Ibid.,

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

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

⁵ See, A.K. Brohi, “Fundamental Law of Pakistan,” (Karachi: Deen Muhammad Press, 1958), 301-303.

⁶ Ibid.,

⁷ See, *State v. Dosso*, PLD 1958 SC 533, 541.

⁸ See, Iqbal, *Right*, 157.

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

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

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

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

¹³ *Ibid.*,

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

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

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

¹⁷ See, *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473, 572; *Hurtade v. California*, 110 US 516.

¹⁸ See, *Mrs. Arshad Ali v. Government of Punjab*, 1994 SCMR 1532; *Khan Asfand Yar Wali v. Federation of Pakistan*, PLD 2001 SC 607.

¹⁹ See, *Khan Asfand Yar Wali and others v. Federation of Pakistan*, PLD 2001 SC 607

²⁰ See, *Syed Wasey Zafar and Others v. Government of Pakistan*, PLD 1994 SC 62; *Muhammad Yasin v. Federation of Pakistan*, PLD 2012 SC 132; *Darshan Masih v. State*, PLD 1990 SC 513.

²¹ See, *Darshan Masih v. State*, PLD 1990 SC 513.

²² See, *CJP Iftikhar Muhammad Chaudhry v. President of Pakistan*, PLD 2010 SC 61.

²³ *Ibid.*, *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *CJP Iftikhar Muhammad Chaudhry v. President of Pakistan*, PLD 2010 SC 61.

²⁴ Ibid.,

²⁵ See, *Darshan Masih v. State*, PLD 1990 SC 513; *Muhammad Akram Bunda v. Pakistan Television Corporation*, 1994 SCMR 2279; *Civil Aviation Authority, Islamabad v. Union of Civil Aviation Employees*, PLD 1997 SC 781.

²⁶ See, *Darshan Masih v. State*, PLD 1990 SC 513; *Khalil-uz-Zaman v. Supreme Appellate Court*, PLD 1994 SC 885; *Baz Muhammad Kakar v. Federation of Pakistan*, PLD 2012 SC 923.

²⁷ See, *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *Benazir Bhutto v. President of Pakistan*, PLD 1998 SC 388; *Muhammad Nasir Mahmood v. Federation of Pakistan*, PLD 2009 SC 107.

²⁸ See, *Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 SC 324; *Darshan Masih v. State*, PLD 1990 SC 513.

²⁹ See, *Inayat Bibi v. Issac Nazir Ullah*, PLD 1992 SC 385; *Syed Wasey Zafar and others v. Government of Pakistan*, PLD 1994 SC 621; *Khan Asfand Yar Wali and Others v. Federation of Pakistan*, PLD 2001 SC 607; *Muhammad Yasin v. Federation of Pakistan*, PLD 2012 SC 132.

³⁰ See, *Darshan Masih v. State*, PLD 1990 SC 513; *Inamur Rehman v. Federation of Pakistan*, 1992 SCMR 563; *Khan Asfand Yar Wali and others v. Federation of Pakistan*, PLD 2001 SC 607; *Ch. Muhammad Siddique v. Government of Pakistan*, PLD 2005 SC 1; *Muhammad Nasir Mahmood v. Federation of Pakistan*, PLD 2009 SC 107; *Baz Muhammad Kakar v. Federation of Pakistan*, PLD 2012 SC 923.

³¹ See, *Inayat Bibi v. Issac Nazir Ullah*, PLD 1992 SC 385.

³² See, *Imran Khan Niazi v. Mian Muhammad Nawaz Sharif*, PLD 2017 SC 265; *Muhammad Hanif Abbasi v. Jahangir Tareen*, Constitutional Petition No. 36 of 2016.

³³ See, *Rai Rashid Ahmed Khan v. President of Pakistan*, PLD 1994 SC 36.

³⁴ Ibid.,

³⁵ See, *General Secretary West of Pakistan Salt Miners v. The Director, Industries and Mineral Developments*, 1994 SCMR 2061.

³⁶ See, *Muhammad Naeem v. Chief Engineer, Irrigation Department, and Quetta*, 1994 SCMR 2059.

³⁷ See, Article 3, the Constitution, 1973.

³⁸ See, Articles 29-40, the Constitution, 1973.

³⁹ See, Article 2-A, the Constitution, 1973.

⁴⁰ Ibid., 506.

⁴¹ See, *Shehla Zia v. State*, PLD 1994 SC 693.

⁴² Ibid.,

⁴³ See, Human Rights Case No.15-K of 1992; the residents of Islamabad approached WAPDA and then the Supreme Court of Pakistan against the construction of a grid station in the green-belt of a residential locality. The petitioners alleged that the construction of grid station as such would be fatal for life and would damage the environment.

⁴⁴ See, Dr. Parvez Hassan and Azim Azfar, "Securing Environmental Rights through Public Interest Litigation in South Asia," *Virginia Environmental Law Journal* (2004), 216-236; Dr. Parvez Hassan, "Changing Global Order: Role of Courts and Tribunals in Pakistan in Environmental Protection," *Pakistan Law Journal* (2014), 25-40; Dr. Parvez Hassan and Azim Azfar, "Human Rights and the Environment: A South Asian Perspective," *Journal of Human Rights and the Environment* (2014), 192-212; Dr. Parvez Hassan, "Judicial Activism Toward Sustainable Development in South Asia," (*Pakistan Law Journal* (2003), 39-41; Dr. Nasim Hasan Shah, "Environment and the Role of the Judiciary," (*PLD Journal*, 1992), 27.

⁴⁵ *Ibid.*,

⁴⁶ See, *General Secretary West Pakistan Salt Miners Labour Union (CBA) Khewra, Jhelum v. The Director, Industries and Mineral Developments, Punjab*, 1994 SCMR 2061, 2069.

⁴⁷ See, *Marvi Memon v. Federation of Pakistan*, PLD 2011 SC 854.

⁴⁸ See, *Ejaz Akbar Kasi v. Ministry of Information and Broadcasting*, PLD 2011 SC 22, 25.

⁴⁹ See, *Assad Ali v. Federation of Pakistan*, PLD 1998 SC 161, 189; *Mehram Ali v. Federation of Pakistan*, PLD 1998 SC 1445; *Sh. Riaz-ul-Haq v. Federation of Pakistan*, PLD 2013 SC 501, 520, 547.

⁵⁰ See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416.

⁵¹ See, *General Secretary West Pakistan Salt Miners v. The Director, Industries and Mineral Developments*, 1994 SCMR 2061, 2071.

⁵² See, Jesse H. Choper, "Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court," (*Chicago*, 1980); Lino A. Graglia, "It's Not Constitutionalism, It's Judicial Activism," *Harvard Journal of Law and Public Policy*, 19 (1996) 296; Archibald Cox, "The Role of the Supreme Court: Judicial Activism or Self Restraint," *Maryland Law Review*, 47 (1987), 121-122; John Hart Ely, "Democracy and Distrust: A Theory of Judicial Review," (Cambridge MA: Harvard University Press, 1980).

⁵³ See, Articles 8-28, the Constitution, 1973.

⁵⁴ See, Articles 233, 238, 239, the Constitution, 1973.

⁵⁵ See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416; *Dharshan Masih v. State*, PLD 1989 SC 533; *A Sharwani v. Government of Pakistan*, 1991 SCMR 1041; *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *Assad Ali v. Federation of Pakistan*, PLD 1998 SC 161; *Maulana Abdul Haque Baloch v. Government of Baluchistan*, PLD 2013 SC 641; *Ch. Muhammad Saddique v. Government of Pakistan*, PLD 2005 SC 1; *Watan Party v. Federation of Pakistan*, PLD 2006 SC 697; *Iftikhar Muhammad Chaudhry v. President of Pakistan*, PLD 2010 SC 61; *Muhammad Azhar Siddique v. Federation of Pakistan*, PLD 2012 SC 774; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; *Vineet Narain and others v. Union of India and others*, AIR 1998 SC 889; *Vellore Citizen's Welfare Forum v. Union of India*, AIR 1966 SC 2715; *Veena Sethi v. State of Bihar*,

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⁵⁶ E. Carolan, 'The New Separation of Powers: A theory of Modern State' (*Oxford*, 2009) 18; Eric Barendt, 'Separation of Powers and Constitutional Government', *Public Law* (1995) 599; Waldron J, 'Separation of Powers in Thought and Practice', *Boston College Law Review*, Vol. 54, Issue 2 (2013) 446; MJC Vile, 'Constitutionalism and the Separation of Powers' (Oxford: Clarendon Press, 1967); Hamilton, *The Federalist* No. 39 and 78. (Edited by Clinton Rossiter, 1961); James Madison, *The Federalist* No. 51 (Edited by Clinton Rossiter, 1961), Baron De Montesquieu, 'The Spirit of Laws' Book XI, Edited by J.Y. Prichard. (Translated by Thomas Nugent. Fred B. Rothman & Co. 1991); William Bondy, 'The Separation of Government Powers' (Law Book Exchange Limited, 1999); William Eaton, 'Who Killed the Constitution: The Judges v The Law' (Gateway Books, 1988); Iyer R. Karishna, 'Justice at Cross Road' (New Delhi: Deep and Deep Publication, 1992); John Locke, 'Two Treatises on Government' (London: C Baldwin, 1824); Fazal Karim, 'Judicial Review of Public Action' (Pakistan Law House, 2006); Hamid Khan, 'Constitutional and Political History of Pakistan' (Oxford University Press, 2004); B.N. Kirpal et.al., *Supreme but not Infallible* (Oxford University Press, 2000); Z.K. Maluka, 'The Myth of Constitutionalism in Pakistan' (Oxford University Press, 1995); Paula R. Newberg, 'Judging the State, Courts, and Constitutional Politics in Pakistan' (Cambridge University Press, 1995); S.P. Sathe, 'Judicial Activism in India: Transgressing Borders and Enforcing Limits' (Oxford University Press, 2002).

⁵⁷ See, WernerMenski, Ahmad RafayAlam and Mehreen Raza Kasuri, 'Public Interest Litigation in Pakistan,' (*Pakistan Law House*, 2000); Mansoor Hassan Khan, "The Concept of Public Interest Litigation and its Meaning in Pakistan," (*PLD Journal*, 1992) 84; Parvez Hassan, "Judiciary Leading the Way," (1998) 15(1) *The Environmental Forum* 48; Dr. Parvez Hassan and Azim Azfar, "Securing Environmental Rights Through Public Interest Litigation in South Asia," (2004) 22 *Virginia Environmental Law Journal* 215; Jona Razzaque, "Public Interest Environmental Litigation in India, Pakistan and Bangladesh," (*Kluwer*, 2004); Dr. Parvez Hassan and Azim Azfar, "Securing Environmental Rights through Public Interest Litigation in South Asia," (*Virginia Environmental Law Journal*, 2004), 216-236; Dr. Parvez Hassan, "Changing Global Order: Role of Courts and Tribunals in Pakistan in Environmental Protection," (*Pakistan Law Journal*, 2014) 25-40; Dr. Parvez Hassan and Azim Asfar, "Human Rights and the Environment: A South Asian Perspective," (*Journal of Human Rights and the Environment*, 2014), 192-212; Dr. Pervez Hassan, "Judicial Activism Toward Sustainable Development in South Asia," (*Pakistan Law Journal*, 2003) 39-41; Dr. Nasim Hasan Shah, "Environment and the Role of the

Judiciary,” (*PLD Journal*, 1992) 27; Zia Ullah Ranjah, “Environment and judicial activism,” (*The Friday Times*, 27 September 2019), <https://www.thefridaytimes.com/environment-and-judicial-activism/>

⁵⁸ See, Abdul Aziz Said, “Precept and Practice of Human Rights in Islam,” accessed November 7, 2014, <http://heionline.org>

⁵⁹ See, Shahbaz Ahmad Cheema, “Problematising “Authenticity”: A Critical Appraisal of the Jamaat-i-Islami Gender Discourse” (PhD Book submitted in University of Warwick, May 2011).

⁶⁰ See, Abul A’la Maudoodi, “Islamic way of life,” 41, 159, 44-5.

⁶¹ *Ibid.*,

⁶² See, Muhammad Munir, “From the State of the Khalifah to the Nation-State: The Transformation of Islamic Legal Politics,” *Islamic Studies* 56: 3-4, 2017, 187-202. The concept of Islamic democracy is not the main topic of this book; hence, further discussion may be avoided.

⁶³ See, Al-Quran (42:38).

⁶⁴ See, Muhammad Asad, “*The Principles of State and Government in Islam*,” (Malaysia: Islamic Book Trust, 2007), 44-68.

⁶⁵ *Ibid.*,

⁶⁶ *Ibid.*,

⁶⁷ See, John L. Esposito, Emad El-Din Shahin, “*The Oxford Handbook of Islam and Politics*,” (Oxford University Press, 2013), 147-153; John L. Esposito, Emad El-Din Shahin, “*Key Islamic Political Thinkers*,” (Oxford University Press, 2018), 44-61.

⁶⁸ See, Saiyyid Abul A’la Maudoodi, “*The Islamic Law and Constitution*,” (Lahore: Islamic Publications (Pvt.) Ltd., 1960)

⁶⁹ *Ibid.*,

⁷⁰ *Ibid.*,

⁷¹ <https://rubikh.wordpress.com/tag/al-mawardis-theory-of-an-islamic-state/> accessed 20 May 2020.

⁷² *Ibid.*,

⁷³ See, Al-Quran (Surah Al-Maida 44).

⁷⁴ See, Al-Quran (Surah Shura 38).

⁷⁵ See, Al-Quran (Surah An-Nisa 135).

⁷⁶ See, Al-Quran (Surah Tauba 71).

⁷⁷ See, Symonds, R., “*Making of Pakistan*,” (Karachi: Allied Book Corporation, 1966), 20.

⁷⁸ See, Zulfikar Khalid Maluka, “*The Myth of Constitutionalism in Pakistan*,” (Oxford University Press, 1995), 83.

⁷⁹ See, Section 18 of the Government of India Act, 1935.

⁸⁰ See, Section 200 of the Government of India Act, 1935.

⁸¹ See, Article 203B (c) of 1973 Constitution, which defines law as for as the jurisdiction of the Federal Shariat Court is concerned. “Law” excludes the Constitution, Muslim personal law, any law relating to the procedure of any court or tribunal etc.

⁸² *Ibid.*,

⁸³ See, Mirza, S.B., “The Chaudhry Doctrine: A Small-C Constitutional Perspective,” in Cheema and Gilani *ed*, *Politics*, 41.

⁸⁴ See, *Sharaf Faridi v. Federation of Pakistan*, PLD 1989 Karachi 404; *Government of Sindh v. Sharaf Faridi*, PLD 1994 SC 105; *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 2009 SC 879; *Ghulam Rasool v. Govt. of Pakistan*, PLD 2015 SC 6; *District Bar Association Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401.

⁸⁵ *Ibid.*,

⁸⁶ See, Dr. Aslam Khaki, “Reading in Human Rights,” (Foundation for Research and Development, Islamabad, 2012), 76-89.

⁸⁷ *Ibid.*,

⁸⁸ *Ibid.*,

⁸⁹ *Ibid.*,

⁹⁰ See, Al-Quran: Oh Men, we have created you from a male and a female and made you into nations and tribes that you might identify one and another. The noblest of you in God’s view is the most righteous of you. God is wise and all knowing (49:13); See, the Prophet (PBUH) says: There is no preference or superiority of Arab over non-Arab and of non-Arab over Arab, of White over Black and Black over White, except on the basis of *Taqwa* (piety) or good conduct.

⁹¹ See, The Quran: There is no coercion in the matter of religion (2:256); So, would you force the people to become Muslims? (10:99).

⁹² See, Al-Quran: The (pious people) conduct their affairs by mutual consultation (42:38); and involve their consultation in the affairs (93:159); The Prophet (PBUH) used to consult his companions. For example, he consulted them in the matter of prisoners of war of Badar and for the third Jumma call (Friday prayer). A woman once criticized the Caliph Umar in fixing the amount of dower. The Caliph listened to her with patience and said: Umar was mistaken and the woman was right.

⁹³ See, Al-Quran: And in Old Testament we decreed for them, a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth and for injuries is retaliation (5:45); That was what we laid down for the children of Israel that whoever killed a human being, except in retaliation or in sedition in the earth, should be deemed as though he had killed all mankind (5:32).

⁹⁴ See, Al-Quran: Do not devour one another’s property through unfair means (2:188); Oh believers! Do not enter the house of others until you get permission and wish peace upon them (24:27); Oh believers! Avoid most of suspicion, for in some cases suspicion is sin. And do not spy on one another, nor backbite one another (49:12).

⁹⁵ See, Donnell J “Human Rights and Human Dignity,” *An Analytical Critique of Non-Western Conceptions of Human Rights* (1982), 303-316.

⁹⁶ See, Baderin Mashood, “International Human Rights and Islamic Law,” (Oxford University Press 2005), 165-168.

⁹⁷ Arabic term, Huquq Adimiyyin.

⁹⁸ See, al-Mawardi, "Al-Ahkam al-Sultaniyyah".

⁹⁹ See, Baderin Mashood, "International Human Rights and Islamic Law," (London: Oxford University Press, 2005), 165-168.

¹⁰⁰ Ibid., 42.

¹⁰¹ See, Leonard Binder, "Religion and Politics in Pakistan," accessed November 08, 2014, <http://heinonline.org>

¹⁰² See, Baderin Mashood "International Human Rights and Islamic Law," (London: Oxford University Press, 2005), 42-43.

¹⁰³ Ibid., 4.

¹⁰⁴ See, Baderin Mashood, "International Human Rights and Islamic Law," (London: Oxford University Press, 2005).

¹⁰⁵ See, M.J.C. Vile, "Constitutionalism and the Separation of Powers," 2nd ed., (Indianapolis: Liberty Fund 1998); See, Gwyn, *Separation*, 127-28; William B. Gwyn, *The Separation of Powers and Modern Forms of Democratic Government*, in *Separation of Powers - Does it still work?* by Robert A. Goldwin and Art Kaufman eds., (Washington, DC: American Enterprise Institute for Policy Research 1986) 68-70; Gerard Carney, G. 'Separation of Powers in the Westminster System', *Australasian Study of Parliament Group, Parliament House, Brisbane* (1993), accessed May 22, 2018, <http://www.parliament.qld.gov.au/aspg/papers/930913.pdf>; See, Resende, *Report*.

¹⁰⁶ See, Montesquieu, "*The Spirit of the Laws*": transl. by A. Cohler, B. Miller & H. Stone. (Cambridge: University Press, 1989); Martin H. Redish and Matthew B. Arnould, "Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative," *Flare. La Review* Vol. 46, no. 6 (2012), 1485.

¹⁰⁷ See, Kairys David, "The Politics of Law: A progressive Critique," 3rd ed. 1998. 591, 592.

¹⁰⁸ See, Paper No. 51.

¹⁰⁹ See, Paper No. 48.

¹¹⁰ See, Paper No.78-79.

¹¹¹ See, Mark Tushnet, "Taking the Constitution Away from the Courts," (Princeton University Press, 1999), 99-102, 154; Saikrishna B. Prakash and John C. Yoo, "The Origins of Judicial Review," *The University of Chicago Law Review*, Vol. 70 (2003), 889; Martin H. Redish and Matthew B. Arnould, "Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative," *Flare. La Review* Vol. 46, no. 6 (2012), 1485; Jesse H. Choper, "Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court" (Chicago, 1980); Lino A. Graglia, "It's Not Constitutionalism, It's Judicial Activism," *Harvard Journal of Law and Public Policy*, 19 (1996) 296; Archibald Cox, "The Role of the Supreme Court: Judicial Activism or Self Restraint," *Maryland Law Review*, 47 (1987), 121-122; John Hart Ely, "Democracy and Distrust: A Theory of Judicial Review" (Cambridge MA: Harvard University Press), 1980.

CHAPTER THREE

THE EVOLUTION AND THE
CONSTITUTIONAL BASIS OF THE
DOCTRINE OF SEPARATION OF
POWERS IN PAKISTAN

3.1 INTRODUCTION

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

This chapter will explore how the constitutional doctrine of separation of powers works in the US and the UK. It will also determine how the practice of the doctrine in these countries is adopted in the former British colonies of Australia and India. The chapter then traces the constitutional basis and practice of the doctrine as to the protection of fundamental rights in Pakistan. The application of the doctrine of separation of powers with respect to the protection of fundamental rights in the US, the UK, Australia, and India is briefly discussed, as the doctrine evolved in the US and the UK and then

experimented in the colonized states such as Australia, India, and Pakistan.

Although Pakistan follows the UK's constitutional norms of parliamentary democracy, its forefathers, while framing the Constitution, adopted certain constitutional themes, such as the separation of powers, judicial review, and the bill of rights, from the constitution of the US. This study compares the features of Pakistan's Constitution concerning the concepts of separation of powers and fundamental rights with the constitutions of the above-mentioned countries. Hence, this chapter contains a brief overview of the way the concepts of separation of powers and fundamental rights apply in these countries. It also provides useful insights into the application of the doctrine of separation of powers in Pakistan. Moreover, this chapter reviews the struggles of the executive, the legislature, and the judiciary as to the protection of their constitutional powers and how these struggles have impacted the state of fundamental rights in Pakistan. It explores the hypothesis of this study (i.e., the complex relationship between the three organs of the state in Pakistan and its effect on the protection of fundamental rights) in the context of the constitutional history of Pakistan. To this extent, this chapter, also discusses important constitutional and political events as well as case law.

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

powers with reference to the protection of fundamental rights in the countries mentioned above.

3.2 THE EVOLUTION OF THE DOCTRINE OF SEPARATION OF POWERS

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

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

The origins of the modern conception of the doctrine of separation of powers can be traced back to the publication of Montesquieu's work in 1748.⁴ He illuminated this concept as the division of political power is necessary for the sake of securing individual freedoms and liberties.⁵ He advocated for separate domains of power for each organ created under the constitution of the state.⁶ He further emphasized that each organ should be able to serve as a check on the other organs.⁷

In the *Federalist Papers*,⁸ James Madison promoted Montesquieu's argument in the US.⁹ Madison essentially argued that a consolidation of political power in any form whatsoever and by any source of election or selection promotes tyranny.¹⁰ Alexander Hamilton, on the contrary, presented a different model of governance. He argued for a strong executive in order to safeguard the rights of the people and

establish a stable government. He believed that only a strong executive could save the polity from foreign aggression or internal disturbance, and could provide effective administration, good governance, and justice.¹¹ In *Marbury v. Madison*,¹² John Marshall settled this debate and held that any controversy as to the division of power would be decided by the courts in accordance with the US Constitution.

Now, this chapter will focus on the evolution of the doctrine of separation of powers specifically in the context of the US, the UK, Australia, India, and, finally, Pakistan. An examination of the doctrine of separation of powers in these countries would help to conceptualize the doctrine in the constitutional scheme of Pakistan.

3.3 SEPARATION OF POWERS UNDER THE US CONSTITUTION

The *Federalist Papers* numbers 47, 48 and 51 discuss the doctrine of separation of powers. Madison argued, in these papers, that division of state power is a necessary ingredient and a requirement of the doctrine; however, a *complete* separation of powers is not attainable as such, nor can it be an objective of any constitutional government.¹³ While commenting on the constitutional systems of several states, Madison argued that there is not even a single state in which state powers are divided absolutely and distinctively.¹⁴ Madison, in fact, stressed that a mixture and a balance of governmental power is the only way forward for any state having a written constitution.

Madison further argued that each organ should be independent and capable of safeguarding its powers from the encroachment of other branches. In other words, he proposed a strong system of checks and balances so that each organ not only keeps a check on other organs but also defends itself from the transgressions or interference of other organs.¹⁵ The *Federalist Papers* and the US Constitution do not provide for a watertight and clear demarcation of institutional power.¹⁶

However, Articles I, II and III of the US Constitution define the sphere of power and functions of each branch i.e., the President, the Congress, and the US Supreme Court.

Article I provides that the Congress (consisting of the House of Representatives and the Senate) shall have the power to make laws;¹⁷ Article II states that the President shall have all executive powers;¹⁸ Article III stipulates that the US Supreme Court and other subordinate courts will exercise judicial power.¹⁹ A brief reading of these articles shows a structural and functional division of power between the various organs of the state. These articles, read together, also reveal a system of checks and balances on state institutions.²⁰ For example, the President enjoys a veto power on laws made by the Congress; the Congress can impeach the US President (and overrule a presidential veto); the Supreme Court can invalidate the acts of the other two branches in exercising its powers of judicial review; the legislature can undo the effects of a ruling of the Supreme Court through legislation; and the executive has the power of appointing judges of the Supreme Court.

It may be argued that the US Constitution provides an indirect system of checks and balances.²¹ A brief reading of the US Constitution reveals that although the Constitution envisages a separation of powers, it does not provide for an absolute separation of powers. This conception, in fact, endorses Madison's views presented in the *Federalist Papers*.²² Further, under the US Constitution, the abuse of state power is less likely as each institution serves as a counter check on the other institutions of the state.²³

The presence of a system of checks and balances is further highlighted by the fact that the Congress can overrule a veto made by the President by a two-thirds majority of both houses. However, it lacks the power to veto the executive actions of the President. Similarly, the US Supreme Court can review legislation and invalidate acts of the executive. These features suggest that different state organs in the US work in an interdependent and coherent manner – a key feature and objective of constitutionalism.²⁴

The judiciary has enormous power to ‘say what the law is’.²⁵ The exercise of such judicial authority has generated heated debate in the US. In 2005, for example, the US SC invalidated the sentencing legislation of 1987,²⁶ which imposed serious mandatory sentences for federal crimes, on the ground that the enactment of the statute was beyond the legislative domain of the Congress.²⁷ This decision challenged thousands of criminal sentences. However, the Court’s command was obeyed by the legislature. In *United States v. Nixon*, the Court ordered President Nixon to hand over tape recordings of one of his most intimate conversations with his advisors to a prosecutor, despite his objections on the ground of executive privilege. Despite the fact that this was a blunt ruling against a President who exercised his executive powers expansively, the President produced the tapes in less than two weeks after the decision. In *Brown v. Board of Education*,²⁸ the US SC prohibited racial discrimination in public schools, raising the ire of the other branches of the government. An overall analysis of the exercise of judicial authority in the US, however, reveals that the US SC has exercised its power of judicial review in a balanced and reluctant manner.²⁹

Likewise, the ‘power of purse’ held by the legislature operates as an effective check on the judiciary. For example, the Congress can appropriate and decline funds to the judiciary. Furthermore, it can create and abolish courts, and redefine the jurisdiction of the judiciary.³⁰ The other elected branch, namely, the executive, has significant check over the courts. The executive has the ability to influence the direction, and shape the constitutional jurisprudence, of the courts by the exercise of its power to appoint judges.³¹

Each institution of the state, namely, the executive, the legislature, and the judiciary, is allotted a separate function in order to prevent an individual or an institution from holding and exercising state power absolutely. Having briefly elaborated the separation of powers under the US Constitution, this chapter will now move onto discuss the constitutional domain and the function of the three key state institutions in the US.

3.3.1 THE EXECUTIVE BRANCH OF THE US GOVERNMENT

The President is the head of the executive in the US and also commands the armed forces.³² The Congress can issue directions to the executive to carry out the functions of the state as per the will of the people. However, the President can veto legislative proposals made by the Congress, while the Congress can overrule a Presidential veto.³³ This interplay between the executive and the legislature defines a unique feature of checks and balances under the US Constitution.

The executive can nominate federal judges and heads of the federal executive agencies which are confirmed by the Senate. The executive is also authorized to negotiate and sign international treaties, to forge international relations with other states, and to promote the national interests of the government.³⁴

3.3.2 THE LEGISLATIVE BRANCH OF THE US GOVERNMENT

The Congress, comprising the House of Representatives and the Senate, constitutes the legislative branch of the state.³⁵ In the House of Representatives, fifty states of the US are given due representation based on the population of each state. Thus, states having a larger population have more seats in the lower house of the Congress. The House of Representatives has four hundred and thirty-five seats. The term of the elected members of this house is two years, following which there is a re-election. Only a US citizen of twenty-five years of age and a resident of a relevant state can contest an election to this house.

The Senate comprises one hundred total seats. Notwithstanding the population of the states, each state can elect two Senators for six years each. After every two years, the terms of one-third of the Senators expire and new Senators are elected to fill the vacuum in the Senate. In order to be elected as a Senator, an individual must have been a citizen of

the US for at least nine years, be thirty years old, and also be a resident of the state it wants to represent in the Congress.

The Congress can make laws, overrule a veto made by the President, and ratify international conventions and treaties entered into by the executive.³⁶ The legislature can also initiate impeachment proceedings against the President.

3.3.3 THE JUDICIAL BRANCH OF THE US GOVERNMENT

The judicial branch is headed by the US Supreme Court. The judiciary can review and invalidate legislation passed by the Congress, and the acts performed by the executive.³⁷ It has the exclusive mandate to interpret the US constitution and all other laws. Moreover, it can call for the production of documentary evidence as well as evidence concerning the personal appearance of any person, including executive functionaries and members of the legislature.³⁸

Article III of the US Constitution envisages a hierarchical judiciary consisting of federal and district courts. Each court has a specified territorial jurisdiction and jurisdiction with respect to the subject matter of the case. The appellate courts generally review the decisions of the district courts. The President nominates the judges of federal courts, but the Senate can confirm or oppose such appointments. Moreover, the Congress can impeach the judges. The judges of the Supreme Court are appointed for a lifetime; there is no age of retirement for them. They can, therefore, continue serving until they feel fit and appropriate, and can only be removed by death or impeachment.³⁹

3.3.4 CHECKS AND BALANCES IN THE US CONSTITUTION

The US Constitution envisages an effective system of checks and balances in the government. This section will

explain this unique feature of checks and balances in the US with the help of examples.

The brief facts of the *U.S. v. Alvarez*⁴⁰ case are that Xavier Alvarez was elected as a director of a company. He told his fellow directors that he had been awarded a prestigious military medal. As a matter of fact, he had neither served in the US army nor received any medal. He had been lying routinely in order to receive employment benefits. This case compelled the legislature to enact the Stolen Valor Act of 2005 (“Act”), which made making up such lies an offence.

Alvarez claimed that the Act violated his right to free speech, protected under the first amendment to the Constitution. The court declared that the Act placed unreasonable restrictions on free speech, and was, therefore, unconstitutional. The court observed that such false statements could not be considered serious as they neither defamed nor caused any threat to others. Moreover, the court found that the Act was too broad and criminalized even harmless and otherwise constitutionally protected statements. Thus, it could not be sustained.⁴¹

After the pronouncement of this decision, the executive established a database to investigate and record the actual extent of the issue of making false statements relating to the award of military medals. The Congress started working on the Act to amend it. The legislature then issued a reformed Stolen Valor Act of 2011, confining the scope of criminal liability for making false statements to those statements which are harmful to others. It shows how the operation of the doctrine of separation of powers and the system of checks and balances in the US ensures the smooth functioning, stability, and efficiency of the government.

3.4 SEPARATION OF POWERS IN THE UK

The separation of powers is a key principle of constitutionalism in presidential forms of government, such as the US.⁴² In countries having a parliamentary system of

government, like the UK, the doctrine holds a less significant constitutional position. The legislative, executive, and judicial institutions in the UK, however, appreciate the balance and division of power in a rather nuanced manner.⁴³ This sense of balance is referred to as the ‘fusion of power’ in the UK.⁴⁴

It is argued, however, that this sense of balance of power between the different institutions of the state is increasingly translated in the UK as a division of power between the various institutions of the government. As opposed to the US, the legislature and the executive are closely knit together in the UK.⁴⁵ The close nexus of these two institutions is, in fact, considered a secret of success in parliamentary forms of government.

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

Due to the concept of parliamentary sovereignty in the UK, the parliament retains the power to revise a legislation in case the SC declares it incompatible with a Convention right. The power of the judiciary is, thus, limited. The courts, however, have established the separation of judicial and executive functions. In the *Anderson* case, for example, three Law Lords, explicitly referring to the separation principle, held that it is the judiciary that must determine the length of a prisoner's sentence, and not the Home Secretary.⁴⁶

3.4.1 SEPARATION OF THE LEGISLATURE AND THE EXECUTIVE IN THE UK

The model of constitutional government of the UK offers a unique perspective on the doctrine of separation of powers. The Prime Minister and his executive Cabinet come from the House of Commons. The executive is, thus, closely entangled with the legislature.⁴⁷ It is argued that the nexus of the executive and the legislature makes the government stable, efficient, and stronger. It promotes coherence, smoothness, and efficacy in formulating and implementing policies.⁴⁸ In such a government, the Prime Minister enjoys enough freedom and ability to act with confidence, as he occupies a prominent role and position, being the head of the executive and a full member of the legislature.⁴⁹

The executive functionaries of the government, where such power has been delegated to them, can make rules, regulations, and issue orders and notifications to meet the day to day requirements of effective governance. In fact, a strict separation of powers cannot be followed in any parliamentary democracy owing to the overlap between parliamentary and executive power. This combination of powers, however, does not dilute the power and responsibility of the legislature, as the Prime Minister can be held accountable for his executive actions before the members of the parliament.⁵⁰ In other words, the Prime Minister is bound to consult cabinet members (who are members of the legislature as well) when making policy. Thus, in a parliamentary form of government, the legislature enjoys enormous powers of law-making as well as influence on the executive.

3.4.2 SEPARATION OF THE JUDICIARY AND THE LEGISLATURE IN THE UK

The doctrine of separation of powers envisages a division of power between the judicial and legislative branches of the state. This requirement is met by prohibiting judges from contesting parliamentary elections.⁵¹ Judges are required to

establish common law through their judgments, which are referred to as 'precedents'. Judges of the Supreme Court are required to retire on becoming 75 years old. They may be removed on the address of both houses of parliament. Judges of lower courts, however, can be removed from a job without such approval. Judges are also immune from any legal action with respect to their judicial acts.⁵²

These features make the judiciary in the UK independent and strong, which is a hallmark of any constitutional government. This independence of the judiciary encourages citizens to challenge acts of the executive that infringe on their basic legal rights. The judge's authority to review acts of parliament also raises a question concerning separation of powers in the context of the UK, namely, whether judges can effectively 'legislate' while reviewing acts of parliament.⁵³

3.4.3 SEPARATION OF THE EXECUTIVE AND THE JUDICIARY IN THE UK

The theory of separation of powers dictates separation between the executive and the judiciary as well. With reference to the actions of the executive, the judiciary is empowered to examine the *vires* of delegated legislation. Furthermore, citizens can challenge executive acts or rules before the courts on the touchstone of constitutional or legal protection of their rights, and the judiciary can review these acts.⁵⁴ Therefore, the judiciary must be separate and independent from the executive, enabling it to render impartial decisions.⁵⁵ The judiciary sometimes exercises judicial restraint vis-à-vis actions of the executive to promote a separation of powers.⁵⁶ The judiciary, for example, may refrain from examining the ratification of international treaties or the definition of standards of health or education set by the executive. Such a balanced use of judicial power has strengthened democratic institutions in the UK, allowing citizens to get their rights materialized through a political process but holding the government accountable for the insufficient protection of such rights.

3.5 SEPARATION OF POWERS IN AUSTRALIA

In Australia, there is a division of power between the different organs of the state, including the judiciary, the executive, and the legislature. This division of power requires specific functions of the state to be performed by each institution, and ensures the running of a democracy in a harmonious and efficient manner. Like the UK, Australia is a parliamentary democracy. Hence, in Australia, state power is divided between the institutions of the state in a blurred manner. For instance, the legislature and the executive work in close cooperation with each other. So, there is no strict division or separation of state power in Australia.⁵⁷ Australia essentially follows the UK's model of responsible government as featured in the system. The characteristics of responsible government are reflected in Articles 44, 62 and 64 of the Australian Constitution.⁵⁸

The Australian Constitution provides separate chapters for each organ of the state. Chapter I deals with the Legislature, Chapter II with the Executive, and Chapter III relates to the Judicature. A brief reading of these chapters shows that separation of political power in the country was inspired by the constitutional ideas and concepts of the US and the UK, as the Australian Constitution divides the powers of the state among the three organs of the state.

3.5.1 LEGISLATIVE AND EXECUTIVE POWERS

The Westminster model of democracy in Australia envisages a system of checks and balances on the power of the state. Legislative and executive powers are nicely balanced without a strict division of power between the legislature and the executive.⁵⁹ State ministers are chosen from the legislature and they are accountable before the parliament.⁶⁰ This feature of power-sharing between the legislature and the executive, in fact, negates a complete separation of power between the organs of the state, as opposed to the US Constitution, which

provides for a strict division of power between state institutions.

The Australian Constitution provides another interesting feature as to the parliamentary membership of a state minister. Generally, a minister has to be a sitting member of the legislature. Sometimes, however, this rule is relaxed. In 1968, John Gorton was appointed as the Prime Minister of Australia when he was a member of the Senate. He resigned from the Senate to contest elections to the lower house. Instead, he continued working as the prime minister until he was re-elected. In the *Victorian Stevedoring* case,⁶¹ the Australian High Court affirmed that with respect to executive and legislative powers, the theory of separation of powers cannot be strictly followed in Australia, as opposed to the way the doctrine is perceived and applied under the constitution of the US.

Despite the fusion of executive and legislative powers, the Australian Constitution provides some mechanism to ensure that these two institutions remain independent from each other's influence. For example, Article 44 of the Constitution stipulates that one cannot become a parliamentarian while holding an office of profit under the Crown or while working under a contract of employment with the Commonwealth. In the *Skyles v. Cleary*,⁶² this disqualification principle enunciated in Article 44 of the Constitution of Australia was applied in 1992 when Phil Cleary won a seat in the parliament while being on leave from the Department of Education. The court held that Cleary was not entitled to contest the election for the parliament while holding an office of the Crown. The court stressed on Article 44, holding that it guarantees that the legislature remains independent from any kind of influence of the executive branch of the Commonwealth.

It may be stressed that the executive in Australia is not adequately called to account for its actions, and is insufficiently scrutinized. This is because members from larger political parties find full support for their actions from the lower house on the basis of their numerical strength in that house. The

power of the executive, however, is somehow balanced as the Senate can resist the executive by blocking legislative bills initiated by the political party having the government.

3.5.2 SEPARATION OF FEDERAL JUDICIAL POWER

The independence and insulation of judicial power from the influence of other state organs is considered an essential feature of democracy and constitutionalism. In *New South Wales v. Commonwealth*,⁶³ the High Court of Australia observed that judicial independence is a fundamental feature of the Australian Constitution. The court further held that the principle of judicial independence is applicable to all courts, tribunals, and authorities performing judicial functions in Australia.

Specifically, the court emphasized that the judiciary cannot share its powers with any other institution of the state as the independence of the judiciary is essential for any government having a written constitution.⁶⁴ This view was upheld in the case of *Ebner v. Official Trustee in Bankruptcy*,⁶⁵ wherein the court observed that the performance of non-judicial functions by the judiciary is not compatible with the judicial functions of the courts. It further held that such a confusion of judicial power compromises and weakens judicial independence. The High Court moved on to explain that courts can review the acts of the legislature when it assigns or delegates some legislative power to the executive or later restricts the exercise of such power through legislation.

In the *Boilermakers'* case,⁶⁶ the Court stressed that Chapter III of the Australian Constitution clearly confers judicial powers on the judicial branch. This means that no other branch of the government can exercise judicial functions in any manner whatsoever. Therefore, it may be argued that the application of the doctrine of separation of powers in Australia promotes and protects judicial independence, and encourages other branches of the government to show deference to judicial

power.⁶⁷ This doctrine of separation of powers is conceived in order to prevent the government from interfering in the constitutional domain of the judiciary. At the same time, the doctrine of separation of powers envisages that the judiciary should let other branches function in their respective fields of power.

In the *Drake* case,⁶⁸ the High Court reiterated that deference and reverence should be shown to the judiciary for its role in promoting constitutionalism. The court, however, also stated that the judiciary is expected not to substitute decisions made by the executive while reviewing the actions of the executive.⁶⁹ Finally, in the *Grollo* case, it was held that non-judicial functions may generally not be assigned to the judiciary.⁷⁰ Nevertheless, the court clarified that such functions may be performed by the judiciary if they are not incompatible with judicial functions.⁷¹

In a nutshell, the constitution of Australia provides for a division of power between the institutions of the state. The judiciary in Australia is largely immune from the influence of other branches of the government. However, the legislature and the executive function with mutual coordination. Hence, the separation of political power is less visible in the operations of these two branches of the government in Australia.

3.6 SEPARATION OF POWERS IN INDIA

India follows a parliamentary form of government that conceives functional separation of powers amongst state institutions.⁷² India's model of government, however, does not adhere to the strict notion of separation of powers. The founding fathers of India envisaged a constitutional scheme under which the judiciary could review acts of other branches of the government.⁷³ India's Constitution divides state power between the legislature (lead by the Prime Minister),⁷⁴ the executive (headed by the President), and a federal as well as a state-level system of courts.⁷⁵

The judiciary has the power to interpret the laws in India and is independent from other branches of the government.⁷⁶ The parliament is empowered to make laws. The executive power lies with the President but exercised in his behalf by the Prime Minister. The Indian Constitution further provides for checks and balances on each organ of the state in order to maintain an institutional balance of power.⁷⁷ Specifically, the President of India has the authority to disapprove a law passed by the legislature on the ground of unconstitutionality; India's Supreme Court can declare a legislation (and even a constitutional amendment) invalid and unconstitutional.⁷⁸ Moreover, the legislature can impeach the President,⁷⁹ and can also prosecute judges for their mala fide acts.⁸⁰

The features of India's Constitution mentioned above indicate that the doctrine of separation of powers is followed in India. However, the courts in India have exercised a great deal of influence over the legislature's power to amend the Constitution itself, ostensibly in an effort to protect fundamental rights.

