

Impact of Anglo-American Jurisprudence on The Pakistan's Legal system

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Abstract

This paper theoretically discusses two different legal paradigms and connects them with contemporary legal practices in Pakistan to analyze the contours of constitutional judiciary and its writ prerogative. It argues that judicial review of legislation and administrative actions is core of constitutionalism in the American liberal jurisprudential context. As this model is based on the Kantian perspective of 'categorical imperative' which indicates that rightful conditions for egalitarians cannot be compromised in any cost. And for sustainability of such rightful conditions, the contractarian philosopher like Kant focuses on the institution of judiciary to protect and promote liberties and rightful conditions in a society. Whereas in the British model of conventionalism, supremacy of parliament is a core premise to maintain rule of law in society as for this context law represents a collective aspiration of a community which emerges through parliamentary excellence. And judiciary as delegate of sovereign is only supposed to ascertain vires of law but not the constitutional validity of law which rests in parliamentary domains. Both of these models focus on the aspirations and collective wisdom of society and intend to protect them through respective institutions. Although Pakistan's legal system is based upon British model due to the continuity of colonial laws after its inception. Yet also contains American conception of egalitarians through objective resolution of 1949, which contemporarily forms an operative part of constitution 1973 under the Article 2A. However in Pakistan neither judiciary nor parliament has evolved as such to cater socio economic justice and rightful conditions due to continuous interventions of military coups, autocratic administrative patters. Interestingly the latter two are usually justified through Dicey's perspective of 'executive prerogative' and 'doctrine of state necessity' which he had evolved in British model as a last resort to protect realm against any unusual perils. For Dicey it was a 'rule by law' instead of 'rule of law' yet again under parliamentary domains and for a limited period to counter emergencies for which judiciary has no remedy. But then in Pakistan such rule by law context is instrumentally relied upon either through presidential executive orders or through provisionally constitutional orders especially when constitution itself has been held in abeyance during proclamation of martial laws. Due to this indigenous novelty neither 'rule of law' as espoused by neither British model nor 'due process of law' as espoused by American model function in its entirety in Pakistan. Study identifies this aspect as the vulnerabilities of constitutionalism and judicial review in Pakistan.

Keywords: Colonial legacy, Federalism, Liberalism, Constitutionalism, Civil-military bureaucracy, Parliamentary Democracy, Social Contract, Public interest litigation, Rule of law, Due Process of Law, Formalism.

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Constitutional Approaches in the Contemporary Jurisprudential Paradigm of Pakistan to establish socioeconomic justice and civil liberties.

As in a recent *Rawalpindi Bar* case the full bench of Supreme Court of Pakistan discusses indigenous constitutional context to evaluate the threshold of due process of law in Pakistan.¹ Hence it seems appropriate here to understand the theoretical frame work of Article 2A, 4,199,184(3), 187 and 190 of the constitution of Pakistan, 1973. Since this constitutional formulation is mostly relied upon by judiciary to protect fundamental rights as enshrined in Article 8-28 of the constitution as well as socio economic justice as enshrined Article 37 and 38 of the constitution, 1973.² Resultantly study focuses on social contract model as it is an authoritative base of the objective resolution of Pakistan which is now the operative part of the constitution under Article 2A besides forms the preamble of the constitution of Pakistan, 1973. Kant being a core social contract philosopher (1724-1804) argues through an expression of *provisionally rightful possession*³ that even prior to statehood; individuals have internal freedom and inborn natural rights to protect their life, liberty and property. Another social contract philosopher Locke (1632-1704) coincides with him and acknowledges that pre-state individual is familiar with basic rights and has an absolute freedom⁴. Yet these rights are susceptible because no authoritative force can protect them; resultantly Kant uses the term 'provisionally' to explain their vulnerability. However with such a perfect liberty an individual becomes a man of integrity and is capable to decide logically for him and for others⁵. Kant identifies this commonsense as *Priori*, (an intuition) which is used by freemen to bring conclusiveness to their provisional rights⁶. It is a deliberate and articulate decision of Locke's *reasonable man* to form a community on the basis of empirical benefits. This view of material benefit is close to Hobbs (1588-1679) conception of social contract; he does not believe on pre-community rights and morality and says that rights, moralities and rules of conducts come in to being after the establishment of civil organization.⁷ Nonetheless to avoid tyranny of majority rule, Locke's reasonable man does not surrender all of his will; in fact he voluntarily surrenders as much as necessary to form a civil and political society on a foundation of shared conception of justice.⁸ In fact this autonomous portion of individual will provides a rationale for resistance if any subjugation occurs in a civil association.⁹

