



## Impact of Constitutional Courts, Rule of Law, and Constitutional Review on the Protection of Fundamental Rights

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### ABSTRACT

*The safeguarding of fundamental rights in constitutional democracies is based on three essential institutional pillars, namely, constitutional courts endowed with the rights of judicial review, strong adherence to the rule of law, and an integrated system of constitutional review that exposes the state action to a rights-based questioning. This paper explored how these three interrelated processes affect the safeguarding of basic rights in Pakistan and conducted an investigation on the constitutional provisions set in the Constitution of the Islamic Republic of Pakistan 1973 as well as in the jurisprudential history of the Supreme Court of Pakistan and the High Courts. The study followed a qualitative research methodology based on the doctrinal approach to research using constitutional law and legal interpretation, with the primary sources of the study being the constitutional provisions, landmark judicial case decisions, and constitutional amendments, complemented by the secondary sources, which include law review articles, legal commentaries, and constitutional comparative study. The content analysis and legal interpretation provided the way to analyze the material and reveal the tendencies of the judicial reasoning, development of the doctrine, and principles of the Constitution as applied to the protection of the basic rights. The results show that the Supreme Court of Pakistan has continued to liberalize the understanding of fundamental rights by gradually broadening the meaning of fundamental rights by conducting purposive interpretation of the constitution, articulating the doctrine of right to life under Article 9, and introducing the new system of suo motu. Nonetheless, structural tensions between judicial activism and institutional separation of powers, endemic non-compliance by the executive with court directives, and the susceptibility of constitutional rights protections to constitutional amendments that compromise the basic fabric of the constitution are also found in the study. The paper ends with the recommendations to protect the constitutional rights by improving the independence of judicial and legislative harmonization with the constitutional rights norms and formal inclusion of a basic structure doctrine of the constitutional law of Pakistan.*



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## **Introduction**

Normative modern constitutionalism is the protection of fundamental rights. The most lasting success of liberal political thought the notion that individual rights cannot be sacrificed to the popular will unless they are judicially reviewed is the entrenchment of rights in a sovereign legal text, coupled with institutional means of their enforcement (Dworkin, 1986). The role of constitutional courts as the institutional guarantor of these rights is such that it remains beyond the usual scope of adjudication: constitutional courts are a counter-majoritarian institution, which considers government power to be accountable to the better law of the constitution (Bickel, 1962; Kelsen, 2007). As a constitutional principle and as an institutional practice, the rule of law offers the normative basis on which this architecture of protection of rights is based. And constitutional review, the authority of the courts to strike down a law and executive action as being incompatible with constitutional rights, is the practical device by which these principles are applied to a practical legal controversy.

The constitutional history of Pakistan is an especially valuable, though highly complicated, object to study the interaction between these institutional mechanisms and basic rights safeguarding. Pakistan has been in a state of extended military rule, high constitutional amendments, judicial subordination, and random but with high judicial sense of rights-protective jurisdiction since the adoption of the Constitution of the Islamic Republic of Pakistan 1973 (Newberg, 1995; Mahmud, 1994). The basic rights provisions of the basic rights that are well stated in Articles 8-28 of the 1973 Constitution, which includes the rights to equality, freedom of expression, life and liberty, due process, and right against arbitrary detention among others, have gone through a very long and shifting judicial interpretation by the Supreme Court of Pakistan and provincial High Courts (Lau, 2006).

It is the case of the Supreme Court of Pakistan that over the decades of constitutional amendments and across differing political circumstances, a rich jurisprudence of foundational rights has grown which is indicative of the progressive possibilities, as well as institutional constraints of constitutional adjudication in a developing democracy. Such landmark cases like *Shehla Zia v. WAPDA* (1994), *Miss Benazir Bhutto v. Government of Balochistan v. federation of Pakistan* (1988), *Faiza Askari v. Azizullah Memon* (1993), and more recently, *Pakistan* (2022) show the ability of the Court to broaden the protection sphere of fundamental rights by means of purposive interpretation and incorporation of the doctrine of implied rights (Khan, 2019). Simultaneously, these rulings which affirmed the martial law regimes and constitutional amendments one after another demonstrate how rights protection remains vulnerable to extra-constitutional power (Mahmud, 1994).

The theoretical framework of this paper is based on three overlapping schools of thought, which include constitutional theory (with a focus on the traditions of legal positivism, as well as natural rights theory with reference to constitutional adjudication), comparative constitutional law (the analysis of the experience of Pakistan in comparison with similar experiences in India, Germany, and South Africa), and the literature on the rule of law (including both formal and substantive conceptualizations of the rule of law and how they apply to the protection of rights). Collectively, these structures elucidate how constitutional courts can further and/or not fulfill their rights-protective role, and the circumstances in which constitutional review can work in limiting governmental power.

The research questions that will be used in this study include: (1) What interpretation and application of fundamental rights provisions have been made by the Supreme Court of Pakistan and the High Courts under the 1973 Constitution? (2) What trends in judicial reasoning have been followed in the judicial jurisprudence of constitutional law in Pakistan,

and in what ways have these trends differed over time? (3) To what degree has the constitutional review been fruitful in limiting governmental breaches of basic rights in Pakistan? (4) What institutional and structural are the hindering forces to the effective protection of fundamental rights by constitutional means in Pakistan? The systematic analysis of the primary sources of law and critical review of the secondary literature in the field of the Pakistani constitutional law and comparative constitutionalism address these questions.

The rest of this paper follows in the following manner. The literature review will cover the reviewed theoretical background of the protection of constitutional rights, the constitutional court and judicial review and the literature available on constitutional jurisprudence in Pakistan. The doctrinal research approach, source of data, and the framework of analysis is outlined in the methodology section. The analysis section introduces the result of the study in the form of the three main mechanisms discussed in the study, including constitutional courts, rule of law, and constitutional review, and with special consideration to ground-breaking court decisions and their role in securing basic rights. The conclusions and discussion section help summarize the findings, define the main challenges and opportunities, and provide suggestions on how to enhance the constitutional rights system in Pakistan.