The courts in India have interpreted the provisions concerning fundamental rights, such as the right to life, progressively and have occasionally departed from the doctrine of separation of powers in order to protect fundamental rights. The courts seem to believe that when the executive fails to protect the rights of the people, there is space for the judiciary, as custodian of their rights, to act on behalf of the people. However, this assumption by the judiciary is contestable. It may be argued that such a wide interpretation of the provisions on fundamental rights would amount to the courts transgressing their constitutional mandate and interfering in the policy-making domain of the government, which is not justifiable under a constitutional scheme that provides for a division of power between the executive and the judiciary.

More specifically, in 1967, in the case of *Golak Nath v. State of Punjab*,⁸¹ the Indian Supreme Court held that the parliament cannot amend fundamental rights, even by a constitutional amendment under Article 368 of the

Constitution. Following this decision, the parliament retaliated by passing the Constitution (Twenty-Fourth Amendment) Act 1971, and asserted its power to amend every part of the Constitution (including the provisions concerning fundamental rights). In 1973, in the case of *Kesavananda Bharati v. State of Kerala*,⁸² the Supreme Court emphasized on the basic structure of India's Constitution and held that although the parliament can amend every part of the Constitution; however, this power does not extend to amending the 'basic structure of the Constitution'.

Following the *Kesavananda* judgment, the government imposed a nationwide Emergency (in 1975 and 1977) and detained many persons without trial; the right to personal freedom (contained in Article 21 of the Constitution) was suspended. In 1976, in *A.D.M. Jabalpur v. Shiv Kant Shukla*,⁸³ the Supreme Court held that even if such detention was found to be mala fide, it could not be challenged. However, after the Emergency was over, the Supreme Court became more responsive to socio-economic changes in legislation. For example, when the fundamental right to property was deleted by the Constitution (Forty-Fourth Amendment) Act, 1978, the court gave the judiciary an enlarged power of judicial review to protect the basic rights of citizens. In the case of *Maneka Gandhi v. Union of India*,⁸⁴ the SC held that "the law in article 21 required more than mere laws made by a legislature, and that the procedure referred to had to conform to the requirement of reasonableness in respect of fundamental rights".

The Supreme Court also enlarged the meaning of "life" in Article 21. The court stated that "life" does not mean merely animal existence or continued drudgery through life, but the finer grace of human civilization which makes life worth living.⁸⁵ The right to life was held to include the right to privacy,⁸⁶ the right to food, the right to clothing, the right to a decent environment and reasonable accommodation,⁸⁷ to shelter,⁸⁸ to health,⁸⁹ to education,⁹⁰ and the right to conservation of the physical environment.⁹¹ The right to life

was even held to include a right to access hilly regions by the provision of roads.⁹²

In subsequent cases, the SC interpreted the right to equality before the law in Article 14 to include a requirement of reasonableness in every action of the government.⁹³ The court stated: “Equality is a dynamic concept with many aspects and dimensions and it cannot be ‘cribbed, cabined and confined’ within traditional and doctrinaire limits. From a positivist point of view, equality is antithetical to arbitrariness. In fact, equality and arbitrariness are sworn enemies: one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch.” This wide interpretation of Articles 14 and 21 expanded the role of the judiciary in the protection of fundamental rights. Arguably, it disturbed the constitutional separation of powers between the various branches of the government.

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

3.7 SEPARATION OF POWERS IN PAKISTAN

The distribution of power has always been an important and contested constitutional subject in Pakistan. The Constitution of Pakistan does not explicitly include the doctrine of separation of powers. Nevertheless, it is enshrined *implicitly* in the Constitution of 1973.⁹⁴ The question of separation of powers first emerged in 1956, when Moulvi Tamizuddin Khan challenged an executive action in the Federal Court on the ground that, while dissolving the Constituent Assembly, the executive had, in fact, violated the doctrine of separation of powers.⁹⁵ In the case of *Mehmood Khan Achakzai v. Federation of Pakistan*,⁹⁶ the SC highlighted this debate by holding that any legislation could be declared null and void if it

violated the essential features of the Constitution. The debate went further in a few other important constitutional cases.⁹⁷ The debate came into the public domain in 2007, following the removal of Iftikhar Muhammad Chaudhry from the Supreme Court through executive action. In the case of *District Bar Association, Rawalpindi* (PLD 2015 SC 401) [REFERENCE], the SC broadly included the doctrine (though not expressly) among the salient features of the Constitution of Pakistan.

Our constitutional history demonstrates that the debate concerning the doctrine of separation of powers has been a key issue in the political context of Pakistan. Although division of power was implicitly provided for under all of Pakistan's constitutional arrangements, state institutions have been struggling to secure and defend their respective powers.⁹⁸

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

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

Pakistan adopted an interim constitution under the provisions of the Indian Independence Act, 1947.⁹⁹ This interim Constitution built on the Government of India Act, 1935, which had failed to provide any specific protections for the rights of the people and to conspicuously extrapolate a

demarcation between the organs of the state.¹⁰⁰ Those who drafted the 1935 Act, following the doctrine of parliamentary sovereignty in Britain, did not think it appropriate to incorporate a bill of rights into the Act for the people of the sub-continent. Therefore, the anti-colonial freedom movement was heavily focused on the rights of the people.

Upon being elected the first president of the Constituent Assembly on 11 August 1947, Muhammad Ali Jinnah made a historic speech in which he charted out the future of constitutional democracy in Pakistan.¹⁰¹ He clearly spelled out the aspirations of the people and emphasized the protection of basic rights for both the Muslim majority and any minority. He specifically stressed on the right to life, property, equality, and religious freedom. He also stated that all citizens would be entitled to equal protection of their rights. While talking to a Reuter's correspondent in 1946, Jinnah said that Pakistan would be a modern democratic country, with all powers vesting in the people.¹⁰²

Under the 1935 Act, the Governor-General had a lot of discretionary powers as he was a representative of the Crown in British India. However, this discretion of the Governor-General was subsequently curtailed.¹⁰³ From 14 August 1947, all powers of the dominion government were conferred on the Cabinet. This was a significant departure from the executive rule to a democratic dispensation in a newly born country as the Constituent Assembly ("Assembly") could hold the Cabinet accountable for any executive act.

In his first speech in the Constituent Assembly, Jinnah clarified that the Assembly would be responsible for framing the Constitution of Pakistan and would also work as the federal legislature.¹⁰⁴ Being a sovereign legislative body, the Assembly had vast legislative powers.¹⁰⁵ As the Assembly had been established to frame a new constitution, it had to perform a fundamental task. The constitutional structure, which included the division of power between different state institutions and the protection of the rights of the people, was an important issue before the Assembly. So, it constituted various

committees for the proper assistance and support of its functions. Two committees, namely, the Basic Principles Committee and the Fundamental Rights Committee were the most important as they had been assigned to provide the structure of the future constitution.

An edifice of justice was also constructed for the delivery of justice.¹⁰⁶ The Governor-General was authorized to appoint the judges of the Federal Court as well as the High Courts. These courts were given jurisdiction to issue writs to government institutions and functionaries.¹⁰⁷ The Governor-General and his provincial Governors were empowered to make laws through an ordinance in times of emergency.

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

3.7.2 THE OBJECTIVES RESOLUTION 1949 AND SUBSEQUENT DEVELOPMENTS

The Objectives Resolution, 1949, outlines the basic features of the constitution.¹⁰⁸ It was a foundational stone on which the superstructure of the future constitution was to be built. It stated that political power would be exercised by the people through their representatives in the legislature. Moreover, it assured that the judiciary would be independent and would protect the rights of the minorities.¹⁰⁹

The Objectives Resolution was debated and hotly contested by non-Muslim minorities and the Muslim majority in the Constituent Assembly. Mian Mohammad Iftikharuddin, for example, argued that the Objectives Resolution should represent the aspirations of the people in the most progressive, democratic, and dynamic manner. He stressed that it should contain all those principles that would make Pakistan a real

democracy.¹¹⁰ He hoped that the first constitution of the country would provide a democratic government blended with an Islamic conception of governance and social justice.¹¹¹

Chaudhry Mohammad Zafarullah Khan (belonging to a community later deemed ‘non-Muslim’) highlighted that the Preamble of the first Constitution provided that God was the ultimate ruler in an Islamic State. He promoted a concept of Islamic democracy that aims to achieve the welfare of the people.¹¹²

The Basic Principles Committee, along with its three sub-committees, was among the most important committees. On 22nd December 1952, the Committee presented a report to the Constituent Assembly according to which the Objectives Resolution was to be considered as the origin of the Constitution. The structure of the federal legislature was based on the two houses of parliament, while judicial powers were assigned to the judiciary.¹¹³ The Objectives Resolution illustrated the doctrine of separation of powers as it provided that the executive and the legislature shall act as representatives of the people. It also envisaged the protection of fundamental rights through an independent judiciary.

After the Constituent Assembly settled (almost) all of the key issues regarding the first Constitution, the Governor-General Ghulam Muhammad declared the Constituent Assembly *sine die*. He declared an emergency and a constitutional breakdown in the country on the ground of the failure of the Constituent Assembly to draft the first Constitution.¹¹⁴ The Governor-General gave instructions for the formation of a Cabinet.¹¹⁵ This was the beginning of the end of legislative supremacy in Pakistan. However, the burden of the constitutional controversy was shifted to the courts.

Moulvi Tamizuddin Khan challenged the emergency proclamation that dissolved the Constituent Assembly.¹¹⁶ The petitioner contended that the Governor-General could not dissolve the Constituent Assembly. The Sindh High Court accepted this argument and rejected the claim of the federal government. The argument of the government was that the

courts could not issue such writs under the law without the assent of the Governor-General.¹¹⁷ The court held that such consent was not required under the law. The court further held that the Constituent Assembly could not be dissolved by the Governor-General.¹¹⁸ This judgment was challenged by the government. The Federal Court accepted the appeal of the government, reasoning that until a new constitution was formally promulgated, the Government of India Act, 1935, required the Governor General's assent for its application, as a representative of the Crown, and, without such consent, no powers of issuing writs could have been conferred on the courts.

The Governor-General took full advantage of this judgment and issued the Emergency Power Ordinance IX of 1955 (the Ordinance). This Ordinance granted unfettered powers to the Governor-General with respect to creating a new Constitution and validating or rejecting any law made by the Constituent Assembly. This Ordinance, however, was challenged in the *Usif Patel* case.¹¹⁹ In the said case, it was contended that the Governor-General could not authorize himself through an ordinance to make constitutional provisions. The Federal Court set the Ordinance aside, creating a perplexing situation; the existing laws could not be validated via an ordinance, nor could they be validated in the absence of a legislature. Faced with this constitutional crisis, the Governor-General sought the opinion of the Court on how to validate existing laws unless a federal legislature was constituted. The Federal Court, once again, validated the promulgation of the Emergency Powers Ordinance, 1955 and the laws listed in its schedule.¹²⁰

While criticizing the judgments of the Federal Court, Hamid Khan argued that these judgments caused serious harm in terms of the constitutional progress of the country.¹²¹ It may be argued that by ignoring the executive onslaught on other institutions, the judiciary undermined the doctrine of separation of powers and failed to protect the fundamental rights of the people. Despite these challenges, the second Constituent

Assembly succeeded in producing a draft which was adopted as the first Constitution of Pakistan, 1956.

3.7.3 THE CONSTITUTION OF 1956

On 23rd March 1956, Pakistan's first constitution was implemented.¹²² The Constitution provided for a federal form of government, fundamental rights, and an independent judiciary. The constitution further stated that a law inconsistent with fundamental rights would be void, and empowered the courts to enforce these rights.¹²³ Thus, a limited government was established, whereby the judiciary was empowered to check the actions of the executive and the legislature.¹²⁴ The Constitution also envisaged the independence and the separation of the judiciary from the executive so that both these institutions could work within their constitutional domain.¹²⁵

The first and the second Constituent Assemblies had shown their inclination towards a parliamentary form of government. Before the commencement of the Second Assembly, various scenarios illustrated the authoritarian behavior of the executive. So, the second Constituent Assembly addressed the misuse of executive power and made the Cabinet responsible to the legislature.¹²⁶ Some aspired for a pure Islamic state, with a stronger executive and a repository of administrative, judicial, and legislative powers.¹²⁷ However, this argument was repelled by the second Constituent Assembly.¹²⁸

The Constitution conferred executive authority on the President. However, he was to act as per the advice of the Prime Minister.¹²⁹ The Prime Minister, being head of the Cabinet of ministers, was required to provide all the information regarding the Cabinet decisions to the President. The legislature could impeach the President on grounds of gross misconduct.¹³⁰

The President was authorized to dismiss the Prime Minister at his discretion and dissolve the National Assembly. However, two safeguards were provided under the 1956

constitution against the arbitrary dissolution of the National Assembly. First, in case of dissolution, the President also had to leave his office and fresh elections were to be held for both the office of the President and the National Assembly. Second, the President could not dissolve the National Assembly if impeachment proceedings were pending against him.

The President was to perform certain legislative functions. For example, he could either grant or withhold assent to bills presented by the National Assembly and could further send bills for reconsideration; however, he was obliged to give his consent to the Bill in case the majority in the Assembly passed the Bill a second time.¹³¹ He could also legislate through an ordinance.¹³²

Another significant feature of the 1956 Constitution was a federal system of government and a unicameral system.¹³³ Generally, the federal system of government has a bicameral system. However, in the early years of Pakistan, there was a sharp difference of opinion as to the number of seats in the federal legislature. In order to satisfy both wings of the country (where the East held a demographic majority), it was thought appropriate to provide equal representation in the federal legislature.¹³⁴ The same unicameral system was adopted in both East and West Pakistan. The structure of the provincial government was exactly the same as that at the federal level.¹³⁵

The 1956 Constitution ensured that the judiciary would remain independent. The Supreme Court was made the most superior court in Pakistan, and it assumed the responsibilities of the Federal Court in accordance with the interim constitution. The Supreme Court was empowered to adjudicate on any dispute and its decisions were to bind other branches of the government.¹³⁶ Moreover, the Supreme Court could interpret the Constitution.¹³⁷ It also retained writ jurisdiction of courts. However, judges could be removed on the grounds of misconduct by the President, following a speech in the National Assembly.¹³⁸

The foregoing discussion shows that the Constitution of 1956 envisaged specific powers for each organ of the state. The

emphasis on the protection of fundamental rights in this Constitution demonstrates the features of a limited government in which the judicial branch protects these rights against transgressions by the government.

General Iskandar Mirza was elected as the President following the adoption of the Constitution of 1956. Being unable to handle the politico-economic crisis, he declared martial law, which led to the 1956 Constitution being buried in its inception.¹³⁹ The declaration of martial law created a constitutional crisis. Therefore, General Ayub issued the Laws (Continuance in Force) Order 1958 (“LCFO, 1958”), creating a new legal order.¹⁴⁰ This order was challenged in the case of *State v. Dosso*,¹⁴¹ wherein the Court observed that, according to international law, victorious revolutions are widely recognized for changing governments. The court held that such a revolution creates a new legal order and it becomes the basis for judging the legality of any act of the executive and the validity of any decision of the courts. It may be argued that the case of *Dosso*, too, derailed Pakistan from the path of constitutionalism.

Since martial law is not a recognized form of constitutional government, General Mohammed Ayub Khan sought to legitimize his regime and got himself elected as a President through a referendum. The Constitution Commission produced a report in 1961 laying down the basis of the future constitution of Pakistan. This report proposed provisions regarding fundamental rights, a bicameral legislature and judicial independence.¹⁴² While ignoring the recommendations of the report, General Ayub Khan decided to construct a presidential government with highly centralized powers, once again undermining the doctrine of separation of powers and the protection of fundamental rights in Pakistan.

3.7.4 THE CONSTITUTION OF 1962

The Constitution of 1962 was focused on having a strong executive.¹⁴³ Under this Constitution, the President was given

extensive powers. Mohammed Ayub Khan argued that the presidential system was compatible with Pakistan's history and would bring more stability in the country.¹⁴⁴ He preferred this system for the reason that it was suitable for a country which had obtained its freedom from a colonial system and was aiming for socio-economic reforms and development. He also believed that the direct mandate of the president from the people would help to create harmony and unity in the nation.¹⁴⁵ However, his arguments undermined the proposals of the first and the second Constituent Assemblies. Muhammad Ali Jinnah, the founding father of the country, had previously categorically stated that it is the people who would have *actual* political power in Pakistan. The same aspiration was spelled out in the Objectives Resolution, 1949, which was later adopted as a preamble to the 1956 Constitution.

Under the 1962 Constitution, the President was to exercise his authority in accordance with the Constitution.¹⁴⁶ However, the Constitution conferred unfettered powers on the President. He was responsible for regulating the business of the central government, and was empowered to ensure the proper administration of laws and to deal with foreign affairs. Moreover, he held military and legislative powers, which he could exercise to make delegated legislation. The Constitution of 1962 also empowered the President to exercise his powers independently; the ministers were only supposed to assist him and he was not bound by their advice. Under the Constitution, not only the President but also his ministers were not accountable to the legislature.¹⁴⁷

The President had a legislative role, despite the fact that he was not a member of the legislature.¹⁴⁸ He could also dissolve the National Assembly, and promulgate ordinances in case of internal and external emergency. The fact that the President could declare an emergency as and when he wanted without an effective check from the judiciary gave sweeping law-making powers to the executive. By conferring such vast power of law-making on the President, the Constitution of 1962 violated the doctrine of separation of powers as law-making is the exclusive domain of the legislature.

Further, the 1962 Constitution proposed a unicameral system.¹⁴⁹ At the central level, the legislature was composed of the President and one house, namely, the National Assembly. The National Assembly was the highest legislative body and no law could be made or take effect without its approval.

Through the first amendment to the 1962 Constitution, the judiciary was given the power to examine the acts of other branches of the government.¹⁵⁰ The Constitution also granted judges a security of tenure, and established the Supreme Judicial Council to remove the judge from office if need be. This was a major shift from the 1956 Constitution, as, previously, the President could have removed judges of the superior courts after seeking the approval of the National Assembly. The provisions on fundamental rights in the 1962 Constitution were on the same pattern as those in the Constitution of 1956. The Constitution also gave superior courts jurisdiction to enforce the provisions on fundamental rights.¹⁵¹

Although the Constitution provided for fundamental rights and the independence of the judiciary, the ground realities did not change.¹⁵² Squeezing political space compelled political parties to agitate against Ayub Khan's regime.¹⁵³ The government criminalized political activities against the government.¹⁵⁴ In the case of *Abul A'la Maudoodi v. Government of West Pakista*,¹⁵⁵ arrests made by the government were challenged and the court stated that criminalizing political activities was unlawful and unconstitutional. The court also stressed that such actions of the government violated the fundamental right of freedom of association.

However, after acquiring political power in national elections held in 1965, President Ayub Khan attempted to reverse the impact of the *Abul A'la Maudoodi* case. He amended the Constitution, empowering himself not only to suspend various fundamental rights but also to suspend the right of the citizens to approach the courts for the enforcement of these rights.¹⁵⁶ This allowed the executive to act with impunity and to exercise its discretion arbitrarily. Such a

draconian law created unrest in the country. In order to control the political chaos following this constitutional amendment, the government arrested a large number of political leaders and students.

These arrests were challenged in the case of *Malik Ghulam Jilani v. The Government of West Pakistan*.¹⁵⁷ The court held that, in order to satisfy the allegations of the detaining authority against the detenus, the allegations must be based on reasonable grounds and objective criteria. The Court asserted that all orders of the executive authorities regarding preventive detention were open to judicial review. This case shows the power play between the various organs of the state. It also shows the way the doctrine of separation of powers is construed and applied in Pakistan, and how it has helped to protect the rights of Pakistani citizens.¹⁵⁸

Despite large scale arrests of political opponents, President Ayub Khan failed to control unrest in the country and was made to resign on 25 March 1969. General Yahya Khan issued a Provisional Constitutional Order, 1969 (“PCO”) in order to govern the state.¹⁵⁹ The state of Pakistan was, once again, left at the will of the martial law administrator. To remove the possibility of any challenge to the PCO, 1969, before the courts, Yahya curtailed the jurisdiction of the courts by stipulating that orders, regulations, and decisions made by military courts and martial authorities would be final and could not be challenged before any other court.¹⁶⁰ Yahya announced the Legal Framework Order, 1970 (“LFO, 1970”) to outline the basic features of the Constitution to be framed in the future. This included a section on fundamental rights, the independence of the judiciary, federalism, and the legislature.¹⁶¹ Yahya also tried to control political unrest in the country but failed. This crisis led to the fall of Dhaka in 1971.¹⁶²

General Yahya Khan resigned following his failure to control the political unrest in the country, and was replaced by Zulfikar Ali Bhutto. After Zulfikar Ali Bhutto took over the government, martial law was terminated, and the interim

Constitution of 1972 was adopted by the National Assembly. This Constitution provided for the protection of fundamental rights, a unicameral legislature, a presidential system of government and a judicature. Zulfikar Ali Bhutto also promised to make a new constitution and appointed a Constitution Committee to make proposals.¹⁶³

3.7.5 THE CONSTITUTION OF 1973

The Constitution of 1973 is hailed as a major success of the political parties in Pakistan because it was passed with a broad political consensus.¹⁶⁴ The essential features of the Constitution include the principles of policy,¹⁶⁵ fundamental rights,¹⁶⁶ federalism,¹⁶⁷ judicature,¹⁶⁸ and the separation of powers between the various organs of the state.

To provide a stable government, the Constitution strengthened the position of the Prime Minister, making him the Chief Executive.¹⁶⁹ The office of the President was made ceremonial as executive power was to be exercised by the Prime Minister and the Cabinet.¹⁷⁰ Moreover, the removal of the Prime Minister through the vote of no-confidence was made difficult.¹⁷¹ The Constitution also provided that the Prime Minister and his ministers were collectively accountable to the parliament.¹⁷² The power of veto of the President was effectively curtailed; he was to give assent to a bill within seven days, otherwise, it would become law.¹⁷³ Furthermore, the advice of the Prime Minister was made binding on the President.¹⁷⁴ The Constitution also stipulated that an electoral college of the parliamentary members would elect the President,¹⁷⁵ who could hold office for two consecutive terms only.¹⁷⁶

The fundamental rights of the citizens were given paramount importance in the Constitution. All democratic freedoms, such as the freedom of speech, assembly, and association, and civil rights, including the right to life, religion, property etc. were incorporated in the Constitution.¹⁷⁷ The Constitution also stated that all laws inconsistent with

fundamental rights were to be rendered void.¹⁷⁸ Furthermore, the superior courts were empowered to issue directives and writs for the enforcement of the fundamental rights.¹⁷⁹ However, certain fundamental rights could be suspended by the President during an emergency in the country.¹⁸⁰

The Constitution of 1973 provided for a bicameral system, which constituted a departure from the constitutions of 1956 and 1962. The 1973 Constitution was different from the earlier constitutions in two major respects. First, there were previously two federating units in the country; the Constitution of 1973, however, provided for four provinces. Second, the parity principle (equal number of seats of each province in National Assembly) incorporated in the earlier constitutions was abandoned under the 1973 Constitution.

The Constitution of 1973 stipulated that the members of the National Assembly were privileged and no action could be taken against them for anything said or done in the parliament. The Constitution upheld the doctrine of separation of powers as it provided that courts are not to inquire into proceedings of parliament; likewise, no discussion could be inaugurated in the parliament regarding the conduct of judges.

There is a significant change in the powers of the judiciary following the promulgation of the Constitution of 1973. Under the 1973 Constitution, the courts' jurisdiction is limited to what is provided by the law.¹⁸¹ The intention of the legislature seems to be very clear here, namely, that the courts should not overstretch their jurisdiction beyond the Constitution or the law. It may be argued that this provision implicitly incorporates the doctrine of separation of powers, as the courts are sometimes inclined to extend their jurisdiction to matters falling outside the scope of their constitutional jurisdiction.

The Constitution further provides that all courts and executive authorities are bound by the law as laid down by the SC.¹⁸² Moreover, all judicial and executive authorities are bound to execute the orders of the SC.¹⁸³ The SC can interpret the Constitution and the law and adjudicate disputes between

the federal and provincial governments, between two provincial governments or between citizens and the government.¹⁸⁴ Furthermore, the Supreme Judicial Council (“SJC”) can remove the judges of the superior courts if they are found to be infirm or guilty of misconduct.¹⁸⁵ The SJC is a constitutional body authorized to inquire into the capacity and conduct of the superior courts’ judges.

In the years following the adoption of the Constitution of 1973, the sanctity of the Constitution was violated and its efficacy diluted through various amendments and unconstitutional orders made under the civilian and non-civilian regimes in Pakistan. Such amendments and orders seriously undermined the doctrine of separation of powers, the protection of fundamental rights, the independence of the judiciary and the legislature, and the supremacy of the constitution in Pakistan.

Through the Second Amendment to the Constitution,¹⁸⁶ the Bhutto government declared Ahmadis non-Muslims, as the latter had apparently offended the spirit of the fundamental right to religion and belief guaranteed under Article 20 of the 1973 Constitution. The third Amendment to the Constitution¹⁸⁷ increased the powers of the government to put political opponents behind bars, who could now be imprisoned for a longer period. The promulgation of the Fourth Amendment¹⁸⁸ dealt a serious blow to the judiciary, as it deprived the High Courts from the jurisdiction to enforce fundamental rights. This amendment was aimed at depriving political opponents of the government from seeking bails following arrest from the High Courts. Through the Sixth Amendment,¹⁸⁹ further damage was caused to the judiciary as the period for the separation of the judiciary from the executive branch of the government was extended from three years to five years. Moreover, the powers of the courts to initiate proceedings for contempt of court were withdrawn. These amendments damaged constitutionalism and undermined the protection of the fundamental rights of Pakistani citizens.

Further damage was caused to constitutionalism and fundamental rights when General Zia ul Haq imposed martial law again, on 5 July 1977, on the ground of massive rigging in the general elections held in March 1977. Several political leaders, including Zulfikar Ali Bhutto, were arrested, and the Constitution was shelved.¹⁹⁰ Moreover, the Laws (Continuance in Force) Order, 1977 (“LCFO, 1977”) was issued to run the government, and the writ jurisdiction of the courts to enforce fundamental rights was ousted.¹⁹¹ Hence, all actions under the martial law regime were fully protected.¹⁹²

In the *Nusrat Bhutto* case, the detention of Zulfikar Ali Bhutto was challenged on the ground that martial law was unconstitutional. However, the court dismissed the petition on the ground that the LCFO, 1977 ousted the jurisdiction of the courts to enforce fundamental rights. The court, without specifying any date for the general elections, held that the chief martial law administrator (“CMLA”) *can* amend the Constitution.¹⁹³ The CMLA was not satisfied even after this favor by the judiciary, and, in order to protect his actions from judicial review, he added Article 212-A in the Constitution.¹⁹⁴ The addition of Article 212-A amounted to a serious violation of the doctrine of separation of powers, as it conferred judicial powers on the executive through the establishment of military courts.

On 25 March 1981, General Zia ul Haq issued the Provincial Constitutional Order (“PCO”), 1981, suspending the authority of the judiciary to enforce fundamental rights and ousting its jurisdiction to review the PCO or any other order, rule, or regulation made there under.¹⁹⁵ The PCO reiterated that the CMLA could amend the Constitution. It also required judges to take a fresh oath, and, thereby, undermined the independence of the judiciary and the doctrine of separation of powers. The PCO was subsequently challenged before the SC. However, in *Tajjamal Husain Malik v. Federal Government of Pakistan*,¹⁹⁶ the PCO was upheld by the court.

In February 1985, general elections were held in the country. General Zia ul Haq promulgated the famous Eighth

Amendment through a presidential order. This amendment made significant alterations to the Constitution. For instance, it empowered General Zia ul Haq, through Article 58(2)(b), to dissolve the National Assembly at his sole discretion.¹⁹⁷ It also made the executive more powerful than the legislature. The judiciary had already been stripped of essential judicial powers prior to the Eighth Amendment. Hence, following the Eighth Amendment, the nature of parliamentary democracy in Pakistan changed drastically. The Eighth Amendment also granted constitutional protection to all unlawful orders of General Zia through Article 270-A of the Constitution.

After the promulgation of the Eighth Amendment, General Zia ul Haq lifted the martial law regime in the country, being confident as to the impunity of his actions.¹⁹⁸ He also, later, relied on Article 58(2)(b) to dissolve the government on the charges of corruption and inefficiency, following his dispute with the civilian government, led by Prime Minister Junejo.

The dismissal of Junejo's government was challenged in the case of *Muhammad Sharif v. Federation of Pakistan*.¹⁹⁹ In this case, the court stated that a constitution for free people could not envisage such discretion for the dismissal of the government as exercised by General Zia. However, the petition was denied, with the court holding that a declaratory order could not bring the dissolved assembly back. This decision was challenged before the SC in the case of *Federation of Pakistan v. Haji Saifullah Khan*,²⁰⁰ where in the court held that exercise of the discretionary power by the President in dissolving the National Assembly is subject to judicial review. The court also stated that the judiciary could examine whether such powers were exercised reasonably and lawfully. Although these judgments were pronounced after the death of Zia, yet they set a good precedent for upholding rule of law in the country.

The President also exercised the power given Article 58(2)(b) of the Constitution to dissolve the elected government of Benazir Bhutto twice, first in 1990, and then in 1996. Benazir Bhutto challenged the dismissal of her first

government in the case of *Ahmed Tariq Raheem v. Federation of Pakistan*²⁰¹ and her second government in the case of *Benazir Bhutto v. Farooq Ahmad Leghari*.²⁰² However, the court upheld the dismissal orders in both cases. In her second term, Benazir Bhutto attempted to interfere with the independence of the judiciary in terms of the appointment of judges. Her government appointed many loyalists who were not suitable for appointment as judges to the superior courts. The SC, in the case of *Al-Jehad Trust v. Federation of Pakistan*,²⁰³ however, settled this issue by providing broad principles promoting merit and transparency in the appointment of judges.

In 1993, Prime Minister Nawaz Sharif's government was dissolved by President Ghulam Ishaq Khan. The Prime Minister challenged the dissolution of his government in the case of *Muhammad Nawaz Sharif v. Federation of Pakistan*,²⁰⁴ wherein the SC restored his government. Nawaz Sharif won the national elections and became the Prime Minister for the second time in 1997. This time, he was determined to scrap Article 58(2)(b), as it was hanging like a sword on the heads of civilian leaders. He removed Article 58(2)(b) from the Constitution through a constitutional amendment.²⁰⁵ Like Benazir Bhutto, he was confronted by the judiciary for appointing judges to the superior courts. This tussle increased to the highest level with the initiation of proceedings for contempt of court against Nawaz Sharif. The Nawaz government issued a new Contempt of Court (Amendment) Bill, which allowed for an appeal before another bench of the SC if an order of contempt was passed by the SC. This Bill was moved apprehending punishment in the proceedings for contempt of court against the Prime Minister lying before the then Chief Justice of Pakistan, Sajjad Ali Shah. Sajjad Ali Shah restrained the President from signing the Bill, which led to a battle between the judiciary and the executive. The SC judges were divided on this issue. A bench of two judges of the SC restrained the Chief Justice from working.²⁰⁶ The CJP suspended the restraining order and started proceedings for contempt of court against Nawaz Sharif, which led to the

storming of the SC. In the case of *Asad Ali v. Federation of Pakistan*,²⁰⁷ a full-bench of the SC comprising of ten judges held that Justice Ajmal Mian should assume the position of CJP.

To demonstrate his power, Nawaz Sharif replaced General Jehangir Karamat (on his proposal to establish a National Security Council) by General Pervez Musharraf. In the backdrop of the Kargil Crisis, however, the relationship between Nawaz Sharif and General Pervez Musharraf became tense and a military takeover took place on 12 October 1999. Two days later, the Constitution was, once again, put in abeyance through a Provincial Constitutional Order (“PCO”).²⁰⁸ Keeping with the tradition of the earlier martial law regimes, the judges were required to take a fresh oath, and the courts were barred from reviewing the acts of the self-declared Chief Executive as well as the authorities working under him.²⁰⁹ Moreover, the fundamental rights of citizens were suspended in view of the declared emergency. The military takeover was challenged before the SC in the case of *Zafar Ali Shah v. General Pervaiz Musharraf*,²¹⁰ wherein the court not only upheld the military takeover, but also allowed constitutional amendments under the military regime. Taking advantage of this judgment, General Pervez Musharraf made drastic constitutional amendments,²¹¹ including the revival of the infamous Article 58(2)(b), which had frequently been used to dissolve the elected governments in the past. Moreover, sub-clause (3) of Article 58, which had previously been inserted in the Constitution through the Seventeenth Amendment, provided that in case of dissolution of the National Assembly by the President, a presidential reference would have to be made to the SC within 15 days of the dissolution. These amendments effectively established presidential rule in the country. In the case of *Pakistan Lawyers Forum v. Federation of Pakistan*,²¹² the court upheld the Seventeenth Amendment. These developments alarmed the legal fraternity as to the separation of powers and the status of fundamental rights in Pakistan.

Seemingly these developments made the then Chief Justice, Iftikhar Muhammad Chaudhry, declare the government's attempt to privatize Pakistan Steel Mills as arbitrary and unlawful.²¹³ He also took suo-moto notice of various cases involving human rights' violations and corruption, such as the 'missing persons' case, which was seen as a threat to the government. On 9 March 2007, General Pervez Musharraf pressed Iftikhar Chaudhry to resign, but the latter refused to do so. Through a presidential order, Chief Justice Iftikhar was restrained from performing his judicial functions. Moreover, General Pervez Musharraf filed a reference against him and he was put under house arrest. The Chief Justice challenged this reference, whereafter he was restored by the SC.²¹⁴ Following the restoration of Chief Justice Iftikhar Muhammad Chaudhry, the legal fraternity started a nationwide movement against Musharraf for maltreating a sitting Chief Justice of the country. A number of petitions were filed against General Pervez Musharraf, challenging his unlawful actions, including that of holding two offices simultaneously.²¹⁵ Wajihuddin Ahmed, being a candidate for the presidency, also filed a petition to challenge the candidature of General Pervez Musharraf. Apprehending an adverse decision in these cases, General Pervez Musharraf declared an emergency through another Provisional Constitutional Order on 3 November 2007.²¹⁶ In the case of *Wajihuddin*, an eleven-member bench of the SC passed a restraining order against this PCO.²¹⁷ Thereafter, General Pervez Musharraf put the judges who gave the decision in the *Wajihuddin* case under house arrest. Meanwhile, a number of judges who had taken oath under the PCO declared the findings of the *Wajihuddin* case without jurisdiction and unlawful.²¹⁸ These judges further upheld the PCO in the case of *Tikka Iqbal Muhammad*.²¹⁹

These developments fuelled the lawyers' long march, which led to the restoration of all judges who had refused to bow before General Pervez Musharraf and take an oath under the PCO on 17 March 2009. General Pervez Musharraf was made to resign on 18 August 2009. All the actions taken, and

the orders passed, by President Pervez Musharraf were declared unconstitutional, unlawful, and void.²²⁰ Further, in 2010, the Constitutional (Eighteenth) Amendment Bill was passed,²²¹ restoring the Constitution in its original form.²²² However, an amendment to the Constitution, introduced in Article 175A, which dealt with the appointment of judges to the superior courts, created a rift between the judiciary and the legislature, as it gave the parliamentary committee the power to approve judicial appointments. The Eighteenth amendment was challenged before the SC, which referred the matter to the legislature for reconsideration.²²³ In the case of *Munir Hussain Bhatti v. Federation of Pakistan*,²²⁴ the SC reiterated that the judicial committee was the appropriate body for appointing judges and assessing their skills, and that the parliamentary committee had no power as such in this regard. These judgments illustrate how the doctrine of separation of powers applies in practice in Pakistan.²²⁵ Consequently, in the Nineteenth Amendment,²²⁶ the legislature incorporated the recommendations of the SC, thereby enhancing the role of judges in judicial appointments.

In 2012, there was a confrontation between the government and the judiciary. The facts leading to the confrontation are as follows. The SC had issued proceedings for contempt of court against two sitting Prime Ministers and removed them from their office for their refusal to execute orders of the court concerning the initiation of civil proceedings against the President for holding accounts in Switzerland.²²⁷ These orders had been issued in the *Dr. Mubashar Hassan* case,²²⁸ wherein the court had declared the National Reconciliation Order, 2007 (“NRO”) void and unconstitutional. Thereafter, the government passed a new statute, the Contempt of Court Act, 2012 (“2012 Act”) to save its skin. However, the court stated that contempt of court was a matter pertaining to fundamental rights. The court further held that it could review any legislation which offended fundamental rights and declared the 2012 Act unconstitutional. This led to a heated debate as to the doctrine of separation of powers and the protection of fundamental rights in Pakistan.²²⁹

In 2015, the government of Nawaz Sharif passed the 21st Amendment to the Constitution and established military courts for the trial of civilians allegedly involved in terrorism. This amendment was challenged before the SC in the *District Bar Association (Rawalpindi) v. Federation of Pakistan*.²³⁰ A seventeen-member bench of the SC upheld the 21st Amendment. However, six judges wrote dissenting opinions and observed that the military, being a part of the executive, could not carry out judicial functions. In this case, the court, by permitting trials to be conducted in military courts and allowing the legislature to enact laws violating fundamental rights, appears to be compromising the doctrine of separation of powers. In addition to the 21st Amendment, the legislature passed the 23rd Amendment in March 2017 to provide further extension and cover to the military courts.²³¹ However, these courts were abolished on 30 March 2019.²³²

In 2020, Imran Khan's government filed a *presidential reference*²³³ before the Supreme Judicial Council, alleging that Justice Qazi Faez Isa, a Supreme Court judge, had concealed his property in London while filing wealth statements before the tax authorities. Justice Isa denied the allegations of the government and stated that he did not own any property in London. In his reply to the court, he submitted that the properties in London alleged to be his actually belonged to his wife and children, who had independent sources of income. Justice Isa argued that the government had initiated the instant proceedings against him because some of his judgments had made the government and the security agencies uncomfortable. He also stated that the government wanted a weak and subservient judiciary.

The counsel for Justice Isa argued that the confidential information regarding the property alleged to belong to his client had been collected through surveillance of the judge, his wife, and children without due approval of the relevant authorities. This information had then been shared with a person who was not a civil servant. This person was, in fact, a proxy complainant. The counsel pointed out that such information had been obtained after the decision concerning

the Faizabad sit-in, in a *suo-moto* case, wherein the learned judge had made some comments about the establishment, in particular, that security agencies and the executive should work within their constitutional domain.

The counsel further stated that the complainant had allegedly acquired information about the alleged properties through an online search. However, the counsel argued, that under the laws of the UK, such information could not be obtained online. Rather, it was the land registry that provided such information, releasing it either to the real owner of the property or to a legally authorized person. The counsel argued that the government agencies had acquired information concerning the client's alleged properties in London and shared it with a proxy without any authorization in order to make a false case against his client, with the aim of weakening the judiciary. He further contended that by investigating and collecting evidence against a sitting judge of the Supreme Court in such a manner and, subsequently, initiating a judicial reference against him, the government had undermined the independence of the judiciary. The counsel argued that the safeguards provided under Article 209 for proceeding against judges of the superior courts should have been observed by the government. Essentially, the counsel's argument was that as the reference amounted to an attack on the independence of the judiciary, the court ought to dismiss it.

The government, on the other hand, claimed that the reference had been filed without any mala fide against the judge. The Attorney General argued that although the properties in London had been purchased in the names of the judge's family members, the honorable judge was the actual owner of the alleged properties. The government contended that Justice Isa had failed to explain the means through which his wife and children had purchased the properties in London. The SC dismissed the reference, declaring it to be 'invalid' and based on 'malice in law'. However, the SC directed the Federal Board of Revenue (FBR) to conduct enquiry proceedings against Justice Isa's spouse and children, requiring them to explain the sources they had used for buying the properties in

London.²³⁴ This reference illustrates how the doctrine of separation of powers applied in this case i.e., how the executive branch of the government tried to weaken the judiciary while interfering into its functions and thus undermined the protection of fundamental rights in Pakistan.

3.8 CONCLUSION

The doctrine of separation of powers is followed in various constitutional systems, including the US, UK, and Australia, in order to protect fundamental rights. The US model of separation of powers stresses a strong executive, with little accountability to the legislature. The UK constitution combines powers of the executive, and the legislature and promotes a strong legislature. Australia essentially follows the model of the UK concerning the separation of powers between the legislature, the executive and the judiciary. In Pakistan, the doctrine of separation of powers has distinctive features, which may be compared and contrasted with the constitutions of the US, the UK, Australia, and India. Prominent features of the doctrine of separation of powers, such as the courts' powers of judicial review and the protection of fundamental rights and liberties, are reflected in all of Pakistan's constitutions.