Rousseau(1712-1778) and Locke commonly believe that society does not evolve through any evolutionary process or through continuity of some dynesties or states with a ruler and subject relation, rather it emerges through voluntraliy agreement of free individuals having a presumed equality.¹⁰ This equality is a practical standard of ethics and morality for Kant, it is the only pragmatic ground for 'Kant's man of integrity', 'Locke's Reasonable man' and 'Rousseau's master of himself with independent will' where an individual interacts with equals to gain right full conditions. Kant calls it *categorical imperative*, a universal parameter of interaction of equals, where subjective and heterogeneous integrities and dignities voluntarily interact with each other on an equilibrium point without any coercion.¹¹ Rousseau identifies this phenomenon as a *virtue of contractual society*¹² and a contemporary political philosopher John Rawls describes it as an '*ethic of mutual*

respect and self esteem.¹³ After attaining this '*ethical common wealth*',¹⁴ Kant argues in '*mine or yours*' debate that owing to inbuilt mutual relationships¹⁵ and altruism man gets an '*outer freedom*' to claim the ownership of things and actions which does not fall in the category of his *internal freedom*.¹⁶ Through an acquired right, man claims the ownership of entities which are external (like public institutions, legislations, public property and governance etc) up to an extent of the same claim of others¹⁷. Thus participants of social contract form a '*commonwealth*' for communal interests and reciprocally entitle themselves to achieve collective civil liberties under '*rightful conditions*'.¹⁸ Such conditions indicate a noninstrumentalization where they have a right to self determination (liberty) for outer freedom without any wrongful interference to their inborn natural rights¹⁹.

This notion of co-existence in a community has also been discussed by a contemporary postivist, (Hart 2005) says that a generalised respect to right to life, liberty, dignity, equality and property creates a *mutual forbearance*.²⁰ He calls it a '*minimum content of natural law*', and declares it mandatory to maintain an equilibrium in a community. Hart argues that laws and morals have no utility in a vulnerable, uneven and indifferent society within adequate resources until its members satisfy their specific level of physiological needs.²¹ Julius Stone is on the same ground and advocates for the testing of positive law through natural law scale and indicates Lockean Spirit for protection of inalienable rights²². He further relies upon Radbruch (1878-1949)²³ for a workable fusion of positive law with natural law to bring justice in a community

Instead of social contract, Jefferson (1743-1826) and Fichte (1762-1814) describe the creation of government through consensus as political contract. Both consider it as an underpinning of legal order to protect acquired and inborn rights.²⁴ (Kelsen 1942) with similar notion defines statehood in terms of law to avoid subjectivity regarding its historical and sociological context and narrates that state is a specific unit of individuals and forms a political community on the basis of a unified indigenous single legal order, and calls it monism.²⁵ Moreover to evade a possible domination of government and wrongful constraints Montesquieu (1689-1775) introduces an instrument of separation of power and Madison (1751-1849) argues for limited government and federalism.²⁶

Rousseau's common force is dependent on a supreme *general will*, engenders through legislative postulates and consists of indispensable elements of equality and equity. This unaltered and constant general will, being a sovereign works as an assertive directive to protect the relationship between state, community and individual²⁷. Rawls describes it as self-preserving '*principles of justice*', '*appropriate conception of justice*' and '*public principles of the ethical commonwealth*' with a specific emphasis on equality, liberty and self-respect and places it prior to the constitution making process²⁸. Moreover all common (heterogeneous socio-political, cultural, religious and economic ideologies) and individual wills ought to be in conformity with this supreme general will to establish a sovereignty²⁹. Therefore Rousseau's '*amour de soi*', as an ultimate source of authority and a collective trust of this compact whole, stands for state's obligations

to protect civil liberties³⁰ and forms a popular sovereignty³¹. Through mingling Kant, Locke and Rousseau with two utilitarian, Bentham (1748-1832) and John Stuart Mill (1806-1873),³² Rawls says that existence of a contractual society is based upon an accumulative satisfaction of all its members and obedience to authority is conditional to this shared conception society³³. Thus legitimacy of state's institutions rests upon pragmatic civil liberties with a confluence of utilitarian, liberal and democratic approaches to society.³⁴ Accordingly in the recent judgments Apex courts in Pakistan has harmoniously interpreted³⁵ Article 2A,³⁶ 4,³⁷ 9,³⁸ 14,³⁹ 25,⁴⁰ 184(3),⁴¹ 187,⁴² and 190⁴³ of the Constitution to create legal fiction to enhance socio-economic justice enshrined in the Article 37⁴⁴ and 38⁴⁵ of the constitution of Pakistan, 1973 for a pragmatic implementation of Constitutionalism. And here the notion of constitutionalism means implementation of constitution in its letters and spirit. However in spite of such a constitutional position Pakistan lacks a tangible rule of law as well as due process of law due to the hegemony of civil military bureaucracy. So the next portion of study deals with this phenomenon.

Administrative Patterns and their impacts on Constitutionalism and Judicial Review in Pakistan:

According to World Bank report⁴⁶, current indicators of development point out that increase in vulnerabilities of judicial review would increase crises of governance in third world countries. However, under influence of globalization and uni-polar world, concepts of legal realism (moral validity of social sensitive laws) and judicial activism (political and social participation of judiciary in the overall national scenario through judicial legislation and interpretation) have trickled down in developing countries like Pakistan. It has also instigated the recent concept of public interest litigation, based upon bottom up approach of public participation and social activism in common law countries. Judicial review deals with domain of revision and review. Power of revision is an internal mechanism of judiciary, where superior judiciary revises decision and judgment of lower courts, quasi judicial authorities and entertains appeals against its own decisions. Therefore, this power is not focus of study; however power of judicial review against public action is main hub of research. Vulnerabilities of judicial review of public actions can be sorted into following categories.

