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THE ROLE OF JUDICIAL ACTIVISM IN PAKISTAN: SAFEGUARDING RIGHTS OR LEGITIMIZING POWER?

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Abstract

This article examines the theoretical purpose and role of the judiciary in Pakistan, with a focus on judicial activism and its impact on the executive, legislature, and constitutional framework. It explores whether judicial activism has effectively upheld the rule of law and fundamental human rights. The study applies Green's two-stage approach to determine if judicial decisions in Pakistan qualify as activist, particularly in cases involving military interventions and executive overreach. Through case studies, including Maulvi Tamizuddin Khan v. Federation of Pakistan (1954) and Zafar Ali Shah v. Pervez Musharraf (2000), the research highlights how judicial rulings have influenced the country's legal and political landscape. While some decisions have upheld judicial independence, others have legitimized military rule under the doctrine of necessity. The article also examines the judiciary's role in balancing constitutional interpretation with political realities. It concludes that judicial activism in Pakistan has been a double-edged sword—at times reinforcing democratic values and at others undermining judicial independence. The findings underscore the need for a more consistent and principled judicial approach to safeguard democratic governance and the rule of law.

Keywords: Judiciary, Judicial Activism, Rule of Law, Constitutional Law, Military Rule, Human Rights, Pakistan, Legal Positivism, Natural Law, Doctrine of Necessity

INTRODUCTION:

This chapter analyses the findings regarding whether or not judges in Pakistan have engaged in judicial activism in cases involving the military (the executive), the judiciary, the legislature; and the Constitution. The aim of analysing these issues is to ascertain if judicial activism has played an effective role towards performing a checks and balances role on the abuse of power by the Government and, more importantly, whether it has contributed towards protecting the human rights of citizens. Section 4.1. provides an analysis of the measurements found from the nominal variables relating to the military (the executive), the judiciary, the legislature, and the Constitution of Pakistan. Section 4.1.1. considers the extent of judicial activism in cases involving the military (the executive), the judiciary, the legislature, and the Constitution. Section 4.2. discusses the effectiveness of judicial activism in upholding fundamental human rights in Pakistan. Section 4.2.1. discusses the rule of law and Pakistan, while section 4.2.2. provides a discussion about the impact of judicial activism on the executive, legislature, judiciary, and the `Constitution. Section 4.3. provides a discussion about the purpose of the judiciary at the theoretical level where there is a discussion about the theories of legal scholars concerning the role and purpose of the judiciary. The section shall examine the role of the judiciary under the theory of legal positivism (section 4.3.1.), the theory of natural law (section 4.3.2.), and Green's approach to the role of the judiciary and judicial activism (section 4.3.3.). Section 4.4. sets out a number of case studies (sections 4.4.1., 4.4.2., 4.4.3., and 4.4.4.) to provide examples of judicial activism in Pakistan and the impact that activism has had on the judiciary's trajectory and the rights of citizens in the country. This section also provides a discussion about the findings applying Green's approach (section 4.4.5.). The overall aim of this chapter is to deduce whether the judiciary has been effective in holding the executive (and military) to account and ensure that fundamental human rights are upheld in the country, and the role that activism has played towards achieving this objective.

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4.1. An analysis of the measurements found from the nominal variables relating to the military (the executive), the judiciary, the legislature, and the Constitution of Pakistan.

The role of judges in protecting the human rights of citizens "has been widely acknowledged" by commentators.[1] This section analyses whether activism by judges does and / or can play an important role towards protecting the fundamental rights of citizens in Pakistan. There shall be an analysis of the findings from the review of the literature in order to deduce the extent and impact (section 4.1.1.) of the role played by judicial activism in protecting the fundamental rights of Pakistani citizens (Chapter 3).

4.1.1. *The extent of judicial activism in cases involving the military (the executive), the judiciary, the legislature, and the Constitution*.

It has been argued that the comprehensive list of rights outlined under the 'Fundamental Rights' section of the Constitution of Pakistan (1973) has been developed by the judiciary into a body of "jurisprudence which it has regularly extended and staunchly defended", notwithstanding the fact that there have been numerous periods of military rule in the country that presented many obstacles to the development of the law.[2]

The above observation recognises that the courts in Pakistan have faced many obstacles when trying to perform their functions as an independent judiciary by upholding the law in the country. This is especially the case due to the periods of military rule experienced in Pakistan. One such period is believed to have occurred as a consequence of judicial activism by the courts. In March 2007, General Pervez Musharraf suspended Chief Justice Iftikhar Muhammad Chaudhry.[3] He was restored to office in July 2007. In November 2007, President Musharraf declared an emergency in the country and suspended the Constitution. The Proclamation of Emergency (Nov. 3, 2007) cited judicial activism as a reason for imposing military rule.[4] This Proclamation suspended the Constitution in Pakistan, which included the suspension of the fundamental rights of citizens enshrined in the instrument. This was the first time the judiciary's conduct was blamed for imposing military rule on the country. Chief Justice Chaudhry was forcibly removed from office with fifty-nine other judges in November for refusing to take the new oath of office pursuant to the Provisional Constitution Order No 1 of 2007, thereby highlighting the impact that the imposition of military rule and the suspension of the Constitution has had on those in favour of an independent judiciary.

Chief Justice Chaudhry had been accused of promoting and practising judicial activism by interfering with the functions of the executive. This was the basis of his removal from office. However, on a closer inspection of his judgments it is difficult to see how his approach to cases has been characterised as judicial activism. The judgments illustrate that he was proactive in exercising his constitutional power as a senior judge by acting independently and upholding the rights of citizens as enshrined in the country's Constitution. In fact, by virtue of Article 184 of the Constitution of Pakistan (1973) the Supreme Court possesses an inherent power to enforce the fundamental rights of citizens. Article 184(3) empowers the Supreme Court to be activist by pronouncing a declaratory judgment on questions of "public

[1] Llias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Second Edn., CUP UK, 2016), 123.

[2] Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice* (CUP, USA, 2013.), 235.

[3] President Pervez Musharraf, Islamic Republic of Pakistan, Reference filed against the Chief Justice of Pakistan (21 Mar., 2007). Available at: <http://proud-pakistan.com/2007/03/21/text-of-reference-filed-against-the-cjp/ [Last visited 22 May 2017].

[4] Pervez Musharraf, Proclamation of Emergency (Nov. 3, 2007). Available at: <http://www.pakistani.org/pakistan/constitution/post_03nov07/proclamation_emergency_20071103.html> [Last visited 22 May 2017].

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importance with reference to the enforcement of any of the Fundamental Rights."[5] The Supreme Court is therefore permitted to be activist in relation to cases raising issues under Articles 8 – 28 (Fundamental Rights), or issues of public importance. The meaning of 'public importance' has been defined broadly. In the case of *Pakistan Muslim League v. Federation* (2007) PLD SC 642, the court said while interpreting the meaning of 'public importance' that the "adjective public necessarily implies a thing belonging to people at large, the nation, the State or community as a whole".[6]

Therefore, the fact that Chief Justice Chaudhry's record as a judge who actively enforced the fundamental rights of citizens by being activist should not be regarded as an anomaly. Since he took up office he has been involved in a raft of cases where he upheld the rights of citizens.[7] It was believed that Chief Justice Chaudhry's stand against infringements of the fundamental rights of citizens to security was the thing that finally rattled the Government.[8] The Chief Justice commenced exercising *suo motu* jurisdiction in cases where there had been the alleged violation of the human rights of citizens by the Government. The Chief Justice simply urged the Government to act in accordance with the law. At the same time, the Chief Justice was merely providing access to justice to ordinary citizens. However, can this conduct be properly described as judicial activism?

Clearly, Chief Justice Chaudhry's approach to cases was castigated as judicial activism simply because it was viewed as controversial. Is it not equally arguable however that those judges who chose to remain in office and take the new oath of office were also activist? By providing legitimacy to the military regime and allowing the suspension of the Constitution the judiciary effectively withdrew the fundamental rights of citizens in the country. This was arguably an example of the judiciary acting *ultra vires* their powers. The validation of the Proclamation of Emergency was also arguably *ultra vires* the jurisdiction and power held by the judiciary under the Constitution.[9]

In this climate it has been argued that there has been an increase in concern about the lack of institutional accountability by the Pakistani judiciary. It has also been claimed that the courts have handed down judicial decisions that encroach on the territory of democratic decision-makers, *inter alia*. It has been recognised that the approach adopted by the judiciary is the result of the judiciary's increasingly activist nature. This activism has been explained in recent times by the judiciary's:

> controversial role in military regime legitimisation, and its progressively aloof and domineering attitude toward political governments in the aftermath of its eventually triumphant defiance of General Musharraf.[10]

This suggests that judicial activism by judges in Pakistan has often been aimed at interpreting the law in the country in a manner which provides legitimacy to the military regime that is in control of the country at any given time. This is opposed to the role that the judiciary may play towards protecting the rights of citizens in the country. However, despite the difficult conditions that the judiciary has apparently been operating under there have been efforts to defend an independent judiciary in Pakistan. In 2007, for instance, the Pakistani Lawyers' Movement took action to defend the judiciary's independence.[11] The Movement called for Chief Justice Iftikhar Muhammad Chaudhry to be reinstated after he was dismissed by

[5] Constitution of Pakistan, Art. 184(3).
[6] (2007) PLD SC 642, *per* Justice Javed Iqbal.
[7] *Haider v. Capital Dev. Auth*., 2006, 394 PLD (a)(SC).
[8] Constitution of Pakistan, Art. 9.
[9] *Khan v. Musharraf*, 2008, 178 PLD (r) (SC).
[10] ibid, 238.
[11] 'The Pakistani Lawyers' Movement and the Popular Currency of Judicial Power', (2010) 123 *Harvard Law Review*, 1705.

