



Constitutional Framework: A Comparative Analysis of Legal Systems in Pakistan and the United States

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Abstract: *Constitution means that principles on which state regulate organized and determine relationship through their subjects of states. Constitution may in form of written and unwritten to some extent we can say that Constitution of Pakistan and America are written Constitutions but United Kingdom's Constitution is unwritten Constitution. Constitution is a comprehensive code which consists on Preamble, introduction, parts that parts consist on chapter and Constitution also define the fundamental right of subjects of state, Principals of polices, mechanism of election and procedure of Amendment into the Constitution by legislation. Judicial Review is of one the impressive and incomparable silent feature of the Constitution. According to this principle no one use Excessive power regarding his authority.*

Key Words: Comparative Analysis, Legal Systems, Pakistan, United States

Introduction

Constitutions and Interim Constitution:

Pakistan became independent of United Kingdom in 1947. Under section 8 of Independence Act of Indian Independence Act 1947 than we adopted Govt. of India Act 1935 with some changes and modification mode. After that our Constituent Assembly take a major step towards Constitution of Pakistan made down basic objectives and aims of the constitution which known as Objective Resolution 12 March 1949. After nine years Pakistan successfully framed constitution of 1956 after that in the history of Pakistan there was 1962, interim Constitution 1972 and at last the Constitution of 1973 promulgated in Pakistan (Choudhury, [1956](#)).

Difference between Constitution & Law

There is a basic difference between the Constitution and the word law the Constitution is Supreme law of the land and its clearly describe in the provision of Article 203-B which explain and indicate that law is relates to non-constitutional or sub-constitutional piece of legislation (Mehfooz, [2021](#)).

Difference between Social Contract & Contract Act 1872

Under the provisions of the Constitution the relationship between people and state is a social contract with one another but under Contract Act 1872 the relationship between parties of contract not come under the ambit of social contract it's a contract formal contract between parties for a specific purpose (Rosenfeld, [1984](#)). Difference properly can be defined as:

Common Benefit

A person who paying tax to state can enjoy the facilities provided by the state but the other one person who not paying the tax he also enjoying that all facilities it's a common benefit under the Social Contract (Rosenfeld, 1984).

Counter Benefit

Parties of contract perform their rights and duties only for specific purpose. One who pays other in the form of consideration the other will perform his specified duty (Reynolds, [2004](#)).

Here no concept of common benefits its counter benefit between them.

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Features of Pakistan Constitution and American Constitution

The word features means characteristics of the Constitution. According to the difference Constitution categories as Rigid or Flexible but here Both Constitutions are Rigid Constitutions.

“The great merit of a rigid constitution is that it is definite and certain, and it puts a check on the rash and hasty legislation and the great defect of rigid constitution is that it cannot be changed according to the needs of the country. The result is that a rigid constitution is not suitable for emergency” (Goodpaster, 1973)

I discussed basic and some other salient features of the Constitutions of Pakistan and America are written, supreme law, bicameralism, concept of separation of power, check and balance judicial review, independence of judiciary, fundamental rights of citizens are common features of the constitutions of both Countries but one salient feature of the both Constitutions is different which Sovereignty is. In Pakistan Sovereignty belong to Allah Almighty but in according to American Constitution Sovereignty Belongs to the people.

Doctrine of “Judicial Review”

It is a doctrine according to which the court cans the use of the state's judicial authority to consider and provide a decision relating the following.

Constitutional validity or lawfulness of any;

- primary law
- subordinate legislation
- A individual or body's administrative decision-making, action, or inaction with regard to the performance of a public function (Jaffe, 1961).

According to Dimock & Dimock:

The process by which courts examine legislative legislation, presidential orders, and administrative actions in cases that are really before them to ascertain whether or not they violate a written constitution or go beyond the authority provided by it is known as judicial review (Jum, 2010).

The concept of judicial review assumes that the Constitution is a valid law that the courts may enforce. It is a more important law than the general law. Where conflict occurs between above mention two Constitution and ordinary law, it shall be decided by the courts that law is void or not (Nelson, 2008).

According to this dictionary Webster's Dictionary it is:

A court's reexamination and reconsideration of the validity or constitutionality of something, such as a legislative enactment, a tribunal's proceedings, a governmental or administrative action (Jum, 2010).

The Court can examine the activities of other parts of government and declare legislative and executive measures to be illegal. It can also evaluate the factual or legal conclusions made by an administrative body or a lower court.

“Judicial Review” used in Constitutions?

The term has not been used in the Constitutions of India and Pakistan and U.S.A.