First one is economic category; legal immunity given to economic policies and reforms of respective governments is a constitutional weakness of judicial review. In contemporary scenario economic policies are in-fact public policies. Therefore inability of higher judiciary to review fiscal and monetary policies creates vital vulnerabilities of judicial review. Second category belongs to systematic flaw of administration of justice, judiciary lacks a proper mechanism for implementation of its judgments and decision and it has to relay upon executive and other law enforcement agencies for implementations. Law enforcement agencies are accustomed to strict observation of law and order but incompatible with rule of law, on other hand rule of law is a spirit of separation of powers and constitutionalism. However this concept is apparently impracticable in Pakistan in presence of aristocratic parliament, colonial determinant of strong civil and military bureaucracy and other

powerful non state actors. Third category deals with constitutional lacunas, contemptuous constitutional amendments have made judicial power most vulnerable in form of legal immunity given to defense forces, Presidential orders and executive actions in name of public orders. Fourth category is political influence over judiciary in form of appointments of judges. Fifth is constitutionally inherited judicial restraints over strategic policy issues in form of doctrine of political question. Sixth category is absence of public interest litigation and alternate dispute resolution mechanism. It creates crisis of governance with respect to public utility services and makes courts overburden with litigation deficit due to shortage of well-trained judicial officers and lawyers. Last category deals with infrastructure of judiciary, lack of funds, poor budgetary allocation, limited resources, shortage of judges create menace of back log and delays and make judicial system inefficient as well as in effective for proper utilization of power of judicial review in public policy implementation.

Parikh and Damell (2007) elaborate colonial sub-continent legal experience by stating that colonial courts represented the spirit of the English common law and European political thoughts and governments of British Raj had unilateral powers to alter and control the judgments of superior judiciary, if they were dissatisfied with it. Writers state further that the post-independence scenario was also the same either in case of pre crown era of 1773 judicature under influence of the governor general of East India Company or the federal supreme court of 1935 under influence of crown. Neither the supremacy of parliament nor separation of powers but only a pathetic federalism with executive obsession of strict law and order prevailed in pre independence period. Writers describe that courts were created to serve interests of executive but post-independence judiciary tried to develop its own worth and position which is usually in conflict with other two branches of state. It is inevitable because judges want to protect the authority and legitimacy of their own institution of judiciary but they are unable to calculate the probability of success of their decisions, and this incapacity leads further conflicts between the vital organs of state. However this study does not mention multidimensional separatist movements for independence which ultimately generated civil disobedience for colonial laws and statutes.⁴⁷

Jennings (1957) elaborates that first constitutional assembly of Pakistan has lost political legitimacy and was not able to determine the public will due to absence of elections and representative governments. He states that power struggle between pro-Islamic and pro secular in constitution making process lead towards clashes of interests between mandate less parliamentarians and strong executives. In this administrative crisis the British trained pro executive judiciary collaborated with executives to avoid political chaos and anarchy. However, writer is unable to determine the worth of the ideology and motives behind the political struggle to gain an independent Muslim state. This ideology was socially more important than constitution and political mandate during that specific post-independence period of early fifties. Along with it legacy of civil disobedience also maintained its roots in the social system of Pakistan due to the nonexistence of public participation in governmental actions⁴⁸. Paula (1995) indicates that to avoid socio political anarchy,

judges always collaborate with executives and governments in power. Immature democracy and vested political interests push every political conflict in to the arena of higher judiciary. She also indicates that the major problem for constitutionalism in Pakistan is the absence of genuinely popular constitution, capable to make objectivity between provinces and heterogenic indigenous customs and diverse social norms. But she is also unable to describe how to minimize social heterogeneity in the constitution making process in Pakistan⁴⁹ Maluka (1995) elaborates causes of the failure of constitutionalism and federalism in Pakistan. The incompatibility between religion and state as well as colonial determinant of elitism and nexuses of civil and military bureaucracy are the main causes which create disparity as well as political polarization for a consensual and legitimate constitution in Pakistan.⁵⁰ Kamran (2008) by collaborating with him narrates, that Pakistan is still having the colonial legacy and the colonialism means the legacy of active, immediate and constitutive determinants. So the functional continuity of these determinants cannot allow an indigenous germination of democratic institutions. He establishes this argument on the rational that British emperor control was based on western concept of contractual law and in- personalized sovereignty. This control through alien rules have completely denied the centuries old norms rules and laws of India and resulting in to a cold blooded, frozen and impersonal bureaucratic institution. He concludes that the true spirit of governance is not in harmony with the continuity of the determinants like civil and military bureaucracy of Pakistan.⁵¹

Choudhury (1969) indicates the threat of arbitrary governments in the presence of immature democracy, pathetic economic conditions and blurred social order with the combination of undemocratic, autocratic, elite leadership in Pakistan. He states that under such socio economic and political conditions, there is urgency to have a vigilant and watchful institution to control administrative abuses⁵². Fazal (1969) points out constitutional concepts of natural justice and due process of law are plausible response for risk of administrative abuses, but for this task legislative collaboration with judiciary is very central and strategic to have a practical judicial review and judicial control over the administrative actions in the indigenous socio political environment of India and Pakistan⁵³. Munir (2006) describes that the British parliament enacted the adoption of existing laws in the Indian independence act 1947⁵⁴. The continuation of these colonial laws made for Indian subject is still present in all the three constitutions of Pakistan. This translational tilt leads to a constitutional flaw where the higher law for citizen ship and the continuity of colonial laws for subjects create a procedural incompatibility for the rule of law.