Pakistan inherited constitutional norms of the common law from Britain. Such norms had been enshrined in the Government of India Act, 1935, and were later incorporated in the interim constitution of Pakistan in 1947. The founding fathers of Pakistan also adopted certain features of written constitutions, such as judicial review, fundamental rights, and the doctrine of separation of powers, from the US Constitution. The first and the second Constituent Assemblies thoroughly discussed the division of political power between the various organs of the state and the status of fundamental rights in Pakistan. The Constituent Assemblies proposed a parliamentary system of government and a balanced constitutional relationship between the three institutions of the state. The basic features of the Constitution were first reflected in the Objectives Resolution of 1949, which provided for the

division of power and the independence of the judiciary for the purpose of providing socio-economic and political justice in accordance with the injunctions of Islam. The Objectives Resolution specifically stipulated the freedoms of thought, expression, belief, faith, worship, and association.

The Constituent Assemblies debated the aforementioned features of the separation of powers and recommended the incorporation of the Objectives Resolution in the first Constitution of Pakistan. Thus, the concepts of separation of powers and the protection of fundamental rights were duly considered by the Constituent Assembly while drafting the first Constitution of Pakistan, i.e., the Constitution of 1956. The 1956 Constitution provided for a federal form of government, the protection of fundamental rights, and an independent judiciary. It also stipulated that any law inconsistent with fundamental rights could be declared void. Furthermore, the Constitution gave the judiciary the power to review the acts of other branches of the government and to enforce fundamental rights.

Iskandar Mirza became the first President of Pakistan following the adoption of the Constitution of 1956. Upon his failure to handle the political crisis in the country, he declared martial law, whereafter the 1956 Constitution came to an end. The proclamation of martial law and the abrogation of the 1956 Constitution caused a legal vacuum. To fill this legal void, General Ayub Khan issued the LCFO, 1958, creating a new legal order. This Order was challenged in the case of *State v. Dosso*; however, the SC validated this order on the basis of a theory of successful revolution propounded by Hans Kelsen.

Thereafter, General Ayub Khan promulgated the Constitution of 1962, wherein he deviated from the parliamentary system and envisaged a strong executive under the presidential system. The 1962 Constitution empowered him to dissolve the National Assembly based on his assessment of the performance of the legislature. The judiciary was empowered to review the actions of the legislature and the executive in order to enforce fundamental rights. Despite the

accumulation of power, General Ayub Khan failed to manage the political and economic affairs of the state. Thereafter, General Yahya Khan took over the government and issued a Provisional Constitutional Order in 1969. He issued the Legal Framework Order, 1970, and conducted national elections. However, due to the heightened political rift in the country, a government could not be formed. This led to the fall of Dhaka in 1971, and Yahya Khan was forced to resign. Following the resignation of Yahya Khan, Zulfikar Ali Bhutto took over the government. He terminated the martial law regime and adopted the Interim Constitution of 1972, which provided for the protection of fundamental rights and an independent judiciary. The 1973 Constitution, finally, provided for a parliamentary system of government, and the division of power between the three institutions of the state alongside the protection of fundamental rights.

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

Similarly, the judiciary validated the dissolution of the first Constituent Assembly in the *Moulvi Tamizuddin Khan* case, the Laws (Continuance in Force) Order of 1955 in the *Dosso* case, the Laws (Continuance in Force) Order of 1977 in the *Nusrat Bhutto* case, and the military takeover of 1999 in the *Zafar Ali Shah* case. The judiciary thus upheld the dissolution of elected governments of M.K. Junejo, Benazir Bhutto, and Nawaz Sharif. Numerous judges of the superior courts took oaths before the martial law administrators, ignoring their

earlier oaths under the Constitution. The presidential references against Iftikhar Muhammad Chaudhary and Qazi Faez Isa show the complex nature of the relationship between the different organs of the state.

Despite these challenges, however, the *Wajihuddin* case, the *Sindh High Court Bar Association* case, and the *Faez Isa* reference, demonstrate that the judiciary can withstand the pressure of the executive and enforce the doctrine of separation of powers as well as the fundamental rights of the people in Pakistan. This indicates that an increased focus on constitutionalism and the doctrine of separation of powers can protect fundamental rights in Pakistan, which is the hypothesis of this book.

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

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¹²⁹ See, Article 39 of the Constitution, 1956.

¹³⁰ Article 35, Ibid.

¹³¹ See, Hamid Khan, “Constitutional and Political History of Pakistan,” (Karachi: Oxford University Press, 2009), 101, 102.

¹³² Article 69 of the Constitution, 1956.

¹³³ Article 43 Ibid.

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¹³⁵ Article 106 of the 1956 Constitution.

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¹³⁷ Article 156, Ibid.

¹³⁸ One-third of the total members were to approve the removal of judges.

¹³⁹ The martial law was declared on 8 October 1958; After the declaration of Martial law, both the assemblies were dismissed and the Prime Minister and his Cabinet were put under house arrest. Ayub Khan was appointed as the Chief Martial law Administrator of the country. A power struggle started between Mirza and Ayub, which ultimately lead to the arrest of Sikandar, Mirza. Ayub sent him into exile and took exclusive control of the state.

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¹⁴⁹ See, Article 19 of the Constitution, 1962.

¹⁵⁰ Constitution (First Amendment) Act, 1963, Act I of 1964, PLD 1964 Central Statutes 33.

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¹⁵⁹ Provisional Constitutional Order, 1969.

¹⁶⁰ Jurisdiction of Courts (Removal of Doubts) Order, 1969.

¹⁶¹ The Legal Framework Order, 1970, was issued on 28 March 1970.

¹⁶² General Niazi and General Jagit Singh signed the instrument of surrender on December, 16, 1971.

¹⁶³ The Constitution Committee comprised of twenty-five members of the National Assembly. On the recommendations of this Committee, on 30 December 1972, Bhutto government moved a Constitutional Bill in the National Assembly which was approved by a large consensus on 10 April 1973.

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¹⁶⁷ Article 41-100, Ibid.

¹⁶⁸ Article 175-212B, Ibid.

¹⁶⁹ See, Article 90(1) of the Constitution, 1973.

¹⁷⁰ Article 90, Ibid.

¹⁷¹ Article 96, Ibid.

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¹⁷³ Article 75, Ibid.

¹⁷⁴ Article 48, Ibid.

¹⁷⁵ Article 41, Ibid.

¹⁷⁶ Article 44, Ibid.

¹⁷⁷ Article 8-28, Ibid.

¹⁷⁸ Article 8, Ibid.

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- ¹⁸⁷ Constitution (Third Amendment) Act, 1975 (Act XXII of 1975), PLD 1975 Central Statutes 109.
- ¹⁸⁸ Constitution (Fourth Amendment) Act, 1975 (Act LXXI of 1975), PLD 1975 Central Statutes 337.
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- ¹⁹⁰ Proclamation of Martial Law, 5 July 1977, PLD 1977 Central Statutes 326.
- ¹⁹¹ Chief Martial Law Administrator's Order, 1 of 1977, PLD 1977 Central Statutes 327.
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- ¹⁹³ See, *Begum Nusrat Bhutto v. Chief of Army Staff*, PLD 1977 SC 657.
- ¹⁹⁴ Constitution (Second Amendment Order, 1979) President's Order 21 of 1979, PLD 1979 Central Statutes 567.
- ¹⁹⁵ Provisional Constitutional Order, 1981, CMLA's Order 1 of 1981, PLD 1981 Central Statutes 183.
- ¹⁹⁶ See, *Tajjamal Husain Malik v. Federal Government of Pakistan*, PLD 1981 Lahore 462.
- ¹⁹⁷ Revival of the Constitution 1973 Order, 1985, President's Order 14 of 1985, PLD 1985 Central Statutes 456.
- ¹⁹⁸ Zia martial law was lifted on 30 December 1985.
- ¹⁹⁹ See, *Muhammad Sharif v. Federation of Pakistan*, PLD 1988 Lahore 725.
- ²⁰⁰ See, *Federation of Pakistan v. Haji Saifullah Khan*, PLD 1989 SC 166.
- ²⁰¹ See, *Ahmed Tariq Raheem v. Federation of Pakistan*, PLD 1991 Lahore 78, PLD 1992 SC 646.
- ²⁰² See, *Benazir Bhutto v. Farooq Ahmad Leghari*, PLD 1998 SC 27.
- ²⁰³ See, *Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 SC 324.
- ²⁰⁴ See, *Muhammad Nawaz Sharif v. Federation of Pakistan*, PLD 1993 SC 473.
- ²⁰⁵ See, Act 1 of 1997, PLD 1997 Central Statutes 323.
- ²⁰⁶ See, 1998 SCMR 122, The Constitution (Thirteenth Amendment) Act, 1997.
- ²⁰⁷ See, *Asad Ali v. Federation of Pakistan*, 1998 SCMR 119.
- ²⁰⁸ See, PLD 1999 Central Statutes 448.
- ²⁰⁹ The Oath of Office (Judges) Order, 2000.
- ²¹⁰ See, *Zafar Ali Shah v. General Pervaiz Musharraf*, PLD 2000 SC 869.
- ²¹¹ See, Legal Framework Order, 2002.

²¹² See, *Pakistan Lawyers Forum v. Federation of Pakistan*, PLD 2005 SC 719.

²¹³ See, *Watan Party v. Federation of Pakistan*, PLD 2006 SC 697.

²¹⁴ See, *Mr Justice Iftikhar Muhammad Chaudhary v. The President of Pakistan*, PLD 2007 SC 578.

²¹⁵ President to Hold Another Office Act, 2004.

²¹⁶ Order 1 of 2007, PLD 2008 Federal Statutes 110.

²¹⁷ See, *Wajihuddin Ahmad v. Chief Election Commissioner*, PLD 2008 SC 25.

²¹⁸ *Ibid.*,

²¹⁹ See, *Tikka Iqbal Muhammad v. General Pervaiz Musharraf*, PLD 2008 SC 6.

²²⁰ See, *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 2009 SC 879.

²²¹ The Eighteenth Amendment effected 97 Articles, an Annex, and four Schedules of the Constitution.

²²² Essentially, it repealed The Legal Framework Order 2002, The Constitution (Seventeenth Amendment) Act, 2003 added Articles 10A, 19A, and 25A to the Constitution, and omitted Article 58 (2)(b).

²²³ See, *Nadeem Ahmad Advocate v. Federation of Pakistan*, PLD 2010 SC 1165.

²²⁴ See, *Munir Hussain Bhatti v. Federation of Pakistan*, PLD 2011 SC 407.

²²⁵ See, Jeremy Waldron, "Separation of Powers in Thought and Practice" accessed November 6, 2014, <http://heinonline.org>

²²⁶ See, PLD 2011 Federal Statutes 19.

²²⁷ The Prime Minister, Yousaf Raza Gillani, was removed for the contempt of court and the government issued a new Contempt of Court Act, 2012 to avoid the contempt proceedings against the new Prime Minister, Raja Pervaiz Ashraf. The 2012 Act was also challenged before the Supreme Court.

²²⁸ See, *Dr Mubashar Hassan v. Federation of Pakistan*, PLD 2010 SC 265;

Federation of Pakistan v. Dr Mubashar Hassan, PLD 2012 SC 106.

²²⁹ See, Thomas Sargentich, "The Contemporary Debate About Legislative-Executive Separation of Powers," accessed November 7, 2014, <http://heinonline.org>

²³⁰ See, *District Bar Association (Rawalpindi) v. Federation of Pakistan*, PLD 2015 SC 401.

²³¹ Military courts given legal cover by senate, DAWN, March 29, 2016.

²³² See, accessed on October 19, 2019 <https://www.icj.org/pakistan-as-military-courts-lapse-government-must-prioritize-reform-of-the-criminal-justice-system/>

²³³ See, *The President of Pakistan and others v. Justice Qazi Faez Isa*, PLD 2021 SC 1.

²³⁴ <https://www.dawn.com/news/1564513> accessed 20 July 2020

CHAPTER FOUR

THE DOCTRINE OF SEPARATION OF POWERS AND LEGISLATIVE ACTION

4.1 INTRODUCTION

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

This chapter examines how our courts have implemented the doctrine of separation of powers in order to enforce fundamental rights in Pakistan, while reviewing the actions of the legislature. The chapter addresses several important questions, which are as follows: What is the procedure of law-making? What is the domain of the federal and the provincial legislatures? What happens when federal and provincial laws conflict with each other? What is the constitutional basis and the justification for the review of legislative action by the judiciary? In addition to examining the

aforementioned questions, this chapter analyses some cases on fundamental rights in order to show how the courts have scrutinized legislative action for the purpose of protecting fundamental rights in Pakistan.

These questions help to understand the procedural mechanism adopted by the federal and the provincial legislatures for the enactment of laws. The appreciation of the 'extent' and the 'limits' of the legislature's role of law-making helps to develop a nuanced sense of the doctrine of separation of powers. The section relating to the constitutional basis and the justification for the practice of judicial review provides a theoretical foundation for analyzing the case law pertaining to the concepts of separation of powers and fundamental rights and illuminates the approach of the courts towards such cases. Each section of this chapter serves as a conceptual block for building the main argument of this book: that a focus on constitutionalism and adherence to the doctrine of separation of powers protects fundamental rights in Pakistan.

4.2 THE LAW-MAKING PROCEDURE

The function of the legislature is to promulgate the constitution and/or constitutional amendments as well as ordinary legislation. The 1973 Constitution provides a structure for the governance of the state. It divides political power into the executive, the legislature, and the judiciary. Ordinary or sub-constitutional law-making facilitates the state in achieving its constitutional objectives and the policies formulated by the state from time to time. Constitutional and sub-constitutional laws regulate the functioning of the institutions of the state as well as the conduct of the citizens. Federal law-making power is bestowed on the Parliament. A bill, when approved by the House in which it is initiated, is transmitted to the other House and, when passed by the other House, is presented to the President for approval.¹ Constitutional laws, in order to be passed, need to be approved by a two-third majority in both houses of Parliament. However, ordinary laws require only a simple majority in the both houses.

Moreover, the President of Pakistan has the power to make law through ordinances for one hundred and twenty days.² The National Assembly may by a resolution extend the ordinance for a further period of one hundred and twenty days. However, this extension can be made only once.³ Almost all bills are initiated by the government, which is legally responsible for their presentation and drafting, for overseeing their passage through both houses, and for their implementation after they have been approved by the President.⁴

Provincial assemblies can legislate with a simple majority of the house. Any law passed as such is then presented to the Governor for approval.⁵ The Governor can also promulgate ordinances for a period of ninety days.⁶ The ordinance may be extended by the provincial assembly once for an additional period of ninety days.⁷

4.3 DISTRIBUTION OF LEGISLATIVE POWERS

The 1973 Constitution deals with the distribution of legislative authority among the federal and provincial legislatures.⁸ Article 141 provides that the Parliament can legislate for the whole or any part of Pakistan. However, provincial legislatures can only legislate for their province or any part of their province. Article 142(c) provides that the Parliament shall legislate on matters mentioned in the Federal Legislative List. The provincial assemblies, thus, can make laws pertaining to the items not covered in the Federal Legislative List. This list provides those subjects on which the federal legislature can make laws. The Concurrent Legislative List has been abolished through the Eighteenth Amendment to the Constitution.⁹ This list provided those areas on which both the federal as well as the provincial legislatures could have made laws.

The Constitution, thus, clearly provides for the distribution of legislative powers between the federal and provincial legislatures. If a provincial assembly makes a law

that is beyond its legislative domain, it can be assailed through judicial review for being *ultra vires* to the Constitution.¹⁰ The distribution of legislative power, therefore, helps the judiciary to enforce the doctrine of separation of powers in Pakistan.

In case of any conflict between the laws made by the federal and the provincial legislatures, the constitutional theory of pith and substance can help to determine the validity of the relevant law.¹¹ The doctrine of pith and substance aims to ascertain the true or essential nature of a particular act or statute; thus, it helps in discovering the true nature of an Act.¹² For example, in case of any confusion, this theory facilitates to find under which head of legislative subject, for instance, education, health, environment, etc., a given piece of legislation falls. In the case of *Punjab Higher Education Commission v. Dr. Aurangzeb Alamgir*,¹³ the Lahore High Court coined the concept of cooperative federalism, which means that any conflict between the policy of the federal government and any provincial government requires a coordinated and intergovernmental policy and cooperation.

As the 1973 Constitution is the supreme law of the land, it is the primary function of the superior courts to construe any law and declare it invalid if it offends any provision of the Constitution, including any provision pertaining to fundamental rights. Thus, in any written constitution, the courts have the power to construe the constitution as well as to review the legislative actions of the government. In a system of constitutional governance, the authority of the courts to examine the actions of the legislature cannot be taken away by any government.¹⁴

4.4 CONFLICT BETWEEN FEDERAL AND PROVINCIAL LEGISLATION

Article 143 of the Constitution deals with inconsistency and repugnancy of the legislation between the federal and the provincial governments. The laws made by the Parliament have an overriding effect on the laws made by the provinces under

Article 143 of the Constitution. In other words, if a law made by a provincial legislature contradicts any law enacted by the Parliament, the law made by the Parliament shall prevail.

The legislature can make any law within its legislative domain. The only restriction on the law-making authority of the Parliament is that the law should not contradict any provision of the Constitution or its overall scheme. The courts are not authorized to declare any legislation invalid on the ground of mala fide on the part of the legislature.¹⁵

Where two legislative provisions can work without interfering with each other, they cannot be deemed to be inconsistent with each other.¹⁶ In case there exists a federal law on a concurrent subject, then a provincial law cannot override it. This principle is termed as a doctrine of occupied field. The doctrine of occupied field can be pressed in service only if a law passed by the provincial legislature clashes with a law made by the federal legislature, which incidentally encroaches upon the legislative domain of the federal legislature. This means that a provincial law cannot sustain or be treated as a valid law if it infringes upon the occupied field of the federal legislature.¹⁷

For example, foreign policy, defence, and currency fall under the legislative domain of the federal legislature. If a provincial legislature makes a law on any of these subjects, it would be an encroachment upon the occupied field of the federal legislature. Thus, the doctrine of occupied field, like the doctrine of incidental encroachment, is another way to ascertain the true nature of any piece of legislation. These two doctrines help the legislature and the courts to determine the validity of any law vis-à-vis the legislative domain of a particular legislature.¹⁸

4.5 THE CONSTITUTIONAL BASIS FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

The Government of India Act, 1935, which was adopted by Pakistan in 1947, did not provide for fundamental rights.¹⁹

The first constitution of Pakistan, i.e., the Constitution of 1956, however, provided for the protection of fundamental rights with an effective mechanism for their enforcement.²⁰ The 1962 Constitution also stipulated for the protection of fundamental rights through a constitutional amendment in 1964.²¹ Finally, the Constitution of 1973 contained provisions on fundamental rights and an elaborate mechanism for their enforcement.²² As Pakistan largely follows Western concepts of fundamental rights, some discussion of that conception is essential for the analysis of the cases pertaining to fundamental rights in this chapter.

Fundamental rights are those basic human rights that an individual is entitled to enjoy by virtue of being human. The creation of these rights does not depend upon the existence of a political entity. According to Emanuel Kant, humans have certain natural rights since birth, prior to the creation of a political state.²³ Kant endorses the view of John Locke, who also believed that human beings had certain basic rights and freedoms, the existence of which preceded the emergence of the concept of the state. These basic rights are integral to the existence of an individual and the collective progress of a human society.²⁴

The idea of basic human rights has its origins both in religion²⁵ and in a secular conception of statehood.²⁶ However, these rights became popular during the intellectual movement in Europe called the Age of Enlightenment.²⁷ These rights then found recognition in the laws of political governments providing protection to citizens against the might of states.²⁸

Jurists have approached the idea of human rights from different perspectives. H. L. A. Hart,²⁹ for example, considers that fundamental rights amount to self-expression and self-assertion, and their protection ensures the welfare of individuals. Jeremy Bentham³⁰ and others³¹ assert that these rights are a means for securing the well-being of human beings. Before the emergence of political governments, these rights were either recognized as provisionally rightful possession³² or ethical supremacy³³ or positive morality³⁴ and non-obligatory.³⁵

This transitional period in the history of human rights is described as a 'pre-legal period'.³⁶

In the transitional phase of the history of rights, all humans were not equal.³⁷ Plato's fabulous myth the one Noble lie depicts such inequalities.³⁸ Likewise, Aristotle believed that the human aspiration to set himself free from oppression prevails in the 'state of nature';³⁹ human beings have always aspired to achieve equality⁴⁰ and eliminate the exploitation of the weak and marginalized groups in society.⁴¹

In the similar fashion, the natural law theory has promoted morality, justice, and equality in society.⁴² This theory stresses individual liberties⁴³ and the dignity of man.⁴⁴ According to this theory, natural rights correspond to modern-day human rights or basic rights.⁴⁵ The safety of fundamental rights is the responsibility of a modern democratic state.⁴⁶ These rights were mentioned in rudimentary form in Babylonian law,⁴⁷ religious laws,⁴⁸ and the Charter of Magna Carta.⁴⁹ Basu traces these rights to the emergence of political philosophy.⁵⁰ Modern international instruments⁵¹ and domestic constitutional documents specifically provide for the protection of fundamental rights.⁵²

The modern-day state has the mandate to govern its citizens. John Locke emphasized that governments should be restrained in the exercise of political power in order to safeguard the rights of citizens.⁵³ Constitutional democracies worldwide envisage these basic human rights in their constitutions in one form⁵⁴ or the other.⁵⁵ Almost all democracies declare and protect fundamental rights.⁵⁶ Reference to such rights is also made in various national⁵⁷ and international instruments.⁵⁸

Fundamental rights are generally regarded as a synonym for human rights.⁵⁹ Human rights jurisprudence⁶⁰ conceives fundamental rights as a legal privilege granted to citizens. According to Black's Law Dictionary, fundamental rights are those rights that have their origins in the express terms of the constitution or are necessary to be implied from those terms.⁶¹

Fundamental rights are provided under the 1973 Constitution so as to grant them a special status. The Constitution also provides a specific procedure for their protection.⁶² On the basis of such constitutional protection, acts of the legislature and the executive may be questioned for being inconsistent with and violative of fundamental rights.⁶³ Tayal argues that the incorporation of fundamental rights in a constitutional document provides a check on the executive and the legislature,⁶⁴ and ensures the protection of such rights from the state⁶⁵ through a judicial process.⁶⁶

In Pakistan, therefore, a deliberate effort has been made to safeguard the fundamental rights of citizens. Chapter 1 of the 1973 Constitution incorporates various fundamental rights, including basic human rights,⁶⁷ socio-cultural rights,⁶⁸ economic rights,⁶⁹ and political freedoms.⁷⁰ These fundamental rights reflect the human rights principles envisaged in the UDHR 1948.⁷¹

Fundamental rights constitute limitations upon the powers of any government.⁷² The superior courts of Pakistan have observed that fundamental rights have special status under the Constitution. Though these rights are subject to certain limitations,⁷³ they are to be protected by the courts as it is their duty to safeguard these rights.⁷⁴ A special constitutional mechanism, therefore, is provided for the protection of these rights under Articles 184(3) and 199 of the Constitution. While relying on these provisions, the courts have proactively reviewed the actions of the legislature to safeguard fundamental rights.⁷⁵

It may be argued that the concept of social contract forms the basis of constitutional governments. The people submit to the state to safeguard their liberties and rights as citizens. The state is, thus, liable to safeguard these rights against the will and power of the majority in a political dispensation. In Pakistan, Articles 9 to 28 of the 1973 Constitution provide for the fundamental rights of the citizens. Such a robust constitutional arrangement upholds the rule of law and helps to establish an egalitarian society. Fundamental rights are

permanent in nature and can only be suspended in exceptional circumstances mentioned in the Constitution.⁷⁶ Any legislative or executive act inconsistent with or made in contravention of the provisions on fundamental rights is to be held void.⁷⁷

Despite the fact that fundamental rights have been guaranteed by the Constitution, there has been a divergence of opinion as to the provision and protection of these rights throughout the constitutional history of Pakistan.⁷⁸ These rights have not only been taken away without any explanation at multiple points in time but have also been suspended by the operation of law under martial law regimes.⁷⁹ The jurisdiction of courts to enforce such rights was curtailed through proclamations of emergencies⁸⁰ and the abrogation and suspension of the constitutions in Martial law regimes.⁸¹

Unconstitutional measures by dictators weakened the judiciary, as it made the courts powerless in the face of a powerful executive.⁸² The courts conveniently ignored the onslaught on the constitution and turned over judicial responsibility to the military.⁸³ From 1977 to 1985, the 1973 Constitution effectively remained suspended or in abeyance. This compromised constitutionalism and the fundamental rights of the citizens of Pakistan.⁸⁴ However, after the lifting of martial law on 30 December 1985, the judiciary realized its constitutional duty to enforce fundamental rights.⁸⁵

It might be stressed that in the preamble of the 1973 Constitution, the values of social justice, equality, liberty, and democracy are mentioned as aspirations of the state. The Constitution envisages two types of rights: justiciable rights, which constitute fundamental rights such as right to fair trial, security of person, and freedom of speech, and non-justiciable rights, which amount to principles of policy.⁸⁶ Non-justiciable rights include the elimination of exploitation⁸⁷ as well as social, economic, and cultural rights.⁸⁸ The courts have interpreted non-justiciable rights quite liberally.⁸⁹ The judiciary has progressively construed and linked non-justiciable rights to fundamental rights.⁹⁰ The courts have further extended the definition of fundamental rights beyond its textual meaning and

the traditional understanding of fundamental rights. For instance, the courts have expanded the connotation of the right to life to a number of other rights, such as environmental protection.⁹¹ In doing so, the courts have demonstrated judicial activism to safeguard the basic rights of citizens.

The judiciary has built upon constitutional provisions pertaining to fundamental rights, including the Objectives Resolution,⁹² the articles on fundamental rights⁹³ and principles of policy⁹⁴ in order to proactively safeguard these rights.⁹⁵ In the *Benazir Bhutto* case, the court expanded the provisions on fundamental rights so as to ensure the provision of socio-economic justice to the citizens of Pakistan.⁹⁶ While interpreting Article 184(3), the court held that the whole Constitution should be interpreted in such a way as to uphold democracy and attain social justice as per the injunctions of Islam.⁹⁷

Muhammad Afzal Zullah J., while interpreting the Preamble to, and Article 4 of, the 1973 Constitution (which concerns the right of individuals to be dealt with in accordance with the law),⁹⁸ expanded the understanding of fundamental rights beyond its conventional scope.⁹⁹ Mehreen argues that these articles ensure the provision of justice for all.¹⁰⁰ As the courts are mandated to deliver justice,¹⁰¹ they have interpreted these provisions liberally in order to establish an egalitarian society in Pakistan.¹⁰² The courts have exercised the judicial review powers and issued positive directions to other branches of the government to do complete justice.¹⁰³

4.6 THE JUSTIFICATION OF JUDICIAL REVIEW

Incorporating fundamental rights in a document as fundamental as the constitution is only a partial success. In addition to mentioning fundamental rights in the constitution, it is necessary to guarantee the provision of fundamental rights to citizens. The materialization of fundamental rights depends upon the availability of enforcement mechanisms to guarantee

their protection. Without an effective mechanism for the implementation of fundamental rights, these rights largely remain a constitutional allusion and a legal fiction. Therefore, in constitutional democracies worldwide, the judiciary is empowered to safeguard fundamental rights.¹⁰⁴ The international legal framework for the protection of human rights also mandates the provision and enforcement of fundamental rights by the various organs of the state, including the judiciary.¹⁰⁵ Pakistan, being a party to such international conventions, such as the International Covenant on Civil and Political Rights, 1966, is obliged to protect fundamental human rights through an independent judiciary.

In this context, the Constitution of 1973 provides an effective procedure for the protection of fundamental rights. Articles 2-A, 4, 8, 9-28, 199, 184(3), 187 and 190 of the Constitution specifically provide for the protection of fundamental rights and confer the responsibility of enforcing the constitutional provisions on fundamental rights on the judiciary. The courts' exercise of judicial review is meant to safeguard the fundamental rights of the people. Such power, however, may only be exercised within the constitutional parameters of the judiciary as prescribed by the doctrine of separation of powers. The judiciary, thus, has a constitutional duty to uphold the doctrine of separation of powers in order to protect the fundamental rights of citizens.¹⁰⁶

Pakistan's judiciary, being cognizant of its constitutional duty, liberally construed the provisions on fundamental rights to provide social justice since the 1980s, when Article 2-A was made an essential part of the Constitution of 1973.¹⁰⁷ While deciding the *Benazir Bhutto* case, the judiciary extended the meaning and horizon of basic rights, and relaxed the procedure for invoking the jurisdiction of the courts in cases pertaining to fundamental rights. Thereafter, the courts used their judicial review powers liberally to interpret and safeguard the fundamental rights of the citizens of Pakistan.¹⁰⁸

The following section analyses some cases on fundamental rights in order to demonstrate how the courts have

scrutinized legislative action for the purpose of protecting fundamental rights in Pakistan.

4.7 JUDICIAL REVIEW OF LEGISLATIVE ACTION

In the case of *Pakistan Broadcasters Association v. Pakistan Electronic Media Regulatory Authority*,¹⁰⁹ the court reviews broadcasted content on TV channels in the context of the Pakistan Electronic Media Regulatory Authority (PEMRA) Ordinance, 2002, with respect to license agreements of broadcasters that restricted the maximum period of an advertisement break during prime time, and Rule 15(3) of the Pakistan Electronic Media Regulatory Authority Rules, 2009, which set a minimum time duration between two successive advertisement breaks.

The court observed that “Broadcasters attempted to lengthen commercial breaks by putting more advertisements to maximize revenue irrespective of whether the viewer was willing or not to watch advertisements”. The court also noted that “the state was obliged to regulate the right to speech when it came in conflict with the right of the viewers or listeners”.¹¹⁰

The court held that Rule 15(3) of the PEMRA Rules, 2009, and the impugned clause only controlled the length of ads and the gaps between ads; and the same neither banned the content of any program, nor restricted the right to free speech. Therefore, “the said rule and clause were also in conformity with... Article 18 of the Constitution, which protected the right to conduct a lawful business, but also made it permissible to regulate any profession.”¹¹¹

The court further observed that the right to freedom of speech and freedom of expression are significant fundamental rights under the Constitution of Pakistan. These fundamental rights help to promote the intellectual growth of society, constitutionalism, and democracy. The court held that the right to free speech helps a person in self-achievement, and prompts revelation of truth; it fortifies the limits of a person to make

decisions and paves the way for accomplishing a developed and civilized society. Freedom of media is the basis of free government. Any endeavor to negate such a right would unquestionably deprive the citizens of the right to free speech under the law.¹¹²

The court also held that state functionaries can only exercise legislative powers to promote and protect fundamental rights within reasonable limits. Legislative power can only be used under the mandate of the Constitution and the law. The court further noted that reasonableness cannot be decided with precision; it can, however, be judged in light of prevailing circumstances. It is impossible to make an abstract, universally acceptable standard of reasonableness. The word 'reasonableness' requires intelligent care and consideration. A reasonable action is always fair and just and should not be oppressive, arbitrary or fanciful.¹¹³

Moreover, the court held that it had the authority to review the right to free speech when the same conflicted with the rights of citizens i.e., citizens' entitlement to the right to free speech. No one could be forced to listen to a content which he did not like while watching any TV show. The court, however, emphasized that equilibrium must be maintained in this regard and that the freedom of speech may be reasonably restricted in order to maintain public order. Therefore, the court held that the government should strike an equitable and sensible harmony between the individuals' entitlement to the right to free speech and the need to regulate the business of broadcasting.¹¹⁴

The court also observed that in modern jurisprudence, prohibitions and duties coexist to promote the right to free speech. Therefore, the government should strike a reasonable balance between upholding the freedom of speech and controlling the business of broadcasting. Thus, the court observed that the High Court had rightly upheld the legality of Rule 15(3) of the PEMRA Rules, 2009, and the impugned clause.¹¹⁵

In this case, the court, while reviewing the acts of the legislature, protected citizens' right to free speech and broadcasters' right to business while maintaining a balance between both the fundamental rights. The court rightly observed that the government should create a reasonable balance between the right to free speech of the people and the right to conduct the business of broadcasting and advertisement. The court, by applying a balanced and justified approach, upheld the impugned legislation and at the same time directed the government to regulate the broadcasted content and the business of broadcasting.

In the case of *Younas Abbas v. Additional Sessions Judge, Chakwal*,¹¹⁶ the appellants questioned the *vires* of Section 22-A(6) and 25 of the Code of Criminal Procedure, 1898 ("CrPC"). Under Section 22-A(6), an Ex-officio Justice of the Peace may issue appropriate directions to the Police authorities on a complaint regarding (a) non-registration of criminal case, (b) transfer of investigation from one Police Officer to another, and (c) neglect, failure or excess committed by a Police authority in relation to its functions and duties. Section 25 provides the designation of Ex-officio Justice of the Peace.

The court observed that the functions of the Ex-officio Justice of the Peace under S. 22-A(6) of the CrPC were quasi-judicial and could not be referred to as ministerial or executive. Such duties of the Ex-officio Justice of the Peace corresponded to the functions of the Police and thus did not meddle with the investigative functions of the Police. Moreover, the duties of the Ex-officio Justice of the Peace were not ministerial or executive as he did not perform his duties mechanically.¹¹⁷

The court observed that these functions are quasi-judicial as the Ex-officio Justice of Peace entertains applications, scrutinizes record, hears parties, and passes orders after due application of mind by applying his mind and exercising his discretion. Therefore, the duties of the Ex-officio Justice of Peace could not be labeled as executive or administrative.

The court held that Sections 22-A(6) and 25 of the CrPC were not *ultra vires* to the Constitution as they did not violate

any provision of the Constitution. In this case, the court, by exercising the authority of judicial review under the Constitution, reviewed the legislative act (i.e., Sections 22-A(6) and 25 of the CrPC) and held that they did not conflict with any article of the Constitution. This case shows how the court, by applying the doctrine of separation of powers, upheld the Constitution and protected the fundamental rights i.e., security of person and safeguards as to arrest and detention of the citizens.¹¹⁸

In the case of *Khan Asfandyar Wali v. Federation of Pakistan*,¹¹⁹ the court examined the *vires* of the National Accountability Bureau Ordinance, 1999 (“Ordinance”) on the basis that it had violated the doctrine of the separation of powers. The Ordinance had vested numerous judicial powers, like the grant of a bail, the discharge of an accused while his trial was pending, and the power to make an appeal, in the executive, and had thereby contravened the principle of separation of powers. Furthermore, Sections 9(c) and 24(d) of the Ordinance had conferred on the Chairman of the National Accountability Bureau the authority to discharge the accused on any condition he deemed appropriate.

The petitioner argued that such powers were purely judicial under Sections 426, 491, 497, 498, and 561-A of the CrPC and Articles 175, 202, and 203 of the Constitution. As per the doctrine of separation of powers as well as the concept of judicial independence, judicial functions could not be conferred on the executive. It was further contended that the denial of the right of appeal to an accused under Section 13(c) of the Ordinance violates the authority of courts and offends Article 2-A of the Constitution, the principles of natural justice and the injunctions of Islam.

The court declared Section 32 of the Ordinance as *ultra vires* to the Constitution and directed that this section be amended as it ousted the jurisdiction of courts.¹²⁰ The court held that the constitutional jurisdiction of the judiciary could not be taken away by subordinate legislation.

The court further directed that Section 6 of the Ordinance, which concerns the appointment, the tenure, and the terms and conditions of service and the removal of the Chairman of the National Accountability Bureau, be amended. The court also declared that clause (b)(i) of Section 6 of the Ordinance, which requires the Chairman of the National Accountability Bureau to hold office as per the will of the President, was *ultra vires* to the Constitution as it undermined the independence of the National Accountability Bureau.

The court held that Article 203 (High Court to superintend Subordinate Courts) of the Constitution applies to all subordinate courts including accountability courts. Thus, the High Court can relocate the list if it thinks a fair trial cannot be held before a particular accountability court.

The court observed that cases could be taken back only with the permission of the accountability court and neither the Chairman of the National Accountability Bureau nor the Prosecutor or Deputy-Prosecutor Generals could withdraw such cases. The court further directed the government to make rules under the Ordinance that would allow the process of accountability to become transparent and to pass appropriate legislation within two months from the order of the court in order to make necessary amendments, modifications and alterations in the Ordinance. The court emphasised that, as per the doctrine of trichotomy of powers, the judiciary could review the acts of the legislature in order to protect the basic rights of the people.

In the case of *Dr Mobashir Hassan v. Federation of Pakistan*,¹²¹ the court examined the constitutionality of the National Reconciliation Ordinance, 2007 (“NRO”). The NRO aimed at “promoting national reconciliation, fostering mutual trust and confidence amongst holders of public office and removing the vestiges of political vendetta and victimization, and to make the election process more transparent”. It was issued by the former President of Pakistan, General Pervez Musharraf, to grant amnesty to politicians and bureaucrats who

were accused of corruption, so it became controversial and challenged before the SC.

To defend the NRO, it was argued before the court that under the Constitution, there is a division of powers amongst the three branches of the state, whereby the legislature enacts the law, the executive executes it, while the judiciary construes the law. No branch can encroach on the domain of the other branches.

The court observed that it leans towards the constitutionality of the legislation and tries to save a statute instead of destroying the same. However, the court noted, the presumption of constitutionality is attached to legislation unless it is prima facie in contravention of the Constitution. Moving on, the court observed that the withdrawal of the cases under the NRO would mean that public officers would be absolved from charges of corruption.¹²² The court observed that the fact that proceedings have been pending for a while and have, therefore, been prolonged does not constitute a ground for terminating or withdrawing a case.

The court stressed that, while allowing the authority for the withdrawal of cases to the executive, the legislature had transgressed into the domain of the judiciary because, under the Constitution, the power to exonerate an accused after following the judicial process fell within the domain of the judiciary.

The court held that that the NRO is not a valid law; the court reiterated that Articles 5 and 8(2) of the Constitution commands that every citizen is bound to follow the law and that the state cannot formulate a law that abridges fundamental rights. By promulgating the NRO, the court observed, the legislature has violated Article 8 of the Constitution; it violates Articles 62, 63, and 175 of the Constitution as well. Articles 62 and 63 relate to the qualifications and disqualifications for membership of Parliament. Article 175 provides for establishment and jurisdiction of courts.

The court further held that equality among the people is an important principle of Islamic justice; when there is

inequality among citizens, there is no justice. The court observed that Article 25 of the Constitution, which provides for equality of citizens, has its origins in Islam. The court stated that any legislation that contradicts the injunctions of Islam cannot be passed. The representative of the people can only exercise their powers in accordance with the commands of Allah and the Constitution.¹²³ The court held that the NRO violates the injunctions of Islam under Article 227(1) of the Constitution. Article 227(1) provides that no law shall be enacted which is repugnant to the injunctions of Islam.

In this case, the court employed the concept of trichotomy of powers and protected the basic rights of the citizens, such as equality of citizens, by nullifying the NRO for being unconstitutional. Therefore, this case demonstrates a connection between the constitutional doctrine of separation of powers and the protection of fundamental rights.¹²⁴

In the case of *Baz Muhammad Kakar v. Federation of Pakistan through Ministry of Law and Justice*,¹²⁵ the court examined the legality of the Contempt of Court Act, 2012 (“2012 Act”). It was argued that, as per Article 204(3) of the Constitution, the legislature could make law to regulate the use of the authority (power to punish any person in contempt of court) bestowed on a court under Article 204 of the Constitution. However, the legislature was bound to follow the relevant law as well as the Constitution while legislating on the jurisdiction of the court.

The 2012 Act was challenged before the SC. The petitioner argued that by exercising the power of judicial review, the courts could examine the actions of the legislature in order to check their constitutionality. The superior courts could annul a law that violated the basic rights guaranteed by the Constitution, undermined judicial independence or contradicted the Constitution as a whole. The court observed that the significance of judicial independence could not be ignored as there would be no protection of fundamental rights in the absence of an independent judiciary. The court noted that the judiciary had the mandate to review any legislation which

contravened the Constitution. The power of judicial review provided for in the law was not meant to protect and promote the self-esteem of the judges but to safeguard the rights of the citizens.¹²⁶ By exercising their power of judicial review, the courts ensured the enforcement of fundamental rights.¹²⁷

The court observed that if Section 13 (Repeal) was invalidated, the remaining sections of the 2012 Act would serve no purpose. Thus, the court found that the present case did not attract the principle of severability. The court declared the 2012 Act void and unconstitutional and restored the Contempt of Court Ordinance, 2003.

In this case, the court reviewed act of the legislature to safeguard the basic rights of the citizens provided under Articles 9 (security of person), 19 (freedom of speech) and 25 (equality of citizens) of the Constitution, by declaring that the legislature could not make a law barring the people from approaching the courts.

In the case of *Sh. Riaz-Ul-Haq v. Federation of Pakistan through Ministry of Law*,¹²⁸ the court examined the right of access to justice with reference to civil servants. The court reviewed the federal and provincial Service Tribunals Acts and rules pertaining to Service Tribunals of the country. The petitioner argued that the right of access to justice was a well-perceived sacred right, which could be found in due process of the law. Further contending that due process of the law included being treated in accordance with the law, and the right to a fair trial before a capable and impartial court. The presence of an independent judiciary and the right of access to justice amounted to fundamental rights in accordance with the Constitution.

While discussing the function of Service Tribunals and judicial powers, the court relied on Article 175(3) of the Constitution to highlight that judicial power to be separated from the executive. The court observed that Service Tribunals exercised judicial powers, noting that when a tribunal decides the rights of the parties by determining relevant facts and taking the evidence into account, it acts as a court. The court

also noted that when judicial powers are granted to any authority, it gains the status of a court. The court stated that the exercise of judicial powers is a vital function of a court, which distinguishes it from an administrative tribunal.

