

## The Role of the Supreme Court of Pakistan & Constitutional Parameters of Judicial Activism

Azmat Ali Shah \* Muhammad Siraj Khan † Naghma Farid ‡

p- ISSN: 2521-2982

e- ISSN: 2707-4587

L- ISSN: 2521-2982

### Headings

- [Introduction](#)
- [Constitution of 1956 and Judiciary](#)
- [Constitution of 1962 and Judiciary](#)
- [Constitution of 1973 and Judiciary](#)
- [Conclusion](#)
- [Recommendations](#)
- [References](#)

### Abstract

Article 184(3) has been utilized in the cases of judicial activism. Since the 1980s it has been utilized quite enormously. Constitution has demarcated the powers of each organ, for better democracy a strong judiciary is imminent. Since the Lawyer movement things have drastically changed. The Chief justice's role is quite peculiar in the federal judiciary of Pakistan. Iftikar Muhammad Chaudhry and Justice Mian Saqib Nisar played a great role in the implementation of article 184(3) of the constitution. A number of important cases have been decided. It has enhanced the people's confidence in the Supreme Court of Pakistan while in the Post Saqib Nisar scenario; almost all of the chief justices adopted the policy of judicial restraint.

**Key Words:** Judicial Activism, Constitutionalism, The Supremacy of the Judiciary

### Introduction

Muslims entered India by conquering Sindh in 712 A.D. They established five dynasties till 1857 when East India Company had already established its hold before the war of independence, the company through proper planning colonized this Part of the world. A Charter was established to formulate laws for the trade, its servants and other related issues; this was the beginning stage of the company in the sub-continent. The emperor Jahangir gives an extension of trade to the company in 1615, on the request of King James-I, the dispute mechanism had to be settled according to local laws. Charles-II issued another charter in 1661, according to which the president of the factory can monitor the activities according to English laws; it was the beginning of the judicial system for the company in the sub-continent. In 1678, another step was taken to establish High Court for resolving disputes in civil & criminal cases. By 1683 they empowered the company to create more courts and in 1687, Mr Biggs was appointed as the first judge, by 1718 another court was established in Bombay but the local Indians get injustices which infuriated the local population.

The year 1726 marked the beginning of the uniformity in the three presidency towns; Madras, Bombay and Calcutta were given the facility but the native laws were dominant in these regions. In 1756 Nawab Siraj U Daula captured Calcutta but again it was recaptured from him, Mir Jafar and his son were installed

\* Department of Political Science, Gomal University, Dera Ismail Khan, KP, Pakistan.

Email: [dr.azmatalishah@gu.edu.pk](mailto:dr.azmatalishah@gu.edu.pk)

† Nawab Allah Nawaz Khan Law College, Gomal University, Dera Ismail Khan, KP, Pakistan.

‡ Nawab Allah Nawaz Khan Law College, Gomal University, Dera Ismail Khan, KP, Pakistan.

as Nawab in this region; by 1765 Shah Alam handed over the area to the company in the amount of 26 lac per year. In 1793, the codification of laws in the sub-continent took place. Meanwhile, independent courts were established in this part of the world; separate courts for civil and criminal cases were created, and circuit courts were also established. The war of independence brought drastic changes in the sub-continent. An act was passed by the British Government. It was followed by the Judicature act 1861. High courts were established in Bombay, Madras and Calcutta and Supreme Court disappeared from the scene. In 1911, the Indian High Court act was passed which created many courts in the Indian sub-continent; Federal courts were established in 1937 and Supreme Court was created under the 1956 constitution of Pakistan.

India and Pakistan got independence by the enactment of the 1947 act, section 18(3) provided that both countries shall follow the rules of British India till the formation of their constitutions. All three constitutions of Pakistan have accepted these laws in letter and spirit; even these laws pervaded the authoritarian regimes in Pakistan.