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President Pervez Musharraf. The importance of the removal of Chief Justice Chaudhry from office was significant given the developments in the protection of fundamental rights in the country that occurred during his time in office. The former Chief Justice was a staunch advocate of fundamental rights and promoted judicial activism to promote this end. The former Vice Chairman of the Pakistan Bar Council, Syed Qalb-i-Hassan, praised the former Chief Justice for this in his speech before the Pakistan Bar Council relating to the retirement of the Chief Justice.[12] In this speech, Syed Qald-i-Hassan said that:

> Soon after assuming the office of Chief Justice of Pakistan My Lord, in addition of doing normal Court work of the Supreme Court, also started giving priority to cases of public importance and enforcement of fundamental rights within the framework of the Constitution and thus promoted "Judicial Activism" in the larger public interest.[13]

During the period of Musharraf's military rule, it was nevertheless argued that the Supreme Court expanded judicial power "by scrutinising questionable urban development, privatisation, and deregulation measures in a virtuous cycle of public interest litigation".[14]

It is clear that the instances of judicial activism in Pakistan have occurred in circumstances to provide citizens with access to justice and enforce their human rights, and to suspend those rights such as in situations where the military has seized control. This dichotomy in activist decision-making by judges was summed up by Adam Cohen in an article titled 'Is John Roberts too much of a Judicial Activist?' when he said as follows:

> Conservatives have long complained that activist liberal judges interpret the Constitution to "create" rights, like the rights to privacy. But there are a growing number of activist conservative judges who are intent on using new readings of the Constitution to take away rights.[15]

The above comments also clarify how judicial activism can be viewed in a positive or negative way. It also underscores how the views about judicial activism by judges is a polarised issue. While that is the case, some of the most landmark decisions handed down in countries with totally independent judiciaries have been described as activist decision-making by judges. For example, in the case *Roe v. Wade*, 410 US 113, 154 (1973) the Supreme Court held that abortion laws throughout the US were unconstitutional. In the case of *Brown v. Board of Education*, 347 US, 483, 495 (1954), the Supreme Court found that separate educational facilities are unequal. These rulings illustrate how judicial activism by judges can advance the rights of individuals and develop a society into a more tolerant and inclusive one.

4.2. The effectiveness of judicial activism in upholding fundamental human rights in Pakistan

The findings from this research are that judicial activism can be 'an important tool to make human rights a central issue of governance'.[16] However, in order for judicial activism to achieve this objective it is essential that the judiciary operates in a climate where they have the freedom and independence to act without undue interference from the legislature or executive. The judiciary in Pakistan has faced many challenges since the country gained independence in 1947. An example of the challenges faced by the judiciary in the country can

[12] Full Court Reference on the Retirement of Mr. Justice Iftikhar Muhammad Chaudhry, *Pakistan Bar Council* (12/12/2013). Available at: <pakistanbarcouncil.org/speech-of-vice-chairmanfull-court-reference-on-the-retirement-of-mr-justice-iftikhar-muhammad-chaudhry/> [Last visited 22 May 2017].

[13] ibid, para. 4.

[14] Shoaib A. Ghias, Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf', *Law & Social Inquiry* (2010), Vol. 35, No. 4, 985, 985.

[15] A Cohen, 'Is John Roberts too much of a Judicial Activist?', *NY Times*, Aug. 27, 2005.

[16] CK Lal, *Human Rights, Democracy and Governance* (Pearson, India, 2010), 52.

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be observed following the military coup in 1999 where military rule was imposed on the country after the Chief of the Army Staff General Pervez Musharraf deposed the then Prime Minister, Mian Muhammad Nawaz Sharif. This resulted from differences of opinion between the two.[17] The courts were subsequently manipulated in an attempt to provide the military government with legitimacy.[18] When the courts tried to act independently by challenging government policies, General Musharraf suspended the Chief Justice, Iftikhar Muhammad Chaudhry, and suspended the Constitution in 2007, in addition to committing other human rights abuses. The reason for deposing the Chief Justice was the refusal of the senior judge to accept the legitimacy of the military government. In this climate, it was not conducive for members of the judiciary to be activist in order to uphold the human rights of citizens. Instead, the judiciary was expected to provide legitimacy to the military government. In 2000, Supreme Court judges were required to take a new oath of office pledging their loyalty to the new military government, but six out of the thirteen judges required to take the oath refused to do so, including the then Chief Justice Saeduzzaman Siddiqui.

However, in 2000 the Supreme Court heard the case of *Zafar Ali Shah v Pervez Musharraf* (2000) SCMR 1137, where the Court gave legitimacy to the coup on the basis that it was conducted in accordance with the doctrine of state necessity. In the process the Court provided the military government with the power to amend the country's constitution or carryout any other act on behalf of the state. The Court did however declare that the military government should hold general elections within three years of seizing power.[19] This ruling provided the military government with legitimacy and arguably undermined the democratic process and, moreover, human rights. When handing down its judgment the Court said as follows:

> That the 1973 constitution still remains the supreme law of the land subject to the condition that certain laws thereof have been held in abeyance on account of state necessity…[and] that the supreme court continue to function under the constitution. The mere fact that the judges of the superior courts have taken the new oath under the Oath of Office (judges) Order No. 1 of 2000, does not in any manner derogate from this position, as the courts had been originally established under the 1973 constitution, and have continued in their functions in spite of the proclamation of emergency and PCO No. 1 of 1999 and other legislative instructions issued by the chief executive from time to time.[20]

The above arguably presented a conundrum for senior judges. The main issue was whether such judges should take the new oath of office in circumstances where the democratic institutions in the country had been comprised, and where certain laws had been restricted or suspended. The options open for senior judges was to either take the oath or resign.

Notwithstanding the conditions that members of the judiciary have been operating under, there are examples of judges adopting arguably activist approaches to a case to achieve a particular result. This is evidenced most in the jurisprudence of the High Court. In the case of *Suo Motu* Case No. 5 of 2012[21] the petitioner sought a review of a judgment handed down by the court in 2012. It is arguable that the High Court has been invoking the *suo motu* jurisdiction in an activist manner to uphold the rights of citizens. This argument is based on

[17] Owen Bennett Jones, *Pakistan: Eye of the Storm* (Lahore: Vanguard Books, 2002), 55.

[18] Khan Faqir, 'Judicial Crisis in Pakistan during Musharraf Regime', *Pakistan Journal of History and Culture*, Vol. XXXV, No. 2 (2004), 131 – 146.

[19] Azmat Abbas and Saima Jasam, *A Ray of Hope: The Case of Lawyers' Movement in Pakistan* (Pakistan: Heinrich-Boll-Stiftung, 2009), 8.

[20] Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2010), 461 - 462.

[21] C.R. P No. 167/2012.

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the premise that the use by the High Court of the *suo motu* power has been explicitly criticised by the Supreme Court as being *ultra vires* the High Court's jurisdiction. In light of this, if the High Court is defying the rulings of the Supreme Court in order to achieve a particular result, such as upholding the rights of citizens, the exercise of *suo motu* power by the High Court could be viewed as judicial activism. The cases where the Supreme Court has held that the exercise of *suo motu* jurisdiction by the High Court is *ultra vires* are numerous. This was observed in notable cases such as *Islamic Republic of Pakistan vs. Muhammad Saeed* PLD 1961 SC 192, PLD, *Accountant-General, West Pakistan vs. The State* 1960 SC (Pak.) 295, and the case of *Tariq Transport Company, Pahore v Sargodha-Bhera Bus Services and other PLD 1958 SC* (Pak) 437. In the latter case it was made explicitly clear when the Court said that it did not believe that Article 175 of the Constitution allowed the High Court to exercise a *suo motu* power to inquire into the exercise of power of executive bodies.[22]

It is based on this premise that any inquiry by the High Court into the acts of the Executive by invoking *suo motu* jurisdictional power could very well be an example of judicial activism. This is especially the case where Court's intention is to uphold the rights of citizens against the purportedly excessive use of power. In which case, the High Court judges are defying judicial precedent and the country's Constitution to provide a judicial remedy to parties who allege that there rights have been infringed.[23] Providing citizens with access to justice where there is no power for the court to allow such access is evidently a blatant example of judicial activism.

There is evidence of many further examples of High Court judges in Pakistan adopting an activist standpoint. A well-documented example can be observed from the judgments of Mr. Justice Khuwaja Muhammad Sharif, one of the country's previous Chief Justices of the Lahore High Court. Chief Justice Sharif handed down numerous ground-breaking rulings on a broad range of matters. These areas include an increase in bus fares[24], negligence of doctors resulting in death[25], the government's decision to withdraw the promotion of prison department employees[26], and the *suo motu* notice on the sugar price hike[27], *inter alia*. It was also explicitly stated by the former Chief Justice Sharif that the *suo motu* power could be invoked by the High Court as an effective means of performing a checks and balances role on the purported abuse of power by the Executive in order to protect the rights of citizens.[28]

4.2.1. The rule of law and Pakistan

The principle of the 'rule of law' has been in existence in England since the thirteenth century following the signing of Magna Carta in 1215. The significance of the 'rule of law' cannot be underestimated when considering the protection of human rights because it plays a fundamental role in discerning what obligations are owed by individuals in society. The actual term the 'rule of law' was first used by Professor A V Dicey, a constitutional lawyer, in the late nineteenth century.[29] Dicey famously said that the 'rule of law' means that 'no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach

[22] *Tariq Transport Company, Pahore v Sargodha-Bhera Bus Services and other PLD* 1958 SC (Pak) 437.
[23] *Shahnaz Begum vs. The Honourable Judges of the High Court of Sindh and Balochistan and another* PLD 1971 SC 677.
[24] LHC stays increase in urban bus fares.
[25] LHC CJ summons 'careless' Sargodha doctor on 11th Jan 2010.
[26] LHC issues notice to Chief Secretary, Home Secretary for 26th.
[27] LHC fixes retail price of sugar at Rs 40 per kg.
[28] Bench Split on *suo motu* powers of high Courts Dawn (2010).
[29] Professor AV Dicey, *An Introduction to the Study of the Law of the Constitution* (5thEdn., MacMillan, 1897).

