PAPER ON "JUDICIAL REVIEW OF ADMINISTRATIVE ACTION"
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In the debates for the ratification of the American constitution, James Madison, known as the father of the American Constitution, identified the dilemma of constitutionalism: how to empower the government sufficiently for its tasks and at the same time, how to limit it from overreaching the individual. He described this most elegantly in Federal Paper No. 51. After observing that the partition of power among the several departments of the government "was necessary as a means of keeping each other in proper places," Madison observed:

> "It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal control on government would be necessary. In framing a government which is to be administered by mean over men, the greatest difficulty lies in this: you must first enable the government to control the governed and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government, but experience has taught mankind the necessity of auxiliary precautions."

The solution to the difficulty lying in a government administered, not by angels, but by men over men, was found in the creation of a limited government and in giving Judicial Review power to the courts. As Alexander Hamiltion, another American founding father said in Federalist paper No. 78:

> "The complete independence of the courts of justice is peculiarly necessary in a limited constitution. By a limited constitution, I understand one which contains specified exceptions to the legislative authority, such, for instance, as that it shall pass no bills of attainder, no ex post facto laws and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

In the landmark case of Marbury vs. Madison[1], to which I shall return, the great Chief Justice John Marshall first asserted the power of Judicial Review, and thereby as Earl Warren Chief Justice has put it, "rooted this fundamental principle in American constitutional law as our original contribution to the science of law". Perhaps the greatest contribution CJ John Marshall made, to quote, Earl Warren Chief Justice again, "to our system of jurisprudence was the establishment of an independent judiciary through the principle of Judicial Review". There is, I venture to think, another achievement of Judicial Review, The story is told that at the end of the Convention an onlooker asked 81-year old patriarch Benjamin Franklin, "What have you given us?" "A republic", he replied with a timeless challenge, "if you can keep it, "Judicial Review has helped the Americans keep the republic."

Ever since Marbury vs. Madison, this principle of Judicial Review has become “part and parcel” of all constitutional systems, having written constitutions, including those on the Westminster model, such as Pakistan, Australia, Jamaica and Srilanka.

Judicial Review in the United States in derived directly from Judicial Review in Britain; to put it differently, it is an adaptation of the British law. As Lord Bryee [2] suggests, it is English doctrine of ultra vires……. That inspired those who invented the American doctrine of Judicial Review of legislative acts.

Judicial Review means one thing in one system of government and an altogether different thing in another. Judicial Review must therefore be understood in a particular constitutional context. For example, before the Human Rights Act, 1998, Judicial Review in Britain was considered to be the essential core of administrative law, its purpose being to ‘enforce the legal limits of public and in particular executive power’, and it was thought impious to suggest that an act of parliament could be questioned by the courts. Thus the Judicial Review power of the English courts was limited to administrative actions only; the reason was that under the British constitution, “an act of sovereign legislature cannot be invalid in the eyes of the courts”.[3]

Under a written constitution, as in the United States of America, Pakistan and India, the written constitution is at once the source and the touchstone of all governmental powers-legislative, executive, judicial; it is a magnet from where every part of the business of the government must take its direction, and as with all constitutions, it must be preserved inviolate.

I have been referring to the American and the English law, and it is time that I explain the reason. It is that the constitution of Pakistan is modeled partly upon the American constitution and partly on the British constitution. For example Pakistan has adopted many of the principles of the English parliamentary system, including the English principle of ministerial responsibility to parliament; it has not accepted the English doctrine of absolute supremacy of the parliament in the matters of legislation. In the latter respect it has followed the American constitution and other systems modeled on it. In that respect, our system is not that of parliamentary supremacy but that of constitutional supremacy. In other words, our constitution is one of limited government.

Judicial Review has been described as judicial power in action; it has also been described as the practical aspect of the rule of law.

Judicial power is the power of courts to administer justice in accordance with the law. Justice means many things; it is a single spectrum comprised to many colors, but its best definition, for our purposes is that provided by the Greek philosophers, including Plato and

Aristotle. They thought-originally on grounds derived from religion-that each thing or person has its proper sphere to overstep which is unjust.