Hamid (2006) descriptively narrates that the rootless and aristocratic parliamentarians were monopolized by the British trained and coercive bureaucracy; it departed the principal of parliamentary supremacy and injected the concept of judicial review in the 1956 constitution of Pakistan to enhance the role of federation. This further depicts that pre and post constitutional era of 50s have duopoly of executives and judiciary to establish the writ of law and order on the subjective cum citizens of Pakistan.⁵⁵ Brohi (1958) analytically depicts this situation as the government by the judges, however on the issue of the interpretation of the

constitution, the writer describes that the judges have to face the limits of their own jurisdiction, power and authority which can create the difference of opinions among the rules of construction. This contradiction of opinions and motives make the judicial decision vulnerable. He narrates that no doubt judges are custodian of constitution and their role is of a super legislator over the executives, legislatures and quasi-judicial actions and decisions, hence they are also the man of flesh and blood. Consequently their opinions and judgments can be manipulated by the extra judicial factors, which are inherent in the constitution of the human mind. By this way writer describes some incompatibilities between the constitution of the state and constitution of the human mind. However he does not elaborates the impacts of constitutionally inherent judicial restraints, on the overall socio political and economic environment.⁵⁶Ralph (1964) narrates that indirect elections, totalitarian constitutional drafting, ambiguous role of precedence, absence of federalism; restricted as well as controlled political representation and autocratic bureaucracy have created structural flaws in the constitution of 1962. He further declares it a deliberate attempt to introduce an American concept of constitutionalism in the legacy of British democratic norms. This artificial confluence of two legal systems with the addition of Islamic concept of justice has further deepened the crises of constitution in Pakistan during the Ayub era⁵⁷. Nonetheless, Javed (2006) goes up to that extreme which elaborates that absence of politically legitimized constitution and federalism embarked the separation of East Pakistan in 1971⁵⁸.

Nevertheless an Articulation of these writers suggests that in absence of true nationalism, legitimate public participation and popular political representation it is impossible to have an efficacy of constitutionalism. These studies are exclusively based on failure of Pakistan's political and legal systems, eventually resulted in to a distorted as well as unpopular constitution and autocratic constitution making process. However these writers do not focus on social mobilization and restructuring to activate public participation for an optimal nationalism. Jelling together the given arguments it is evident that constitutionalism is a result of cooperation and aiding between significant pillars of state. It is also acknowledged in following judgments; PLD 2005 SC 193⁵⁹, PLD 1993 SC 341⁶⁰, PLD 1997 SC 582⁶¹, PLD 2010 S.C.1165⁶², P.L.D 1997 S.C 426⁶³ and P.L.D. 2010 Kar 374⁶⁴. However these rulings ignore some other significant stakeholder such as de facto role of military establishment, print as well as electronic media and social activists in form of influential NGOs. Yet like the scholarly work Apex court is also unable to determine an issue of social fragmentation as well as alienation for a nation making process to attain a legitimate constitution. The colonial tilt of executive's discretionary powers as discussed by pervious writers is clear in P.L.D 2010, S.C. 265⁶⁵, as regards to the infamous 'National Reconciliation Ordinance, 2007', a stigma on face of fair trial, equality, equity, legalism and socioeconomic justice in Pakistan. It also instigates Apex court to jump in a perplexing domain of doctrine of political question. Critically analysis of this case indicates that up to a level of elite corruption, favoritism and nepotism court is unable to assert its powers. Yet, court resists passively and observes "the legislature is competent to legislate but without encroaching upon the jurisdiction of the judiciary". In same case court is overtly

expressing its incapacity and vulnerability and observes “Legal proceedings are not undertaken by the courts merely for academic purpose unless there are admitted or proven facts to resolve the controversy”. That is why court attempts to evolve a formula for due process of law to establish legalism and rule of law as follows, “Transparency = power - accountability”.⁶⁶

