

The State of Judicial Review in 1973 Constitution of Pakistan

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Abstract: *The aim of this paper is to highlight the power of judicial review in the 1973 constitution of Pakistan. The three organ of the government: the executive, judiciary and legislature are working in such a way that each organ is functioning in its sphere. The functions and activities may not be disturbed by each other. There is a mechanism in the 1973 constitution of Pakistan of judicial review. In this way the judiciary has some check on the other branches of the government. Under the 1973 constitution, the judiciary has certain powers to control the executive and legislative branches of the government. In this way judiciary is playing a key role in Pakistan. The paper is an attempt to highlight the process of judicial review in the 1973 constitution of Pakistan and its role in constitutional history in Pakistan.*

Key Words: Judicial Review, 1973 Constitution, Executive, Judiciary, Legislature.

Introduction

The world is a progressive place and society has been in constant change since the beginning. The change has been evolutionary rather than revolutionary. Thousands of years ago primitive people had had no rules and regulations. They had no constitutions and were living in a lawless society. But it is impossible to live in society without laws. It is a natural phenomenon that no society can live without laws and constitution. From the very outset there were no written laws and government machinery to control the primitive societies. However, the said societies had never been scattered and disordered. The societies concerned had been kept adjunct through moral values and customs. [\[Encyclopedia of Islamic philosophy: 2006. P. 245\]](#)

Plato and Aristotle the father of political science gave a new shape to human life. Their theories regarding "State" had the origin of state. According to them, man is social animal by nature and he has the aptitude of good, better and best life. Human nature of progressivism and inter-dependency gave shape to family, village and then state. State was a novice institute of human life. If a kingdom could not remain without a king then a state also cannot establish and regulate itself without constitution, so consequently law and constitution came into being to control every institution of state and every side of human life.

Law

Everyone explains it according to their own perception and meaning but no one can present exact and acceptable definition of law. However, laws are those codes and conducts according to which we have to act under some special rules and regulations, some moral values and customs which will have to follow everyone and defiance of any law is punishment.

Constitution

Simply, constitution is the bundle of laws while in other words constitution is the collection of some setting rules and regulations, codes and conducts, customs and values, tradition and convention, precedents and acceptable decision, social, moral and religious values which explain the limit and power of every state institution and describe the duties and responsibilities of citizens and explore the relation among various institutions of state from which further laws flow fluently.

In the light of above definition of constitution every state has four pillars i.e. territory, population, government and sovereignty. Government is machinery which runs the whole system of a state. Like state, government has also three essential institutions e.g. legislature, judiciary and executive.

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Legislature frames laws, while judiciary is the custodian of the constitution and interpret the laws in the light of constitution and executive implement that laws into practical shape.

Judiciary

Judiciary is the branch of government which is responsible for justice in court system. Judiciary interprets the laws in the light of constitution which means that no institution is superior to constitution. (www.brainyqout.com. Visited on 05-04-2012)

Constitution is a parameter which explains the exact position and legal jurisdiction of every institution in state. So, to keep every institution in its legal jurisdiction, the constitutions of many countries have been given the power of judicial review to "Judiciary" to judge the laws of the legislature and the executive & administrative orders of the government, whether they are framed and issued in the light of constitution or contradict the constitution.

Judicial Review

Judicial review may be defined in different ways, and like other political term one definition can't be possible. Nevertheless, according to the definition of New Encyclopedia Britannica, judicial review is "Power deputy by the courts of a state to observe and judge the laws of legislature, actions of executive and all the administration of the government and to confirm that whether they endorse to the provision of state constitution or not. Laws and actions that do not abide and adhere to constitution are *ultra vires* and therefore are unacceptable and invalid. The power of judicial review is applicable on a written constitution that adaptable through some tough process of legislature. (Britannica: 1987, p. 641)

Historical Perspective of Judicial Review

The doctrine of judicial review means courts have the power to examine the constitutionality of an action and law framed by the integrated institutions of the government. Judicial Review was taken place 1st time in England in Dr. Bonham's case in 1610. ([Craig R. and W. Chase: 992. P.2](#))

A convention was held regarding judicial review at Pennsylvania state house in Philadelphia on May 25 and September 17 1787. The doctrine of judicial review got reputation in England in 1710, related to the Chief Justice of England, Sir Edward Coke, regarding Dr. Bonham's case, as it was considered against the sovereignty of the Britain Parliament but finally, they accepted it as legal fact.