This is precisely what the power of Judicial Review is. The court's function, in exercising that power, is to ensure that the public authorities do not act unjustly by overstepping their proper sphere.

Before the constitution of Pakistan, 1962, the High Courts exercised what was popularly known as writ jurisdiction, conferred on them first in 1954 by section 223A of the Government of India act, 1935 and then by Article 170 of the constitution of Pakistan, 1956, to issue the English writs of mandamus, prohibition, certiorari and quo warranto. This was legislation by reference and the defect in this method of legislation was that the scope of those writs had to be gathered from the textbooks on the subject and from decided cases in England and other countries. Then, the legal profession was not familiar with the Latin names, and as Senator S. M Zafar, a great advocate and lawyer, was telling us at the launching of my book "Judicial Review of Public Actions", a lawyer was heard pronouncing certiorari as shora shori.

The constitution of Pakistan, of 1962, introduced the Presidential system of government in Pakistan. But what it deserves to be remembered for is that it codified the law of Judicial Review in its Article 98, Not only did it rid the law of the Latin names, what is more important, it produced order and consistency by sifting substance form that "thicket of technicality and inconsistency" which the writ jurisdiction in England was, and by reducing it to "self-contained propositions", a rare combination of the skills of a legal draftsman and intellectual power of a great lawyer. This, I am proud to claim, is our original contribution to this branch of the law.

Article 199 of our present constitution is the successor provision of Article 98 of the 1962 constitution without any material change in substance or language.

The revolutionary change introduced by Article 199, thus is that Judicial Review is no more an inherent or common law jurisdiction-it is no more issued by the royal authority of the king. It is time therefore that we stop using the description "writ jurisdiction", that description sends a wrong message.

Almost all Judicial Review questions, even when the constitutional validity of a legislative enactment is challenged, arise out of administrative actions. This position is clearly reflected in the language employed I n Article 199 to confer the power of Judicial Review. The power is to direct a person performing functions in connection with the affairs of the Federation, a Province etc. to do something he is required by law to do, or not to do a thing he is prohibited by law to do or to declare an act of such a person to be without lawful authority and of no legal effect. It is also a power to be satisfied that a person in custody is not being held without lawful authority and in

an unlawful manner, and to require a person holding a public office to show under what authority he claims to hold it.

All executive and administrative authorities derive their powers from the constitution or law made under the constitution conferred upon them expressly or by necessary implication. Thus when an administrative authority takes an action under a law, the question can be whether he has exceeded or abused the power conferred by the law and has therefore acted ultra vires; the question can also be whether the law giving him the power to act is constitutionally valid. For, it is a basic rule of constitutional law that a constitutionally invalid or ultra vires law, be it result of primary or subordinate legislation, is incapable of conferring any jurisdiction or power. [4]

Of the illustrating examples of the statement that almost all Judicial Review questions arise out of administrative actions the greatest is Marbury vs. Madison. That cases arose out of the appointment of, what are called "Midnight Judges", appointed in the last days of the Federalist Adam's administration. Several commissions of appointment had been signed and sealed but remained undelivered when President Adam's term ended. The new President Thomas Jefferson refused to issue them and an action was brought for a direction to issue them. Though the petitioner was held entitled to the direction, but the Supreme Court held that the law which conferred the power upon the Supreme Court to issue the writ was unconstitutional.

Almost the same happened in the much debated case of Maulvi Tameez-ud-Din Khan case. Maulvi Sahib was the president of the constituent assembly, which was dissolved by an order of the Governor General. The action was challenged, the challenge was upheld by the Sindh Chief Court, but the Federal Court held that the act which conferred the power to issue the writ was constitutionally invalid.

And in a simple detention case, the question can turn on whether the law under which the detention was ordered was constitutionally invalid. Begum Shorish Kashmiri case [5] and the very recent English case of A vs. Secretary of State [6] are the outstanding examples.