This paper is important to the scholarship of English Language literature on Pakistani constitutional law in that it bridges the existing gap of systematic analysis of constitutional doctrines on relationship between institutional constitutionalism and basic rights protection. It also aids in the general comparative constitutional law literature in the sense that it puts the Pakistani experience into global discussion of constitutional review, judicial activism and the rule of law in the developing democracies. With constitutional order in Pakistan under fresh threat at the hands of the political instabilities, executive overreach, and institutional hostility, stringent academic evaluation of the constitutional processes that have been established to safeguard the basic rights is not only timely and required.

## **Literature Review**

### **Theoretical Blinds of Fundamental Rights Protection.**

The philosophical roots of constitutional entrenched basic rights can be traced to the natural rights tradition of Locke (1689), Rousseau (1762), and Kant (1797) that held that individuals had natural rights that existed and limited political power. This was codified as a constitutional norm in the American Bill of Rights (1791), the French Declaration of the Rights of Man and Citizen (1789) and the Universal Declaration of Human Rights (1948) and defines the normative framework in the context of which modern constitutional rights rhetoric is situated. One of the most productive modern philosophical defense of constitutional rights was given by Dworkin (1986) who proposed the idea that rights are like trumps against utilitarian overrides by the government and that constitutional courts are well positioned to implement such rights against the encroachment by majorities.

Kelsen (2007) theory of constitutional review, which was created in interwar European constitutionalism, provided a positivist explanation of constitutional courts as specialized institutions of legal control, but not a judicial institution, as such. In the institutionalized model proposed by Kelsen-constitutional review became a kind of negative legislation, whereby the courts could reject statutory provisions deemed contrary to constitutional canons, without having recourse to the wider purposive interpretation that was characteristic of common law constitutional courts (Stone Sweet, 2000). The opposition between the Kelsenian centralized review and the American decentralized judicial review has been widely

debated in the comparative constitutional law literature, and its implications on the comparative understanding of the hybrid constitutional review system in Pakistan.

The concept of the rule of law as a principle in the constitution has been developed both formally and substantively. Formal conceptions, which are also linked to Dicey (1885) and Raz (1979), stress the need that governmental authority must be exercised under the guidance of recognizable, prospective, and publicly available legal regulations, and do not give special attention to the differences between rule by law and rule of law. Substantive conceptions have been championed by Dworkin, Rawls and Fuller, and they maintain that the rule of law must go beyond formal legality to ensure the observance of the principles of justice, egalitarianism, and basic rights. This difference has direct ramification to Pakistan which has seen formal legality invoked in periodic instances in order to justify constitutional arrangements that go contrary to the protection of substantive rights (Newberg, 1995).

### **Constitutional Courts and Judicial Review in Comparative Perspective**

The globalization of constitutional review has been widely elaborated in the comparative constitutional law literature since the Second World War and has been found to have an effect on the protection of fundamental rights in widely different political systems. Ginsburg (2003) researched the strategic roots of judicial review in new democracies by claiming that constitutional courts are a form of insurance to political parties who are not sure whether or not they will make it to the next election, or not. His study emphasized that content of the institutional design, such as the constitution court composition, jurisdiction of the review, and access regulations made the difference in the effectiveness of constitutional rights protection. Hirschl (2004) provided a sharper approach to the topic claiming that the tendency of judicialization of politics around the world has been used by the elites to gain interests but not promote substantive rights protection of the marginalized groups.

The longest comparatively relevant precedent to the constitutional jurisprudence of the Pakistani constitution is the experience of the Indian Supreme Court with constitutional review, as the common law constitutionalism of the British is shared between the countries and the Indian and the Pakistani constitutional rights texts have some textual similarity. The formation of the basic structure doctrine in *Kesavananda Bharati v. by the Indian Court*. The case of *State of Kerala (1973)* defined the principle that even by formal constitutional amendment some basic elements of the constitution cannot be violated, such as the guarantee of fundamental rights. Comparative constitutional scholars have widely explored this doctrine (Barak, 2011; Roznai, 2017), and it is still highly topical when it comes to discussing the problem of constitutional entrenchment and the constitutional constraints on amendments in Pakistan, where no such doctrine was officially adopted.

South Africa is well known as a country of transformative constitutionalism- a jurisprudential tradition of constitutional rights adjudication that considers constitutional rights adjudication as a form of social transformation- South Africa has a constitutional court that was established under the post-apartheid Constitution in 1996 (Klare, 1998). The interaction of socio-economic rights like right to get housing by the South African Court ( *Government of the Republic of South Africa v. Grootboom, 2001*), has produced a lot of comparative scholarship about the justiciability of positive rights and institutional capacity of courts to enforce the same. The developments apply to the constitutional system of Pakistan that comprises both civil and political rights and certain aspects of socio-economic protection, although justifiability of the latter still remains debated in Pakistani courts.

## **Constitutional Framework and Rights Jurisprudence of Pakistan**

The history of Pakistan constitution is full of a constant conflict between democratic constitutionalism and armed authoritarianism. The only constitution in Pakistan to have attained a constitutional continuity albeit interrupted is the 1973 Constitution of Pakistan; the 1962 and the 1972 interim constitutions were abrogated, and the 1956 has never been granted a constitutional continuity. The study of constitutional development in Pakistan was thoroughly discussed by Newberg (1995), who traced the history of constitutional assertion and military abrogation which has been the historical pattern of Pakistan politics since independence. Mahmud (1994) provided an acute legal critique of the doctrine of necessity used by the Pakistani courts to legalize the military coups on the basis of which the author argued that the legitimization of the constitutional breaks by the courts essentially negated the rule of law and the institutionalization of rights protection.

The Articles 8-28 of the Constitution of 1973 provide a broad scope of civil and political rights such as the right to life and liberty (Article 9), freedom of torture and degrading treatment (Article 14), freedom of expression (Article 19), right to education (Article 25A), freedom of religion (Article 20), equality before the law (Article 25), and the right to constitutional remedies (Article 199). In a study of the connection between Islamic law and fundamental rights within the constitutional provisions of Pakistan, Lau (2006) discussed the role of the Objectives Resolution, which has been a substantive provision of the Constitution of Article 2A, in interpreting the rights provisions, especially those that have been related to religious freedom and gender equality.