The British Government had adopted different lines of action for the United States and the Indian subcontinent. The latter strategy had been systematic, they mixed the English and the native laws, and the local people were allowed to participate in the affairs of the Government, on the other hand, in the USA, the local people were not allowed and the native laws were not mixed with the Majesty laws. After independence, India and Pakistan decided to opt for a written and flexible constitution. It was lengthy as well; on the contrary, the United States decided to adopt a written but brief and rigid constitution. Both India and Pakistan have mixed systems; some of the institutions adopted from the colonial masters like flexibility, coordination of power, and parliamentary system while some are adopted from other countries of the world. The judiciary of both the sub-continent countries has the features of both i.e. Great Britain and the United States; the hierarchical structures have resemblance with England and the roles it plays are quite familiar with the United States, for example, the interpretation of the constitution, a guardian of fundamental rights and so many other things have quite resembled with the later.

## **Judicial Activism and Various Constitutions of Pakistan**

### **1935 act and the Role of the Judiciary**

The British government introduced a peculiar setup in the said act; the judiciary had original, Appellate and advisory powers, in the original jurisdiction, according to section 204 of the 1935 act, the federal court has to settle disputes between the federation and the provinces and among the units. It hears appeals against the decision of the High Court if it involves a question of law. It also provides an advisory function in matters of national importance (Section 213, 1935 Act).

According to the said act, various high courts already working were retained in their previous positions. The act had discussed in the detail, the mode of appointment of the judges, their salaries, promotion and other things necessary for uplifting the judiciary in the State. They were the appointees of the crown and their salaries had to be drawn from the consolidated fund of India.

The act mentioned how to remove the members of the judiciary in case of gross violation. It is stated that the Privy Council of England had a big say in this process. After the approval of the majesty's government, the process for impeachment had to be started and finalized. At the district level, the appointment of judges had to be confirmed by the Governor of the province. The role of the public service commission was important to declare qualifications for incumbents (Art. 254, 255 & 256 of 1935 act).

### **1947 act and Judiciary**

All laws before the partition of India shall have to be governed in the new State of Pakistan, section 18 of the act clearly demonstrated that till the arrival of the new constitutional document the already prevailed system shall be retained. (Section 8 of Indian Independence Act 1947) The provisional constitutional order in 1947 adopted the act of 1947 as the new constitutional document. The independence act followed the

British-made system including the system of Judiciary, (Governor General order, 3 of 1947). Pakistan retained the high court at Lahore, the chief court of Sindh and the Commissioner System of the judiciary for Peshawar and Quetta; for East Pakistan, a new High court was established at Dacca. The legislature passed an abolition act in which the Privy Council remained no more to decide judicial cases of this part of the State, and the powers of appellate jurisdiction had been shifted to the federal court.

### **Constitution of 1956 and Judiciary**

The first regular constitution of Pakistan has been constituted in 1956. It safeguarded enough provisions for the independence of the Judiciary. The framers of the constitution made sure that enough documentation has to be made for a transparent judicial system. For the independence of the judiciary, it is essential that the mode of appointment, procedure of promotion and job security is in safe hands. To follow the principles of justice enough, provisions have been inserted in the constitution. The structure and jurisdiction of the Supreme Court were adopted from the federal court, the decisions were binding upon the lower courts. While the remaining organs of government were bound to help the judiciary in all kinds of writs, orders, decrees and decisions (Constitution of Islamic Republic of Pakistan 1956, Article 163).

The constitution for a mechanism of interpretation has been provided like the federal court provided under the 1935 act. It can settle disputes between the federal & provincial governments and among the latter; the provinces can approach the court for legal rights, and interpretation of the constitution. It has a peculiar feature of judicial review available in the United States and other federal states of the world. Constitution has retained the provisions of writ jurisdiction of July 1954 which has been endorsed in the 2<sup>nd</sup> report of the constituent assembly; Supreme Court was composed of a Chief Justice and other six judges whose strength can be increased or decreased as parliament suggests (Constitution of 1956, Article 148).