The court observed that in order to make the Chairman and the Members of the Service Tribunals independent, it was necessary to appoint them after a meeting with the concerned Chief Justices; all appointments made without such consultation were void. The court stated that where a retired judge of the High Court was to be appointed as a Chairman of the (Service) Tribunal, selection should be made following consultation with the Chief Justice of the High Court in the case of a Provincial Service Tribunal and after consultation with the Chief Justice of Pakistan in the case of a Federal Service Tribunal.

The court held that the Chairman and the members of the Service Tribunals must have legal or judicial experience. Thus, an individual who is qualified to become a presiding officer of the district court could be employed as a member of a Service Tribunal. For safer administration of justice, a retired judge of the High Court must preferably be appointed as the Chairman of the Service Tribunals. This would improve the quality of judgments of Service Tribunals and uphold judicial independence, and thereby, help to protect and promote fundamental rights. The court further observed that both the Federal and Provincial Service Tribunals perform important judicial functions by determining the terms and conditions of civil servants. Therefore, it is imperative that appropriate laws be made as soon as possible.

The court declared that certain provisions of the Acts and Rules were *ultra vires* and were void as they derogated from the Constitution.¹²⁹ The court further directed the government to appoint the Chairmen and the Members of the (Service) Tribunals afresh within thirty days in accordance with the orders of the court. The court also stated that the law which had been declared void would cease to have an effect after thirty days. Consequently, the incumbent Chairmen and

the members of the Service Tribunals would also seize to hold office after thirty days.

This case illustrates a robust connection between the principle of separation of powers and the protection of the fundamental rights of the people. In this case, the court protected the right of access to justice of civil servants by declaring various provisions of the Service Tribunals Acts and the rules¹³⁰ void for being *ultra vires* to the Constitution and, thereby, not only protected the fundamental rights of the citizens, but also upheld constitutionalism.¹³¹

In the case of *Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law*,¹³² the court determined the issue of the disqualification of legislators holding dual nationality.¹³³ It was argued that in accordance with Article 63 (1)(c) of the Constitution, an individual who held dual nationality, yet wished to become a parliamentarian, needed to repudiate his citizenship of the foreign state. An individual who held dual nationality at the moment of presenting his nomination papers would be excluded from being considered for the position of a parliamentarian. If any public representative acquired dual nationality, he would lose his seat in the Parliament. The law clarified that an individual having dual nationality was ineligible from being chosen as a public representative.¹³⁴

The court held that the bearers of state authority must be seen as fiduciaries because governmental authority is just like a sacred trust. The court also noted that members of the National and Provincial Assemblies make decisions of great importance which have an impact on the basic rights of the citizens. The members must show the utmost loyalty to the people and the state. If the members were to make false assertions before state institutions, then the citizens would lose their trust in their representatives. The Constitution required the members to solemnly swear that they would bear real faith and loyalty to Pakistan and to their duties in the interest of the state.

The court held that the members were not eligible to become public representatives in accordance with the law as

they had acquired the citizenship of a foreign state.¹³⁵ Moreover, the members, despite holding dual nationality, had made false assertions in front of the Election Commission at the time of submitting their papers, and, therefore, seemed to be liable for fraud.¹³⁶

The court directed the Election Commission to de-notify the members and initiate legal action against them as per the law.¹³⁷ The court also directed that the records of the other members of the legislature be scrutinized and, to this extent, required fresh oaths to be taken from them, regardless of whether they held foreign nationality when they submitted the nomination papers. The court further required public representatives to return all the monetary benefits they had obtained from the national exchequer while they held office.

This case illustrates a solid connection between the doctrine of separation of powers, the protection of fundamental rights, and constitutionalism. In this case, the court attempted to protect the mandate of the people and to ensure their fair representation as the court emphasised that the power of the government is like a sacred trust and its holders must act as trustees.

In the *Province of Sindh through Chief Secretary v. M.Q.M. through Deputy Convener*,¹³⁸ the court examined the legality of the local government elections, in particular, whether the delimitation officer could convert a rural area into an urban area during the delimitation process without a prior notice. Under the Sindh Local Government Act, 2013 (“Act”), a panel system was introduced in the Union Councils in terms of Section 18(12) of the Act, and Section 18(14) provided that if a political party or an independent applicant failed to form a group in the elections, the nomination papers of all such applicants would be rejected. This appeared to be a clog on the fundamental right of equality of citizens.

The court held that Sections 18(12) and 18(14) of the Act violated the Constitution. The court emphasized the need for a neutral body to carry out the delimitation exercise because there were instances when the voting strength of a minority or

an ethnic group was diluted during the process, which constituted a violation of Article 25 of the Constitution.

The court further held that the authority to conduct delimitation had been given to the delimitation officer devoid of any rules and was subjective. The court also stated that the proviso to S.13(1) of the Act was biased and had been included to invalidate the real background of the Act as well as to safeguard the actions of the delimitation officers retrospectively.¹³⁹ The proviso to Section 13(1) authorized the delimitation officer to declare any area rural or otherwise even during the process of delimitation and without a prior notice. Thus, the proviso raised questions concerning the fairness of the process of the election. Hence, the court observed that the proviso to S.13(1) of the Act contravened the Act as well as the Constitution.¹⁴⁰ Furthermore, the court held that the federal government should enact the laws necessary to empower the Election Commission to carry out the delimitation of the constituencies and that the Provincial Government should also amend the Act correspondingly.¹⁴¹

In this case, the court, by holding that the requirement under the law for political parties and independent applicants to make a panel in the elections, and the rejection of the nomination papers of persons who failed to meet this requirement, seemed to be an obstruction in the exercise of fundamental rights. More specifically, while promoting the fairness of the process of election by holding that the proviso to S.13(1) of the Act was discriminatory and *ultra vires* to the Constitution, the court protected fundamental political rights of the people.

In the *Munir Hussain Bhatti* case,¹⁴² the court discussed the role of the parliamentary committee as to the disapproval of the nomination of the judges of the High Court by the Judicial Commission. The court established its exclusive power regarding the appointment of the judges of superior courts and held that, under the constitutional scheme of distribution of powers, a parliamentary committee could not reject nominations made by the Judicial Commission. In the *Nadeem*

Ahmad case,¹⁴³ again, the appointment of a judge of a superior court was challenged in view of the Eighteenth Amendment, which had given a significant role to the parliamentary committee in the appointment of judges. The court asserted its power regarding the appointment of superior courts judges and asked the Parliament to reconsider the formulation of the mechanism for judicial appointments proposed in the Eighteenth Amendment, which had given a significant role to the parliamentary committee in the appointment of judges.

These two cases highlight the doctrine of separation of powers *vis-à-vis* the role and domain of the legislature and the judiciary in the appointment of judges. Arguably, these cases helped to protect the independence of the judiciary, while reviewing the act of legislature, that is a must for the protection of fundamental rights.

In another case,¹⁴⁴ the Prevention of Electronic Crimes (Amendment) Ordinance 2022 (“Ordinance”) challenged before the court by various organizations of journalists on the ground that the Ordinance violates the freedom of speech guaranteed under the Constitution.

The court declared the Ordinance unconstitutional and held that free speech protected under Article 19 and the right to receive information under Article 19-A of the Constitution are essential for the development, progress, and prosperity of a society, and suppression thereof is unconstitutional and contrary to the democratic values. The court further noted that “The criminalization of defamation, protection of individual reputations through arrest and imprisonment, and the resultant chilling effect violates the letter of the Constitution and the invalidity thereof is beyond a reasonable doubt”.

The court ruled that the Ordinance was promulgated in derogation of the Constitution and the fundamental rights guaranteed thereunder, particularly Articles 9, 14, 19 and 19-A. The offence under Section 20 of the Ordinance to the extent of the expression “or harms the reputation” and the punishment thereof is unconstitutional, invalid beyond reasonable doubt

and is, therefore, struck down. The court further directed the Interior Ministry to probe the conduct of the officials of the Cyber Crime Wing of Federal Investigation Agency, which had led to widespread abuse of powers and consequent grave violations of the fundamental rights of the citizens. In this case, again, the court has protected the freedom of speech while declaring legislation unconstitutional and against the fundamental rights.

In suo moto case, ¹⁴⁵ the court took notice of the dismissal of a constitutionally sound no-trust motion against the ex-Prime Minister, Imran Khan, by the National Assembly Deputy Speaker, and the dissolution of the National Assembly on the advice of PM Imran Khan against whom a motion of no-trust was set for voting. The court took suo-moto notice of the situation in the country as it involves a question of public importance concerning the fundamental rights of the citizens (Article 184).

By dismissing the no-trust motion, the National Assembly Deputy Speaker, endorsed the claim of the PM that a foreign conspiracy is behind domestic political efforts to oust his government. Calling the opposition members of the National Assembly disloyal to the State, produced another political crisis in Pakistan. More specifically, the Speaker's ruling stated that "[...] to me it is now clear that there has been blatant foreign interference in the internal affairs of Pakistan and there exists a close nexus between such foreign interference and the campaign to oust and remove the democratically elected government [...]". Thus, the Speaker disallowed a constitutionally permitted no-confidence motion by claiming to preserve, protect, and defend democracy and the constitution.

Based on the aforementioned ruling, the court was essentially confronted with two questions: Can a no-confidence motion associated with numerous political opponents of the government be disallowed and rejected on the ground of 'foreign conspiracy' in a parliamentary democracy? Can a

President dissolve the National Assembly on the advice of the Prime Minister facing a motion of no-confidence? A brief analysis of the relevant provisions of our Constitution provides an answer.

Article 95 clearly provides that “[a] resolution for a vote of no-confidence...may be passed against the Prime Minister by the National Assembly [...]”. Article 58(1) states that “[t]he President shall dissolve the National Assembly if so advised by the Prime Minister [...],” and an explanation to Article 58(1) states that, “[r]eference in this Article to “Prime Minister” shall not be construed to include reference to a Prime Minister against whom a notice of a resolution for a vote of no-confidence has been given in the National Assembly [...]”.

The no-confidence motion was dismissed as contrary to Article 5 of the Constitution. This article states that "Loyalty to the State is the basic duty of every citizen" and that "obedience to the Constitution and law is the inviolable obligation of every citizen..." The government argued that the joint opposition has collaborated with a foreign state and is sponsored to change the regime in Pakistan. On the basis of this allegation against the country's joint opposition, that opposition was prevented from casting a constitutional vote of no-confidence against the Prime Minister.

The court observed that such an interpretation and application of Article 5 challenges the concept of constitutional democracy. The Speaker's ruling violates Article 95 of the Constitution and makes it completely redundant. Any government can simply name its opponents as 'traitors' and, in doing so, block them from participating in a constitutional no confidence motion. But such a charge sheet should not be envisaged against parliamentarians desiring to exercise their constitutional right to vote in a no-confidence motion. Further, the court held that during the pendency of a no-confidence motion, the Prime Minister's right to advise the President to dissolve the National Assembly ceases. Even if the President acts on such advice, it offends Article 58(1) of the Constitution.

It was argued on behalf of the government that the court cannot inquire into proceedings of Parliament, as Article 69 provides that, "[the] validity of any proceedings in Parliament shall not be called in question on the ground of any irregularity of procedure [...]". The court, however, dismissed this argument and observed that rejecting a no-confidence motion on the ground of 'foreign conspiracy' is not a matter of procedural irregularity. It is an important question concerning the interpretation of the constitutional articles and, thus, the protection of constitutional and fundamental rights such as the freedom of expression and the right to vote. It is the constitutional role of the judiciary to interpret the Constitution. If the decision of a Speaker is found constitutionally incorrect and mala fide, it can be set aside by the court. Constitutional mechanisms meant to safeguard a constitutional rule of democratic government cannot be subverted by the Parliament. Thus, the court declared all orders and actions initiated by the PM, the President, and the Speaker's Ruling unconstitutional. In this case, while reviewing act of the legislature, the court has promoted fundamental rights, the separation of powers, and constitutionalism in Pakistan.

4.8 CONCLUSION

The main points of the preceding discussion have been summed up in the following sentences. The Constitution of 1973 provides a comprehensive procedure for making the law. The function of the legislature encompasses the enactment of constitutional and sub-constitutional laws. Constitutional law-making requires a bill to be approved by two-thirds of the total membership of both the houses of the Parliament. Sub-constitutional laws can be passed with a simple majority of both the houses of Parliament. Articles 141 and 142 of the 1973 Constitution specify the law-making domain of the federal and provincial governments. There is a federal legislative list that provides subjects on which the federal legislature can make laws. The provincial assemblies can legislate on subjects which are not mentioned in the federal

legislative list. The subjects of criminal law, criminal procedure, and evidence, fall within the legislative domain of both the federal and the provincial legislatures. The 18th constitutional amendment, which was passed in 2010, abolished the concurrent legislative list. Under Article 143 of the Constitution, in case of any conflict between laws made by the federal and provincial legislatures, the law enacted by the former prevails. The president and the governor are also empowered to make laws through ordinances. However, a law made through an ordinance is only valid for a specified period and requires the approval of the relevant assembly for its validity and continuation.

An effective mechanism for judicial review and the enforcement of fundamental rights is provided under Articles 184 and 199 of the Constitution. Article 8 provides that any law inconsistent with fundamental rights can be declared void. In the *Benazir Bhutto* case, the judiciary extended the scope of the protection of fundamental rights while relaxing the procedural requirements for invoking the jurisdiction of the judiciary. This case has given rise to a debate concerning the link between the separation of powers and fundamental rights in Pakistan.

Constitutional theorists like Emanuel Kant, H.L.A Hart, and Jeremy Bentham have emphasised the importance of human rights. Kant argues that human rights are acquired naturally since birth and that their creation precedes the development of a political state. Before the emergence of modern political states, human rights were recognised as ethical supremacy and positive morality. Hart equates these rights with self-expression and advocates their protection for the welfare of human beings. Bentham also considers these rights as a means of securing the well-being of humans. Thus, modern democracies are obliged to protect these rights. John Locke stressed that governments should be restrained in the exercise of their power in order to protect the rights of citizens.

Thus, the courts have a constitutional mandate to examine any legislative instrument which infringes the fundamental

rights of the people. The courts can nullify such laws, partly or wholly, depending upon the nature of the laws. The courts have applied the doctrine of separation of powers while reviewing the actions of the legislature in order to protect fundamental rights. In some cases, the courts have declared legislation to be unconstitutional for violating the fundamental rights of the citizens of Pakistan. In other cases, the courts upheld the impugned legislation.

In the *Pakistan Broadcasters Association* case, the court, while upholding the impugned legislation, directed the government to regulate the broadcasted content to protect the freedom of speech. In the *Younas Abbas* case, the appellants questioned the *vires* of Sections 22-A(6) of the CrPC on the ground that these sections violated the division of power between the executive and the judiciary and thus infringed the fundamental rights to life and liberty. The court held that the impugned provisions of the law did not offend the Constitution and any fundamental rights, hence, valid.

In the case of *Province of Sindh through Chief Secretary v. M.Q.M. through Deputy Convener*, while reviewing Sections 18(12) and 18(14) of the Sindh Local Government Act, 2013, the court declared the requirement of forming a panel under the aforementioned provisions for election to local bodies a clog on fundamental right to equality.

In this chapter, the analysis of the theory and the practice of judicial review help to prove the main argument of the book i.e., a focus on constitutionalism and adherence to the doctrine of separation of powers promotes the protection of fundamental rights in Pakistan. The next chapter shall discuss the domain of the executive and the nature of the functions of the federal and provincial governments. It will also examine the grounds for judicial review and the competing approaches of judicial review i.e., judicial activism and judicial restraint. It would elaborate how the judiciary in Pakistan has reviewed the actions of the executive in order to enforce fundamental rights in Pakistan.

END NOTES

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- ¹ See, Article 75 of the Constitution, 1973.
- ² See, Article 89 of the Constitution, 1973.
- ³ See, Article 89(2)(a)(i), of the Constitution, 1973.
- ⁴ See, A.G Chaudhry, "Lectures on Constitutional Law," (Lahore: Eastern Law Book House Press, 2013), 35.
- ⁵ See, Article 116 of the Constitution, 1973.
- ⁶ See, Article 128 of the Constitution, 1973.
- ⁷ See, Article 128(2) (a) of the Constitution, 1973.
- ⁸ See, Article 141-144 of the Constitution, 1973.
- ⁹ The Constitutional (Eighteenth Amendment) Act, 2010.
- ¹⁰ See, *State v. Syed Mir Ahmed Shah and another*, PLD 1970 Quetta 49.
- ¹¹ See, *Province of Punjab v. National Industrial Cooperative Credit Corporation and others*, 2000 SCMR 567.
- ¹² See, Narendra Mahovia, "What is the Doctrine of Pith & Substance?" accessed October 9, 2019 <https://www.quora.com/What-is-the-doctrine-of-Pith>
- ¹³ *Punjab Higher Education Commission v. Dr. Aurangzeb Almgir etc.*, 2017 Lahore 1341.
- ¹⁴ See, *Province of East Punjab v. Sirajul Haq Patwari*, PLD 1966 SC 854.
- ¹⁵ See, *Abdul Rehman v. The State*, PLD 1983 SC 76 (DB).
- ¹⁶ See, AIR 1956 SC 676.
- ¹⁷ Ibid.,
- ¹⁸ See, *Quetta Textiles Mills Ltd v. Province of Sindh*, PLD 2005 Karachi 55.
- ¹⁹ See, Section 8 of the Indian Independence Act, 1947.
- ²⁰ See, Articles 22 and 170 of the Constitution, 1956.
- ²¹ In 1964, the 4th Amendment was made in the Constitution, 1962, and thereby fundamental rights were provided in this Constitution.
- ²² This enforcement mechanism is in term of Judicial Review powers of High Courts and the Supreme Court under Articles 199 and 184(3) of the Constitution, 1973, respectively.
- ²³ See, Kant, Groundwork, in Mary Gregor ed, Trans Practical, 410.
- ²⁴ See, Chiranjeet Singh and M.R. Garg, "Human Rights as the Base Component of Democratic State," in B.P. Singh Sehgal ed., Human Rights in India - Problems and Perspectives, (New Delhi: Deep and Deep Publications, 1996), 98.
- ²⁵ Magna Carta Libertatum, frequently called as Magna Carta. It is a charter of rights which was agreed to by King John of England at Runnymede on June 15, 1215. It stated that the grant was made "through the inspiration of God.... for the honour of God and the exaltation of Holy Church" (See, Z Chafee, Documents on Fundamental Human Rights, Vol. I, (Cambridge, Mass: Harvard University Press, 1951), 2 39.
- ²⁶ See, The *Magna Carta*, 1215.

²⁷ A phase of society when the conventional hierarchical orders in socio-political setup were transmuted assertively by an order founded on the concepts of liberty and equality. The reference may be made to the French Revolution (1789). It motivated the publishing of “The Declaration of the Rights of Man and of the Citizen,” which was written by Marquis de Lafayette. Such document even in contemporary period has encouraged the rights-based liberal democracy worldwide.

²⁸ See, Stanford Encyclopedia of Philosophy, (Stanford University: 2007), accessed July 11, 2019, <https://stanford.library.sydney.edu.au/archives/fall2007/>

²⁹ The idea of this theory was propounded by H L.A. Hart in his seminal work titled ‘Are There Any Natural Rights?’ through which he argues that “If there are any moral rights at all, it follows that there is at least one natural right; the equal right of all men to be free...” The other prominent proponents of ‘Will Theory’ include Austin, Steiner, Wellman, and Simmonds.

³⁰ See, Bentham, J; Anarchical Fallacies, in Jeremy Waldron, ed., Nonsense upon Stilts, (New York: Methuen, 1987).

³¹ For the adoption of this theory, reference may be made to Lyons, David, ‘Rights, Welfare, and Mill’s Moral Theory’ (Oxford: Oxford University Press, 1994); Raz, Joseph, The Morality of Freedom, (Oxford: Oxford University Press, 1986).

³² See, Kant, Groundwork in Mary Gregor ed trans Practical, 410.

³³ See, Stumpf Samuel Enoch, “Morality and the Law,” (Tennessee: Vanderbilt University Press, 1966), 204-205.

³⁴ See, Roger Cotterrell, “The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy,” (London: LexisNexis Butterworth’s Tolly, Ltd, 2003) 54-56, 65-70.

³⁵ Ibid., 54-56, 65-70.

³⁶ Ibid., 166-167, 181-188.

³⁷ See, Conceptual, 43, accessed June 19, 2016, shodhganga.inflibnet.ac.in/bitstream/10603/19847/8/08_chapter%201.pdf

³⁸ See, Plato, Republic, Book III, 303, Classics Club Edition.

³⁹ See, Aristotle, Politics, Book I, Classics Club ed., 25, 248.

⁴⁰ See, Krishna Murthy, ‘Human Rights and the Indian Police,’ (Bangalore: R.R. Publishers, 1994), 29.

⁴¹ See, Pathak R.S, “The Protection of Human Rights, Indian Journal of International Law,” 18, (1978), 274-78.

⁴² According to this theory human rights are decided by morality instead of authority like that of the government etc. This theory recognizes law and morality as closely connected, yet not the same. According to this theory, a law is defined from the idea that morality sprouts from nature. Contrary to the Natural Law Theory is the theory, of Legal Positivism. The major proponents, among others, are Thomas Aquinas (See, Thomas Aquinas, *On Law, Morality and Politics* (Indianapolis: Hackett Publishing Company,

1988); See, John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); Finnis, John M. "Natural Law Theory: Its Past and Its Present," *American Journal of Jurisprudence*, 81, Vol. 57 (2012), accessed July 11, 2019, https://scholarship.law.nd.edu/law_faculty_scholarship/1085/

⁴³ See, Krishna Iyer, "The Dialectics and Dynamics of Human Rights," (Calcutta: Eastern Law House, 1999), 54.

⁴⁴ See, V.D. Devasia and Leelama Devasia, "Women, Social Justice and Human Rights", New Delhi: APH Publishing Corporation, 1998) 1; See, Krishna Iyer, "Justice at Cross Road," (New Delhi: Deep and Deep Publication 1992), 21.

⁴⁵ See, Louis B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States," *American University Law Review* Vol. 32, no. 1 (1982); Thomas Buergenthal and Dinah Shelton, "Protecting Human Rights in the Americas, Cases and Materials", 11, in Dr. U. Chandra, *Human Rights* (Allahabad: Allahabad Law Agency Publications, 1999), 21.

⁴⁶ See, Singh and Garg, *Human in Sehgal ed. Human*, 98.

⁴⁷ Such Babylonian law may be referred to in Hammurabi Code, and in Vedic period e.g. Manusmriti and later in Kautilya's Arthashartha; See, Nirvani, Sharada T., "A Critical Study of Judicial Enforcement of Human Rights in India Through Public Interest Litigation with special Reference to Right to Life", PhD Diss., (Saurashtra University, 2005), 25.

⁴⁸ See, Chafee, *Documents*, 239.

⁴⁹ It was granted by King John of England on June 15, 1215 A.D. Through it an absolute monarch was obliged to realize that the people have certain rights which could not be infringed even by a mighty sovereign. This instrument proved to be the inspiration for putting the human rights in terms of fundamental rights in the constitutional documents of different jurisdictions.

⁵⁰ See, Durga Das Basu, "Human Rights in Constitutional Law," 2nd ed., (New Delhi: Wadhwa and Company Nagpur, 2003), 2.

⁵¹ See, Article 55 and 56, UNO Charter, 1945; United Nations Declaration of Human Right (UNDHR), 1948; Article 2, International Covenant on Civil and Political Rights (ICCPR), 1963; Article 2, International Covenant on Economic, Social, and Cultural Rights (ICESCR), 1963; European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953.

⁵² These rights are incorporated and guaranteed in the constitutional texts of the countries; See, Articles 8-28, 199, and 184(3) of Constitution, 1973 of Pakistan, Articles 13-35 and 226 of Constitution, 1950 of India; Articles 3, 6 and the Amendments 1-10, 14, and 15 of the Constitution, 1789 of USA.

⁵³ See, Thomas E. Patterson, "The American Democracy," (New York: McGraw-Hill, Inc, 1993), 63.

⁵⁴ These are the civil and political rights constitutionally termed as fundamental rights. See, Articles 9-28, of the Constitution, 1973; Article 14-34, of the Constitution, 1950 of India.

⁵⁵ These are the socio-economic and cultural rights termed as principles of policy. See, Articles 29-40, of the Constitution, 1973; Articles 36-51, of the Constitution, 1950 of India.

⁵⁶ Declaration of Independence of the thirteen States of America in 1776 (The Virginia Declaration, 1776); The Constitution of USA, 1789, with amendments in 1791, 1865, 1869, and 1919 guaranteed a number of rights. The French Declaration of the Rights of Man and of Citizen of 1789 inspired other European States to include certain provisions in their laws for the protection of human rights. So, Sweden in 1809, Spain in 1812, Belgium in 1831, Prussia in 1850, and Switzerland in 1874 provided for the fundamental rights of people. Initially, till the year 1998, there was no particular declaration for fundamental rights in Britain. However, there has been an emerging trend that guaranteed civil rights serve practical purpose, so Britain should also have a written Bill of Rights. On July 7, 1975 a resolution was presented in the House of Commons requiring the specific Bill of Rights. Later on, Britain government promulgated the European Charter on Human Rights, 1995. Afterward the British Parliament passed the Human Rights Act, 1998.

⁵⁷ Reference may be made to the Constitutions of the democratic countries like of India, 1950, USA, 1789, and Pakistan, 1973.

⁵⁸ See, Preamble and Article 1(3) of the Charter, 1945 of UNO; UNDHR, 1948; ICCPR, 1966; ICESCR, 1966.

⁵⁹ See, Gianluigi Palombella, "Arguments in Favour of a Functional Theory of Fundamental Rights", 299, accessed on December 7, 2017, http://works.bepress.com/gianluigi_palombella/12/

⁶⁰ See, Article 8 of the UDHR, 1948.

⁶¹ See, Black's Law Dictionary, 5th ed., 248.

⁶² See, *West Virginia State Board of Education v. Barnett*, 319 US 624.

⁶³ See, Basu, *Human Rights*, 2.

⁶⁴ See, Tayal, B.B. and Jacob, A. *Indian History, World Developments and Civics*, 2005, A-24.

⁶⁵ See, *Province of East Pakistan v. Mehdi Ali Khan*, PLD 1959 SC 387.

⁶⁶ See, *Abul A'la Maudoodi v. Government of West Pakistan*, PLD 1964 SC 673.

⁶⁷ See, Article 9, 'Security of person'; Article 10, 'Safeguards as to arrest and detention'; Article 10-A, 'Right to fair trial'; Article 11, 'Prohibition of slavery, forced labor, human trafficking, and compulsory services'; Article, 12 'Protection against retrospective punishment'; Article 13, 'Protection against double punishment and self-incrimination'; Article 14, 'Inviolability of dignity of man'; Article 15, 'Freedom of movement'; Article 19, 'Freedom of speech'; Article 19-A, 'Right to information'; Article 25, 'Equality of citizens'; Article 26, 'Non-discrimination in respect

of access to public places'; Article 27, 'Safeguards against discrimination in services' of the Constitution, 1973.

⁶⁸ See, Articles 20, 21, 22, 'Freedoms of Religion'; Article 24-A, 'Right to Education'; Article 28, 'Preservation of Language, Script and Culture' of the Constitution, 1973.

⁶⁹ See, Article 18, 'Freedom of Trade, Business, and Profession'; Article 23 and 24, 'Rights of Property and Protection of Property Rights' of Constitution, 1973. These are the fundamental rights provided in substantive provisions of constitutional law establishing a claim for the provision of certain services and a claim of financial nature.

⁷⁰ See, Article 17, 'Freedom of Association' of the Constitution, 1973.

⁷¹ Though UDHR, 1948 along with ICCPR and ICESCR do not demonstrate an extensive scheme for the attainment of a perfect situation, they declare certain ideals which reflect guidance for all the world. But in the international community, respect for the human rights depends upon the system and functioning of the State and her institutions. Thus, the condition of human rights varies manifestly country to country (See, Louis Henkin, *The Rights of Man Today*, (London: Stevens and Sons, 1979), 31.

⁷² See, *Hurtado v. California*, 110 US 516 (1884).

⁷³ See, *Nasruallah Khan v. District Magistrate*, PLD 1965 Lahore 642. The court observed that "only a few of these rights can be stated in the form of absolute propositions. Most of them require qualification in the general interests of society, particularly in a social welfare state, where the individual's interest is considered to be subordinate to the public welfare."

⁷⁴ See, *Abul A'la Maudoodi v. Govt. of West Pakistan*, PLD 1964 SC 673; *Province of East Pakistan v. Mehdi Ali Khan*, PLD 1959 SC 387.

⁷⁵ See, Mohammad Yasin Brig, Tariq Banuri, "The Dispensation of Justice in Pakistan," (Oxford University Press: 2004), 60.

⁷⁶ See, Articles 8(5) and 233 of the Constitution, 1973.

⁷⁷ See, *State v. Dosso*, PLD 1958 SC 533 ; *Federation of Pakistan v. United Sugars Mill Limited*, PLD 1977 SC 397; *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416; *Shirn Munir v. Government of Punjab*, PLD 1990 SC 295; *Pakistan Lawyers Forum v. Federation of Pakistan*, PLD 2005 SC 719; *Saeem Raza v. State*, PLD 2007 Karachi 139; *Ch. Mohammad Isaquah Advocate v. Cantonment Executive Officer*, PLD 2009 Lahore 240; *Dr. Mubashir Hassan v. Federation of Pakistan*, PLD 2010 SC 1.

⁷⁸ See, Ahmad Rafay Alam, "The Law of Public Interest Litigation in Pakistan," in Werner Menski, et al., *Public Interest Litigation in Pakistan*, (Karachi: Pakistan Law House, 2000), 30.

⁷⁹ See, Article 8(5) which allows the suspension of the fundamental rights as proclaimed by the Constitution, 1973. See, Article 233 of the same. Under these provisions guarantee for fundamental rights has not been provided.

⁸⁰ See, Proclamations dated 24th January, 1949; 29th December, 1951; 14th March, 1954; 29th May, 1954; 27th March, 1955; 2 6th May, 1956; 31st

August, 1956; 21st March, 1957; 25th June, 1958; For these: Constitutional Documents of Pakistan, Ministry of Law and Parliamentary Affairs, Law Division Vol. IV-B, Orders and Proclamations, 1823, 1827, 1831, 1834, 1838, 1839, 1843, 1847, 1854; For adverse consequences of these Proclamations on fundamental rights, and judicial powers, see, Abdul Quddoos Sial, "Constitutional Deviations and their Implications for Democracy in Pakistan," PhD Diss., (The Islamia University Bahawalpur, 2005), 114-117.

⁸¹ Since 1947, four times martial law has been on imposed in the country. It was pretended in the name of Islamic democracy aiming at socio-economic justice through ensuring the enforcement of civil liberties and maintaining the rule of law. First martial law was enforced on 7th October, 1958; see, Constitutional Documents of Pakistan, Ministry of Law and Parliamentary Affairs, Law Division, Vol. IV-B, Orders and Proclamations, p. 1857; Second martial law, on 25th March, 1969; Third Martial Law on 5th July, 1977; See, Proclamation of martial law 1977, CMLA Order 1 of 1977. For detail discussion and effects of these martial laws on constitutional system and fundamental rights and judicial powers; See, Sial, Constitutional, 204-278); Fourth martial law was forced on 14th October, 1999; See, PLD 1999 Central Statutes 448 and again emergency was proclaimed on 3 November 2007; See, PLD 2008 Federal Statute 108 and the Constitution was suspended, and Provisional Constitution Order 1 of 2007 was issued; see, PLD 2008 Federal Statutes 110). Besides, the imposition of martial laws, four times assemblies and governments have been dissolved in the years 1988, 1991, 1993, 1996.

⁸² see, Alam, *Law*, 25, in Menski et al., Public.

⁸³ see, Paul R. Newberg, Paul R., "Judging the State, Courts and Constitutional Politics in Pakistan," (Cambridge University Press, 1995), 169.

⁸⁴ Ibid.,

⁸⁵ Ibid.,

⁸⁶ See, Article 2-A (principles of democracy, equality, tolerance, freedom, and social justice, as pronounced by Islam); Article 3 (elimination of all types of exploitation); Article 4 (people to be treated in accordance with the law); Articles 29-40 (Principles of Policy) of Constitution, 1973.

⁸⁷ See, Article 3 of the Constitution, 1973.

⁸⁸ See, Articles 29-40 of the Constitution, 1973.

⁸⁹ See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416.

⁹⁰ See, Sujata Manohar, "Human Right Agenda: A perspective for Development," Vol. 45, *J.I.L.I.* (2003), 169.

⁹¹ Right to life has been expanded to included the environmental protection; See, *Shehla Zia v. WAPDA*, PLD 1994 SC 693; See, *Khalil-uz-Zaman v. Supreme Appellate Court, Lahore*, PLD 1994 SC 885, clean water ; see, *General Secretary West Pakistan v. Director Industries*, 1994 SCMR 2061 allotment of residence; See, *Employees of Pakistan Law Commission v.*

Ministry of Works, 1994 SCMR 1548, Rule of Law and Judicial Independence; See, *Malik Assad Ali v. Federation of Pakistan*, PLD 1998 SC 161; *Shah Liaquat Hussain v. Federation of Pakistan*, PLD 1999 SC 504.

⁹² See, Article 2-A, of the Constitution, 1973.

⁹³ See, Articles 9-28, *Ibid.*

⁹⁴ See, Articles 29-40, *Ibid.*

⁹⁵ *Ibid.*,

⁹⁶ See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416, 489.

⁹⁷ *Ibid.*,

⁹⁸ See, Article 4 of the Constitution, 1973; PLD 1978 Lahore 523.

⁹⁹ See, Mohammad Afzal Zullah, "Human Rights in Pakistan, Commonwealth Law Bulletin," (London: Commonwealth Law Secretariat, 1992), 1343.

¹⁰⁰ See, Raza, *Reviewing*, in Menski et al., *Public*, 72.

¹⁰¹ See, Khalid Ishaque, "Powers of the Supreme Court under Article 184(3) of the Constitution" referred in Hussain, Faqir, *Public*, 5.

¹⁰² See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416.

¹⁰³ See, Article 187(1) of the Constitution, 1973.

¹⁰⁴ See, Articles 3 and 6, the Constitution 1789 of United States of America; Articles 32 and 226, the Constitution, 1950 of India; Articles 199 and 184(3), the Constitution, 1973 of Pakistan; Articles 102, the Constitution, 1971 of Bangladesh; Section 3 of the Human Rights Act, 1998 of UK.

¹⁰⁵ Though there is no express provision imposing legal obligation on the UNO member-states to get the basic human rights enforced. However, such an obligation is in Article 56 which provides that "*all Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in article 55.*" In this context Article 55 asserts that UNO shall attempt to endorse the widespread recognition for, and preservation of human rights and fundamental freedoms for all. The UDHR, 1948, though, is of limited importance from a practical point of view; however, it has an important contribution for securing the human rights; See, also European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953; Article 2, ICCPR, 1966; Article, 2, ICESCR, 1966.

¹⁰⁶ See, Third Schedule, Oaths of Office of Judges of the Superior Courts, the Constitution, 1973.

¹⁰⁷ See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416; See, also, Alam, *Law*, in Menski, et al., *Public*, 36-41.

¹⁰⁸ *Ibid.*,

¹⁰⁹ See, *Pakistan Broadcasters Association v. Pakistan Electronic Media Regulatory Authority*, PLD 2016 SC 692.

¹¹⁰ *Ibid.*,

¹¹¹ *Ibid.*,

¹¹² See, Article 19 of the Constitution, 1973.

¹¹³ See, *Pakistan Broadcasters Association v. Pakistan Electronic Media Regulatory Authority*, PLD 2016 SC 692.

¹¹⁴ Ibid.,

¹¹⁵ Ibid.,

¹¹⁶ See, *Younas Iqbal v. Additional Sessions Judge*, PLD 2016 SC 58

¹¹⁷ Ibid.,

¹¹⁸ See, *Younas Iqbal v. Additional Sessions Judge*, PLD 2016 SC 581.

¹¹⁹ See, *Khan Asfandyar Wali v. Federation of Pakistan*, PLD 2001 SC 607.

¹²⁰ See, Articles 199 and 184(3) of the Constitution, 1973.

¹²¹ See, *Dr Mobashir Hassan v. Federation of Pakistan*, 2010 PLD SC 265.

¹²² See, Section 33F of the National Accountability Ordinance, 1999, inserted through Section 7 of NRO.

¹²³ See, Article 2A of the Constitution, 1973.

¹²⁴ See, Articles 12, 13, 25 of the Constitution, 1973.

¹²⁵ See, *Baz Muhammad Kakar v. Federation of Pakistan through Ministry of Law and Justice*, 2012 PLD SC 923.

¹²⁶ See, Article 204 of the Constitution, 1973

¹²⁷ Ibid.,

¹²⁸ See, *Sh. Riaz-Ul-Haq v. Federation of Pakistan through Ministry of Law*, PLD 2013 SC 501.

¹²⁹ See, Articles 2A, 9, and 175 of the Constitution, 1973.

¹³⁰ See, s. 3(1), (3), (3)(b), (4) & (7) of the Service Tribunals Act, 1973; S.3(3)(b) of the Sindh Service Tribunals Act, 1973; S.3(3)(b) of the Khyber Pakhtunkhwa Service Tribunals Act, 1974; S.3(3)(b) of the Balochistan Service Tribunals Act, 1974; Rule 1 of Federal Service Tribunal Chairman and Members Service Rules, 1983; and Rule 2 of Service Tribunals (Qualifications of Members) Rules, 1974.

¹³¹ See, Articles 2A, 9, and 175 of the Constitution, 1973.

¹³² See, *Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law*, 2012 PLD SC 1089.

¹³³ See, Article 63(1)(c) of the Constitution and Sec.14 of the Pakistan Citizenship Act, 1951.

¹³⁴ See, Article 63(1)(c) of the Constitution and S.14 of Pakistan Citizenship Act, 1951 (as amended by Pakistan Citizenship (Amendment) Act, 1972.

¹³⁵ See, Article 63(1)(c) of the Constitution.

¹³⁶ Section 78 of Representation of the People Act, 1976.

¹³⁷ Section 82 of the Representation of the People Act, 1976 read with Sections 193, 196, 197, 198, and 199, PPC.

¹³⁸ See, *Province of Sindh Through Chief Secretary v. M.Q.M. through Deputy Convener*, PLD 2014 SC 531; S. 13(1), Sindh Local Government (Third Amendment) Ordinance (XV of 2013).

¹³⁹ Ibid.,

¹⁴⁰ Ibid.,

¹⁴¹ Ibid.,

¹⁴² See, *Munir Hussain Bhatti v. Federation of Pakistan*, PLD 2011 SC 407.

¹⁴³ See, *Nadeem Ahmad Advocate v. Federation of Pakistan*, PLD 2010 SC 312.

¹⁴⁴ See, <<https://www.dawn.com/news/1684133>> accessed on 19 April 2022.

¹⁴⁵ See, Suo moto case No. 1 of 2022; <<https://www.dawn.com/news/1683857>> accessed on 19 April 2022.

CHAPTER FIVE

THE DOCTRINE OF SEPARATION OF POWERS AND EXECUTIVE ACTION

5.1 INTRODUCTION

Chapter four examined how the courts have protected fundamental rights while employing the doctrine of separation of powers in the context of legislative action. It explored the law-making domain of the federal and the provincial legislatures. It also briefly examined the justification for the judicial review of legislative action. Finally, it analysed some cases to assess how the courts have applied the doctrine of separation of powers for the purpose of protecting fundamental rights in Pakistan.

This chapter explores how the courts have examined executive action in order to protect fundamental rights. It attempts to answer a few questions, which are as follows: What is the extent of the power of the federal and the provincial governments? What is the nature and the scope of the functions of the executive? What is the constitutional justification for the judicial review of executive action? On which grounds can executive action be reviewed by the courts? How can judicial review be exercised in a balanced manner?

Answers to these questions are important as they help to examine the hypobole of this study, which aims to explore the relationship between the three organs of the state to assess its impact on the protection of fundamental rights in Pakistan. Thus, this chapter contributes to proving the overall hypobole of the book.

5.2 THE EXTENT OF THE POWER OF THE FEDERAL GOVERNMENT

The federal government exercises the executive power of the federation in the name of the President. The federal government consists of the Prime Minister and the federal ministers. The Prime Minister is the chief executive of the federation and the federal government acts through him. The Prime Minister may act directly or through his ministers to fulfill his duties under the Constitution.¹ The Cabinet comprises of the Prime Minister and his ministers. The Prime Minister heads the Cabinet. The Prime Minister and the Cabinet remain accountable to the Parliament for the performance of their executive functions. The Cabinet also advises the President concerning his constitutional duties.² The federation has executive authority in all matters on which the Parliament can legislate.³ On the request of the federal government, the federal legislature, through a legislative enactment, can also empower the subordinate officers or authorities of the federal government to perform different executive functions.⁴

Ordinarily, the authority of the executive is limited only to execute the laws in existence. The very nature of fundamental rights implies that they cannot be taken away by the executive except in accordance with the law.⁵

5.3 THE EXTENT OF THE POWER OF THE PROVINCIAL GOVERNMENT

The executive power of the provinces extends to subjects on which the provincial legislature has the authority to make laws. The executive authority of the federal government shall prevail over that of a provincial government with respect to matters over which both a provincial legislature and the federal legislature have law-making authority.⁶ Like the federal government, the provincial government can also empower the subordinate officers of the provincial government through legislation to perform different functions of an executive nature.⁷

5.4 FUNCTIONS OF THE EXECUTIVE

The role of the executive includes the governance of the country, excepting the law-making function of the legislature and the judicial function of the courts, which is an essential feature of the doctrine of separation of powers. However, a limited legislative role has also been assigned to the executive through the Constitution, which includes making laws through ordinances and delegated legislation.