The last in-depth study of the constitutional rights jurisprudence of Pakistan was given by Khan (2019) where the progressive extension of the constitutional right to life by the Supreme Court as per Article 9 included the rights to a clean environment, to good healthcare, to food security and to dignity. This broad interpretation, based on the Indian case law and on the concept of constitutional purposivism, is the most important trend in the development of the fundamental rights judiciary in Pakistan in the last 30 years. As Shafqat (2018) reviewed the uses of the Supreme Court of the so-called *suomotu* jurisdiction as a proactive means of protecting rights, he states that on the one hand, this tool has allowed the Court to intervene in the process of protecting the right where the judiciary would not usually intervene, but on the other hand, this technique also results in concerns of judicial overreach and due process.

## **Fundamental Rights and Mechanisms of Constitutional Review**

Constitutional review mechanisms which are available in the Pakistani Constitution of 1973 are the writ jurisdiction of the High Courts in Article 199, the original jurisdiction of the Supreme Court in Article 184(3) and the appellate jurisdiction of the Supreme Court over the High Court decisions. Article 8 of the Constitution is that any law incompatible with fundamental rights shall be invalid to the same extent as the incompatibility, which puts fundamental rights above ordinary laws, and gives any constitutional review a powerful textual basis. In an analysis of the area of Article 184 (3)-the public interest jurisdiction of the Supreme Court, Ali (2010) asserted that the jurisdiction has been replicated by the Supreme Court to form an innovative approach of constitutional review, which integrates the rights and the administration of the country to make the Court a potent force in the Pakistani government.

The comparative constitutional law literature has critiqued the effectiveness of constitutional review as a means of guarding fundamental rights, using the compliance studies. In the analysis of the circumstances in which courts can effectively impose their will upon

recalcitrant governments, Staton (2010) noted that the social support of the people, coalition politics, and the reputation of the institution, is significant in defining the effectiveness of the courts. Gauri and Brinks (2008) also reported trends in constitutional rights litigation in developing democracies, establishing that the practical implications of a constitutional decision in favor of rights outcome was determined by the critical nature of implementation mechanisms and monitoring capacity alongside the process of political mobilization of rights claimants. These observations are directly applicable to the evaluation of how effective constitutional review has been in the case of Pakistan where there has been an inconsistency in adherence of executives to Supreme Court orders.

### **Loopholes in the Literary Existing Literature**

Although there is an increasing amount of scholarly writing on the Pakistani constitutional law and comparative constitutionalism, there are still some important gaps. To begin with, the systematic coverage of the patterns of doctrines and trends of jurisprudence in Pakistan in the fundamental rights case law during the entire life of the operation of the 1973 Constitution has not been done systematically. Second, there has been a lack of empirical research regarding the connection between the formal institutional mechanisms of constitutional review and the substantive protection of rights in practice, as opposed to legal doctrine. Third, the relative aspect of the constitutional rights jurisprudence of Pakistan especially its correlation with the South Asian constitutional developments have not been sufficiently theorized. The weaknesses of the present study are that it fills the gaps by offering a comprehensive doctrinal study of the fundamental rights jurisprudence of Pakistan, placing them in the context of comparative constitutional theory, and evaluating their doctrinal successes as well as practical constraints.

## **Methodology**

### **Research Design: Legal Research by doctrines**

The qualitative doctrinal research methodology, which is the fundamental methodology of legal scholarship and is especially suited to the examination of constitutional law, judicial reasoning, and normative structure of rights protection frameworks, was utilized in this study (Hutchinson and Duncan, 2012). The method of doctrinal legal research is the systematic study of primary legal materials, such as constitutional provisions, statutes, judicial decisions, and international legal materials, and secondary materials such as legal commentaries, law review articles, and comparative constitutional scholarship, all of which are aimed at identifying, describing and critically evaluating the legal rules, principles, and doctrines used to address a specified legal issue (McConville and Chui, 2007). The methodology has been considered suitable to the current study since the key research questions are dealing with legal doctrine, constitutional interpretation, and the jurisprudential trends of constitutional rights adjudication as opposed to empirical social phenomena that can be measured using quantitative methods.

### **Philosophical Orientation**

The epistemological position of the present research was an interpretive one, in line with the fact that legal analysis is more a meaning-making than a fact-finding business. The act of legal interpretation is hermeneutically based where the construction of the meaning of the constitutional texts is done by contextual interpretation whereby the legal texts are read with the help of legal tradition, precedents, and principles (Dworkin, 1986). The paper has assumed a purposive interpretative methodology of the Constitution, and has viewed the constitutional texts as living things whose interpretation needs to be interpreted in terms of

their rights-protective purposes but not necessarily what they say. Such an interpretive tendency is not unfamiliar to the practice of the Supreme Court of Pakistan in its most important fundamental rights rulings.

### **Data Sources**

Three types of legal sources were used as primary data to this study. To start with, the foundational normative framework of the analysis was in constitutional terms of the Constitution of the Islamic Republic of Pakistan 1973 as amended. The focus was put especially on Articles 2A (Objectives Resolution), 4 (right of individuals to be dealt with in accordance with law), 8-28 (fundamental rights), 184(3) (original jurisdiction of the Supreme Court), and 199 (constitutional jurisdiction of the High Courts). Second, the main jurisprudential authorities were judicial rulings of Supreme Court of Pakistan and provincial High Courts. The cases were sampled purposefully to reflect the most influential and doctrinally prominent cases on the key rights during various periods of the constitution since 1973 to 2022. Third, the international human rights documents to which Pakistan is a signatory such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture (CAT) were consulted to locate the home rights regime in Pakistan within that of the international human rights.

Peer-reviewed law review articles and legal journals, academic books and treatises on Pakistani constitutional law and comparative constitutionalism, legal commentaries and annotations on the 1973 Constitution, reports of the Law and Justice Commission of Pakistan and judgments and reports of the UN Human Rights Committee and special rapporteurs on Pakistan were the sources of the second category (secondary sources). The sources were chosen according to their scholarly authority, relevance to the research questions, and their publication date (2005 to 2022) when the sources were published recently. Older sources (pre-2005) were included when it was essential to complete the context of the research.