Similarly on another occasion PLD 2010 SC 61⁶⁷ Apex court criticizes authoritarian but constitutional role of President, elaborates a unique role of judiciary as the guardian of people’s rights, so implicitly constitution is in fact a document, which represent the unanimous determination of a nation. However, this case is a perfect example of the vulnerability of judicial review, where a constitutional guardian of state has thrashed out the chief guardian of judicial power. Nevertheless, it also represents determination of judiciary to resist the executive’s coercion .Court observes, “the critical dispensation of justice in a society, be it between men and men or between the governors and governed, could never be over emphasized. ---- A state where the people had opted to be governed by a written and federal constitution through a system, which envisaged trichotomy of sovereign powers. The judicial power of necessity got vested in the judiciary, which then obliged it to act as the administrator of public will”. Ajmal (2004), in his book ‘A judge speaks out’, over judicial judgments on the issue of the doctrine of state necessity narrates that it is like a musical chair game which is dangerous for the socio economic development of the country. He has of an opinion by keeping a specific emphasis on the Zafer Ali Shah case that the uncertain and instable position and views of the judges of the Supreme Court of Pakistan, over the ultra vires acts of the military is not good for political stability of country.⁶⁸By collaborating with Ajmal, Patel (2000) narrates that merely constitutional grantees of human right in constitution cannot safeguard human life. In-fact it is the judgment and practice of judges which protect it. However, in the name of natural justice, judges play politics in courts. But he is not explaining the factors and ways which facilitate the entry of politics in to the court of law.⁶⁹ Moreover Ajmal also blames the irrational constitutional amendments for the decay of constitutionalism in Pakistan. He states that vested interests of powerful elites have turned the constitution as a dead document and it is dead for ever, Apex court also makes scream on these judicial attacks and observes in 2000 SCMR 751⁷⁰“If the judiciary of the country is stripped of its powers, the country would cease to exist as a free nation” The Apex Court also elaborates it in the PLD 1993 SC 341⁷¹ By having a special emphasis on the compatible confluence of essence of morality of the natural law, the impartially of the statues of the civil law, the rigidity of the positive law with equity of common law. It was held, “Constitution is a living document--it has to be interpreted in a manner to keep it alive and blossom under all circumstances and in every situation”. Same has been observed in PLD 1997 SC 582⁷²“The judicial approach should be dramatic rather than static, pragmatic and not pedantic and elastic rather than rigid.” That’s why as a synthesis of judicial review being a modern concept of judicial activism prevails in the contemporary world, and Pakistan also represents this philosophy. Resultantly in P.L.D 2010 S.C 1165⁷³ it elaborates this concept in this judgment, “The political sovereign i.e. the people, being trustees of a ‘sacred’ trust in the distribution of powers under the

Constitution, did not make Judges supreme arbiters on issues purely political. But they wanted the Judges to do, right to all manner of people according to law, without fear or favor, affection or ill-will.”

The above mentioned discussion indicates that though power of judicial review is an important feature of judicial system and sustains in Pakistan under written constitutions of 1956, 62 and 73. But the chronology of administrative patters in Pakistan demonstrates that executive has avoided the implementation of superior court's verdicts, under the exercise of judicial power emanating from prerogative of writ jurisdictions and public interest adjudication. This has led to tensions between two vital organs of the state, creating uncertainties and deficits among the public at large. It also indicates that while judiciary is authorized under the American perspective of constitutional scheme of protection of fundamental rights and principles of policy to assert for good governance under Article 199 and 184 (3). Yet it is unable to perform a role of catalyst for progressive social change and right based development of society. Since democratic, executive and judicial failures under subjective constitutionalism and polarized social orientation has created a vicious circle of crisis of constitutional governance as muddled with arbitrary powers and corruption. Never the less, this crisis has directional relationship with vulnerabilities of constitutionalism and judicial review in Pakistan. These vulnerabilities also systematically engender opacity, unaccountability and lack of public participation in strategic as well as pro poor public policy process.

Conclusion:

Since Stokes⁷⁴ argues that the positivists Utilitarian's like James Mill, John Stuart Mills and Macaulay under the influence of Bentham gave the corpus of law to subcontinent during 1830 to 1833. Its initial draft was based upon the rational choice theory of utilitarianism. However due to the negative impact of Mutiny in 1857 the fundamentalist perspective of public order had overruled the preventive and reformatory spirit of utilitarianism. Resultantly an overemphasis on administrative discretions was preferred to control the subjects of colonial India. Sharma believes that such kind of administrative patterns sustained in subcontinent even after independence in 1947⁷⁵. Hence Setalvad argues that due to such continuity the writ prerogative of high court in Indian and Pakistan's constitutions is not compatible with their substantive legal order⁷⁶. Nevertheless these judicial powers are borrowed from American experience of pursuit of happiness, due process of law and constitutionalism whereas the existing legal order depicts the continuity of English Jurisprudence with a meager connotation of constitution as a higher law. Hence for the positivist English perspective constitution is only a positive morality with a fable power of persuasion. Therefore the notions like constitutional validity and constitutional supremacy is alien to the classic positivist jurisprudence as prevail in the Indo-Pak legal corpus. Resultantly legal formalism along with a literal approach of construction prevails in these jurisdictions which subsequently empowers delegated legislation in an absence of Parliamentary contingencies, especially in the context of Pakistan which has also experience a long history of military coups. This situation becomes more complex when the substantive criminal justice system of

subcontinent has a permanent role of armed forces as in aid of civil power. Such role is again based on the ring fence theory of the Royal Indian Army, which guarded the entire subcontinent internally. So armed forces of the united India were also involved in the internal policing with regards to the law and order situation. This theoretical legal frame work is still present in Ss.127to 131 of the Criminal Procedure Code of Pakistan, 1898⁷⁷. Such paternalistic approach toward public order is intrinsically based on administrative discretions which subsequently have a negative impact on the personal and civil liberties. Therefore as fallout of an incompatibility between English and American jurisprudential traditions an administrative penology under the auspicious of colonial administrative patterns prevails in Pakistan.