Executive authority generally includes maintaining law and order in the country, defense of the state, the advancement of prosperity and welfare of the state, the provision of basic rights to the people, the management of public administration, and the development of good relations with foreign states. Executive duties are performed over a range of subjects, extending from the making of state policy to the administration of the affairs of the government. Executive functions are performed in the name of the President.

Executive functions of the state, in any constitutional government, are disseminated amongst different institutions and government officials. The armed forces, the police, the local authorities, and statutory bodies perform specialized executive functions.⁸ The nature of executive functions demonstrates a division of powers among different

organs of the state.⁹ These organs are required to exercise their respective functions in accordance with the constitution.¹⁰

Thus, the following two sections discuss the supremacy of the Constitution and the authority of the courts to interpret the Constitution. This discussion will help to sharpen the understanding of the courts' exercise of judicial review in order to protect fundamental rights in Pakistan.

5.5 SUPREMACY OF THE CONSTITUTION

The executive, the legislature, and the judiciary are creations of the Constitution. Thus, it is the Constitution which provides for their powers and the limits of those powers. Each institution is obliged to follow the spirit and dictates of the Constitution. With reference to the enforcement of fundamental rights and the separation of powers, the judiciary is authorized to uphold the supremacy of the Constitution. If the judiciary fails to maintain constitutional supremacy, the fundamental rights of the people suffer.

The Constitution is supreme.¹¹ Since the Constitution embodies the will of the people, it must be upheld to protect the basic rights of the citizens. In case of any conflict among the acts of any branch of the government and the Constitution, the latter will hold.¹² The primacy of the supreme law of the land is, thus, a basic purpose and feature of any written constitution.

A written constitution puts limits on the authority of the government. If the written constitution is not held supreme, the whole concept of constitutional government would be defeated.¹³ The constitution, being the supreme law of the land, carries the highest normative status in any legal system.¹⁴ The Constitution is considered supreme as it contains the cluster of supreme principles and rules, which establish and regulate the institutional arrangements of a state.¹⁵

A written constitution serves two basic purposes. First, it envisages the concept of limited government and the norm of

constitutionalism. Second, it provides and protects fundamental rights.¹⁶ The Constitution of Pakistan also stipulates these two key functions of a constitutional government. Again, with reference to any written constitution, two questions are very important. First, who is responsible for interpreting and maintaining the rule of the Constitution? Second, what are the parameters of exercising such constitutional authority? The next section briefly examines these two questions.

5.6 JUDICIAL AUTHORITY FOR INTERPRETING THE CONSTITUTION

All state authorities are required to protect the Constitution.¹⁷ All government officials are obliged to uphold the Constitution, including those officials who interpret the Constitution in the course of making and applying the law.¹⁸ However, the existence of a separate and independent judiciary is a must for upholding and interpreting the Constitution and protecting fundamental rights.¹⁹ Without such judicial authority, there would be a confusion of institutional power and a constitutional crisis in any government.²⁰

Locke and Montesquieu were of the view that people preserve and protect their Constitution through their chosen representatives.²¹ Dicey argued that only a Monarch could effectively hold power and arbitrate a balance of powers between the various organs of a political state.²² However, modern democracies functioning under written constitutions bestow this authority on the judiciary as it is considered to be a neutral institution of the government.²³ Without a neutral and independent arbitrator, the constitution would be a dead letter.²⁴ The judiciary is, thus, the final authority on the constitution as the constitution is what the courts say it is.²⁵ It is the obligation of the judiciary to interpret as well as uphold the constitution. In case of any ambiguity as to the meaning and scope of the constitution and its consonance or conflict with any other sub-constitutional law, the judiciary, alone, must decide the matter.²⁶

If any institution transgresses its constitutional domain, the judiciary is bound to maintain institutional checks and balances.²⁷ Justice Jackson observed that the judiciary is obliged to interpret the constitution, and, thereby, to maintain the system of checks and balances and uphold the doctrine of separation of powers in a society in which fast changes upset the institutional equilibrium, without exceeding its own limited powers.²⁸ An emphasis may be placed on the phrase '*without exceeding its own limited powers*'. This means that while restraining the transgressions of other branches, the judiciary in itself must be cognizant of the use of its *own* power. It *must* restrain itself. This is because if the institution that is responsible to maintain constitutional balance between the three branches of the government itself undermines the constitutionally provided balance of power, it would destabilize the overall system of constitutional governance, as a result of which fundamental rights would suffer. In this context, Chief Justice John Marshall said that it is for the judges to say what the law is;²⁹ he also observed that we need never overlook it is a constitution we are construing.³⁰ Similarly, in the UK, it is for the judiciary to determine and pronounce what the common law is.³¹ However, while pronouncing the law, the judiciary can neither make policy nor execute it on behalf of other organs of the state. If it does so, it would violate the doctrine of separation of powers and will undermine the fundamental rights of the people.

The courts may not be totally immune from the political dynamics of their time; however, the courts are much more likely than other institutions to have the required impartiality to examine constitutional questions fairly and to implement the fundamental values embedded in the constitution in a balanced manner.³² Pakistan's judiciary has reaffirmed this principle by pronouncing that it is the mandate of the judiciary to maintain the supremacy of the Constitution.³³

5.7 INTERPRETING THE CONSTITUTION THROUGH JUDICIAL REVIEW

The constitution is interpreted and upheld through the courts' exercise of judicial review.³⁴ The courts use their power of judicial review in accordance with the doctrine of separation of powers. The courts review the functions of both the executive and the legislature to ensure that these branches do not transgress their constitutionally prescribed boundaries, and, thereby, affect the fundamental rights of the people. Judicial review, in fact, works as a check on governmental powers. It is an effective measure that keeps state functionaries under constitutional check and legal control.³⁵ The concept of judicial review is briefly discussed in the following paragraphs in order to provide a foundational understanding of the concept before a thorough analysis of the competing approaches of judicial review in the next chapter.

The concept of judicial review has been understood and defined within a specific political and constitutional context. Brian Thompson, for example, defines judicial review as the authority of the judiciary to declare void any executive or legislative action that fails to conform to the Constitution.³⁶ E.S. Crown stated that judicial review is the authority of the judiciary to examine the validity and constitutionality of the actions of the legislature and the executive.³⁷ According to S.P. Sathe, judicial review means judicial scrutiny of the functions of the government on the touchstone of the constitution.³⁸

Justice Brennan argues that judicial review is the enforcement of the rule of law over executive action in order to ensure that the executive does not transgress its powers, so that the rights of the citizens can be protected.³⁹ Determining the legitimacy of governmental acts on the basis of the constitution is how the concept of judicial review is understood in Pakistan.⁴⁰

In any democratic system, judicial review is used to interpret and enforce the constitution to uphold constitutionalism and the fundamental rights of the people.

Historically, the foundations of judicial review were laid down by Greek philosophers.⁴¹ The modern conception of judicial review, however, has developed in the constitutional jurisprudence of the US and the UK. While exercising its power of judicial review, the US Supreme Court, in the case of *Marbury v. Madison*, annulled an act of Congress as unconstitutional.⁴² This judgment has provided conceptual premises to the concept of judicial review and the doctrine of separation of powers. John Marshal has emphatically stated that the phraseology of the US Constitution confirms that laws inconsistent with the written constitution are null and void.⁴³ This jurisprudence has influenced the constitutions of different states, including Pakistan.⁴⁴

In Pakistan, the courts have extensively exercised their power of judicial review to examine the executive and legislative acts of the government in order to protect the fundamental rights of the citizens. The doctrine of ‘trichotomy of power’, as envisaged in the Constitution of 1973, provides a conceptual rationalization for the exercise of judicial review by the judiciary.⁴⁵ It is argued that only the judiciary should interpret and enforce the Constitution and the fundamental rights guaranteed therein.⁴⁶ However, there is some disagreement as to the scope and the extent of the courts’ power of judicial review. This disagreement will be thoroughly examined in the next chapter.

The following section briefly discusses the grounds for the judicial review of executive action by the courts. It will help to analyse executive action in relation to the cases concerning fundamental rights discussed in the following part.

5.8 THE GROUNDS FOR JUDICIAL REVIEW OF EXECUTIVE ACTION

An executive act can be declared void if the same is unlawful or if it contravenes the constitution. By using their powers of judicial review, the courts exercise an effective check on the executive when the latter transgresses from its

constitutional authority. There are some jurisdictional principles such as the doctrine of reasonableness, improper motive, irrelevant considerations, acting under dictation, abdication of authority and subjective discretion that enable the courts to regulate the use of power by executive authorities. These principles are discussed as follows:

5.8.1 THE DOCTRINE OF REASONABLENESS

The doctrine of reasonableness provides that the executive should use its discretionary powers in a reasonable manner. It means that executive powers have to be used judiciously and not in an arbitrary and unpredictable manner.⁴⁷ Capricious use of jurisdiction has been referred to as misuse of power.⁴⁸ For example, in *Safar Ali v. Province of East Pakistan*,⁴⁹ acquisition of land by executive authorities in the absence of an immediate need for doing so for a public purpose has been held to be arbitrary. In *Akbar Ali v. Raziur-ur-Rehman*,⁵⁰ following the cancellation, by an election tribunal, of certain ballot papers which were proved to be free from defect, the court observed that the tribunal had acted wantonly in excluding from count those ballot papers as spoiled. The court struck down such order for being unreasonable, arbitrary, and capricious.

5.8.2 IMPROPER MOTIVES

In the case of *Safar Ali v. Province of East Pakistan*,⁵¹ the government issued notifications for the acquisition of a piece of land, declaring that the property was required for a public purpose, when, in fact, it was needed by a commercial company. The acquisition was held to be invalid. In *Zafar-ul-Ahsan v. The Republic of Pakistan*,⁵² the court stated that the executive proceedings were mala fide, since the government had used a piece of legislation just as a cap to hide the true motive behind its actions, pretending to have undertaken such actions in accordance with the law, when in reality, this was not the case. If a government awards a contract to favor a

particular contractor without following the relevant rules, such an act could be said to have been done with an improper motive.

5.8.3 IRRELEVANT CONSIDERATIONS

In *Associate Provincial Picture House Ltd v. Wednesbury corp*,⁵³ the court held that it is an established principle that in exercising their discretion, executive officials should consider relevant matters and ignore irrelevant considerations. In the case of *Deputy Director of Consolidation v. Deen Ba Ndhu*,⁵⁴ a settlement authority disallowed a request for authorization to carry out an interchange of properties on the ground that permitting the authorization would bring about substantial labor for the authorities of the settlement branch. Here, the court observed that such grounds were not appropriate for the dismissal of the petition, being based on irrelevant considerations.

5.8.4 ACTING UNDER DICTATION

Discretion can only be exercised by the persons authorized by the statute. One of the rules to ensure this policy is that the persons so authorized must not act under the dictation of others. In the case of *B Rajagopala v. S.T.A Tribunal*,⁵⁵ a licensing authority had acted under directions issued by the government, which had not been authorized to do so by statute. Hence, the decision of the licensing authority was set aside. Even where the government delegates certain authority to one of its officers, such an officer is required to act on his own satisfaction and not under dictation from his delegator. The case of *Noor Mohammad v. District Magistrate*,⁵⁶ establishes that a district Magistrate, empowered by the government to carry out arrest and detention of certain citizens, can only do so on its own satisfaction and should not refer the matter to the government for further satisfaction.

5.8.5 ABDICATION OF AUTHORITY

This principle requires that persons invested with discretion must exercise it properly and not surrender their power to any other authority. Thus, in *Ghulam Mohiuddin v. Chief Settlement Commissioner*,⁵⁷ where the Chief Settlement Commissioner did not apply his independent mind to the question raised on the petition (concerning the divisibility of a house and the entitlement of the parties to the dispute) for revision but merely countersigned the note put up by the Settlement Commissioner, it was held that he had not exercised the jurisdiction vested in him. In *Hamid Javed v. Dean, Faculty of Engineering*,⁵⁸ the court held that expulsion from a scholarship scheme by a government department did not render a student liable to be expelled from the university. The court observed that expulsion from the university had to be ordered by the proper authority in accordance with the relevant statutes and regulations.

5.8.6 SUBJECTIVE DISCRETION

In *Muhammad Tufail v. Province of Punjab*,⁵⁹ the exercise of subjective discretion by an executive authority allowed under an enactment was brought under judicial review. The court held that expressions such as “*shall make such orders as it may think fit*” do not allow an authority to make a fanciful or arbitrary order unrelated to the case before it. The order should be as per the rule of reason and the law and uphold justice. In *Nasim Fatima v. Government of West Pakistan*,⁶⁰ an authority had detained a person it suspected on grounds that appeared to it to be reasonable. It was held that the reasonableness of the grounds was personal to the authority and not objective, so the courts could examine their reasonableness.

The following section will discuss three different approaches of constitutional interpretation, namely, the theory of jurisdictional retrenchment, the theory of process-oriented judicial review, and the theory of structural judicial activism. The case studies used in chapters 4 and 5 show that the courts

have largely appreciated these theories while exercising their powers of judicial review, which has, in turn, helped to protect fundamental rights. However, our judiciary, occasionally, appears to deviate from these theories of judicial review, thereby impeding the protection of fundamental rights in Pakistan.

5.9 THE THEORY OF JURISDICTIONAL RETRENCHMENT

The theory of judicial retrenchment was presented by Jesse H. Choper while reconciling competing approaches of judicial review, namely judicial restraint and judicial activism.⁶¹ This theory primarily concentrates on the *political process* of the government that allotted constitutional powers to the judiciary,⁶² which shows that Choper was less concerned about the interpretation of the constitution by the judiciary and more inclined to find out when the judiciary could or should intervene in the political process.⁶³ He advanced startling proposals regarding the interpretation of the constitution, including the doctrine of separation of powers and provisions on fundamental rights, which were aimed at regulating and protecting judicial power.⁶⁴

Choper considers the judiciary a deviant institution and appreciates the advantages of passive virtue.⁶⁵ At the same time, he argues for an assertive judiciary when it comes to safeguarding the basic rights of the people against the transgressions of the state.⁶⁶ He seems to find a balanced, principled, and functional role for judicial review.⁶⁷ He suggests that the judiciary should abstain from taking decisions which would affect the constitutional distribution of powers between the institutions of the state, as this would weaken democracy.⁶⁸ However, he maintains that the judiciary should resist when the government attempts to restrict judicial power. He argues that jurisdictional retrenchment *preserves* the *moral* and *constitutional* powers of the judiciary, which can be applied when the rights of the citizens are endangered by the government.⁶⁹

Choper appreciates the distribution of state power under a federal system of government. He concedes that while the judiciary is subject to some political influence, it is the least democratically responsive institution. However, he notes that, as opposed to the judiciary, the other branches of the government are purely democratic.⁷⁰ Therefore, he argues that the judiciary should remain within its constitutional limitations envisaged by the doctrine of separation of powers in order to safeguard democracy.⁷¹

Choper was aware of the counter-majoritarian dilemma of the active use of judicial review. He feared that judicial activism could lead to a conflict between the judiciary and the legislature, which could result in the legislature curtailing judicial power by limiting jurisdiction, impeaching judges and overruling judicial decisions.⁷² The legislature and the executive could also defy the mandate of the judiciary, and, thereby, severely affect its capacity to enforce fundamental rights.⁷³ Therefore, Choper suggested that the courts should exercise their powers of judicial review with care and caution.

Choper is mainly concerned with three areas: the rights of individuals, federal matters, and the separation of powers. To him, the most appropriate subject for exercising judicial power is individual rights. It is the duty of the judiciary to protect the rights of the people if they are infringed by other branches of the government.⁷⁴ Choper considers that the courts should avoid examining federal matters as these can be better resolved through political processes.⁷⁵ If a similar or better solution could be found through political institutions, the judiciary should restrain from interfering in such political matters.⁷⁶ Finally, Choper advises that the judicial organ should observe the concept of separation of powers in its letter and spirit and avoid taking cognizance of matters which fall in the domain of the other branches of the state. He considers that if the judiciary were to be prevented from exercising judicial review in policy matters, this could lead to the judiciary appearing weak and cause damage to the judiciary. Therefore, it would be safer to leave such matters to the wisdom of the legislature and

the administration of the executive.⁷⁷ To him, judicial restraint is better than inappropriate judicial intervention.⁷⁸

Choper's theory has received criticism from a few scholars. For instance, Greg Jones argues that while the theory of judicial retrenchment apparently looks reasonable, it suffers from serious problems as it fails to take into account the rapid changes occurring in the political process and the increasing power of governments.⁷⁹ Calabresi declares Choper's views a historical anomaly due to the changing nature of modern democracies.⁸⁰ According to O'Brien, Choper fails to address the current controversies concerning the role of the judiciary in ordering and supervising institutional reforms.⁸¹ Hence, he states that Choper's proposals do not present a modest judicial approach.⁸²

Notwithstanding this criticism, Choper's theory seems to be a break-through from the mainstream conception of judicial activism and judicial restraint. In any constitutional government, no institution can be granted unrestricted powers. Hence, Choper's theory can be endorsed for upholding constitutionalism and the separation of powers. Choper's theory concerning the constitutional role of the courts, thus, possesses qualitative implications for the doctrine of separation of powers between the three organs of the state in Pakistan.

5.10 THE THEORY OF PROCESS-ORIENTED JUDICIAL REVIEW

John Hart Ely presents the theory of process-oriented judicial review to address the challenges posed by judicial activism and judicial restraint. He stresses that all the institutions should work within their constitutional domain to preserve the *overall scheme of the constitution*, uphold democracy, and protect civil liberties.⁸³ He appreciates the difficulty the judiciary encounters in drawing clear lines between the allotted spheres of each institution while interpreting the constitution. He rejects the idea that constitutional provisions are self-contained and can be

interpreted without seeking help from external sources, such as legislative history.⁸⁴

Ely criticizes judicial restraint as it promotes a rigid following of the constitution in an attempt to find the intent of the law-makers. He considers that judicial activism is also employed by the judiciary to impose subjective views of the judges on other branches of the government, which negates the very essence of the constitution and of democratic dispensation. Considering the flaws and inadequacies of these theories of constitutional interpretation, Ely proposes a 'representation reinforcing theory' that focuses on the 'constitutional scheme'. This theory dictates that judges should interpret the constitution in a way that appreciates each provision of the constitution, its scheme as a whole, and the overall structure of the constitution.

Ely builds his understanding of constitutional interpretation on three themes: first, the Constitution is based on democratic underpinnings; second, it promotes procedural fairness in the adjudication of disputes between the state and the citizens and desires open participation in the enterprise of the government; and third, judges are expected to be experts in order to ensure procedural fairness in dispute resolution.⁸⁵ According to Ely, judicial review should follow the overall arrangement of the constitution as well as the objectives of democracy.⁸⁶ Protecting the democratic process and democratic institutions as well as the fundamental rights of the people should be the guiding principles for judicial review.⁸⁷

While referring to some court decisions,⁸⁸ he speaks of the legitimate exercise of judicial review—that is, the judiciary should ensure open participation in the political process as opposed to interfering in the merits of the political choice and political decisions.⁸⁹ Ely's insistence on procedural fairness suggests that he is deeply concerned about the rights of the people, while his emphasis on the judiciary refraining from interfering in political matters shows his concern for upholding the independence of democratic institutions.

In fact, Ely favors a proactive use of the courts' powers of judicial review for the enforcement of procedural fairness, which would expand the freedom and the choice of the people to participate in the democratic process for the realization of their rights and help hold the government responsible and accountable to the people.⁹⁰ In his final analysis, Ely draws attention to the basic feature and the structural elements of the constitution, namely the balance of powers, federalism, and the basic rights of the citizens. His theory of constitutional interpretation promotes constitutionalism and democracy by preventing the courts from intervening in political questions and preferences, which are better left to political players and actors, and by encouraging the courts to safeguard the basic rights of the citizens from the encroachments of other organs of the state.

5.11 THE THEORY OF STRUCTURAL JUDICIAL ACTIVISM

Greg Jones highlights the basic structure of the constitution while appreciating a space for variations in written constitutions in different parts of the world. He contemplates the division of powers as the supreme feature of any constitution.⁹¹ These two features, in fact, protect individual freedoms and liberties from the transgressions of the legislature and the executive.⁹²

The doctrine of separation of powers dictates the distribution of governmental authority amongst the federal and state units. This is known as vertical distribution of powers. The doctrine also divides powers between state institutions horizontally so that a system of check and balance may be introduced in order to protect the rights of the citizens from the aggression of state institutions. Under federalism, political authority is divided amongst the federal and provincial units. Thus, both federalism and the doctrine of separation of powers are integrated and serve the same purpose—that is—a division of political power. These features of the constitution are integral for any constitutional government as they safeguard

the fundamental rights of the citizens from the tyranny of the majority government or any institution or branch of the government.⁹³

Jones considers that judicial review, while appreciating the constitutional structure, promotes democratic governance and protects the fundamental rights of the people.⁹⁴ Steven G. Calabresi supports Greg Jones and argues that the judiciary should take into account the structure of the constitution, while interpreting the constitution, when exercising its powers of judicial review.⁹⁵

It may be argued that judicial review is the most important power given to the judiciary. It allows the judiciary to promote constitutional governance and protect the rights of the citizens. At the same time, it may be used as an instrument to weaken democracy while incapacitating other branches of the government through judicial activism. The judiciary, through judicial activism, can attempt to impose a judicial solution on issues of a purely political nature.⁹⁶

Greg Jones categorizes judicial review into ‘proper’ and ‘improper’ categories. According to him, improper exercise of judicial review involves judges interfering into political issues, which the constitution prohibits, either expressly or impliedly.⁹⁷ Such an exercise of judicial review challenges the constitutional concept of the division of powers and is an affront to democracy. In such a case, judicial decisions do not come from the constitution but from the subjective views of the judges. An improper exercise of judicial power involves judges assuming themselves to be the savior of the people and the flag-bearers of morality and goodness; they adopt the role of a revolutionist or a passionate reformer.⁹⁸

However, Greg Jones does not lose hope while considering the challenges of the improper exercise of judicial review. He states that there is a way of using the power of judicial review in an appropriate manner,⁹⁹ which he terms ‘proper judicial activism’. Proper judicial activism, too, centers on the structure of the constitution and demands restraint on the part of judges while examining and nullifying acts of the other

organs of the state.¹⁰⁰ This method of judicial review discourages the judiciary from stepping into the shoes of the other branches.¹⁰¹

Structural activism or proper judicial activism promotes proper statutory interpretation,¹⁰² judicial integrity,¹⁰³ and fidelity to the constitution.¹⁰⁴ This type of judicial review is both justified and required under written constitutions. Written constitutions imply a system of checks and balances that may not be secured without allowing the judiciary a proper space to construe and enforce the constitution, which helps keep all institutions, including the judiciary, in their limits, protect the fundamental rights of the citizens, and uphold the integrity and supremacy of the constitution.¹⁰⁵ Eaton supports Greg's theory of constitutional interpretation as it serves a carefully designed purpose, namely, to preserve the structure of the constitution for the stability of a polity.¹⁰⁶

Brutus suggests that judges are independent, *both of the legislature as well as of the people*. Their judgment cannot, therefore, be corrected by any power above them.¹⁰⁷ Greg Jones referred to Brutus's view as an exaggeration. As opposed to Brutus, Greg considers that judges should not force decisions, but pass a judgment upholding the sense of the law. He states that even the efficacy of judicial decisions depends on the aid of the executive for the enforcement of judicial decisions.¹⁰⁸ Greg basically argues for a restrained or proper exercise of judicial review while preserving the structure of the constitution.

The written constitution conceives a limited government. This means that no organ of the state enjoys absolute or unfettered powers. Rather, state power is distributed amongst three organs: the legislature, the executive, and the judiciary.¹⁰⁹ Unrestricted use of judicial review does nothing except to block legislative or executive initiatives.¹¹⁰ In the words of Choper, "venturing beyond the constitution is to call upon the individual conscience, which is not the law".¹¹¹ Therefore, a proper exercise of judicial power, as proposed by Greg Jones, would help in upholding the rule of the constitution, preserving

the essence or the structure of the Constitution, promoting democracy, and protecting fundamental rights.

The following section examines cases concerning fundamental rights. An analysis of these cases demonstrates how the judiciary has employed the doctrine of separation of powers for protecting fundamental rights in Pakistan.

5.12 JUDICIAL REVIEW OF EXECUTIVE ACTION

In *Shahab Usto v. Government of Sindh through Chief Secretary and Others*,¹¹² the court determined the issue of the availability of clean drinking water to the residents of Sindh. The reports and visual footage produced in the court revealed that polluted water had seeped into the canals and main rivers, adversely affecting the health of the citizens. It was argued that the provincial government had failed to safeguard the fundamental rights of the citizens of access to clean drinking water and to a safe environment.

The court heard the contentions of the parties and ordered that the visual reports be sent to the provincial assembly so that the representative of the people could appreciate the prevailing conditions of drinking water and sanitation in Sindh. The court also ordered the provincial government to act as per the directions of the commission constituted by the court and provide all required support to the commission to achieve its objective i.e. ensuring the supply of clean drinking water. The commission was empowered to seek any information related to the issue of water supply in Sindh and to pass any order for the compliance of its objectives, which would be binding on all provincial authorities. This case shows judicial review of executive action can help protect fundamental rights.

In *Mustafa Impex, Karachi v. The Government of Pakistan*,¹¹³ the federal government exempted certain companies, which imported cellular phones and textile-related items, from the sales tax in 2008. However, the government

withdrew these exemptions via notifications issued in 2013. The impugned notifications were signed by the Additional Secretary of Finance with the approval of an advisor of the Prime Minister.

M/s. Mustafa Impex challenged the notifications of 2013 in the court on the ground that an Additional Secretary was not competent to issue such notifications. While elaborating the role of the Cabinet in a parliamentary form of government such as Pakistan, the court specifically referred to the protection of the rights and liberties of the people. The court held that the federal government consists of the members of the Cabinet and the Prime Minister. It explained that the Prime Minister alone cannot perform executive functions on behalf of the Cabinet. On this premises, the court set aside the impugned notifications issued by the federal government. This case demonstrates how the courts can review the actions of the executive without indulging in judicial outreach and protect the fundamental rights.

In *Haider Ali and another Versus DPO Chakwal and others*,¹¹⁴ the court dealt with the issue of the misuse of authority by the police regarding the recording of a First Information Report, orders of the Justice of the Peace, violations of the fundamental rights of the citizens, and the accountability and performance of police.¹¹⁵

The court observed that even the earlier orders of the instant court concerning the betterment of the criminal justice system had been ignored by the executive. The court noted that desecration of fundamental rights by executive authorities demonstrates lawlessness on the part of the executive. The court also observed that a strong criminal justice system helps to safeguard and promote basic rights as well as democracy in the country.

Moreover, the court ordered the training of the police and directed that funds be made available to the police for conducting investigations. The court ordered the relevant authorities to make a website for the public to file complaints. The court further directed that, until the making of the website,

Section 154 of the Code of Criminal Procedure, 1898 (“CrPC”) had to be followed by the police and that legal action should be taken against any police officer who failed to obey the aforementioned directions. Furthermore, the court stated that strict action must be taken against vexatious complaints and criminal cases ought to be recorded under the law.¹¹⁶ The court held that the police ought not to detain any person in the absence of any adequate proof to support such detention.¹¹⁷ Moreover, the court stated that in the case of a wrongful arrest, compensation was to be paid by the relevant police officer to the aggrieved person. Finally, the court ordered the concerned police officers to submit a compliance report in accordance with the directions of the court within a specified time. This case, too, illustrates how the judiciary, through judicial review of executive action, has protected fundamental rights, particularly, the right to life, the right to a fair trial, and the right to dignity.¹¹⁸

In the *Muhammad Aslam Awan* case,¹¹⁹ the court dealt with the issue of the seniority of the judges of the superior courts. It was argued by the petitioner that the decision of the President and the Chief Justice of the High Court regarding the seniority of High Court judges in the absence of any criterion raised an issue concerning the independence of the judiciary, which is essential for the protection of the basic rights of the people.¹²⁰ Judicial independence helps maintain the public’s confidence in the judiciary as it ensures that cases would be decided on merit and the rights of citizens would be protected.¹²¹

The court held that the concept of judicial independence is based upon the constitutional principle of trichotomy of powers, according to which each organ has independent powers and no organ can intrude into the domain of the other organs of the government. The makers of the Constitution stipulated for a judiciary independent from the other organs of the government because they wanted the judiciary to protect the rights of the people without any fear or bias. The court noted that the basic rights provided under the Constitution could not be safeguarded in accordance with Articles 184(3)

(power of the SC to enforce fundamental rights of public importance) and 199 (power of the High Courts to enforce fundamental rights of individuals) without an independent judiciary. Therefore, the court emphasized that the judiciary be kept independent from the other branches of the state.

The court observed that the independence of the judiciary could be ensured by improving the procedures for judicial appointments, judicial accountability, and the removal of judges. The court noted that the Judicial Commission of Pakistan (“JCP”) sends its nomination for the appointment of judges to the committee of the Parliament for confirmation of the nomination, which must make a decision on nomination within fourteen days. In case of the committee’s failure to decide the matter within the said time, the recommendation of the JCP would be deemed to be final. The court further observed that the judiciary has supremacy in the process of the appointment of superior courts judges. The court proposed guidelines for determining seniority among the judges of the High Court. In this case, while highlighting the primary role of the JCP in judicial appointments, the court emphasized the importance of the separation of powers and the independence of the judiciary for the protection of fundamental rights in Pakistan.

In *Mubashir Raza Jaffri v. Employees’ Old-age Benefits Institutions*,¹²² illegal appointments in the Employees Old-Age Benefits Institutions (“EOBI”), grounded on politics and favoritism, were challenged before the court. The grievance of the applicants was that they had applied for the posts in EOBI but their applications had been denied illegally, which constituted a violation of their fundamental rights, particularly, the right to equality of citizens guaranteed in Article 25 of the Constitution.

The court, after hearing the arguments of the parties, noted that the employees had been appointed at a time when no post was available for them. The said employees had been regularized and their regularization had been approved by the

cabinet sub-committee, which did not possess the authority to rectify such appointments.

The court further observed that civil servants are prone to the fancies of the rulers that damage public bodies and severely undermine democracy and constitutionalism. The court declared that the placements in EOBI had no legal effect. The court ordered that all vacant posts in EOBI had to be publicized and that all appointments had to be made strictly in accordance with the law. Moreover, the court directed that the issue of illegal appointments be probed by the National Accountability Bureau and that all officials found guilty of making illegal appointments be proceeded against in accordance with the law.

In this case, the court reviewed the executive's actions of making appointments on the basis of political influence, and rightly declared such appointments to be illegal and void. By doing so, the court upheld the fundamental right to equality of citizens. This case, therefore, demonstrates a connection between the protection of fundamental rights and the separation of powers.

In a *suo-moto* case,¹²³ the court took notice of the right to free education. As per the facts of the case, the government had neglected its duty to ensure the provision of free schooling to the children of a particular age group.¹²⁴ The court noted that some schools were not being used for imparting education and were illegally occupied by government departments, and that some schools had even been abandoned; however, monthly salaries were still being paid from the government exchequer.

The court directed the District and Session judges in all the provinces to carry out surveys to determine how many schools were functioning properly and how many ghost schools were operating in their districts; to ascertain how much funds were being spent for imparting education to children and the number of children studying in their respective areas; to find out the reasons for illegal occupation of school buildings, why cases concerning such encroachments were not being expedited, and why no action was being taken against those who had encroached upon school buildings.

The court highlighted that under the Eighteenth Amendment to the Constitution, Article 25-A (Right to education) was included in the Constitution. Despite this, the executive had failed to make the right to education available to the citizens of the country. The court reaffirmed that the judiciary was mandated under the Constitution to act as a custodian of the rights of the people. In this case, the court, by directing that the the fundamental right to education be guaranteed to the citizens of Pakistan while reviewing the actions of the executive, tried to promote fundamental rights in Pakistan. The case, therefore, indicates a robust connection between the doctrine of separation of powers and the protection of fundamental rights.

In *Dr Shahid Masood v. Federation of Pakistan*,¹²⁵ the grievance of the petitioners was that the Pakistan Electronic Media Regulatory Authority (“PEMRA”) and cable technicians had suspended telecasting and transmission of their networks. It was argued that the act of the operators of cable TV grids of obstructing the broadcasts of the petitioners was an abuse of the law, which attracted punitive provisions of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 (“Ordinance”).¹²⁶ Moreover, access to information about all subjects of national significance was one of the most important fundamental rights of the citizens of Pakistan.¹²⁷

The court, after hearing the arguments of the parties, directed the Chairman of PEMRA to guarantee instant dissemination of airing services to the licensed channels. The court also stated that strict legal action had to be taken against negligent cable TV technicians. The court further directed the Chairman of PEMRA to confirm that broadcasts of TV channels were constantly aired, without any interruption. The provincial police officers were ordered to take strict legal action against those delinquent persons who had obstructed the broadcasts of the channels. In this case, the court attempted to safeguard fundamental rights, in particular, the rights to freedom of speech and expression, by exercising judicial review in accordance with the doctrine of separation of powers.

In the *Usif Patel* case,¹²⁸ the law-making power of the executive and the legislature was discussed. The court clarified that the then Governor-General had *no* legislative power as law-making was the exclusive domain of the Constituent Assembly, serving, simultaneously, as the National Assembly. In the case of *Haji Saifullah and Tariq Raheem*,¹²⁹ the unfettered discretionary power of the President, under Article 58(2)(b) of the Constitution, to dissolve the National Assembly, became a moot point. The court held that such power must be exercised reasonably, fairly, and subject to the scrutiny of the courts through judicial review. These cases depict the tension between the judiciary and the executive as to their respective roles under the Constitution.

The aforementioned cases demonstrate that the judiciary has largely used its powers of judicial review to examine the acts of the executive so as to protect the fundamental rights of the citizens of Pakistan. Sometimes, however, the courts appear to interfere into the domain of the executive, as demonstrated by the case of *Haji Saifullah and Tariq Raheem*. This inclination of the judiciary to take cognizance of questions of a political nature shall be thoroughly discussed in the next chapter.

5.13 CONCLUSION

In order to uphold the supremacy of the Constitution and protect fundamental rights, it is necessary that executive action be judicially reviewed so as to annul all actions that violate basic rights. Under written constitutions, powers of the state are divided between the executive, the legislature, and the judiciary. The Constitution of Pakistan also envisages the division of power between the three institutions of the state. The Constitution confers on the judiciary the power of judicial review, which enables the courts to examine the actions of the executive.

The executive power of the federal government encompasses the areas in which the federal government has the

power to legislate. Executive authority is exercised by the Prime Minister, ministers, civil servants, and executive institutions, such as the military, the police, as well as statutory authorities functioning in the name of the President. The legislature can hold the Prime Minister and the Cabinet accountable in the performance of their executive functions. Similarly, the executive authority of provinces extends to subjects on which the provincial legislature can make laws. Executive functions include maintaining law and order, the provision of basic rights, public administration, defense, and welfare of the state etc.

Written constitutions define and restrict the executive power of the government. The authority to interpret the constitution and protect fundamental rights is conferred on the judiciary because it is neutral. Thus, it is the duty of the judiciary to uphold the supremacy of the constitution. It is for the judges to say what the law is. Under the doctrine of separation of powers, the judiciary maintains the rule of the constitution by exercising its powers of judicial review. It serves as a check on other branches of the government and helps to protect fundamental rights. Brian Thompson and E.S. Crown define judicial review as the authority of the judiciary to examine the validity of the actions of the executive and the legislature and, where appropriate, to declare such acts void. The foundations of judicial review were laid down by Greek philosophers. However, its modern conception is attributed to the US and the UK, which influenced the constitutional jurisprudence of other countries.

The judiciary reviews the actions of the executive on the basis of reasonableness, the propriety of its motives, irrelevant considerations, whether the executive was acting under dictation, abdication of authority, and subjective discretion. Constitutional theorists have proposed approaches for a balanced exercise of judicial review. Jess H. Choper introduced a theory of jurisdictional retrenchment, which demanded an apolitical, principled, functional, and balanced role for judicial review. John Hart Ely proposed a theory of process-oriented review, which emphasizes on upholding the overall structure

and scheme of the constitution so that the division of power between the institutions of the state could be maintained. Greg Jones coined a theory of structural judicial activism, which highlighted the doctrine of separation of powers as a supreme feature of any constitution and advocated a proper exercise of judicial review. This means that the courts, by exercising their powers of judicial review, should uphold the supremacy of the constitution, preserve the essence of the constitution and promote democracy and fundamental rights.

In Pakistan, the judiciary has protected fundamental rights while examining the actions of the government. In doing so, the courts have generally adhered to the doctrine of separation of powers. For example, in the *Haider Ali* case, the court, while dealing with the issue of the misuse of police authority, safeguarded the fundamental rights to life and liberty. In the *Dr. Shahid Masood* case, the court directed the Chairman of PEMRA to guarantee instant dissemination of airing services to the licensed channels, as this was a matter concerning the freedom of speech. These cases demonstrate that the courts have reviewed the transgressions on fundamental rights by the executive and attempted to remedy such transgressions.

An analysis of the relevant literature and case law exhibits that the courts have protected fundamental rights while reviewing the actions of the executive. This finding proves the hypothesis of this study that adherence to constitutionalism and the doctrine of separation of powers protects fundamental rights in Pakistan.

The next chapter shall examine the jurisprudential bases and the implementation of prominent approaches to judicial review, namely, judicial activism and judicial restraint, in Pakistan. The case law analysis will show how the courts have occasionally interfered into the domain of the executive while deciding on political questions or have abstained, sometimes, to interfere into the discretion of the executive. It will propose a balanced interpretation of the Constitution, promoting constitutionalism and adherence to the doctrine of separation of powers, which, in turn, protects fundamental rights.

END NOTES

¹ See, Article 90 of the Constitution, 1973.

² See, Article 48 of the Constitution, 1973.

³ See, Article 97 of the Constitution, 1973.

⁴ See, Article 98 of the Constitution, 1973.

⁵ See, *Lords Blanesburgh and Atkin and Sir Lancelot Standerson v. Officer Administering the Government of Nigeria and others*, AIR 1931 PC 248.

⁶ See, Article 137 of the Constitution, 1973.

⁷ See, Article 138 of the Constitution, 1973.

⁸ See, A.G. Chaudhry, "Lectures on Constitutional Law," (Lahore: Eastern Law Book House Press, 2013), 36.

⁹ See, William E. Raftery, "The Legislature Must Save the Court from Itself," Recusal, Separation of Powers, and the Post-Caperton World accessed January 5, 2015, <http://heinonline.org>

¹⁰ See, *State v. Zia-ur- Rahman*, PLD 1973 SC 49.

¹¹ See, A.G. Chaudhry, "Lectures on Constitutional Law," (Lahore: Irfan Law Book House, 2013), 81.

¹² This is the general principle as established by the judiciary under the authority of judicial review in various cases. Among those, the leading cases in different national jurisdictions are namely, *Marbury v. Madison*, 5 US (1 Cranch) 137 (1803); *State v. Zia-ur-Rehman*, PLD 1973 SC 49; *Golaknath v. State of Punjab*, 1967 AIR 1643 SCR (2) 762.

¹³ See, Hamilton, Alexander, "The Federalist No. 78," Independent Journal (1788) in *The Documentary History of the Ratification of the Constitution*, Volume. 18, ed. Gaspare J. Saladino and John P. Kaminski Madison (Wisconsin Historical Society Press, 1995); See also, *Marbury v. Madison*, 5 US 1 Cranch, 137(1803).

¹⁴ See, Louis Henkin, "Economic Rights under the United States Constitutions," *Columbia Journal of Transnational Law*." Vol. 32 (1994), 40-42), *Grimm*, (2010B 9).

¹⁵ See, Yaniv Roznai, "Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers," PhD Diss., (London School of Economics, 2014), 9.

¹⁶ See, Chaudhry, *Lectures*, 2.

¹⁷ See, Contents of Oath of Legislatures, "Executives and Judges in the Constitutions of Pakistan, 1973, India, 1949 and United States of America," 1789.

¹⁸ See, Gewirtz, *Approaches*, 208.

¹⁹ See, Carl J. Friedrich, "Constitutional Government and Democracy," (New Delhi: Oxford and IBH Publishing Company, 1974), 265.

²⁰ See, Eugene v. Rostow, "The Sovereign Prerogative: The Supreme Court and the Quest for *Law*," (New Haven: Yale University Press, 1962), 118.

²¹ See, Friedrich, *Constitutional*, 650.

²² See, Friedrich, *Constitutional*, 249; See also, A.V. Dicey, "Law of Constitution," (Eighth Ed., 1926), 420.

²³ See, Friedrich, *Constitutional*, 265.

²⁴ See, A. De Tocqueville, "Democracy in America," (P. Bradley ed., 1945), 151.

²⁵ See, Hughes, Charles Evans, "Addresses and Papers of Charles Evans Hughes," (New York: G.P. Putnam's Sons, 1908), 139.

²⁶ See, Hamilton, *The Federalist No. 39*, (C. Rossiter ed. 1961), 245.

²⁷ *Ibid.*, 196.