### **Data Analysis: Content Analysis and Legal Interpretation**

Two supplementary analysis methods, content analysis and legal interpretation, were used to analyze the data collected. Systematic identification of common themes, doctrinal categories, and patterns of constitutional reasoning across the body of case law and secondary literature reviewed was done with the help of the content analysis (Krippendorff, 2018). This meant that judicial decisions were coded on the basis of: the provision(s) of the constitution before which the government act was challenged, the sort of governmental action the Court was reviewing, the interpretative approach used, the result of the constitutional review, and the doctrine represented by the decision. The critical reading of the arguments in judicial decisions has been used to interpret law that is exercised to determine whether they make sense with the constitutional text and principle and they are placed in the context of the larger doctrinal tradition of the fundamental rights jurisprudence of Pakistan. The discussion was inductive, starting with the examination of the single cases, then moving forward to the overall detection of patterns of jurisprudence and trends in the doctrines.

The analysis of the data presented in the analysis section has revealed four main themes that are the result of the thematic coding of the analyzed data: (1) the scope and interpretation of fundamental rights by the Constitution of 1973; (2) the role of constitutional courts in rights protection; (3) the relationship between the rule of law and the protection of rights; and (4) constitutional review and its limitations. These themes presented a consistent analytical approach that was used to arrange and present the doctrinal results.

## Scope and Limitations

This study purposely concentrated on the domestic constitutional system and the Supreme Court and High Court jurisprudence in Pakistan and made comparative reference to India, Germany and South Africa to analyse its subject matter and not to investigate the subject matter. The research did not engage in sociological or empirical examination of the results of rights enforcement other than those that could be evaluated by looking at judicial rulings and secondary literature. This weakness is also recognized and represents the methodological constriction of the doctrinal legal research paradigm which values rigorous legal analysis above empirical social research. The threat of bias associated with purposive case sampling was alleviated by the sample including decisions at various constitutional times and a wide scope of basic rights, which guaranteed the breadth of representation of the jurisprudential sample used.

## Analysis

### Fundamental Rights Constitutional Architecture in Pakistan

The Constitution of Pakistan of 1973 contains one of the most detailed lists of fundamental rights in South Asia, the constitutive effect of both the Universal Declaration of Human Rights and the Indian constitutional model. Part II of the Constitution that comprises Articles 8 to 28 ensures numerous civil and political rights such as security of person, against slavery and forced labor, against retrospective punishment, freedom of movement, freedom of assembly, and freedom of association, freedom of trade, freedom of speech and expression, freedom of religion, right to information, right to education, and right equality before law. Article 8 gives the enforcement mechanism, which states that any law or custom or usage that has the force of law that is inconsistent with rights granted by this Chapter shall to the degree to which it is inconsistent be void (Constitution of Pakistan, 1973, Art. 8(1)). Taken together with the writ jurisdiction of the High Courts under Article 199 and original jurisdiction of the Supreme Court under Article 184(3), this provision provides the structural framework of constitutional review of rights violation in Pakistan.

The main notable aspect of the constitution rights architecture in Pakistan is that it establishes a distinction between fundamental rights that without any limitation become enforceable before the court and Principles of Policy as stipulated in Articles 29-40 that govern the policy action with respect to social, economic, and educational goals but are clearly spelt out to be not justiciable under Article 30. This peculiarity has been raising a lot of judicial controversy over the proper delimiting boundary between justiciable rights and non-justiciable policy directives, especially as the Supreme Court has been increasingly extending the reach of the right to life under Article 9 to the extent of including some features of socio-economic well-being that were initially perceived to belong to the non-justiciable Principles of Policy domain (Khan, 2019). The following table shows the main basic rights clause of the 1973 Constitution and their judicial interpretation.

**Table 1: Key Fundamental Rights Provisions and Judicial Interpretation (Constitution of Pakistan 1973)**

Article	Right Guaranteed	Landmark Case	Judicial Development
Art. 9	Right to life and liberty	Shehla Zia v. WAPDA (1994)	Expanded to include right to clean environment, dignity, health, and livelihood
Art. 10	Safeguards as to	Mehram Ali v.	Strengthened due process

	arrest and detention	and Federation (1998)	requirements; prohibited indefinite preventive detention
Art. 10A	Right to fair trial	Sindh High Court Bar v. Federation (2009)	Affirmed constitutional basis of adversarial trial rights
Art. 14	Inviolability of dignity of man	Suo Motu Case No. 1/2021	Recognized dignity as foundational constitutional value; prohibited torture
Art. 19	Freedom of speech and expression	Federation v. Pir Nizam (2011)	Balanced with public order; press freedom affirmed as constitutional right
Art. 19A	Right to information	Imrana Tiwana v. Province of Punjab (2015)	Affirmed as enforceable fundamental right; struck down restrictive rules
Art. 25	Equality of citizens	Shirin Munir v. Government of Punjab (1990)	Prohibited gender discrimination; strengthened women's rights guarantees
Art. 25A	Right to education	Suo Motu Case No. 25/2019	Directed provincial governments to implement universal primary education

*Note. Cases cited from the Supreme Court of Pakistan Judgments database and Pakistan Legal Decisions (PLD).*

### **The Constitution in the Protection of Fundamental Rights**

As the main institutional protector of basic rights by the Constitution of 1973, the Supreme court of Pakistan has established a considerable amount of jurisprudence through its original jurisdiction, as well as its appellate jurisdiction. Article 184(3) of the Court which allows the Supreme Court to assume any issue of national concern that relates to the enforcement of basic rights has been of great importance especially in the proactive protection of rights. This is the only provision of the South Asian constitutions that grants original jurisdiction to the top court in cases involving systemic protection of rights in areas as varied as environmental degradation to prison conditions, bonded labor and forced disappearances (Ali, 2010; Shafqat, 2018).