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of law established in the ordinary legal manner before the ordinary courts of the land.'[30] This means that an individual should only be punished by the national courts of a country where he or she is guilty of a clear breach of laws that have been passed through the proper legislative process. The 'rule of law' therefore permits a state to punish any individual pursuant to the rule of law, irrespective of his or her standing, where the person breached the law. It is also clear from Dicey's definition of the rule of law that any punishment administered to an individual must be carried out by an 'ordinary court' of the land that is independent and impartial.[31] The role of the judiciary pursuant to the rule of law is to simply enforce valid laws. The meaning of 'valid law' is a law that is passed through the proper legislative process. The other definition of the 'rule of law' provided by Dicey underscores that all people in society are bound by valid law irrespective of their position in society. In this respect, Dicey said as follows:

> ..not only……..no man is above the law, but…..that here, every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.[32]

The impact of a 'valid' law is that all individuals are subject to the law. Dicey also provided another meaning of the 'rule of law'. This definition pertained to the role the constitution plays in relation to a country's constitution. In this regard, Dicey said as follows:

> the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from general principles.[33]

4.2.2. The impact of judicial activism on the Executive, Legislature, Judiciary, and Constitution

The impact of judicial activism on the executive, legislature, judiciary, and constitution in Pakistan is most evident from cases of judicial review heard by the High Court. Applications to the High Court for judicial review are proceedings that are particularly prone to allegations of judicial activism because they involve actions brought by an individual against an agency of the State. This is because such proceedings involve the court reviewing the legality of the use of power by the executive (the Government) against an individual. Allegations of judicial activism concerning High Court proceedings are normally based on the grounds that the Court has exceeded the remit of its powers by undermining a decision by the Executive arm of Government. In the context of Pakistan, in many cases heard by the High Court the court has exercised *suo motu* jurisdiction notwithstanding the fact that it is controversial for the High Court to investigate a matter on its own motion in such a manner. This is evident from Article 175(2) of the Constitution of Pakistan which expressly provides that 'No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law'.[34] In light of the fact that there is no explicit mention in the country's constitution

[30] ibid.
[31] T Bingham, *The Rule of Law* (Penguin Books, UK, 2011), 3 – 4.
[32] ibid.
[33] Professor AV Dicey, *An Introduction to the Study of the Law of the Constitution* (5thEdn., MacMillan, 1897), 187.
[34] Constitution of Pakistan (1973), Art.175(2).

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that the High Court possesses this type of jurisdiction it follows that the High Court is not entitled to exercise *suo motu* jurisdiction.

Albeit there is no provision in the Constitution of Pakistan providing the High Court with the requisite jurisdiction to exercise a *suo motu* power against the executive. The position is different in relation to the Supreme Court. Article 184(3) of the Constitution of Pakistan clarifies that the Supreme Court in the country does have the power to exercise *suo motu* power. This is evident from Article 184(3) of the Constitution which states that:

> Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article.

It is clear that the High Court has illustrated a willingness to exceed its express powers as enshrined in the Constitution. Whether or not the High Court's apparent defiance amounts to judicial activism shall depend on the reason why the High Court is exercising the *suo motu* judicial power. It is necessary to examine some of the case law in this area to discern whether or not the High Court has been activist.

The literature reviewed evidences that the balance of power under the constitution model adopted in Pakistan is weighed heavily in the favour of the Executive, primarily the military. This was evidenced recently following the massacre of more than 150 people by the Taliban at a school run by the military north-western Peshawar in December 2014. Following this incident the Government controversially sought to introduce measures to allow the military tribunals / courts to try individuals accused of offences related to terrorism, amongst other types of crimes. The Government in Pakistan introduced an amendment to the country's Constitution and the Army Act 1952 in January 2015. This amendment was controversial given that it provided the country's military tribunals / courts with the jurisdiction to determine civilian cases who were allegedly involved in acts of terrorism, or sectarian violence, amongst other types of cases. The initial two periods were extended for a further two years in March, 2017.

One of the principal concerns in relation to this amendment to the law is that there is a 'lack of transparency' by trying citizens in this manner.[35] Furthermore, the evidence available suggests that the country's Supreme Court upholding this law. It has been documented by the US State Department that in August 2016 the Supreme Court upheld death sentences handed down by the military courts against 16 civilians.[36] Furthermore, during the first period of the military court's new expanded jurisdiction, it was claimed that these courts / tribunals convicted 274 individuals from the commencement of the amendment in January, 2015 until 6 January, 2017. Out of this number a staggering 161 were sentenced to death. This presents concerns that the Supreme Court of Pakistan does not appear to thoroughly considering the compatibility of these new laws with the country's international human rights obligations. If this is true, it would evidently result in a lack of safeguards concerning the rights of Pakistani citizens when it comes to those appearing before military courts / tribunals. These rights include, *inter alia*, human rights standards enshrined in key international instruments, such as ICCPR. Accordingly, by passing laws to allow individuals to be tried in this manner the Government in Pakistan has been subjected to international criticism. This criticism has been forthcoming from bodies such as the UN Human Rights Council. The Council considered the independence, impartiality and competence of military courts, and the judiciary, including the

[35] US State Department Country Report: Pakistan, 2016, 12.
[36] ibid.

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right to fair trial, and other procedural safeguards. The main observation and recommendations made by the Council are that 'there were significant gaps in implementing the right to a fair trial'.[37] The Council invited states to 'take appropriate measures to ensure that the right to fair trial in military tribunals was in full conformity with the International Covenant on Civil and Political Rights'.[38] Of particular concern for the Council was the trial of individuals by military tribunals courts. This was recognised by the Human Rights Committee when it said that 'civilians should not be subject to the jurisdiction of military courts except in exceptional circumstances'.[39] However, while some experts did say that military tribunals / courts should not possess jurisdiction to hear civilian cases, other experts stated that 'if a military tribunal was independent, impartial and competent, such crimes could be judged'.[40] While the experts were divided, this does illustrate that all experts did have concerns about the trial of individuals by military tribunals / courts. Criticism for trying individuals through this manner has also been observed from the Inter-American Court of Human Rights, a regional institution in the Americas. The Inter-American Court of Human Rights has stated that military courts / tribunals should not hear cases involving civilians who have been accused of terrorism, irrespective of whether the country's constitution provides its military courts with the requisite jurisdiction.[41] The Court also found that domestic laws allowing the military courts to try civilians amount to a violation of the principles of the American Convention.[42] This provides compelling evidence that the trial of individuals by military tribunals shall constitute a violation of international human rights standards. In light of this, it is arguable that the Pakistani Supreme Court's backing for the use of military courts / tribunals to try civilians is judicial activism in the making because it could amount to a violation of the country's Constitution and its international human rights obligations as set out in Article 14 of the ICCPR. Article 14 of the ICCPR states explicitly that:

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[43]

The use of military courts / tribunal in circumstances where the accused's safeguards are denied is likely to amount to a breach of the above provisions and the country's Constitution. The evidence available also suggests that the High Court is failing to properly scrutinise the proceedings held by the military to gauge whether or not they are compatible for the country's domestic and international obligations. There is evidence that in January 2016 the High Court in Peshawar dismissed the case of an Indian citizen called Hamid Nehal Ansari (the 'petitioner'), whose case had been pending since 2012. The petitioner was accused of espionage and subsequently convicted and sentenced to three years in prison. Pakistan's Ministry of Defense confirmed to the UN Commission of Inquiry on Enforced Disappearances that the petitioner was being held in military custody pending trial before a military court. However, there were concerns about the case because the petitioner's mother

[37] UN General Assembly, 'Summary of the discussions held during the expert consultation on the administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations', *Human Rights Council, Twenty-eighth session* (2015) (A/HRC/28/32), para. 74.
[38] ibid, para. 74.
[39] ibid, para. 75.
[40] ibid, para, 76.
[41] *Lori Berenson v Peru* (2004).
[42] *Castillo Petruzzi v Peru* (1999).
[43] International Covenant on Civil and Political Rights, Art.14(1).

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claims that her son was job seeking in Afghanistan, but was arrested after he crossed the Pakistani border to meet a woman.[44]

Evidence to support the assertion that the Supreme Court in Pakistan should carry out a more thorough review of the decisions handed down by the military courts / tribunals is due to the allegations from lawyers and the relatives of those convicted by such courts / tribunals that those convicted were:

(i) intimidated to confess to the crimes they were accused of committing;
(ii) refused access to legal counsel of their choice; and
(iii) the evidence against them was not disclosed.[45]

If the aforementioned can be substantiated and proved this would contravene fundamental principles of natural justice. On the whole, claims have been made that military courts / tribunals do not provide the right to a fair trial and, moreover, there is no right of appeal against a decision handed down by a military court.[46] This is arguably an infringement of Pakistan's domestic and international human rights obligations.