References:

¹ See in PLD 2015 SC 401.

² See e.g. in PLD 2006 SC 697; 2006 SCMR 1360; P.L.D 2007 SC 133; P.L.D 2008 SC 178; PLD 2009 SC 879; P L D 2010 SC 1; P LD 2010 SC1165; P L D 2010 SC731; P L D 2010 Lhr 230; PLD 2010 S.C 265 P.L.D 2010 S.C. 61; P.L.D 2010 SC 1109; 2010 C.L.C. 577; 2010 C.L.D.571 Lhr; P LD. 2010 Karachi 374; 2010 P.L.D. LHR.605; 2010 S.C.M.R. 511; 2010 S.C.M.R 1301.

³ See in Immanuel Kant, "Groundwork of Metaphysics of Morals," in *Practical Philosophy*, Translated and Edited by Mary Gregor (New York: Cambridge University Press, 2008), 410.

⁴ See in Alpheus Thomas Mason and Richard H. Leach , "Taproots of Freedom," in *In Quest Of Freedom* (Lanham: University Press of America, 1981), 10-11:according to Jhon Lock , "Perfect Freedom and Equality" under natural law; Ronald Grimsley, "Political Theory," in *The Political Philosophy of Rousseau* (London: Oxford University Press, 1973), p.116

⁵ See in Immanuel Kant , "Groundwork of Metaphysics of Morals," in *Practical Philosophy* , Translated and Edited by Mary Gregor (New York: Cambridge University Press, 2008), p.409-410

⁶ See in Evan Fox-Decent and Evan Criddle, "The Fiduciary Constitution of Human Rights," *Cambridge University Press* 15, (2010): 301-336, at 325

⁷ See in Ronald Grimsley, "Political Theory," in *The Political Philosophy of Rousseau* (London: Oxford University Press, 1973), 117; Michael Haas, "The Philosophical Basis for Human rights" in *International Human Rights* (London: Routledge Taylor & Francis Group, 2008), p.23

⁸See in Alpheus Thomas Mason and Richard H. Leach , "Taproots of Freedom," in *In Quest Of Freedom* (Lanham: University Press of America, 1981), 13; W. Friedman, *Legal Theory*, (Fifth Indian Reprint. New Delhi: Universal Law Publishing Co. Pvt Ltd, 2008), p.123-125

⁹Ibid., 14-15: for Locke, Natural law is ought to fill the gap left by positive law, and provide a logical ground for resistance and revolt when tyranny of majority rule or crises of governance occur in a contractual society; His position has also been recognized by Dworkin, who argues that there is always a right answer to a legal problem, and this right answer is based upon principles (Extracted from natural law)

present yet undiscovered in a seamless web of a legal system. See in Ronald Dworkin, *Taking Rights Seriously* (Fourth Indian Reprint. Delhi: Universal Law Publishers, 2008), 82-117, and at 210-211: “ If the law is doubtful ,he may follow his own judgment, even after a contrary decision by the highest competent court,” and at 221-222: “ Conviction under a vague criminal law offends the moral and political ideals of due process in two ways .First, it places a citizen in the unfair position of either acting at his peril or accepting a more stringent restriction on his life than the legislature may have authorized.”

¹⁰ See in Ronald Grimsley, “Political Theory” in *The Political Philosophy of Rousseau* (London: Oxford University Press, 1973), p.115

¹¹ See in Immanuel Kant , “Groundwork of Metaphysics of Morals,” in *Practical Philosophy* , Translated and Edited by Mary Gregor (New York: Cambridge University Press, 2008), 407; Evan J. Criddle and Evan Fox-Decent , "A Fiduciary Theory of Jus Cogens," *The Yale Journal of International Law* 34, no. 331 (2009): 331-387, at 353:The categorical imperativeis a practical reason and moral standard to form a community,where individual's freedom is compatible with others.

¹² Ronald Grimsley, “Political Theory,” in *The Political Philosophy of Rousseau* (London: Oxford University Press, 1973), p.96

¹³See in Jhon Rawls, *A Theory of Justice* (Third Indian Reprint. (Delhi: Universal Law Publishing Co, 2008), p.256

¹⁴Ibid., p.257

¹⁵ Evan Fox-Decent and Evan Criddle,"The Fiduciary Constitution of Human Rights," *Cambridge University Press* 15, (2010): 301-336, at 326: Fiduciary relationship of man with community and state based upon integrity, formal moral equality and solicitude.

¹⁶ An absolute liberty to utilize personal belongings like life, body, thought, property and actions etc without any permission or interception.

¹⁷ See in Immanuel Kant, “Groundwork of Metaphysics of Morals,” in *Practical Philosophy*, Translated and Edited by Mary Gregor (New York: Cambridge University Press, 2008), p.402-413

¹⁸ See in Ibid, 455-460.