It is important to bear in mind that subordinate legislation-the making of rules, regulations etc. in exercise of the power given by primary legislation-is a form of administrative action. It is so treated in America, in Britain and in Pakistan, and validity of subordinate legislation is therefore subject to the normal law governing Judicial Review of administrative actions.

There is a distinction between the political executive that is ministers of the cabinet and the administrative executive, or what is known as the bureaucracy. Ministers are political animals; civil servants are not. Ministers come and go; departments of which they are political heads and the civil servants remain: Discretion in making administrative decisions in conferred upon a minister not as an individual but as the holder of the office in which he has available to him in arriving at his decisions the collective knowledge, experience and expertise of all those who serve in the department of which he is for the time being the political head. Therefore to treat the

minister in his decision-making capacity as someone separate and distinct from the department is to ignore the practical realities.

However that may be, Article 199 makes no such distinction. Any state functionary, any person who is performing a governmental functions, be he the President, the Prime Minister or a minister, or a civil servant is amenable to the High Court's jurisdiction under Article 199. Dissolution of assembly cases namely Haji Muhammad Saifullah case, Ahmad Tariq Rahim cases, Mian Nawaz Sharif case and Benazir Bhutto case illustrate this point.

The expressions "without lawful authority" and "of no legal effect" are expressions of art; the constitutional basis of the court's power to quash is that the impugned action "is unlawful on the ground that it is ultra vires". Thus, in the filed of Judicial Review, the word "lawful" has acquired a technical meaning; when it is said that a person has acted unlawfully, it means that he has acted outside the powers conferred on him by law; and when the question is of the validity of an administrative action, the only question the court asks is: Has the decision maker exceeded his statutory powers, thus acting ultra vires and therefore unlawfully.

Also Article 199 has effectively scotched the distinction between 'judicial', 'quasi-judicial' and 'administrative' for the purposes of the High Court's Judicial Review power. The court is not to enter into that esoteric distinction; all that it is concerned with is the lawfulness of the impugned action.

Furthermore, it is a fallacy to think that the Judicial Review is in the nature of an appeal against the decision of the executive authority; the court does not sit in appeal over the executive action or substitute its own discretion for that of the executive authority. To quote from Abdul Ala Maudoodi case[7],the function of judicial review is to check against the excess of power in the derogation of private right; yet Judicial Review cannot supervise all administrative adjudications, for it exists to check, not to supplant them. According by, if on a point of law, the administration has adopted a construction, which is a possible one, the court will support the action.

Coming to Judicial Review of administrative discretion, the starting point must be the definition of "discretion" but that is not an easy task. Attempt at its definition had led to such rhetorical observations, as that "discretion" is a softer word for 'arbitrary' and that 'where law ends, tyranny begins'. As has been rightly said[8], to so define discretion is to define it out of existence. Suffice is to say, with Lord Diplock[9] that the very concept of administrative discretion-

> "involves the right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred."

In a country governed by the rule of law and not by men, there is no such thing as absolute or unfettered discretion, not subject to review by the courts. For the right to choose must be between courses of action that are lawful, and lawfulness is for the courts.

Article 4 of the constitution of Pakistan encapsulates the essence of the rule of law: To enjoy the protection of law and to be treated in accordance with law is the inalienable right of very citizen and of every other person for the time being in Pakistan." The basic principle, according to Lord Bridge is to be found "no where more clearly expressed and explained than by Professor Sir William Wade QC in his "Administrative Law" [10] according to him, unfettered or absolute discretion is a "beguiling heresy" and those who argue that some enactment confers unfettered discretion are "guilty of constitutional blasphemy. Unfettered discretion cannot exist where the rule of law reigns".