²⁸ See, Robert H. Jackson, "The Supreme Court in the American System of Government," (Cambridge, MA: Harvard University Press, 1955), 61.

²⁹ See, *Marbury v. Madison*, 5 US 1 Cranch, 137 1803, 177.

³⁰ *Ibid.*,

³¹ See, *Thomas Bonham v. College of Physicians*, 77 Eng. Rep. 638 (1610)

³² See, Gewirtz, *Approaches*, 209.

³³ See, *Syed Zafar Ali Shah v. Pervez Musharraf*, PLD 2000 SC 869, 1123.

³⁴ Alexander M. Bickel, "The Least Dangerous Branch: The Supreme Court at the Bar of Politics," (Yale University Press 1986), 1; Michael Halley, "Response, Constitutional Interpretation and Judicial Review: A Case of the Tail Wagging the Dog," *Michigan Law Review*, Vol. 108 (2010): 60; David A. Strauss, "The Modernizing Mission of Judicial Review," *University of Chicago Law Review*, Vol. 76 (2009): 859; See, *Cohens v. Virginia*, 19 US 264 (1821).

³⁵ See, Soli J. Sorabjee, "Obliging Government to Control Itself - Recent Development in Indian Administrative Law," *Public Law*, (1994), 39.

³⁶ See, Brian Thompson, "Text book on Constitutional and Administrative Law," (Blackstone Press, 1997), 397.

³⁷ See, E.S. Crown, "Essay on the Judicial Review," *Encyclopedia of Social Sciences*, Volume 8 (1962), 457.

³⁸ See, S. P. Sathe, "Judicial Activism: The Indian Experience," *Washington University Journal of Law and Policy*, Vol. 6 (2001).

³⁹ See, *Church of Scientology v. Woodward*, 154 CLR 25 (1982), 70.

⁴⁰ See, *Syed Zafar Ali Shah v. Pervez Musharraf*, PLD 2000 SC 869, 1123.

⁴¹ See, Dr. Shoukat Hussain, "Judicial Review of Legislation - A Powerful Mechanism and its Historical Over view," *The Pakistan Legal Decision, Journal* 19 (2009), 22, 23.

⁴² *Ibid.*,

⁴³ See, Kermit Lance Hall, "The Oxford Guide to United States Supreme Court Decisions," (Karachi: Oxford University Press: 2001), 174.

⁴⁴ This principal spread the world over in different national jurisdictions; See, Constitution of Argentina, 1994; Austrian Constitution of 1920; See, Weimar Constitution, 1919; Italian Constitution, 1948; the Bonn Constitution, 1949; the French Constitution, 1958; Portuguese Constitution, 1976; Spanish Constitution, 1978; Indian Constitution, 1950.

⁴⁵ See, Dr. Shoukat Hussain, “Judicial Review of Legislation - A Powerful Mechanism and its Historical Over view,” *The Pakistan Legal Decision Journal* (2009), 19-20; See, *Zafar Ali Shah v. Pervez Musharraf*, PLD 2000 SC 869, 1121.

⁴⁶ See, Larry David Kramer, “Judicial Supremacy and the End of Judicial Restraint,” Vol. 100, 621, *Calcutta Law Review*, (2012), 632.

⁴⁷ See, *Commissioner of Income Tax v. Asiatic Industries Ltd*, PLD 1964 Dacca 769.

⁴⁸ See, *Nasreen Fatima Awan v. Principal*, PLD 1978 Quetta 17.

⁴⁹ See, *Safar Ali v. Province of East Pakistan*, PLD 1963 Dacca 467.

⁵⁰ See, *Akbar Ali v. Razi-ur-Rehman*, PLD 1966 SC 492.

⁵¹ See, *Safar Ali v. Province of East Pakistan*, PLD 1963 Dacca 467.

⁵² See, *Zafar-ul-Ahsan v. The Republic of Pakistan*, PLD 1960 SC 113.

⁵³ See, *Associated Provincial Picture House Ltd v. Wednesbury Corp*, 1948 1 KB 223.

⁵⁴ See, *Deputy Director of Consolidation v. Deen Bandhu*, AIR 1965 SC 484.

⁵⁵ See, *B Rajagopala v. S.T.A Tribunal*, AIR 1964 SC 1573.

⁵⁶ See, *Noor Mohammad v. District Magistrate*, PLD 1976 Lahore 233.

⁵⁷ See, *Ghulam Mohiuddin v. Chief Settlement Commissioner*, PLD 1964 SC 829.

⁵⁸ See, *Hamid Javed v. Dean, Faculty of Engineering*, PLD 1964 Lahore 483.

⁵⁹ See, *Muhammad Tufail v. Province of Punjab*, PLD 1978 Lahore 87.

⁶⁰ See, *Nasim Fatima v. Government of West Pakistan*, PLD 1967 Lahore 103.

⁶¹ Choper presented this principle in his seminal work, “Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court,” (See, Choper, *Judicial*). It is also named as ‘Political Safeguards’. According to Greg, it was “First argued by Professor Herbert Wechsler in the 1950s,” (See, Herbert Wechsler, “The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,” *Columbia Law Review*, Vol. 54, Iss., 4 (1954), and “given its strongest voice by Professor Jesse Choper in the 1980s” (See, Choper, *Judicial*); See, also Greg, 171.

⁶² See, Grzebielski, *Judicial*, 781, 782.

⁶³ See, Choper, *Judicial*.

⁶⁴ *Ibid.*,

⁶⁵ See, Bickel, *Least*, 18.

⁶⁶ See, Choper, *Judicial*, 26-30, 361.

⁶⁷ *Ibid.*, 1054.

⁶⁸ *Ibid.*,

⁶⁹ *Ibid.*,

⁷⁰ See, Grzebielski, *Judicial*, 782.

⁷¹ See, G. Allison, *The Essence of Decision*, (Little, Brown, 1971).

⁷² Ibid., 49.

⁷³ See, Choper, Judicial, 158-160. This has been observed in Pakistan because of judicial activism during 2015-2018 in the cases involving political questions - resulting in reaction both from leaders and people.

⁷⁴ See, Grzebielski, Judicial, 784.

⁷⁵ Ibid., 180-181.

⁷⁶ Ibid., 217-19.

⁷⁷ See, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579 (1952).

⁷⁸ See, Grzebielski, Judicial, 784.

⁷⁹ See, Jones, Proper, 172.

⁸⁰ See, Steven G. Calabresi, "A Government, of Limited and Enumerated Powers: In Defense of *United States v. Lopez*, Michigan Law Review, Vol. 94, Iss. 3 (1995), 793.

⁸¹ See, O'Brien, Judicial, 1059.

⁸² Ibid.,

⁸³ See, Ely, Democracy, 7.

⁸⁴ Ibid., 12,13.

⁸⁵ Ibid., 87.

⁸⁶ See, Ely, Democracy, 12, 16.

⁸⁷ Ibid., 87.

⁸⁸ Among others see, namely, *The New York Times v. Sullivan*, 376 US 254, (1964), 267-83, on freedom of speech; *Bates v. City of Little Rock*, 361 US 516, (1960), 522-23, on freedom of association; *Cardona v. Power*, 384 US 672 (1966), 674, on supervision of reapportionment and voting rights; *Katzenbach v. Morgan*, 384 US 641, (1966), 646-58, on voting rights; *Harper v. Virginia State Bd. of Elections*, 383 US 663, (1966) 665-67, on reapportionment.

⁸⁹ See, Ely, Democracy, 181

⁹⁰ Ibid., 105.

⁹¹ See, Jones, Proper, 141.

⁹² See, *Clinton v. City of New York*, 524 US 417, 452 1998.

⁹³ See, Jones, Proper, 161.

⁹⁴ See, Jones, Proper, 141.

⁹⁵ See, Calabresi, Government, 770.

⁹⁶ See, David L. Anderson, "Note, When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante," Stan. Law Review, 42, (1990), 1559, 1570.

⁹⁷ See, Lino A. Graglia, "It's Not Constitutionalism, It's Judicial Activism," Harvard Journal of. Law and Public Policy, 19 (1996), 296

⁹⁸ See, Archibald Cox, "The Role of the Supreme Court: Judicial Activism or Self Restraint," Maryland Law Review, 47 (1987), 121-22.

⁹⁹ See, Jones, Proper.

¹⁰⁰ Ibid., 144.

¹⁰¹ See, William Eaton, "Who Killed the Constitution: The Judges v. The Law," (Gateway, Books, 1988).

¹⁰² See, Jones, *Proper*, 168.

¹⁰³ See, *Bowers v. Hardwick*, 478 US 186, 194 (1986); Jones, *Proper*, 170-171.

¹⁰⁴ “The structural activist does these things because, above all, the judge respects the principles upon which the Constitution is founded and the People for whom he adjudicates.” (Jones, *Proper*, 168).

¹⁰⁵ See, Jones, *Proper*, 163.

¹⁰⁶ See, Eaton, *Who*, 13.

¹⁰⁷ Brutus XI, *New York Journal* (1788) in 2, *Debates Debate on Constitution*, 129 (Bernard Bailyn ed., 1993).

¹⁰⁸ *Ibid.*,

¹⁰⁹ See, *Gregory v. Ashcroft*, 501 U. 452 (1991), 457; See, *United States v. Lopez*, 514 US. 549 (1995), 552.

¹¹⁰ See, Cox, *Role*, 128.

¹¹¹ See, Choper, *Judicial*, 59.

¹¹² See, *Shahab Usto v. Government of Sindh through Chief Secretary and Others*, 2017 SCMR 732.

¹¹³ *Mustafa Impex Karachi v. Government of Pakistan*, PLD 2016 SC 808.

¹¹⁴ See, *Haider Ali and another v. DPO Chakwal and others*, 2015 SCMR 1724.

¹¹⁵ See, Articles 9-28 of the Constitution, 1973.

¹¹⁶ See, Sections 182 and 211 of PPC.

¹¹⁷ See, Muhammad Bashir’s case, PLD 2007 SC 539.

¹¹⁸ The right to life, safeguards as to arrest and detention, right to fair trial, and dignity of man (Articles 9, 10, 10A and 14) of the Constitution.

¹¹⁹ See, *Muhammad Aslam Awan Advocate Supreme Court v. Federation of Pakistan and Others*, 2014 SCMR 1289.

¹²⁰ This Article provides right of individuals to be dealt with in accordance with law.

¹²¹ See, Donnelley J, “Human Rights and Human Dignity,” (An Analytical Critique of Non-Western Conception of Human Rights, 1982), 303-316.

¹²² See, *Mubashir Raza Jaffri v. Employees’ Old-age Benefits Institutions, (EOBI)*, 2014 SCMR 949.

¹²³ See, Article 25-A of the Constitution, 1973.

¹²⁴ See, *Petition regarding Miserable Condition of the Schools*, 2013 SCMR 764.

¹²⁵ See, *Dr Shahid Masood v. Federation of Pakistan*, 2010 SCMR 1849.

¹²⁶ See, Sections 30 and 33, Pakistan Electronic Media Regulatory Authority Ordinance, 2002.

¹²⁷ See, Article 19 of the Constitution, 1973.

¹²⁸ See, *Usif Patel v. the Crown*, 1955 Federal Court 384.

¹²⁹ See, *Federation of Pakistan v. Haji Muhammad Saifullah Khan*, PLD 1989 SC 166; *Khawaja Ahmad Tariq Raheem v. Federation of Pakistan*, PLD 1992 SC 646.

CHAPTER SIX

THE DOCTRINE OF SEPARATION OF POWERS AND JUDICIAL OVERREACH

6.1 INTRODUCTION

The previous two chapters discussed how the courts, using their powers of judicial review, have examined legislative and executive actions in order to protect fundamental rights. Chapter five briefly analysed the interpretation and the supremacy of the constitution. It also explored the grounds of and the three approaches to judicial review.

This chapter thoroughly analyses the two competing arguments concerning the way the courts' exercise of judicial review has impacted the protection of fundamental rights in Pakistan. One view is that the judiciary protected fundamental rights while following the doctrine of separation of powers. The other view is that the judiciary restrained the actualization of fundamental rights through the political process by ignoring the doctrine of separation of powers and interfering into the policy-making domain of the government.

This chapter examines these arguments in the light of two approaches to judicial review, namely, judicial restraint and judicial activism. It addresses the following question: have the

courts exceeded their constitutional limitations while interpreting and enforcing fundamental rights in Pakistan? In other words, has the judiciary ignored to follow the doctrine of separation of powers while enforcing fundamental rights in Pakistan? The answer to this question, in fact, helps to test the hypobole of this book while unpacking the complex institutional relationship between the three organs of the state and assessing its effect on the protection of fundamental rights.

Some cases relating to fundamental rights will also be discussed in this chapter. This chapter proposes a balanced exercise of judicial review, allowing the actualization of fundamental rights through the political process. It concludes that the judiciary has occasionally failed to focus on constitutionalism and adhere to the constitutional doctrine of separation of powers, and has, thereby, impeded the protection of fundamental rights in Pakistan.

6.2 PROACTIVE USE OF JUDICIAL REVIEW POWERS

The judiciary in Pakistan has interpreted the provisions on fundamental rights promoting values of economic and social justice.¹ The courts have sometimes used judicial review powers quite actively. Through judicial activism, the courts appear to intervene in the realm of other branches.² The following section examines the power of judicial review in order to find out the *limits* of judicial review and a balanced approach to interpreting the Constitution. It is hoped that such an interpretation of the Constitution would result in an increased adherence to the doctrine of separation of powers, which, in turn, would enhance the protection of fundamental rights in Pakistan.

6.3 THE LIMITS OF JUDICIAL REVIEW

The limits of judicial review have been contested since the inception and incorporation of the power of judicial review

in written constitutions.³ This debate gained momentum in Pakistan in the 1960s, due to the proactive use of the courts' exercise of judicial review, and was shaped in terms of two competing approaches to judicial review, namely, judicial activism and judicial restraint.⁴

These two approaches have been associated with two different schools of thought - the conservative and the liberal schools. In Pakistan, the courts have used their power of judicial review for enforcing fundamental rights while following one judicial approach or the other. Factors such as subjective preferences of judges, understanding of the laws and socio-economic factors seem to have influenced the courts' approach towards judicial review. In the following section, the two approaches to judicial review will be examined, which will help appreciate the reasons for and the way in which our judiciary has exercised a specific approach to judicial review while examining acts of other branches of the government.

6.3.1 JUDICIAL RESTRAINT

The judicial restraint approach is rooted in two prominent strands of thought called 'judicial supremacy'⁵ and 'popular constitutionalism'.⁶ These two schools of thought are in agreement on the principle that the judiciary must exercise restraint while interpreting or upholding the constitution when it reviews governmental actions. They argue that the judiciary can nullify executive or legislative action only when there is an apparent violation of the provisions of the constitution.

Judicial restraint requires that judges should refrain from reviewing government action unless they find that it is manifestly against the constitution.⁷ However, the question remains: how do courts determine that a particular action of the government is *apparently* unconstitutional?⁸ Wilkinson suggests that judges must be moderate in their aspirations and overrule the results of the democratic course only where the constitution *clearly* demands it.⁹ He further suggests that judges should never push any particular agenda of a social,

political, or economic nature while reviewing acts of the government.¹⁰

Another notable constitutional theorist, James Bradley Thayer, argued that the judiciary should refrain from setting aside acts of the legislature whenever it is possible to do so, as the legislature is the ultimate sovereign in a political state.¹¹ Both the liberal¹² and the conservative¹³ schools of thought support a restrictive use of judicial power when it comes to interpreting the constitution and reviewing acts of the other branches of the state.

Judicial restraint does not represent a singular principle of constitutional interpretation; rather, it embodies various models of judicial conduct.¹⁴ The challenge, again, remains how to find an appropriate criterion or yardstick to determine the constitutionality of governmental actions. To address these challenges, jurists have proposed different methodologies of constitutional interpretation.¹⁵

James Bradley, for example, presented a model of 'sense and reflection test'.¹⁶ According to this model, violation of the constitution or constitutional rights must be clear to everyone as an axiomatic truth.¹⁷ Essentially, he proposed that judges should not declare any act of the legislature or the executive unconstitutional unless it is manifestly clear, even to an ordinary man of sense and reflection, that such an act violates the constitution.¹⁸ On similar lines, Oliver Wendell Holmes introduced a 'reasonable man' test to suggest that a specific action of the regime may not be declared unconstitutional unless a reasonable man could perceive that act as unconstitutional.¹⁹ Different judgments of the US courts also endorse this approach.²⁰ Gerald Gunther proposed that the judiciary could review governmental action only when it found empirical or historical evidence that the impugned act had failed to serve the public interest.²¹

Frankfurter presented the 'precedence-based test.'²² According to this test, notwithstanding judicial political belief, the judiciary, while striking down a governmental act, must follow precedents, which is a hallmark of the common law

system.²³ J. Harvie Wilkinson coined the ‘textlist test’, which dictates that the judiciary can nullify a legislative act when it is against the legitimate content of the text of the law.²⁴ If legislation is textually sustainable, the judiciary should put off its hands.²⁵

Alexander M. Bickel suggests that legislative action should not be declared unconstitutional unless it offends the core values or the ordered scheme of the society.²⁶ Bickel seems to have pushed the idea of judicial restraint in its advanced or extreme form. He persuades the judiciary not to interfere in the domain of other branches of the government. He appreciates Thayer’s ‘rule of clear mistake’²⁷ for constitutional adjudication, which suggests that the judiciary should restrain from declaring a governmental action void unless it is sufficiently clear that the administration has clearly committed a mistake or blunder which undermines the basis of a constitutional government. This restrictive approach to judicial review has been widely hailed as a ‘passive virtue’ in the academic literature.²⁸

While appreciating this passive virtue, the judiciaries in Pakistan,²⁹ India,³⁰ the UK,³¹ and the USA³² have shown manifest reluctance in declaring actions of the executive and the legislature unconstitutional. An excessive reliance on the approach of judicial restraint has, at times, led the courts to compromise upholding the constitution and the protection of fundamental rights. For example, the courts in Pakistan have validated various martial law regimes on the basis of the doctrine of necessity coined by Hans Kelsen.³³ Such an exercise of judicial restraint attracted criticism.³⁴

Those who support judicial restraint are of the view that the judiciary is not expert in legislative and executive functions, so it should not interfere in these domains. It is argued that policy matters should not be subject to judicial review as policies are formulated in order to advance specific political objectives. In this context, Justice Harlan Stone has beautifully stated that the only check on the use of judicial review is the judiciary’s own wisdom of self-restraint.³⁵

The theory of judicial restraint helps promote democracy.³⁶ Fredric justifies the exercise of judicial restraint on the basis that judges are fallible.³⁷ Those who know their scholarly limits refuse to enforce their subjective notions of the good on the collective democratic conscience.³⁸ Democracy is appreciated for its exercise of experimental qualities for resolving complex issues through innovative solutions rather than its reliance on judicial inventiveness.³⁹ It is argued that granting unfettered powers to the judiciary may discourage democratic initiatives.⁴⁰

Despite its obvious advantages, the theory of judicial restraint has received criticism. The courts, being delegates of sovereign authority, are considered the agents of the people.⁴¹ It has been argued that if the courts fail to maintain the supremacy of the constitution, they would, in reality, be failing to meet their constitutional duty as a matter of public trust. Furthermore, a failure to exercise judicial review effectively would amount to fundamental rights being undermined, protection of which is the basic function of the courts. Thus, passive virtue would impede the materialization of fundamental rights and encourage transgression of governmental power.

David Luban suggests that although we do not want government by judiciary, the judiciary is expected to correct the legislature, recognize methods of democratic failure, and shutter unauthorized paths.⁴² Richard Posner considers judicial restraint a self-contradictory theory.⁴³ The critics explain that it is self-contradictory because this theory does not embody the actual function of the judiciary, that is, to construe the constitution to determine whether there is any violation by the government.⁴⁴ It is judges who should decide constitutional matters, despite the fact that their decisions could be incorrect at times.⁴⁵ Thus, Anotnio declared Bickel's 'passive virtue' problematic.⁴⁶ Martin H. Redish considered Bickel's theory of 'passive virtue' faulty as its political and social costs outweighed its theoretical gains.⁴⁷ Governor Morris went a little too far in his criticism of judicial restraint, stating that the judicial policy of restraint left the constitution as an

immeasurable value in the hands of idiots and insane men⁴⁸ and was not less than the greatest follies and absurdities.⁴⁹

Critics of the theory have also argued that judges employ judicial restraint to promote conservative activism,⁵⁰ and are, therefore, ‘tragically’ political.⁵¹ Carl Black has suggested that judicial restraint must be discarded as a model of judicial review.⁵² To critics of judicial restraint, the so-called ‘passive virtue’ has made governments unaccountable and has put the rights of the people at stake. Thus, an alternative judicial approach called judicial activism has been regarded as a remedial means of judicial review, which helps uphold constitutional supremacy and promote the fundamental rights of the people.

6.3.2 JUDICIAL ACTIVISM

Judicial activism became popular by the mid of the 20th century in the constitutional jurisprudence of the US.⁵³ However, excessive use of the approach was criticized following the US Supreme Court’s declaration of legislative acts as unconstitutional.⁵⁴ Many jurists questioned the active use and the legitimacy of judicial review.⁵⁵ Some jurists even proposed eliminating judicial review and empowering the Congress to overrule activist judicial decisions.⁵⁶ Professor Kramer considered the judicial efforts to police the boundaries of national power unwarranted.⁵⁷ By the end of the 20th century, the judicial activism jurisprudence developed by the US courts influenced British jurisprudence, compelling Lord Denning to criticize the same.⁵⁸

Judicial activism found its traces in various judgments.⁵⁹ In the sub-continent, the courts’ power of judicial review was declared as a basic structure of India’s Constitution.⁶⁰ The limits of judicial review were, however, debated in India.⁶¹ At times, the Indian judiciary has used the power of judicial review proactively.⁶² Since the 1980s, Pakistan’s judiciary has shown increasing activism while interpreting the Constitution with reference to the acts of the legislature and the executive.

Judicial activism became more popular in Pakistan following the *Benazir Bhutto* case.⁶³ Thereafter, Iftikhar Muhammad Chaudhry and Mian Saqib Nisar have used the power of judicial review in cases pertaining to fundamental rights more actively.⁶⁴ It has been argued that, by doing so, they intervened into the policy-making domain of other branches of the government.

The active exercise of judicial review has been criticized in Pakistan on the basis that the judiciary's intervention in the policy-making domain of the government through the proactive use of judicial review constitutes a violation of the doctrine of separation of powers.⁶⁵ It may be argued that the courts have used their power of judicial review as an instrument for interfering in the policy decisions of the government.⁶⁶ There is a perception that judges allow personal views to impact public policy under the guise of judicial review.⁶⁷ It has been argued that while reviewing actions of the government, the judiciary, at times, attempts to legislate, thereby violating the division of power between the three organs of the state.

Critics have argued that the judiciary appears to be the most dangerous institution in terms of its power to split 'the chains of the constitution'.⁶⁸ Thus, according to critics, judicial activism establishes a parallel government by the judiciary.⁶⁹ It has been argued that while deciding judicial questions, the judiciary embarks on political questions, disturbing the balance of power between the different organs of the government and negating the concept of constitutionalism envisaged in the doctrine of separation of powers.⁷⁰ Moreover, uncontrolled judicial review causes a counter-majoritarian difficulty, shaking the very foundation of democracy and constitutional governments.⁷¹

Judicial activism has been a hot issue in Pakistan. Some consider it necessary to uphold constitutionalism and to safeguard basic rights in the face of transgressions by the executive in under-developed democracies. Others argue that judicial review should be appreciated for upholding constitutional supremacy, including the constitutional

provisions on human rights. However, judicial review has been criticized for its coercive power⁷² and its legitimacy to upset the equilibrium maintained by the Constitution.⁷³

The debate as to the limits of judicial review has become significant in Pakistan as it empowers the courts to interpret the Constitution. Martin H. Redish states that the issue of judicial review and constitutional interpretation generates more debate amongst constitutional experts than on any other issue of constitutional law.⁷⁴ Due to the potential abuse of judicial power, Professor Schwartz cautioned that it should not be forgotten that no matter how we may gloss over it, judicial review is basically an undemocratic institution.⁷⁵ It may be argued that unrestricted judicial activism can impede the democratic process and, hence, jeopardize the rights of the people in the long run. For these reasons, Alexander Bickel considers judicial review a counter-majoritarian difficulty and the judiciary a deviant institution.⁷⁶ It has been argued that in its misguided zeal of being the savior of the people, the courts may destroy the basic features of a constitutional democracy, which entails that each institution must remain within its constitutional limits.⁷⁷ Hence, it has been proposed that the courts must save democracy from destroying itself by the excesses of its own power.⁷⁸

Although the judiciary is mandated to maintain the supremacy of the constitution and to enforce basic human rights, it is bound by the constitution. After all, the judiciary is a creation of the constitution that represents the ultimate will of the people. While performing its constitutional duty, the judiciary must be mindful of the fact that the people also empower other organs of the state to legislate and make policies for their welfare. In any case, the judiciary cannot damage constitutionalism while attempting to enforce the same.⁷⁹

The next part of this book will discuss how the judiciary can interpret the constitution in a balanced manner and protect fundamental rights more effectively.

6.4 A BALANCED APPROACH TO CONSTITUTIONAL INTERPRETATION

The limits of judicial review have been contested since 1798.⁸⁰ The activist or liberal approach to judicial review, termed as ‘judicial activism’, and the restrictive approach to judicial review, referred to as ‘judicial restraint’, have been placed in juxtaposition to find equilibrium in constitutional interpretation. Judicial restraint is said to promote pro-majoritarian rule as a passive virtue. On the contrary, judicial activism is regarded as some kind of an interpretive instrument through which the judiciary promotes its agenda at the cost of democracy and constitutionalism. Thus, judicial activism is considered a threat to a democratic polity.⁸¹ It may be argued that judicial activism challenges democracy and the doctrine of separation of powers. Judicial restraint, on the contrary, is perceived to weaken the system of constitutional checks and balances.⁸² The two approaches to judicial review seem to create a dilemma when it comes to interpreting the constitution and protecting fundamental rights. Constitutional theorists, thus, have always been in search of finding a balanced approach to judicial review, maintaining a balance of powers between state institutions and promoting constitutionalism.

Though it is challenging to find such a balanced approach to judicial review and constitutional interpretation, yet this exercise may not be futile.⁸³ There is always a way forward for reconciling two extreme positions, and the same holds true for the two competing approaches to judicial review, namely judicial restraint and judicial activism. In this regard, prominent jurists like Jesse H. Choper,⁸⁴ John Hart Ely,⁸⁵ and Greg Jones⁸⁶ have suggested three alternative approaches towards a balanced interpretation of the constitution through judicial review. While doing so, these theorists have dismissed the opposing notions of majoritarian and counter-majoritarian judicial review and justified their approaches on the basis of the principles of constitutional interpretation. These approaches have been thoroughly discussed in the previous chapter.

The analysis of cases pertaining to fundamental rights in the following section would demonstrate how the judiciary in Pakistan has interpreted the Constitution and used its power of judicial review for the enforcement of fundamental rights. This analysis would help to appreciate the judicial approach of our courts regarding the protection of fundamental rights in Pakistan.

6.5 ANALYSIS OF JUDICIAL POWERS IN PAKISTAN

In *Muhammad Nawaz Sharif v. President of Pakistan*,⁸⁷ the then President of Pakistan, Ghulam Ishaq Khan, had dissolved the National Assembly and dismissed the Cabinet under Article 58(2)(b) of the Constitution. This Article allowed the President to unilaterally dissolve the National Assembly and the elected government. Muhammad Nawaz Sharif challenged this order of the President before the Supreme Court.

The court observed that organizing a political party and then enjoying its consequential gains in terms of forming and running a democratically established government is a right guaranteed under the Constitution. A political party having more members in the National Assembly has the Constitutional right to make the government.⁸⁸ The court declared the impugned order unconstitutional and violative of the constitutionally protected fundamental right to freedom of association.⁸⁹ The court justified the use of judicial power under Article 184(3) of the Constitution and observed that the court has a duty to protect democracy and constitutionalism.⁹⁰

By using a progressive interpretive approach, the court observed that the right to form political associations under Article 17(2) also includes peripheral and consequential rights.⁹¹ Everyone has a constitutional right to become a member of the national legislature and a political association has a fundamental right to form a government if it has such a mandate.⁹²

It seems that, in this case, the court used judicial activism to decide a political issue by exercising its extraordinary jurisdiction in the name of protecting fundamental rights. The court undoubtedly has the power to review the actions of the executive.⁹³ However, the judiciary should exercise such power while remaining within the limits prescribed by the Constitution.

It is arguable that the court, in the *Muhammad Nawaz Sharif* case, transgressed its constitutional powers. Osama Siddique contends that the court did not interpret the Constitution correctly in the said case and that the relief granted to the petitioner was termed as a ‘special relief’.⁹⁴ This judgment has been widely criticized by the bar and the civil society.⁹⁵ It has been argued that such judicial populism may create constitutional and political chaos and cause frustration among the citizens.⁹⁶

The legal fraternity strongly criticized the judicialization of politics by the judiciary. It may be argued that, in this case, the court protected the political interests of the petitioner under the guise of safeguarding fundamental rights. The court could have adhered to the doctrine of separation of powers to promote democracy and constitutionalism in the country.⁹⁷ Adherence to the doctrine of separation of powers helps in materializing fundamental rights through a political process, while judicial activism violates the essence and structure of the Constitution.

In a *suo-moto* case,⁹⁸ the court took notice of the wages of Industrial Home teachers. The salary of teachers who were providing occupational training to undergraduates was five hundred rupees. This was less than the remuneration awarded to laborers. After hearing the arguments of the parties, the court asked the executive why the salary of these teachers had not been enhanced to a rational amount. The court ordered the executive to raise the pay of the teachers to a sensible level, in line with their right to life. In this case, the court over stepped its domain in violation of the doctrine of separation of powers apparently to protect fundamental rights of the teachers. The

matter of the salary of government employees, with respect, falls outside the domain of the judiciary.

Likewise, in another *suo-moto* case,⁹⁹ the court dealt with the issue of financial corruption in Hajj engagements. The court stated that it would not let anyone digest the taxpayers' money. The court even transferred the public officials involved in corruption. Moreover, the court observed that where the executive transferred an honest person from his seat to prevent him from completing an investigation into a case involving corruption, the court could intervene to fight corruption and safeguard the fundamental rights of the people. The matter of corruption in governmental schemes falls outside the domain of the judiciary and is better resolved through political forums. Therefore, the judiciary should not have intervened in this matter.

In *Abdul Raheem Ziaratwal v. Federation of Pakistan*,¹⁰⁰ the court examined the issues of the embezzlement of development money, corruption in public welfare ventures and the dearth of elementary facilities of life in Balochistan. The Inquiry Committee, formed on directions of the court, undertook an inspection of fifty-five projects and presented its findings to the court.

The report revealed that the progress of development schemes in Balochistan was disappointing; the work was being done sluggishly, despite the availability of considerable funds. No noticeable progress had taken place with respect to the basic rights of the people, including access to clean drinking water, the right to education, access to health-care etc. The development funds had been misused owing to corruption and no action had been taken against the persons or authorities involved in corruption.

The court noted that in the absence of any public accounts committee to supervise development projects, the Chief Minister and the Cabinet had the responsibility to ensure that public funds were applied for the welfare of the people in accordance with the law. The court also ordered the executive

to hold accountable those who had used public funds in a non-transparent manner.

In the *Ch Nisar Ali Khan* case,¹⁰¹ the appointment of the Chairman of the National Accountability Bureau without any meaningful discussion with the opposition was challenged in the court. The court observed that it was necessary to have a purposeful discussion and that an honest effort had to be made in order to conclude an agreement between the President and the leader of the opposition.¹⁰² The court emphasized that it was of the utmost importance that a consensus was reached between the consultees after having discussed the qualities and drawbacks of any nominees being considered for the post of the Chairman of the National Accountability Bureau.

It may be argued that devoid of a real system of merit and accountability of the executive, the fundamental rights of the people cannot be protected. This case apparently demonstrates that the judiciary is fully cognizant of its role to protect fundamental rights by adhering to the doctrine of separation of powers. Arguably, such a judicial approach amounts to intervention in the domain of the government as the question of the appointment of the Chairman of the National Accountability Bureau is a political question and the judiciary should refrain from deciding such questions, as they may be better decided through a process of political consultation.

In *Maulana Abdul Haque Baloch v. Government of Baluchistan*,¹⁰³ the court reviewed the legality of the grant of licenses by the Baluchistan Development Authority to foreign companies for the mining in *Reko Diq* area of Chagai, Balochistan. The validity of the exploration agreement and its execution was first challenged in the High Court (“HC”) of Balochistan.¹⁰⁴ The HC dismissed the petition and the matter came before the SC.¹⁰⁵

The petitioners argued before the SC that the grant of leases to foreign companies was against the national interest and caused loss to the national exchequer.¹⁰⁶ It was argued that the Government of Baluchistan had blatantly ignored the national interest and violated basic rights of the people while

negotiating and determining the terms and conditions of the impugned agreement.

The respondents maintained that the terms of the agreement were valid and legal.¹⁰⁷ They also argued that the mechanism of international arbitration stipulated in the impugned agreement barred the jurisdiction of the SC. The respondents contended that aside from the question of jurisdiction, the agreement did not violate the basic rights of the people or negatively impact the national interest.¹⁰⁸

The court held that as the Balochistan Development Authority had not publicly advertised the fact that it was granting a lease of the mines in *Reko Diq*, it had deprived the other investors of the right to participate in the bidding process. Therefore, it had adversely affected the national interest. The court further observed that the poor handling of such an important matter raised questions concerning the legality of the transactions and thus damaged the public interest.¹⁰⁹ The court noted that executive actions were not immune from judicial review and that, according to the Constitution, the judiciary was obliged to review executive actions in cases involving any breach of basic rights.

The court pointed out many irregularities and lacunas in the agreement.¹¹⁰ The court also observed that the agreement had been made in contravention of the relevant rules concerning the *Reko Diq* project.¹¹¹ The court, therefore, declared the agreement void and illegal.¹¹²

Despite the fact that the issue was of a public nature given that the mineral resources in *Reko Diq* amounted to public property, the infringement of any specific fundamental right could not be established before the court. Therefore, the court used a progressive interpretive approach to intervene in the domain of the executive and acted beyond its constitutional mandate. This judgment has been strongly criticized by the legal fraternity. It has been argued that the court failed to exercise judicial restraint in this case.¹¹³

The court should not have used its powers of judicial review as the aggrieved parties had an alternate remedy to redress their grievances, given that there was an international arbitration clause in the agreement. It may be stressed that judicial review is premised on the constitutional doctrine of separation of powers, a core principle of constitutionalism that ensures a constitutional form of government.¹¹⁴ In this case, the judiciary seemingly overstepped its constitutional domain to protect national interest and basic rights of the people.

In a *suo-motu* case,¹¹⁵ the court dealt with the issue of the dissemination of public money by ex-Prime Minister, Raja Parvez Ashraf, among the public representatives. The Prime Minister disseminated the money, exceeding the budgetary distribution of Rs. 22 billion in his electorate, by diverting money from schemes of national significance. The court observed that the Prime Minister, being a representative chosen by the public, was required to demonstrate a fair dissemination of the funds within the allocated budget in accordance with the law.

The court noted that the workability of the schemes for which the money had been approved had not been observed; that the funds had been distributed without following any transparent system and that the money had been channeled from ventures of general importance. The court directed the Accountant General of Pakistan to draw up the facts regarding the development projects and restrained the executing agencies from releasing any more funds to the public representatives.

In this case, the judiciary exercised its powers of judicial review for enforcing fundamental rights and ensuring that public funds were not misused. It may be argued that, in this case, the judiciary acted beyond its mandate by intervening in the policy-making domain of the government for the sake of the protection of fundamental rights of the people.

The case of *Farooq Ahmed Khan Leghari v. Federation of Pakistan*,¹¹⁶ concerned the issue of the proclamation of an emergency and the order concerning the suspension of fundamental rights by the executive.¹¹⁷ The petitioner argued

that the executive had proclaimed an emergency and suspended the enforcement of fundamental rights without satisfying the requirements (i.e., war, internal disturbance, and failure of constitutional machinery) as stipulated under Articles 232 to 235 of the Constitution.

The respondents contended that the petition was not maintainable because of the ouster clause in Article 236(2) of the Constitution, which provides that the validity of any proclamation of emergency shall not be called in question in any court. Further contended that the implementation of basic rights and the right to approach the court had been suspended during the proclamation of emergency. The respondents further argued that the order concerning the proclamation of the emergency had been passed after the satisfaction of the President, and the approval of the order of proclamation in both houses of the Parliament. Thus, the court had no jurisdiction in this case and the order could not be assailed before the court.

The court observed that the proclamation was not covered by Article 236(2). The court relied upon the case of *Sabir Shah*, wherein it was held that if a proclamation was without jurisdiction or mala fide, it did not come under Article 236(2). Moreover, it was observed that the court had jurisdiction to review such a proclamation.¹¹⁸

The court further observed that the petitions were maintainable and that the order of the proclamation of emergency had been made in accordance with the Constitution. The court, however, declared the order concerning the suspension of fundamental rights illegal and unconstitutional. Maryam S. Khan commented that while, in the past, the judiciary had examined executive action and promoted constitutionalism by declaring the suspension of fundamental rights unconstitutional, the validation of the proclamation of emergencies by the courts destroyed the roots of democracy in the country.¹¹⁹ The judiciary, by failing to perform its duty to protect the Constitution in this case, seems to have ignored the doctrine of separation of powers.¹²⁰

In the case of *Syed Zafar Ali Shah v. General Pervez Musharraf*,¹²¹ the declaration of emergency by Pervez Musharraf was challenged before the court.¹²² More specifically, the Provisional Constitutional Order (“PCO”) 1999 and Oath of the Office of (Judges) Order, 2000 (“Order”), were challenged in this case. The petitioners blamed the respondent for destabilizing and politicizing the armed forces. The petitioner argued that all the instruments i.e., the PCO and the Order offended Article 2-A (The Objective Resolution to form part of substantive provisions), fundamental rights, and various other provisions of the Constitution. Moreover, it was argued that the suspension of fundamental rights amounted to a violation of the Constitution.¹²³

The respondent opposed the petitions and argued that the order of the proclamation of emergency and the provincial constitutional order barred the jurisdiction of the court to adjudicate the petitions. The court validated the order of the proclamation of emergency relying on the doctrine of necessity. The doctrine of necessity postulates that extra constitutional actions purportedly taken to restore order and stability in a country are deemed to be valid.

It has been argued that the court legitimized extra-constitutional measures and the military coup¹²⁴ in utter disregard of constitutionalism, fundamental rights and democracy.¹²⁵ While the judiciary should exercise restraint in matters pertaining to government policy, in the case of transgressions by the executive, such as a military takeover, the court is obliged to uphold the Constitution and protect fundamental rights.¹²⁶

The judiciary has often abdicated from its constitutional duty to protect Constitution and legitimized unconstitutional acts of the executive in Pakistan.¹²⁷ Judicial restraint in such circumstances helps authoritarian governments and weakens the democratic process in the country.¹²⁸

In the *Ch. Muhammad Sadiq* case,¹²⁹ the petitioners assailed the *vires* of two laws prohibiting ostensible display and wasteful expenditures in marriage ceremonies.¹³⁰ The

petitioners submitted that the legislature was not authorized to make the impugned legislation as it was against the injunctions of Islam and offended Article 25 of the Constitution.

On the other hand, the respondent contended that only the Federal Shariat Court had jurisdiction to examine any legislation on the ground of the legislation being against the injunctions of Islam in accordance with Articles 203-D and 227 of the Constitution. Thus, the court lacked jurisdiction to invalidate the impugned legislation on the basis of the injunctions of Islam. The respondent further contended that Article 25 of the Constitution was not attracted in the instant case as the petitioners had not been discriminated against in any manner.

However, the court held that the petitions were maintainable as the subject of the petitions concerned the interest of public at large. In other words, the court invoked power of judicial review in a matter of public interest which was ostensibly out of its jurisdiction. It may be argued that such matters can only be challenged before the Federal Shariat Court.¹³¹ So, this case should have been adjudicated by the Federal Shariat Court. In this case, the court seemingly overreached its constitutional domain and interfered into the domain of the Federal Shariat Court, in violation of the Constitution.¹³² Though this case does not strictly fall within the debate of separation of powers between the different organs of the state, yet it has been discussed in order to show how the judiciary sometimes uses its judicial power in apparent disregard of the Constitution, even within its own sphere of power.

In a Civil Petition No. 9 of 2006, the issue of the privatization of a steel mill came under discussion before the court. In this case, the petitioners argued that the privatization of steel mills through the promulgation of the Privatization Commission Ordinance, 2000 (“Ordinance”) violated the Constitution. The respondents opposed the petitions on the ground that there was no infringement of the basic rights of the petitioners and that the petitioners did not avail the alternate

remedy provided under the Ordinance before approaching the court.