It has been used in first time in the recent English legislative instruments. In the Civil Procedure (Amendment No.4) Rules 2000 in the schedule Part 8 as modified by a new Pat 54 rule 54.1 defines “**Judicial Review**” as follows:

“In this Part a claim for judicial review means a claim to review the lawfulness of

- I. An enactment; or
- II. A decision, action or failure to act in relation to the exercise of a public function”. (Jaffe, 1961)

In the trite words of **Lindley MR**, there is

There is no judicial obligation that is more vital to uphold than the court's authority to ensure that public entities remain within their legal bounds (Jaffe, 1961).

We shall see that the power of making laws is derived from the Constitution so the only ground on which the lawfulness of legislative acts can be judged is its repugnance to the constitution. When question is about the constitutional validity of an act the court's duty is to declare whether the legislation is according to the provisions of the constitution or not (Jaffe, 1961).

Constitutional Base for “Judicial Review”

The Supreme Court is not expressly given judicial review authority by the US Constitution. Many authors were against the American system of judicial review. Alexander Hamilton proposed an independent judiciary as a great deterrent to intrusions and subjugation of the representative body, and he planned for the Supreme Court to reject legislation passed by Congress (Brennan, 2017)

Codification in Pakistan

“Judicial review” is codified expressly in its Article 184 clause (3) and Article 199, Article 8 and 143 (Shapiro, 1999).

Article 199 clause (1) sub clause (c) and Article 184 clause (3) both provide

- Remedies for the enforcement of fundamental rights.
- The power given by these provisions is an extra ordinary power.
- The High Courts and the Supreme Court have concurrent jurisdiction and applicant may chose between these two (Shapiro, 1999).

Codification in United States

As is already common knowledge, legal review in the United States is an adaptation of British law, directly drawn from judicial review in Britain.

There is no constitution written down in England, and judicial review was not available for any Act of Parliament. Judicial review is restricted to administrative acts alone, and review courts lack the authority to challenge main legislation (Allan, 1985).

The written constitution of the United States of America is based on the theory of judicial review, which grants courts the authority to decide whether a decision made by a subordinate level of government is valid. Judicial scrutiny also applies to the enactment of laws (Prakash & Yoo, 2003).

A provision specifically for judicial review not added in to the Constitution of America this power to be clearly implied in the language of Article III and VI.

Article III Section 2 summaries that: All matters arising under this Constitution, the regulations of the United States, and Treaties formed or to be established under such jurisdiction shall fall within the purview of the judicial power.

Article VI Section 2 summaries that: The supreme law of the nation shall be this Constitution, the laws of the United States established in accordance with it, and all treaties formed with US authority.

Pillars of the State: Pakistan v/s United States:

In Pakistan and America Pillars of the states are likely same there is no difference in to the Constitutions of both states. The Pillars of states are:

1. Legislation to make law
2. Executive to administered law
3. Judiciary to interpret and enforced law

Supreme court's jurisdiction to review in the eye of j. Qazi faez esa

Today's hot and burning issue is that Pakistan Supreme Court decision on judicial review on the Constitutional Amendment s18th, 19th, and 21st. the petitioners have assailed or attacked on certain provisions of the constitution to which was discussed in above mentioned three amendments before the

Supreme Court of Pakistan. These provisions amend the constitution of Pakistan 1973, to challenge these constitutional amendments is a long discussion among 17 judges of the Supreme Court that the Supreme Court has authority or jurisdiction to entertain the petition or to give decision on Constitutional amendment. But here we consider this discussion with a view of justice Qazi Faez Isa that Supreme Court has jurisdiction to review the Constitutional amendment and another question also discuss here that Parliament is Supreme under this Constitution or having limited powers.

Locus Standi

The word locus-standi means that "Place of Standing" and we say that "to appear in a court of law" in this petition the parties position is clear that they have right of locus-standi to come in front of court to gain justice on these constitution amendments which change or amend the constitution of 1973 (Fiss, 1979).

Ouster of jurisdiction: Article 239(5) & (6)

Here the question is that court have or capable to entertain the petition?

- Above mentioned to question are basic question for Supreme Court that in any court include Supreme Court?
- And other one basic query which settled here that Parliament power is supreme or not?

Attorney General Butt and Counsel on behalf of Govt. of Pakistan they challenged that this petition not fall into the jurisdiction of supreme court because its out from Supreme court jurisdiction on ground that;

Article 5

"No Amendment shall calls in question any court on any ground whatsoever"

Article 6

"parliament amends any provision of the constitution has no limitation"

"They said matter would peacefully come to an end under crushing weight of these provisions of the constitution."