It is arguable therefore that Pakistan could be acting in breach of its own Constitution and other international human rights obligations. In relation to the latter, Pakistan has been a signatory of the ICCPR since June 2010 and is therefore obliged to uphold its international obligations. This is particularly the case because such proceedings are not made public and, more importantly, there are inadequate procedural safeguards in place to ensure a fair trial for civilians.[47] For the aforementioned reasons, it has been pointed out that there is a lack of transparency trying civilians through military courts / tribunals.[48] The US State Department also criticised the trial of individuals in Pakistan in this manner.[49] However, it is worth noting that there are grounds for derogating from holding a hearing public under Article 14 of the ICCPR, where "reasons of morals, public order…or national security" are raised, amongst other reasons.[50] Notwithstanding these grounds, the use of these tribunals in Pakistan to try citizens has been subjected to criticism by organisations such as the UN Human Rights Council. This provides evidence that there are some concerns about the veracity of the grounds raised by the government in Pakistan to suspend the right of a far and public trial citizens. Furthermore, while Article 14 does provide grounds for derogating from the right of citizens to have their case heard in public, there is no right to derogate from the requirement to hold a fair trial under Article 14. As a signatory of the ICCPR, Pakistan is obliged to respect and adhere to these obligations. First and foremost, however, the right to a 'fair trial and due process' as enshrined at Article 10A of the Constitution of Pakistan.[51]

The Constitution of Pakistan also ensrhines a number of other key human rights. For example, Part II, Chapter 1 of the Constitution of Pakistan outlines the 'Fundamental Rights', which are set out at Articles 8 – 28 of the Constitution. In addition to the right to a fair trial[52],

[44] US State Department Report, 'Country Reports on Human Rights Practices for 2016: Pakistan', *US State Department*, 5. Available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265546> [Last visited 8 April 2017].
[45] ibid.
[46] ibid.
[47] Human Rights Watch, 'Pakistan: Don't Reinstate Secret Military Courts: Fight Militancy by Reforming Justice System, Upholding Rule of Law', *Human Rights Watch* (Mar. 2017). Available at: <https://www.hrw.org/news/2017/03/20/pakistan-dont-reinstate-secret-military-courts> [Last visited 8 April 2017].
[48] US State Department Country Report: Pakistan, 2016, 12.
[49] ibid.
[50] International Covenant on Civil and Political Rights (1966), Art. 14(1).
[51] Constitution of Pakistan (1973), Art. 10A.
[52] ibid, Art. 10A.

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these rights include, *inter alia*, the right to life and liberty[53], safeguards in relation to arrest and detention[54], the right against forced labour or slavery[55], the prohibition against torture[56], and the freedom of speech.[57]

The Supreme Court's conservative stance in relation to military court / tribunal proceedings against civilians accused of terrorism related offences has not been subjected to allegations of judicial activism due to the laws that support the widening of the militiary court's / tribunal's jurisdiction. However, it is equally arguable that the Supreme Court's overly strict stance concerning the cases handled by the military courts / tribunals raises serious concerns about whether or not the Court is upholding key 'Fundamental Rights' ensrhined in the Constitution of Pakistan. Particularly those rights mentioned above. By upholding the decisions handed down by the military courts / tribunals in dubious circumstances that may constitute a breach of key rights set out in the country's Constitution and key interntional human rights treaties, there is a risk that the new amendment to the laws may infringe domestic and international law. Moreover, as a consequence, the rights of Pakistani citizens may be violated due to the Court's failure to properly scrutinse the compatibility of the new measures with the country's Constitution and international human rights obligations.

The Pakistani Government has stated, however, that they intend to reform the civilian criminal justice system in order to provide the normal courts with the capacity to try the cases that are currently being tried by the military courts / tribunals. However, these measures are yet to be introduced. Until such time, the country's military courts / tribunals shall have the jurisdiction to hear cases concerning individuals accused of terrorist related offences. This power was given under the Constitution (Twenty-First Amendment) Act, 2015. The received Act Presidential Assent in January 2015. The Preamble to the Act states that:

> Whereas extraordinary situation and circumstances exist which demand special measures for speedy trial of certain offences relative to terrorism, waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan.[58]

The amendment to the Constitution clarifies that it is aimed at preventing an independent and separated judiciary in relation to the trial of those persons accused of crimes related to terrorism, amongst other things.[59] By upholding this amendment, the judiciary has arguably been activist in accordance with Kmiec's result-orientated definition of judicial activism. The result is to provide legitimacy to an amendment to the Constitution that arguably infringes on the country's international and domestic obligations. The judiciary in Pakistan was implicitly subjected to criticism recently by the International Court of Justice ('ICJ') who stayed the execution of a retired Indian naval officer who was accused and convicted of espionage in Pakistan. Pakistan was accused of violating international law. The ICJ ordered that 'Pakistan take all measures at its disposal to ensure that Mr. Jadhav is not executed'.[60] The conviction of other individuals for espionage have also been criticised for the manner in which they were

[53] Constitution of Pakistan (1973), Art. 9.
[54] ibid, Art. 10.
[55] ibid, Art. 11.
[56] ibid, Art. 14(2).
[57] ibid, Art. 19.
[58] Constitution (Twenty-First Amendment) Act, 2015, Art. Preamble.
[59] Constitution of Pakistan, Art. 175(3).
[60] *Jadhav case (India v Pakistan) – Order – Request for the indication of provisional measures* (18/5/2017), para. 58.

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handled. This criticism includes the handling of cases by both the Supreme Court and the High Court.

The High Court in Peshawar was criticised in 2016 for dismissing the case of another Indian citizen accused and convicted of espionage. The person was subsequently convicted and sentenced to three years in prison. The person had been held in custody for three years by the military pending trial before a military court / tribunal.[61] The Supreme Court has also illustrated support for the rulings of military courts / tribunals notwithstanding the fact that these proceedings have been subjected to criticism from UN human rights bodies, human rights organisations, lawyers, amongst others. The main criticism is that military courts / tribunals do not provide the accused with a right to a fair trial and there is no right of appeal against a decision handed down by a military court / tribunal.[62]
From a legal realist perspective, the courts can arguably justify the derogation from the right to a fair trial set out in the ICCPR and the country's Constitution by virtue of the provisions set out in the Act. However, adopting a natural law approach there is arguably no justification for the courts deciding to apply a law which purports to withdraw a citizen's right to a fair trial, and any law that purports to do so would be rendered null and void.

4.3. The purpose and role of the judiciary at the theoretical level

The role of judge has been of paramount importance around the world for centuries, especially in common law jurisdictions. More recently, members of the judiciary have become more prominent with the establishment of constitutional courts, resulting in an increase in judicial power. This section of the paper discusses some of the theories of the judiciary in order to discern the purpose of the judiciary.
Sir William Blackstone enunciated one of the first theories relating to the judicial process. Blackstone's theory argued that human law is universally binding 'in all countries, and at all times'[63] and has been ordained by God and is consistent with the law of nature. According to Blackstone the role of the judiciary is to identify and apply the law, but they are not lawmakers as such. This discounts the role of the judiciary in a common law system where the judge establishes law through judicial precedent under the doctrine of stare decisis. Blackstone therefore has a restrictive view of judges because a judge cannot make law but simply apply it to a scenario before him. This theory is based on the notion that laws derive from God. This explains why judges cannot make laws because of their divine origin. However, all laws are binding on men. The judge is therefore viewed as somebody who identifies and applies the law with divine mandate. The law is already in existence in Blackstone's view, and the judge is merely required to find and apply it.
Blackstone's theory of the judicial making process is somewhat criticised by other theorists. For example, the Realist perspective of the judicial making process asserts that laws are the creation of human beings with no divine origin.[64] This is evidenced, according to Realists, by the variation in interpretations by judges on legal issues that are identical. Therefore, Realists would view Blackstone's theory of the judicial making process as overly simplistic. The Realist would argue that the lack of consistency regards decisions handed down by judges illustrates that judges with different personalities have been responsible for the decision.

[61] US State Department Report, 'Country Reports on Human Rights Practices for 2016: Pakistan', *US State Department*, 5. Available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265546> [Last visited 8 April 2017].
[62] ibid.
[63] Sir William Blackstone, *Commentaries 41* (16th edn., 1825).
[64] Theodore M Benditt, *Law as Rule and Principle* (Standford University Press, 1978).

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According to Realists this proves that the law does not originate from heaven and is, instead, the product of judges. This view is inconsistent with the role played by judges in a common law system.

The Formalist Theory is a theory that differs from Blackstone's theory and the Realist view of the judiciary. The Formalist Theory about judicial decision-making is comprised of the following equation: (1) the rules of law, "R"; (2) the facts of the case, "F"; (3) and the decision of the judge, "D" (R x F = D). The first element, the rule of law, exists as a result of statute or previous decisions handed down by the courts (judicial precedent). This is clearly consistent with the role of the judiciary under a common law system. The judge only applies the rule of law once it has been identified and the facts of the case have been fully considered.[65] The emphasis under this theory is therefore placed on the judge's ability to identify the relevant statutory provision/s or common law principle/s to reach an outcome in a case. However, it follows that because the same formula is applied to each and every case, the theory suggests that a different judge should reach the same conclusion under circumstances where the facts are similar. The emphasis is placed on the judge to analyse the case factually and legally to find the appropriate rule of law to arrive at the correct conclusion. This theory would argue that the judge's outcome in a case is frequently predictable.[66] This is because a decision in a case is the product of the unique set of facts and the rule of law.

The above theories highlight some of the major discrepancies between the different viewpoints about the role of the judiciary and the judicial-decision making process. The Realists vehemently reject the formula adopted by Formalists to arrive at a decision in a case. The Realists argue that the facts of the case and the law are not vital components in the judicial decision-making process. This is clear from the Realists' formula for the outcome of a case. The Realists say that the formula for the judicial process is as follows: S x P = D. "S" represents a stimuli or judicial hunch, which is multiplied by "P", or the judge's personality. A judicial hunch multiplied by the judge's personality results in "D". The letter "D" in the equation represents the judge's decision. This highlights the lack of importance of the law or facts to the Realist, unlike the position adopted by Formalists. Realists argue that the judge cannot obtain the facts of a case until the case has been considered. More philosophically, the viewpoint of the Realists is that the facts in a case are not the actual facts, but what the court believes happened. The Realists are of the view that judges are not infallible and shall provide diverse and frequently incorrect assessments of the fact in a case. The Formalists, on the other hand, assume that the correct facts shall arise from the parties' testimonies and shall be outlined in the interpretation by the judge of the case. The Realists, unlike the Formalists, therefore view the facts of a case as an unpredictable aspect of a case. The Realists do not therefore regard the facts of a case as a very important part of a decision by a judge. According to the Realist, the rule of law can be overlooked or pre-empted, which renders it unimportant. For the Formalist however the rule of law determines the outcome of a case. The rule of law is therefore critical to the Formalist, while it is somewhat illusory to the Realist.