Thus, the days when it used to be said that a person seeking a privilege, such as a license, is not entitled to be heard are long gone and however widely- worded the discretion-conferring provisions maybe, there is a duty to give a reasoned decision. [11]

The well-established law therefore is that there is no such thing as absolute discretion, and the discretion must be used to promote the policy and the objects of the discretion-conferring enactment. This is known in England as Padfield doctrine after the case of Padfield vs. Ministry of Agriculture [12]. Montgomery Four and General Mills case [13] which I regard as the locus classicus on the subject, the director food stopped the sugar quota of the petitioner on the ground that it had failed to pay a disputed debt owed by the petitioner as the owner of another concern. It was held:

> "If the order granting or rejecting the quota of sugar be based on the ground that is beyond the scope of the ……Act, the order is an abuse of power…… The director of food might as well refuse quota for the purpose of putting pressure on a person to give up a particular political party, to give evidence for the prosecution in a police challan, or to give information to Customs Department.
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> It should be remembered that no discretion vested in an executive officer is an absolute and arbitrary discretion. The discretion is vested in him for public purpose and must be exercised for the attainment of that purpose……."

Judicial Review of discretionary executive powers reached a high water-mark in dissolution of assemblies cases under Article 58 (2) (b) of the constitution. In the first case under that article, namely Khawaja Muhammad Sharif vs. Federation [14], Lahore

High Court declared the President's order dissolving the national assembly to be unconstitutional and void, and the decision was upheld by the Supreme Court[15].

> "The President cannot exercise his powers…….. on wish or whim. He has to have facts, circumstances which can lead a person of his status to form an intelligent opinion requiring exercise of discretion of such a grave nature……. His action must appear to be called for an justifiable under the constitution if challenged in a court of law."

In the leading judgment in the Supreme Court Nasim Hasan Shah J said that the discretion conferred by Article 58 (2) (b)-

> "Cannot…….. be regarded as an absolute one, but is deemed to be a qualified one in the sense that it is circumscribed by the object of the law that confers it…….. Thus if it can be shown that not grounds existed on the basis of which an honest opinion could be formed the exercise of power would be unconstitutional and open to correction through Judicial Review……."

There is then the well-recognized principle of, 'fairness', it has received recognition in the European Convention of 1950, which says:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".and section 24 A of the General Clauses Act, 1897, which embodies

1. the principles or natural justice, that is to say-
   a) Right of hearing;
   b) Absence of bias;
2. advancement of the purposes of the enactment to control discretionary powers;
3. Duty to give reasons; and
4. Duty to communicate the decision to the affected party,

Natural Justice, it has been said, is fair play in action. The rule against bias, which means that there is an overriding public interest that nobody may be a judge in his own cause, and the right to be heard are the twin pillars supporting Natural Justice; they are firmly established grounds for Judicial Review.

Some of the leading cases on right of hearing are Ridge vs. Baldwin [16] Anisminic [17] from English jurisdiction and Zakir Ahmad case [18], Collecter vs. Muhammad Akhtar [19] and Dina Sohrab case [20] from Pakistan, and some of the leading cases on the rule against bias are Sussex Justices cases [21], R vs. Gough [22] and Pinochet Ugarte's case [22a] from English jurisdiction and M.H. Khandkar vs. State [23], Asad Ali vs. Federation [24] from Pakistan.

Legitimate expectation and promissory estoppels as grounds for Judicial Review fall under the general head 'fairness'.

In public law 'unreasonableness' as descriptive of the way in which a public authority has purported to exercise discretion has become a term of art. To come within this expression it must be a conduct which no sensible authority acting with due appreciation of its responsibilities should have decided to adopt. The classical statement of what is reasonableness and the grounds on which courts intervene to quash administrative decisions is that of Lord Greene MR in Wednesbury Corporation case [25]. This has been applied in Dada Mir Haider case [26] and Gadoon Textile Mills case [27].

The doctrine of proportionality or more accurately disproportionality is regarded as one indication of manifest unreasonableness; it is, what Lord Ackner said to be a picturesque way of describing the Wednesbury irrationality test, using a sledgehammer to crack a nut. It is well-established in European Law [28], has been adopted in England [29] and in India [30].