Supreme Court Decide the Jurisdiction

The Supreme Court decide the issue of any court and parliament has no limitation with

- Precedents
- With principles of interpretation methods
- Historical backgrounds of the Constitution
- Intention of law makers

- Indentation of the Articles

Case: Farooq Ahmad Khan Loghari V. Federation

In this case president M. Rafiq Tarar exercised powers conferred by Article 232 impose emergency in Pakistan dated 28 May 1998 and Fundamental Rights of the citizens were suspended on the ground;

Article 236(2)

“No court challenge the validity of Proclamation of emergency”

This argument ignored by Supreme Court on the Grounds held:

- Courts are Preserver of Fundamental Rights
- Judges are bound by their oath to preserve and protect the Constitution
- Duty of the Judiciary to keep the Constitutions provision operative and alive
- If Fundamental rights Suspended Article 4 fully operative and stands there.

Article 4

“To enjoy protection of law and treated accordance with law”

Established Principles of Interpretation

There are two principles of interpretation that;

Particular Law enactment

Its principle that particular law enactment would be prevail on the general law enactment.

General Law enactment

Its principle that where general law enactment it would be subordinate to the particular law enactment.

In Articles of Pakistan Constitution Article 203G, Article 247 clause 7 here clear intention of the Constitution that specifically restrain the Supreme Court (Lau, 2006).

So with the view of Qazi Faez Esa under the weighty precedent of Federation of Pakistan Vv. Ghulam Mustafa Khar that where Constitution specifically mentioned the Supreme Court name the Jurisdiction ousted in that cases under that provisions.

Insertion of Article 239(5) (6)

This article inserted by Gen. Zia-ul-Haq these are no mentioned into the original Constitution of Pakistan the main aim of this insertion by Zia-ul-Haq to usurped

office of president. This concept oriented or taken by Indian Constitution 42 Amendment Act 1976 which amend the India Constitution Article 368 (Lau, 2005).

Chief justice Y.V Chandra-Chud held

its void and unconstitutional amendment on the following grounds;

- It deprives the court nice balance of power among three pillars of state.
- If court deprives the power how fundamental right enforced?
- No right without remedy considered its like right into water
- Identity of court destroyed means Basic structure theory destroyed with this amendment.

So with the view of Qazi Faez Esa view that from where this concept oriented for Pakistan Constitution this Concept or amendment already negated by the Chief Justice of India and these Clauses 5 and 6 having no valid or strong image so we want to ignore these justice Esa ignore these clauses with other justified arguments follows (Posner & Sunstein, 2006).

Basic Structure theory & Doctrine of Bar

With a reference of the Case Anwar Hussain v. Bangladash they held that; Basic Structure theory means that;

- Basic Structure
- Basic Features
- Structural Pillars
- Fundamental Principles

Doctrine of Bar is a medium where you do not change the basic structure of the constitution change by any amendment made by the Parliament and with the application of it no one change the basic features or salient features of the constitution. Justice Qazi Faez give honor this theory to regard the Constitution of Pakistan 1973 (Nadeem, 2020).

Conflict between Two Articles

Case: Al-Jehad Trust v. Federation of Pakistan

“The method of reconciliation adopted here an where we cannot reconcile the provision the provisions of the original constitution 1973 would be prevail” (Asmal et al., 1996)

Constitution guarantees Independence of Judiciary

Article 203(c) gives constitutional guarantees that independence of judiciary, fundamental rights and

democratic principles this Article 203(c) is a nucleus of the constitution which stated that system of the government operation under constitution and function determining by the courts or judiciary (Epstein, Knight, & Shvetsova, [2001](#))

Coram-Non- Judicia

Article 239(6) challenged on the ground coram-non-judicia which means that “Malafide” or “lack of jurisdiction” that forum which has not competency so in the view of Justice Faiz Esa the parliament does not enjoy unlimited or unbridled power under the Supreme law of the land which is Constitution.

Trichotomy of power

Constitution based on the Trichotomy structured that legislation, executive and judiciary and with this concept there is concept of separation of powers but to check and balance and to review the acts which not beyond the limits from power the judicial organ has judicial review vested in Supreme Court (Prakash & Yoo, 2003).

Words of judges Oath

According to third scheduled of the constitution judges oath to;

- Preserve
- Protect and
- Defend the constitution is main and basic responsibility of judiciary so the word preserve means that safeguard an to prevent from injury or destroy the constitutions provisions by any amendment in which parliament used its excessive powers (Roznai, [2013](#)).

Justice Qazi Faze Esa view that parliament not change the salient features of the constitution due to the Basic Structure theory of constitution and Article 239 Clause 5 of the constitution destroyed one organ of the state which is judiciary and under the Article 239 clause (5) Supreme court not oust the jurisdiction to review the constitutional amendments because constitution itself not permit it Article 239 clause (6) Parliament having no limitation is void concept, Supreme Court having

jurisdiction to judicial review on the amendments in Pakistan. By the majority of 13 to 4 constitution petition he to be maintainable and after that Supreme Court decide the matters regarding 18th, 19th and 21st amendment (Currie, [1983](#)).