The respondents further maintained that the court's interference in the matter of the privatization of a steel mill would breach the concept of separation of powers between the three branches of the government.¹³³ They further argued that the Ordinance allowing the privatization of the steel mill was protected under Article 270-AA (Declaration and continuance of laws) of the Constitution.¹³⁴ Thus, it could not be reviewed by the court. However, the court held that it could review any act of the government if it conflicted with the fundamental rights guaranteed by the Constitution.¹³⁵ The court further observed that although the judiciary had a policy of not interfering in policy matters in normal circumstances since such matters fell within the domain of the government, there was an exception to this rule. In this context, the court referred to three cases titled *Balbo Employees*,¹³⁶ *Delhi Science Forum*,¹³⁷ and *Messrs. Leah Cotton Mills*.¹³⁸

In the *Balbo Employees* case, the court held that it was bound to interfere in any issue involving economic feasibilities which violated legal and constitutional bounds.¹³⁹ This view was reinforced in a few other cases.¹⁴⁰ The court agreed that while using its power of judicial review, it must not express views on policy matters, as such matters require expert knowledge.¹⁴¹ However, the court distinguished the issue of the privatization of steel mill from policy matters. The court argued that while examining the transparency of the procedure, it is entitled to rule on the privatization of steel mills.¹⁴²

In doing so, the court scrutinized the actions of public functionaries with respect to the privatization of steel mill in accordance with the criteria of the law, the Constitution as well as internationally accepted principles, and found substantive and procedural violations in the process of privatization.¹⁴³ In this case, the court held that if law assigns power to an authority to do a particular work, then the court must not direct the authority to perform that task in a specific way. However, if the authority uses its power without following the law, then the

court is entitled to review illegal acts of the authority and rectify the wrong. In fact, if the court does not review such illegal acts, then the court would be failing to perform its constitutional role of judicial review.¹⁴⁴

It is arguable that, in this case, the court exceeded its constitutional powers and disregarded the doctrine of separation of powers while declaring the procedure of the privatization of the steel mill unconstitutional. Judicial review of the administrative policies of the government in this case was without any solid piece of evidence and legality. Thus, the review of the administrative policies of the government by the court cannot be defended on the principles of constitutionalism and limited government. If courts were allowed to review every act of the government, including acts strictly within the government's domain, the judiciary would be offending the theory of separation of powers. This would, ultimately, undermine the fundamental rights of the people as rights cannot be protected in any democracy which is incapacitated either by unconstitutional takeovers or by judicial overreach.

Furthermore, while it is possible to argue that the judiciary is the sole custodian of the fundamental rights of the citizens, this contention seems to be misconceived. The judiciary becomes custodian of fundamental rights only when they are explicitly violated by the two other branches of the government. The Constitution confers the responsibility of protecting fundamental rights on each organ of the state. The judiciary and the executive may have different perspectives towards a policy or varying approaches for protecting fundamental rights in any given situation. The judiciary may, then, restrain itself and let the other branches function in order to enforce fundamental rights. This would promote a balance of power in accordance with the Constitution and the doctrine of separation of powers.

Thus, in the context of the case in hand, it may be argued that the Ordinance was all-inclusive, as it provided an effective remedy for the resolution of any dispute with respect to the process of the privatization of the steel mill and its impact upon

fundamental rights. Judicial review of the procedure of privatization was, therefore, not appropriate and amounted to an overreach of judicial powers. The Ordinance had the potential to counter any misuse of the procedure of privatization, as it afforded an effective mechanism for inquiring into any irregularity in the process of privatization. Thus, the intervention of the court in the matter in the instant case was not required. The court should have allowed the government to resolve any issue relating to the privatization of the steel mill by the means available to it under the relevant law, instead of conducting judicial review and offending the principle of separation of powers. The parties could have availed the assistance of the court after making use of the remedy available to them under the law.

As a result of this judgment, the process of the privatization of the steel mill was halted and the issue remains unresolved to this date. Consequently, the mill's operations have been discontinued. Therefore, it can be seen that the interference of the judiciary into policy matters has caused a heavy loss to the state treasury. Hence, the courts should review the acts of the executive while remaining within their constitutional limits and adhering to the doctrine of separation of powers.

In the *Tika Iqbal Muhammad Khan* case,¹⁴⁵ the petitioners challenged the proclamation of emergency by General Pervez Musharraf.¹⁴⁶ The petitioners prayed for the restoration of the deposed judges of the superior courts as well as fundamental rights. The petitioners pleaded that the proclamation of emergency amounted to governance by martial law, and the declaration of the emergency was, therefore, illegal, *ultra vires*, without jurisdiction, mala fide, and liable to be set aside. The respondents objected to the maintainability of the petitions, arguing that the Constitution recognized the proclamation of the emergency by the President, and that, in view of the order of proclamation of emergency, the court had no jurisdiction to enforce the suspended fundamental rights.¹⁴⁷

The court observed that it was empowered to review the *vires* of the proclamation of emergency. On the assurance of the executive that fundamental rights would be restored, the court validated the proclamation of emergency.¹⁴⁸

In this case, too, the court validated unconstitutional acts of the executive. This case has been severely criticized by the legal fraternity, the civil society, and the media objecting that the court exercised restraint on important constitutional issues.¹⁴⁹ Under the doctrine of separation of powers, the court has the authority to judicially review the unconstitutional orders of the executive and promote constitutionalism, fundamental rights, and democracy. However, in this case, by exercising undue judicial restraint with respect to extremely important constitutional questions, the court legitimized unconstitutional acts of the executive and failed to perform its duty under the Constitution.

In this case, the court withdrew itself from a progressive interpretative approach and legitimized the illegal actions of the *de facto* ruler on the ground of 'state necessity'.¹⁵⁰ Judicial restraint in such cases amounts to compromising the supremacy of the Constitution and the fundamental rights of the people.¹⁵¹ When the judiciary abandons its constitutional role, it encourages other branches of the government to violate the Constitution and the basic rights of the citizens.

In *Muhammad Azhar Siddiqui v. Federation of Pakistan*, the question of the implementation of the judgment in the *Dr. Mobashir Hassan* case¹⁵² came before the court. The court had held that the NRO was *ultra vires* to the Constitution and, therefore, void.¹⁵³ It had also directed the executive to take all measures to pursue the revival of the requests and claims with concerned authorities of Switzerland with respect to bank accounts of the President. The government did not comply with the said judgment. Thereafter, the court convicted the Prime Minister for contempt of court for his failure to implement the order of the court.¹⁵⁴

The petitioners argued that the respondent was disqualified from the legislature and the office of premiership

after his conviction in the contempt proceedings. The petitioners further submitted that the conviction of the prime minister *ipso facto* had become an issue of national importance, resulting in a breach of their fundamental rights.¹⁵⁵

The respondents objected to the maintainability of the petition and argued that no specific fundamental rights of the petitioners had been violated. They also argued that the petitioners had come to the court with unclean hands, and that they had approached the court to promote their political agenda and gain public sympathy.

The court reaffirmed that the issue involved in the *Mobashir Hassan* case was of public importance as the Prime Minister had failed to execute the order of the court to restore civil proceedings regarding the alleged corruption of the President and his bank accounts in Switzerland. The Prime Minister had, therefore, been disqualified on the basis of his conviction for contempt of court. The court also stated that a Prime Minister who had been convicted of contempt of court could not be restored to his office.

In this case, the court used its extraordinary jurisdiction under Article 184(3) of the Constitution to decide a politically heated constitutional question that had entangled the state for months.¹⁵⁶ Shahid Javed Burki argues that the court should have left the implementation of the order to the executive in order to promote democracy in the country.¹⁵⁷ It has also been argued that the court cannot take away the constitutional immunity available to the President of Pakistan.¹⁵⁸

It can be argued that, in this case, the court was overzealous in pursuing judicial activism. The interference of the court in political issues was strongly condemned by the legal fraternity and the civil society. It was argued that such an exercise of judicial review hampers constitutionalism, good governance and the democratic process.¹⁵⁹ Moreover, it creates a constitutional and political crisis in the country and violates the spirit of the Constitution that is envisaged in the doctrine of separation of powers.¹⁶⁰ Arguably, it is an appropriate case of judicial overreach, both in the domain of the legislature as well

as the executive. The superior courts should strongly adhere to the doctrine of separation of powers for the promotion of constitutionalism and fundamental rights in the country.¹⁶¹

In the case of *I.A Sharwani*,¹⁶² the petitioners alleged that they had been discriminated against in the payment of pension under Article 25 of the Constitution. The respondents, however, argued that the petitioners were barred by Article 212 (Administrative Courts and Tribunals) of the Constitution from bringing this matter before the court. The matters relating to the terms and conditions of persons in the service of Pakistan, the respondents argued, could not be challenged in the extraordinary jurisdiction of the court. They also contended that the petitioners had not been discriminated against and had been treated in accordance with the law.

The court held that extraordinary jurisdiction should be exercised liberally, and that the question involved was one of public importance as it affected a large number of pensioners. While liberally interpreting the question of its extra ordinary jurisdiction, the court declared the petitions maintainable. The court further observed that the refusal to pay the pension was not a question of the terms and conditions of the service of the petitioners. Hence, the petitioners were not barred by the Constitution or the relevant civil service laws from bringing their claim before the court. The court also noted that the petitioners had been discriminated against, and, accordingly, they could not be denied relief.

This case pertains to civil service law. Civil service law provides effective remedies before the service tribunal for the resolution of all matters relating to the terms and conditions of service of the civil servants. Thus, it would have been better if the petitioners had availed the remedy provided by the law and let the service tribunal adjudicate the matter. Article 212 of the Constitution prohibits courts from entertaining issues of civil service at first instance. Despite this, the court stressed for exercising original jurisdiction under Article 184(3) of the Constitution. Does such an exercise of judicial review not undermine the aim of the Constitution of maintaining a balance

of power between the different organs of the state? When an alternative remedy was available before a quasi-judicial forum, should the court have intervened with the powers of that forum, given that it had specifically been constituted for resolving the disputes of the executive branch of the government? The answer to these questions must be in the negative. Otherwise, it would promote the trend of overlooking the requirements to invoke the extraordinary jurisdiction of the court. This might have the effect of paralyzing all other institutions and forums of the state. In the case of *I.A Sharwani*, the court seems to have expanded its jurisdiction beyond the scope of Article 184(3) of the Constitution. By overstepping its institutional powers, the court violated the doctrine of separation of powers and undermined the rights of the people.¹⁶³

In a *suo-moto* case,¹⁶⁴ in an attempt to regulate the price of sugar, the court claimed to have constitutional authority to review government policy if it violated fundamental rights. Indeed, this case created serious debate concerning the powers of the judiciary and the domain of the other state institutions vis-à-vis fundamental rights. This is an important case which establishes the argument of this study that, sometimes, the courts have intervened in the policy-making domain of the government while exercising their power of judicial review, which is embedded in the theory of separation of powers.

In another *suo-moto* case, the then Chief Justice, Mian Saqib Nisar, created a national fund to collect public donations for the construction of a dam.¹⁶⁵ He also restrained the Federal Board of Revenue and cell phone service providers from deducting withholding tax and other charges on mobile phone top-up cards.¹⁶⁶ While the judiciary has the jurisdiction to protect fundamental rights in accordance with the Constitution, the question that arises is: what is the meaning, scope, import, and extent of fundamental rights? Another question to be considered is whether policy matters of the executive can be covered within the definition of fundamental rights. Arguably, Justice Saqib Nisar employed a wide definition of fundamental rights that included reviewing the policy matters of the government as well.¹⁶⁷ This approach of judicial review can

hardly be justified under the constitutional doctrine of separation of powers, as policymaking clearly falls in the domain of the government.

In *Mian Irfan Bashir v. The Deputy Commissioner, Lahore*,¹⁶⁸ the petitioners had challenged a notification regarding the removal of sign boards and advertisements from their shops at Mall Road, Lahore, before the Lahore High Court. While deciding the case, however, the court passed a direction on a different issue (wearing of helmets by motorcyclists) that had not even been raised before the court. The court stated: "... petrol pumps shall not fill in the petrol tanks of the motorcyclists who have not worn... helmets and in case any owner of the filling station is found to provide... petrol to those motorcyclists, the petrol pump will be sealed and heavy fine will be imposed." The learned Division Bench ("DB") of the Lahore High Court also upheld this order. Thereafter, the DB's order was impugned before the Supreme Court.

The SC noted that an application by the aggrieved party is essential to invoke the constitutional jurisdiction of the High Court and that the High Court is not empowered to exercise suo-moto jurisdiction under Article 199 of the Constitution. The SC also observed that the direction of the court, whereby it imposed a ban on the sale of petrol by petrol pump owners to motorcyclists who had not been wearing helmets, was not backed by any law or executive policy, and found the impugned direction devoid of legal legitimacy. The SC emphasized that judicial overreach entails "the exercise of judicial power without any backing of the law and interfering in and encroaching on the legislative and executive domain."

The SC observed that, "The role of a constitutional judge is different from that of a King, who is free to exert power and pass orders of his choice over his subjects... having taken an oath to preserve, protect, and defend the Constitution, a constitutional judge cannot be forgetful of the fact that he is first and foremost subject to the Constitution and the law."

Moreover, the SC closely examined the concept of judicial review, and the two approaches to judicial review, namely, judicial activism and judicial restraint, and observed that “both judicial activism and judicial self-restraint operate within the bounds of judicial legitimacy.” However, the court observed that “Judicial overreach is transgressive as it transforms the judicial role of adjudication and interpretation of law into that of judicial legislation or judicial policy-making.” The court termed such an exercise of the power of judicial review as ‘judicial adventurism’ or ‘judicial imperialism’.

The SC also highlighted the importance of the doctrine of separation of powers and the limits of the power of judicial review in a constitutional democracy. The court declared the impugned order imposing a ban on the sale of petrol by petrol pump owners to motorcyclists who had not been wearing helmets unconstitutional, illegal, and without jurisdiction.

In *Chief Executive Officer, Multan Electric Power Company Ltd., Khanewal Road, Multan v. Muhammad Ilyas, etc.*,¹⁶⁹ the court elaborated the concept of judicial overreach in order to promote the doctrine of separation of powers in Pakistan. In this case, the respondent had applied for the post of Assistant Line Man (“ALM”) pursuant to a public advertisement issued by the Multan Electric Power Company (“MEPCO”). The respondent had passed the written test but had not been invited for an interview. He, therefore, challenged MEPCO’s decision to not appoint him to the post. The post of ALM had been advertised on the basis of merit and the candidate who had been selected for an interview most recently had a score of 66 marks in the written examination, whereas the respondent had 50 marks. The High Court held that: “Despite the fact that the petitioner obtained 50 marks in written test as per report submitted by learned counsel for the respondents and his name was placed at Sr. 269 of the successful candidates, the petitioner was not called for interview and on account of his non-participation in such process, he was not appointed.” Further, the Court noted that:

“Assistant Director appearing for MEPCO has confirmed that 1000 vacancies of ALM are still lying vacant. The petitioner who was qualified against the said post and is liable to be appointed as ALM in BS-7 has been deprived of his such right in an unauthorized and illegal manner.” The High Court further directed that “Assistant Director, MEPCO, is directed to appear along with Appointment Letter duly signed and issued by the Competent Authority in favour of the petitioner as ALM before the Court on the next date of hearing.”

MEPCO, however, failed to submit the Appointment Letter as ordered. Thereafter, the respondent filed a petition for contempt of court against MEPCO and its officers. A show cause notice for contempt was issued to the Chief Executive Officer and another officer of MEPCO. Thereafter, MEPCO filed an intra-court appeal before the Division Bench of the High Court. The said appeal was dismissed and the matter then came before the SC.

The SC set aside the orders passed by the High Court. The Court elaborated how the honorable High Court had exceeded its power and assumed the power of the executive in passing a direction for the appointment of the ALM against the policy of the executive. The SC held that “in the instant case, the judge instead of deciding the case on merits, passed the final order of appointment of respondent without adjudicating the issue in hand and then executed the order by directing the petitioner that the Appointment Letter be issued by the next date of hearing. By assuming the role of the Executive, the judge disregarded his core function of adjudication... ignoring the constitutional boundaries of separation of powers can easily equip a judge with a false sense of power and authority. This is a dangerous tendency and must be guarded against to ensure that the judicial role continues to remain within its constitutional limits”. This case appears to be a textbook case of judicial overreach in Pakistan.

The case of *Malik Munsif Awan, Advocate, Chairman, Pakistan Justice Party*,¹⁷⁰ concerned the issue of the appointments of Special Assistants for the Prime Minister. The petitioner had challenged the exercise of discretionary power by the Prime Minister under Rule 4(6) of the Rules of Business, 1973. The court held that, under the doctrine of trichotomy of powers, certain discretionary powers had been vested in the Prime Minister in order to facilitate him in performing his functions and conducting the business of the state. The appointment of any Special Assistant could not be challenged unless it could be specifically shown that the appointee suffered from any blot or blemish on their name or reputation for having been convicted for an offence of any nature or was under a cloud for having committed an illegality for which they had been convicted by a court of competent jurisdiction.

The court further held that the power to appoint Special Assistants fell within the discretionary powers available to the Prime Minister under the Constitution and the law, and that such appointments could not be challenged unless abuse, excessive exercise, mala fides or blatant arbitrariness on the part of the Prime Minister was clearly demonstrated. The court observed that causal and frequent judicial interference in such matters would be violative of the concept of trichotomy of powers enshrined in the Constitution. The court noted that such interference would hamper and obstruct the Prime Minister in the effective and efficient discharge and performance of his constitutional functions and obligations. Therefore, the court held that judicial restraint in such matters should be the norm and judicial interference only an exception. This case promotes the doctrine of separation of powers in Pakistan and strengthens democracy, as the court abstained from interfering into the discretion of the executive.

Finally, the *suo-moto* case regarding the conduct of polls in Punjab and KP once again creates a heated debate regarding the institutional role of the judiciary in Pakistan. Voices have been raised from within the judiciary, the Parliament, and the civil society that the SC needs to regulate its jurisdiction under Article 184(3) of the Constitution when it comes to enforce the fundamental rights of the public importance. Justice Syed Mansoor Ali Shah and Justice Jamal Mandokhail illuminate the role of the SC in a parliamentary democracy and suggest a structured and balanced role of the Chief Justice of Pakistan and the judiciary.¹⁷¹

6.6 A WAY FORWARD FOR PAKISTAN'S JUDICIARY

The analysis of the case law pertaining to fundamental rights in the preceding section shows that our judiciary has exercised both judicial activism and judicial restraint in interpreting the Constitution and protecting fundamental rights in Pakistan. By doing so, however, it has attracted some criticism as to the use of its power of judicial review. The next section would examine how the judiciary can exercise its power of judicial review in a balanced manner.

The advocates of a balanced theory of constitutional interpretation focus on three constitutional features: the separation of powers, fundamental rights and liberties, and federalism. These features collectively address the issue of judicial review while promoting fundamental rights, constitutionalism, and democracy.¹⁷² According to this theory, judicial review is not an auxiliary precaution,¹⁷³ but an opportunity to check prejudice on the part of, and the zeal of, judges, which could destroy the basic interests of democracy.¹⁷⁴ The approaches to judicial review (which have been thoroughly discussed in chapter five) promote an appropriate exercise of the power of judicial review.¹⁷⁵ These theories boil down to a singular constitutional objective, that is, the protection of fundamental rights through adherence to the

doctrine of separation of powers in the exercise of judicial review.¹⁷⁶ These theories have a direct bearing on Pakistan's judicial system as they help to understand the practice of judicial review regarding the protection of fundamental rights.

The Constitution of Pakistan features the concepts of fundamental rights, the division of powers between the various organs of the state, and federalism, although these concepts were conceived and developed in foreign jurisdictions.¹⁷⁷ These concepts are relevant to our courts as they often follow judicial activism while interpreting and enforcing the provisions pertaining to fundamental rights in the Constitution.

The following section, thus, focuses on the application of these theories of constitutional interpretation and judicial review in the constitutional context of Pakistan. This analysis will support the central argument of this study that implementing the constitutional doctrine of separation of power is challenging due to the complex institutional relationship between the legislature, the executive, and the judiciary. However, an increased focus on constitutionalism, including adherence to the constitutional doctrine of separation of powers, helps protect fundamental rights. It may be argued that stretching fundamental rights beyond the explicit terms of the relevant provisions of the Constitution impedes the protection of fundamental rights through a democratic process, as the people start believing that the courts are the only forum for seeking the provision and protection of fundamental rights.

6.6.1 EXERCISING JUDICIAL POWERS IN A BALANCED MANNER

The main aim of a constitutional democracy is to safeguard the fundamental rights of the citizens against the tyranny of the government. Therefore, since the emergence of constitutional governments, constitutional theorists and the proponents of democracy have been struggling to devise a constitutional mechanism for safeguarding individuals' rights and liberties. Judicial review of legislative and executive action

is premised on the constitutional doctrine of separation of powers. Jurists like E. Carolan have declared the theory of separation of powers the basis of constitutionalism and the worldwide benchmark for a constitutional government.¹⁷⁸ In other words, the doctrine of separation of powers has been equated with constitutionalism and the rule of law.¹⁷⁹

The doctrine of separation of powers places a check on the powers of the government. It discourages the exercise of political power in an oppressive and arbitrary manner.¹⁸⁰ It holds governments responsible to the people. It contemplates an accountable government whereby each institution remains within its constitutional limits and the basic rights of the citizens are not violated.¹⁸¹ In case of concentration of political power in a single authority, basic rights cannot be safeguarded.¹⁸² Thus, the doctrine of separation of powers promotes the rule of the Constitution, and upholds democracy and fundamental rights.¹⁸³

Some constitutionalists like Geoffrey Marshall and Charles Manga consider the theory of separation of powers imprecise, complex, and ambiguous.¹⁸⁴ There has, as yet, been no agreement between scholars as to the precise meaning and content of the doctrine of separation of powers.¹⁸⁵ This study, therefore, relies on the definition of the concept of separation of powers proposed by M.J.C Vile. This definition postulates that to protect political liberties, it is constitutionally desirable that government power is divided between the different organs of the state. Each organ has a specific role of government. Every organ is confined to use its own power and not permitted to interfere in the domain of the other branches of the state. According to this definition, every organ should be entitled to protect its powers from transgressions by other branches.

Despite the difficulty in defining the concept, the doctrine of separation of powers has been considered useful for promoting the rule of law as well as responsibility, efficiency, and accountability of the various organs of the state.¹⁸⁶ The doctrine is applicable, with some modifications, to both the presidential as well as the parliamentary form of

government.¹⁸⁷ For example, in the presidential system, the executive is given more powers than the other branches of the government. In a parliamentary form of government, as between the three organs of the state, the legislature holds the maximum power. Thus, this doctrine is recognized worldwide as a helpful tool in establishing good governance.¹⁸⁸

The challenge remains in applying the doctrine of separation of powers while reviewing acts of the executive and the legislature. The constitutions of 1956, 1962, and 1973 provide for the doctrine of separation of powers as they divide political power amongst the executive, the legislature, and the judiciary.¹⁸⁹ Our courts have, at times, been proactive and, at other times, passive while employing this doctrine when interpreting the Constitution and protecting fundamental rights.

The courts have interpreted fundamental rights broadly, and, at times, gone beyond the express terms of the legal provisions pertaining to fundamental rights.¹⁹⁰ In exercising its powers of judicial review, Pakistan's judiciary appears to have adopted judicial activism as it has interfered in the domains of the legislature and the executive.¹⁹¹ Jurists have criticized such an excessive exercise of judicial authority.¹⁹² Their criticism is based on the concept of the majority rule, and is as follows: as the judiciary lacks representative character, judicial powers are subject to the will of the majority.¹⁹³ Therefore, jurists like Jesse Choper, Greg Jones, and Hart Ely have proposed different approaches to interpreting the Constitution in order to protect fundamental rights.¹⁹⁴ Pakistan's judiciary may appreciate these approaches of constitutional interpretation while exercising judicial review.

6.7 CONCLUSION

Conclusively, under the constitutional doctrine of separation of powers, the courts can examine the actions of the executive and the legislature through judicial review and protect fundamental rights. In *Kesavananda Bharti v. State of Kerala*, the power of judicial review was declared a basic

structure of India's Constitution and it was used proactively for the enforcement of fundamental rights. In Pakistan, the courts have followed judicial activism and have been interpreting the provisions on fundamental rights progressively since the 1980s. In the *Benazir Bhutto* case, judicial activism became popular as the court relaxed the procedural requirements for invoking the jurisdiction of the courts under Articles 184 and 199 of the 1973 Constitution, which deal with the protection of fundamental rights. Iftikhar Muhammad Chaudhry (2005-2007; 2009-2013) and Mian Saqib Nisar (2016-2019) used the power of judicial review more aggressively. This raised a hot debate in Pakistan as to the limits of the power of judicial review.

Some jurists have argued that while exercising the power of judicial review, the courts have protected fundamental rights in Pakistan. Others maintain that the courts have occasionally ignored the doctrine of separation of powers and demonstrated judicial activism in the domain of public policy. For instance, the courts have, at times, issued broad policy directions to other branches of the government without appreciating the constitutional distribution of powers between the three organs of the state. By stretching the provisions on fundamental rights beyond their textual content and defined scope, the judiciary appears to have blurred the prescribed constitutional boundaries of each organ of the state. It is essential to recognize that the power of judicial review has its limits. Judicial activism cannot be a substitute for government policy and interference by one branch of the state in the domain of other branches hampers the actualization of fundamental rights through a democratic process.

Critics like Jesse H. Choper have argued that judicial activism establishes a government by the judiciary as it involves the judiciary embarking upon political questions. Moreover, it negates the concept of constitutionalism envisaged in the constitutional principle of the separation of powers. Uncontrolled judicial review, thus, causes a counter-majoritarian difficulty, shaking the foundation of constitutional governments.

Professor Schwartz argued that judicial review is an undemocratic institution. He stated that unrestricted judicial activism may impede the democratic process, and, hence, undermine the rights of the people. Alexander Bickel considered the judiciary a deviant institution. Charles Evans Hughes argued that, in its misguided zeal of being the savior of the people, the judiciary may destroy democracy by exceeding the constitutional limits on its powers. Thus, judicial activism is deemed to be problematic.

Despite such problems, judicial activism has attracted some appreciation in Pakistan and elsewhere. It has been argued that if the judiciary fails to maintain the supremacy of the constitution, it would be failing to meet its constitutional duty. The courts, being delegates of sovereign authority, are considered the agents of the people. A failure to exercise judicial review would amount to compromising the protection of fundamental rights, which is the main function of the courts.

The opponents of judicial activism, however, suggest an alternative approach to judicial review, namely, that of judicial restraint. Judicial restraint is rooted in two strands of thought called 'judicial supremacy' and 'popular constitutionalism'. These schools of thought promote judicial restraint while interpreting or upholding the constitution. Judicial restraint requires that judges should refrain from interfering in the actions of the government unless they find that government action is manifestly against the constitution. Wilkinson suggested that judges must be moderate in their aspirations and overrule the results of the democratic course only where the constitution *clearly* demands it. He proposed that judges should not push any agenda of a social, political or economic nature while reviewing the acts of the government.

James Bradley argued that the judiciary should refrain from setting aside acts of the legislature whenever it is possible to do so, as the legislature is the ultimate sovereign in a political state. He proposed that judges should not declare any act of the legislature or the executive unconstitutional unless it was manifestly clear, even to an ordinary man of sense and

reflection, that such an act violated the constitution. Oliver Wendell Holmes introduced the 'reasonable man' test, arguing that a specific action of the legislature or the executive should not be declared unconstitutional unless a reasonable man could perceive that action as unconstitutional.

The judiciary in Pakistan has also occasionally shown reluctance in declaring actions of the legislature and the executive unconstitutional. By validating martial law regimes in Pakistan on the basis of the doctrine of necessity, the judiciary has failed in its duty to uphold the Constitution. Such an exercise of judicial restraint has attracted criticism that the judiciary compromised on its duty to protect the Constitution.

The advocates of judicial restraint have argued that it promotes democracy. Fredric has justified judicial restraint on the basis that judges are fallible. Those who know their scholarly limits have argued that democracy can resolve complex political issues and such issues should not be left to judicial inventiveness. It has also been argued that an unrestricted exercise of judicial powers can discourage democratic initiatives.

However, judicial restraint has also attracted criticism. For example, Martin H. Redish has argued that judicial restraint is a faulty approach as its political and social costs outweigh its theoretical gains. Gouverneur Morris has stated that judicial restraint amounts to leaving the constitution as an immeasurable value in the hands of idiots and insane men. Critics of the approach have also argued that judicial restraint promotes conservative activism. Carl Black has gone on to state that judicial restraint should be discarded as a model of judicial review.

While exercising judicial review, the courts in Pakistan have, at times, followed judicial activism and, at other times, judicial restraint. Both these approaches have led to the doctrine of separation of powers being violated, thereby undermining fundamental rights. For example, in the *Maulana Abdul Haque Baloch* case, the court held that as the offer concerning the granting of the lease of the mines had not been

advertised publicly, investors, other than the company who had acquired the lease of the mines, had been deprived of the right to participate in the bidding process. In this case, the court reviewed the actions of the executive, despite the fact that it did not have the jurisdiction to do so and in the absence of the violation of any particular fundamental right of the petitioner. The court, thereby, exceeded its constitutional powers.

In the *Syed Zafar Ali Shah* case, the court validated the order of the proclamation of emergency by General Pervez Musharraf, relying on the doctrine of state necessity. The court compromised its constitutional duty to uphold the Constitution by exercising undue restraint, and, thereby, violated the doctrine of separation of powers and undermined fundamental rights of the people.

END NOTES

¹ These are the rights inferred from broadening the extent of the existing fundamental rights including the socio-economic and cultural rights under the subject of Principles of Policy; See, Articles 29-40, the Constitution 1973, rights of Islamic nature as provided in Objective Resolution, 1949; See, the Article 2-A, the Constitution, 1973, elimination of exploitation; See, the Article 3, the Constitution, 1973 and right to be dealt according to the law; See, Article 4, the Constitution, 1973. For judicial jurisprudence as developed for the enforcement of all these rights; See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416.

² See, Hamid Khan, "Role of Bar in the Administration of Justice," *Pakistan Law Journal*, Magazine 3(1998), 148; Report of the National Judicial Conference (Islamabad: National Judicial (Policy Making) Committee, 2011), 28-36; See, Khurshid Iqbal, "The Right to Development in International Law: The Case of Pakistan," (London: Rutledge Taylor Francis Group, 2010), 166; Raza, Reviewing, in Werner Menski et al., *Public*, 105; *Lahore Conservation Society v. Chief Minister of Punjab*, PLD. 2011 Lahore 344; *High Court Bar Association v. Government of Baluchistan*, PLD 2013 Quetta 75; See, Mohammad Waseem, "Judging Democracy in Pakistan: Conflict between the Executive and Judiciary," *Contemporary South Asia*, Vol. 20, Iss.1 (2012),1.

³ See, *Calder v. Bull*, 3 U S 3 Dall 386, 388 (1798).

⁴ *Ibid.*,

⁵ This notion is argued by ‘Federalists’ as developed in American jurisprudence. They categorically discarded the suggestion that the public had any authority for interpreting the constitution. By the middle of 1790s, Federalists had appeared to hold a position similar to the one prevailing today: constitution entrusts the ultimate authority of interpretation to the judiciary, and thus they have developed the idea of ‘judicial supremacy’ for interpreting the constitution.

⁶ This notion is advocated by the ‘Republicans’ as has emerged in American jurisprudence concerning the constitutional supremacy. They have the idea that the people have the primary authority of interpreting the constitution, and it is properly exercised through their representatives which are legislature and executive.

⁷ See, *Fletcher v. Peck*, 6 Cranch 87, 3L Ed. 162 (1810) wherein the Court held that judges should declare the legislation unconstitutional only when they “feel a clear and strong conviction” of unconstitutionality.

⁸ See, Zachary Baron Shemtob, “Following Thayer: The Conflicting Models of Judicial Restraint,” 6, accessed May 29, 2018, <http://www.ssrn.com/abstract=2029687>

⁹ See, Harvie Wilkinson III, “Of Guns, Abortion, and the Unraveling Rule of Law”, *Virginia Law Review*, 95 (2009), 253.

¹⁰ *Ibid.*,

¹¹ See, Bradley Thayer, ‘John Marshall’ (Boston: Houghton Mifflin 1901), 109.

¹² For the liberals, the lesson of the *Lochner* era (1897-1937) continued to require the limited review.

¹³ See, Douglas H. Ginsburg, “Delegation Running Riot,” *Regulation*, 83 (1995), 84; See Randy E. Barnett, “Restoring the Lost Constitution: The Presumption of Liberty” (United Kingdom: Princeton University Press, 2004). For conservatives, just the contrary was appropriate. Trend of restraint emerged as an argument to check the liberal activism of the Warren and early Burger Courts. Even, as Conservatives criticized those courts for departing the ‘true’ constitution in ‘exile’ by discarding their constitutional obligation of scrutinizing the power of congress and defend certain other rights preferred by Conservatives.

¹⁴ See, Shemtob, ‘Following,’ 1.

¹⁵ *Ibid.*, 10.

¹⁶ See, Shemtob, ‘Following,’ 11.

¹⁷ See, Thayer, ‘Origin,’ 140.

¹⁸ *Ibid.*, 36.

¹⁹ See, Frederic Rogers Kellogg, “*Oliver Wendell Holmes, Jr.*: Legal Theory and Judicial Restraint,” (Cambridge University Press, 2006), 6, 110, 151.

²⁰ See, the judgements in the cases namely, *Adair v. United States* 208 US 61 (1908) 191; *Coppage v. Kansas*, 236 US1, (1915), 27.

²¹ See, Gunther, ‘Learned,’ 248.

²² See, *Board of Education v. Barnette*, 319 US (1943) 624.

²³ See, *Poe v. Ullman*, 367 US 1961, 497.

²⁴ See, Wilkinson, 'Guns,' 253.

²⁵ Ibid.,

²⁶ See, Learned Hand's Lecture at Harvard on "Judicial Restraint and the Bill of Rights," reviewed by Alexander M. Bickel, *The New Republic* (1958), 5, accessed June 20, 2018, accessed July 11, 2019, <https://www.scribd.com/document/35196787/Learned-Hand-s-Holmes-Lecture-At-Harvard-On-Judicial-Restraint-And-The-Bill-Of-Rights-Reviewed-By-Alexander-Bickel-From-The-New-Republic-Dated-12-May>

²⁷ Ibid., 21-22.

²⁸ See, Gerald Gunther, "The Subtle Vices of the 'Passive Virtues' - A Comment on Principle and Expediency in Judicial Review," *Columbia Law Review*, 64 (1964), 1, 25.

²⁹ See, *State v. Dosso*, PLD 1958 SC 533; *Asma Jilani v. Govt. of Punjab*, PLD 1972 SC 139; *State v. Zia-ur-Rehman*, PLD 1973 SC 49; *Begum Nusrat Bhutto v. Chief of Army Staff*, PLD 1977 SC 657; *Syed Zafar Ali Shah v. Pervez Musharraf*, PLD 2000 SC 869; *Wasim Sajjad v. Federation of Pakistan*, PLD 2001 SC 233; *Tika Iqbal Muhammad Khan v. Gen Pervez Musharraf*, PLD 2008 SC 178.

³⁰ See, *Infra* Notes 167.

³¹ The principle of judicial review could not prevail for a long time in England because the Parliament neutralized the supremacy of King with its own. This principle was replaced by the doctrine of parliamentary sovereignty. (See, *Lee v. Bude and Torrington*, (1871) LR 6 CP 576) Where Justice Wills held "We do not sit here as a Court of Appeal from the Parliament; if an Act of Parliament has been obtained improperly, it is for the Legislature to correct it by repealing it but so long as it exists as law, the Courts are bound by it." Sir William Black Stone inflicted the legitimacy of judicial review by upholding the parliamentary supremacy. (See, William Blackstone, I Commentaries (15th Ed., 1765) 91, c.1'; See, S.N. Ray, *Judicial Review and Fundamental Right* (Calcutta: Eastern Law House, 1974), 17). Thus, the doctrine of judicial review as it started with *Dr. Bonham Case* (*Thomas Bonham v. College of Physicians*, Court of Common Pleas (1610) 8 Co Rep 114) afterward had an aversive emergence in Public Law jurisprudence of England, in as much as the authority was used by the courts narrowly. For such judicial trend (See, the cases namely, *R v. London Sessions Appeal Committee*, (1951) 2 K.B 508; *Ealing Corporation v. Jones*, (1959) 1 Q B 384; *Gouriet v. Union of Post Office Workers*, (1977) 3 W.L.R. 300. Therefore, the English Judiciary while acknowledging the parliamentary supremacy abandoned the notion of judicial review and retreat from 'supervisory review' until 1930.

³² In the early constitutional jurisprudence of USA, there was a notion that "primary authority to interpret the Constitution lies with the people and not with the court." (See, Kramer, 'Judicial,' 621). The development of this

idea, as per view of Judge Posner, is traced back to James Bradley Thayer's renowned work, 'The Origin and Scope of the American Doctrine of Constitutional Law' published in 1893. (See, Thayer, Origin 129). However, some other authors have referred this matter "to the time of the founding era and the origin of judicial review in 1780s." (Kramer, 'Judicial,' 622). Such approach has been holding the field till "the replacement of this concept of popular constitutionalism with the modern doctrine of judicial supremacy - a change that took hold only in the 1960s." (Kramer, 'Judicial,' 621). In early 20th century, judicial restraint was commonly called up by Liberals in the expectation of restraining the judiciary from invalidating the progressive and new deal in economic regulations. Among Justices of the Supreme Court allied with the growing trend of judicial restraint were the notable judges, Oliver Wendell Holmes Jr. (1902-32), Louis Brandeis (1919-39) and Flex Frankfurter (1939-62). In the latter half of this century, particularly during the period of Chief Justice Earl Warren (1953-69), the Supreme Court embarked on taking liberals' positions, and the trend of restraint appeared a general conservative political issue. The Justices approving restraint in this phase included John Marshall, Harlan and Frankfurter, who constantly endorsed this idea.

³³ See, Rajshree, J. "Pakistan's Judicial Renaissance: A New Phase", ISAS Insights, 166 (2012), 1-7.

³⁴ See, Shemtob, 'Following,' 1.

³⁵ See, *United States v. Butler*, 297 US 1, 78-79 (1936).

³⁶ See, Bickel, 'Least.'

³⁷ See, Kellogg, 'Oliver,' 6, 110.

³⁸ See, Shemtob, 'Following,' 5.

³⁹ See, Wallace Mendelson, "The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter", *Vanderbilt Law Review*. Vol. 31 (1978), 76.

⁴⁰ Justice Brandeis has repeatedly expressed such concern that, "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory." (See, *New State Ice Company v. Liebmann*, 285 US 262 (1932), 311.

⁴¹ Republicans' approach started in 1980s from USA.

⁴² *Ibid.*, 449, 455, 510.

⁴³ See, Posner, 'Rise,' 524.

⁴⁴ See, Cass R. Sunstein, "Backlash's Travels," *Harvard Civil Rights - Civil Liberties Law Review* 42 (2007), 335, 345.

⁴⁵ See, Posner, 'Rise,' 28.

⁴⁶ See, Anotnio F. Perez, "The Passive Virtues and the World Court: Pro-Dialogic Abstention by International Court of Justice," *Michigan Journal of International Law*, 18 (1997), 399.

⁴⁷ See, Redish, 'Judicial,' 1033.

⁴⁸ Ibid.,

⁴⁹ See, Gouverneur Morris Statement (See, 11 Annals of Congress (1802), 3.

⁵⁰ See, Richard Garnett, 'Citizens United and 'Conservative Judicial Activism', National Law Review, accessed June, 20, 2018, <https://www.nationalreview.com/.../citizens-united-and-conservative-judicial-activism->

⁵¹ See, Posner, 'Rise'; Bruce Ackerman, The Perils of Judicial Restraint, accessed June 20, 2018, http://www.slate.com/articles/news_and_politics/.../the_perils_of_judicial_restraint.html

⁵² See, Carl Black, Jr., "The People and the Court: Judicial Review in a Democracy," (New York: Macmillan 1960), 203; Rostow, *Sovereign*, 39,179.

⁵³ See, *Brown v. Board of Education of Topeka*, 347 US 483 (1954); *United States v. Students*, 412 US 669 (1973); *Environmental Defense Fund v Environmental Protection Agency*, No. 97-1637, (1999).

⁵⁴ See, *Marbury v. Madison*, 5 US (1 Cranch) 137 (1803); *Printz v. United States*, 521 US 898, 935 (1997); *United States v. Morrison*, 529 U.S 598, 619 (2000); *Kimel v. Florida Board of Regents*, 528 US 62, 67 (2000).

⁵⁵ See, Philip P. Frickey and Steven S. Smith, "Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique," 111, *Yale Law Journal* (2002), 1707; Robert C. Post and Reva B. Siegel, "Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimmel," 110, *Yale Law Journal* (2000), 441; Lynn A. Baker and Ernest A. Young, "Federalism and the Double Standard of Judicial Review," 51, *Duke Law Journal*, (2001), 75; Steven G. Calabresi, "A Government of Limited and Enumerated Powers: In Defense of *United States v. Lopez*," 94, *Mich. Law Review* (1995), 752.

⁵⁶ See, Tushnet, *Taking*, 99-102,154.

⁵⁷ See, Saikrishna B. Prakash and John C. Yoo, "The Origins of Judicial Review," *The University of Chicago Law Review*, Vol. 70 (2003), 889.

⁵⁸ See, S. A. de Smith et al, 'Principles of Judicial Review,' (London: Sweet and Maxwell 1999), 54.