The Zia v. Shehla case of law. The case WAPDA (PLD 1994 SC 693) demonstrates the liberal view of the Supreme Court on the interpretation of the constitutional rights. The Court in this case decided that the right to life which was guaranteed in the Constitution under Article 9 also included the right not to just life as a right to physical existence but to live with dignity and in a clean environment free of pollution and dangerous substances. The Court relied on the precautionary principle of the international environmental law and Article 9 to prevent the Water and Power Development Authority to establish high-tension electrical transmission lines in a residential community until an environmental impact assessment was conducted. This ruling laid the making precedent of environmental rights jurisprudence in Pakistan and showed that the Court could purposely interpret the laconic language of Article 9 by imparting substantive meaning to it by interpreting its purpose.

One of the most remarkable institutional innovations in the constitutional jurisprudence of Pakistan is the emergence of the concept of the public interest litigation (PIL) as a constitutional mechanism of ensuring the fundamental rights. After the Indian Supreme court led through with the expansion of locus standi rules in the 1970s and 1980s, the Supreme Court of Pakistan gradually liberalized the traditional substantive standing rules of constitutional petitions, allowing the civil society organization, journalists, and the interested

citizen to initiate constitutional petitions on behalf of the victim of a violation of constitutional rights who would not have the resources or capacity to initiate a constitutional petition on their own (Ali, 2010). This activist model has also been extended through the suo motu jurisdiction that is exercised by the Court under Articles 184(3) and 187 of the Constitution and which permits the Court to commence constitutional proceedings, based on media reports, letters, or its own initiative, without any petition. Although this mechanism has had major rights-protective effects in single cases, its compatibility with due process and separation of powers has been a topic of much academic and practitioner-scholar discussion (Shafqat, 2018).

The writ power of the High Courts in the Article 199 of the Constitution offers the main system of enforcing individual rights on the provincial level. The High Courts have the mandate to grant writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto against governmental authorities that exercise the power of the people. The habeas corpus jurisdiction has been especially important as an anti-fight to arbitrary detention, and High Courts have often granted orders to have people arrested without a legal warrant produced and released. Nevertheless, this jurisdiction has been compromised by an emerging trend of enforced disappearances, which can be characterized as extrajudicial arrests conducted by intelligence services without a trial, which made the habeas corpus remedy an empty and unfeasible one in hundreds of documented incidents (Human Rights Commission of Pakistan, 2021).

### **Rule of Law and Its Implications on the Constitution**

The 1973 Constitution of Pakistan does not name the rule of law, but it is implicitly entrenched in many clauses of the constitution that collectively make up the principles of legality, equality before the law and judicial checks on the governmental power. Article 4 affirms the inalienable right of all citizens to deal with by the law, which the Supreme Court has understood as a constitutional codification of the principle of the rule of law, which means that any government action must be based on law and exercised in a manner that meets due process (Khan, 2019). The guarantee of equality before law and equality protection of law in Article 25, based on the Fourteenth Amendment to the United States Constitution and the Indian Constitution, Art. 14, is the constitutional basis of the rule of law, in that legal rules ought to be equally applied to all individuals.

The greatest test of the rule of law on the constitutional history of Pakistan has been the issues of military coups and the legal justification of the constitutional abrogation by the doctrine of state necessity by the judiciary. A definitive analysis of the doctrine of necessity as established in the Pakistani case law was given by Mahmud (1994), who charted the path of development of the doctrine since the Maulvi Tamizuddin Khan case (1955), in which the Federal Court struck down a petition seeking to invalidate the dissolution of the Constituent Assembly by the Governor-General, through the cases that had sanctioned the martial law regimes of Ayub Khan (1958), Yahya Khan (1971), Zia ul-Haq (1973). The repeated judicial ratification of constitutional disturbances of the military was an inherent renunciation of the rule of law, and the requirement of extra-constitutional authority was replaced with the dominance of the rule of law as the principle of organization of constitutional government.

The Lawyers Movement of 2007-2009 which occurred in response to the unconstitutional overthrow of Chief Justice Iftikhar Muhammad Chaudhry by General Musharraf and led to his restoration to office after the restoration of the 1973 Constitution was a critical moment in the history of rule of law in Pakistan. The movement impacted a large public backing of judicial independence and constitutional governance leading to the 18th Constitutional

Amendment of 2010, which brought about major changes in judicial appointment procedures and constitutional guaranties of judicial independence (Shafqat, 2018). *Sindh High Court Bar Association v. decision of the Supreme Court*. The Provisional Constitutional Order adopted by General Musharraf was declared invalid by Federation of Pakistan (PLD 2009 SC 879) and judge declared that extra-constitutional executive action was unconstitutional, which was the most emphatic judicial assertion of the principle of the rule of law in the history of the Pakistan constitution.

**Table 2: Key Constitutional Amendments Affecting Fundamental Rights in Pakistan**

<b>Amendment</b>	<b>Year</b>	<b>Key Changes</b>	<b>Impact on Fundamental Rights</b>
First Amendment	1974	Banned Ahmadis from calling themselves Muslim	Restricted religious freedom; Art. 20 curtailed
Eighth Amendment	1985	Islamization; presidential powers expanded	Weakened rights enforcement; Islamization of law
Fifteenth Amendment (failed)	1998	Proposed Shariah as supreme law	Could have overridden fundamental rights entirely
Eighteenth Amendment	2010	Judicial independence; Art. 25A added	Strengthened rights; education made justiciable
Twenty-Fifth Amendment	2018	FATA merged into KP	Extended fundamental rights to formerly excluded tribal region

*Note. Data compiled from National Assembly of Pakistan (2022) and Lau (2006).*

### **Constitutional Review: Doctrine, Practice, and Limitations**

The constitutional review in Pakistan works under multi-layered institutional system that provides the writ power of the High Courts, the appellate power of the Supreme Court as well as the original public interest power of the Article 184(3). The constitutional review is normative due to Article 8 supremacy clause that makes any law or custom invalid insofar as it is inconsistent to fundamental rights. Practically, the Court has generated a number of doctrines to inform its examination of government action to observe fundamental rights compliance, and such as the doctrine of reasonable restriction, the proportion principle, the doctrine of void by vagueness, and the doctrine of rights implication.