Mala fides is yet another ground for Judicial Review of administrative actions. A mala fide act is by its very nature an act without jurisdiction. [31]

The point of principle in national security cases is as to the duty of the court when in proceedings properly brought before it a question arises as to what is required in the interest of national security. The law appears to be well settled that issues of national security do not fall beyond the competence of the courts. It is self-evidently right that the courts must give due weight and defer to the views of the executive on matters of national security but even in matters of national security the court will not act on a mere assertion dixit- of the executive. Evidence will be required that the decision under challenge was in fact founded on relevant grounds. [32] The English case of A vs. Security of State [33] ,Zamora [34], described as "one of the more courageous judicial decisions' even in the long history of England, and Farooq Ahmad Khan Laghari case [35] are striking examples illustrating the interference of courts in appropriate cases.

Brind vs. Secretary of State [36] and the Secretary of State vs. Rehman [37] are illustrations of national security in the context of international terrorism, and so is the American case of Hamdi [38]. As was said in the Rehman case "In the contemporary world conditions, action against a foreign state (the reference was to the 9/11 events in America) may be capable of indirectly

affecting the security of United Kingdom". The 9/11 events in America, said Lord Hoffmann, "are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of the ministers……"But as is demonstrated by the recent case of A vs. Secretary of State [39] , even in the context of terrorism, the court has an important role to play, namely it has responsibility to ensure that the rule of law is respected. The House of Lords ruled that the power to detain suspected international terrorists for an indefinite period without charge or trial was unlawful being inter alia, disproportionate interference with the right to liberty.

It is natural, nay inevitable, that tensions and frictions will arise from the exercise of the power of Judicial Review. For one, it is in the nature of those exercising political authority to be over weaning in its exercise and secondly, judges are the bulwarks of liberty and it is the requirement of their judicial function that they treat the executive on the same footing as any other litigant.[40]

Despite Marbury vs. Madison, significant pockets of opposition to Judicial Review persisted even two decades thereafter. This is illustreated by an episode from Kentucky (now known the world over for its Kentucky Fried Chicken). The Kentucky State Supreme Court struck down a popular debtor relief statute. The state legislature reacted by dissolving the court and replacing it by another institution with tightly limited review authority, on the theory that authority to interpret the constitution was "never with the judges" and "always with the people", or their legislative agents. This became an election issue, which was eventually resolved when the public voted to re-establish Judicial Review.

President Roosvelt, after his landslide victory in 1936 elections, attacked the Supreme Court not directly but disingenuously; he proposed a law that when any judge of the Supreme Court of American reached the age of 70 and did not resign or retire, the president could, with Senate confirmation, appoint one additional judge to the court. He supported the measure saying that the court had been assuming the power to pass on the wisdom of acts of congress and that it was necessary "take action to save the constitution from the court and the court from itself". The Senate Judicial Committee disapproved the bill "as a needless, futile and utterly dangerous abandonment of the constitutional principle…….It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America".

In Pakistan, in the year 1997, the tension rose so high that a Bench of the Supreme Court suspended the operation of a constitutional amendment; in another matter a Bench directed the President not to give assent to a bill duly passed by the national assembly and the Senate, leading to speeches in and out of the national assembly regarding the judges. This give rise to contempt proceedings against the Prime Minister and others. This culminated in the national

humiliation of having the Supreme Court physically attacked when the contempt proceeding were in progress.

In a recent article by Lord Woolf [41], a great authority on Judicial Review, the question has been posed "shall that be a matter of concern? The answer is 'no' Says Lord Woolf:

> "The tension created by Judicial Review is acceptable because it demonstrates that the courts are performing their role of ensuring that the actions of the government (executive) of the day are being taken in accordance with the law. The tension is a necessary consequence of maintaining the balance of power between the legislature, the executive and the Judiciary upon which our constitution depends……."

There is then the question-is judicial review undemocratic? As a modern American author has put it "How can we square Judicial Review and democracy? How can an unelected life-tenured Supreme Court profess to know what is better for the country than the people's elected representatives in congress or the state legislatures? "There has been a lively debate on his issue in America, but that is partly due to the reason that there is no express provision in the US constitution conferring the power of Judicial Review upon the Supreme Court. I shall not enter into that debate and would be content to refer to a recent English case [42], where the question was as to the compatibility of a 2001 Act with articles 5 and 14 of the European Convention and the lawfulness of the action taken thereunder. In his submissions, the Attorney General drew distinction between democratic institutions, namely the legislature and the Executive, which are the elected political branches of the government and the courts. Lord Bingham referred to the Human Rights Act, 1998, which empowers the court to render unlawful any act of any public authority incompatible with a Convention right and observed:

> "The Attorney General is fully entitled to insist on the powers limits of judicial authority, but he is wrong to stigmatize judicial decision making as in some way undemocratic."