⁵⁹ See, *R v. Thomas Magistrate's Court, Ex-parte Green Barren* (1957) 5 LGR 129; *R v. Paddington Valuation Officer*, (1966) 1QB 380; *Philips v. Berkshire CC*, (1967) 2 Q.B. 991; *Club v. Ende* (1977) 2 WLR 974; *R v. Police Commissioner*, (1973) 2 Q B 241; IRC case (1982) A.C. 617. *The Attorney-General, Ex-parte ICI PLC* (1987) 1 CMLR 72; *R v. GLC*, (1976) 1 WLR 550; *R v. Secretary of state for the Environment* (1994) 4 All ER 329; *R v Somerset CC*, (1998) 75 P. & C.R. 175; *R v. London Underground*, (2002) EWHC 2307; *R v. The Environment Agency, Secretary of State (Defendants) and Rugby Ltd*, (2004) EWHC 736; *Osterreichischer Rund*

Funk v. Austria (35841/02 (2006) ECHR 1043); See, also Lord Denning, 'The Discipline of Law,' (London: Butterworth, 1979), 133.

⁶⁰ See, *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 461.

⁶¹ See, Justice K.G. Balakrishnan, "Growth of Public Interest Litigation in India," (Address, Singapore Academy of Law, 8th October, 2008, accessed June 20, 2018,

<http://www.indialawyers.wordpress.com/2009/03/06/speeches-of-cji-of-india-2008/>; See, *Shankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458.

⁶² Judicial activism as exercised in the name of public interest for protecting the fundamental rights particularly for the access to justice for the deprived has indeed caused serious reservations for all concerned. The executive through Manmohan Singh, the then Prime Minister complained that "the dividing line between judicial activism and judicial overreach is a thin one . . . A takeover of the functions of another organ may, at times, become a case of over-reach." (See, "Don't Overstep Limits, PM tells Judiciary," The Indian Express (New Delhi), April 8, 2007; On the similar line the Speaker of the House of People, Somnath Chatterjee, himself a lawyer, wrote, "Now-a-days, there are umpteen instances where the judiciary has intervened in matters entirely within the domain of the executive, including policy decisions.... Activism of any institution has to be first directed to the due discharging of its own duties," (Somnath Chatterjee, The Indian Express (New Delhi), April 28, 2007. The judiciary itself seems not satisfied from such approach as Justices A.K. Mathur and Markanday Katju in *Divisional Manager, Aravali Golf Club v. Chander Hass*, Appeal (civil) 5732 of 2007, pronounced that "Recently, the Courts have apparently, if not clearly, strayed into the executive domain or in matters of policy..."

⁶³ See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416.

⁶⁴ See, *Imran Ahmed Khan v. Muhammad Nawaz Sharif*, PLD 2017 SC 265; PLD 2017 SC 692; *Zulfikar Ahmed Bhutta v. Federation of Pakistan*, PLD 2018 SC 370

⁶⁵ See, Hamid Khan, "Role of Bar in the Administration of Justice," *Pakistan Law Journal, Magazine* 3 (1998), 148; *Report*, 28-36; See, Iqbal, *Right*, 166; See, Raza, *Reviewing*, in Menski, et al., *Public*, 105; Waseem, *Judging*; *High Court Bar Association v. Government of Baluchistan*, PLD 2013 Quetta 75; *Tariq Saeed v. Director, Anti-Corruption*, 1996 MLD 1864.

⁶⁶ See, Nicholas Katers, "Judicial Activism and Restraint: The Role of the Supreme Court," referred in "Separation of Powers, Judicial Review and Judicial Activism" by Markandey Katju, accessed on July 11, 2019, <http://justicekatju.blogspot.com/2013/10/separation-of-powers-judicial-review.html>

⁶⁷ See, Garner A. Bryan, 'Black's Law Dictionary' (West Group Publication, 2002).

⁶⁸ See, Thomas Jefferson, "Resolutions concerning The Alien and Sedition Laws," 17 (A. Lipscomb & R. Bergh eds. 1905), 389.

⁶⁹ See, Raoul Berger, "Government by the Judiciary," (Indianapolis Liberty Fund, 1997), accessed on July 11, 2019, <https://books.google.com.pk/books?isbn=0865971447>; See, Glazer, "Towards an Imperial Judiciary?" Public Interest 41, (1975).

⁷⁰ See, 1 A. De Tocqueville, eds. 'Democracy in America' (New York: A.A. Knopf, 1945), 28.

⁷¹ The famous statement of the 'Counter-majoritarian Difficulty' is contained in Bickel, 'Least'; See, also John Hart Ely, 'Democracy and Distrust: A Theory of Judicial Review' (Cambridge M A: Harvard University Press, 1980) ; See, Bruce Ackerman, "The Storrs Lectures: Discovering the Constitution", 93, Yale Law Journal, 1013 (1989); See, Barry Friedman, "The History of the Counter-majoritarian difficulty, Part one: The Road to judicial Supremacy", New York University Law Review, 73 (1998).

⁷² See, Gewirtz, 'Approaches,' 215.

⁷³ Ibid.,

⁷⁴ See, Martin H. Redish and Mathew B. Arnould, "Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative," Flare. La Review, Vol. 46, no. 6 (2012), 1485.

⁷⁵ See, R.C.S. Sarkar, "Judicial Review in the Framework of Indian Politics," (New Delhi, 1983), 101.

⁷⁶ See, Bickel, 'Least,' 16, 18.

⁷⁷ See, Charles Evans Hughes, Proceedings in Commemoration of the 150th Anniversary of the First Congress, H.R. Doc. No. 212, 76th Cong., 1st Session, 32 (1939).

⁷⁸ Ibid.,

⁷⁹ See, *Vriend v. Alberta*, 1998 1 SCR 493, Para,136.

⁸⁰ See, *Calder v. Bull*, 3 US 386, 1798.

⁸¹ See, Redish, 'Judicial,' 2.

⁸² Ibid.,

⁸³ "It is misguided and undesirable to search for a theory of constitutional interpretation that will yield determinate results, right and wrong answers, to most constitutional questions. No such theory exists or ever will exist." (See, Erwin Chemerinsky, "Constitutional Interpretation for the Twenty-first Century," The Journal of ACS Issue Groups (2007), 25.

⁸⁴ See, Jesse H. Choper, "Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court," (Chicago: University of Chicago Press, 1980).

⁸⁵ See, Ely, 'Democracy'.

⁸⁶ See, Greg Jones, "Proper Judicial Activism," Regent University Law Review, Vol. 14 (2001):141.

⁸⁷ See, *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473, 60-555.

⁸⁸ *Ibid.*,

⁸⁹ All the judges answered affirmatively of this question except Justice Sajad Ali Shah who delivered the contra judgment, with the majority view of 10 to 1 judges. The author of the judgment was Justice Shafiur Rahman. However, the agreeing judges except Justice Abdul Qadeer Chaudhry and Justice Fazal Elahi Khan, wrote also their own additional notes because of the significance of the constitutional concerns moved up in the case. However, as per view of Justice Shafiur Rehman, the Articles 17(2) and 14 of the Constitution were violated.

⁹⁰ See, *Muhammad Nawaz Sharif v. Federation of Pakistan*, PLD 1993 SC 473, 735.

⁹¹ See, *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473, 557, 558, 641.

⁹² See, Nasim Hassan Shah, the then CJP, and Justice Ajmal Mian in *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473, 559 and 673 respectively.

⁹³ See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416.

⁹⁴ See, Siddique, 'Jurisprudence,' 80.

⁹⁵ *Ibid.*, 81.

⁹⁶ See, Khan, 'Genesis,' 310 and 313

⁹⁷ See, "Separation of Powers: asking a different Question Suzanna Sherry," accessed November 5, 2014, <http://heionline.org>

⁹⁸ *Ibid.*,

⁹⁹ See, Regarding Corruption in Hajj Arrangements 2010 PLC CS 1489.

¹⁰⁰ See, *Abdul Raheem Ziaratwal v. Federation of Pakistan*, 2014 SCMR 873.

¹⁰¹ See, *Ch Nisar Ali Khan vs Federation of Pakistan*, PLD 2013 SC 568.

¹⁰² Section 6 (b) (i) of the National Accountability Bureau Ordinance, 1999.

¹⁰³ See, Petitioners arguments at Para Nos. 11, 12, 15, 16 in *Maulana Abdul Haque Baloch v. Government of Balochistan*, PLD 2013 SC 641, 678-679 and 681-682.

¹⁰⁴ See, Constitution Petition No. 892 of 2006 wherein the allegation was leveled as illegal, ultra vires, unconstitutional, and *malafide*.

¹⁰⁵ Vide judgment dated 26-06-2002.

¹⁰⁶ *Ibid.*, 678.

¹⁰⁷ In view of the order dated 14-11-2011 passed by the licensing authority, and upheld on 03-03-2012 in Administrative Appeal; See, *Maulana Abdul Haque Baloch v. Government of Balochistan*, PLD 2013 SC 641, 766.

¹⁰⁸ See, *Maulana Abdul Haque Baloch v. Government of Balochistan*, PLD 2013 SC 641, 766.

¹⁰⁹ See, *Maulana Abdul Haque Baloch v. Government of Balochistan*, PLD 2013 SC 641, 710.

¹¹⁰ *Ibid.*,

¹¹¹ See, *Maulana Abdul Haque Baloch v. Government of Balochistan*, PLD 2013 SC 641, 774-75.

¹¹² The Exploration License-5, Addendum No. 1 dated 04.03.2000, Option Agreement dated 28.04.2000, Alliance Agreement dated 03.04.2002 and Novation Agreement dated 01.04.2006.

¹¹³ According to the Counsel for respondent, the judicial restraint “would be the best, clearest, fairest and most transparent approach, which would restore the confidence of foreign investors in Pakistan as a safe environment for their investments and there would be no conceivable allegations that the agreement was struck down after the discovery had been made. He urged that Pakistan should stand up for its commitments under the bilateral treaty read with ICSID clause, which the State of Pakistan has accepted voluntarily and freely, and that this Court should not put its prestige on the line.” (See, *Maulana Abdul Haque Baloch v. Government of Balochistan*, PLD 2013 SC 641.)

¹¹⁴ See, E. Carolan, “The New Separation of Powers: A Theory of the Modern State,” (Oxford: Oxford University Press, 2009), 18.

¹¹⁵ See, *Petition against Distribution of Development Funds by Ex-Prime Minister of Pakistan, Raja Parvez Ashraf*, 2013 SCMR 1017.

¹¹⁶ See, *Farooq Ahmed Khan Leghari v. Federation of Pakistan*, PLD 1999 SC 57.

¹¹⁷ The Order dated 13.7.1998.

¹¹⁸ See, *Pir Sabir Shah v. Federation of Pakistan*, PLD 1994 SC 738.

¹¹⁹ See, Khan, ‘Genesis,’ 314.

¹²⁰ See, Jonathan L. Entin, “Separation of Powers, the Political Branches, and the Limits of Judicial Review,” accessed November 7, 2014, <http://heinonline.org>

¹²¹ See, *Syed Zafar Ali Shah v. General Pervez Musharraf*, PLD 2000 SC 869.

¹²² The Provisional Constitutional Order (PCO) 1999 and Oath of the Office of (Judges) Order, 2000 were challenged in this case.

¹²³ See, the cases, *Muhammad Nawaz Sharif*, PLD 1993 SC 473, *Farooq Ahmed Khan Leghari*, PLD 1999 SC 57 and *Sheikh Liaquat Hussain* PLD 1999 SC 504.

¹²⁴ See, Khan ‘Genesis,’ 316.

¹²⁵ *Ibid.*, 318.

¹²⁶ *Ibid.*, 91.

¹²⁷ *IBID.*,

¹²⁸ See, “Human Rights in Pakistan,” accessed November 8, 2014, <http://heinonline.org>

¹²⁹ See, *Ch. Muhammad Siddique v. Government of Pakistan*, PLD 2005 SC 1; Constitutional petition Nos. 23 of 1999 and 21 of 2004.

¹³⁰ The Marriage Functions (Prohibition of Ostentation Display and Wasteful Expenses) Ordinance, 2000 and the Punjab Marriage Functions (Prohibition of Ostentation Display and Wasteful Expenses) Act, 2003.

- ¹³¹ See, Article 203-D of the 1973 Constitution.
- ¹³² See, George Rossman, Chief Justice of the Supreme Court of Oregon, "The Spirit of Laws: The Doctrine of Separation of Powers," accessed November 7, 2014, <http://heinonline.org>
- ¹³³ *Ibid.*, 722.
- ¹³⁴ See, *Wattan Party v. Federation of Pakistan*, PLD 2006 SC 697, 726.
- ¹³⁵ *Ibid.*, 731.
- ¹³⁶ See, *Balco Employees Union (Registered) v. Union of India*, AIR 2002 SC 350.
- ¹³⁷ See, *Delhi Science Forum v. Union of India*, AIR 1996 SC 1356.
- ¹³⁸ See, *Balco Employees Union (Registered) v. Union of India*, AIR 2002 SC 350.
- ¹³⁹ See, *Wattan Party v. Federation of Pakistan*, PLD SC 697, 725.
- ¹⁴⁰ See, *Nottinghamshire County Council v. Secretary of State*, 1986 1 All ER 199.
- ¹⁴¹ See, Peter Cane, "An Introduction to Administrative Law", 2nd ed. (Clarendon Press, 1996).
- ¹⁴² See, *Wattan Party v. Federation*, PLD 2006 SC 697, 739.
- ¹⁴³ See, *Wattan Party v. Federation*, PLD 2006 SC 697, 759, 760, 763, 765, 767, 768, 769, 770, 80 and 81.
- ¹⁴⁴ *Ibid.*, 755-756.
- ¹⁴⁵ Constitutional Petitions Nos. 87 and 88 of 2007.
- ¹⁴⁶ The emergency was declared on 03-11-2007: The Provincial Constitution Order No. 1 of 2007, and the Oath of Office (Judges) Order, 2007 under Article 184(3) of the Constitution. Articles 4, 5, 8, 9, 10, 15, 16, 17, 19, 25, 47, 48, 89, 90, 91, 209, 243, 244 and 245 of the 1973 Constitution, were argued to be violated through the declaration of emergency in the country by General Pervaiz Musharraf.
- ¹⁴⁷ Section 3 the Provincial Constitution Order No. 1 of 2007.
- ¹⁴⁸ *Ibid.*, 92.
- ¹⁴⁹ See, Khan, 'Genesis,' 332.
- ¹⁵⁰ The text of the judgment itself is self-explanatory (See, *Tika Iqbal Muhammad v. Pervez Musharraf*, PLD 2008 SC 178, 204, 205, 245, 246, 251, 255, 267, 288, 290, 295; Khan, 'Genesis,' 331-32.
- ¹⁵¹ See, Jonathan L. Entin, "Separation of Powers, the Political Branches, and the Limits of Judicial Review," accessed November 7, 2014, <http://heinonline.org>
- ¹⁵² See, *Dr. Mobashir Hassan v. Federation of Pakistan*, PLD 2010 SC 265.
- ¹⁵³ The National Reconciliation Ordinance (NRO), 2007.
- ¹⁵⁴ The Court passed the short order on 26-4-2012 for which the detail reasons were released on 8-5-2012.
- ¹⁵⁵ The breach of fundamental rights under Articles 5, 10-A, 14, 17, and 25 of the Constitution was alleged in this case.
- ¹⁵⁶ See, Khan, 'Genesis,' 336.

¹⁵⁷ See, Shahid Javed Burki, “Gilani’s Removal: A Step in the Right Direction,” (Institute of South Asian Studies, National University of Singapore, 2012.)

¹⁵⁸ See, Aziz-ud-Din Ahmad “On Judicial Activism, 2012”, accessed July 10, 2019, <https://www.pakistantoday.com.pk/2012/08/10/on-judicial-activism-3/>

¹⁵⁹ See, Muhammad Zahid Jamil, “Exploring Political Questions Doctrine in Courts: A Comparative Study of United States and Pakistan’s Judicial System,” accessed July 10, 2010, <https://www.studocu.com/en-us/document/ivy-tech-community-college-of-indiana/understanding-colour/essays/essay-exploring-political-questions-doctrine-in-courts-a-comparative-study-of-united-states-and-pakistans-judicial-system-grade-b/724485/view>

¹⁶⁰ See, Qasim Nauman, “Pakistan Supreme Court Disqualifies Prime Minister,” REUTERS, 2012, accessed August, 13, 2017, <http://www.reuters.com/article/2012/06/19/us-pakistan-gilani-idUSBR E85I0KS20120619>

¹⁶¹ See, Jeremy Waldron, “Separation of Powers in Thought and Practice? Accessed November 6, 2014, <http://heinonline.org>

¹⁶² See, *IA Sharvani v. Government of Pakistan*, 1991 SCMR 1041.

¹⁶³ See, David B. Frohnmayer, Volume 52 Oregon Number 3 Law Review, “The Separation of Powers: An Essay on the Vitality of a Constitutional Idea,” accessed November 7, 2014, <http://heinonline.org>

¹⁶⁴ See, Suo-moto case No.10, 2007 PLD 2007 SC 673.

¹⁶⁵ See, accessed on November 7, 2019 <https://www.dawn.com/news/1465737>

¹⁶⁶ See, accessed October 26, 2019 <https://www.dawn.com/news/14181275>

¹⁶⁷ See, accessed October 26, 2019 <https://herald.dawn.com/news/1398778>

¹⁶⁸ See, *Mian Irfan Bashir v. The Deputy Commissioner, Lahore*, PLD 2021 SC 571.

¹⁶⁹ See, *Chief Executive Officer, Multan Electric Power Company Ltd., Khanewal Road, Multan v. Muhammad Ilyas, etc.*, PLD 2021 SCMR 775.

¹⁷⁰ See, *Malik Munsif Awan, Advocate, Chairman, Pakistan Justice Party v. Federation of Pakistan*, PLD 2021 SC 379.

¹⁷¹ See, <<https://tribune.com.pk/story/2408420/dissenting-judges-urge-sc-to-revisit-cjps-one-man-show?amp=1>> accessed on 29 March, 2023.

¹⁷² See, O’Brien, *Judicial*, 1058.

¹⁷³ See, James Madison, *The Federalist No. 51* (Clinton Rossiter ed., 1961), 322.

¹⁷⁴ See, C. Hughes, *Proceedings in Commemoration of the 150th Anniversary of the First Congress*, H.R. Document No. 212, 76th Congress, 1st Session, 32 (1939).

¹⁷⁵ See, O’Brien, ‘Judicial,’ 1058.

¹⁷⁶ See, O’Brien, ‘Judicial.’

¹⁷⁷ Activist approach, as emerged in the second half of this century in USA, particularly during the tenure of Chief Justice Earl Warren (1935-69), seems to have been pursued by our courts particularly during the period of 2005-2013 (For activism in Pakistan, See, Cheema and Gilani ed., 'Politics;' See also Sanaa, Ahmed, "Supremely Fallible? A Debate on Judicial Restraint and Activism in Pakistan," ICL Journal, Vol. 9, 2 (2015); See, also Myram S. Khan, "Genesis and Evaluation of Public Interest Litigation in Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization," accessed November 20, 2016, [http://www.ideaspak.org/wp-content/.../06/Public-Interest-Litigation-in-the-Supreme Court. pdf](http://www.ideaspak.org/wp-content/.../06/Public-Interest-Litigation-in-the-Supreme-Court.pdf)) and 2016-2018. The judicial policy of restraint of Pakistani courts may be traced in the pursuance of judicial jurisprudence developed by the judges of the Supreme Court of USA including Oliver Wendell Holmes Jr. (1902-32), Louis Brandies (1919-39), and Felix Frankfurter 1939-62.

¹⁷⁸ See, E. Carolan, 'The New Separation of Powers: A Theory of the Modern State' (Oxford: Oxford University Press, 2009), 18.

¹⁷⁹ Ibid., 302

¹⁸⁰ See, *Myers v. United States*, 272 US 52 (1926), 293.

¹⁸¹ See, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 US 579 (1952), 635.

¹⁸² See, M. Judd Harmon, "*Political Thought from Plato to the Present*," (National Book Foundation, Islamabad, 2000), 281-282.

¹⁸³ See, Oxford, B. et.al. 'Politics: An Introduction,' (Routledge, New York, 1997), 290.

¹⁸⁴ See, Charles Manga Fombad, "The Separation of Powers and Constitutionalism in Africa: The Case of Botswana," 25 B.C. Third World Law Journal. (2005), 301.

¹⁸⁵ Ibid., 301.

¹⁸⁶ See, Gwyn, 'Separation,' 127-28; William B. Gwyn, The Separation of Powers and Modern Forms of Democratic Government, in Separation of Powers - Does it still work? By Robert A. Goldwin and Art Kaufman eds., (Washington, D.C.: American Enterprise Institute for Policy Research 1986), 68-70.

¹⁸⁷ See, Gerard Carney, G. "Separation of Powers in the Westminster System," Australasian Study of Parliament Group, Parliament House, Brisbane (1993), accessed June, 22, 2018, <http://www.parliament.qld.gov.au/aspg/papers/930913.pdf>

¹⁸⁸ See, Resende, 'Report.'

¹⁸⁹ See, Hamid Khan, "Constitutional and Political History of Pakistan," (Karachi: Oxford University Press, 2004), 4.

¹⁹⁰ See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416; *Darshan Masih v. State*, PLD 1989 SC 533; *A Sharwani v. Government of Pakistan*, 1991 SCMR 1041; *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *Assad Ali v. Federation of Pakistan*, PLD 1998 SC 161; *Maulana Abdul Haque Baloch v. Government of Baluchistan*,

PLD 2013 SC 641; *Ch. Muhammad Saddique v. Government of Pakistan*, PLD 2005 SC 1; *Watan Party v. Federation of Pakistan*, PLD 2006 SC 697; *Iftikhar Muhammad Chaudhry v. President of Pakistan*, PLD 2010 SC 61; *Muhammad Azhar Siddique Federation of Pakistan*, PLD 2012 SC 774; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; *Vineet Narain and others v. Union of India and others*, AIR 1998 SC 889; *Vellore Citizen's Welfare Forum v. Union of India*, AIR 1966 SC 2715; *Veena Sethi v. State of Bihar* (1982) 2 SCC 583; *Upendra Baxi v. State of Uttar Pradesh*, (1983) 2 SCC 308; *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420; *Sheela Barsi v. Union of India*, (1988) 4 SCC 226; *SP Gupta v. Union of India*, 1981 Supp. SCC 87.

¹⁹¹ See, Mohammad Waseem, "Judging Democracy in Pakistan: Conflict between the Executive and Judiciary," *Contemporary South Asia*, Vol. 20, Issue 1(2012); Zia Ullah Ranjha, "Defining fundamental rights" (*The Friday Times*, 2018); Irfan Hussain, "Judicial Overreach," (*DAWN*, 2018); Babar Sattar, "Judicial imperialism," (*The News*, 2018); Reema Omer, "Suo-moto action," (*DAWN*, 2018); Somnath Chatterjee, "Activism of Any Institution Has to Be First Directed to the Due Discharging of its Own Duties," (*The Indian Express*, 2007).

¹⁹² See, Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999) 99-102, 154.; Saikrishna B. Prakash and John C. Yoo, "The Origins of Judicial Review," *The University of Chicago Law Review*, Vol. 70 (2003), 889.

¹⁹³ See, Martin H. Redish and Matthew B. Arnould, "Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative," *Flare. La Review* Vol. 46, no. 6 (2012), 1485.

¹⁹⁴ See, Jesse H. Choper, "Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court," (Chicago, 1980).

CONCLUSION

The analysis of the literature and the judgments pertaining to the constitutional doctrine of separation of powers and the concept of judicial review shows that the superior judiciary has protected fundamental rights in Pakistan. In doing so, however, it has occasionally intervened into the policy-making domain of the government. For example, while enforcing the fundamental right to life, the judiciary extended the meaning of the word 'life' to include the provision of clean environment, freedom from corruption, access to public health and maintenance of education standards, controlling prices of commodities, and imposition of taxes. Clearly, these areas fall within the domains of the legislature and the executive. Hence, such an exercise of the power of judicial review generated a heated debate in Pakistan concerning the separation of powers between the executive, the legislature, and the judiciary.

Pakistan is a parliamentary democracy and follows a common law system. The first Constituent Assembly in Pakistan debated the utility of the distribution of state power between the three institutions of the state and its importance for the protection of fundamental rights. The outcome of this debate was reflected in the Objectives Resolution, 1949, which provides for the independence of the judiciary and the enforcement of fundamental rights. The doctrine of separation of powers and the protection of fundamental rights were also embodied in the constitutions of 1956, 1962, and 1973.¹

The Federal Court first pronounced the constitutional doctrine of separation of powers in the *Moulvi Tameezuddin* case in 1956, while reviewing the actions of the Governor General who had dissolved the first Constituent Assembly. This case raised important questions about the domain of the executive, the legislature, and the judiciary. Thereafter, the courts reviewed the acts of the legislature and the executive in cases relating to the enforcement of fundamental rights. The debate concerning the link between the constitutional doctrine of separation of powers and the protection of fundamental rights continues to this date.

Based on the analysis conducted within the theoretical framework of this study,² it is proposed that the courts should strongly adhere to the constitutional doctrine of separation of powers, which would allow the realization of fundamental rights through an institutionally multi-dimensional process i.e., the political process. It was observed, in chapter six, that there are two approaches of judicial review: judicial activism and judicial restraint. Judicial activism violates the scheme and the structure of the constitution, in particular, the distribution of power between the legislature, the executive, and the judiciary. Judicial activism, in fact, challenges the doctrine of separation of powers and amounts to interference in the policy-making domain of the government. Judicial restraint, on the other hand, amounts to compromise on the supremacy of the constitution, the independence of the judiciary, and the protection of fundamental rights.³ Thus, there is a need for a balanced approach to judicial review.

Constitutional theorists, such as James Bradley and Alexander M. Bickel, proposed judicial restraint in government policy for the protection of fundamental rights. They argued that a restricted use of the power of judicial review would help to promote constitutionalism and protect fundamental rights. Constitutionalists, like Jesse H. Choper, John Hart Ely, and Greg Jones, opposed both the approaches of judicial restraint and judicial activism. They suggested new theories to interpret the constitution. Jesse H. Choper proposed a theory of jurisdictional retrenchment, which provides that the judiciary

should refrain from interfering in matters of a political nature, as such matters can be better resolved through political forums, like the legislature. John Hart Ely coined a theory of process-oriented review, whereby judges should interpret the constitution considering the overall scheme and structure of the constitution.⁴ Greg Jones presented a theory of structural activism, which provides that the judiciary should adhere to the constitutional doctrine of separation of powers, which is the supreme feature of any constitution. Greg Jones placed judicial activism into two categories: ‘proper’ and ‘improper’ judicial activism. Improper activism demonstrates a belief that judges can build a good society according to their subjective vision of the law.⁵ Preventing the legislature from making policy amounted to an improper exercise of judicial power.⁶ Likewise, non-interference by the judiciary in the policy-making domain of the legislature is called proper exercise of judicial review. Considering the turbulent constitutional history of the doctrine of separation of powers in Pakistan, this study suggests following a balanced approach to judicial review as has been proposed by these three constitutional theorists.

While making an original contribution to literature, this study traces the constitutional *link* between the doctrine of separation of powers and the protection of fundamental rights in Pakistan. Second, it makes an assessment of the superior courts’ *practice* of judicial review while protecting fundamental rights in Pakistan. In this context, this study makes two claims: First, it argues that although the doctrine of separation of powers has not expressly been stipulated in Pakistan’s Constitution, it has valid constitutional basis as it has been envisaged *implicitly* in the Constitution. Second, while exercising judicial review, the superior courts have *applied* this doctrine to safeguard fundamental rights; at times, however, the judiciary has overstepped its constitutional domain by overstretching fundamental rights provisions and, thereby, *undermined* the protection of fundamental rights.

This book specifically argues that when interpreting the Constitution, including the provisions on fundamental rights, the judiciary needs to appreciate its constitutional limitations

and allow *the realization of fundamental rights through a political process*. While such a balanced exercise of judicial review has its risks, given that the executive might not adequately protect fundamental rights, such an approach would promote constitutionalism and the protection of fundamental rights in Pakistan, as it would enable the people to hold the executive accountable for its failure to provide fundamental rights through an electoral process.

This study appreciates that the doctrine of separation of powers and the protection of fundamental rights are essential features of any written constitution. Pakistan's Constitution features the concepts of fundamental rights and the doctrine of separation of powers, though modern conceptions of these concepts developed in other jurisdictions.⁷ Notably, however, the concepts of separation of powers and the protection of fundamental rights existed in the early Islamic state of Madina and have been present throughout in the laws of traditional and modern Islamic states.

These concepts have become even more significant in Pakistan as the judiciary has occasionally shown a tendency of judicial activism. Some theorists consider that judicial review is not merely an auxiliary precaution,⁸ but an opportunity to keep a check on or promote prejudice and the zeal of the judiciary, which could destroy or save the basic interests of democracy depending upon the use/misuse of judicial review power.⁹ Therefore, scholars have presented different arguments promoting an appropriate exercise of judicial review.¹⁰ These arguments boil down to a single constitutional challenge, which is a focus of this study, namely, protecting fundamental rights while adhering to the doctrine of separation of powers.¹¹

The implementation of the doctrine of separation of powers is challenging due to the complex relationship between the legislature, the executive, and the judiciary. However, an increased focus on constitutionalism, including adherence to the doctrine of separation of powers, protects fundamental rights in Pakistan. As it allows the protection of fundamental rights through multi-institutional and political processes. It is

further contended that stretching the provisions pertaining to fundamental rights beyond the explicit terms of the Constitution undermines the democratic process while disturbing the constitutional balance between the various institutions of the state.¹²

This study notes that since the emergence of constitutional governments, experts have been struggling to devise a constitutional mechanism for the protection of fundamental rights. The experts have declared the doctrine of separation of powers as the essence of constitutionalism and the universal criterion of constitutional governance.¹³ The theory of separation of powers places an effective check on the powers of any government and precludes the arbitrary exercise of power by the government.¹⁴ It makes governments accountable through a system of institutional checks and balances by ensuring that each institution remains within its constitutional limits.¹⁵ In fact, there would be no liberties if powers of the state were concentrated in a single authority or institution.¹⁶ Therefore, the study concludes that the separation of powers between the different branches of the government protects democracy, which, in turn, ensures the protection of fundamental rights in Pakistan.¹⁷

The theory of separation of powers has attracted a lot of criticism. For instance, Geoffrey Marshall criticized the theory for being imprecise.¹⁸ Similarly, Charles Manga considered the doctrine of separation of powers a complex and ambiguous theory.¹⁹ He stated that modern scholars had not arrived at an agreement concerning what the theory exactly meant.²⁰ According to these critics, there appears to be a lack of consensus amongst jurists as to the meaning and content of the theory of separation of powers. On the contrary, it may be argued that the theory of separation of powers presents a clear scheme for the division of power between the various organs of the state. It has a viable definition that provides for the division of power between, and the assignment of specific functions, namely, enactment of the law, execution of the law, and interpretation of the law, to specific state institutions. The theory further states that these institutions should perform their

prescribed functions while remaining within their allotted domains, and be empowered to protect their respective domains from any encroachment by the other institutions.

This study concludes that despite such challenges, the doctrine of separation of powers is useful for promoting the rule of law and the balancing of interests between the various institutions of the state.²¹ Moreover, the doctrine of separation of powers is applicable to both the presidential as well as the parliamentary form of governments and recognized as an effective tool for the protection of fundamental rights.²²

In Pakistan, the courts have occasionally interpreted the provisions on fundamental rights broadly, going beyond the textual content of the provisions.²³ By doing so, they have interfered into the domain of the legislature.²⁴ As what is not expressly provided in the text of the fundamental rights provisions may not be read into those provisions. Jurists have criticized such an exercise of the power of judicial review.²⁵ Their criticism is premised on the 'majority rule' and the theory of constitutionalism, and is as follows: the judiciary lacks representative character; thus, judicial powers are subject to the will of the majority and to the Constitution, which represents the will of the people.²⁶

The ex-chief justices, namely, Iftikhar Muhammad Chaudhry and Mian Saqib Nisar, used the power of judicial review to enforce a broad understanding of fundamental rights, creating a tension between the judiciary and the executive. As a result of this proactive use of the power of judicial review, determining the *limits* of judicial power with respect to defining and enforcing fundamental rights has become a crucial topic of debate in Pakistan.

Notably, the excessively active use of the power of judicial review disturbs the constitutional distribution of powers between the three organs of the state. Such an exercise of judicial review amounts to assuming the role of the executive, incapacitating other branches of the government.

This study also appreciates that Article 184(3) of the Constitution states that if the SC considers that a question of public importance relating to the enforcement of any of the fundamental rights is involved in a particular case, it can make an appropriate order. A literal interpretation of this article reveals that the judiciary has a constitutional mandate to enforce fundamental rights. However, the challenge remains in defining the *limits* of judicial power for the enforcement of these rights.

As for as the enforcement of fundamental rights is concerned, there is no doubt that the courts have a constitutional duty to safeguard these rights, being custodians of the rights of the people. While performing its constitutional duty, however, the judiciary needs to appreciate the doctrine of separation of powers.²⁷ To promote constitutionalism and protect fundamental rights, it is necessary for the SC to clearly distinguish between the enforcement of fundamental rights and government policy.

This book proposes that the judiciary should protect fundamental rights without interfering in policy-making, which is the realm of the government. The judiciary must show and observe a clear link between the provisions on fundamental rights (Articles 8-28) and court orders for the protection of fundamental rights. For example, the judiciary should explain the link between the right to life (Article 9) - that prohibits the deprivation of life save in accordance with the law - and visits to hospitals to inspect healthcare standards.

If the judiciary continues using its power of judicial review without any restraint and in the absence of any defined boundaries when exercising its duty to protect fundamental rights, this would undermine the division of powers in Pakistan. Moreover, it would create a conflict between the executive, the legislature, and the judiciary, which, in turn, would result in the weakening of democracy and fundamental rights. Therefore, in order to maintain a balance of power between the three institutions of the state as regards the enforcement of fundamental rights, it is necessary for the

judiciary to provide a clear definition and scope of fundamental rights.²⁸

In this regard, two questions are extremely important: what is a 'fundamental right' and when can fundamental rights become a question of public importance? Article 184(3) empowers the SC to determine cases involving issues of public importance and a breach of fundamental rights contained within the Constitution. The challenge remains in defining 'fundamental rights' and 'questions of public importance' for the enforcement of these rights.

The SC should appreciate the doctrine of separation of powers while attempting to enforce fundamental rights. The SC should define the terms 'fundamental rights', 'public policy', and 'public importance' clearly. There is a perception that Justice Nisar's understanding of 'fundamental rights', for example, traded short-term popularity for a long-term constitutional imbalance between the institutions of the state. Some argue that such an exercise of judicial power incapacitated the other branches of the government. A bare reading of the Constitution of Pakistan reveals that the legislature and the executive are responsible for making and executing government policy, while the judiciary is obliged to ensure that *government policy is implemented* and fundamental rights are protected.

Finally, it is proposed that adherence to the doctrine of separation of powers, whereby the legislature, the executive, and the judiciary work within their respective domains, would promote fundamental rights in Pakistan through an institutionally multi-dimensional process. There is an ongoing struggle, with each institution trying to secure its constitutional domain. Hence, the people, the ultimate sovereign, need to remain aware of the practice and the impact of the separation of power on fundamental rights. A vigilant eye would help to promote the rule of law, constitutionalism, and the enforcement of fundamental rights in Pakistan.

END NOTES

¹ See, Hamid Khan, "Constitutional and Political History of Pakistan," (Karachi: Oxford University Press, 2004), 4.

² Ronald Dworkin, "Laws Empire," (Cambridge: Harvard University Press, 1986).

³ See, "Human Rights in Pakistan," accessed November 8, 2014, <http://heinonline.org>

⁴ See, John Hart Ely, "Democracy and Distrust: A Theory of Judicial Review," (Cambridge MA: Harvard University Press, 1980).

⁵ See, Archibald Cox, "The Role of the Supreme Court: Judicial Activism or Self Restraint," *Maryland Law Review*, 47 (1987), 121-122.

⁶ See, Lino A. Graglia, "It's Not Constitutionalism, It's Judicial Activism," *Harvard Journal of Law and Public Policy*, 19 (1996), 296.

⁷ Activist approach emerged in second half of this century in U.S.A, particularly during the tenure of Chief Justice Earl Warren (1935-69); it seems to have been pursued by our Courts particularly during the period of 2005-2013 (For activism in Pakistan, see, Cheema and Gilani ed., *Politics*; See also Sanaa Ahmed, "Supremely Fallible? A Debate on Judicial Restraint and Activism in Pakistan," *ICL Journal*, Vol. 9, 2 (2015); See, also Myram S. Khan, "Genesis and Evaluation of Public Interest Litigation in Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization," accessed October 20, 2019, <http://www.ideaspak.org/wp-content/06/Public-Interest-Litigation-in-the-Supreme-Court.pdf> and The judicial policy of restraint of Pakistani courts may be traced in the pursuance of judicial jurisprudence developed by the judges of the Supreme Court of U.S.A including Oliver Wendell Holmes Jr. (1902-32), Louis Brandies (1919-39), and Flex Frankfurter (1939-62).

⁸ See, James Madison, *The Federalist* No. 51 (Clinton *Rossiter* ed., 1961), 322.

⁹ See, C. Hughes, *Proceedings in Commemoration of the 150th Anniversary of the First Congress*, H.R. Document No. 212, 76th Congress, 1st Session, 32 (1939).

¹⁰ See, O'Brien, *Judicial*, 1058.

¹¹ See, O'Brien, *Judicial*.

¹² See, Bruce G. Peabody, John D. Nugent, "Toward a Unifying Theory of The Separation of Powers," accessed November 7, 2014, <http://heinonline.org>

¹³ See, E. Carolan, "The New Separation of Powers: A Theory of the Modern State," (Oxford: Oxford University Press, 2009), 18.

¹⁴ See *Myers v. United States*, 272 US 52 (1926), 293.

¹⁵ See, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 US 579 (1952), 635.

¹⁶ See, M. Judd Harmon, "Political Thought from Plato to the Present," (National Book Foundation, Islamabad, 2000), 281-282.

¹⁷ See, Oxford, B. et.al, *Politics: An Introduction* (Routledge: New York, 1997), 290.

¹⁸ See, Geoffrey Marshall, *Constitutional Theory* (Oxford University Press, 1971), 124.

¹⁹ See, Charles Manga Fombad, "The Separation of Powers and Constitutionalism in Africa: The Case of Botswana," 25 *BC Third World Law Journal*, 301 (2005), 301.

²⁰ *Ibid.*, 301.

²¹ See, Gwyn, *Separation*, 127-28; William B. Gwyn, *The Separation of Powers and Modern Forms of Democratic Government*, in *Separation of Powers - Does it still work?* by Robert A. Goldwin and Art Kaufman eds., (Washington, DC: American Enterprise Institute for Policy Research, 1986), 68-70.

²² See, Resende, *Report*.

²³ See, *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416; *Dharshan Masih v. State*, PLD 1989 SC 533; *A Sharwani v. Government of Pakistan*, 1991 SCMR 1041; *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473; *Assad Ali v. Federation of Pakistan*, PLD 1998 SC 161; *Maulana Abdul Haque Baloch v. Government of Baluchistan*, PLD 2013 SC 641; *Ch. Muhammad Saddique v. Government of Pakistan*, PLD 2005 SC 1; *Watan Party v. Federation of Pakistan*, PLD 2006 SC 697; *Iftikhar Muhammad Chaudhry v. President of Pakistan*, PLD 2010 SC 61; *Muhammad Azhar Siddique v. Federation of Pakistan*, PLD 2012 SC 774; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; *Vineet Narain and others v. Union of India and others*, AIR 1998 SC 889; *Vellore Citizen's Welfare Forum v. Union of India*, AIR 1966 SC 2715; *Veena Sethi v. State of Bihar*, (1982) 2 SCC 583; *Upendra Baxi v. State of Uttar Pradesh*, (1983) 2 SCC 308; *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420; *Sheela Barsi v. Union of India*, (1988) 4 SCC 226; *SP Gupta v. Union of India*, 1981 Supp SCC 87.

²⁴ See, Mohammad Waseem, "Judging Democracy in Pakistan: Conflict between the Executive and Judiciary," *Contemporary South Asia*, Vol. 20, Issue 1(2012); Zia Ullah Ranjah, "Defining fundamental rights," (The Friday Times, 2018); Irfan Hussain, "Judicial Overreach," (*DAWN*, 2018); Babar Sattar, "Judicial imperialism," (The News, 2018); Reema Omer, "Suo-moto action," (*DAWN*, 2018); Somnath Chatterjee, "Activism of Any Institution Has to Be First Directed to the Due Discharging of its Own Duties," (The Indian Express, 2007).

²⁵ See, Mark Tushnet, "Taking the Constitution Away from the Courts," (Princeton University Press, 1999) 99-102, 154; See, Saikrishna B. Prakash and John C. Yoo, "The Origins of Judicial Review," *The University of Chicago Law Review*, Vol.70 (2003), 889.

²⁶ See, Martin H. Redish and Matthew B. Arnould, "Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a

“Controlled Activism” Alternative,” *Flare. La Review* Vol. 46, no. 6 (2012), 1485.

²⁷ See, Perfecto V. Fernandez, “Separation of Powers as Juristic Imperative,” accessed on 7 November, 2014, <http://heinonline.org>

²⁸ See, Zia Ullah Ranjah, “Defining Fundamental Rights,” (*The Friday Times*, 8 February 2019), <https://www.thefridaytimes.com/defining-fundamental-rights/>

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