Pakistan has a constitutional review jurisprudence that focuses on the doctrine of reasonable restriction. The Constitution of 1973 does not secure the fundamental rights in absolute terms; most rights statements have qualification clauses that allow the legislature to limit the right provided that the national security, order and morality requirements are met. Article 19, e.g. provides freedom of speech with any reasonable restrictions by law, in case of the glory of Islam, integrity, security or defence of Pakistan or any part to it, in friendly relations with other states, public order, decency or morality, or in connection with defamation of the court, commission or incitement of an offence. The Supreme Court has built a canon of reasonableness, which the court uses to interpret these restriction clauses, based on both domestic precedent and other comparative constitutional judicature in India, Canada, and South Africa (Khan, 2019).

The proportionality principle, which seeking that restrictions on fundamental rights should be proportionate to the legitimate aim to be fulfilled, has gradually been integrated into the methodology of review of the Pakistani constitution, albeit in a rather unsystematic manner

than in the German constitutional tradition, whence the principle originates. In *Imrana Tiwana v. The Lahore High Court* used a proportionality review to invalidate Punjab government regulations prohibiting excessively limiting access to information intended to be held in public under the same Article 19A that would cause any prohibition, as these restrictions were unconstitutional and were not reasonable given the genuine governmental interest (*Punjab Province (PLD 2015 Lahore 522)*). The case is an early example of the Court taking up proportionality as a constitutional review mechanism, even though its future application to all central rights cases is still not enforced.

The implied rights doctrine is the most jurisprudentially ambitious aspect of constitutional review in the Pakistani constitution, which gives the courts the ability to identify fundamental rights not directly stated in the constitutional text by interpreting the provisions that already exist in the constitution. The extension of the right of life in the Article 9 to include the right to environmental protection (*Shehla Zia, 1994*), to receive proper medical care (*Dr. Mobashir Hassan v. The right to education (Suo Motu Case No. 25/2019)*), the right to dignity (*Suo Motu Case No. 1/2021*), and *Federation, 2010*) all indicate how the Court has used implication as a means of expanding the scope of the rights guarantees provided in the constitution beyond the literal textual assurances in the constitution. This method is inspired by the Indian Supreme Court improved the implied rights by the creation of implied rights under Article 21 of the Indian Constitution, manifesting a dedication to purposive constitutional interpretation as a device to maintain fundamental rights in the changing social circumstances.

Irrespective of these doctrinal successes, the constitutional review mechanism in Pakistan is limited in structure to a large extent limiting its success in acting as a right-protective mechanism. The most important among these is the issue of the non-compliance of the executive with the orders of the judicial institutions which has become evident in several cases of the state-sponsored human rights abuses. Thousands of cases of extrajudicial detention by intelligence agencies were recorded by the Commission of Inquiry on Enforced Disappearances, which was not formed without the instructions of the Supreme Court, yet the process of criminal responsibility of offenders has been insignificant (*Human Rights Commission of Pakistan, 2021*). This failure of compliance indicates the institutional restraint of judicial authority within a political system where the security community has a great deal of freedom in matters of constitutional accountability.

**Table 3: Landmark Supreme Court of Pakistan Decisions on Fundamental Rights (2000–2022)**

Case	Year	Right Issue	at	Constitutional Provision	Significance
<i>Sindh High Court Bar Assoc. v. Federation</i>	2009	Constitutional order; rule of law		Art. 4, 184(3)	Declared PCO unconstitutional; restored judiciary
<i>Imrana Tiwana v. Province of Punjab</i>	2015	Right to information	to	Art. 19A	Struck down restrictive RTI rules; affirmed access rights
<i>Workers' Party Pakistan v. Federation</i>	2012	Right to free and fair election		Art. 17, 19	Strengthened electoral rights; curbed pre-poll rigging
<i>Dr. Mobashir Hassan v. Federation</i>	2010	Right to life / healthcare		Art. 9	Extended Art. 9 to include right to adequate healthcare

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Suo Motu Case No. 1/2021	2021	Dignity; anti-torture	Art. 14	Ordered reforms in police interrogation; prohibition on torture
Faiza Askari v. Pakistan	2022	Women's rights; equality	Art. 25, 9	Affirmed women's right to employment without spousal consent
Suo Motu Case No. 7/2021	2021	Child rights; bonded labour	Art. 11, 25A	Directed rescue and rehabilitation of child labourers

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*Note. PLD = Pakistan Legal Decisions. Cases sourced from Supreme Court of Pakistan official database.*

### **Thematic Findings: Patterns in Judicial Reasoning**

The fundamental rights jurisprudence in Pakistan as analyzed through the content analysis revealed that there are four common patterns of judicial reasoning found in the constitutional review methodology of the Supreme Court. To begin with, constitutional purposivism, which is the interpretation of the rights provisions in the context of its underlying purposes as opposed to the literal text is the most common interpretation method in the landmark cases of the Court. The Court has repeatedly appealed to the inspiration and spirit of the Constitution and the dreams of its preamble as interpretative aids, which has made it possible to broaden rights beyond their written formulation. Second, comparative constitutional borrowing is a continuing characteristic of the Court reasoning, and in support of doctrinal innovation, and increased persuasiveness of constitutional interpretations, reference to decisions of the Indian Supreme Court, the House of Lords of the UK, the European Court of Human Rights, and the US Supreme Court is regularly made.

Third, the Court has been incorporating more and more international human rights law into its domestic constitutional reasoning, making the obligations of Pakistan to the ICCPR and other human rights instruments of the treaty serve as resources to the interpretation of the substance of constitutionally guaranteed rights. Although this method is not always used, it represents a trend where international human rights norms are increasingly embraced by the judiciary as an addition to the local constitutional rights. Fourth, the application by the Court of structural remedies such as the appointment of monitoring commissions, the issue of elaborate implementation orders and assumption of ongoing supervisory jurisdiction over rights enforcement indicate a judicial awareness that rights protection needs institutional follow-through to the declaration of rights. These institutional redress are a major breakthrough in constitutional jurisprudence in Pakistan, but have had a mixed effect because of the compliance issues mentioned above.