¹⁹ See in W. Friedman, *Legal Theory* (Fifth Indian Reprint. New Delhi: Universal Law Publishing Co. Pvt Ltd, 2008), 157-161.

²⁰ See in H.L.A.Hart, *The Concept of law* (New Delhi: Oxford University Press, 2005), 193-200.

²¹Ibid, 193-194: “unless certain physical ,psychological, or economic conditions are satisfied-----no system of laws or code of morals can be established.”

²² See in Julius Stone, *Human Law & Human Justice* (Second Indian Reprint. New Delhi: Universal Law Publishing Co.Pvt Ltd, 2004), p.75-78

²³ Gustav Radbruch, a German politician and professor of law, his philosophical foundation about justice based upon equality is also known as ‘Radbruch Formula’

²⁴ See in Michael Haas, “The philosophical basis for human rights,” in *International Human Rights* (London: Routledge Taylor & Francis Group, 2008), 22 and at 25

²⁵ See in Hans Kelsen, "The Pure Theory of Law and Analytical Jurisprudence," *Harvard Law Review* 55, no.44 (1942), 64-70; Hans Kelsen, "Sovereignty": *Principles of International Law* (New York: Holt, Rinehart and Winston, Inc, 1967), 581-585; Thomas D. Grant, "Defining Statehood: The Montevideo Convention and its Discontent," *Columbia Journal of Transnational Law* 37, (1999):403-457, p.410-411

²⁶ Haas, *International Human Rights*, p.23-24

²⁷ See in Ronald Grimsley, "Political Theory," in *The Political Philosophy of Rousseau* (London: Oxford University Press, 1973), 97-99: "Political association based on collective will and makes a common force . Rousseau's *amour de soi*, a total strength of the political community acting as a single body."; Mutua Makau, "The Ideology of Human Rights," *Virginia Journal of International Law* 36 (1996), p.650-660

²⁸ See in Jhon Rawls, *A Theory of Justice* (Third Indian Reprint. Delhi: Universal Law Publishing Co, 2008), 138, p.196-197, 257

²⁹ See in Ronald Grimsley, "Political Theory": *The Political Philosophy of Rousseau* (London: Oxford University Press, 1973), p.101-105

³⁰ *Ibid.*, p.102-103

³¹ See in Evan Fox-Decent and Evan Criddle, "The Fiduciary Constitution of Human Rights," *Cambridge University Press* 15, (2010): 301-336: at 324: under state-subject fiducery relationship of contractual society ,public policies and laws are formulated with a specific focus on the legitimate interest of citizens through Kant's *solicitude* and Hart's *five truisms of minimum content of natural law*. Thus with an instrument of *categorical imperative* general and common will ought to be aligned to gain popular sovereignty.

³² See in Michael Haas, "The philosophical basis for human rights" in *International Human Rights* (London: Routledge Taylor & Francis Group, 2008), 25-26: Bentham being a positivist looks toward parliament to devise laws and policies enshrined with maximum good for maximum people and Mill believes in freedom of expression with *laissez-faire* market concept. Never the less Rawls believes in institutional justice, thus he concentrates on institutions for dispensation of rights with an orientation of maximum goods for maximum number.

³³ See in Jhon Rawls, *A Theory of Justice* (Third Indian Reprint. Delhi: Universal Law Publishing Co, 2008), 24: "a society is properly arranged when its institutions maximize the net balance of satisfaction".

³⁴ *Ibid.*, 56-59: obedience to system is based on the share conception of justice stemming from common good , thus obedience is conditional to the substantive justice dispensed by the institution of a respective society.

³⁵ *President Balochistan High Court Bar Association v. Federation of Pakistan etc*, Constitutional petition no 77 of 2010, [http://www. supremecourt.gov.pk/ 2012/Judgments/Orders/](http://www.supremecourt.gov.pk/2012/Judgments/Orders/); *Human Rights Commission of Pakistan v. Federation of Pakistan*, Constitution Petition No 5 of 2010 /CMA4410/07/CMA4420/09, [http://www. supremecourt.gov.pk/ 2012/ Judgments/Orders/](http://www.supremecourt.gov.pk/2012/Judgments/Orders/) .*Mst. Rohaifa (dec) Through her Sons v. Federation of Pakistan through Secretary, Ministry of Defence etc, DG,ISI, Islamabad*, Const. P.No.1 of 2012 and Crl.O.Ps.No.8 & 12 of 2012.doc,

13.12.2013,[http://www. supremecourt.gov.pk/](http://www.supremecourt.gov.pk/) 2013/ Judgments/Orders;/P L D 2010 S.C. 1;P.L.D 2010 SC1165; P L D 2010 SC731;P.L.D 2010 L.H.R 230;P.L.D 2010 S.C .265;P.L.D 2010 S.C. 61;P.L.D 2010 SC 1109;Suo Moto Case No. 24 of 2010;Constitution Petition No. 62 of 2010 / Suo Moto Case No. 17 of 2010;Constitution Petition No. 68 of 2010;2010 C.L.C. 577;2010 C.L.D.571 L.H.R L.H.C; P.L.D. 2010 Karachi 374; 2010 P.L.D. LHR.605; 2010 S .C .M .R .511; 2010 S.C.M.R 1301'

³⁶ The objective Resolution to form part of substantive provision

³⁷ Right of individual to be dealt with in accordance of law (confluence of due process of law with Rule of Law)

³⁸ Security of Person

³⁹Inviolability of Dignity of man, etc.