Article 149(2) has enumerated the procedure, and structure, for the appointment of the chief justice and other judges of the Supreme Court; the appointment of the CJ shall be made by the President of the Republic while judges shall be appointed by him after consulting with the Chief justice. The procedure for removal of the members of the judiciary has been adopted from the constitution of India (1950). The parliament after investigating the issue shall submit a report for voting, not less than Two-Thirds of the members present on the occasion, and then a report is to be submitted to the president of the Republic (Ibid, Article 151).

There were two high courts, one in West Pakistan and the other in East Wing; each has a chief justice and other members assented to by the president. The procedure of appointment has been discussed in article 166 of the constitution. The document enumerated a detail about the removal of the members of the judiciary at the provincial level; the constitution provided for the procedure of acting chief justice and other judges when necessary. The mechanism for transfer from one high court to another was subject to the consent of both judges of high courts. Like Supreme Court, the provincial high courts have been assigned the power to issue various writs for safeguarding the basic rights of the citizens.

### **Leading Cases under the Constitution of 1956**

Justice Abdul Rashid laid the foundation for a strong judiciary in Pakistan but after his retirement, Justice Mian Munir delivered some of the controversial decisions which have shaken the judiciary and the masses in the State. In *Muhammad Ishaq Khan V The State* (PLD 1956 SC 256), the petitioner submitted an appeal against his acquittal under article 159(c) of the constitution. In this case, special leave to appeal was granted, however, the case was decided on merit and the application was terminated. (*Muhammad Ishaq Khan V The State*, PLD 1957 SC 256) The President of the Republic sought an opinion regarding article 162 of the constitution in the following words: "Is Governor of a Province in Pakistan empowered under Article 83 or any other provisions of the constitution or any other principle of law to dissolve the Provincial Assembly of

his province functioning under Article 225 of the constitution?" (Muhammad Ishaq Khan V The State, PLD 1956 SC 256).

The Supreme Court while responding to the question replied that article 225 is quite clear and Governor has no jurisdiction to dissolve the Provincial assembly against the said article. Article 233(2) describes a mechanism for filling the vacant seats of the national assembly, the question before the court arose whether article 5 and presidential order rule 5(2) are in clash with each other and whether the constitution tells something regarding these developments. The issue came to the surface when Mushtaq Ahmad Gurmani resigned from the seat of the constituent assembly, his seat have to be filled according to the presidential order of 1956; The Secretary of National Assembly issued date of holding election to the said vacancy which was challenged in the court. Another dilemma arose under article 141 of the constitution which states that a by-election has to be held within six months after the seat has been declared vacant, in this regard, 3 months' time has been extended by the president under the Removal of difficulties Order (VII of 1956). Initially, the writ petition was dismissed by the high court when Supreme Court was approached, it argued that neither rule 5 nor article 5 are repugnant to the constitution and filling of the said seat is valid (PLD 1957 SC 46). A petition was submitted to the high court to challenge the amendment act of 1954 which was invalidated by the federal court (PLD 1955 FC 240). It was declared that the signature of the Governor General to the amendment has not been administered. it contended that article 233-A is a valid document. On the other hand, the Rehabilitation Commissioner act was declared unlawful; Supreme Court retained the decision of the High Court of West Pakistan and terminated the petition. It added that:

"Section 233-A Government of India Act, 1935 merely provides a new remedy for the existing right; it may, therefore, have a retrospective effect. The order could be set aside by the High Court by the exercise of their writ jurisdiction under section 233-A, Government of India Act, 1935, even if the section was not in existence when the impugned order was made. In such a case there was no question of taking away any right because no right was conferred by an order which in law could not be made" (PLD 1958 SC 201).