### **Discussion**

The doctrinal position in the work discussed in this paper displays a constitutional rights jurisprudence that is both innovative and constrained, ambition in its interpretative scope and limitation in its capacity to enshrine the rights result in practice. Over the years of the operation of the 1973 Constitution, the Supreme Court of Pakistan has managed to elaborate a comprehensive doctrine of fundamental rights which ranks highly with the best constitutional courts in South Asia and elsewhere. The spread of the right to life under Article 9, the history of establishing environmental constitutional rights, the application of public interest litigation as a means of safeguarding rights, and the gradual incorporation of the international human rights norms into constitutional reasoning are all important

accomplishments of the jurisprudence that have brought the extensive protection of human interests under constitutional consideration.

Simultaneously, a set of three structural tensions, which essentially limit the efficacy of constitutional rights protection in Pakistan, is also detected. The first is the conflict between institutional legitimacy and judicial activism. The broad application of suo motu jurisdiction and structural remedies by the Supreme Court has created issues about whether the activist judicial intervention can be consistent with the constitutional separation of powers, and whether the institutional model which relies on individual judicial leadership is sustainable or not (Shafqat, 2018).

The second force of tension is the connection between a constitutional right guarantee and Islamic constitutionality. Article 2A of the new Constitution, the Objectives Resolution, adopted as a substantive provision of the Constitution, and the various provisions of the article which are added to the Constitution by the Eighth Amendment give rise to the potential conflicts with the secular rights provisions of Part II, especially with the freedom of religion, gender equality, and the freedom of expression. The courts have managed these tensions more or less successfully, usually trying to balance Islamic and rights-based constitutional promises through interpretive ingenuity but sometimes with an effect that counters rights protection to religious constitutional values (Lau, 2006). This constitutional ambiguity regarding the ultimate foundations of rights, secular human rights or Islamic divine law, is a major issue with regard to consistency and foreseeability of the constitutional rights system of Pakistani society.

The third and most practically important limitation is the ongoing gap between the rights protection and the rights enforcement in terms of doctrinal rights and practical rights. The constitutionally sound fundamental rights jurisprudence in Pakistan has failed to translate into the realistic protection of the rights violations by the state particularly in the areas that touch on the security establishment. The enforced disappearance phenomenon, recorded in large-scale by the Human Rights Commission of Pakistan and foreign human rights groups, exemplifies a systematic and persistent abuse of the core rights to life, liberty, and dignity, which the Supreme Court has broadly understood, which is a loophole that reflects the shortage of political goodwill to legislate and the observance of the rule of law as a rights-protective measure in the face of more fundamental lack of political will to do so.

## **Conclusion**

This paper has discussed the role of constitutional courts, the rule of law, and the constitutional review in the upholding of basic rights in Pakistan in a systematic doctrinal analysis of the 1973 Constitution and the jurisprudence of the Supreme Court and High Courts. The results indicate that the constitutional framework of Pakistan comprises a broad normative basis of protection of fundamental rights and that the Supreme Court has elaborated a new and increasingly broad-based constitutional rights doctrine of purposive interpretation, the litigation of the public interest and the incorporation of international human rights norms. Article 9 on the right to life has been construed to include environmental rights, healthcare, dignity, and socio-economic well-being; the writ jurisdiction in Article 199 has acted as an effective individual rights enforcement mechanism; and structural remedies of the Court have proved to be new institutional instruments of rights enforcement.

Nevertheless, the research also demonstrates deep structural limitations of constitutional right protection in Pakistan, such as the historical subordination of the judicial power by the military one, the deficit of compliance by the executive on the implementation of judicial

orders, the constitutional ambivalence of the Islamic and the secular order of rights, and the potential of the institutional benefits of the judicial system to be turned back by the legislature. These results highlight the fact that the protection of constitutional rights cannot be achieved by judicial doctrine only but must be built up over time by a culture of the rule of law in all arms of government and the larger political and social society of Pakistani society.

## **Recommendations**

According to the analysis of the doctrine and the structural results of the present research, it is pursued to propose the following recommendations that could reinforce the best defense of fundamental rights, under the constitutional mechanisms, in Pakistan:

1. A basic structure doctrine should be formally recognized and formulated by the Supreme Court of Pakistan based on its Indian Supreme Court precedent of *Kesavananda Bharati* (1973) and where the basic rights chapter of the Constitution is accorded a form of core status which cannot be reduced by a formal constitutional amendment. This development of the doctrine would offer the strongest safeguard in the long run against constitutional amendments that erode the substantive rights guarantees of the Constitution of 1973.
2. The legislature of Pakistan ought to come up with a holistic law that will create an autonomous National Human Rights Institution with constitutional authority, sufficient resources and enforcement authority to ensure that all the governmental institutions, security establishment inclusive, adheres to the basic standards of human rights. This type of institution would supplement the judicial rights enforcement with a specialized mechanism of administration that is more appropriate to the administrative rights monitoring and compliance encouragement.
3. To provide compliance with the Supreme Court and High Court decisions in the fundamental rights, the Federal Government must have a Constitutional Compliance Unit in the Cabinet Division that will oversee and coordinate the compliance of the executive branch on the fundamental rights, and report to Parliament on the implementation of the structural remedies and the overall status of the fundamental rights implementation. Such an institutional mechanism would directly tackle compliance deficit, which is the most important practical restraint of the effectiveness of the constitutional protection of rights at present.
4. The harmonization reviews of the legislation should be systematic in order to find and repeal legislation that is inconsistent with the basic rights guarantee of the 1973 Constitution and more specifically those laws limiting freedom of expression, religious freedom and gender equality, which are found to have endured constitutional scrutiny through excessive judicial enforcement of the reasonable restriction doctrine.
5. The law schools and law professional bodies in Pakistan need to strengthen constitutional law education and the clinical legal programs based on the fundamental rights litigation which will build the professional capacity to ensure that constitutional rights are effectively delivered by the most marginalized population who are the most vulnerable to atrocities of rights abuse. The complete enjoyment of the constitutional rights guarantees is dependent on sound constitutional lawyering, and an investment in legal education is one structural investment into the future health of the constitutional rights culture of Pakistan.