However, Judicial Review as legal power of the Judiciary got international and popularity in the United State of America in Marbury V. Madison case in 1803. ([Ahmad, 1983. p.94](#))

Marbury V. Madison:

Marbury was recommended as a 'Justice of Peace' by President John Adam in Columbia district to coordinate the Federal Judiciary. Despite the fact that Marbury's nomination had been accepted by the Senate, after complete official process, his appointment was determined by President Adam, but before to consent his final commission President Adam's office tenure ended and Marbury Appointment remained pending at the eleventh-hour. New elected president Thomas Jefferson's Secretary of State, James Madison rejected to issue the appointment; whereupon Marbury took a legal action against the secretary of State in the Supreme Court to get approval of his designation.

Marbury V. Madison case was handled in the light of congress enacted law; Judiciary Act 1789, which confirms the original jurisdiction of Supreme Court to void those laws which contradict to the provision of American Constitution article III, Section 11.

This judgment was a milestone in the American Constitutional History because it ensured the power of Judicial Review to the Supreme Court as well as it became a precedent and source of reference for higher and federal courts. (Britannica: 1987)

Constitution of Islamic Republic of Pakistan 1973 and Judicial Review

The constitution of 1973 is landmark in the constitutional history of Pakistan. It is a comprehensive and consensus-based document and current constitution of the country. It was promulgated on 14th August 1973.

Article 184 and 185 along clauses and sub clauses; explain the original jurisdiction, exclusive jurisdiction and appellate jurisdiction of Supreme Court respectively.

The following legal cases were decided by the Supreme Court of Pakistan.

Former Chief Justice of Pakistan, Justice Muhammad Munir writes about original and appellate jurisdiction of Supreme Court that any disputes between inter-governments i.e. between federation and units or province or between provincial government and federation or any administrative disputes between various institutions of government or any question about the explanation of the constitution; the Supreme Court have the authority to declare the disputes in the light of constitution. And according to article 185, clause 2 Supreme Court can hear any appeal against the final order of inferior court.

Supreme Court may also give its opinion regarding any question from the president about law of public importance in the light of article 186.

Under the article 187 with clauses 1 and 2; the Supreme Court has the power to issue an order for the purpose of complete justice related in such cases which were not yet decided and still in pending.

According to the said article, the power of Judicial Review has been given to Supreme Court to promote and stimulate complete justice and eradicate chances of any illegality. The predominant spirit and objectives of judicial review were/are, any action taken by the executive or order; is to keep sanctity and respect of law and enforce supremacy of law and constitution.

Article 188 says that “The Supreme Court shall have power subject to the provision of any Act of [Majlis-e-Shoora (Parliament)] and of any rules made by the Supreme Court to review any judgment pronounced or any order made by it.” [\[Mahmud, 2006, p.57\]](#)

And articles 189 and 190 all these three articles are supplementary and auxiliary to each other. In these consecutive articles, Supreme Court has the authority and power of review regarding any act of parliament, any order of itself or any action of any administrative institution of the government. And in the light of article 190, all the administrative and governments institutions are responsible to support and integrate Supreme Court to implement its decision. (The 1973 Constitution of the Islamic Republic of Pakistan.)

Analysis of “Judicial Review”

Judicial Review has to be evaluated in the light of Pakistan’s political and constitutional history and the Supreme Court decisions, verdicts in legal disputes between the federation and provinces, and between the citizens and government. In this regard, the power of judicial review given to the Supreme Court has distorted the spirit of the constitution and sometime ensured supremacy of the constitution.

Sovereignty of the Constitution

Constitution is a standard document which defines the legal and constitutional limitations of every institution of the government. It is obvious and clear that enactment of the laws is the duties of the legislature i.e. parliament. But there is a ‘check and balance’ over the parliament in the shape of ‘Judicial Review’ which does not permit parliament to make such law which contradict and contrast to the provisions of the constitution.

Preservation of Fundamental Rights

In the context of constitutional law, fundamental rights have been defined as, those rights which are assimilated and incorporated in a constitution. The most important fundamental rights are: right of speech, right of education, right of assembly, employment, practice of religion, travel, marriage etc.; the fundamental rights are mostly based on the concept of human rights.

In our political and constitutional history, the judiciary has frequently preserved the fundamental rights through Judicial Review. The Supreme Judiciary has been strenuously and fiercely engaged in subjecting administrative and legislative actions to judicial review, in the light of restriction inflicted on such action by the fundamental rights and has impartially elucidated the “reasonable restriction” on these rights. In our political and constitutional history, the leading cases are hereby discussed.

Sayed Abul A’la Maudoodi Vs. Government of West of Pakistan PLD, 1964 SC 673
Rowshan Bijya Shaukat Ali Khan vs. Government of East of Pakistan PLD 1966 SC 286
Government of West Pakistan vs. Ghulam Jilani PLD 1967 SC 373. (Ahmad, 1983)

In the case of Syed Abul A’la Maudoodi, *Jamat-i-Islami* had been declared an illegal and unlawful political party under the criminal law amendment 1908 and action taken here was invalid by reason of infringement of the fundamental right of freedom of association.