## **Constitution of 1962 and Judiciary**

After declaring Martial law in the State, General Ayub Khan constituted a constitutional commission for framing the constitution. It was headed by Justice Shahab u Din. He ensured that enough provisions are inserted to safeguard the judiciary. The Cabinet subcommittee was an influential body which modified the recommendations of the commission. It had certain peculiar features quite different from those in the constitution of 1956. However, job security and some of the other things have been focused on. As far as the removals of the judges are concerned it was quite different from the former constitution. Supreme Judicial Council was established which shall be the authority to remove the judges in case of gross misconduct. In the earlier setup, it was done through the recommendation of parliament not less than two-thirds of the majority. The council consisted of a chief justice and the other two senior judges of the Supreme Court, and the chief justices of high courts. The decision of the council shall be implemented by the President of the Republic (Constitution of 1962, Article 128).

The framers of the constitution adopted this procedure from the first report of the constituent assembly published in 1954. They were of the opinion that Indian democracy is mature. They can decide the fate of judges in the parliament but however, but Pakistan's parliament was not mature yet. The Judiciary under the constitution of 1962 had no power to interpret the constitution. It was a step towards the autonomy of parliament as prevailed in the United Kingdom while the courts have no power to declare a law as ultra virus, unlike the American judiciary. The courts under the said constitution had original jurisdiction in a case of dispute between the federal government and provinces and among the two provinces; courts had the power to hear an appeal against the decisions of high courts (Constitution of 1962, article 58).

The first amendment to the constitution was made in 1963 which acknowledged the importance of courts in the matters of judicial review as existed in the United States. The recent development in the constitution can be well compared with section 223-A and article 170 of the constitution of 1956. Articles 49, 50, 52, 53, 54, 55, 92, 95, 96, 99 and 124 of the constitution have expressed in detail the composition, and mode of appointment of the judges. The president under the said constitution has been empowered to issue orders whenever necessary which must bring according to the provisions of the constitution. (Ibid, Article 224(i) and 242) General Ayub Khan issued a Removal of difficulties order in 1962 but it was challenged in the Supreme Court of Pakistan. It was declared an ultra virus by the High court of Dhaka and the said judgment was upheld by Supreme Court (PLD, 1963, Dacca 669).

Justice Cornelius was an influential person behind the judgments during this time, more frequently article 98 has been utilized for facilitating the citizens; due to the 1965 war, the Defense of Pakistan ordinance 1956 was enforced and a number of politicians were detained. When they knocked on the door of high courts their petitions were dismissed, Nawazada Nasrullah Khan has been released while the case of Malik Ghulam Gillani was dismissed (PLD 1967 SC 373). Supreme Court laid down basic guidelines for the detention of persons. It argued that it comes within the ambit of judicial review as prescribed in the first amendment. In this regard, the government must provide enough documentation for detaining the persons, otherwise, they must be released. Those days the students of Dhaka University had been detained by the syndicate. When Dhaka High Court was approached, it decided the case in favour of the student. The same decision was upheld by Supreme Court with the remarks that it is a violation of the basic rights of the people as guaranteed by the constitution.

When a member of the National Assembly resigned from the membership of the Pakistan Muslim League, the speaker notified that he had resigned from the membership of the parliament. When the high court was approached for justice, it decided the case with the remarks that the candidate had not lost the seat. Supreme Court upheld the decision of the high court utilizing article 111 of the constitution. It further added that the candidate has not tendered resignation to the speaker which is essential for the loss of membership (PLD 1966 SC 105). The court had further argued that the authority must provide enough activities against the name of detainees otherwise action shall be considered unconstitutional (PLD 1966 SC 286). Justice Cornelius had explained the concept of the Mala fide act which is often exercised by the government for ulterior motives. Supreme Court held that it is an act without jurisdiction, it is when the executive or legislature issues an order which is not in the domain (PLD 1965 SC 671).