This is precisely the position of the court in Pakistan. They are the judicial organ of the state. The system of the government under the constitution of Pakistan is democracy and the courts are an integral part of that democratic system. The constitution a itself, by its Articles 184 (3) and 199 in express terms, confer on the Supreme Court and the High Courts the power of Judicial Review. The courts, in the exercise of that power, are not concerned with the general question of the goodness or badness of the impugned public action. Their sole concern is the constitutionality and the lawfulness of the public action. That is the power given by the constitution made by the people of Pakistan through their duly elected representatives and is therefore a democratic power.

I must conclude. In the hands of a competent storyteller, the story of Judicial Review would have grown taller in the telling instead of growing longer as it has in my hands. Still I am tempted to pose the question, as Mark Tushnet has in his recent important book on popular constitutional interpretation.

"What would a world without Judicial Review look like".

I thank you.

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[1] (1803) 5 US (1 CRANCH) 137
[2] See "American Commonwealth" by James Bryee
[3] Yardley's Source Book of English Law p.2 quoted in State vs. Zia –ur-Rehman-PLD 1973 SC 49,66
[4] Marbury vs. Madison 5 US (1 Cranch) 137; Yarbrongh case-110 US 651, Maulvi Tameez-ud-Din case-PLD 1955 FC B240 etc.
[5] PLD 1969 SC 14
[6] (2005) 2WLR 87
[7] PLD 1964 SC 673,709
[8] Sree Nathan Isaac's "The Limits of Judicial Discretion" in (1922-23) 32 Yale Law Journal 339
[9] See Secretary of State vs. Tameside- (1976) 3 All ER 665,695
[10] 5th ed. 1982, pp. 355-6 also cited by Saleem Akhtar J in Gadoon Textile Mills vs. Wapda-1997 SCMR 641, 802-3
[11] (1997) 1 All ER 228, 240
[12] (1968) 1 All ER 694
[13] PLD 1957 (WP) Lah. 914
[14] PLD 1988 Lah. 725
[15] Federation vs. Muhammad Saifullah-PLD 1989 SC 166
[16] (1963) 2 All ER 66, 71
[17] (1969) 1 All ER 208,213
[18] PLD 1965 SC 90
[19] 1971 SCMR 681
[20] PLD 1959 SC (Pak) 45
[21] (1923) All ER 233
[22] (1993) 2 All ER 740
[22a] (1999) 1 All ER 577
[23] PLD 1966 sc 140
[24] PLD 1998 SC 161
[25] (1947) 2 All ER 680
[26] PLD 1987 SC 504
[27] 1997 SCMR 641, 802
[28] R V Intervention Board- (1986) 2 All ER 115
[29] R (Mahmood) vs. Secretary of State (2001) 1 WLR 840
[30] Ranjit Thakur case (AIR 1987 SC 2356)
[31] Abdul Rauf vs. Abdul Hamid-PLD 1965 SC 671
[32] Sec eg. CCUS case- (1984) 3 All Er 935; Mir Abdul Baqi Baloch case-PLD 1968 SC 31[3]
[33] (2005) 2 WLR 87
[34] (1916) 2 AC 77
[35] PLD 1999 SC 57, 178-9
[36] (1991) 1 All ER 122
[37] (2002) 1 All ER 122
[38] 316F. 3rd 450
[39] (2005) 2 WLR 87
[40] Lord Woolf in his article "Judicial Review- The tension between the Executive and the Judiciary"-1998 LQR 579
[41] 1998 LQR 579
[42] A Vs. Secretary of State for Home Department (2005) 2 WLR, 87,113