The above discussion highlights that some of the theories of the judiciary conflict somewhat with each other in a variety of ways. Deducing the purpose of the judiciary from considering the theories relating to the judiciary is problematic. This purpose would depend on the approach adopted by the judiciary to judicial decision-making and / or the remit of the

[65] Jerome Frank, 'What Courts Do In Fact', 26 *Ill. L. Rev*. (1935), 645, 648.
[66] ibid, 649.

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jurisdiction of the court in question. For example, in a country which has a codified constitution, such as the United States of America, the role and powers of the judiciary are enshrined in the country's constitution. The purpose of the Supreme Court judge is evidently to interpret the provisions of the country's constitution. It would be non-sensical to suggest the applicable constitutional provision does not play any role in the judge reaches his decision in a case as the Realist viewpoint would suggest. In a country where there is no codified constitution, such as the United Kingdom, the role of the judiciary can be unclear. In the UK, the role and powers of the judiciary have been inferred or induced from previous decisions handed down by the courts. The courts are inferior to Parliament under the doctrine of parliamentary sovereignty. Under the constitutional model adopted in the UK, the courts are therefore simply required to interpret the wording of statutory provisions, and declare the law in the process. This role and purpose is akin to the Formalistic theory of the judiciary.

4.3.1. The role of the judiciary under the theory of legal positivism

The theory of legal posivitism is founded on the premise that laws must be enforced irrespective of the substantive content of those laws. Pursuant to the theory of legal positivism, the role of the judiciary is to enforce those laws in society that are valid. This includes laws that are controversial because they purport to remove fundamental rights of citizens. The role of the judiciary in circumstances where they are confronted with controversial laws is to enforce those laws irrespective of morality of the laws. A good example of legal positivism in practice can be observed from the Nazi era, where officials attempted to justify atrocities that were committed by the party by trying to rely on the laws were introduced at the time.

The validity of Nazi law was examined by Hart and Fuller during the 1950s. Nazi laws were controversial to the extent that they withdrew the civil rights of Jews living in Germany.[67] Hart and Fuller's discussion offers a good example of a judge when faced with a case which involves controversial laws that were introduced by the legislature through the proper legislative process. The discussion addressed salient issues relating to the validity of law and separability. The issue of separability recognises that there is a distinction between morality and law. That is to say that the validity of a law is not determined by the question about whether or not it is moral. It is sufficient that a state has introduced a law through the proper constitutional and legislative process for the law to be viewed as valid.

The Nuremburg Tribunal examined the difficult issue regarding the removal of the civil rights of individuals in a society. Following an approach that is consistent with the theory of legal positivism, it is the duty of the court in a state to enforce the laws. However, the Nuremburg Tribunal when considering the cases of Nazi war criminals, it was accepted that the Nazi law was viewed as valid by the Third Reich, notwithstanding the fact that the laws removed the rights of certain citizens. The Federal Republic of Germany reaffirmed the validity of Nazi law in numerous judgments handed down by the court following the Third Reich's demise.[68] In these cases, the court of the Federal Republic of Germany heard the cases of individuals who allegedly denounced people who were purportedly killed by the former regime for criticising the regime.

Hart argued that irrespective of the lack of morality regarding Nazi laws, it is not a requirement that a legal rule must contain moral substance to be recognised as a valid law. All that is required is to ask 'whether a system of rules which altogether failed to do this

[67] Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart, *Harvard Law Review*, Vol 71, No 4 (1958), 630 – 672.
[68] H O Pappe, 'On the Validity of Judicial Decisions in the Nazi Era' (1960) 23 *MLR* 260.

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could be a legal system'.[69] Hart rejected Austin's command theory and said that a law need only be introduced by the sovereign / monarch. A sovereign can be a monarch or Parliament, providing they possess the requisite authority to pass and introduce laws. Once a law has been passed by such an institution, the law is regarded as valid. It follows that even an immoral law, such as the Nazi law, would be viewed as valid pursuant to the theory of legal positivism. According to the accused during the Nuremburg Trials, the fact that the country's legislator at the time introduced the discriminatory laws through the appropriate constitutional and legislative process, they were obliged to follows those laws. A legal positivist perspective suggests that once a law has been passed through the proper process, it is the duty of the judge to simply apply those laws. However, Austin did argue that the sovereign / parliament does bestow on judges a discretion to interpret the rules in a manner to make new order where a problem arises. Once made, the new judge-made rules are either upheld by the sovereign / parliament, or they may be repealed by the introduction of new rules.

The principal role of the judge when examining it in the context of the theory of legal positivism is to identify the pertinent law and apply them to the case. The judge's personal opinions or views about the case are irrelevant when the judge performs his or her role.[70] There is not much scope for a judge to determine a case other than in accordance with the letter or the law. The judge simply takes into consideration to facts of the case, identifies the requisite laws, and reach a decision based on the two aforementioned issues.[71]

The Nuremburg Trials underscore that there is no defence to enforcing laws which purport to remove fundamental rights from citizens in circumstances where the laws amount to international crimes, such as was the case concerning the Nazi law. Any individual participating in enforcing the laws, potentially including the courts, shall arguably present the risk that such individuals can be held accountable under international law. This position highlights that depending on the legal theory adopted, the approach adopted to investigate and examine the validity of law shall depend on the theory adopted. From the perspective of legal positivism, laws that have been introduced through the correct legislative and constitutional process shall be valid and ought to be enforced, irrespective of whether they are moral or ethical, as law and morality are viewed as distinct and separate entities under the theory of legal positivism.

4.3.2. The role of the judiciary under the theory of natural law

Natural law theorists have argued that natural law 'is binding over all the globe, in all countries, and at all time'.[72] This argument suggests that natural law is superior to any other law. It follows therefore that any law that is inconsistent with natural law is rejected and superceded by natural law. This is evident from Blackstone's comments that man-made laws are void unless they 'derive all their force' from natural law.[73] Blackstone was a staunch advocate of the natural law theory and vehemently argued against the adoption of legal positivism by the judiciary.[74] The argument advanced by Blackstone was that laws should be divine and consistent with the intentions of God. A judge hearing a case would simply need

[69] H L A Hart, 'Positivism and the Separation of Law and Morals' (1958), *Harvard Law Review*, Vol 71, 601.
[70] J Frank, 'What Courts Do In Fact', 26 *Ill. L. Rev*. (1935), 645, 648.
[71] ibid, 649.
[72] ibid.
[73] ibid.
[74] ibid, 55.

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to identify the law and apply it to a case where the law was consistent with natural law. A judge confronted with a law that is not of divine origin and inconsistent with God's intentions would be obliged to view the law as null and void.

The natural law theory dictates that there has to be some moral dimension to the law to justify its validity.[75] That is to say that the law must be consistent with God's intentions. An example of the laws that may be viewed as consistent with God's intentions are fundamental human rights under international law, such as the right to life, the prohibition on torture, inhumane and degrading treatment, and the right to liberty and security, war crimes, genocide, or crimes against humanity. These rights have been enshrined and articulated in various international treaties, such as the Universal Declaration of Human Rights (1948), the ICCPR, and the Rome Statute of the International Criminal Court (1998), *inter alia*. Irrespective of the form that such norms are found, fundamental rights are likely to reach the requisite threshold to be viewed as a valid law under the theory of natural law. These rights can be evidenced at both the international and domestic levels. Nonetheless, even if such rights are enshrined in the law and are theoretically legally binding on a state, a judge adopting an approach consistent with the theory of natural law would only be obliged to enforce the law where these laws are viewed as consistent with the commands of God.

The role the judiciary should take pursuant to the natural law theory when confronted with laws that are arguably contrary to natural law can be observed from the trial of Nazi war criminals at the Nuremberg Tribunal. In this case, an issue arose between the issues of the validity of law and the separation thesis. The Nuremburg Tribunal clearly adopted a natural law theory approach to the case. The Tribunal created new laws, such as international war crimes[76], which were justified on moral grounds to prevent further atrocities similar to those committed by the Nazis during the second World War. The Tribunal convicted 18 out of the 22 defendants who were senior members of the Nazi party. Three were acquitted, three were given life imprisonment, four were sentenced to varying lengths of imprisonment and eleven were sentenced to death. The defendants were accused of offences outlined in the London Agreement and Charter (1945). The principal argument raised by the defendants that they were merely following German law at the time and were therefor lawful was rejected outright by the Tribunal. Instead, the Tribunal held that the defendants were acting in breach of international laws pertaining to the human rights of the victims. It is clear therefore that the Tribunal viewed the law that was breached by the defendants as one that was 'binding over all the globe, in all countries, and at all time', including on Germany.[77] This evidences that a natural law approach was adopted by the Nuremberg Tribunal.

Under the theory of natural law, if a legislator introduces laws that are inconsistent with the principles of natural law, the law shall be deemed invalid. It is the role of the judge in these circumstances to refuse to enforce or risk accusations that he or she has acted 'unlawfully'.[78] This would justify a judge departing from the law introduced, even if it was introduced in accordance with the proper constitutional procedure applying in the country where the case is heard.

The approach adopted by a judge under the natural law theory is therefore diametrically opposed to the approach that should be adopted under the theory of legal positivism. The former approach was observed by the judges sitting on the panel during the Nuremberg Trials. This approach highlighted that the law is not unfettered and limits can be imposed on

[75] R M Dworkin, 'The Model of Rules', *The University of Chicago Law Review*, Vol 35 [1967], 14 – 46.
[76] H O Pappe, 'On the Validity of Judicial Decisions in the Nazi Era' (1960*) MLR*, Vol 23, 260.
[77] ibid.
[78] *Rochin v California*, 342 US 165, 172 (1952), *per* Justice Frankfurter.

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the extent to which the law can deny individuals of certain rights. The judges hearing the cases in the Nuremburg Trials found that the deprivation of civil rights in accordance with the Nazi law was unlawful. Moreover, the findings from the Tribunal are that no individual in society, irrespective of his or her standing, can justify or defend actions that infringe certain fundamental rights, even if those actions are supported by laws introduced by the legislature pursuant to the proper constitutional process.