Article 2 of the constitution of 1962 explained the due process of law, the court declared that although it is illegal having retrospective effects with the help of an ordinance could be declared as an ultra virus (PLD 1966 SC 357). Supreme Court in another case declared that it can issue Sue Motto to a person who had been acquitted in a case later on. If proves that something is missing in the record. This is done with the intention to fulfil the requirements of justice, the court also explained the time as after how much time it can be issued (PLD 1966, SC 481). In *Anwar Khan V The Crown (1958)* Justice Cornelius gave the following remarks about the justice system as prevalent in the 1960s:

“A judge while doing a case under the influence of bias would take one view of his wrongdoing... but on the other hand, he would take a very different view and might even be encouraged in his wrongdoing... The enforcement of an absolute rule of nullity is, therefore, calculated to encourage and preserve the maintenance by judges of complete impartiality, and to deter all those who may be interested to influence their decision” (*Anwar Khan .V. The Crown, 1958*).

## Constitution of 1973 and Judiciary

After the dismemberment of the State, a new constitution was framed for the new federation of Pakistan. The new document contained provisions for the judiciary which were identical to the constitution of 1956. The new constitution was framed on April 10th and adopted on August 14th 1973. According to the

constitution of 1973; the Superior Courts shall have the following "No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law (Art. 175(2), Constitution of 1973). It demonstrated that courts can't cross the limits of constitutional parameters while deciding different cases. Article 175 (3) demonstrated that the "Judiciary shall be separated progressively from the executive within three years from the commencing day" (Article 175 (3)).

It was the peculiar feature of the constitution that the executive does not interfere in the judicial organ of the government. The fifth Amendment to the constitution was introduced by the legislature which stated that within a period of 3 years executive shall make sure that no interference is to be made from the judiciary which provided a transparent system for the judiciary to provide easy access to justice in Pakistan. A petition was filed by Sindh Bar Association in the Karachi high court under article 175 (3) of the constitution which guaranteed the independence of the judiciary (PLD 1989, Karachi 404).

Sindh High Court by a majority of 5-1 had clearly demonstrated that article 175 (3) was very much clear and the government had taken no practical steps for the independence of the judiciary since the 5<sup>th</sup> amendment to the constitution in 1976. The government challenged the decision of the said high court in the supreme court. However, its petition was dismissed and the government was directed to implement the decision as per the decision of the court. In light of the above decision, the judiciary was separated from the executive at the district level in 1996. The judicial history of Pakistan since the dismemberment of the country tells us that a number of amendments were introduced in the 1970s to curtail the powers of the judiciary which have hurdled a way of development in this sector.

Article 2A of the constitution tells about the independence of the judiciary. The document clearly indicated many provisions for the structure, powers and jurisdictions of the Supreme Court. Articles 178 and 194 lays down the role of the court in the preservation and protection of the constitution. Articles 177 and 193 tells about the salary, and expenditures of the judges, they also talked about the utilization of consolidated funds for the judiciary (Art.81, constitution of 1973). Article 209 has discussed the procedure of the removal of the judges; a council has been established to process the case. It consists of the senior judges of the Supreme Court and High courts, through this way transparency has been tried in this institution.

Sharaf Faridi's case (1994) has opened a new avenue for the financial independence of the judiciary. Now it can appropriate funds and can change its heads without the approval of the ministry of finance (PLD 1994 SC 105). The decision tells about the separation of the judiciary from the executive. When the review petition was launched it warned the government to implement the decision no later than March 1996. In *Al-Jihad Trust V The Federation* (PLD 1996 SC 324) and *Asad Ali V The Federation* (PLD 1998 SC 33) further interpreted the procedure for the appointment of the members of the judiciary, but later on, the procedure was amended through the 18<sup>th</sup> and 19<sup>th</sup> amendment to the constitution 1973. Now judges must be recommended by a judicial commission comprising of the chief justice, four senior judges of the Supreme Court, a retired judge that shall be the nominee of the chairman for the period of two years, the Attorney General, one member from the Bar Council and federal law minister. They will approve the name, and it shall be sent to the parliamentary committee, within 2 weeks the process shall be completed and the final names shall be sent to the President of Pakistan, through the prime minister for onward appointment (Art. 175-A, constitution of 1973). The constitution has also discussed the composition and appointment of the Federal Shariat Court; Chief Justice along with other senior judges shall be part of the judicial commission, and the procedure for high courts has been also enumerated. Supreme Court is the superior court of Pakistan with original, appellate and advisory powers. It decides cases, protects the rights of the people, interprets the constitution and safeguards the liberties of individuals. The decisions are binding upon the parties except in advisory opinion (Art. 189). Article 177 has enumerated the strength and composition of the court. It shall consist of a chief justice and other judges as determined by the president, after the recommendation of the judicial commission and parliamentary committee with the consent of the prime