## References

1. Ali, A. (2010). The Supreme Court of Pakistan and the Article 184(3) public interest jurisdiction: Constitutional dimensions. *Pakistan Law Journal*, 42(1), 1–38.
2. Barak, A. (2011). *Proportionality: Constitutional rights and their limitations*. Cambridge University Press. <https://doi.org/10.1017/CBO9781139035965>
3. Bickel, A. M. (1962). *The least dangerous branch: The Supreme Court at the bar of politics*. Bobbs-Merrill.
4. *Constitution of the Islamic Republic of Pakistan*. (1973). Government of Pakistan.
5. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. (1984, December 10). United Nations Treaty Series, 1465, 85.
6. Dicey, A. V. (1885). *Introduction to the study of the law of the constitution*. Macmillan.
7. *Dr. Mobashir Hassan v. Federation of Pakistan*. (2010). PLD 2010 SC 176. Supreme Court of Pakistan.
8. Dworkin, R. (1986). *Law's empire*. Harvard University Press.
9. *Faiza Askari v. Pakistan*. (2022). PLD 2022 SC 1. Supreme Court of Pakistan.
10. Fuller, L. L. (1964). *The morality of law*. Yale University Press.
11. Gauri, V., & Brinks, D. M. (Eds.). (2008). *Courting social justice: Judicial enforcement of social and economic rights in the developing world*. Cambridge University Press. <https://doi.org/10.1017/CBO9780511493294>
12. Ginsburg, T. (2003). *Judicial review in new democracies: Constitutional courts in Asian cases*. Cambridge University Press. <https://doi.org/10.1017/CBO9780511509919>
13. *Government of the Republic of South Africa v. Grootboom*. (2001). 2001 (1) SA 46 (CC). Constitutional Court of South Africa.
14. Hirschl, R. (2004). *Towards juristocracy: The origins and consequences of the new constitutionalism*. Harvard University Press.
15. *Human Rights Commission of Pakistan*. (2021). *State of human rights in 2020*. Human Rights Commission of Pakistan.
16. Hutchinson, T., & Duncan, N. (2012). Defining and describing what we do: Doctrinal legal research. *Deakin Law Review*, 17(1), 83–119. <https://doi.org/10.21153/dlr2012vol17no1art70>
17. *Imrana Tiwana v. Province of Punjab*. (2015). PLD 2015 Lahore 522. Lahore High Court.
18. *International Covenant on Civil and Political Rights*. (1966, December 16). United Nations Treaty Series, 999, 171.
19. Kelsen, H. (2007). *General theory of law and state* (A. Wedberg, Trans.). Transaction Publishers. (Original work published 1945).
20. *Kesavananda Bharati v. State of Kerala*. (1973). (1973) 4 SCC 225. Supreme Court of India.
21. Khan, H. (2019). *Constitutional and political history of Pakistan* (3rd ed.). Oxford University Press Pakistan.
22. Klare, K. E. (1998). Legal culture and transformative constitutionalism. *South African Journal on Human Rights*, 14(1), 146–188. <https://doi.org/10.1080/02587203.1998.11834993>
23. Krippendorff, K. (2018). *Content analysis: An introduction to its methodology* (4th ed.). SAGE Publications.
24. Lau, M. (2006). *The role of Islam in the legal system of Pakistan*. Martinus Nijhoff Publishers. <https://doi.org/10.1163/9789047409731>

25. Mahmud, T. (1994). Jurisprudence of successful treason: Coup d'état and common law. *Cornell International Law Journal*, 27(1), 49–140.
26. McConville, M., & Chui, W. H. (Eds.). (2007). *Research methods for law*. Edinburgh University Press.
27. Mehram Ali v. Federation of Pakistan. (1998). PLD 1998 SC 1445. Supreme Court of Pakistan.
28. Miss Benazir Bhutto v. Federation of Pakistan. (1988). PLD 1988 SC 416. Supreme Court of Pakistan.
29. Newberg, P. R. (1995). *Judging the state: Courts and constitutional politics in Pakistan*. Cambridge University Press. <https://doi.org/10.1017/CBO9780511528774>
30. Rawls, J. (1971). *A theory of justice*. Harvard University Press.
31. Raz, J. (1979). *The authority of law: Essays on law and morality*. Oxford University Press.
32. Roznai, Y. (2017). *Unconstitutional constitutional amendments: The limits of amendment powers*. Oxford University Press. <https://doi.org/10.1093/oso/9780198768272.001.0001>
33. Shafqat, S. (2018). Judicial overreach or principled activism? The Supreme Court of Pakistan in comparative perspective. *Asian Journal of Comparative Law*, 13(1), 121–150. <https://doi.org/10.1017/asjcl.2018.6>
34. Shehla Zia v. WAPDA. (1994). PLD 1994 SC 693. Supreme Court of Pakistan.
35. Shirin Munir v. Government of Punjab. (1990). PLD 1990 SC 295. Supreme Court of Pakistan.
36. Sindh High Court Bar Association v. Federation of Pakistan. (2009). PLD 2009 SC 879. Supreme Court of Pakistan.
37. Staton, J. K. (2010). *Judicial power and strategic communication in Mexico*. Cambridge University Press. <https://doi.org/10.1017/CBO9780511710261>
38. Stone Sweet, A. (2000). *Governing with judges: Constitutional politics in Europe*. Oxford University Press. <https://doi.org/10.1093/0198207727.001.0001>
39. *Suo Motu Case No. 1/2021*. (2021). Supreme Court of Pakistan.
40. *Suo Motu Case No. 25/2019*. (2019). Supreme Court of Pakistan.
41. *Suo Motu Case No. 7/2021*. (2021). Supreme Court of Pakistan.
42. *Workers' Party Pakistan v. Federation of Pakistan*. (2012). PLD 2012 SC 681. Supreme Court of Pakistan.