An approach consistent with the natural law theory would mean that a judge is entitled, and in fact obliged, not to enforce laws that are inconsistent with natural law principles, even if they were passed in accordance with the proper constitutional process. If the law is viewed as immoral it is clearly unjust and invalid from the natural law perspective as the law is inextricably linked to morality. In light of the above position, it is clear that the role of the judiciary when considering a case involving laws which purport to remove certain fundamental rights of citizens depends on the legal theory / philosophy that has been adopted by the judge.

4.3.3. Green's approach to the role of the judiciary and judicial activism

Green's approach to assessing whether or not a judge has been activist is flexible enough to be applied to judgments handed down by the courts in Pakistan. The approach advocates that legal scholars ought to continually examine the meaning of the term judicial activism because 'these cultural debates are all that maintain judicial conduct's long-term legitimacy and effectiveness'.[79] The approach differs from other commentators in so far as it is broader and more flexible.[80] The analogy used by Green is that a judge is similar to a 'rope tied to an anchor'[81], which is capable of moving in certain circumstances. These circumstances may impact on how a judge decides a case.[82] The findings from this research are that the 'circumstances' in question in relation to Pakistan are the change of regime, where the military took over control of the country on numerous occasions. In Pakistan, there have been successful military coups in 1958 – 1971, 1977 – 1988, and 1999 – 2008. During the aforementioned periods, Pakistan was under military rule.[83] It is therefore necessary to adopt an approach to evaluating judicial activism that can accommodate such drastic changes to governance in a country. It is argued that the flexibility of Green's approach allows it to be used to evaluate whether or not judges have been activist in Pakistan. The reason for adopting this approach is that rather than imposing a fixed and rigid definition of the term judicial activism, the approach accommodates a variety of circumstances that a judge can find him/herself in.[84] This is particularly useful in the context of Pakistan given its turbulent and tumultuous political history.

The first stage in Green's approach is to consider whether the alleged judicial activism is consistent with 'principles with historical and institutional roots'.[85] This is a generic test. These principles and institutional roots must therefore exist or a decision cannot be described as activist under Green's approach. Pakistan acquired independence from Britain on 14 August 1947. The legal system cannot claim the existence of principles with historical institutional roots during its brief 70 year period of existence. However, Britain was the former colonial power. Therefore, these principles can be evidence from the British legal

[79] R C Green, 'An Intellectual History of Judicial Activism', *Temple University* (2008), 1 – 61, 56, 32.
[80] A M Schlesinger, Jr, *The Supreme Court: 1947*, Fortune, Jan. 1947.
[81] R C Green, 'An Intellectual History of Judicial Activism', *Temple University* (2008), 1 – 61, 56, 53.
[82] ibid.
[83] M Aziz, *Military Control in Pakistan: The Parallel State* (Routledge Oxon, 2008), 78.
[84] ibid.
[85] R C Green, 'An Intellectual History of Judicial Activism', *Temple University* (2008), 55.

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system which has a rich history and developed over many centuries. The existence of these principles under the British legal system would therefore satisfy stage one of Green's approach. Adopting this process eliminates the possibility that a decision is determined as being activist because of political reasons, or the need to examine if a judgment is activist having been made on the basis of logic, emotion or morality.

The second stage of Green's approach is aimed at only classifying those judgments that satisfy certain criteria to be regarded as activist. This process ensures that all decisions handed down by the courts are treated the same. Under this stage, one must consider if there is evidence of historical examples which support or contradict the objective advanced by the court in the case under consideration. When considering a case under the second stage, the decision shall only be viewed as activist where there is no evidence of previous judgments having been made by the court which advance the agenda that has been pursued by the supposedly activist court. A judgment by a court shall be viewed as activist where the above two stages have been satisfied.[86]

4.4. The Case Studies

A number of judgments by the courts in Pakistan have played a pivotal role in influencing the route adopted by the judiciary. The first judgment considered in this section is the case of Tamizuddin Khan, while the second case is called *Federation of Pakistan vs. Maulvi Tamizuddin PLD* 1955 FC 240, which challenged this ruling. The cases highlight the political turmoil affecting the country and the development of the judiciary. The cases also provide evidence how some of the country's military dictators, such as General Pervez Musharraf, became directly involved in the country's politics and influencing the judiciary.[87]

4.4.1. Case study 1

The first case study takes a look at the landmark case of *Maulvi Tamizuddin Khan (Petitioner) v Federation of Pakistan (Respondent No. 1) & Others (Respondents)* 1954 SHC 81. The judgment in this case played a significant role in the decline in the path adopted by Pakistan's judiciary. The case of *Maulvi Tamizuddin Khan* is well known for the standard set by the judiciary in order to ensure the rule of law was upheld in the country. The case involved an action against a proclamation made by the then Governor-General Malik Ghulam Muhammad which posed a threat to democracy in the country because it was declared that the Constituent Assembly be dissolved. The then President of the Constituent Assembly, Maulvi Tamizuddin Khan, brought a writ of *mandamus* and *quo warranto* aimed at restraining the Respondents from giving effect to the proclamation and from preventing the petitioner from exercising his functions and duties as President, and to assess the legal validity of the Governor-General's appointment of ministers.

The Case of the Petitioner

The Petitioner asserted that the proclamation was beyond the scope of the powers held by the Governor-General (*ultra vires*), illegal, contrary to the Constitution, without the requisite jurisdiction, inoperative and void. The grounds upon which the aforementioned arguments were based are that the Governor-General did not possess the requisite authority under the Indian Independence Act (1947) or the Government of India Act (1935). The country

[86] ibid, 56.

[87] Iqbal S. Hussain, *Pakistan: A Proud Nation but a Failing State* (Lahore: Humanity International Publishers and Promoters, 2007), 132.

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acquired independence from Britain pursuant to the Indian Independence Act (1947), and was to be governed by the 1935 Act until the country's Constitution had been established.

The Petitioner argued that the Governor-General's assertion that the constitutional machinery had collapsed which led to and justified the proclamation was false. The Petitioner also argued that the Indian Independence Act (1947) empowered the Constituent Assembly to function as supreme legislature, which included the power to act as legislature on federal matters for the purpose of the Government India Act (1935), and that it was only the Constituent Assembly that was empowered to assent to the dissolution of the body where a Resolution was passed by at least two-thirds of the members of the Assembly assenting to the dissolution. It was also argued that the Governor-General also had no power to dissolve the Constituent Assembly even while it is acting in its Federal Legislative capacity. The powers the Governor-General possessed to dissolve the body in accordance with ss. 19(2)(c) of the 1935 Act were not included in the Pakistan (Provisional Constitution) Order 1947 and, as such, the Governor-General had no power to dissolve the Constituent Assembly. It was asserted that the Constituent Assembly's acts in this regard did not require the Governor-General's assent due to a bill that was about to be signed by the President of Pakistan and was given the authority of law after being published in the Official Gazette of Pakistan.

The Case of the Respondent

The respondent raised the following grounds to reject the petitioner's claims: The powers of the Crown under the common law in Pakistan is held by the Governor-General, the Governor-General (the Crown) was empowered to dissolve the legislature pursuant to the common law unless there is legislation in place which provides otherwise, the Crown has a prerogative power to dissolve the legislature in the absence of any laws passed pursuant to s. 8 of the Indian Independence Act (1947), under the Rules of Procedure of the Constituent Assembly of Pakistan[88], the Constituent Assembly has to power to dissolve the body following the passing of a Resolution by at least two-thirds of the Assembly members. The respondent asserts that this rule did not amount to law pursuant to ss. 6 and 8 of the 1947 Act and as such did not provide the Assembly with such power, under the 1947 Act[89] and the Interpretation Act 1889[90], the Governor-General possessed the power to annul or modify order of the Governor-General of India empowering the Assembly to dissolve and / or to make any other orders it so wished, while the Governor-General of India's power to dissolve the Constituent Assembly under s. 19(2)(c) of the 1935 Act was removed, it did not follow that the Governor-General of Pakistan was removed of his power to dissolve the Constituent Assembly pursuant to s. of the 1947 Act, and in any event the Court had not jurisdiction to determine the lawfulness or legitimacy of the exercise of the power by the Governor-General when making the proclamation in 1954.

The Court's Judgment

The Court indicated at the outset that the laws establishing the countries of Pakistan and India[91] that the legislatures of those new countries were fully empowered to "make laws repugnant to the law of England and any Act of Parliament" and Parliament has no power over the laws passed by the legislature.[92]

The Sind Chief Court held unanimously that the Governor-General had no power under the common law prerogative and / or under s. 19(3)(b) of the 1947 Act to dissolve he Constituent

[88] Rules of Procedure of the Constituent Assembly of Pakistan, r.15.
[89] Indian Independence Act (1947), s. 19(3).
[90] Interpretation Act (1889), ss. 12 (1) and (2).
[91] Indian Independence Act (1947).
[92] ibid, s. 6.

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Assembly. The Court accordingly found that there was no legal basis for the dissolution of the Assembly by the Governor-General. In rejecting the Governor-General's case the Court stated as follows:

> It follows, therefore, that the Constituent Assembly's purported dissolution is a nullity in law, and that both it and the office of its President are still existent. It is common ground that as a result of the proclamation the petitioner has been prevented from performing the functions of his (undoubted public) office. We have the power to issue writs against any Government, and that Government for this purpose includes the Federation of Pakistan appears undeniable.

The Court explicitly stated that the office of the Governor-General did not equate to the Crown. Based on this premise, the Court stated that:

> a Governor has no special privilege like that of the Crown; he must show in any Court that he has, authority by law to do an act, and what is more important for our purpose, he must show not merely that the Crown might do the act, but that he personally had authority to do the act.[93]

The Court recognised, by reference to the English case of *Attorney-General v de Keyser's Royal Hotel Limited* [1920] UKHL 1, that once a prerogative power has been placed on a statutory footing, the prerogative power is not reinstated in the event that the statute is repealed. The Court summed up the position by saying as follows:

> when the prerogative is merged in the statute, there can be no reserved prerogative … [because] … [w]hen the prerogative which has once been put on the statute is deliberately removed there from, it no longer exists.