minister. Article 184 (3) has laid down the original jurisdiction of the court, Article 184(3) has enumerated the fundamental rights of the constitution, article 185 has enumerated the appellate jurisdiction of the court, and article 186 has discussed the advisory function of the supreme court.

Judiciary has been the cornerstone of every country. The constitution defines the powers and functions of each organ of the government. A sound judiciary ensures democratic progress which has been linked with national security, economic boom, good governance and a sound social sector; the executive and legislature have to follow the decisions of the judiciary if it is according to the law of the land. Dr Hasan Askar Rizvi argued "Democracy is based on liberal constitutionalism. It needs a well-established constitutional and legal system that recognizes civil and political rights, and equality of all citizens irrespective of religion, caste, ethnicity, or language and region. An independent judiciary ensures that the Rule of Law is available to all citizens. Civil and political rights have to be protected not only from the excesses of state institutions and functionaries but also secured against powerful interest groups that resort to violence or against any particular community or region" (Rizvi, Express Tribune, n, d.).

Good governance needs a true rule of law and selfless accountability which has to be ensured by the judiciary; both traditional and accountability courts are interlinked with each other. In the same manner, Courts guarantee fundamental rights, social progress and interpretation of the constitution for national development. Life, liberty and property of each and every citizen are protected. For the implementation of a sound economic base efficient judiciary is needed in which public and private enterprises participate. These contracts among parties are being enforced by national judiciaries.

The Constitution of 1973 has prescribed the hierarchical structure of courts. At the apex is the Supreme Court, branches in all four provinces, High courts in all provinces and at Islamabad branch. There are courts at the district level which deal with the cases of all levels in Pakistan. The judicial set-up of the country has similarities with what has been constituted in the act of 1935 and 1947 act as adopted with certain amendments. Justice Mian Muneer introduced bad examples in the State by adopting the doctrine of necessity. Decades later, in 1972 again the said doctrine was used in the case of General Yahya Khan by declaring his martial law (1969) illegal; The decision couldn't have a positive impact on the political system because a few years later the military takeover by General Zia ul Haq was legitimized by the courts under the doctrine of necessity. In the 1990s and 2002, the doctrine was again enforced. In the post-2007, the federal judiciary challenged the military dictator and declared an emergency against the spirit of the constitution. A military dictator came to the front and dismissed the entire bench included in the decision. New oaths were administered under Provisional constitutional order. The lawyer movement started to restore the pre-2007 position; which led the military dictator to resign. The work will assess the overall performance of the Supreme Court in the matters of judicial activism, especially in the post-2007 when Iftikhar Muhammad Chaudhry actively participated in the decision-making. After him, Mian Saqib Nisar also played activist Chief Justice in the judicial history of Pakistan. Although not all of the Chief Justices in the post-2007 were activists, some of them worked for judicial restraint.

Constitution of 1973 in part VII discussed the structure, procedures and functions of the Judiciary; the 18<sup>th</sup> and 19<sup>th</sup> amendments have reformed the appointment mechanism for the judges. Article 2 (A) focused on the separation of power for the three organs of government, qualifications, appointments procedure have been narrated in articles 177 and 193, pay and package for the judges have been discussed in article 205, while removal of the judges has been discussed in the article 209 of the constitution. Article 176 has discussed the composition of the Supreme Court, including the chief justice and a number of other judges for the superior judiciary in the State. Article 189 discussed the jurisdiction of the court, including original, appellate, and advisory opinion, it also mediates settling disputes between the federal government and provinces (Constitution of 1973, Art.184).