Criticism on the Doctrine of Judicial Review in America

The excessive use of power of judicial review has raised the criticism on following points.

- The Supreme Court has used its power to such an extent that it now functions as a non-elective super legislature, acting as a quasi-political body that decides cases pertaining to not only the constitutionality but also the propriety and justness of laws.
- Everything which is against the constitution is unconstitutional but it is a very vague test as chief justice Hughes said;

Although the constitution is what the judge says it is, we still live under it.

- Judicial review may be the result of one man tyranny means five judges may hold a law unconstitutional and four may hold it valid. Thus decision rests with one man who holds office for life and is not responsible to the voters. “The actions of the lawfully elected Congress and the President may be overruled by the ruling of a single judge.. So the court is described as archaic and aristocratic political institution as five out of nine judges can play havoc” (Rawle, [1970](#))
- The decisions of the Supreme Court on constitutional questions often clog the wheel of progress.

“Judges become politicians when they enter the legal profession; as a result, Roosevelt has argued that the constitution should be changed to allow Congress to re-enact any law that the Supreme Court may have declared unconstitutional with a two-thirds majority”. (Rawle, 1970)

References

- Allan, T. R. S. (1985b). Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism. *The Cambridge Law Journal*, 44(1), 111-143. <https://doi.org/10.1017/s0008197300114461>
- Asmal, K., Asmal, L., & Roberts, R. (1996). *Reconciliation through truth: a reckoning of apartheid's criminal governance*. <http://ci.nii.ac.jp/ncid/BA38780562>
- Brennan, W. J. (2017). The Constitution of the United States: Contemporary Ratification. In *CQ Press eBooks* (pp. 230-241). <https://doi.org/10.4135/9781071800942.n25>
- Choudhury, G. W. (1956). The Constitution of Pakistan. *Pacific Affairs*, 29(3), 243. <https://doi.org/10.2307/2753474>
- Currie, D. P. (1983). The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864. *Duke Law Journal*, 198(34), 695. <https://doi.org/10.2307/1372464>
- Epstein, L., Knight, J., & Shvetsova, O. (2001). The role of constitutional courts in the establishment and maintenance of democratic systems of government. *Law & Society Review*, 35(1), 117-163. <https://doi.org/10.2307/3185388>
- Fiss, O. M. (1979). The Supreme Court, 1978 term. *Harvard Law Review*, 93(1), 1. <https://doi.org/10.2307/1340507>
- Goodpaster, G. S. (1973). The Constitution and Fundamental Rights. *Ariz. L. Rev.*, 15, 479.
- Jaffe, L. L. (1961b). Standing to secure judicial review: private actions. *Harvard Law Review*, 75(2), 255. <https://doi.org/10.2307/1338717>
- Jum, O. (2010). *Constitutional law*.
- Lau, M. (2006). *The role of Islam in the legal system of Pakistan*. <https://doi.org/10.1163/ei.9789004149274.i-250>
- Mehfooz, M. (2021). Religious freedom in Pakistan: A case study of religious minorities. *Religions (Basel)*, 12(1), 51. <https://doi.org/10.3390/rel12010051>
- Nadeem, A. H. (2020). *Pakistan: The politics of the misgoverned*. <https://openlibrary.org/books/OL28079565M/Pakistan>
- Nelson, C. (2008). Judicial review of legislative purpose. *Social Science Research Network*. https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1136125_code104659.pdf?abstractid=1136125&rulid=10157729&mirid=1
- Posner, E. A., & Sunstein, C. R. (2006). Chevronizing foreign relations law. *Social Science Research Network*. <https://doi.org/10.2139/ssrn.901999>
- Prakash, S., & Yoo, J. (2003). The origins of judicial review. *the University of Chicago Law Review*, 71(3), 887. <https://doi.org/10.2307/1600662>
- Rawle, W. H. (1970). *A view of the Constitution of the United States of America*. <https://www.cap-press.com/pdf/1813.pdf>
- Reynolds, L. (2004). Taxes, fees, assessments, dues, and the get what you pay for model of local government. *Fla. L. Rev.*, 56, 373.
- Rosenfeld, M. (1984). Contract and justice: The relation between classical contract law and social contract theory. *Iowa L. Rev.*, 70, 769.
- Roznai, Y. (2013). Unconstitutional Constitutional Amendments—The migration and success of a constitutional idea. *the American Journal of Comparative Law*, 61(3), 657-719. <https://doi.org/10.5131/ajcl.2012.0027>
- Shapiro, M. (1999). The success of judicial review. In *Palgrave Macmillan UK eBooks* (pp. 193-219). https://doi.org/10.1057/9780333982518_9