The Chief Justice of Supreme Court of Islamic Republic of Islamic Mr. A.R Carnilius remarked the responsibility and duty of the judicial review as below:

“The role and duty of judicial review is to inspect and enquire against over-abundance and miss-use of power in defamation of the private and personal right. The Court through judicial review cannot superintend all administrative judgments and decisions while it exists to examine not to supersede and replace them.”

The crucial and imperative duty is to protect fairness in court formula and mechanism. While explaining the term “reasonable restriction” the Chief Justice of Islamic Republic of Pakistan was of the view that in written constitution the importance of judicial review is to observe the reasonableness of the law as well as the mode of utilization of the limitation, whether such manner and mode be endorsed and recommended by law or not.

In Syed Abul A'la Maudoodi case, in which Jamat-i-Islami was declared invalid association by the government of Pakistan was vacated. In the case of Bijya Shaukat Ali Khan vs. Government of East Pakistan, the High Court and Supreme Court had declared invalid the detention of arresting man.

As detention was contradict to fundamental rights number 2(1), (2), (5) of 1962 constitution of the Islamic Republic of Pakistan.

In the case of Gulam Jilani Vs. government of West Pakistan, PLD 1967 SC 373, where the men concerned had been imprisoned by the detaining authority under the Rule 32 of Defense of Pakistan Rules, the Chief Justice of Islamic Republic of Pakistan Mr. AR Carnilius that the detaining authority should have made it possible to prohibit people from disturbing public and civilian order. But administrative authority cannot violate fundamental rights under article 98 of constitution of 1962. (Ahmad, 1983. p.94)

In all the above-mentioned cases, the Supreme Judiciary has set aside many administrative decisions and actions on the basis of judicial review.

There are many cases in our political and constitutional history in which our superior and inferior courts have restored fundamental rights individually as well as collectively through constitutional jurisdiction.

In the case of (Darshan Masih Vs. State PLD 1990 SC 513), 21 brick kiln bonded labors were imprisoned illegally and their fundamental rights were suppressed. The Supreme Court was informed through telegram. The Supreme Court took action and released all the labors from unlawful and illegal detention in the light of article 184 of 1973 constitution. [\[Mahmud, 2006\]](#)

While in well-known case of Muhammad Nawaz Sharif Vs. President of Pakistan PLD 1993 SC 473, the former President Gulam Ishaq Khan had dissolved the National Assembly under the article 58 (2)(b). The Prime Minister of Pakistan Mian Muhammad Nawaz Sharif filed a petition under article 184 (3) before the Supreme Court. Mian Muhammad Nawaz Sharif government was restored by the Supreme Court on 26 May 1993, and declared the president action illegal and unconstitutional. [\[Khan: 2001\]](#)

Public Hangings Banned

The government of Pakistan had fixed a public place for death sentence for quick trials. The Supreme Court of the Islamic Republic of Pakistan took sue motto action and void the law and argued that hanging in public place is against the dignity of human under the article 14 of 1973 constitution of Pakistan.

Karachi had been in worst situation for almost last three decades. In this regard, when the situation of Karachi deteriorated too much, resultantly a well-known personality Hakeem Saeed a man of high caliber was assassinated in broad day light. The MQM (Mutahida Quami Movement) was accused for worst situation.

For controlling the slump and downhill situation, an ordinance (ordinance XIII of 1998) was issued to support the civilian power through armed force. The ordinance allowed the armed forces to establish Military Courts for civilian trials. The ordinance had been challenged by MQM before the Supreme Court. The Supreme Court declared the ordinance unlawful and unconstitutional. [\[Khan: 2001\]](#)

It's a long constitutional history with a lot of complexity; but I am giving preference to the most public importance cases.

In the whole process of complete justice, judges play indispensable role. So, when Pakistan Steel Mill was privatized by the former President General Parvez Musharraf. Chief Justice of Pakistan

Justice Iftikhar Muhammad Choudhry took sue motto action on the request of Steel Mill workers and suspended the government decision in great public importance and benefit.

The military government had started a new Murre Project which was disastrous for the environment. Some well-known politicians and generals had had share in the project. But the Chief Justice Iftikhar Muhammad Choudhry had postponed the project in public interest through court jurisdiction under article 184 (3). Another very essential issue was about kidnapped and disappeared persons from Baluchistan. Uncountable reputed persons of media and poets were vanished from the screen.

Supreme Court accepted the request of Human Rights Commission of Pakistan. Most people were in the light of Court verdict.

The former President General Musharraf had imposed “Emergency plus” on 3 November 2007 and oppressed all fundamental rights and particularly judiciary was pushed to the wall, and all the judges of Supreme Court were put under house arrest.