Federal Shariat Court has been constituted under the presidential order of 1980 which became the part of 1973 constitution; an amendment had been made in 1980 which became chapter 3A of the

constitution. The composition of the court has been discussed in article 203 D, and the functions of the court are part of article 203 DD; the relationship between high courts and FSC has been discussed in article 203 F of the constitution of 1973.

In the post-2000, a number of amendments have been made; earlier in the *Government of Sindh v Sharaf Faridi* PLD 1994 SC 105; the court declared that the chief justice is free to exercise the managerial funds without the approval of the ministry of finance, it was a financial autonomy for the court which has been declared in the article 175(3). It adds that "the judiciary shall be separated progressively from the executive within 14 years" (Cons. of 1973, Art. 175 (3)).

In *Al-Jihad Trust* (PLD 1996 SC 324), the court has investigated the role of courts in judicial autonomy which is necessary for national development. The case was decided under Article 184(3) of the constitution which admitted the fact that is a matter of public importance. It dealt with the appointment procedure of the judges under article 177 and 193 of the constitution, consultation regarding the appointment of judges are mandatory. It adds that "an organic document designed and intended to cater for the need for all times to come. It is like a living tree; it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people. Thus, the approach, while interpreting a constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. The interpretation cannot be narrow and pedantic. But the Court's efforts should be to construe the same broadly, so that it may be able to meet the requirement of an ever-changing society. The general words cannot be construed in isolation but the same is to be construed in the context employed; in other words, their colour and contents are derived from their context" (PLD 1996 SC 324).

In *Syed Zafar Ali Shah V. Chief Executive* (2000) it stated that "If the Parliament cannot alter the basic features of the Constitution, power to amend the Constitution cannot be conferred on the Chief Executive of the measure larger than that which could be exercised by the Parliament. Clearly, unbridled powers to amend the Constitution cannot be given to the Chief Executive even during the transitional period even on the touchstone of State necessity. The Constitution of Pakistan is the supreme law of the land and its basic features i.e. independence of judiciary, federalism and parliamentary form of government blended with Islamic provisions cannot be altered even by the Parliament. Resultantly, the power of the Chief Executive to amend the Constitution is strictly circumscribed by the limitations laid down by the Supreme Court "(*Syed Zafar Ali Shah*, 2000). The proclamation of Emergency and Provisional Constitutional order has been validated by the court which was challenged in the Supreme Court of Pakistan. Ultimately it restored the judiciary on 15<sup>th</sup> March 2009; *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2010 SC 879).

The government of the Pakistan People's Party introduced the 18<sup>th</sup> amendment to the constitution of 1973(2010). It reformed the appointment procedure of the judges, article 175 A has been inserted into the constitution. A judicial commission has been constituted under the said amendment; the list must be submitted to the parliamentary committee which on the basis of the majority of  $\frac{3}{4}$  of the membership recommends the names for appointment. Earlier it was done by the chief justice of the Supreme Court. When the 18<sup>th</sup> amendment was challenged in the supreme court of Pakistan, it was decided to settle the issue between the judiciary and executive once forever, the 19<sup>th</sup> amendment has been introduced in the parliament. It was assented to by President Asif Ali Zardari on January, 1<sup>st</sup>, 2010; the members of the judicial commission and parliamentary committee have been enlarged, and the chief justice shall have a key role in the appointment of new judges for superior courts. A constitutional petition was submitted to the court when there was a rift between the judicial commission and parliamentary committee on the recommendations, the government submitted the following comments to the court, it added: "the Parliamentary Committee represented the view of the Parliament and consequently had supremacy over all other bodies." He also argued that "its decision could not be the subject of judicial review as the Parliament was the supreme law-making institution, and its decision could not be reviewed by any court."



The court declared that the judicial commission is the legal body to recommend the names of the judges for the superior courts in Pakistan, both honourable judges of the bench, Mr Khawaja and Shahid Qureshi focused to work under article 175 A of the constitution. The court further argued that “the process of making judicial appointments was inextricably linked with the independence of the judiciary; and since the latter was a matter of public importance [...] it was held that the petitioner had “rightly invoked the jurisdiction of this Court (Parliamentary committee, 2010).