The Court resolved the issue by inquiring into the Assembly's power under s. 19 of the 1935 Act. The Court said that the life of the Federal Legislature was fixed for a period of five years under the 1935 Act unless the Governor-General was to exercise his power under s. 19(2)(c) of the 1935 Act to dissolve the body. However, the Court continued by saying as follows:

> Under the adaptations its life was not limited to any period for the simple reason that the Constituent Assembly set up under section 8 of the [Indian] Independence Act [1947] was also to act as the Federal Legislature under the 1935 Act and the life of the Constituent Assembly was to last till the Constitution was made for Pakistan. Therefore, it could not be dissolved till it had completed the Constitution.[94]

The Court was therefore of the opinion that the Constituent Assembly must exist until it had performed its role of establishing the country's constitution. It followed that the Governor-General's power to dissolve the Federal Legislature in accordance with s. 19(2)(c) of the 1935 Act had been withdrawn.

The Court accordingly found that it did possess the requisite jurisdiction to hears the case and the petitioner was entitled to bring an action before the Court pursuant to s. 223-A of the Constitution Act. As a consequence, the Court granted the orders of *quo warranto* to prohibit the Governor-General from exercising the office of Minister and *mandamus* aimed at restoring the petitioner to his post as President of the Constituent Assembly and preventing the respondents from acting against him in this position. Costs were also awarded for the petitioner.

The Court ultimately dismissed the arguments presented by the Respondents that the Governor-General's power to assent to Federal Legislation had been removed by s. 5 of the Indian Independence Act (1947). There was no useful purpose for keeping the powers

[93] *Maulvi Tamizuddin Khan (Petitioner) v Federation of Pakistan (Respondent No. 1) & Others (Respondents)* 1954 SHC 81.
[94] ibid.

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outlined at ss. 19(2)(a) and (b) of the 1935 Act. The court referred to ss. 61(2) and 62(2) of the 1935 Act to show that the Governor-General's prerogative power of dissolution had been somewhat retained, yet the power had also been removed. The point made by the Court was that the Governor-General did not possess any power under the provisions of the Independence Act 1947 to dissolve the Constituent Assembly. The Respondent's argument therefore that there was no power under s. 223-A of the Constitution Act for the Court to consider the petitioner's petition due to a failure by the Governor-General to assent to the legislation was dismissed on the premise that there had been a consistent practice of the Constituent Assembly passing many pieces of legislation without the Governor-General providing his assent. It is only under the provisions of the 1935 Act that the assent of the Governor-General shall arise. The issue of assent was resolved by the Court stating that the Governor-General's authority, as set out under s. 9 of the Indian Independence Act (1947) was merely extended for one year from 1948 to 1949. The Court said that the Governor-General himself had been acting under legislation which had not receive his assent. In this regard, the Court said that "If every one of these Acts were held invalid for want of assent, the consequences are bound to be disastrous." This reasoning emphasised that the Governor-General's lack of assent to legislation did not necessarily invalidate the legislation in question. Rather, there are many pieces of legislation that have been held to be binding notwithstanding the fact that the Governor-General did not provide his assent.

4.4.2. Case study 2

Case study 2 discusses the landmark case of *Federation of Pakistan vs. Maulvi Tamizuddin* PLD 1955 FC 240 that reversed the ruling in the case of *Maulvi Tamizuddin Khan*. This appeal was heard before the Federal Court by Justice Muhammad Munir, Justice ASM Akram, Justice Muhammad Sharif, Justice SA Rahman, and Justice AR Cornelius (dissenting). The case raised issues under Articles 58 & 199 of the Constitution of Pakistan (1973), and Articles 19 & 223-A Government of India Act, 1935. The case was a challenge to the judgment handed down in the *Maulvi Tamizuddin Khan* case. Delivering the judgment, Muhammad Munir, C.J. found that assent of the Governor-General is necessary to the introduction of all legislation by the Legislature and that s.223-A of the Government of India Act, which was used by the Chief Court of Sindh to accept jurisdiction for the case, had not received such consent, then it follows that the Court granting the orders of *quo warranto* and *mandamus* had no jurisdiction to do so.

The Court said that the Constituent Assembly performs the function of the country's legislature pursuant to s. 6 of the 1947 Act while acting under s. 8(1) of the 1947 Act. However, while acting in this capacity there is a requirement under s. 6(3) of the Act that the Governor-General provides his explicit assent for all legislations passed by the Legislature. In light of this reasoning, the Court stated that the legislation under which the Chief Court of Sindh claimed to possess jurisdiction[95] was invalid because it had not received the assent of the Governor-General.[96] The Court drew a distinction between the role played by the Assembly when acting in its principal role as the country's legislature to make laws relating to the constitution, and the role played by the Assembly when acting in the capacity of Federal Legislature, which is does pursuant to the powers and limitations set out in the Government of India Act, 1935.[97] The Court reasoned that due to the restrictions imposed on the Assembly when acting in its Federal Legislative role it follows that the Crown's, or its

[95] Government of India Act, s. 223-A.
[96] PLD 1955 FC 240, para. 315.
[97] ibid, para. 278.

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representative's, assent to legislation passed by the legislature is vital, and that this power has not been handed over by the Crown to any other institution.

The Court held that the legislation pertaining to assent to legislation by the Crown does not give rise to new rights for the Crown or its representative, but rather reaffirms a pre-existing right and outlines the way the Crown can exercise this right. Therefore, if the Crown has an inherent power to assent to legislation and that right is enshrined in legislation, the legislation in question does not create the right of the Governor-General to assent or withhold assent to legislation *per se*, but instead outlines the process to be followed when exercising that right.

The Court stated that the constitutional position in the country is that the Crown or its representative (the Governor-General) is part of the country's legislature in so far as the Governor-General is presented with all prospective legislation for his assent or his decision to withhold the same for all bills passed by the legislature and to be placed on the statute book. S. 6(3) of the 1935 Act simply confirms this power by the Governor-General to either assent to or withhold assent to any prospective legislation passed by the Legislature. It follows therefore that any prospective legislation that is passed to the Governor-General for his assent or refusal of assent shall not become binding law until he provides is assent. To this extent, the Governor-General is a "constituent part of the legislature" and without the performance of his role in assenting to legislation, the legislature has not functioned properly. Accordingly, the legislation shall therefore not become law until this role has been fulfilled. One could draw a comparison between the Royal Assent by the Queen to Bills passing both Houses of Parliament. Prospective legislation shall not become law in the UK until the Bill has received the Queen's Royal Assent. The Court therefore found that there is no distinction between those constitutions such as the UK where the Crown plays a legislative role, and the legislature in Pakistan where the Constituent Assembly exercises these functions by passing bills, and the Governor-General assents to this prospective legislation under s. 6(3) of the 1935 Act.[98]

The Court based its reasoning on the 'necessity' of the function of the Governor-General in providing his assent or refusal of consent to prospective legislation. It was argued that this rationale was based on the long-standing principle of 'necessity'. The Court found that legislation is always subject to assent, whether that is carried out by prerogative power, or delegated by statute to the legislature or other body. However, it is normally the Crown that provides the requisite assent in such circumstances.

The Court said that the making of laws is a part of the government of the Dominion. The Governor-General represents the Crown for these purposes. The Court acknowledged that if the Governor-General is the Crown's representative when performing the task of assenting to laws passed by the Constituent Assembly seeking to introduce federal laws, it follows that the Governor-General also acts as the representative of the Crown when assenting to constitutional law passed by the Constituent Assembly. The Court further stated that a rule of procedure is incapable of amending the Constitution.

The Court was of the opinion that complete sovereignty was not bestowed upon the Constituent Assembly to act in its legislative capacity, and the body was not empowered to act outside the remit of the Indian Independence Act. It was recognised in the case that the Assembly was only given the power to make laws of a constitutional or federal nature. The power to make laws applicable to the country's constitution were set out in s. 6, while federal legislation could be passed by the Assembly with the restrictions that were imposed on it by the requirement for assent by the Governor-General for legislation that has been passed by the Constituent Assembly. More importantly, the Crown, through its appointed representative

[98] ibid, para. 286.

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the Governor-General, retained the power to assent to all legislation passed by the constituent Assembly. That is to say that the assembly did not possess completed sovereignty in relation to introducing legislation. The Constituent Assembly was therefore claimed to have tried to operate outside the Constitution pursuant to the Indian Independence Act (1947). The Governor-General was also empowered to this which was unconstitutional.[99] The Court said that an argument based on the premise that the Governor-General has a power of veto if he withholds consent to prospective legislation cannot be raised as a basis for arguing that the Governor-General's power to assent or withhold assent on legislation amount to an encroachment on the Constituent Assembly's power to legislate.[100] The appointment of the Governor-General of Pakistan is by the Crown and is the Crown's representative for the purpose of Government affairs.[101] This includes the prerogative power to act on the Crown's behalf to make decisions relating to the country's internal affairs in the absence of legislation or constitutional provisions which provide to the contrary.[102]

The Court stated that the 1947 Act was similar to the Statute of Westminster (1931) in so far as the constitutional hierarchy applicable in the country. However, the difference was that the Act aimed at outlining the freedom to be provided to the Dominions of India and Pakistan in place of the former Indian Empire. The Court said that the extent of freedom given to these Dominions under the 1947 was broader than was provided to the Dominions that existed in 1931.

The Court highlighted that the Constituent Assembly was simply a legal body. While the Governor-General was recognised as a statutory authority. It was said that the functions of the Constituent Assembly while passing federal legislation was not to be viewed as being subject to the Governor-General's assent.[103] The reasons for this were described as being aimed at providing the Assembly with sovereign body status aimed at exercising sovereign power, which covered amending the country's Constitution. This power was subject to the power of the Governor-General to provide his assent to the prospective legislation.