⁴⁰ Equality of citizen

⁴¹ Original jurisdiction of Supreme Court , Public Importance

⁴² Complete Justice for a just Society

⁴³ Action in aid of Supreme court

⁴⁴ Promotion of social justice and eradication of social evils

⁴⁵ Promotion of social and economic well-being of the people

⁴⁶ See in Alvaro ,Santos .2002. "The World Bank's uses of the rule of law promise in economic development,". World Report No.7, <http://www.worldbank.org> .

⁴⁷Sunita, Parikh and Alfred, Damell2007. "Interbranch Bargaining and Judicial Review in India". Presentation at the Law and Political Economy Colloquium: (Northwestern; University Law School, 2007)

⁴⁸Jennings, Ivor. 1957. *Constitutional Problems in Pakistan*. (Cambridge: Cambridge University Press, 1957)

⁴⁹ Newberg, Paula. *Judging the State-Courts and Constitutional Politics in Pakistan*.(Cambridge: Cambridge University Press, 1995).

⁵⁰ See in Maluka, Zulfiqar. *The Myth of Constitutionalism in Pakistan*. (Karachi: Oxford University Press, 1996)

⁵¹Kamran, Tahir. *Democracy and Governance in Pakistan* (Lahore: South Asia Partnership, 2008)

⁵²G.W, Choudhury. 1969. *Constitutional Development in Pakistan*. (London: Longman Group Ltd Harlow, 1969)

⁵³M.A, Fazal.*Judicial Control and Administrative Action in India and Pakistan: A Comparative Study of Principals and Remedies*. (Clarendon: Clarendon Press, 1969)

⁵⁴Muneer Muhamad "the Judicial System of the East India Company Precursor to the Present Pakistani Legal System." *Al-Jami'at Al-Islamiyyat Al-Alamiyyah* (2006)

⁵⁵Khan, Hamid.*Constitutional and Political History of Pakistan*. (Oxford University Press, 2006)

⁵⁶Brohi, A.K. 1958 .*Fundamental Law of Pakistan*. (Lahore: Punjab Law Book House, 1958)

⁵⁷Braibanti, Ralph. '*Public Bureaucracy and Judiciary in Pakistan*, *Bureaucracy and political development*, ed. Joseph La Palombara (Princeton; Princeton University Press, 1964)

- ⁵⁸ Iqbal, Javeed. *Encounters with Destiny* (Karachi : Oxford University Press, 2006)
- ⁵⁹ See in *Arshad Mahmood and others verses Government of Punjab and others*'
- ⁶⁰ See in *Government of Baluchistan through additional Chief Secretary verses Azizullah Memon*'
- ⁶¹ See in *M/s. Illahi Cotton Mills and other verses Federation of Pakistan and another*'
- ⁶² See in *Nadeem Ahamed, Advocate vs. Federation of Pakistan (The 18th Amendment Case).*'
- ⁶³ See in *Mahmood Khan Achakzai and others v. Federation of Pakistan.*
- ⁶⁴ See in *Zanib Garments Pvt. Ltd, through Chief executives and others vs. Federation of Pakistan through Secretary, Ministry of Housing and Works Islamabad and others*'
- ⁶⁵ See in *Dr. Mobashir Hassan and others vs. Federation of Pakistan and others (NRO Case)*'
- ⁶⁶ See in *Attaullah Khan Malik vs Federation of Government of Pakistan.*
- ⁶⁷ See in *Chief Justice of Pakistan ,Iftekhhar Muhammad Chaudhry vs. President of Pakistan through secretary & others*'
- ⁶⁸ Ajmal, Mian. *A judge speaks out* (Karachi: Oxford university press, 2004)
- ⁶⁹ Patel, Dorab. *Testament of a Liberal.* (Karachi: Oxford University Press, 2000)
- ⁷⁰ See in *State v. Tariq Aziz M.N.A and others*
- ⁷¹ See in *Government of Baluchistan through additional Chief Secretary verses Azizullah Memon and 16 others.*
- ⁷² See in *M/s. Illahi Cotton Mills and other verses Federation of Pakistan and another*'
- ⁷³ See in *Nadeem Ahamed, Advocate vs. Federation of Pakistan.*
- ⁷⁴ See in Eric Stokes, *The English Utilitarians And India* (Claredon, London: Oxford University Press, 1959), 140-233.
- ⁷⁵ See in L.P. Sharma ,*The Brwn Rulers of India* (Delhi: Konark Publishers Pvt., Ltd., 1988), 42-78.
- ⁷⁶ See in M.C. Setalvad, *The Role of English Law in India* (Jerusalem: The Hebrew University, 1966), p.25-55
- ⁷⁷ See in Shaukat Mahmood and Nadeem Shaukat, eds., *The Code of Criminal Procedure* (Lahore: Legal Research Center, 2003), p.411-425