## **Conclusion**

Since the introduction of the term by Mr Arthur Schlesinger in the “Fortunate Magazine” in January 1947, it has been used quite regularly by many judiciaries in the world including Pakistan. Before concluding judicial activism in Pakistan, there is a need to look into the concept globally. In the first few decades, the Supreme Court of the United States decided constitutional cases, however with the passage of time the dictum has been changed. In the post-2017, it decided on ideological cases by 5-4. Certain anti-trust laws were declared unconstitutional, and strong chief justices like Robert, Rehnquist and Warren played a tremendous role in the cases of judicial activism in the United States. The Indian Supreme court decided various cases regarding health, education, environment, child labour, domestic violence, corruption, and socio-economic issues, which enhanced people's confidence in the federal judiciary. The courts in India successfully implemented articles 21, 13 and 32 of the constitution, which has strengthened constitutionalism in India.

After independence by virtue of the 1947 act, section 18(3), both countries of the sub-continent followed the British laws till the formation of their own constitutions. It is ironic to see that the British government introduced a different mechanism for various colonies in the world; due to the peculiar set-up in the United States; it implemented a truly democratic setup, while in the Indian sub-continent it mixed their English laws with native laws. The in-depth analysis reveals that in Pakistan, the federal judiciary had adopted both American and British laws; the hierarchy of courts is just like in England, while interpretation of various laws, constitutions, and fundamental rights have been adopted from the United States.

## **Recommendations**

In the constitution of 1973 article 2 (A) explained the independence of the judiciary; article 178, and 194 explains where courts can rescue the constitution. Article 177 and 193 focuses on the security of judges and the salaries mechanism; if the judges violated the rules and regulations, it can be dealt with according to article 209 of the constitution, which provides a process of removal from service. From 2010 onwards 18<sup>th</sup> and 19<sup>th</sup> Amendments changed many things. The role of the parliamentary committee and judicial commission has immense importance and article 175 has been amended.

## References

- A.K.Fazal Quader Chaudhry ( 2021) The Court case of Shah Nawaz in Lahore High Court, PLD 1966 Section 105 Clause. Page No. 230
- Abdul Rauf ( 2016) The Court case of Case Abdul Hamid Khan, PLD 1965 SC 671
- Al-JehadTrus ( 2008) In the reference of Federation of Pakistan, (PLD 1996 SC 324).
- Asad Ali ( 2007-2008) In the reference of Federation of Pakistan, (PLD 1998 161 SC 161).
- Constitution of 1956, Art.
- Constitution of 1962, Art.
- Constitution of 1973, Art. 175-A, Art.189, Art.177, Art.184(3), Art.186, 2(A), Art.193,Art.205, Art.176,Art.203(D),Art.203(DD),Art.175(3),
- Dr Mobashir Hassan ( 2010) with reference of Federation of Pakistan, PLD 2010 (SC 879).
- ZM. Jaffar (1955) With special reference Federation of Pakistan and others v. Moulvi Tamizuddin Khan, (PLD 1955)
- A.M. Rafiq (1955) With special reference Federation of Pakistan V. Tamizuddin Khan, PLD 1955FC 240
- Muhammad Abdul Haque (1963) The court case of. Fazal Qadir Chaudhry, PLD 1963, Dacca 669
- Muhammad Ishaq Khan( 1957) . In the dignity of The State, PLD 1957 SC 256
- Pakistan Cons. (1973) art. 184(3)
- Sharaf Faridi (1989) In the Dignity Federation of Pakistan and others, PLD 1989 Karachi 404
- Muhammad Nawaz (1966) with special reference to State' PLD 1966, SC 481
- The act of 1935
- Zafar Ali Shah ( 2000) The court case of Pervez Musharraf, (P.L.D.2000 SC 869)