The Court concluded by saying that there was nothing in s. 6(3) of the Indian Independence Act (1947), or in the country's status as a Dominion which would give rise to the argument that there are obligations that all laws passed by the Constituent Assembly necessitate the assent of the Governor-General before they are viewed as valid. However, the Court concluded that s. 6 related to the powers provided to the Constituent Assembly and pursuant to s.8(1) of the Act, and the limitation imposed on this power by virtue of the requirement of the Governor-General to assent to the legislation. whatever may be the character of that legislation was applicable when the Constituent Assembly exercised the powers of the Legislature of the Dominion under section (1) of section 8. The provision assumes that the Constituent Assembly's powers cover the power to introduce constitutional provisions, and provides that those powers shall first be exercised by the Constituent Assembly. Once this position has been acknowledged however the Court went on to say that it is clear that the assent of the Governor-General to laws passed by the Constituent Assembly is just as important as the requirement of his assent to any future legislature passed by the Constituent Assembly.

By finding that the Governor-General's assent to complete the law-making process commended by the Assembly, this resulted in constitutional issues arising in Pakistan. The

[99] ibid, para. 298 – 299.
[100] ibid, para. 304.
[101] Indian Independence Act (1947), s. 5.
[102] PLD 1955 FC 240, para. 311.
[103] ibid, 364.

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consequence of the ruling was that all laws that had previously been introduced by Constituent Assembly that had not received the assent of the Governor-General were rendered invalid

4.4.3. Case study 3

This case study considers the case of *Usif Patel v. The Crown* (1955) PLD FC 387 which considered the lawfulness of Emergency Powers Ordinance (IX of 1955), which provided the Governor-General with the power to validate any laws he so chose to assent to that had already been passed by the Constituent Assembly with retrospective effect. The main issue before the court was whether the Governor-General had the consent for legislation to be validated. This amounted to a serious confrontation between the Federal Court and the Governor-General. On this occasion the Court found that the Governor-General had exceeded its power. The Court held that any:

> legislative provision that relates to a constitutional matter is solely within the powers of the Constituent Assembly and the Governor-General is, under the Constitution Acts, precluded from exercising those powers.[104]

The decision in the *Usif Patel* case was therefore viewed as a progressive decision for those in favour of an independent judiciary in Pakistan.

4.4.4. Case study 4

The final case study takes a look at the *Governor-General's Reference No. 1*, PLD (1955) FC 435. The main issue in the case was whether or not the imposition of martial law in the country is valid, and whether the Governor-General was entitled to validate law passed by the Constituent Assembly in a retrospective manner, or dissolve the Assembly. Any progress that had been made in *Usif Patel* was reversed in *Governor-General Reference* case. The Court's ruling was based on the doctrine of necessity. Chief Justice Muhammad Munir stated that the doctrine of necessity can render something lawful that would otherwise be regarded as unlawful. Justice AR Cornelius found that the prerogative power held by the Governor-General was not a matter that was justiciable by the courts. By adopting the doctrine of necessity to justify the decision in the case, the Court provided an avenue for the legal justification for controversial acts taken by the military (executive).

The precedent set out the above judgments handed down by the Federal Court / Supreme Court provided legitimacy to rule by military regimes and other anti-democratic and otherwise unconstitutional moves taken by the executive in the country.[105] This included restricting the remit of judicial power held by the courts and encroaching on their independence. The Supreme Court again invoked the doctrine of necessity to validate the intervention by the military to take control of the country in *Syed Zafar Ali Shah and others v. General Pervez Musharraf* (2000) PLD SC 869. In this case the Court provided the regime with unlimited powers while in control of the country, and sanctioned the amendment of the Constitution by the regime, but the Court did state that the military regime should hold elections within three years. However, continued interventions by military regimes has stifled the growth of institutions in the country, principally the judiciary.[106] On the whole, the findings are that the judiciary 'has had many opportunities to uphold the Constitution and place constraints on the Executive and military, but it has often failed to do so'.[107]

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[104] *Usif Patel v. The Crown* (1955) PLD FC 387.

[105] VV Ramraj and AK Thiruvengada, *Emergency Powers in Asia: Exploring the Limits of Legality* (2010).

[106] International Crisis Group, 'Reforming the Judiciary in Pakistan', *Asia Report No 160*, 2008.

[107] International Bar Association, 'The struggle to maintain an independent judiciary: a report on the attempt to remove the Chief Justice of Pakistan', *International Bar Association* (2007), 18.

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4.4.5. The findings applying Green's approach

The adoption of Green's two-stage framework to evaluate if a judgment handed down by the high court or Supreme Court in Pakistan shall ensure that any decision to classify a decision as activist will have met specific criteria to support such a classification. It is hoped that the adoption of the two-stage approach shall prevent or minimise the scope for criticism about the classification that a judgment is activist in light of the fact that both stages must be satisfied before a judgment shall be classified as activist. If both stages have been satisfied, an activist judgment shall be a judgment that can be identified as one that can be distinguished from other judgments made by the court/s.

Judgments handed down by the high court and Supreme Court in Pakistan can satisfy the first stage of Green's approach as being decisions which fall within the principles that have historical and institutional roots. Albeit Pakistan has only enjoyed independence since 1947, the country was formerly under British rule. In light of this, the British legal system can be considered when assessing whether or not a decision by the courts in Pakistan meets stage one of Green's approach. Furthermore, the principles adopted by the high court and Supreme Court in Pakistan are similar to those adopted by the higher courts in England (i.e. applications for judicial review). The principal difference between the courts in Pakistan and the English courts is that the role of the judiciary in Pakistan acquires its powers and jurisdiction from the country's written constitution. In England, judges essentially acquire their powers and jurisdiction from statutes, judicial precedent or judicial discretion where the court finds that a case is distinct and unique, and there are no laws addressing the question being considered.[108]

In relation to stage two, each ruling that is being evaluated to determine if it can be classified as activist must be considered on its individual merits. When considering this stage, it is recognised that it shall prove problematic trying to evaluate if a decision by the courts in Pakistan is activist given the country's short legal history. Reliance will therefore need to be placed on judgments handed down by the courts in England. In light of the fact that the countries have distinct political histories, there shall be some difficulty when applying judgments handed down by English courts to those made by Pakistani judges. The second stage of Green's approach shall demand that there is sufficient evidence of historical examples which support or contradict the objective advanced by the court in the case under consideration. As already noted above, Pakistan is a relatively young country given that it only obtained independence in 1947. Therefore, significant reliance will need to be placed on the 'historical' examples of objectives advanced or opposed by English judges. A number of judgments handed down by Pakistani courts have been adopted to evaluate judicial activism in the country. The judgments selected above played a crucial role in determining the development and route adopted by the Pakistani judiciary (see The Case Studies below at section 4.4.). These cases included *Maulvi Tamizuddin Khan (Petitioner) v Federation of Pakistan (Respondent No. 1) & Others (Respondents)* 1954 SHC 81 (case study 1), *Federation of Pakistan vs. Maulvi Tamizuddin* PLD 1955 FC 240 (case study 2), *Usif Patel v. The Crown* (1955) PLD FC 387 (case study 3), and *Governor-General's Reference No. 1*, PLD (1955) FC 435 (case study 4).

Case study 1 is useful because it is a famous case in Pakistan where the court considered the standard that must be met by the judiciary to ensure the rule of law in the country is

[108] *Marbury v. Madison*, 5 U.S. 137 (1803).

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respected. A comparison cannot be held between the facts of this case and an English case because of the different institutions adopted by each country. However, a comparison can be drawn between judgments handed down by the English courts and Pakistan in relation to this case in so far as the courts were seeking to uphold the rule of law. This satisfies Green's second stage of his approach to evaluating if the case falls into the category of being defined as judicial activism because it is evidence of an historical example of the English courts supporting the objective advanced by the courts in Pakistan.[109] It follows that the ruling by the court in *Maulvi Tamizuddin Khan (Petitioner) v Federation of Pakistan (Respondent No. 1) & Others (Respondents)* 1954 SHC 81 cannot be classified as judicial activism pursuant to Green's approach. In *Federation of Pakistan vs. Maulvi Tamizuddin* PLD 1955 FC 240 (case study 2), however, the Federal Court overturned the decision in *Maulvi Tamizuddin Khan*. This illustrates an example of judicial activism in accordance with Green's approach as there is no historical examples where the English Courts have ruled against the advancement of the rule of law. The judgment in *Federation of Pakistan vs. Maulvi Tamizuddin* PLD 1955 FC 240 can justifiably be classified as judicial activism. However, this example of judicial review was not aimed at upholding the human rights in Pakistan, but rather at undermining the rule of law.

In the case of *Usif Patel v. The Crown* (1955) PLD FC 387 (case study 3) the court held that the Governor-General had exceeded its power. This decision advanced the objective of the judiciary's independence (Usif Patel v. The Crown, 1955). However, the high court in England has a supervisory jurisdiction to consider applications for judicial review. Therefore, there are many examples of the courts pursuing the same agenda. Based on this premise, the ruling in *Usif Patel* cannot be described as judicial activism in accordance with Green's approach. The ruling in *Usif Patel* was reversed in the case of *Governor-General's Reference No. 1*, PLD (1955) FC 435. This decision therefore contravenes the notion of an independent judiciary. Applying the second stage of Green's approach to this case, it is arguable that the decision can amount to judicial activism as there are no historical examples of the English courts determining cases in a manner which is contrary to an independent judiciary. Furthermore, this decision can arguably be classified as one that seeks to uphold the rights of citizens as the main issue in the case was the validity of martial law in the country. This case arguably provides evidence that the courts in Pakistan have been activist and that judicial activism can play a crucial role in upholding human rights.

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[109] *Entick v Carrington* [1765] EWHC KB J98. Also see *R v Secretary of State for Foreign and Commonwealth Affairs*, ex p Bancoult (No 2) [2008] UKHL 61.

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