A new era started with “lawyer movement” and after a successful long march, Chief Justice Iftikhar Muhammad Choudhry along other judges of the Supreme Court and High Courts were restored by the Prime Minister Yousaf Raza Gillani on 22 March 2009. After the restoration of judges the Supreme Court declared the 3 November emergency null and void on 31 July 2009. And consequently all the judges concerned who have taken oath under PCO (provisional constitutional order) were removed from their offices.

NRO (National Reconciliation Ordinance) was contentious and tendentious ordinance issued by General Pervez Musharraf on 5th October 2007. Owing to this ordinance, all the politicians, bureaucrats and political workers who were arraigned for corruption, money laundering and embezzlement from 1st January 1986 to October 12, 1999 were exempted from accountability. [\[Oldenburg: 2016\]](#)

The ordinance was a stigma in national history which protected all the national criminals and thieves who looted Pakistan.

Having the power of Judiciary review, the Supreme Court declared NRO illegal and unconstitutional on 16 December 2009. And the Supreme Court ordered to reopen and revive all the cases which were closed due to NRO. (En .Wikipedia org)

The Supreme Court ordered to FIA (Federal Investigation Agency) and NAB (National Accountability Bureau) to bring all the looted money from the foreign countries particularly from Swiss Banks.

We have seen in our recent past after the restoration of judiciary, the judiciary has activated itself to some extent. In this context the Supreme Judiciary took notices on corruption, public important and benefits issues under the power of judicial review.

There were miscellaneous cases which were reviewed by the SC and all the decisions taken by the government of Pakistan were reversed by the Supreme Court in the light of original and appellate jurisdiction.

The dismissal of President Asif Ali Zardari’s order about the appointment of judges in Lahore High Court and Supreme Court additional and ad-hoc judges was also the symbol of judicial activism. The Supreme Court also reversed the illegal transferred of reputed bureaucrats who were involved in influential cases of NAB and FIA.

The 18th amendment enacted on 19 April 2010, was passed unanimously by both the Houses of the parliament. The amendment is a land mark in Pakistan constitutional development; it aimed to restore the constitution to its original form and amended 98 of its 280 articles, its only annex, and five of its seven schedules. The great achievement of the amendment was the devolution of power to the provinces, in particular abolish the concurrent list which gave the federal parliament overlapping power over dozens of provincial matters. The amendment, however, also sought to reign in the powerful judiciary by taking away the Chief Justice of Pakistan’s almost exclusive authority to appoint judges of the Supreme Court and high courts. The amendment introduced a new Article 175 A into the constitution whereby the power to appoint judges was to be shared by the judiciary, the executive and the parliament. The Supreme Court instantly took up a number of petitions that challenged, among other things, article 175 of the constitution as an attack on the independence of judiciary. By its order of 21 October 2012, the court referred the matter back to parliament for reconsideration along with its recommendations. The court’s recommendations did not alter the basic scheme under article 175 but did seek effective control of the appointment process through the enhanced number and powers of judicial members of the appointment process. In, response, parliament partially accepted the

recommendations and passed the 19th amendment to the constitution on 1 January 2011. (Mirza, 2015). There is a long list of such cases which were reviewed by the Supreme Court in matter of public and national interest.

Conclusion

The judiciary is the real custodian of the constitution. The power behind all the institutions is the constitution and judiciary. Judiciary exercises the power of judicial review to examine and keep check on every other branch of the government. And the power of judicial review gives supreme position to judiciary. And in Pakistan the power of judicial review has very influential benefits for the citizens.

References

- Ahmad, N. (1983). Judicial Review, *Journal of Pakistan Study Centre*, 7.
- Babar, M., S. (2015) The Chaudhry doctrine: A small-c Constitutional Perspective, edited in The Politics and Juresprudence of the Chaudhry Court by Moeen H Cheema and Ijaz Shafi Gilani, *Oxford University Press Karachi*
- Craig R. D., & Harold. W. C. (1992) *Constitutional Interpretation Power of Government* 5th edition, west publishing company En. Wikipedia org
- Encyclopedia of Islamic philosophy, (2006). Perception of Islamic philosophy. *Pentagon press New Delhi, 1.*
- Khan, H. (2001). The Constitutional and Political History of Pakistan, Karachi: *Oxford University Press*
- Mahmud, M. *Constituent of Islamic republic of Pakistan 1973*, Pakistan law publisher, Lahore, 2006.
- Oldenburg, P. (2016) The Judiciary as a political Actor, edited by Christopher Jaffrelot in Pakistan at the Cross Roads, Domestic Dynamics and External Pressure, Pengium Random House India.
- The 1973 Constituent of the Islamic Republic of Pakistan.
- The New Encyclopedia of Britannica, volume 6, 15th edition, the University of Chicago, 1987 www.brainyqouttr.com. Visited on 05-04-2012